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# EDITORIAL BORD

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# BETWEEN STRENGTH AND COOPERATION: THE PROBLEM OF STATES' GOVERNANCE IN THE ARCTIC UNDER INTERNATIONAL LAW

**Mariusz MUSZYŃSKI** [1]
**Joanna OSIEJEWICZ** [2]

***Abstract:***

*The status of international legal regulation on interstate relations in the Arctic is not impressive. This is due to the relatively short activity of states in this area, but also due to the lack of clear standards and the resulting necessity to applicate instruments of general nature. The other causation for this is the political and economic motivation resultng from the possibility to access mineral resources or from some commercial opportunities offered by marine waters.*

*The aim of the paper is to determine the scope of the states' power that is possible to be exercised in the Arctic from the perspective of international law. The Arctic covers areas of land, sea water and solid ice, including the North Pole, therefore the analysis has been conducted with regard to this taxonomy.*

***Keywords:*** *Artic, International Law, territory, governance, states'power*

## INTRODUCTION

The term Arctic is used in many senses. In legal and political terms, it is most often applied to the area north of the border designated

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by the Arctic Circle, that is the area located between 66º 30'40" north latitude and the North Pole. It represents approximately twenty percent of the area of the globe.

In the days of colonization, the Antarctic area was not a subject to the states' interest. Because of climate and technological considerations they did not perceive it and they had not the technological possibilities of its use. For centuries, the Arctic region was thus *res nullius*. It was to until the interwar period, when the first claims appeared.

The large-scale problems revealed in the second half of the twentieth century, when preliminary scientific data shown that the Arctic holds more than twenty-five percent of the Earth's reserves of oil, natural gas, coal and precious metals[3]. So when modern technologies and climate change made access and exploitation easier, many countries began again to raise the claim[4]. The symbolic manifestation of the changes was represented by the Russian flag in the North Pole (2007) and the declaration of the Russian State Duma deputy, Arthur Chilingarov that "the Arctic is Russian. (...) We must prove the North Pole is an extension of the Russian coastal shelf."[5]

The aim of the paper is to determine the scope of the states' power that is possible to be applied in the Arctic from the perspective of international law. Thus the Arctic includes areas of land, sea water and solid ice, including the North Pole, the analysis will be conducted with regard to this taxonomy.

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[3] As of December 11, 2013, Polskie Radio. Accessed July 30, 2015, http://www.polskieradio.pl/5/3/Artykul/1000625,Rozpoczyna-sie-zimna-wojna-o-Arktyke-Rosja-kieruje-tam-wojsko.

[4] As of March 15, 2013, WP Wiadomości. Accessed July 30, 2015, http://wiadomosci.wp.pl/kat,1020223,title,Zimna-wojna-o-bogactwa-Arktyki-Jak-daleko-posunie-sie-Rosja,wid,15400614,wiadomosc.html?ticaid=115502&_ticrsn=5.

[5] Paul Reynolds, "Russia ahead in Arctic 'gold rush'". Accessed July 25, 2015, http://news.bbc.co.uk/2/hi/6925853.stm.

## 1. LAND TERRITORY OF THE ARCTIC

When it comes to the land territory of the Arctic, the matter of sovereignty over them is now substantially closed. Any disputes or claims in this regard seem to be difficult to legitimate[6]. We had to deal with them approx. one hundred years ago when the first states' interest in the Arctic region was expressed. The grounds to those claims were various. Partially there were already known titles, namely the discovery and the effective occupation, and partly there were new institutions. The Arctic is related to the creation in international law of the so-called sectoral theory, which allowed to assign states' rights to the territory constituting *res nullius*, despite the lack of discovery and occupation, solely on the basis of being in an area called a sector[7]. The father of the concept was Senator Poirier, who concluded that Canada, as a successor of the Hudson's Bay Company, should pick up claims against "possession of all the lands and Island extending north of the St. Lawrence up to the most hyperborean extremities - up to the North Pole"[8]. Inspired by this concept, the Canadian parliament passed an amendment to the Act on the north-western territories, by which researchers had to obtain a license of the Canadian authorities on scientific activities in the area[9].

However, wide recognition of claims based on the sector theory was unlikely[10]. States rejected this theory because it created a monopoly

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[6] Sinah Marx, „Die Macht am Nordpol. Warum ein Krieg wahrscheinlich ist", *Internationale Politik und Gesellschaft* 1 (2010): 98.

[7] Ian Brownlie, *Principles of International Law* (Oxford: Oxford University Press 2008): 144. The sector was seen as a triangle founded on the earth surface, the top of which was leaning against the pole, and the two sides went according to latitude towards the equator at the junction of the lateral borders of the claimant, and the third side marked a degree of latitude.

[8] Donat Pharand, *Canada's Arctic Water in International Law* (Cambridge: Cambridge University Press 1988): 8-9.

[9] Mark Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green & Co. I926): 4. Pharand, *Canadan's Arctic waters*, 8.

[10] A different view: Valeri Lakhtine "Rights over Arctic", *American Journal of International Law* 24 (1930): 704.

and denied the possibility of application to those existing titles acquired upon international law. In addition, the doctrine emphasized that its consequences led to absurdities. The US would be then entitled to raise claims to the territory north of Alaska between the meridians 141 and 170 degrees of west longitude, Norway to areas between 32 and 35 degrees of east longitude, as well as Denmark to northern Greenland[11]. The only practical case when the sector theory has been recognized, was the acquisition of Wrangel Island by Soviet Russia (1926). This occurred despite the fact that the island was discovered by the British (1849) and then it was repeatedly occupied by them (1914, 1921, 1923).

Therefore, claims to land territory at that time tried to be formalized through bilateral treaties and agreements, court decisions, and sometimes even unilateral action. An example of the first situation is the Spitsbergen Archipelago[12]. It was discovered by the Dutch (1596), but the peace conference at Versailles admitted it to Norway. The basis for the acquisition is "Traité concernant le Spitsbergen"[13]. On the other hand, Sverdrup Islands, which form the eastern group of the Queen Elizabeth Islands in the Arctic Archipelago, were covered by the Canadian sovereignty in 1930 due to the resignation of claims by Norway. In turn, based on the case-law the most famous territorial dispute in the Arctic was adjudicated in the 30s of the twentieth century. That was the conflict between Norway and Denmark regarding eastern Greenland. Norway, which ruled most of Greenland on the basis of the discovery, gave sovereignty over the area to Denmark on 14 February 1814 upon the Treaty of Kiel[14]. The right, however, to fish along its western coast, remained by Norway. At the Versailles conference, the Norwegian Foreign Minister, Nils Claus Ihlen, said to the Danish ambassador that Norway will not disturb the Danish claims to Greenland.

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[11] Lindley, *The Acquisition,* 5.
[12] Lindley, *The Acquisition,* 706.
[13] It has been signed by eight states: China, Denmark, France, Canada, Germany, India, Norway Russia, the United States and the United Kingdom. In 2015, it already had forty-three signatories. Accessed 25 July, 2015, https://www.admin.ch/opc/fr/classified-compilation/19200005/index.html.
[14] Lindley, *The Acquisition,* 705.

A problem appeared in connection with the Norwegian statement of 10 July 1931 regarding its intention to obtain the so-called Eirik Raudes Land, which is the area of East Greenland. Denmark, which recognized it as an area subject to its sovereignty, appealed to the Permanent Court of International Justice (PCIJ) [15]. Denmark emphasized to have performed in a peaceful manner their dominion over Eastern Greenland for many years, and that Norway did not only contest it, but also recognized the Danish sovereignty thourh treaties, as well as in some other way. Norway demanded recognition of these areas as *terra nullius*, as falling outside the territory controlled by Denmark.

The PCIJ confirmed the Danish sovereignty over the whole Greenland considering its manifestation through issuing acts of Danish national law concerning foreigners entering Greenland (visas, licenses, etc.). They also pointed out that the Minister of Foreign Affairs of Norway, Nils Claus Ihlen, "(...) made a statement to the Danish Minister to the effect "that the Norwegian Government would not make any difficulties in the settlement of this question." They concluded that this type of commitment is binding for the State[16].

Today, no state that is active in the Arctic region challenges the titles of acquisition from this period. The only disputed land territory is the uninhabited Hans Island that was discovered in 1871 by an American expedition. In the interwar period, Denmark raised the claim to this island, recognizing it as an integral part of Greenland. Counterclaims were raised by Canada, based on the transfer of rights to a series of islands in the Arctic made by Britain in 1880. Over one hundred years there were, however, no tensions, despite the fact that Canada was using the island for scientific research[17]. The problem arose only in 2004, when Canada decided to send there some military troops. Demark expressed its opposition and since then bilateral talks have been pending.

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[15] Legal Status of Eastern Greenland (Denmark v. Norway), Judgment of the Permanent Court Of International Justice, PCIJ Series AB 53 (1933).

[16] More: Przemysław Saganek, *Akty jednostronne państw w prawie międzynarodowym* (Warszawa: Europejska Wyższa Szkoła Prawa i Administracji, 2010): 325-329.

[17] Michael Byerst, *International Law and the Arctic* (Cambridge: Cambridge University Press, 2013): 10.

The second current territorial problem is associated with Spitzbergen Archipelago. It does not apply, however, to the island territory, but it reffers to the question of sovereignty over the continental shelf. In fact, the main issue is the question of the interpretation of the Treaty[18].

In the new dimension also appeared the problem of Greenland. It's clear that its international status is not the matter in question. Since 1953 Greenland is a part of the territory of Denmark, but since the 70s of the twentieth century it has an increasingly wider autonomy. However, since 2008 the main problem is, whether the residents have the right to self-determination and the establishment of a sovereign state. In 2015, the Danish Parliament adopted the Act on Greenland Self-Government[19]. On its basis, the autonomy of Greenland has been extended. Danish sovereignty over the island includes only the issues of foreign policy and security as well as Greenland representation in international organizations. The Act on Grenland Self-Government committed also the possibility of secession, although not by unilateral exercise of the right to self-determination, but „*If decision is taken pursuant to subsection, negotiations shall commence between the Government and Naalakkersuisut with a view to the introduction of independence for Greenland*". As a result, there will be a treaty that will approve a referendum. In consequence, Grenland will reach its sovereignty[20]. Thus,

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[18] Byerst, *International Law*, 21.

[19] Accessed July 30, 2015, http://www.stm.dk/multimedia/GR_Self-Government_UK.doc.

[20] Chapter 8: Greenland's Access to Independence

21. (1) Decision regarding Greenland's independence shall be taken by the people of Greenland.

(2) If decision is taken pursuant to subsection, negotiations shall commence between the Government and Naalakkersuisut with a view to the introduction of independence for Greenland.

(3) An agreement between Naalakkersuisut and the Government regarding the introduction of independence for Greenland shall be concluded with the consent of Inatsisartut and shall be endorsed by a referendum in Greenland. The agreement shall, furthermore, be concluded with the consent of the Folketing.

the title to land territory is no longer a problem in the Arctic. Disputes refer, however, to marine areas, the Arctic ice and the North Pole.

## 2. MARINE WATERS OF THE ARCTIC

The problems of international law associated with sea waters in the Arctic consist of three issues: the delimitation of maritime boundaries of states, the delimitation of the continental shelf and the issue of freedom of navigation through some sea straits.

The first problem seems to be moving towards a solution. Sea borders have already been partially delineated in the twentieth century. To be the first, Canada and Denmark in 1973 concluded a water demarcation treaty territory on the basis equidistance[21]. In 1990 a long-term dispute between the USSR and the USA concerning the boundary to the Bering Sea has been closed. It consisted in the fact that the Treaty of 1867 did not specify a range of lines demarcating maritime waters towards the North Pole. As ice was melting, each party would demarcate the line differently. The effect of this difference in positions was to reveal the disputed area. However, it has been simple dividing in two halves on grounds of the agreement on the maritime boundary[22]. In the same way, Russia settled more than forty-years long lasting boundary dispute with Norway in the Barents Sea[23]. It concerned an area of over one hundred

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(4) Independence for Greenland shall imply that Greenland assumes sovereignty over the Greenland territory.

[21] Agreement between the Government of the Kingdom of Denmark and the Government of Canada relating to the Delimitation of the Continental Shelf between Greenland and Canada, Ottawa 17 December 1973. Accessed July 29, 2015, http://www.state.gov/documents/organization/61370.pdf.

[22] Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, with Annex, Washington June 1, 1990. Accessed July 29, 2015, http://www.state.gov/documents/organization/125431.pdf.

[23] More: Janusz Symonides, „Delimitacja obszarów morskich na Morzu Barentsa i Oceanie Arktycznym między Rosją a Norwegią", in *Współczesne problemy prawa. Księga pamiątkowa dedykowana profesorowi Jerzemu Młynarczykowi*, ed. by Urszula Jackowiak and Izabela Nakielska and Piotr Lewandowski (Gdynia: Wyższa Szkoła Administracji i Biznesu im. Eugeniusza Kwiatkowskiego, 2012): 57 – 80.

and fifty thousand square kilometers. The relevant treaty was concluded in 2010[24]. Also, Norway and Denmark regularized in 1993 the boundary around the island of Jan Mayen, that has been incorporated into Norway in 1930 [25]. The agreement performed the demarcation made by the International Court of Justice at the request of the parties, and the basis for settlement was "fair access to fish stocks[26]". In February of 2006, Norway and Denmark have entered into a Copenhagen agreement for the delimitation of the waters at Spitzbergen Archipelago, where Denmark recognized the claims of Norway[27].

Today, the only boundary dispute is the demarcation of waters in the Beaufort Sea between Canada and the United States. The reason of the dispute is the delimitation of oil and gas in the seabed, that were discovered in the seventies of the twentieth[28]. The dispute was raised because of the action of Canada granting in 1976 production licenses in

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[24] Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean, Murmansk, September 15, 2010. Accessed July 29, 2015, https://treaties.un.org/doc/Publication/UNTS/No%20Volume/49095/Part/I-49095-08000002802f6f0e.pdf.

[25] Agreement between the Government of the Kingdom of Norway and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland concerning the Delimitation of the Continental Shelf and the Fisheries one in the Area between Greenland and Svalbard, Copenhagen, February 20, 2006. Accessed July 29, 2015, http://www.icj-cij.org/docket/files/78/6743.pdf.

[26] Case Concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 1993 ICJ Rep. 38. Accessed July 29, 2015, http://www.icj-cij.org/docket/files/78/6743.pdf.

[27] Agreement between the Government of the Kingdom of Norway and the Government of the Kingdom of Denmark together with the Home Rule Government of Greenland concerning the delimitation of the continental shelf and the fisheries zones in the area between Greenland and Svalbard. Accessed July 29, 2015, http://treaties.un.org/doc/Publication/UNTS/Volume%202378/v2378.pdf.

[28] More on the delimitation of oil and gas reserves upon international law: Joanna Osiejewicz, „Delimitacja własności ropy naftowej w prawie międzynarodowym", in *Bezpieczeństwo energetyczne - rynki surowców i energii. Energetyka w czasach poitycznej niestabilności,* ed. by Piotr Kwiatkiewicz and Radosław Szczerbowski (Poznań: Fundacja Na Rzecz Czystej Energii 2015): 661-677.

waters recognized by the United States to be covered by their sovereignty.

Canada recognizes that the boundary line should run toward the North Pole along the 141 meridian, as an extension of the border of the Yukon and Alaska whose meridian it is[29]. Ottawa based this claim on the Russian-British treaty of 1825. It concerned indeed the land territory, but the letter to George Canning, the then Minister of Foreign Affairs of Great Britain, written to his uncle, Stratford Canning on 8 December 1824, included a statement indicating a wider aspect, namely the question of allocation of jurisdiction on the ocean to the extent that exceeded the contemporary possibility of its measure. Canada, which subrogated to rights of a successor to the British in 1880, recognizes that the acquisition of sovereignty over Alaska binds the US as a successor to the Russian in this respect.

However, Washington rejects this solution. For the US, the delimitation should be done by the application of new legal criteria stipulated in the Convention on the Law of the Sea, that is by designating perpendiculars to the coast (although the USA is not a party to the Convention). US officials say that in the nineteenth century, arrangements for the jurisdiction of the waters could only apply to a small fragment of the ocean because of the permafrost water.

In recent years, however, the dispute muted as a result of serious issues concerning global warming and its wider consequences. There appeared new possibilities concerning the displacement of the continental shelf boundaries. This is due to the fact that although the Convention on the Law of the Sea defines the boundaries of the continental shelf at two hundred nautical miles, the delimitation is not obvius. The so called Irish formula, as adopted by the Convention (Art. 76, paragraph 4), referring to the geomorphological criteria such as "the foot of the continental slope" or "thickness of sedimentary rocks", creates opportunities for arbitrary demarcation of its external border stretching as

[29] Byerst, *International Law*, 59.

far as 350 miles from the baseline[30]. The only limitation is subject to the approval of the Commission on the Limits of the Continental Shelf that has been established by the Convention. Its recommendations are, in accordance with Art. 76 paragraph 8 of the Convention on the Law of the Sea, "final and binding"[31].

The threat, however, comes with a solution that allows in certain circumstances to offset the external limit of the continental shelf beyond 350 nautical miles from the baseline (Art. 76 paragraph 6 of the Convention on the Law of the Sea). This is the case when there are "(...) plateaus, rises, caps, banks and spurs" on the shelf[32]. They are called ridges of the sea. In the case of the Arctic, the most important is the so called Lomonosov Ridge, discovered by a Soviet expedition in 1948. It stretches from Ellesmere Island to New Siberian Island and distributes the Arctic Ocean into two basins: the Eurasian and the Canadian. The Lomonosov Ridge became the premise for Russian claims as early as 2001[33]. Its recognition as an extension of the continental shelf would redefine the scope of the Russian wielding at the bottom of the ocean, extending it over a million square kilometers. The Commission on the Limits of the Continental Shelf rejected the request as poorly documented. Russia announced a new request at the end of 2015.

Another subject to the dispute regarding the limits of the continental shelf is the so called Alfa Ridge that separates the Beaufort Basen and the Makarov Basin. It was discovered in 1963. As early as in 1983 in Canada, there appeared the first theories on the extending of the shelf just over the Alpha Ridge. The Alpha Ridge connects to the Mendeleev Ridge, which stretches all the way to the East Siberian Sea.

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[30] Janusz Symonides, „Status prawny i roszczenia do Arktyki oraz Bieguna Północnego", *Państwo i Prawo* 1 (2008): 35.

[31] See also: Jan Łopuski and Janusz Gilas, *Prawo morskie*, vol. II (Bydgoszcz: Branta 1996): 212.

[32] Convention on the Law of the See of December 10, 1982. Accessed September 9, 2015, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

**[33]** Yuri Zarakhovich, "Russia Claims the North Pole"**,** *Time,* July 12, 2007. Accessed September 23, 2015, http://content.time.com/time/world/article/0,8599,1642905,00.html.

Russia treats the Mendeleev Ridge in this region as an extension of their shelf. Denmark, in turn, raises claims to the shelf basing it on the ridges of Greenland (Gakkel, Mohna and Mayen)[34]. In 2006, caims on the displacement of the external limit of the continental shelf extending beyond 200 nautical miles, were reported also by Norway. They covered three areas: the Loop Hole in the Barents Sea, the western Nansen Basin in the Arctic Ocean and the Banana Hole in the Norwegian Sea[35]. The interest in the affairs of the continental shelf in the Arctic Ocean was also reported by some non-Arctic states. In 2009, China proposed to possibly include this area with international jurisdiction. They considered that the dispute among the Arctic states cannot be settled only in the relations between themselves, because the Arctic is of too great geopolitical and economic importance.

The third problem of marine areas of the Arctic is a matter of freedom of navigation resulting from the opening of new shipping routes. The disputed points include: the Northwest Passage (dispute between Canada and the US) and the Northern Sea Route (Russia's claim). The problem boils down to the question of whether each country can enjoy the freedom of navigation on these waters? States raising a claim rejected this idea by introducing their historical titles into the dispute.

The doctrine of historic waters stems from the nineteenth century. It was founded in relation to some of the bays that were relevant to specific states for safety or national reasons. Its content was the demand for exclusive governance over certain geographical water reservoirs based on long-term and continuous possession on these waters in the past[36]. Although not regulated in any of a number of conventions relating to maritime affairs, the International Court of Justice (ICJ) confirmed its existence in a dispute between the UK and Norway concerning fishing zones (1951). He stressed that " by historic waters are usually meant waters which are treated as internal waters but which would not have that

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**34** Jan Molsen, "Denmark claims North Pole via Greenland ridge". Accessed July 29, 2015, http://phys.org/news/2014-12-denmark-north-pole-greenland-ridge.html.

35 Symonides, *Status prawny*, 39.

36 Pharand, *Canadian's Arctic waters*, 105.

character were it not for the existence of an historic title"[37]. Today it is claimed that the role of historical water decreased by extending the boundaries of marine water under other titles granted by convention[38]. However, it should be remembered that the ICJ confirmed the historical priority of Norway comparing with general methods of delimitation of marine waters upon international law. Therefore, the doctrine of historical waters returned to the sphere of disputes on the Arctic in the mid-twentieth century. After Norway, also another states used this doctrin: the Soviet Union in relation to the Gulf of Peter the Great (1957) and the United States of America to a series of bays on the outskirts of Alaska. In the seventies of the twentieth century, claims based thereon also claimed Canada to the many bays and archipelago straits in the Arctic[39], which blocked the use of the so-called Northwest Passage.
The Northwest Passage is a fairly large group of possible transport routes between the Canadian Islands. As the historic title, Canada applies herein the many hundred yeuars old use of these waters by Inuits. As a result, Canada defines these waters as Canadian internal waters, the consequence of which is to exclude the possibility of using tchem by other countries, even on the principle of the right to freedom of movement, because the right to free movement applies only to territorial waters. The result is a full national jurisdiction[40].

This position met with opposition from the United States. Yet in 1986, the State Department stressed that it recognizes these waters for international sea areas, although later, on the basis of the Agreement on cooperation in the Arctic (1988), the Americans agreed to apply to the Canadian government for permission to movement of their ships. In this

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[37] Fisheries Case (United Kingdom v. Norway) ICJ (1951). Accessed August 15, 2015, http://www.icj-cij.org/docket/files/5/1809.pdf.
[38] Pharand, *Canadian's Arctic waters*, 98-99.
[39] More: Pharand, *Canadian's Arctic waters*,113-114.
[40] Oceans Act Regulations, Territorial Sea Geographical Coordinates (Area 7) Order (SOR/85-872). Accessed July 30, 2015, http://lawslois.justice.gc.ca/eng/regulations/SOR-85-872/index.html.

agreement they enrolled, however, that it does not mean a recognition of the Canadian title.[41]

In turn, the Northern Sea Route, which is a route along the northern coast of Russia, thanks to the climate change allow to shorten the journey from Western Europe to Japan by about forty percent[42]. Russia recognized some elements of this route, namely: Wilkickiego Stait, Laptev Strait, Sannikov Strait and Szokalski Strait, for their internal waters in the likeness of sea water canals, and reserved their the right to regulate maritime traffic in them according to their objectives and regulations. The Russian Ministry of Transport developed legislation governing the organization and conditions for the Northern Sea Route to be used by shipowners [43]. To safeguard the rights and to control foreign flag vessels upon Russian law, a naval base was established on the Islands of Chukotka.[44] On the part of the Rout, the rights of Russia are undermined by the United States[45]. They recognize that these waters are high seas.

However, a Russian-American dispute concerning the passage across the Bering Strait, which connects the Northern Sea Route and the Northwest Passage, came to the end. Since 2009, the two countries cooperate here in transit.

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[41] Agreement between The Government of Canada and The Government of The United States of America on arctic cooperation on arctic cooperation. Ottawa, January 11, 1988. Accessed July 30, 2015, https://treaties.un.org/doc/publication/unts/volume%201852/volume-1852-i-31529-english.pdf.

[42] Mirosław Sobolewski, „Globalne wyzwania w Arktyce", *Infos* 161 (2014): 2.

[43] Olaf Osica, „Daleka Północ jako nowy obszar współpracy i rywalizacji", *Nowa Europa* 4 (2010): 14.

[44] As of September 6, 2014, Dziennik, „Rosja tworzy nową bazę wojskową. Będą kontrolować północną drogę morską?". Accessed September 23, 2015, http://wiadomosci.dziennik.pl/swiat/artykuly/468986,rosja-tworzy-baze-wojskowa-w-arktyce-chce-kontrolowac-polnocna-droge-morska.html.

[45] William Dunlap, *Transit Passage in the Arctic Straits* (Durham: International Boundaries Reaserch Unit, 1996): 26-27.

## 3. THE NORTH POLE AND AREAS OF ICE IN THE ARCTIC

Even more complicated is the issue of the North Pole area. When Robert Pearry reached in 1909 the North Pole, the American government has not issued a statement about the intention of occupation and claims directed to this territory. But already in 1926, Washington declared its intention "to annex the North Pole as an extension of Alaska to the North American possessions". He announced at the same time that "the United States of America cannot allow a vast unexplored area of 1,000,000 square miles adjacent to the United States to pass into the hands of another Power". In response, the Soviet government issued a decree, in which they expressed the will to treat as part of the territory of the Soviet all discovered and undiscovered countries and islands in the Arctic, which are located in the Soviet sphere of influence[46].

The problem became more complicated when earlier suspicions have been confirmed that the North Pole itself and the surrounding vast area are not the mainland, but the ice covering seas. So arose the question, which law is to be applied to the area. If it was water, there would be no problem. There was already the law of the sea governing the rights of states on the high seas. So if the North Pole was water, it would be part of the oceans and there would operate the freedom of navigation[47]. To solve the problem, the United States established the ice as land theory that allows for raising claims by states[48]. It was considered that the North Pole as the ice is a physical item like construction to the ground, and people can build on it housing and live a long time. This has been already proven during the Russo-Japanese War in 1905, when the Russians built in the winter railroad tracks and railway stations running on the ice through Lake Baikal. They transported that way people and

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[46] Lakhtine, *Rights over Arctic*, 711.
[47] Thomas Balch, "Arctic and Antarctic Regions and the law of Nations", *American Jounral of International Law* 2 (1910): 256.
[48] Jan Verzijl, *International law in historical perspective* (Leiden: Springer, 1971): 272,

military equipment[49]. This meant that people can habitually occupy the North Pole because the ice in this region never melts. It is possible to build stations and even the estate[50]. The situation was complicated for the second time, when it turned out that the ice is in constant motion and moves slowly away from the Bering Strait towards the Atlantic Ocean. Hence, people would also lived in motion, and any occupation would be uncertain and would not provide any legal title.

There was no larger dispute in this respect, however, because neither the technical capacity nor the political ideas of those years, reached the issue of possible benefits of these areas. Therefore, this concept lasted almost until the end of the twentieth century, despite the fact that at that time there were more attempts to obtain the Pole. Today, although the ice cover disappears, the problem as such returned. Using the discovery of the Lomonosov Ridge, Russia possessed an important condition for the possibility of raising claims to the North Pole, because it is in fact located nearby. For if Moscow does not lift them, they recognize similar opportunities also on the side of Denmark. The North Pole is in fact on the potential shelf of Greenland. [51] The problem of the power of the Pole remains, therefore, open, or it is at least not legally regulated.

## 4. ARCTIC IN TERMS OF SAFETY AND ENVIRONMENTAL PROTECTION

The increased activity of states in the Arctic region was created indeed through the use of nuclear energy. It was started by the USS Nautilus, which already in 1958 crossed under the North Pole. As a result, during the Cold War, under the ice of the Arctic, like the Antarctic, nuclear submarines stationed on both sides of the conflict. It opened up a new realm of relations between states in the Arctic region, namely concerning safety issues.

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[49] Balch, "Arctic and Antarctic Regions", 256.
[50] Verzijl, *International law*, 272.
[51] Symonides, *Status prawny*, 44.

Through the Cold War, however, there were no regional treaties. To this region referred indirectly general collective guarantees contained in the North Atlantic Treaty and the Warsaw Pact. Their spatial extent also included those parts of the far north, the rights to which have or claimed the states that were parties to these agreements. Indirect references can also be found in the treaties limiting armaments or nuclear weapons testing (including SALT I, SALT II, AMB Treaty). Particular emphasis existed in the area of the Arctic that was exluded from the stationing of nuclear weapons, which was encouraged by the Treaty on the Non-Proliferation of Nuclear Weapons of 1968 (NPT) [52].

The end of the Cold War did not alleviated the threat of conflict in the region. Although in verbal terms all the actors of the Arctic zone emphasized the need for cooperation, in fact, each of them was increasing its military presence. This includes the construction of new bases and the presence of submarines or aircraft. In particular, intense activities took Russia, which rebuilt its base in New Siberian Islands that was abandoned in 1993, as well as establihed a group of Arctic troops. In 2013, they sent to Northern Sea Routhe a squadron of ten warships and nuclear-powered icebreakers[53]. This is a consequence of increasing ability to exploit new areas that are rich in natural resources and the growing activity of partners. This activity is not accompanied, however, by extended treaty guarantees.

It is different in the issues of environmental protection and scientific cooperation. A respective treaty basis has been being built for years. The origins of the establishment of international standards date back to the even early twentieth century. Yet in 1911, the United States, United Kingdom (on behalf of Canada), Russia and Japan, signed conventions limiting the hunting for seals in the North Pacific. In 1931, the Convention for the Regulation of Whaling has been signed. The cooperation regarding the protection of endangered species also survived

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[52] Byerst, *International Law*, 256-257.

[53] As of September 6, 2014, Polskie Radio. Accessed July 30, 2015, http://www.polskieradio.pl/5/3/Artykul/1226310,Rosja-przejmuje-Arktyke-Tworza-nowa-baze-wojsko-w-drodze.

difficult times of the Cold War. The new Convention for the Regulation of Whaling has already been signed in 1946[54]. In 1973, Denmark, Norway, the US and the Soviet Union signed the Agreement on the Conservation of Polar Bears[55]. After 2000, a phase of bilateral agreements begann, which were adopted, among others, by the USA and Canada as well as by the USA and Russia.

After the Cold War, the cooperation extended to the area of the fight against pollution. Further conventions were adopted, including the Convention for the Control and Management of Ships' Ballast Water And Sediments (2004)[56], the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue (2011)[57] and the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (2013)[58]. An important element of this cooperation has also become the protection against nuclear accidents in connection with the use by states in the Arctic of a large number of nuclear-powered ships.

A significant role for cooperation in the Arctic in the area of environmental protection also play the standards of the Convention on the Law of the Sea (1982). The area of the Arctic is also protected in the

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[54] Convention for the Regulation of Whaling. Accessed July 30, 2015, http://uk.whales.org/issues/in-depth/international-convention-for-regulation-of-whaling-icrw.

[55] Agreement on the Conservation of Polar Bears. Accessed July 30, 2015, http://pbsg.npolar.no/en/agreements/agreement1973.html.

[56] International Convention for the Control and Management of Ships' Ballast Water And Sediments. Accessed July 30, 2015, http://www.bsh.de/de/Meeresdaten/Umweltschutz/Ballastwasser/Konvention_en.pdf.

[57] Agreement on Cooperation on Aeronautical and Maritime Search and Rescue, Nuuk, May 12, 2011. Accessed July 30, 2015, http://arctic-council.org/index.php/en/documentarchive/category/20-main-documents-from-nuuk?download=73:arctic-search-and-rescue-agreementenglish.

[58] Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, done in Kiruna, May 15, 2013. Accessed July 30, 2015, http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-fromkiruna-ministerial-meeting?download=1942:agreement-on-cooperation-on-marine-oil-pollutionpreparedness-and-response-in-the-arctic-final-formatted-version

prevention of air pollution. There are general conventions such as the Stockholm Convention on Persistent Organic Pollutants (2001) [59].

## CONCLUSIONS

The status of international legal regulation of interstate relations in the Arctic is not impressive. This is due to the relatively short activity of states in this area, but also because of the lack of clear standards which require instruments of general nature to be applicated. The other reason is the political and economic motivation of states due to the possible access to mineral resources and commercial opportunities offered by marine waters. Therefore, instead of a legal consensus, states often use unilateral instruments, demonstrations of force or *facta concludentia*.

However, the Arctic region cannot be undoubtedly named a sphere of confrontation, although the international law operating in this area has not entirely eiminated this threat[60]. There are still substantial areas where the cooperation between states meets its legal dimension, e.g. environmental protection. Although a number of western think tanks exclude the outbreak of open war in the Arctic, they recognize a "cold war" over resources in the Arctic in the twenty-first century as real[61]. The problem of governance in the Arctic begins to reach a global dimension becoming a part of a global policy of non-Arctic states. The key to

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[59] Stockholm Convention on Persistent Organic Pollutants. Accessed July 30, 2015, http://www.pops.int/documents/convtext/convtext_en.pdf.

[60] As of October 29, 2014, Sputnik News. Accessed July 30, 2015, http://en.ria.ru/russia/20141029/194800682/Russia-to-Seek-Expansion-of-Continental-Shelf-Limit-Minister.html.

[61] Compare i. a.: Basics of the State Policy of the Russian Federation in the Arctic 2009. Accessed July 30, 2015, http://www.arcticlio.com/docs/nsr/legislation/Policy_of_the_RF_in_the_Arctic.pdf; Strategy for the Arctic Region 2011. Accessed July 30, 2015, www.government.se/content/1/c6/16/78/59/3baa039d.pdf; Implementation Plan for The National Strategy for the Arctic Region, January 30, 2014. Accessed July 30, 2015, www.whitehouse.gov/sites/default/files/docs/implementation_plan_for_the_national_strategy_for_the_ar ctic_region_-_final.pdf.

stabilization and calming disputes on the level of international law may be the economic cooperation.

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# FUNCTIONARY - SUBJECT OF CORRUPTION OFFENSES IN REGULATING THE NEW CRIMINAL CODE

**Camelia ŞERBAN - MORĂREANU** [1]

***Abstract:***

*Entry into force on 1 February 2014 of the new Criminal Code has brought a number of changes to the content of various criminal offenses incriminating covered in previous criminal legislation. These include offenses of corruption in the previous Criminal Code be found in Title VI entitled "Crimes Against activities of public interest or other activities regulated by law" and in Chapter I of this title that group offenses of service or about the service - category of offenses which included not only corruption offenses but also offenses of service (the latter in the master plan, taking into account the order in which the legislator wanted to list them.*

*A first observation towards the settlement of the previous Criminal Code, is the separation of these two categories of crimes - the service and the corruption - though a common title (corruption offenses and service), however, and into distinct chapters order reversed regulatory priorities of the legislature. It can be said that corruption offenses are thus highlighted as the most important title crimes contained therein, and the symbolism of the legislature's decision placing them in the foreground can be used without difficulty.*

***Keywords:*** *corruption, crime, functionary, bribery*

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## 1. GENERAL REMARKS ON CORRUPTION OFFENSES

In matters of corruption crimes, the new Criminal Code brought some news.

They succinctly as:

The first novelty is bringing crime of buying influence in Law no. 78/2000 on preventing, detecting and punishing corruption (article6[1]) the content of the Criminal Code.

Another novelty is the new Criminal Code punishing the crime of receiving undue benefits (previously referred to the Criminal Code article 256 as an act of bribery.

The new Criminal Code broadens the scope of criminal acts punishable by the fact that the previous text of criminalization of the offense of receiving undue benefits penalize the act of execution only receiving and not promise or provide benefits. In the new Criminal Code, where it will only make a promise of undue benefits, criminal act will have both official who accepts this pledge, and for those who make such a promise.[2]

In some penal systems, corruption is dealt with differently in relation to the legality or illegality of the task requested bribe-giver. Previous Criminal Code have this feature only for the offense of receiving undue when "gift" official act is exclusively for legal fulfilled. In the new Criminal Code, the principle of legal classification perspective, it is irrelevant whether the act requested the bribe-giver situation official or not a legal character. From this rule there is an exception, namely that the acts committed by persons covered by article 175 paragraph 2 of the new Criminal Code no longer under way perpetration of the completion and expedite the fulfillment of act falling within the duties of the civil service. The rationale would be that, provided in article 175, paragraph 2 persons, because of their special status himself, may charge an additional fee for making an act falling

[2] In previous Criminal Code for such an act was not criminal, nor civil and obviously no one who was to receive such a promise.

within the scope of their emergency service, without thereby disturb trust honestly in the exercise of duties by the civil servant in question and so, for a consideration (fee etc.) that could not receive criminal relevance put their knowledge, experience, skills etc. available to those who seek their services.

We consider that an important place in the whole buzz that characterizes corruption offenses (and not only them) is determining the quality of an active subject. The analysis is of interest especially as the active subject of the crime of corruption is the public official - phrase that was redefined by the provisions of the new Criminal Code, while being subjected analysis of the Supreme Court, which was asked to rule in full amounted to solve questions of law, on the ability of professionals in certain fields, receive or not the name of *"public official"*.

Summarizing the provisions of the new Criminal Code considerations relevant decisions of the Supreme Court, we can compose, without assurance that deplete analysis, an array of all categories of officials - likely to become active subjects of corruption crimes.

## 2. THE PERSON EXERCISING POWERS AND RESPONSIBILITIES, ESTABLISHED UNDER THE LAW IN ORDER TO ACHIEVE THE PREROGATIVES OF THE LEGISLATIVE, EXECUTIVE AND JUDICIAL

Regarding "*public official*" article 175 paragraph 1 of the new Criminal Code states that an individual who, permanently or temporarily, with or without remuneration attributions and responsibilities established by law in order to achieve the prerogatives of the legislative, executive and judicial;

In this category fall - as people involved in the prerogatives of the legislative power - MPs, senators and deputies, including their management presidents and vice presidents, and secretaries Quaestors Chamber of Deputies and the Senate.

Among those who exercise the prerogative of the executive are: President of Romania, Prime Minister, Deputy Prime Minister, Ministers, Ministers delegates with special assignments, secretaries of state,

secretaries of state, heads and deputies of specialized bodies of the central public administration subordinated Government or ministries, and heads and their deputies of the autonomous administrative authorities at central level.

Finally, the activities requiring prerogative law are fulfilled by: the President and judges of the Constitutional Court, the President, Vice-Presidents of sections and judges of the High Court of Cassation and Justice, the Attorney General's Office attached to the High Court of Cassation and Justice and deputies thereof, including the chief prosecutor of the Directorate for Investigating Organized Crime and Terrorism, the chief prosecutor of the National Anticorruption Directorate and deputies, prosecutors in the Prosecutor's Office attached to the High Court of Cassation and Justice, presidents, vice presidents and judges of courts of appeal tribunals and courts and Prime prosecutors, their deputies, prosecutors prosecution by the courts of appeal, tribunals and judges, assistant magistrates and court clerks, the latter two categories of staff is unique to justice and not a category of officials with special status .

## 3. THE PERSON PERFORMING A PUBLIC DIGNITY FUNCTION OR FUNCTION PUBLIC OF ANY KIND

It notes that, according to article 175 paragraph 1, letter b) the new Criminal Code, defining civil servant is therefore not by reference to the remit of the public official, but the type of position that it occupies:

• public dignity or

• public office of any kind.

There are functions that belong to both categories as there are categories of public officials who may be assigned both in article 175 paragraph 1, letter a) and in the article 175 paragraph 1, letter b) of the Criminal Code, such as cabinet members and judges of High Court of Cassation and Justice.

As regards, public dignity - article 175 paragraph 1, letter b) thesis - it is defined by the Framework Law no. 284/2010 regarding the unitary remuneration of personnel paid from public funds as a public function held through a mandate obtained directly by organized elections,

or indirectly by appointing law. The law distinguishes between *dignities chosen* and *called dignities.*

The *dignities chosen* in turn, are divided into two categories:

- *Dignity selected at national level* (which includes Romanian president, senators and deputies, and those appointed from among the latter, the management bodies of the Senate and Chamber of Deputies), and

- *Elected local dignities* (which includes chairmen and deputy chairmen of county councils, mayors and deputy mayors, local councilors and county).

Persons exercising *public dignitaries are called*, according to the Framework Law no. 284/2010: Romanian Government members, including the Secretary General and Deputy Secretary General of executive institution, the Constitutional Court judges, members of the Legislative Council, the Court of Auditors, the Competition Council, the National Broadcasting Council and the National Council for Studying the Security Archives, Ombudsman and his deputy, presidential advisors and state of the Presidential Administration and Secretaries-General and their deputies in the Chamber of Deputies and Senate of Romania. Although not expressly provided by law, are part of the same category and appointed local officials, prefects and deputy prefects ie.

Regarding people who exercise public office of any kind - article 175 paragraph 1, letter b) second sentence - fall into this category:

- *Functionary*, as they are defined by Law no. 188/1999 regarding the statute of functionary;

- *People holding a public authority, which is a position held by a person belonging to a governing body of a public authority* or its structure as a result of the act of election or appointment. In this category all management positions, senior functionary and public managers;

- *Functionary with special status* (parliamentary officials, police officers, inspectors fraud etc.).

## 4. PERSONS EXERCISING ALONE OR WITH OTHERS, IN A AUTONOMOUS STATE OF ANY ECONOMIC OR OPERATOR OF A LEGAL OWNED OR MAJORITY STATE, TASKS RELATED TO ITS WORK OBJECTIVE

Provisions of article 175 paragraph 1, letter c) the new Criminal Code into consideration, therefore, a distinct category of people, namely people who work in the economic field within the framework of legal entities wholly or majority state capital.

Employees who fall into this category:

- operates in a managerial or executive position in the national or local autonomous administrations, national companies or national companies,

- self within associations and foundations, private legal persons without profit.

The reason these people are considered functionary for the purposes of criminal law is to protect the property interests of the State or the autonomous legal entities where capital is wholly or majority state. In the absence of such express provisions, these people either were officials 'private', as defined in article 308 of the new Criminal Code or were categorized as *"non officials"*. They can not thus be active subjects of corruption crimes or service.

From that article 175, paragraph 1 form, letter c) has currently, that falls into the category of public servants and persons employed banking units owned or majority state, but not those who work in a private bank or one Romanian state is not a shareholder or a minority shareholder.

## 5. ASSIMILATED FUNCTIONARY

In article 175 paragraph 2 of the new Criminal Code explicitly stated that, from the perspective of criminal law is assimilated civil servant, a person who exercises a public service of which was invested

by public authorities or is subject to control or supervision of them on the performance of that public service.

So, for a person to be part of this category must be fulfilled, cumulatively, has two obligations:

- *to perform a service of public interest*; Analysis fulfill this requirement - which aims to remit person - is given the definition of public service in the doctrine of administrative law. In other words, it should be noted that, by making service aims to meet the needs of general interest and that reveals, directly or indirectly, a public authority.

- *and be vested with the performance of that public service by a public authority (first sentence)* or *perform public service under the control of a public authority or supervision* (second sentence). Analysis fulfill this requirement - the relationship of the person who performs public service with public authorities - this is accomplished alternatively: if sworn to fulfill the service was done by a public authority or if the person's activity is subject to control or supervision by a public authority, irrespective of how to invest.

By investing to achieve a public service means:

- either to grant quality which obliges them to perform that service by a public authority (the appointment as a *notary*, authorization as an *interpreter* etc.)

- or custody for services of public interest by a decision by the (appointment by the court of the judicial *administrator* and *liquidator* in insolvency proceedings[3] or *judicial technical expert*).

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[3] In the same respect and legal doctrine was expressed earlier entry into force of the new Criminal Code, which held that the liquidator is a civil servant on the ground that it fulfills a service of public interest [see I. Gârbuleț, *Corruption offenses: practice commented judicial, law doctrine decisions of the Constitutional Court, appeals on points of law, judgment*, (Bucharest: Universul juridic, 2010), 59]. Compared to the new definition of public official contained in the new Criminal Code, the doctrine correctly assessed that the liquidators are in the category of persons treated as civil servants referred to in art. 175 paragraph 2 of the new Criminal Code. The same authors emphasize, however, that, in general, they are regarded as freelancers [C.F. Uşvat, C*rimes of corruption*, (Bucharest, Ed. Universul juridic, 2010), 117];

Includes therefore, individuals receiving public service management (national or local), economic or sociocultural, thus becoming public utility. It's about subjects that operate within private legal persons for profit: companies that, through administrative contracts, recovered in the general interest, state and local, as appropriate, public goods and services.

The determination of the status of assimilated functionary, High Court of Cassation and Justice has established the panel empowered to solve issues of law that *judicial technical expert* is part of the assimilated functionary governed by the provisions of article 175 paragraph 2 first sentence of the Criminal Code, whereas public service exercises (drawing expertise to establish the truth and resolve pending cases handled by the courts or the prosecution) service which was invested by a public authority (Ministry of Justice).[4]

In the category of subjects suspected of article 175 paragraph 2 second sentence of the new Criminal Code - this includes *some of the persons exercising certain professions* and when, although operating under a special law and not financed by the state budget, *public service exercises* and *are subject to control or supervision by a public authority*. In this regard it is noted that the liberal professions are organized and exercised only under the law and code of ethics of the profession and have the status of autonomous functions that are exercised in offices or cabinets or professional associations established under the law.[5]

In these circumstances, the conditions stipulated by article 175 paragraph 2 of the new Criminal Code must be considered for each professional category in particular, from the special rules governing the status.

In this context, we consider that there are at least two categories of *freelancers*:

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[4] Decision. 20/2014 of 29/09/2014 The High Court of Cassation and Justice - the panel for a dispensation of law in criminal matters, *Official Gazette,* 766, (2014);

[5] Decision. 20/2014 of 29/09/2014 The High Court of Cassation and Justice - the panel for a dispensation of law in criminal matters, *Official Gazette,* 766, (2014);

- Those carrying out an activity involving the use of powers "delegated" by the state, thereby exerting a service of public interest (but who do not exercise a position of public authority or public office); For example, notary activity is one that is done by freelancers, notaries, who, through their work, may confer a document signed by private individuals quality of *"authentic"*, that act in itself comprising a size The state official. The above statement can be made of the bailiffs and judicial liquidators. In connection with this, opinion in the sense of their ability to be the subject of corruption offenses.

- The lawyers - although employed, consider that they may be considered as persons performing public interest in the common language, but not in the language of criminal law, unfulfilling delegated state. They have been invested by the public authorities do not carry out this activity as a result of a delegation of state power and not under the control or supervision on how public service exercises. This applies both to lawyers elected and those appointed ex officio. Appointed lawyers believe that operate under delegation issued the bar, and compliance or non-compliance with the rules of conduct of their profession is subject to rules of professional disciplinary offenses, and not a possible state control exercised directly.[6] The same situation is found in the case of mediators, which are not subject to corruption offenses under article 175 paragraph 2 of the new Criminal Code.

## 6. PRIVATE FUNCTIONARY

The notion of "private functionary" is defined by default in the Special Part of the new Criminal Code, article 308 - text the legislator establishes offenses that may be committed by "others".

[6] Ibid, p. 108. There was also a contrary view; See, in this regard, M.C. Sima, "The active subject of the crime of bribery. Appointed lawyer," *Criminal Law Review* 2 (2007): 119

Thus, provided that the provisions of corruption offenses applies offenses[7] committed by or in relation to persons who work, permanent or temporary, with or without remuneration a commission of any kind:

- in the service of physical persons among those referred to in article 175 paragraph 2 of the new Criminal Code,

- or under any legal person.

Taking into account the explanations given above (supra pt. 5) understand that such officials are the ones exerting an assignment (of any kind) in a persons among those referred to in article 175 paragraph 2 of the new Criminal Code (notary offices, law enforcement agents, liquidators cabinets, etc.) or under any legal person is not necessarily a contractual employment.

The general wording of the text of article 308 of the new Criminal Code as meaning the charge can be exercised "*permanently or temporarily, with or without pay*" leads to the conclusion that it is sufficient to have only a relationship of authority between the charge and the one it charges for attract first an official - subject of corruption offenses.

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[7] But embezzlement, abuse of office, negligence, misuse of office in sexual purposes, usurpation of office, conflict of interest and disclosure of secret information

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# FREEDOM OF CONSCIENCE
# LEGAL AND RELIGIOUS IMPLICATIONS

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***Abstract:***

*Conscience is a defining existential reality of man, whose meaning can be seen only through an interdisciplinary unceasing effort of thinking and knowledge. In this study, we propose to make such an analysis of the conscience as an ontological foundation and characteristic of man, in its individual and social dimension, whose basis is made up of philosophical, theological and legal ideas, concepts and theories. Freedom of conscience is the main feature of the manifestations of man as a person within the specific environment of his/her existence. From the legal point of view, freedom of conscience is a complex fundamental right requesting a wide legislative system in order to establish and guarantee it. In our opinion, both the basis and the legitimacy of the legal system protecting the freedom of conscience are given by the philosophical truths and the truths of faith, as expressed in theological writings and meditations. In this study, we identify the theological and philosophical bases of the freedom of conscience and their reflection in the legal field.*

***Keywords:*** *Self-conscience /Conscience of inner self / Social conscience /Freedom of conscience as a fundamental right / theological, philosophical and legal meanings of conscience and freedom of conscience /constitutional guarantees.*

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# I. ABOUT CONSCIENCE, LAW AND LIBERTY

Conscience is the essence and particularity of man by which he relates to the nature, society, but also to his own being and, especially, to the Supreme Being. The blessed Augustine also said that "there is something inside of us deeper than ourselves", referring also to human conscience, especially inner self-conscience.

Important to underline is that before being transposed into legal norms, conscience is a natural dimension by which man becomes what he is and he definitely differentiates from any other existential form. Thus, the natural reality in its existential manifestations transforms under the laws of causality, as Kant would say. Unlike this, man through his conscience and in his supreme form, the inner self-conscience is not transformed, he rather becomes according to the laws of freedom, as the great philosopher said. So we can understand the thoughts of Father Theophilus Părăian: the man becomes to what he is, which is to his own self discovery and inner self-conscience achieving.

Man is the only creature that through rational senses can contemplate on existence, but also on his own thoughts, in other words possess the ability *to reflect and question*, on himself and the outside world, seeking answers and, if possible, certitudes to his questions.

The reflections on thoughts give existential meanings through which man conceives himself and sometimes defines himself, recognizes and asserts his place into the world and universe. We try to say that the contemplation on the thought, the returning of the thought on itself, or as rationalist philosophers say "the thinking that thinks on itself" is more than a philosophical meditation or a simple logical construction because the reflection has not a purely formal character, but an existential one. The thought which thinks on itself is aiming not only to the reason, but to the existence or being, as such. This is the *conscience* as ontological peculiarity of the being that is based on the reflective capacity of the reason. Through conscience I can state my own existence as a rational being by that "I am", not so much by the existential uncertitudes, as Descartes was saying, neither by the formal certainties of the reason, but through the compassionate, rational feeling, which reveals to me my

inner self and meanings conferred by the reflection on the self, upon the world and universe.

The conscience is proper to the human being, distinguishing it of any other existential form, through which man is understood in his individuality, but also through his fellowship to all humanity. Conscience is the result of man's relationship, through the rational faculties and the understandable feelings with oneself, with nature, with society and with the Supreme Being. The existential meanings are not to be found in the simple consciences, but rather in the facts of the conscience that represent its content. Conscience is not an existential void, but is always the conscience of "something" or "through something". Content determinations generate two forms or sizes: the ego-conscience and inner self conscience.

In general, the philosophical and psychological thinking that emphasized the *inner self* is wider than - ***I***, integrates it and is much more than **I**: "And the inner self who broke the circle of the ego, is always proned to enlargement, as being the moving horizon in which you sooth yourself into the deep"[2]. For Carl Gustav Jung, "the self" refers to an entity that does not replace the designated one until now by the concept of "**I**", it rather includes this one within its scope as a superconcept. In the great psychologist's vision, **"I"** means that complex factor to which relates all contents of conscience. It is the centre of the field of conscience, and to the extent this one includes the empirical personality in its sphere, **I** is the subject of all personal acts of conscience. "The relating of the psychical content to **I** represents the criterion of this one's conscience, because no contents is aware whether not represented to *a subject*"[3].

We notice, as a matter that is common to philosophical and psychological thinking, the understanding of conscience through the idea of subject, we may say, through the idea of person conferred to the man.

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[2] Constantin Noica, *Cuvânt împreună despre rostirea românească* (Bucharest: Humanitas, 1996), 15.

[3] C.G. Jung, *Puterea sufletului. Antologie, psihologia analitică* (Bucharest: Anima, 1994), 129.

For Jung, although the **I** is based on the entire "field of conscience", it is not this field, is rather the reference point defined by the somatic, psychological factor. Through the "**I**" is obtained an image of the established personality, but the total personality is more complex. The "inner self" is for the **"I"** an objective given which the liberty of will of **"I"** in the field of conscience, cannot change. Jung says: "That's why I suggested to name with **self**, the *total personality* which, though not entirely noticeable, is still present. **I** is, by definition, subordinated to the self and is related to it as part of the wholeness."[4]

In Noica's concept, the understanding of the relationship between *self* and ***I*** is done on three levels: 1) the understanding the self in the passivity of **I**, "as a deeper conscience of this", one can understand that the self related to **I** is an archetype; 2) the self can be an active expression of the **I**: as ideal, ethical conscience, freedom. Here the self is a modeler of the **I**; 3) The self as an expression of lucidity of **I**, is determined by "the liberty that found the necessity". Under the term of lucidity hides the one of conscience, meaning the field of onscience, as it is called by Jung[5]. For Noica, the **"I"** is a dialectical process of elevation to innerself. In this becoming, the man and his creation are the expression of liberty of superior inner self that represents the being. Therefore, the becoming is understood by Noica as oriented towards the being, through a progressive transition from **I** to the deeper self.

Related to these brief philosophical reflections, one can notice that philosophy and psychology highlight the complexity of conscience, as a fundamental ontological dimension of human being. This complexity and profoundness of content does not exclude, but rather involves the unity of conscience, based at its turn, on the unity of being. The conscience, which only man as a rational being is possessing, is unitary, but manifestes itself in two forms: the *conscience of **I***, whose content is the existential phenomenality of man, as a finite being, in nature and society, subjected to the material and temporarily determinism and

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[4] C.G. Jung, *Puterea sufletului*, 133.
[5] For development see Constantin Noica, *Cuvânt împreună despre rostirea românească*, 17 – 35.

through this, to existential precariousness, and, on the other hand, the *inner self-conscience* specific to the man that found himself and the true meaning of existence that is beyond the finitude and natural determinism, transfiguring through this knowledge and conscience, the being and thus becoming what is through the nature, a person and spiritual personality, and as such, free.

Yet man can remain a simple individual constrained by the laws of nature and society, whether through will, faith and culture, he does not transcend the limits of **I** and he does not discover its true meaning in the Supreme Being and in eternal life, thus reaching to the conscience of inner self, inexhaustible in its depths. The transition from the conscience of **I** to inner self-conscience is, essentially, the becoming of man from individual to spiritual person, free, in an infinite and indefinite relationship of love with God, with people and whole creation. The philosophical concepts too, notice such a differentiation between man as a finite being, and on the other hand, the human personality defined by his freedom. Where there is no freedom, ie where there is only the finite conscience of **I** and not of the person, it is a number, such as Noice said".

It is discussed in politology and philosophy about a social conscience, too. In our opinion, this concept is a gnoseologic construction, whose existence is theoretically and ontologically derived and conditioned by a single ontological form of conscience, namely the human conscience in his individuality and personality. Interesting to notice that the Juridical expresses this fact, meaning that it guarantees not the social conscience as an abstract and theoretical structure, but only the individual conscience inextricably linked with the person. It is remarkable that the law has more or less elaborately taken the theological and philosophical fundamental values regarding the understanding of man as a person throughout his social existence, in that as it constantly states the thesis according to which the holder of the fundamental rights can only be but the man in his individuality, I would say as a person and not as an individual, and not as a group, nor as a community or society as such. Certainly, since the legal status of man is his exterior existence in the social and natural environment, the holder of any fundamental right can exercise it, if we have into consideration this legal status, in the

social environment in which he is located. Thus, any social individual liberty is also social through the legal existence of man in his social externality.

One should also notice that the freedom of conscience is part of the so-called natural rights of man, pre-existing, according to some authors, to the consecrations in the constitutional norms, or of a different type. This thesis, which the limited space does not allow us to develop, is worthy to be remembered in order to clarify, to some extent, the relationship between the liberties (rights) of man and, on the other hand, the juridical norms (positive law). It's not the law that determines and gives the content of individual freedoms and fundamental rights, but conversely, the legitimacy of any law stems directly from the way the fundamental rights and freedoms, pre-existing, are being reflected in the juridical norm. We appreciate that this is a social imperative to outline in this way, the possibility of man's liberty within the social environment. Assuming that the freedom is determined by the law, understood as a normative act rather than as a moral law, the dominant reality in which freedom manifestes is the non-authentic and constraining, because any juridical law, by its nature, is a form of limitation and restriction or conditioning, in a word of constraining the human freedom. In such a situation a distructive contradiction can manifest between the law, in its legal meaning and man's freedom, including the freedom of conscience.

If it comes to a situation where the law is a construction that reflects the preexisting natural rights of man, then we can speak of a genuine freedom, guaranteed by the legal enactment and not constructed by the juridical norm. It worth emphasizing that in the classical, universal legal instruments regarding the human fundamental rights and freedoms, usually there is a formula according to which the "States *recognize* the fundamental rights and freedoms", therefore they are normatively constructing them and do not impose them as a juridical given. This is not only a mere simple legal formula, but one expressing a fundamental thought of the derivative character of the law from the previous fundamental existential values, I would say, included in the truths of faith.

There is a unilateral contradiction such as Constantin Noica says, between law and liberty, if we accept the idea of the law's derived nature related to the values of freedom. **Thus, the law can not contradict human freedom, yet the freedom of man can contradict the law**

## II. THEOLOGICAL MEANINGS OF CONSCIENCE

The issue of the unity of conscience and being is oviously a goal for theological meditation. Here is what the pious hermit Isaiah was saying, in this respect: "Let's persevere, beloved ones, in fear of God, guarding and keeping the doing of virtues, not causing lunacies to our conscience, but taking heed to ourselves in fear of God. Let's do it till this will be freed with us, to produce between it and us a union, so that it will reach to be our guardian, showing in everything the danger to fall. But if we do not listen to it, it will split from us, letting us to fall into the hands of our enemies and will no longer be helping us"[6].

Commenting on this text, the priest Professor Dumitru Stăniloae remarked the duality between our conscience and our being. The conscience is the one through which we can guard our being against the existential precariousness attractions, while the purpose of existence is to achieve the unity between the conscience and our being. In this regard priest Professor Dumitru Stăniloae said: "there are three in a man, different from the Supreme Third. The conscience that the third in man (different from **I** and from the own being) is strong in man, mostly when it has in itself the supreme Third, or God"[7].

The man who has reached to the inner self-conscience is a person and through it, is free to communicate with God and with others. Rev. Prof. Dumitru Stăniloae said that man, as a person, is "spirit and freedom" and at the same time, mystery and light, is a "mystery of light". The inner self-conscience of man is a depth of love and humbleness because is the infinite and indefinite link of the human person with the

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[6] Isaia Pustnicul, *Word IV, Philocalia, Vol. XII* (Bucharest: Humanitas, 2009), 60.
[7] Priest Professor Dumitru Stăniloaie, *Philocalia Vol. XII,* 60.

Supreme Person. This communion is however the higher order of the natural determinism, because it is neither constraining nor finite, is yet infinite in love, is the order revealed by the Savior in His commandments and mainly through *the commandment to love, and the commandment to perfection and commandment to holiness*.

One can say that the genuine philosophical reflection about the conscience is supported by the truths of faith in the natural and supernatural revelations, truths so beautifully expressed in many patristical writings.

One of the most beautiful reflection about the conscience , we see at Ava Dorotheos: "When God created man, planted in him something divine, like the hottest and brightest thought, having the quality of a sparkle to enlighten the mind and to show to it the distinction of good from evel. This is called conscience and it is the law of His nature"[8].

Likewise, Mark the Ascetic refers to the conscience as man's own nature: "Conscience is a natural book. He who reads it with the deed makes the divine help's experience. The good conscience is known through prayer and the pure prayer through conscience. For one has need of another by nature"[9].

Should we examine the relationship between conscience and knowledge, we can say that there is no identity between the two faculties of human nature, but they presume each other. The amount of scientifical knowledge, or of any type, forms the conscience. Through inner self conscience the knowledges get their natural meaning. On the other hand, conscience is something else than the discursivity of reason or sensitivity of the intellect. Is the reflection on thought, on concept, categories built by the intellectual sensibility or the connoisseuring reason and is, in essence, the profound existential communion between the persons. In inner self-conscience, as defined by Philocaly parents, is disappearing the dichotomy of own rational knowledge between subject and object. Through knowledge, understood in the interpersonal communion

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[8] Avadoriotei, *Teachings, III, 1, In Philocalia, Vol. X.*
[9] Mark the Ascet, *About the Spiritual Law*, in 200 items, 186 şi 198.

relationship, the knowledges acquire their unity and meaning, because the conscience of **I,** mostly the conscience of inner self can belong, but only to the person. Such an idea is brilliantly built by Rev. Prof. Dumitru Stăniloae: "The same thing it attested by the word con-science. I do not know myself without a relationship with others. Ultimately, I know or am aware of myself in my relationship with God. The light of my knowledge related to the work or to myself, is projecting over the human face, communitarily, in the supreme personal communion. We are not aware of ourselves other than in relationship with another, and ultimately, before God. **I** alone would not have conscience; through conscience he is a spiritual "place" of his own in relationship with others. In his self-conscience he grows along with his self conscience growing, and this grows along with his growing in his knowledge of God and his neighbors, and also of the things"[10].

Unlike the conscience of **I**, bordered by the existential finitude, the self-conscience has its own freedom in the order given by the divine commandments. The man who has become a person is aware that he depends on God and through it, he is master on himself, being mastered by God and then from a slave of the sin he becomes "a slave of freedom", through equity, the work of virtues and through the Holy Grace. He is a slave of freedom because he lives through an infinite loving communion with God and with others and this is part of an order which the philosophers call "the law of freedom".

Conscience is a natural dimension through which man becomes what he is and he definitely differentiates from any other existential form. Thus, the natural reality in its existential manifestations transforms according to the laws of causality, as Kant says. In contrast, man through his conscience and in the supreme form, the self conscience, does not transform, he rather becomes according to *the laws of freedom*, such as the great philosopher said. Priest Theophilus Părăian said that man becomes what he is, which is that his existence meaning being oriented on the achieving and discovery of self-conscience.

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[10] Priest Professor Dumitru Stăniloaie, *The Orthodox Dogmatic Theology, vol. I,* (Bucharest: The Romanian Orthodox Church Biblic and Mission Institute, 2003), 243.

Consequently, the freedom is distinctive to self-conscience. There cannot be conceived a self-conscience in the natural determinism's borders or subjected to some constraints, conditionings or any legal limitations imposed by the law and, in general, by the social law.

This is highly emphasized in the Patristic writings, which reveal that the freedomof the man that became a spiritual person is inherent to self-conscience. For the depth of thought we quote one of the most beautiful philocalia meditations on human freedom, as a self-aware person, in his love communion with God and with others, "God made man free, so that he is proned to good. But being proned to good, through his free will, he is not able to achieve it without the help of God. Therefore it was written: it is not from he who is willing, neither from the he who is running, but from God that is full of mercy (Rom. 9, 16). Therefore, if man orientes his heart to good, and calls God's name for help, God paying attention to his good desire, gives strength to his work. Thus, the two of them meet; man freedom and God power. For the good comes from God but is accomplished through His saints. Thus glorifies God in everyone and he glorifies them all"[11].

The juridical status of man narrows and even constraints to phenomenal limits the inexhaustibility of self-conscience, but also of the own freedom, proper to human nature as a spiritual person, because the law, no matter how generous it may be, remains within the limits of human finitude, even when is trying to conceptualize, to recognize and guarantee this preciousless human divine gift, that is the freedom of conscience, about which Priest Arsenie Boca said that "it is the deepest spiritual good that man has in his hand throughout his life." Therefore, the freedom of conscience being a spiritual good, more than the material goods, must be cultivated, developed and mostly defended against any kind of constraints and interference, some coming precisely from the distorted application in relation to the profound existential meanings of the principles and norms of law.

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[11] Devoutedly Varsanufie and Ioan, *Scrisori duhovniceşti, 763, Philocalia, vol. X.*

## III. LEGAL MEANINGS OF THE FREEDOM OF CONSCIENCE

This fundamental right is stipulated and recognized in most of the international declarations and treaties referring to the human fundamental rights and freedoms, starting with the Universal Declaration in 1948. It is at the foundation of other fundamental rights, such as the freedom of speech, freedom of association, freedom of mass media. At its core is a natural law that provides for the individual to be able to express, in private or in public, a certain conception about the world, to have or not have a religion, to belong or not to a religious faith or an organization of any kind, recognized by the existing constitutional order at a given time. It expresses at the same time the freedom to think, to have opinions, theoretical concepts, feelings, ideas expressed publicly, privately or not, so that no one can interfere or censorship, or know without the person's will, these thoughts. It is a natural right, because man distinguishes from other forms of life by the very existence of conscience and freedom to think, to have feelings.

Human conscience must not be directed by administrative means, though it must be the result of his freedom to think and to share his own thoughts expressed. The freedom of conscience involves also the moral and conscience responsibility for the thoughts expressed. The responsibility, including the juridical one, intervenes only when the thought or opinion are being expressed, in which case they may harm the dignity, honor and freedom of thought of another subject of law or even the social order or lawfull order, therefore the freedom of conscience is closely related to the freedom of expression, the latter one representing precisely the possibility acknowledged to man to express his thoughts. Consequently, the freedom of conscience has a complex content, whose legal content is expressed in three dimensions: freedom of thought, freedom of conscience and freedom of religion.

The freedom of religion, as a matter of content of the freedom of conscience, means the exteriorizing of a faith, religions and, secondly, the freedom to join a religious organization and the ritual practiced. It is

necessary that religion or religious organization be known by the state through the law and the activity of a certain religious cult not be considered as contrary to the lawfull order or good morals. The organizing of the religious cults recognized by the State, is free and reflected in their own statutes. Over time, the relations between the state and the religious authority can be categorized into three types: 1. State is mistaken to the religious authority; 2. State supports the religious authority, but differentiates from it; 3. State takes a position of indifference towards the religious authority.

Romania's Constitution consecrates the separation of state from the authority, but obliges the state authorities to support religions cults recognized by law, including by financial means. It also proclaims the religious autonomy, meaning that each denomination is free to organize the form of the ritual, education, relations with the cult followers, the relationship with the state. The religious autonomy must be exercised only by respecting the human rights, morals and lawfull order. Art. 29 of the Constitution referrs to the relationships between religions, according to the following principles: equality between believers and nonbelievers; it requires cultivating tolerance and mutual respect; are forbidden all forms, means or acts of religious enmity.

The doctrine in specialty reveals some interesting aspects about the legal content of the freedom of conscience, sometimes called the freedom of thought.

Thus, an important dimension of the juridical content is *"the right to have a belief"*. This is a right with a general character, protecting the interior citadel, ie the domain of the personal opinions and religious beliefs. It is important to notice that, legally, the right to have an opinion may not be subjected to restrictions, conditioning, limitations or exceptions. The European Court of Human Rights in Strasbourg emphasizes that the freedom of religion is "one of the vital elements that contributes to forming the identity of believers and their conception of life" - Decision on 20$^{th}$ of September 1994 A.295 - A. Understood in a wider sense by the European Court, this right is used both by believers and by the atheists "agnostics, skeptics and neutral people."

According to the Strasbourg Court, "the belief" - a term used by the international legal instruments - distinguishes from the mere "opinions and ideas" and denotes the "views that reach a certain degree in intensity, seriousness, consistency and relevance" – Decision on 25th of February 1982, A.48. We emphasize an interesting statement in this regard of the Court: a faith that is essentially or exclusively in the cultivation and distribution of a narcotic drug can not enter the scope of a legal protection given by the European Convention on Human Rights.

The right to have opinions relates, therefore, to the practicing of spiritual or philosophical opinions that have a valuable, identifiable content and thus may be subjected to the juridical protection. The right to have an opinion involves state neutrality in regard to the moral and political beliefs. This obligation of neutrality excludes any assessment of state authorities regarding the legitimacy of beliefs and ways of expressing them. Understood thus, the right to have an opinion takes a triple aspect in legal terms. It represents, firstly, the freedom of every person to have or adopt a belief or religion in its sole discretion, without involving the freedom to deny the validity of the compelling legislative provisions, backed on objections arising from certain religious beliefs.

A second issue concerns *the freedom of not having a belief or religion*. In this way, in legal terms, the individual is protected against "any duty to directly participate in religious activities against his will" (see, on that regard the Court decision on May 9th, 1989, A187).

Finally, *the right to express an opinion expresses the legal guarantee of individual's freedom to change his belief or religion without suffering any coercion or prejudice*. In this spirit, the United Nations General Assembly adopted on 25th of November 1981 the Declaration on the Elimination of all forms of intolerance and of discrimination based on religious faith or beliefs, international document which prohibits "any distinction, exclusion, restriction or preference based on religious faith or belief".

Another aspect is the "*human right to manifest one's beliefs"*. This right includes every person's freedom to manifest one's beliefs, individually or collectively, in public or private. The right has to do with the freedom of expression and refers in particular to the manifestation of

religious beliefs. It is interesting to notice that in the European Court's opinion, the freedom to manifest the religious beliefs includes also "the right to try to convince your neighbor."

Social expression of freedom of thought, conscience and religion, with very diverse consequences, the freedom to manifest the beliefs may be subjected to some restrictions within law provisions. The European jurisprudence provides many examples of restrictions on the right of the individuals to express one's beliefs, justified by the protection of public order, lawfull order or moral order, or even health.

As highlighted in a decision delivered on 25th of May 1993, the European Court held that: "In a democratic society where several religions coexist within the same population, the limiting of the right of individuals to express their beliefs may prove to be necessary to reconcile the interests of different groups and ensure that everyone's beliefs are respected". The 'public order' clause allows in these situations the protection of the freedom of thought, conscience and religion and condemns the "poor quality" proselytism, characterized by abusive pressure which take the harassment form, or the abuse of power. In the same spirit, the protection of children's right to education, where conflicting with the right of parents to respect their religious, prevails on the latter one.

The freedom of individuals to manifest one's religion includes the participation in religious community life and assumes that the latter one "can function peacefully, without the state arbitrary interference" (see the Decision on 26th of October 2000, A.78). The state has the obligation to guarrantee not only the religious pluralism, but the internal pluralism within a particular religious denomination; on this purpose, it must not arbitrate in matters of dogma conflicts within a religious community and must not interfere in favor of a community or other religion.

The freedom of religion must be interpreted so that the religious communities have the opportunity to ensure their own legal protection, of their members and assets and in particular, of its legal personality, in case where under the national law only the recognized religious denominations can be practiced (see the Metropolitan Church of

Bassarabia and others against Moldova, the Decision on 13th of December 2001: The refusal of the authorities to officially recognize a Church).

## IV FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION IN EUROPEAN JURISPRUDENCE

The three concepts, namely: thought, conscience and religion, which are the topic for the protection in Article 9 of European Convention on Human Rights, the most important European legal instrument in this area, are closely interlinked. The notions of "thinking", "conscience" and "religion" that appear in the content of the Convention emphasize the broader content attributed to the freedom of thought. The European Court of Human Rights (hereinafter ECHR) has estimated that the notion of philosophical belief" designate the ideas based on knowledge and reasoning with regard to the world, life and society ... which a person adopts and applies in accordance with own conscience requirements. These ideas can be described briefly as an individual concept about life, about human behavior in society.[12]

The freedom of thought, conscience and religion is one of the foundations of a democratic society in the sense of Convention, "it appears, in its religious dimension, among the essential elements of identity of believers and conceptions of life, but it is also a precious asset for atheists, agnostics, skeptics and the indifferent ones. This stems from the pluralism paid dearly along centuries, yet necessary to such a society"[13]

C.E.D.O jurisprudence reveals two major aspects of the right guaranteed by Article 9: a) the freedom of the individual to adopt a belief that he manifests; b) the freedom of the individual to be or not part of a

[12] Decisions and Reports of the European Commission for Human Rights no.25. Report on 16th of May 1980.
[13] Case of Basarabia Mitropoly and others versus Moldova, Decision on December 13th 2001.

group, including to another religious cult and defend it when deemed necessary[14].

Most cases related to the infringement of provisions of Article 9 of the Convention debated on religious freedom. The international Court in Strasbourg emphasized the importance of respecting the pluralism and tolerance between different religious groups. In its relations with various religions, denominations and beliefs, the state must be neutral and impartial "the role of authorities in this case is not to eliminate tensions, by eliminating pluralism, but to ensure that conflicting groups tolerate each other." [15]

The freedom of thought, conscience and religion requires the state's obligation to restrain from exercising any constraint on individual's conscience. The European Commission has shown that Article 9 protects what is called "interior forum" of the person, ie areas of strictly personal beliefs and closely related deeds. However, this text does not protect any social behavior based on certain beliefs. The right guaranteed in Article 9 is not absolute, because in a democratic society, where many religions co-exist in the same population, it is necessary that this freedom be accompanied by limits to reconcile the interests of different groups and ensure the respecting of everyone's beliefs. Furthermore, Article 9 paragraph 2 stipulates the possible restrictions of freedom of conscience, thought and religion. In accordance with these provisions, the liberties consecrated in Article 9 may be subjected to some restrictions if they are prescribed by law and are necessary in a democratic society and aim one of the legitimate purposes expressly and restrictively set out in the Convention.

The compliance with the proportionality condition, as appropriate relationship between the restrictive measures and the legitimate aim pursued form the International Court topic of analysis. Of

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[14] Doina Micu, *Garantarea drepturilor omului*, (Bucharest: All Beck, 1998), 91.
[15] Case of Basarabia Mitropoly and others versus Moldova, quoted previously.

course, in this case the European Court of Human Rights considers the proportionality related to the nature of protected right, the situation in fact, the legitimate aim pursued, the kind and intensity of the restrictive measures imposed, having in consideration the respecting of the principle of pluralism and the two procedural criteria: "the necessity in a democratic society" and "the appreciation margin" recognized by the Contracting States.

The Court in Strasbourg acknowledges that states have a certain appreciation margin in regard to the requirements for the exercising of this freedom, but their power can not be discretionary. The jurisprudence is oriented towards a strict interpretation of limiting of the freedom of conscience and religion, related to the specific circumstances of the case and the legitimate aim pursued. To determine the extent of the margins of appreciation of the respondent State, the international Court emphasizes the importance of the deed for the recognition of the national authorities. Only a denomination recognized has a legal personality, therefore it may organize and operate, can stay in court to protect its heritage. In relation to these criteria C.E.D.O. considers that the refusal to recognize the applicant church has such implications on the religious freedom, so that it can neither be considered proportionate to the legitimate aim pursued, nor necessary in a democratic society, therefore, Article 9 of the Convention has been violated.

In connection with the guarantee of freedom of conscience, thought and religion, we can say that the principle of proportionality is an essential criterion to limit the discretionary power of public authorities and to eliminate abuses by unduly restricting of the exercising of a right protected by the Convention. Thus, in any case, an administrative procedure can not be used to impose rigid conditions and even prohibitive, to the exercising of certain denominations. Proportionality is not an abstract condition, but is determined by each case peculiarities but as results from the jurisprudence of the Court in Strasbourg, there are important value premises that determine the assessment of the proportionality relations between the restrictive measures ordered and the legitimate aim pursued.

## V. SOME CONCLUSIONS

Conscience is an ontological dimension of the human being, a *given* that is an existential feature of man. *Inner self-conscience* is a divine *gift* that every man carries within himself as a vocation since the baptism, but which is actual through the theandric work of the grace and human. The *freedom of conscience* is constituted and accomplished not in a relationship with the material world subjected to determinism and natural causality and implicitly to all existential precariousness, but by being related to the authentical values universe, which follows naturally out of man's love relationship with God and his fellowmen.

The legal status of the freedom of conscience has as essence the freedom of self-conscience in its theological meaning. Priest Professor Dumitru Stăniloaie says that "man in his essence is spirit and freedom." Man's freedom has as foundation the freedom of conscience which, through faith, becomes *self-conscience*. This way is surpassed the individualism, egotism, the "ego" and everything meaning the existence of man thrown into the world according to Heidegger and Sartre.

The freedom of conscience is the long path, but the only tranquil way of man towards himself, towards his deeper self, to found himself in the infinity of love for God and people.

Noica said: "You need to be unfaithful to your ego on the way to innerself".

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# CRIMINOLOGICAL LANDMARKS REGARDING CRIMINAL PERSONALITY AND BEHAVIOUR

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***Abstract:***

*Criminal's personality can be defined according to an entire kit of particular elements that include temperament, skills and character, all together having a different influence on the individual behaviour.*

*Antisocial behaviour of the individual is not only a part of the temperament acquired and developed through interaction with the external environment or the skills an individual has or not in achieving an activity, but the character features and moral traits that generate a certain action or lack of action.*

***Keywords****: criminal, behaviour, personality, investigation, offence*

## INTRODUCTION

The study of criminal personality involves o multiple approach both legal and nonlegal, in point of all social factors that generate and influence the criminal behaviour, as well as the mental traits of the individual and existent contingent disfunctions[3].

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[3] Emilian Stancu and Carmina-Elena Aleca, *Elemente de criminologie generală,* (Bucharest: Pro Universitaria, 2014), 55.

The cognition of the offender's personality and psychology is essential for the identification of the adequate prevention and rebutment measures for criminal phenomena.

The steps for investigative intervention must consider the entire development of circumstances that lead to the perpetration of each and single crime by grasping the specific factors and conditions in which each of them occurred and the mental traits of the perpetrator.

Thus, the criminal's personality can be defined according to an entire kit of particular elements that include temperament, skills and character, all together having a different influence on the invidual behaviour.

What is essential for defining the temperament of an individual is that it can change during lifetime through inevitable contact with physical and social environment, generating deviant behaviours.

We, therefore, assume that with a view to the identification of the criminal personality, one must consider both the individual temperament developed within the social environment and the type of nervous system proper as a part of one's personality which is inseparable thoughout lifetime.

Antisocial behaviour of the individual is not only a part of the temperament acquired and developed through interaction with the external environment or the skills an individual has or not in achieving an activity, but the character features and moral traits that generate a certain action or lack of action.

## 1. THE DETERMINANTS OF THE CRIMINAL ACTION

Any crime is a print of its author; its interpretation cannot be made by generalizing the analytical benchmarks that belong to the respective person. As a reflection of the offender's personal reaction[4], the understanding of the criminal act must be conditioned by the

[4] T. Butoi, D. Voinea, V. Iftenie, Al. Butoi, C-tin Zărnescu, M. C. Prodan, I.T. Butoi and L.G. Nicolae, *Victimologie*, (Bucharest: Pinguin Book Publishing House, 2004), 52.

understading of the criminal himself as a whole of biopsychosocial coordinates influenced by the actual socio-economic context.

At the same time, each offence has a certain specificity we have to take into account so that the inclination to commit a crime is contingent to a plethora of personality traits depending on age and sex, some physical or mental inconsistencies that create a barrier against society, or even the appurtenance to a certain race or ethnic minority, such individuals becoming affected by being labelled by the society they live in.

Therefore, we have to talk mainly about the offender's personality at the moment of criminal action focusing on each reaction in the respective circumstance.

## 2. THE OFFENDER'S PSYCHOLOGICAL PROCESSES

The problem of committing a criminal offence supposes a long deliberative process, through the offender's intra-psychic state which involves an approach of his psychology since the momemet before decision-making up to the moment of action itself, including on-the-process and after-the-process development[5].

Thus, committing the offence itself is the final step of a long deliberative process which comprises, at the same time, the total amount of causes and conditions, endogenous and exogenous factors shaping the offender's personality. In other words, bringing to bay the idea of committing the crime determines the deliberative process having as a consequence the perpetration of the offence.

The cognition of the offender's psychic structure is necessary as this is the way to assess the efficiency of the measures to be hold against the offender[6].

Hence, the offender's psychological processes are highly complex considering the following phases:

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[5] Stancu and Aleca, *Elemente de criminologie generală*, 55.
[6] Butoi et al., *Victimologie*, 63-66.

- *The advent of the reasons or causes* that determine the criminal behaviour mobile; the necessity that urges the offender to make the decision to pursue the criminal intention, necessity that interacts directly with the entire external conditions.

- *The psychic deliberative process* based on the preshadowing the means and ways necessary to carry out the purpose, as well as the place and time conditions, the risk-forecast and the final purpose of the actions. Within this phase the offender has an exploratory attitude weighing the operational instruments dedicating oneself tot the achievement of these preparations. As a result of the deliberative process, the offender's attitude may end up with either the decision to act or postpone the action.

- *Performing the criminal action* which presupposes the offender's attitude during the perpetration of the act. Time, circumstaces, operational instruments, unforseen events are factors that induce pressure and determine a range of emotional feelings which make the perpetrator experience fear, nervousness, agitation, uncertainty, etc. Under the influence of such feelings the perpetrator is inclined to making mistakes leaving behind at the crime place evidence that help the investigators trace and identify him.

- *Post-facto, avoiding the criminal liability* which implies the offender's attitude to desert the place of the crime as soon as possible, to break the chain of the facts that could deconspire him and to create an alibi. The offender makes use of all psychological processes to re-enact the facts and avoid being identified. The offender very seldeom has consciouness reprimands. Most of the times, the perpetrator goes back to the crime scene for either ensure that everything happened as planned beforehand and enjoy his masterpiece or to supervise the investigations in order to manufacture evidence and clues with the purpose of making the investigators becoming confused.

## 3. CAUSES, CONDITIONS AND CIRCUMSTANCES THAT DETERMINED, FAVOURED OR FACILITATED THE CRIMINAL OFFENCE

The cognition and disambiguation of the causes, conditions and circumstances that favoured or facilitated the criminal offence is of extreme importance as the criminal investigation bodies are offered, thus, the possibility of achieving the prevention act through identifying and and choosing the most efficient methods of fighting criminal acts[7], so that in the future, the same facts should be avoided although the same circumstances occur[8]. This task is mandatory as most of the times, the circumstances are determinant for the identification of the mobile generating the criminal offence, which against the offender's anti-social background implicitly conducts to the criminal decision-making[9]. As to this aspect, the practice in the field concluded that the determinant reason provides the moral and legal significance of each human action[10].

The circumstances in which the offences can be committed are extremely various and have different significance from one case to another as are important in appreciating the gravity of the fact and the degree of actual social danger. Therefore, during investigation all time and place circumstances are important, as well as the framework in which the offence was committed in participation, simultaneously or separately considering contingent steps that make the crime more difficult to reveal.

Considering the degree of social danger that any criminal offence represents for breaching of the social values, there has been certified by

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[7] Lazăr Cârjan, *Compendiu de criminalistică*, (Bucharest: Editura Fundației România de Mâine, 2005), 378.

[8] A. Iacob, H. Măndăşescu, S. Bălţatu and C. Ignat, *Metodologia investigării infracționalității,* ( Craiova: Sitech Publishing House, 2008), 63.

[9] Butoi et al., *Victimologie*, 37, 64.

[10] Enrico Ferri, *Drept criminal. Principii de drept criminal*, vol. I, (Bucharest: Tipografia şi Legătoria de cărți „Închisoarea Văcăreşti", 1929), 242.

practice that such offences can have multiple causes both general (that are basic for any type of offences) and particular (specific for this type of offences). Consequently, considering the factors generating or favourable to such an offence, the investigation bodies in collaboration with other empowered legal institutions have to put an end to such anti-social actions and their negative effects.

In order to achieve this goal, a very complete and realistic investigation should be made with a view to social and psycho-social factors that "convince" the perpetrator to act deviantly. Firstly, what determines such behaviours within the society is the absence of a real and effective protection due to the lack and inconsistences in the collaboration between the criminal law provisions and other steps meant to implicate in all fields of social life. The indisputable *raise of criminal index* may be noticed against the high social tension background generated by late years Romania's depression.

One can notice an inefficiency of the steps taken by the state for ensuring an effective protection as a result, perhaps of the high number of criminal offences but of the decresase of authority, as well, considering the citizen's perception that concepts as *freedom* and *democracy* were unnaturally perverted through a negative influence of the media. As a solution, we think that individual causes should be discovered and researched according to each situation.

Hence, the high risk factors (alcohol, violence, lust, conflict, etc.) that generate the perpetration of the crime should be identified and the efficient intervention of the legal bodies since the beginning in order to prevent producing social peril through deviant behaviour and high social factors. Therefore, excessive alcohol and more recently drugs consumption are most of the times, the factor that determines the deviant behaviour opposed to the most elementary social life norms, characterised by violence, aggression, irrationality and irresponsibility. At the same time, we would like to draw attention to the lack of education or the low level of school instruction as well as the negative influence exerted by the family, circle of friends, society, media, lack of action of the responsible authorities of inefficient prevention steps.

The causes and conditions that conduct to actions and manifestations labelled as social danger breaching the values the criminal law protects are varied and belong to biological, psychological, economic, social fields considering:

- *intellectual or affective immaturity;*
- *inferiority complex or frustration* – defined as a psycho-moral state of spirit consisting in a major dissatisfaction, generally justified, regarding his condition and existance and socially agreed behaviour which conducts to anti-social acts;
- *mental illness, paranoia*;
- *excessive alcohol consumption*; - which determines the person in cause to have a deviant behaviour contrary to the social life norms;
- *drugs* – substances consummed illicitly that endager the consummers' lives that are a major danger for the society itself through its psycho-social impact;
- *unfavourable social environment* (group of friends, family environment, school, work, etc.) or low level of culture;
- *antagonism* – a major risk psyco-moral factor which can determine a person to perform actions with dangerous consequences.

## CONCLUSIONS

The entire behaviour of the individual, whether social or anti-social is the result of mutual action of some biased or non-biased factors. One should consider, thus, all particular elements of the individual's mental structure and moral conceptions as well as concrete conditions of his life.

Scientific research of criminal offences implies complex interdisciplinary studies in order to approach the etiology of criminal behaviour at individual, group, social and global levels. As to this aspect, we have to point out the social control factors as well as, social and educational assistance that compete for the profilaxis and protection those being in the position of perform criminal offences. Hence,

considering the complexity of the factors that generate criminal behaviour of the individuals, framing and implementing efficient prevention steps are mandatory requirements.

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# DONATION BETWEEN SPOUSES IN THE LIGHT OF THE NEW CIVIL CODE

**Viorica POPESCU**[1]

***Abstract*:**

*The elimination of the interdiction of sales between spouses stated by the New Civil Code generated a reconfiguration of the institution of donation between spouses. In this regard, the Romanian legislator has inserted special provisions, derogative from the general rules applicable for donations, the most important one being that referring to the principle of revocability of the donation.*

*The present study aims to make a short analysis of the regulations stated by the Civil Code referring to the donation between spouses, emphasizing the special provisions.*

***Keywords**: donation, donation between spouses, the principle of revocability, the nullity of marriage, Civil Code*

## INTRODUCTION

Stated by Art 985 of the Book IV, Title III, Chapter II of the Civil Code, the donation is defined as being "the contract by which, with the intention of gratifying, a party, named donor, irrevocably disposes of an asset in favor of the other party, named grantee".

From this definition it results the fact that this contract is an act on a free basis, "by which one of the parties aims to offer a benefit to the other one, without receiving any advantage in return"[2], simultaneously being an *inter vivos* liberality.

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[2] Art 1172 Para 2 of the Civil Code.

The qualification of the donation has as main criteria that *animus donandi* (liberal intent) of the donor, because the dispose alienates his assets without receiving an equivalent in return[3].

Other legal features of the contract of donation are:

- It is an unilateral contract because it generates obligations only for one party;
- It is a solemn contract, because it is subjected to the special form, requested as an *ad validitatem* condition according to Art 1011 of the Civil Code "the donation is concluded by an authenticated act";
- It is an agreement transferring property rights. This legal feature must be analyzed only from the perspective of the nature of the donation agreement, because through this contract can also be validly transmitted other rights (another real right or the right to claim).

## 1. DONATION BETWEEN SPOUSES. CONDITIONS OF FORM AND CONTENT

The donation between spouses must fulfil all conditions of form and content stated by the general regulations in this area, the only special condition being related to the quality of the parties, namely that of being spouses at the moment when the contract is concluded.

Under the aspect of the conditions of form, the following must be mentioned:

∗ The **capacity** required both from the donor, as well as the grantee at the moment when the agreement is concluded it is necessary in order to conclude acts of disposition. According to Art 987 Para 2-3 of the Civil Code the condition for the capacity of disposition through liberalities must be established at the date when the donor expresses his consent, and the capacity to receive a donation must be valid at the date when the grantee accepts the donation.

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[3] "The donation is a contract in which the grantee plays a less important role, the donor's will being preponderant" – see in this regard Ph. Malaurie, L. Aynes, *Cours de droit civil* (Paris: Cujas, 1989), 191.

∗ The **consent**, as an element of validity of the contract, must be validly expressed (without undue influence), expressly manifested in written.

The defection of consent in the contract of donation usually may be made by duress manifested as suggestion or collection[4].

∗ The **object of the contract** in the case of donation between spouses is represented by the assets belonging to the donor-spouse regardless if the matrimonial regime selected by the spouses is the one of the legal community, separation of assets or conventional community, becoming, if otherwise not stated, the grantee-spouse's own assets, if their inclusion into the community has not been stated, "which could mean the transformation of the exclusive right of property of the donor-spouse into a condominium property of both spouses"[5].

Also, the literature has stated the fact that the donor may also donate his quota – the ideal share belonging to him from a right of property for an asset which does not represent the object of the community or the right to an open inheritance (universality or undivided share of the universality) which is the heir-spouse's private right[6]. It is unconceivable the donation of a common asset, such legal act being null[7].

∗ The **cause of the donation** has two elements: the intention to gratify and the determinant reason. The intention to gratify is tightly connected to the free consent expressed by the donor consisting in the transmission of the right to property over an asset or over other real right or right to claim, being an abstract, objective, invariable element common to all donations, while the determinant reason is practically the

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[4] See in this regard M. Eliescu, *Moştenirea şi devoluțiunea ei în R.S.R.* (Bucharest: Romanian Academy, 1966), 178.

[5] *I. Filipescu, Tratat de dreptul familiei* (Bucharest: All, 1993), 73.

[6] Francisc Deak, Lucian Mihai, Romeo Popescu, *Tratat de drept civil. Contracte speciale*, 4th Edition (Bucharest:Universul Juridic, 2007), 210.

[7] Florin Moțiu, *Contracte speciale în Noul Cod Civil*, 4th Edition revised and amended (Bucharest:Universul Juridic, 2013), 140.

purpose aimed by the donor, being a subjective, variable and specific element[8].

If the cause of the donation is contrary to the law, morality or public order, the donation shall be void[9].

Regarding the form of the contract of donation, it is expressly stated by the legislator in Art 1011 Para 1 of the Civil Code, which states that: "the donation shall be concluded by an authenticated document, under the sanction of absolute nullity". An exception from this rule is represented by indirect donations, the disguised ones or manual gifts.

The reasons determining the exigencies of the legislator in surrounding the donation by formalities, sanctioned by absolute nullity are mainly connected by the protection of the donor's will which currently and irrevocably disposes of a right in favor of another person, without receiving an equivalent value in return, as well as the protection of the family's donor for a possible abuse of gratuities[10].

## 2. REVOCABILITY OF THE DONATIONS BETWEEN SPOUSES

Regarding the principle of irrevocability of donations, the donation between spouses is characterized by a derogative legal regime, because Art 1031 of the Civil Code states the fact that "any donation concluded between spouses is revocable only during their marriage".

The revocability of the donations between spouses is an element of the essence of this agreement, which assumes on the one hand that it cannot be removed by contrary stipulation, and on the other hand neither must be expressly mentioned in the content of the contract.

The unilateral will of revocation may be both expressly stated, in court, but also tacitly, being deduced from a subsequent document of the

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[8] Gabriel Boroi, Liviu Stănciulescu, *Instituții de drept civil în reglementarea Noului Cod Civil* (Bucharest: Hamangiu, 2012), 413.

[9] See in this regard the Decision No 3177/2001 of the Bucharest Court of Appeal, Section 3 Civil, in *Practică judiciară civilă 2000-2001*, 102 and next.

[10] F. Baias, E. Chelaru, Rodica Constatinovici, Ioan Macovei (coord.), *Noul Cod Civil. Comentariu pe articole* (Bucharest: C.H. Beck, 2012), 1057.

donor unequivocally stating his will to revoke the donation. An example in this respect in literature aims the revocation of the donation made by a gratuitous juridical act for cause of death, namely leaving a legacy by particular title by which the asset donated by the spouse is left to another person, provided that the manifestation of will to be expressed during marriage[11].

The fundamental condition allowing the revocability of the donation between spouses is related to the fact that the manifestation of will of the donor-spouse must be expressed during marriage. In case of divorce, the revocation of the donation can only be made until the moment in which the decision to dissolve the marriage remains definitive, according to Art 927 Para 3 of the Civil Procedure Code.

Another special legal provision for the donation between spouses refers to the situation of the contracts concluded during marriages which subsequently have been annulled. In this regard, the legislator has stated in Art 1032 of the Civil Code that "the nullity of the marriage generates the relative nullity of the donation made by the bad-faith spouse". Per a contrario, if the donor is the good faith spouse, the nullity of the marriage shall not generate the relative nullity of the donation, the latter one being subjected to Art 1031 of the Civil Code regarding its revocation. This perspective is justified by the fact that the good faith spouse from an annulled marriage is assimilated to the spouse from a valid marriage.

For the protection of the principle of revocability of donations between spouses, the legislator has established the sanctioning by nullity any simulation in which the donation represents the secret contract with the purpose of eluding the revocability of the donations between spouses". Though it is not stated the form of the nullity, absolute or relative, by relation to Art 1250 of the Civil Code it is appreciated that the protected interest is general, which cannot draw the absolute nullity.

According to Para 2 of the same article are absolutely presumed as being interposed persons any relative of the donor to whose inheritance would have vocation in the moment of the donation and which did not resulted from the marriage with the donor, as well as his

[11] F. Baias et al, *Noul Cod Civil,* 1070.

children from a different marriage or from outside the marriage, and relatives in straight or collateral line up to the fourth degree with the donor.

### 3. THE EFFECTS OF THE DONATION BETWEEN SPOUSES

If the donation was not revoked by the donor spouse during marriage, this specie of contract shall have as effect the transmission of the right of property or other real right or the right to claim from the donor to grantee, rightful.

The donor's main obligation is to hand over the asset. Of principle, the donor has no obligation to guarantee the grantee for eviction or hidden vices. Nevertheless, the donor owes the guarantee for eviction in the following cases:

- If he has expressly promised a guarantee;
- If the eviction results from his action or from a circumstance which affects the right being transmitted, which he had known about and did not communicated it to the grantee at the conclusion of the agreement;

Also as an exception, the donor owes guarantee for the vices of the donated asset if he had known about the hidden vices and avoided to communicate them to the grantee at the conclusion of the agreement, case in which he is compelled to fix the prejudice caused for the grantee by these vices, according to Art 1019 Para 2 of the Civil Code.

Regarding the obligations of the grantee, mainly he has no obligation, because the contract is unilateral. Nevertheless, in relation to Art 1023 of the Civil Code, in literature has been appreciated the fact that the grantee would at most an imperfect obligation, of gratitude, which, if would be violated could determine, under certain conditions, the revocation of the donation for ingratitude.

If the donation would be affected by methods, namely by the burden, the grantee has the obligation to execute the task, on the contrary the donor being entitled to ask for the execution of the task, or for the revocation of the donation.

## CONCLUSIONS

The donation between spouses represents a variety of the contract of donation, whose specificity is determined by the fact that the donor and grantee are spouses. This contract could have as object only the assets property of the donor-spouse becoming property of the grantee-spouse, except the case in which it was expressly stated their enlistment in the community of assets of the spouses. For this latter case, the contract has as effect the conversion of the donor-spouse's right to exclusive property over the donated asset into a common property in condominium of the spouses.

Complying with the general provisions regarding the conditions of form and content, the donation between spouses is characterized by a derogatory legal regime only in reference to the revocability of the contract.

This exception refers to the possibility of the donor-spouse to revoke at any time during marriage the donation, either expressly through a judicial decision or in front of a public notary, or tacitly, the manifestation of will being expressed only during marriage.

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# RECENT DEVELOPMENTS REGARDING THE REGULATORY BURDEN REDUCTION IN THE EUROPEAN UNION

**Sorina ŞERBAN-BARBU**[1]

***Abstract:***

*Currently, Europe is going through a period of change. Following the crisis, the economic and social progress was cancelled and the structural weaknesses in Europe's economy were highlighted.*

*In this context, the strategy developed by the European Commission for reducing the regulatory burden mentions the necessary priorities for the European Union and for the Member States.*

***Keywords:*** *European Union, regulation, burden, reduction*

## INTRODUCTION

In the last decade, the EU has introduced several instruments to ensure good regulation and also to ensure the procedures necessary for its application.

The European Commission's recent Communication on *Better Regulation for better results* from 5.19.2015, is continuing the principles of good regulation which will provide visible benefits to citizens, institutions and society. This communication is the result of the progress of the Regulatory Fitness and Performance programme (REFIT) and proposes an approach based on transparency and accountability that takes

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into account the views of those targeted by the legislation.

However, it appears that there is a need for openness and transparency from the EU institutions and the Member States must implement these principles.

This approach applies both for existing legislation and for the future legislation, also being essential for sustainable development of the single market and to unlock the required investments.

## 1. EUROPEAN COMMISSION`S APPROACH REGARDING THE REGULATORY BURDEN REDUCTION

The Commission Communication COM (2010) 543 of 08.10.2010 on "Smart Regulation in the European Union" marked the ending of a cycle and the shift to new global economic conditions, from better regulation to smart regulation. With this Communication were set four major goals and adequate measures to achieve them[2]:

- Improvement of existing EU legislation by: simplifying EU legislation and reducing administrative burdens, the continuation of this process both at EU and Member State level; evaluation of the benefits and costs of existing legislation, namely the ex-post evaluation of the legislation through cooperation with Member States in order to develop this approach.

More specifically, assessing whether a regulatory framework for a policy area is fit for its purpose and if it is not, it would be amended. The objective is to identify excessive burdens, inconsistencies and obsolete or ineffective measures and to help to identify the cumulative impact of legislation[3];

- Ensuring that the new legislation is the best possible through: establishing a system for impact assessment to serve as a tool for the

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[2] Christensen Tom, Laegreid Per, Wise Lois R., *Transforming Administrative Policy*, (Public Administration, 2011), 158

[3] Şerban-Barbu, Sorina, "Strategia Europa 2020, soluții pentru criza administrației" in *Administrația publică în situații de criză*, (Bucharest: Wolters Kluwer, 2015), 83.

process of political decision-making and to ensure transparency of public policy in terms of benefits and costs operations; planning in a transparent manner, the business impact assessment, so that stakeholders can be involved in the process as quickly as possible. From 2010 Commission publishes roadmaps for all proposals which may have significant impact; actual assessment of the impact, benefits and costs when possible, taking into account the fact that what can be quantified at the level of 28 member states is not exhaustive: frequently, data are limited and the impact of EU legislation often depends on the way in which national administrations are implementing it;

- Improving the implementation of EU legislation by: paying attention to the implementation and enforcement within the impact assessment when designing new legislation; support the Member States during implementation in order to anticipate implementation problems and to avoid further breach of procedures, taking into account that, in reaching this objective, the responsibility lies primarily with the Member States;

- Clearer legislation and more accessible through: examination by the European Commission of all new legislative proposals to ensure that the rights and obligations they create are expressed in a simple language in order to facilitate the legislation implementation; further codification[4] and consolidation of existing legislation; reducing the volume of legislation by repealing obsolete provisions[5].

The European Commission Communication *Better Regulation for better results* is taking into consideration a periodic review of EU policies and creating a context in which transparency and accountability regarding the objectives to manifest.

The European Commission`s promise for a better regulation from 5.19.2015 by which to achieve better results will apply to all legislative

[4] See also Şerban-Barbu, Sorina, *Public administration regulations codification in the European Union*, Comparative Law Review, Torun, Poland, 17(2014): 81-95

[5]See Commission Communication COM (2010) 543 of 08.10.2010 on Smart Regulation in the European Union

construction taking into account the progress already made by the program launched in 2013[6].

There were identified areas where some initiatives envisaged will not be continued, a number of proposals were withdrawn that have blocked the adoption process and several laws were repealed. In total, there were identified more than 100 actions, half of which are new proposals to simplify and reduce the regulatory burden. The remaining actions are evaluations and fitness checks designed to examine the efficiency and effectiveness of EU regulations and to prepare future burden reduction initiatives.

Since October 2013, the European Parliament and the Council have adopted a number of proposals for simplification and burden reduction: for example, the Professional qualifications Directive amended simplify the recognition and facilitate access to information; new legal framework for public acquisitions contains measures to simplify and reduce administrative burdens and promote electronic acquisitions.

On 27 October 2015 the European Commission adopted its work program for 2016[7].

Thus, the Commission's commitment to better regulation prioritizes studying the available evidence and ensuring that, when it intervenes, the European Union will proceed in a way that actually brings a positive change on the ground[8].

In 2016, 13 REFIT actions will contribute to key initiatives such as simplifying the rules for EU funding or reviewing legislation on taxation and energy. There will also be launched 27 new REFIT actions, for

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[6] The Regulatory Fitness and Performance programme (REFIT)

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2016 No time for business as usual, 27.10.2015 COM(2015) 610 final

[8] Each year, the Commission adopts a work program setting out the list of actions that will be undertaken in the next twelve months. The work program informs the co-legislators on the political commitments of the Commission and presents new initiative to withdraw pending proposals and to review existing EU legislation

instance, to assess maritime legislation, to reduce the administrative burden related to public acquisitions for SMEs, to facilitate compliance with the legal framework provided by REACH[9] and to ensure that legislation Health and safety is functional and will be implemented.

For 2016, the Commission announces the withdrawal or amendment of 20 legislative proposals pending which are not in accordance with the Commission's political priorities, which are likely to be adopted or were distorted during the legislative process and no longer meet their initial policy. The European Commission has proposed to do so within six months, until May April 2016.

## 2. THE REFIT PLATFORM

By setting up the REFIT platform by the Commission decision of 19.5.2015 establishing the REFIT Platform, the Commission is bringing together high-level experts from business, civil society, the Economic and Social Committee and the Committee of the Regions, and the Member States. The role of this platform is to collect suggestions for reducing administrative and regulatory burden and assist the Commission by[10]:

- inviting and collecting suggestions from all available sources on regulatory and administrative burden reduction, arising from Union legislation and its implementation in Member States;
- assessing the merits of the collected suggestions in terms of their potential to reduce regulatory and administrative burden without endangering the achievement of the objectives of the legislation and, where appropriate, providing supplementary remarks on the suggestions;
- forwarding for comments those suggestions considered to merit most attention, as well as any supplementary remarks, to the Commission

[9] REACH is a regulation of the European Union, adopted to improve the protection of human health and the environment from the risks that can be posed by chemicals, while enhancing the competitiveness of the EU chemicals industry. It also promotes alternative methods for the hazard assessment of substances in order to reduce the number of tests on animals.

[10] Article 2 of the Commission decision of 19.5.2015 establishing the REFIT Platform

services concerned or, as the case may be, to the Member State concerned;

- responding to each person making a suggestion and rendering public the suggestions it receives, the supplementary remarks and the comments received from the Commission services or Member State concerned.

Article 4 of the Commission decision on REFIT Platform establishes that the Platform shall be composed of two groups: the *government group* that consists of representatives of the Member States[11] and the *stakeholder group* consist of up to 20 experts, two of them representing the European Economic and Social Committee and the Committee of the Regions and the rest from business, including from SMEs, and from social partners and civil society organisations having direct experience in the application of Union legislation[12].

The most important task of the groups is to analyse suggestions on regulatory and administrative burden reduction arising from Union regulation and its implementation and application in Member States and also to actively invite suggestions for burden reduction in particular areas of interest.

## CONCLUSIONS

European Commission`s reform regarding the regulation is given a central place because it generates economic value added, thus leading to fulfill the main objective of the Union - to contribute to economic and social welfare of citizens through its internal market and common policies, which are heavily regulated at EU level.

We can see the value and performance the legislation brings to the system and we recognize the European Union and the European Commission's ambition for further improvement of this system and the

[11] Each Member State shall appoint a high-level expert from its public administration

[12] The experts in the stakeholder group shall be appointed in their personal capacity or to represent a common interest shared by a number of stakeholders.

desire to provide concrete and sustainable benefits for citizens, businesses and society.

Currently, the European Commission set a very high standard for better regulation, with renewed commitment to consult stakeholders in several innovative ways, indicating the steps to follow through the ordinary legislative procedure by developing the ex-post evaluations.

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# THE TRANSMISSION OF PROCEDURAL QUALITY

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***Abstract:***

*The procedural quality is one of the conditions for the exercise of civil action. The procedural quality is the ability of a subject as it gives them legitimacy to stand trial. The procedural quality arises from a material legal statement in which the subject is part.*

*Procedural rights and obligations may be transmitted during the suit, which is equivalent to a transmission of procedural quality active or passive.*

*Transmission of procedural quality occurs under the law or by treaty.*

*Regarding the extent of procedural quality transmission, it can be universal, as universal or particular title.*

*In the case of litigious right transmission through acts between alive with particular title, if in the course of litigious right is transmitted through acts between alive with particular title, the suit will continue between the initial parties. When the transmission of litigious right by particular title acts upon death, the suit will continue with universal or universal successor of the author.*

*In all cases, the succesor by particular title is obliged to intervene, if aware of suit existance or it may be introduce into suit on request or ex officio.*

*The decision against estrange or universal successor or universal title succesor thereof, as appropriate, will produce legal effects also against his individual succesor and will always be invoked against it, unless it has acquired the right in good faith and can not be evicted by law, by the true owner.*

***Keywords***: the modality of procedural quality transmission and the effects of the pronounced decision

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## INTRODUCTION

Procedural quality is one of the conditions for the exercise of the civil action together with procedural capacity, legitimate interest, vested and present, and the assertion of a claim.

According to the provisions article 36 of the Civil Procedure Code, procedural quality results from identity between parties and subjects of litigious legal statement deferred to Court.

Therefore procedural quality is the ability of a law subject as it gives the legitimacy to stand suit.

Procedural quality arises from a material legal statement in which the subject is part.

During the process, may arise circumstances that lead to the transmission of procedural quality.

Procedural rights and obligations can be transmitted during the suit, which is equivalent to a transmission of the active or passive procedural quality.[3]

By submitting procedural quality is understood passing the procedural quality from person holds on another person, receiving in this way the active legitimation or passive legitimation to continue the suit.[4]

The old Civil procedure Code not contained rules of procedural quality transmission.

The new Civil procedure Code establish the procedural quality transmission, thereby the article 38 shows that can be transmitted legal or conventional, the status of parties, as a result of the transmission, according to the law, of rights or legal situations deducted on the judgment.

Procedural quality can be transmitted *in the conventional way*, by legal act or *legally* with particular title, with universal title or universal.

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[3] Gabriel Boroi, Mirela Stancu, *Drept procesual civil, 2nd edition revised and added* (Bucureşti: Hamangiu, 2015), 42.

[4] Andreea Vasile, *Excepţiile procesuale în noul Cod de procedură civilă* (Bucureşti: Hamangiu, 2013), 377.

In the latter situation mentioned, article 20 paragraph (2) Civil Code regulates the effects of transmission, showing that between parties or their successors, universal or with universal title, as the case, rights, legal acts or facts produce entire effects, even were not fulfilled the publication formalities, unless provided otherwise by law.[5]

The legal transmission assumes that the part lose the procedural quality, the transmission to another person operating by law, in accordance with the law.

The legal transmission of the procedural quality, in the case of individuals, is a consequence of death from the part which has the status of parties into the suit.

Under the provisions of article 412 paragraph (1) point 1 of the Civil Procedure Code, in case of death of one of the parties, the judgment is suspended until the successors are introduced into the suit, unless the interested part requests a term to introduce them.

Therefore if the plaintiff is the one who dies, judgment shall be suspended until successors of plaintiff interferes in the process requesting the resumption of the judgment.

If the defendant is the one who dies, the plaintiff having interest to settle the case, will request to introduce into suit the heirs defendant.

Thus, the heirs who accepts the legacy, take over all the procedural rights and obligations of their author, including the quality of plaintiff or defendant, as the deceased was standing into suit the active or passive procedural quality.

This occurs often in a patrimonial character actions. Procedural quality can not be transmitted, in principle, strictly personal actions. Like an exception to this rule, some actions can be started or continued as the case, by heirs, if they have been promoted by their author during his lifetime.[6]

The Civil Code provides special situations where operates legal transmission of procedural quality.

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[5] Andreea Tabacu, *Drept procesual civil* (Bucureşti: Universul Juridic, 2013), 136.
[6] Ioan Leş, *Noul cod de procedură civilă, Comentariu pe articole* (Bucureşti: C.H. Beck, 2013), 66.

According to article 380 from the Civil Code, in the case of the divorce action, if the plaintiff spouse dies during the process, his heirs may continue the action, which will be admissible only if the court finds the exclusive fault of the defendant husband.

The reason of the regulation aims that, in the situation described, the surviving spouse will not benefit from the legacy of deceased spouse, marriage deeming loosen form the date of decease, the surviving spouse no longer having the succession vocation to the legacy of the deceased husband.

The situation is unusual because, traditionally, the deceased of spouse into the divorce leading to dismiss the action as devoid of purpose, marriage by ceasing due to death and do not divorce. Patrimonial disadvantages of such a solution (spouse stayed alive benefit from legacy, although was into divorce) led to regulate the legal transmission of procedural quality.[7]

In the matter of the donation, according to article 1024 Civil Code., within the action for revocation of the donation for ingratitude, the donor's heirs may continue the action brought by donor, after his death. The action in revocation for ingratitude can be exercised only against the donee, but in the situation where the donee dies after the he introduced the action, this can be continued against successors. In this case operates a legal transmission of procedural quality.

Another case of legal transmission of procedural quality is regulated by article 256 Civil Code, according to which the action to restore infringed non-property rights can be continued, after the injured person’s death, by the surviving spouse, by any of the relatives of the deceased person in a straight line and any of its collateral relatives up to the fourth degree included.

In the old view, non-property rights could not be transmitted mortis causa, so it does not admit to start an action with injured person heirs. New Civil Code provides the transmission of procedural quality,

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[7] Alexandru Suciu*, Excepţiile procesuale în noul Cod de procedură civilă, 2nd edition revised and added* (Bucureşti: Universul Juridic, 2014), 165.

but not to the heirs, under common law, but to a certain class of relatives and surviving spouse.[8]

According to the article 423 Civil Code, the action in establishing parentage to the mother belongs of the child and starts, on his behalf, by the legal representative. The action can be initiated or continued, where applicable, also by the child's heirs.

The action into establishing paternity outside of marriage belongs to the child and starts, on his behalf, by the mother, even she is minor, or by his legal representative. The action can be started or continued, where applicable, also by the child's heirs, according to article 425 Civil Code.

So as regarding denying paternity action, the legislature regulates another case of procedural quality transmission. According to article 429 Civil Code, the denying paternity action can be started by the mother's husband, by the mother, by the biological father, as well as the child. The action can be started or continued, where applicable, also by their heirs.

Legal transmission of procedural quality in the case of legal entity takes place on the path of the legal entity reorganization which is part to the suit.

Reorganization of legal entity is achieved through the merger, by division or by transformation.

Within the framework of the merger (by absorption, through merger), absorbed and merged companies will be dissolved without going into liquidation, thus ceasing its existence, and the acquiring company increases its patrimony with the heritage of acquired or merged companies. The acquiring company takes over all assets and liabilities, therefore take over all of the acquired company or of the merged companies, all assets, rights and obligations, including contracts already concluded.

Transmission of heritage into this case will have a universal character, as merger transaction involves the transfer of the totality of assets acquired or merged companies to the acquiring company, respectively merged company. Therefore the recipient company acquires all the assets, namely all the rights and obligations that belonged to

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[8] Alexandru Suciu, *Excepțiile procesuale*, 166.

companies which shall cease to exist. In this regard, we believe that the transfer will occur *ex lege*.[9]

The division is a reorganization mode of a company by dividing its patrimony between two or more companies.

Total division is the operation that its performed by dividing of all patrimony from a legal entity, between several existing corporate or so take being, the legal entity divided ceased to exist.

Partial division is achieved by the separation of a part from the legal entity patrimony and its transmission to one or more legal entities that are established so. In this case, the legal entity that has suffered the division does not shall cease to exist.

Within the division (total division or partial division), the transmission of the patrimony divided company to several recipient companies, would not have universal character, but shall be done as universal title. Consequently, recipient companies will acquire certain parts of patrimony, more precisely fractions of all rights and obligations which belonged to divided society.[10]

Procedural quality transmission can be done also in the conventional way.

The conventional transmission of procedural quality operates through agreement of wills between the right holder of procedural quality and a third party. Transmission can take place before the suit began, when it transmits itself the material right, or during the suit, when it transmits litigious right.[11]

The conventional transmission litigant quality operates, under the assumption of real legal statement, in accordance of the sale, exchange, donation, bringing the contribution of the litigious asset if the asset goes into patrimonial society and in the hypothesis of obligational legal

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[9] Ioan Adam, Codruț Nicolae Savu, *Legea societăților comerciale, comentarii şi explicații* (București: C.H. Beck, 2010), 874.
[10] Ioan Adam, Codruț Nicolae Savu*, Legea societăților comerciale,* 875.
[11] Alexandru Suciu, *Excepțiile procesuale*, 166.

statements, under cession debt, personal subrogation, novation by change of lender/ debtor, stipulation for another and takeover of duty.[12]

Regarding the extent of procedural quality transmission, it can be universal (the case of unique legal heirs and of universal legatee, the merger by absorption or fusion, transformation of legal entities), with universal title (case of legal heirs and of the legatee of universal title, fiducia, total or partial division of legal entities) and with private title (legate with particular title, conventional transmission).[13]

Regarding the transmission of litigious right during the suit through legal acts with particular title, the new Civil Procedure Code distinguishes between the assumption of alienation between alive and alienation of property upon death.

In the case of litigious right transmission through acts between alive with particular title, unlike the solutions adopted before entry into force of the new Code of Civil Procedure, according to article 39 paragraph (1) I thesis, if during the suit litigious right is transmitted through acts between alive with particular title, the judgment will continue between the initial parts.

But if the transfer is made, according to the law, by acts with particular title property upon death, the judgment will continue with universal or universal title successor of the author, where appropriate, according to article 39 paragraph (1) thesis II of the Civil Procedure Code, beeing obvious that the suit could not continue into default configuration, as in the case of I thesis from the same paragraph.[14]

Therefore in this last case, procedural position of the transmitter deceased will be continued by his universal or universal title successors. It was argued that the introduction of these persons in question is mandatory.[15]

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[12] Gabriel Boroi et al, *Noul cod de procedură civilă, comentariu pe articole* (Bucureşti: Hamangiu, 2013), 110.
[13] Gabriel Boroi and Mirela Stancu, *Drept procesual civil*, 43.
[14] Gabriel Boroi et al, *Noul cod de procedură civilă,* 111.
[15] M. Tăbârcă, *Drept procesual civil, vol. I* (Bucureşti, 2013), 220 in Andreea Vasile, *Excepţiile procesuale,* 383.

However, the provisions of article 39 paragraph (2) Civil Procedure Code stipulate that in all cases the successor with particular title is obliged to intervene in the matter if he is aware of the existence of the suit or can be introduced into suit on demand or ex officio.

If the estrange not know about the suit, nor the parties know about transmission litigious right, its arrive at a situation where the decision is pronounced contradictory with a person who is not in a position to execute forced the judgment because has passed the right and by default does not have nor its realization.[16]

The phrase "in all cases" used in the legal text takes into account the hypothesis of alienation litigious right through legal act with particular title *inter vivos* (sale, donation, exchange), as well as the alienation right through legal act with particular title *mortis causa* (legate with particular title).[17]

In the case of legal persons, distinction of "acts between alive with particular title" and "acts property upon death with particular title" can not be done, so in their case, the quality is transmitted through acts between alive with particular title and it put only the issue of continuing the suit between the initial parts and, where appropriate, between part original and particular title successor of the other part.[18]

In practice the question was in which manner the particular title successor is introduced into suit.

It was concluded that the introduction into the suit of the successor with particular title does not identify with any of the forms of intervention of third parties in the process. Accordingly, the court does not pronounce on the admissibility in principle of the request, but cites indicated as the particular title successor; the one introduced into suit not owes distinct fee from the one paid by the estranged and nor the one who

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[16] Andreea Tabacu, *Drept procesual civil*, 136.

[17] Gabriel Boroi et al, *Noul cod de procedură civilă,* 112.

[18] V.M. Ciobanu and T.C. Briciu and C.C. Dinu, *Drept procesual civil. Drept executional civil. Arbitraj. Drept notarial. Curs de bază pentru licenţă şi masterat, seminare şi examene* (Bucureşti, 2013), 128 in Andreea Vasile, *Excepţiile procesuale,* 383.

formulated the request to introduce into suit the successor with particular title does not owe for this request fee.[19]

In the case of main intervention, the court is vested with a new pretense, while the introduction into the suit of the successor with particular title, it will participate into suit in the same procedural quality which has the estrange, which will join to support defense procedural framework undergone an expansion under the aspect of the object.

Assuming the request for summons of other persons who could claim the same rights as the plaintiff, between the forced intervener and plaintiff is a contrariety of interest, while the introduction into the suit of successor with particular title, between it and the plaintiff does not exist contrary interests.

Entering in question *ex officio* by the court of the successor with particular title is one of the hypotheses to which it refers article 78 paragraph (1) of the Civil Procedure Code, which aims cases expressly provided by law, when the judge dispose *ex officio* the introduction into suit of others persons.[20]

As regards the moment at which the transmission procedural quality may occur, the rights and obligations may be submitted at any time[21], during the process, even at the stage of the appeal or the appeal, because the transmission of the quality of the parties represents a consequence of changes produced in the content of legal statement of substantial law, these neeing not limited in time.

After the introduction in question of the successor with particular title, the court will decide according to circumstances and taking into account the position of other parties, if the estrange, universal successor or with universal title will remain or, where applicable, will be removed from the suit.

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[19] V.M. Ciobanu, T.C. Briciu, *Câteva reflexii cu privire la soluţiile din doctrină şi jurisprudenţă privind unele probleme ivite în aplicarea NCPC,* on www. Juridice.ro and in RRDP no. 3/2014 in Alexandru Suciu, *Excepţiile procesuale,* 166.

[20] Gabriel Boroi et al, *Noul cod de procedură civilă,* 112.

[21] D.N. Theohari in Andreea Vasile, *Excepţiile procesuale,* 381.

Removing from the suit of the estrange, of the universal successor or with universal title operates on the basis of procedural quality transmission and not as a result of accepting exception of lack of active or passive procedural quality.[22]

The doctrine was shown that the court will keep the estrange (or successor universal or with universal title) into the suit whenever there are contrary positions between them and the successor with particular title in connection with the transmission of procedural quality in question. If the estrange (or successor universal or with universal title) raises objections to the act of transmission quality, then its presence further in the suit is required. He will remain part to the suit until the court regulates transmission situation of the right, even through the final decision.[23]

If the estrange or, where applicable, successor universal or with universal title is removed from the suit, the judgment will continue with the successor with particular title which will take the procedure as is at the time it intervene or was introduced into suit, so he can not request the fulfillment to him of the procedural acts that had been made previously, as he can not require consent to carry out procedure acts that had to do before to submitting its author. All acts done up to the time of its intervene or introduced into the suit are enforced against it.

As regards the effects of the judgment, the article 39 paragraph (3) of the Civil Procedure Code enshrines the principle that judgment against the estrange or universal successors or with universal title thereof, as appropriate, will produce by law effects also against his successor with particular title and will always be enforceable against it, unlessIt acquired the right in good faith and can not be evicted by law, by the the true owner.

Quoted text establishes the rule of the opposability by law of the judgment against the bad faith successor with particular title, who knew about the process and did not intervene in the process, so it can not

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[22] Gabriel Boroi et al, *Noul cod de procedură civilă,* 112.

[23] V.M. Ciobanu and T.C. Briciu, *Câteva reflexii…*, in Alexandru Suciu, *Excepțiile procesuale*, 167.

invoke unenforceability of the judgment against its author or against successor universal or with universal title thereof.

The norm established in the article 39 paragraph (3) is a real exception to the relative character of the judgment effects, as long as the judgment takes effect and towards people who did not have status of parties into the suit.

The debtor quality of successor with particular title into the enforcement procedure it does not follow this time of enforceable title, which is not pronounced in contradiction with himself, but follows *ex lege*, beeing an exception from the rules of enforcement proceedings.[24]

The Code do not provides directly that the judgment is enforced against him, speaking only of opposability, but it is certain that was aimed to expand effects of the judgment over the acquirer order to avoid the consequence of wear in the vain of a subsequent suit, discussing the same right, for the same arguments as in the first case.[25]

The legislature establishes an exception to the rule in article 39 namely the successor with particular title of the acquired the right in good faith and can not be evicted by law, by the true titular.

The two conditionsrespectively that the third part acted in good faith at the time of acquisition and can no longer be evicted are cumulative.

In doctrine[26] we have identified the following cases of legal impossibility of eviction successor with particular title: the one who has acquired in good faith a right tabulated through legal act for valuable consideration (article 901 Civil Code), the successful tenderer within the enforce of immovable property (article 859 civil Code), the acquirer in good faith of a movable asset, under article 937 Civil Code.

Within enforcement stage it is possible the procedural quality transmission, by the lender or debtor, without some conditioning. After this moment, the enforcement acts fulfilled until the time of procedural

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[24] Alexandru Suciu, *Excepțiile procesuale,* 166.
[25] Andreea Tabacu, *Drept procesual civil*, 136.
[26] V.M. Ciobanu and T.C. Briciu, *Câteva reflexii…*, in Alexandru Suciu, *Excepțiile procesuale*, 167.

quality transmission, produce effects face to the successors in title of the lender or the debtor, as the case.[27]

## CONCLUSIONS

Summarizing, legal or conventional transmission of procedural quality can be done throughout the suit, including the stage of appeal or review, as a result of changes in the content of the legal statement of substantially right, deferred to Court.

In all cases, regardless of whether the suit continues between the original parties or that universal successors or universal title succesor is introduce into suit, the particular title successor is obliged to intervene in the suit if aware of its existence or can be introduce into suit on request or ex officio.

Decision takes effect against successor particular, even if it did not intervene in the suit, being opposable, unless the particular title successor has acquired a right in good faith and can not be evicted, according law, by the true titular.

The quality of the borrower particular title successor in enforcement proceedings, if not intervene or is not introduced into the suit, is not the result this time from enforceable, it deriving ex lege, beeing an exception from the rules of enforcement proceedings.

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[27] Andreea Tabacu, *Drept procesual civil,* 137.

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# ILLEGAL ENTRY INTO A FOREIGN AIR SPACE . CASE STUDY: TURKEY-RUSSIA INCIDENT

**Flavius-Cristian MĂRCĂU** [1]

***Abstract:***

*In the present study we intend to analyze the situation in which a country's airspace is violated by foreign aircraft without their own consent in this regard. We want to highlight the ways in which a state signatory to the Chicago Convention, should deal with such an incident. the case study that i have chosen in view of illustrating, is based on the incident of 24 november 2015 between Turkey and Russia. A military aircraft su-24 type entered, unauthorized airspace of the turkish state. The latter, by an excess of zeal, without passing some of the steps required in such a situation, decided to resort to open fire in order destruction of foreign aircraft. However, we decided to present in this article, the steps that are to be taken in such a situation, such as an incident similar to the one between Turkey and Russia can be prevented.*

***Keywords:*** Turkey, Russia, F 16, SU-24 aircraft incident, NATO, Syria.

## INTRODUCTION

On November 24, 2015, Turkey has broken the plane type Russian SU-24, on grounds of violation of Turkish airspace. Also, in our study we try to analyze this incident, in light of international conventions and treaties that Turkey has ratified and regulating international air space.

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The reason for attacking Russian plane its strict targets the entering in Turkish airspace, without prior consent from in this regard. Specifically, the Defense Ministry in Turkey authorized the shooting down plane avoidance of the indications citing as a reason by Russian pilots. What we want is to continue to demonstrate how the incident could have been avoided, and the fact that Turkey has pursued *a policy of punishment,* given recent intrusions[2] of Russian planes in its airspace. However, we want to make mention that this case represents the most serious incident between the North Atlantic Treaty and Russia from the Cold War.

## DELIMITATION OF AIRSPACE OF THE STATES

The territory of a state is defined as a legal concept and not one type of geographical type. Thus, a legal concept defined as a given that the geographical point of view may involve a lot of factions that are not contiguous. The territory of a State (legal concepts) are within the competence of the state space, the portion of the Earth's surface in the system of legal norms is valid, effective and enforceable.[3] Noting the above definition, we understand that the airspace of a State is a component thereof, represented by a column of air that is above the state's aquatic and terrestrial.[4]

Regarding the airspace of a State, the Convention on International Civil Aviation, signed in Chicago on 7 December 1944, clearly stipulates in Article 1 *that "every State has complete sovereignty over the airspace above exclusive territory"*.

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[2] Following the numerous accusations against Russia of violating Turkish airspace, the European Command of the United States sent the 6th of November, six planes vanataore from their base in the UK, the airbase Turkish Incirlik to help Turkey, a NATO member, to secure airspace

[3] V. Constantin, International Law, (Bucharest: Legal Publishing House, 2010), 221

[4] See Laura Magdalena Trocan, "Evolution of International and European legal framework airspace"
http://www.utgjiu.ro/revista/jur/pdf/2012-4/5_LAURA_MAGDALENA_TROCAN.pdf, accessed 29/11/2015

One of the situations in which an unauthorized aircraft entering the airspace inside of another state party to the Convention in Chicago, can occur when the aircraft does not get the permission (permit) from the institutions of law of that State. But institutions varies depending on the service that it performs aircraft. Specifically, a civil passenger aircraft, cargo or correspondence will obtain authorization from the Civil Aviation Authority, while a military aircraft (regardless of type) will require authorization from the Ministry of Defense State.

Each state, as agreed previously mentioned, establish a certain area, or more, as prohibited overflight to the aircrafts. Such measures are taken, usually in a period of crisis and tension have temporary or delineates areas where important security of the State, they are permanent.

## ILLEGALLY PENETRATION INTO AN AIRSPACE

First, any aircraft, civilian or military, has no right to break into the airspace of a State other than its prior approval. Otherwise, the state whose space was violated is entitled to resort to measures to force the intruder to return to legality.

Regarding war zones airspace violation happens quite frequently. For example, in 2012, the air forces shot down a military plane Syria which belonged to Turkey, because they entered the airspace. On this occasion, President Erdogan said *the violation for a short period of airspace, can't be a reason to attack.*[5] But on November 24, Turkey broke a military plane that belonged to Russia because it is located in airspace. F-16 planes were engaged in the fight at only 17 seconds to run Su-24 aircraft in its space.

[5] See http://www.theguardian.com/world/2015/nov/26/russia-turkey-jet-mark-galeotti, accessed 11/29/2015

*Map 1*[6] shows the trajectories of aircraft involved in the incident flight

Map above is attached during Russian military aircraft Su-24 type, identified by the red line trajectory Turkish aircraft F-16, identified by the purple line and the airspace of Turkey, bordered by blue line. What is interesting and must emphasize violate Turkish airspace by Russian aircraft. However, the response of Turkish military air forces be considered justified? The answer that we got is not, and still will try to argue it.

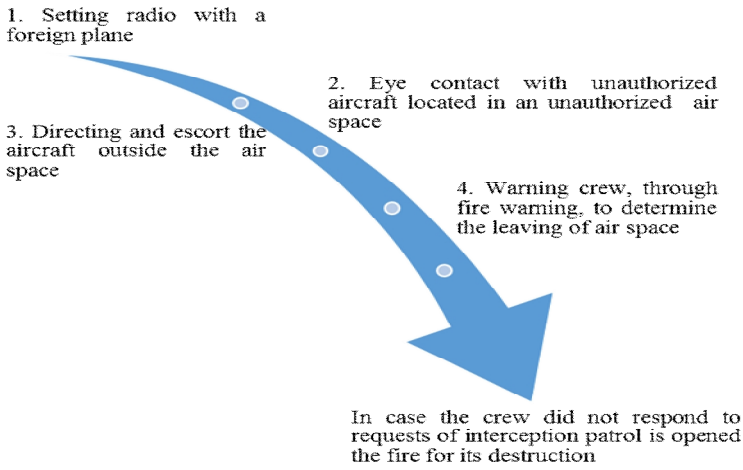
Turkey, in the grounds of its shares, said that Russian aircraft pilots did not answer the request of the air traffic, ignoring repeated messages sent to them, calling for Russian pilots to leave Turkish airspace. However, Turkey's action is not founded because they missed some of the steps provided for such situations. Specifically, if a plane stranger enters the of territorial a state bodies responsible for air traffic, contact the pilots in order to inform them that fly over a space alien that have not received authorization from the competent institutions (in our case it is about Turkish Defence Ministry). If the pilots do not respond to radio messages and orders does not comply, the plane is intercepted by the air police state. This intercept is considering establishing visual contact with the aircraft concerned. Why such a measure is necessary? First, if the

[6] Map taken from http://theaviationist.com/2015/11/24/audio-tuaf-warns-ruaf-su-24/, accessed 29/11/2015

airplane pilots did not respond to requests radio, take into account the possibility of a malfunction of the aircraft's instrument panel, respectively, so that repeated messages can not be received by pilots. When visual identification of the aircraft is directing and escorting try it out airspace for which no authorization.

If and after these steps have been taken, and the foreigner plane does not respond the indications of the military pilots who are on interception patrol, proceed to step of warning. It plans to open fire advertisement, but without being hit enemy aircraft. Use exclusive endowment artillery weapons belonging to the patrol planes - in the case of Turkey, the F 16 feature-cannon M61A1 Vulcan board, horse. 20mm) - with the intention to attract foreign attention airplane pilots who are in unauthorized air space. If after the warning maneuver, the crew refuses to obey orders to intercept the patrol, they can open fire destruction.[7]

Finally, a state when confronted with unauthorized violation of airspace by a foreigner aircraft must meet certain steps:




*Scheme 1. Method of action of a state in case it is violated its airspace*

[7] See analysis from Valentin Vasilescu, military analyst, former deputy commander of Otopeni,
http://www.ziaruldegarda.ro/pilotii-militari-ai-turciei-la-fel-de-lipsiti-de-onoare-ca -isis /, accessed 11/29/2015

Turkey, in case of November 24, 2015, omitted some of these steps, skipping eye contact and alert the crew by opening artillery fire warning supplied weapons, going straight to destruction. They considered it sufficient repeated attempts to transmit radio messages, but have not taken into account for one second, the possibility of failure of instruments. However, the Russian plane type Su-24 participated in a mission of bombing the territory of Syria, targeting terrorist bases of the Islamic state and it is possible that during the execution of the mission to intervene faults which put the crew unable to communicate (failure station transceiver) or to orient in space (failure geolocation tools).

## CONCLUSION

Airspace of a State is inviolable, but in case of foreign aircraft enter that space without the permit, it must be going through certain stages. In the incident between Turkey and Russia, Valentin Vasilecu believes that *"Russian plane Su-24 was shot down in Syrian territory 1 km from the border, a plane F-16 C Turkey with an air-to-air AIM-120 AMRAAM, radius of action beyond visual range (70-105 km). Overthrow occurred after Su-24 to fulfill the mission of bombing on ground targets governorate of Latakia in Syria and returned to the airbase Hmeimim. In this case, international law and international treaties on air space which Turkey has ratified, have been violated grossly. "*[8]

Throughout the flight the plane Russian, not even for a second it had no intention to penetrate into the depths of space Turkey. We see from the map presented at the beginning of the last chapter, such appliance Su-24 flying parallel to the border of Turkey and for a maximum of 20 seconds, it is in the airspace of the Turkish village. If visual interception by F-16 pilots could solve this violation without

[8] See analysis from Valentin Vasilescu, military analyst, former deputy commander of Otopeni,
http://www.ziaruldegarda.ro/pilotii-militari-ai-turciei-la-fel-de-lipsiti-de-onoare-ca -isis /, accessed 11/29/2015

resorting to force, by simply escorting foreign aircraft outside the restricted air space.

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1 http://www.theguardian.com/world/2015/nov/26/russia-turkey-jet-mark-galeotti. Accessed November 29, 2015.

2 http://theaviationist.com/2015/11/24/audio-tuaf-warns-ruaf-su-24/. Accessed November 29, 2015.

3 Valentin Vasilescu, military analyst, former deputy commander of Otopeni, http://www.ziaruldegarda.ro/pilotii-militari-ai-turciei-la-fel-de-lipsiti-de-onoare-ca -isis /. Accessed November 29, 2015.

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# GENERAL ISSUES REGARDING THE EUROPEAN BANKING AUTHORITY AND ITS AUTHORITY

**Adriana PÎRVU**[1]

***Abstract:***

*The European Banking Authority*[2] *(EBA) is an independent EU Authority whose objective is to ensure the effective and consistent prudential regulation and supervision across the whole European banking sector, especially to maintain the financial stability in the EU and to safeguard the integrity, efficiency and orderly functioning of the banking sector.*

*One of the main requirements that the Authority is liable for is to safeguard the integrity, transparency and orderly functioning of the financial markets, to strengthen the cooperation on supervision and to prevent the arbitrage regarding the regulations in force. In this regard, the Authority undertakes measures to ensure that the competent authorities and the financial credit institutions apply effectively and consistently the legislation on fighting against money laundering and terrorism funding.*

*The Authority has also the task to develop and coordinate mock exercises of some financial crises. By theses drills, they want to check and assess the bank resistance to financial shocks. Within such exercises, the Authority collaborates with the national authorities responsible with bank supervision.*

***Keywords:*** *The European Banking Authority, Banking sector, financial crises, banking supervision*

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[2] https://www.eba.europa.eu/languages/home_ro, Accesed December 5, 2015

## INTRODUCTION

The European Banking Authority was established in 2010, by Regulation (EU) 1093/2010 of the European Parliament and Council "to protect the stability and the resistance of the European banking system"[3], in order to create a single regulatory and supervisory framework of the banking sector for the whole European Union. The Authority should also strengthen the coordination between the national bank inspectors and ensure the consistent application of the European Union banking legislation.

## 1. ORGANISATION OF THE ACTIVITY OF THE EUROPEAN BANKING AUTHORITY

The European Banking Authority[4] (EBA) is an independent EU Authority whose objective is to ensure the effective and consistent prudential regulation and supervision across the whole European banking sector, especially to maintain the financial stability in the EU and to safeguard the integrity, efficiency and orderly functioning of the banking sector.

Although it is independent, EBA answers in front of the European Parliament, of the European Council and of the European Commission.

The European Banking Authority (EBA), together with he European Securities and Markets Authorities (ESMA), with the registered office in Paris, with the European Insurance and Occupational Pensions Authority (EIOPA) and with the European Systemic Risk Board (ESRB), both with registered office in Frankfurt, are part of the European System of Financial Supervision (ESFS) created in 2010.

The activity of the Authority is coordinated as follows:

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[3] http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=URISERV:mi0069, Accesed December 5, 2015

[4] https://www.eba.europa.eu/languages/home_ro, Accesed December 5, 2015

- The Board of Supervisors (BoS), made up of the supervisory authorites from each Member State, takes all policy decisions of EBA; discussions within the board are lead by the Chairman of the Authority;
- The Management Board (MB) whose role is to ensure that the Authority carries out its mission and work programme;
- The Resolution Committee (ResCo) whose role is to make decisions on the matters related to resolutions of the banking crisis situations[5].

Within the work groups and permanent committees, all the documents issued by the Authority are discussed. At these discussions, the representatives of the national authorities can intervene, and when necessary, also other national, international or European bodies. The final decisions are adopted within the Board of Supervisors.

## 2. ACTIVITY OF THE EUROPEAN BANKING AUTHORITY

The Authority is interested in promoting "sound and high-quality"[6] accounting and advertising standards, as well as transparent and comparable financial statements that should strengthen the banking market discipline.

At the same time, the Authority promotes the creation or maintaining a market of the financial-banking products and services where transparency, simplicity and fairness should prevail.

The Authority plays an important role in promoting the protection of the consumers of financial services and products within the European Union, by identifying the possible damaging experiences they had or may be at risk. In performing its duties, the Authority has the power to investigate the alleged incorrect application of EU banking and financial

[5] http://europa.eu/about-eu/agencies/eba/index_ro.htm, Accesed December 5, 2015
[6] https://www.eba.europa.eu/regulation-and-policy/accounting-and-auditing, Accesed December 5, 2015

law by a supervisory authority, especially when the compliance by a bank with the requirements established by law is not guaranteed[7].

In order to accomplish its tasks, the Authority collects, analyses and reports the consumer „trends" in the EU, reviews and coordinates the financial "literacy" and education initiatives, develops the training standards for the financial-banking sector, contributes to the development of common rules for this sector, monitorsg existing and new financial activities, issuesg warnings if a financial activity poses a serious threat to the EBA's objectives as set out in its funding Regulation, also having the possibility to decide the prohibition or restraint of some certain financial activities, provided certain conditions are met[8].

One of the main requirements that the Authority is liable for is to safeguard the integrity, transparency and orderly functioning of the financial markets, to strengthen the cooperation on supervision and to prevent the arbitrage regarding the regulations in force. In this regard, the Authority undertakes measures to ensure that the competent authorities and the financial credit institutions apply effectively and consistently the legislation on fighting against money laundering and terrorism funding.

As the financial crisis in 2008 revealed the need of existence of such a supervisory body, the Authority has also the task to develop and coordinate mock exercises of some crises similar to the one that generated it. By theses drills, they want to check and assess the bank resistance to financial shocks. Within such exercises, the Authority collaborates with the national authorities responsible with bank supervision.

The fact that, from autumn 2014, the European Central Bank supervises the euro zone banks, does not mean that the Europena Bank Authority ceased to exist. The Authority will continue to be responsible for the establishment of common regulatory and supervisory standaerds

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[7] http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=URISERV:mi0069, Accesed December 5, 2015

[8] https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation, Accesed December 5, 2015

and practices and the consistent application of EU measures across the EU Single Market[9].

According to the latest semi-annual report of the European Banking Authority (EBA), on risks and vulnerabilities in the EU banking sector, recently published, EU banks have continued to strengthen their capital position and to improve asset quality. However, the level of non-performing exposures remains high and profitability is still weak. The report also analyses the exposures towards emerging market (EM) and non-bank financial intermediaries[10].

## CONCLUSIONS

Following this summary analysis of the duties and competences of the European Banking Authority, we appreciate as accurate the statement according to which the beneficiaries of the activity carried out by the Authority are both the European institutions, and the enterprises and consumers form the banking sector. On the whole, the beneficiary of the Authority's activity is the economy of the European Union[11].

Regarding the activity of the Authority, its Chairman, Andrea Enria, appreciated that due to the policies undertaken by the Authority, "the banking sector is now much more powerful than a few years before"[12]. But this result hasn't been reached easily, the Authority having a long and difficult way to go through.

In this regard, the Chairman of the Authority specified that since its establishment in 2011, the European Banking Authority has faced

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[9] J.Crisp, *Europe's bank stress tests were unreliable, EU auditors say*, on http://www.euractiv.com/sections/euro-finance/europes-bank-stress-tests-were-unreliable-eu-auditors-say-303257, Accesed December 20, 2015.

[10] http://www.eba.europa.eu/, Accesed December 22, 2015.

[11] http://europa.eu/about-eu/agencies/eba/index_ro.htm, Accesed December 5, 2015

[12] The speech of Andrea Enria, the Chairman of the European Banking Authority at the 5th seminar from Santander Central Bank, Sovereign and Financial Institutions, on 27th.11.2015, published at https://www.eba.europa.eu/documents/10180/1294146/Andrea+Enria's+speech+at+Santander%2C%2027+November+2015.pdf, Accesed December 5, 2015.

powerful pressures on behalf of the market participants, of the international institutions and of the European policy authors in order to strengthen the banking auditing and to implement compelling reforms in order to regulate the banking system, services and products.

The reform process was so wide, so that occurence of erros was unavoidable, and some choices proved to be unsuitable and generated unwanted adverse consequences. That is why the Authority assumed the task to review those aspects of its policy that prove to be improper.

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2. http://eur-lex.europa.eu. Accesed December 5, 2015.
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# DOES PUBLIC SERVICE MOTIVATION (PSM) HAVE A POSITIVE EFFECT ON THE INDIVIDUAL ATTITUDES AND ORGANIZATIONAL BEHAVIORS OF PUBLIC EMPLOYEES?

**Constantin NICOLESCU** [1]

***Abstract:***

*The purpose of this article is to gain a deeper understanding of the role of public sector organizations in public service motivation (PSM) and the link between PSM and sector employment choice. This research makes conceptual and methodological contributions to PSM's impact on sector employment choice and the intrinsic person–organization mechanism handling the connection between PSM and sphere of employment.*

***Keywords:*** *organizational behavior; public service motivation; job performance*

## 1. INTRODUCTION

Public service motivation (PSM) tackles the economic logic that individuals are self-maximizing persons driven only by fortifying their status within the organization[2] individual incentives are elaborate and comprise reputation, power, and social aims. Instead of attempting to exclude values and convictions, PSM encompasses their value as motivational instruments. The most direct impact of PSM is its beneficial

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[2] Elvira Nica,"Public Administration as a Tool of Sustainable Development," *Journal of Self-Governance and Management Economics* 3(4) (2015): 30–36.

connection with job performance and contentment. Individuals who display significant degrees of PSM also sense their organization more fairly and experience a stronger association with its objectives and values. Stressing PSM competencies in performance assessment may assist managers in determining those workers best suited for advancement. Employment judgments have a decisive effect on organizational operation[3]. To establish the function that PSM has in hiring decisions necessitates a better grasp of how PSM associates with both person-organization fit and person-job fit. Persons with relevant PSM tend to opt for public hiring as the operations of public sector entities are more compatible with the worker's public service principles (sector can function as a substitute for organizational values). The stress a position places on assisting others via direct service interplay should raise the capacity of PSM to anticipate the probability an individual will accept the position irrespective of the employment sphere. Notwithstanding the sphere in which they operate, people have financial demands that their positions help fulfill, and frequently have to select between positions that provide distinct financial compensation packages[4].

## 2. THE ROLE OF ORGANIZATIONS IN FURTHERING PSM

Retaining, assessing, recompensing, and stimulating workers are decisive human resources (HR) roles that may profit from exploiting the public service work ethic. Enrolling and singling out individuals who display PSM-like qualities, who are less worried about financial remuneration, may enhance the chances of identifying sufficiently qualified and motivated workforce. Employing instruments to assess

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[3] R. Paul Battaglio Jr., *Public Human Resource Management: Strategies and Practices in the 21st Century*. Thousand Oaks, CA: Sage. (2015).

[4] Robert K. Christensen, and Bradley E. Wright, "The Effects of Public Service Motivation on Job Choice Decisions: Disentangling the Contributions of Person-Organization Fit and Person-Job Fit," *Journal of Public Administration Research and Theory* 21(4) (2011): 723–743.

PSM in the employment process may be the best manner to enroll individuals displaying qualities contributing to the public service. To enroll personnel that integrate PSM-like qualities, public HR managers need to make obvious their interest for individuals who display qualities of altruism, sympathy, and devotion, and who have a concern in public policy making. Displaying the practical advantages of public hiring together with the PSM may be a compelling recruiting approach[5]Combining organizational and employee features is decisive for the positive result of entities. It is unclear whether the reported beneficial correlation between PSM and public sector hiring[6]is due to the employment sphere or to the character of public service undertaking. Labor market entrants experience a considerable motivational decrease after entering an entity. Persons opting for a position aim to identify a setting complementing their personal features for the purpose of optimizing the fit between person and setting. People search for an entity that complements their principles, whereas a particular position in the organization tends to be selected based on a compatible fit. The fit between person and setting may be due to separate motivational adjustments to the setting and post-decision processes instead of being an issue of attraction, choice, and attrition. Career objectives can be comparatively dispersed, whereas a particular position is more restrictive and constitutes a career[7].

PSM only brings about job satisfaction if the workers can assist other individuals and society in their present positions. More objective knowledge regarding where PSM thoroughly influences job satisfaction may allow public managers to employ the PSM of their workers more successfully and by that employ the impact of PSM on job satisfaction and eventually performance. Job satisfaction is intimately associated with employee work motivation, which involves the determination a worker is

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[5] Battaglio, *Public Human Resource Management*, 2015.

[6] Doina Popescu- Ljungholm, "E-Governance and Public Sector Reform," *Geopolitics, History, and International Relations* 7(2), (2015): 7–12.

[7] Anne Mette Kjeldsen and Christian Bøtcher Jacobsen, "Public Service Motivation and Employment Sector: Attraction or Socialization?," *Journal of Public Administration Research and Theory* 23(4) (2013): 899–926.

inclined to consecrate for the purpose of accomplishing a particular goal associated with his undertaking. Job satisfaction relies on the discordance between what an individual aims in a position regarding distribution of public services, and what an individual has in the present position. The public sector may provide better chances for serving the public, irrespective of the kind of service produced[8]. Job satisfaction and turnover objectives are indications of the approach that workers have regarding their hiring. Workers exhibit more significant degrees of job satisfaction, and afterwards diminished turnover objectives, when the features of their operational setting meet their demands. PSM is portrayed as selfless purposes that stimulate persons to satisfy the public interest. If PSM systematically influences the job satisfaction and turnover objectives of public workers in a beneficial manner, then persons with significant degrees of PSM should perform for more time in public entities than persons with less relevant degrees of PSM. Although PSM tends to raise the congruity between persons and public entities, it cannot ensure that public workers will have beneficial degrees of job satisfaction and turnover objectives[9]

## 3. THE MECHANISMS VIA WHICH PSM AFFECTS EMPLOYEE ATTITUDES

*Challenging work* supplies personal challenge and chances to deal with novel duties, employ and extend one's expertise, and grasp new things. *Team-oriented leadership* is leader conduct that promotes and develops team play, and proves furtherance and interest for all team components. *Co-worker support* covers how much work group components assess member contributions and indicate interest for group

[8] Andersen Lotte Bøgh and Anne Mette Kjeldsen, "Public Service Motivation, User Orientation, and Job Satisfaction: A Question of Employment Sector?," *International Public Management Journal* 16(2) (2013): 252–274.

[9] Leonard Bright, "Does Public Service Motivation Really Make a Difference on the Job Satisfaction and Turnover Intentions of Public Employees?," *The American Review of Public Administration* 38(2) (2008): 149–166.

component welfare via performances of constructive backing and feedback. *Flexible work arrangements* concern to an entity's readiness to be manageable in how it complies with rules and approaches on how workers satisfy job demands. *Recognition for good performance* covers how much an entity identifies and recompenses significant endeavor and fine operation (workers should think that endeavor and fine operation generate precious outcomes). *Autocratic leader behavior* concerns manager behaviors that negatively influence workers' psychological and/or emotional condition, or make it hard for them to handle their job. *Co-worker shirking* entails co-employees not providing 100% endeavor or not shaping a group undertaking, and comprises co-employees disregarding their own performance via constant absence, unpunctuality, breaks or inferior quality work. *Power-orientation* covers how much workers sense their entity is typified by detrimental internal contest, political difficulties and a concern of confronting individuals in positions of command or[10]. Even if separate recompense choices and organizational compensations indicate sector values or dissimilarities, the accessibility of financial recompenses is relevant when establishing individual–job fit and making hiring judgments irrespective of sector. Besides significant salary remunerations, people are attracted to jobs that stress the capacity to assist other individuals via direct service supply and communication with beneficiaries. Sector is not automatically a precise substitute for organizational principles or undertakings. For the purpose of comprehending the possible consequences of PSM, the level to which an entity essentially shares the person's public service principles and supplies chances for the worker to perform on or meet them is important[11].

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[10] Robyn Morris, "Motivating and Retaining Local Government Workers: What Does It Take?," *Proceedings of the 3rd National Local Government Researchers' Forum*, June 5–6, Adelaide, South Australia, (2013): 1–28.

[11] Robert K. Christensen and Bradley E. Wright, "The Effects of Public Service Motivation on Job Choice Decisions: Disentangling the Contributions of Person-Organization Fit and Person-Job Fit," *Journal of Public Administration Research and Theory* 21(4) (2011): 723–743.

The public–private breach hardly clarifies all dissimilarities in the organizational capacity to enable public service stimulated persons to accomplish their goals. Job satisfaction is positively related to user predisposition, salary, and (particularly for workers operating with direct distribution of public services) PSM. Operation with public service distribution positively improves the impact of employee PSM on job satisfaction analogized to performing in entities with other work duties. A more significant degree of PSM generates a raised level of professional job satisfaction irrespective of hiring sphere (private sector workers with more significant degrees of PSM are similarly contented with their positions)[12]. Public workers have considerably greater degrees of job satisfaction and considerably lower degrees of turnover in settings that are consistent with their requirements and interests. PSM positively leads to the conformity between people and public entities. Although PSM may attract public workers to public service operation, this advantage is temporary in adverse public sector settings. Significant degrees of PSM cannot secure beneficial degrees of job satisfaction and turnover objectives in public entities. When workers with significant degrees of PSM are compatible with the features of public entities, they will have beneficial degrees of job satisfaction and turnover objectives[13].

## 4. PSM AND JOB PERFORMANCE

HR managers with an intense admiration for PSM may support the public service ethic related to agency operation. PSM may be effective in associating agency purposes with those of staff. Public management reform holds that the public service is disorganized[14],

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[12] Andersen Lotte Bøgh and Anne Mette Kjeldsen, "Public Service Motivation, User Orientation, and Job Satisfaction: A Question of Employment Sector?," *International Public Management Journal* 16(2) (2013): 252–274.

[13] Leonard Bright, "Does Public Service Motivation Really Make a Difference on the Job Satisfaction and Turnover Intentions of Public Employees?," *The American Review of Public Administration* 38(2) (2008): 149–166.

[14] Elvira Nica and Ana-Madalina Potcovaru, "Effective M-Government Services and Increased Citizen Participation: Flexible and Personalized Ways of Interacting with

requiring the motivation and organization needed to enhance productivity and performance. Providing public HR managers more significant adjustability in the handling of HR undertakings and roles[15] is relevant to enhancing performance. The presumption forming the basis of performance-based pay is that monetary compensation is the most significant method for stimulating workers. In reform settings, schemes are likely to be established on market standards of cost-effectiveness, administrative adjustability, and outcomes. A concern on PSM in recruitment, retention, and performance assessments can be an excellent outset to revitalizing the public service. Performance evaluations can be revised to concentrate not only on how well the person is satisfying separate and agency goals but also on the worker's display of PSM-like qualities[16]. To enhance its strength, and to satisfy its subsequent difficult tasks, local government managers should identify manners to establish a workplace setting that is appealing and generates an interest for guaranteeing adequate service distribution to communities. To constitute an extremely gratifying workplace, local government should further a management approach that is greatly reassuring and team-orientated, project positions that are thought-provoking, identify industrious and well performing workers, and further a culture in which cooperation is a premium. To generate greater unrestricted work endeavor concerning stimulating staff to perform harder and to aim to identify better manners of doing their job to enhance service distribution, local government should: concentrate on projecting positions so that they are thought-provoking; constitute cooperation amongst work groups; back adjustable work plans; and supply a financial stimulus to individuals who aim to make enhancements in their position, work unit and/or the entity. To more thoroughly grasp employee work outcomes, the dissimilar functions

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Public Administrations," *Journal of Self-Governance and Management Economics* 3(2) (2015): 92–97.

[15] Doina Popescu - Ljungholm,"The Practice of Performance Management in Public Sector Organizations," *Geopolitics, History, and International Relations* 7(2) (2015): 190–196.

[16] Battaglio, *Public Human Resource Management*, 2015

of the position, and interpersonal, organizational and monetary recompense spheres of the work setting should be distinguished. [17]

Managers attempting to acquire the advantages of PSM need to consider the work duty of the entity [18]and whether it backs the workers as act-significant defenders. Job satisfaction relies on internal psychological recompenses furthered by doing something good for other individuals and society and in addition on extrinsic recompenses. The connection between salary and job satisfaction is not regulated by neither sphere nor service type. PSM can have a beneficial impact on job satisfaction for both public and private workers when the organizational duty is associated with creating "public service"[19]. PSM makes a different on the job contentment and turnover goals of public workers when it raises their congruity with their organization. The most significant characteristic of public workers with significant degrees of PSM is not their incentive to public entities, but their compelling demand to be significantly conducive to the public good. Work settings that are contributive to these interests are greatly motivating and gratifying to public workers with significant degrees of PSM, which afterwards generate the supplementary advantages of significant degrees of job satisfaction and mediocre levels of turnover among them[20]

## 5. CONCLUSIONS

The public sphere should cultivate the values and purposes forming the foundation of PSM: persons hired in the public sector elaborate a more powerful concern in assisting others[21]and satisfying the interests of society (individuals finding hiring in the public sphere should undergo a rise in PSM). Public sector hiring does not precisely further

[17] Morris, "Motivating and Retaining Local Government Workers, 1–28.
[18] Doina Popescu –Ljungholm, "Pay-for-Performance in the Public Sector," *Geopolitics, History, and International Relations* 7(1) (2015): 90–95.
[19] Bøgh, "Public Service Motivation, User Orientation, and Job Satisfaction", 252–274.
[20] Bright, "Does Public Service Motivation", 149–166.
[21] Elvira Nica, "Sustainable Development and Citizen-centric E-government Services," *Economics, Management, and Financial Markets* 10(3) (2015): 69–74.

significant degrees of PSM, but it definitely affects the PSM of its workers. Post-entry processes chiefly influence the link between PSM and public/private employment sphere. PSM is an effective tool for entities furnishing public services: entities that can engage and retain persons with significant PSM are presumably better suited to satisfying various difficult tasks they confront through their environments, clients, etc[22] As the local government sphere experiences structural reform and encounters augmented demands to enhance service distribution, it is relevant to better grasp how distinct elements influence public sphere employee work outcomes. Organizational leaders can affect the work setting to persuade workers to involve in work conducts that enhance organizational strength and operation, and cut down staff turnover. Management education and HR training should comprise data on how best to project thought-provoking positions established on separate expertise and abilities, and how best to constitute quality leader–employee links. Policy makers should inspect the ability for public sphere managers to establish organizational perquisites that can further the constitution of first-rate leader–employee links, should take into account advancing and backing local government manager instruction in how to establish perquisites and to approach irks in their entities, and should inspect how local government managers can be granted more significant adaptability to recompense workers for fine performance via a series of monetary and non-monetary stimulants[23]

[22] Mette Kjeldsen, "Public Service Motivation and Employment Sector", 899–926.
[23] Morris, "Motivating and Retaining Local Government Workers", 1–28.

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