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I. Articles

WHAT DOES SOLIDARITY MEAN IN MULTI-NATIONAL CONTEXTS? THE CASE OF THE EUROPEAN UNION[*]

Giuseppe MARTINICO[**]

Abstract

This paper aims to respond to the following questions: "what does solidarity mean in the language of EU law?" and what is the relationship between solidarity and diversity in EU law?" In order to respond to these questions I used the comparative argument, trying to compare the EU with Canada and Switzerland. Kymlicka and Banting (2004), among others, have analysed the tension between redistribution and heterogeneity in multicultural contexts in order to understand whether multicultural policies (MCs) exacerbate any underlying tension between diversity and social solidarity, further weakening the support for redistribution. My argument is that there is no trade-off between welfare policies (Ws) and MCs, rather, that it is possible to detect a kind of tension between them which generates asymmetry.

Keywords: *solidarity, European Union, Canada, Switzerland, diversity*

Résumé

Cet article se propose de répondre aux questions suivantes: "qu'est-ce qu'il signifie la solidarité dans le langage du droit de l'Union Européenne?" et quelle est la relation entre solidarité et diversité dans le droit de l'UE? Afin de répondre à ces

[*] Paper presented at the International Conference "Solidarity in Hard Times. Solidarity and the European Social Model in times of economic crisis", 11-12 June 2015 in Madrid. This paper builds on a previous work delivered at the Institut d'Estudis Autonòmics, Barcelona.

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questions, l'auteur utilise l'argument comparatif, en essayant de comparer l'Union Européenne avec Canada et la Suisse. Kymlicka et Banting (2004), entre autres, ont analysé la tension entre la redistribution et la hétérogénéité dans des contextes multiculturels, au but de comprendre si les politiques multiculturelles (MC) amplifient les tensions entre diversité et solidarité sociale, en affaiblissant, en même temps, le support à la redistribution. L'argument de l'auteur est qu'il n'y a pas de compromis entre les politiques de bien-être (Ws) et les MCs, mais qu'il est possible de déceler une sorte de tension entre eux, qui pourrait générer une assymetrie.

Mots-clès: *solidarité, Union Européenne, Canada, Suisse, diversité*

Introduction

This work originates from a sort of terminological paradox present in the latest developments in European law (*largo sensu* understood): when describing the recent amendment to Article 136 TFEU[1] in response to the EU economic crisis, in an excellent article published in V. Borger[2] argued that this provision "embodies both the change in normative solidarity and the transition from negative to positive solidarity". The paradox is- when looking at some of the initiatives taken by the EU to challenge the crisis-

[1] "1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:
(a) to strengthen the coordination and surveillance of their budgetary discipline;
(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.
2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.
A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).
3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

[2] Verstet Boerger,, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, in (2013) 9 *European Constitutional Law Review*, pp. 7-36.

that neither Article 136 nor the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) use the word solidarity in their texts. A partial exception to this trend is represented by the Preamble of the ESM Treaty.[3]

From this overview it seems that solidarity has become a sort of f-word. Starting from this consideration this paper aims to respond to the following questions: "what does solidarity mean in the language of EU law?" and what is the relationship between solidarity and diversity in EU law?" In order to respond to these questions I used the comparative argument, trying to compare the EU with Canada and Switzerland. W. Kymlicka and K. Banting,[4] among others, have analysed the tension between redistribution and heterogeneity in multicultural contexts in order to understand whether multicultural policies (MCs) exacerbate any underlying tension between diversity and social solidarity, further weakening the support for redistribution.

My argument is that there is no *trade-off* between welfare policies (Ws) and MCs, rather, it is possible to detect a kind of tension between them which generates asymmetry.

In order to develop my argument, I shall analyze the connection between "meta-national" social policies and the cultural implications of legal integration by focusing on the EU and then comparing it with the Canadian and Swiss cases.

Indeed Canada, the EU and Switzerland are characterized by the coexistence of different cultures, languages and welfare models within their own boundaries.

In their works on welfare policies, G. Esping-Andersen[5] and M. Ferrera[6] have distinguished at least three or four worlds of welfare coexisting in

[3] "This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union."

[4] Keith Banting, Will Kymlicka, *Do Multiculturalism Policies Erode the Welfare State?*, in P. van Parijs, (ed.), Cultural Diversity versus Economic Solidarity (Brussels: Deboeck Université Press, 2004), pp. 227-284.

[5] Gϕsta Espring-Andersen, 1950, *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press, 1990).

[6] Maurizio Ferrera, *Le trappole del welfare* (Bologna: Il Mulino, 1998).

Europe. This is one of the reasons for the difficulty of harmonization in the field of social policies, and partly explains why the EU has resorted to soft law instruments and to the Open Method of Coordination (with questionable results in the majority of the cases). A similar variety can be found in Canada[7] and in Switzerland.[8]

In these contexts the coexistence of different worlds of welfare can be explained keeping in mind the identity implications of welfare policies as confirmed by Canadian scholarship[9] which clearly show that social policies are perceived as a distinctive element of the local identity and culture.

1. Solidarity in Multi-national Contexts: A Framework of Analysis

Many scholars (e.g., from a legal perspective, P. Carrozza)[10] have already stressed the importance of welfare policies from a nation-building (and political identity-building) perspective, but always assume the state-condition as the reference field of research. Traditionally, in fact, the redistribution policies are founded on a common sense of belonging, a spirit of solidarity in a homogeneous community: a confirmation of this could be found in the history of state-building according to S. Rokkan's theory.[11] According to this author the development of the welfare state – in a context of growing social citizenship rights for the culturally homogeneous national communities – is aimed at providing a substantive complement to political democracy.

As scholars have pointed out:

> Theories about solidarity have traditionally been developed in view of the nation state. The nation is considered a Gemeinschaft (community). The

[7] Paul Bernard, Sebastien Saint-Arnaud, 2004, *More of the Same? The Position of the Four Largest Canadian Provinces in the World of Welfare Regimes*, at http://www.cprn.org/documents/32764_en.pdf.

[8] Klaus Armingeon, Fabio Bertozzi, Giuliano Bonoli, *Swiss Worlds of Welfa*re, in (2004) 27 *West European Politics*, pp. 20-44.

[9] Daniel Béland, Andre Lecours, *Sub-State Nationalism and the Welfare State: Québec and Canadian Federalism*, in (2006) 12 *Nations and Nationalism*, pp. 77-96.

[10] Paolo Carrozza, *Nazione*, in (1994) 10 *Digesto delle discipline pubblicistiche*, IV,UTET, Turin.

[11] Stein Rokkan, *State Formation, Nation Building, and Mass Politics in Europe* (Oxford: Oxford University Press, 1999).

> members of the community are united by a lien social (social bond). This social bond, grounded in a common language and a common cultural heritage of a people, is seen as the basis for social solidarity. From a legal point, the community or Solidargemeinschaft is often regarded as something prior to law. Conceptually, a nation is considered to be an entity that exists independently of the state and its legal regulations. It is thus the idea of the nation that provides the conceptual framework for the development of legal concepts of solidarity embodied in particular welfare regulations, social rights and institutions at the level of a Member State…In the context of European law, the discussion about solidarity seems to draw on the very same conceptual foundations. Accordingly, solidarity is considered a common value which unites Member States and the people of the Member States. But can the concept of solidarity be simply transferred from the nation state to the European Union?...The European Union is, above all, a community of law, a Rechtsgemeinschaft. It is not a community united by solidarity in the traditional sense but, primarily, a community united by law. The discussion of solidarity in the European Union may therefore not simply revert to the theoretical foundations of national solidarity but has to reinvestigate the question about the philosophical foundations of social solidarity. Does social welfare rely on a community in the traditional sense or are there other possible explanations for solidarity and mutual assistance? Is solidarity a legal concept or is it a moral concept? Does it emanate from self-interest or from altruism? Is it based on reason or on emotion?[12]

When looking at those lines, one could question the very existence of solidarity in a context, like the EU or other pluri-cultural contexts, not characterised by the same features present in the nation state arena and wonder if there is a sort of trade-off between multiculturalism policies and solidarity policies. More recently, scholars like W. Kymlicka, K. Banting and A. Alesina have analysed the tension between redistribution and heterogeneity in multicultural contexts in order to understand whether multiculturalism policies - which recognise or accommodate ethnic groups - tend to exacerbate any underlying tension between diversity and social solidarity, further weakening the support for redistribution. This point has been analysed in multicultural contexts such as that of Canada by K. Banting and W. Kymlicka. In their study they demonstrate the non-exclusive relationship between solidarity and cultural homogeneity. Those who support the opposite vision identify three kinds of trade-off effects between multiculturalism policies (MCPs) and welfare policies (WPs):

[12] Julianne Ottmann, *Solidarity in National and European Law*, in (2008) 2 *www.icl-journal.com*, pp. 36-48, p. 37.

1) The misdiagnosis effect, by which

> MCPs lead people to misdiagnose the problems that minorities face. It encourages people to think that the problems facing minority groups are rooted primarily in cultural 'misrecognition', and hence to think that the solution lies in greater state recognition of ethnic identities and cultural practices. In reality, however, these 'culturalist'' solutions will be of little or no benefit, since the real problems lie elsewhere.[13]

2) The corroding effect, by which:

> MCPs weaken redistribution by eroding trust and solidarity amongst citizens, and hence eroding popular support for redistribution. MCPs are said to erode solidarity because they emphasize differences between citizens, rather than commonalities.[14]

3) The crowding out effect, by which:

> MCPs weaken pro-redistribution coalitions by diverting time, energy and money from redistribution to recognition. People who would otherwise be actively involved in fighting to enhance economic redistribution, or at least to protect the WS from right-wing retrenchment, are instead spending their time on issues of multiculturalism.[15]

Cultural heterogeneity would, in fact, weaken trust and national solidarity across ethnic/racial lines[16] then

> multiculturalism policies that recognize or accommodate ethnic groups tend to exacerbate any underlying tension between diversity and social solidarity, further weakening support for redistribution.[17]

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[13] Banting, Kymlicka, *op. cit., supra*, note 4, p. 232.
[14] *Ibid*. p. 231.
[15] *Ibid*, p. 230.
[16] Keith Banting, *Canada as Counter-Narrative: Multiculturalism, Recognition and Redistribution*, in L. White, R. Simeon, R. Vipond and J. Waller (eds.), The Comparative Turn in Canadian Political Science (Vancouver: University of British Columbia Press, 2008), pp. 59- 75.
[17] *Ibid*, p. 60.

As Banting concludes,

> there is a tension between the ethnic diversity of one's neighbourhood and levels of trust in neighbours, even when one controls for all the other factors that might influence trust, such as economic well-being, education, gender, age and so on", but: "Many analysts simply stop at this point, and assume that diminished trust necessarily weakens support for redistribution… There is no statistically significant negative relationship between multiculturalism policies and growth in social spending across OECD countries.[18]

Relying on this research devoted to the Canadian context, in this paper it is suggested that these conclusions can be used in order to support the possibility of a supranational principle of solidarity. Despite the differences between Canada and the EU, expressed by, among others, J. Weiler,[19] one can argue that the former can be a good comparative term for the latter. I have elsewhere explained why the Canadian and EU constitutional experiences are comparable. Traditionally the word federalism has been seen as an 'infamous f-word'[20] in European Studies and similar ostracism has been opposed to all those studies characterised by a comparative approach to the EU. Recently, this tendency seems to have been abandoned thanks to the works of R. Schütze,[21] R. Howse and K. Nikolaidis,[22] M. Burgess[23] and F. Laursen[24] which can be understood as attempts to recover a comparative approach to the EU's integration process. A similar approach will be followed in this paper, aware of the useful results that can

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[18] *Ibid*, p. 67.

[19] Joseph Weiler, *European Democracy and the Principle of Constitutional Tolerance: The Soul of Europe*, in F. Cerutti and E. Rudolph (eds.), A Soul for Europe, I (Leuven: Peeters, 2001), pp. 33-54.

[20] Markus G. Puder, *Constitutionalizing the European Union. More than a Sense of Direction from the Convention on the Future of Europe,* in (2003) 26 *Fordham International Law Journal,* pp. 1562 *et seq.*

[21] Robert Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford: Oxford University Press, 2009).

[22] Kalypso Nicolaidis, Robert Howser (eds.), T*he Federal Vision. Legitimacy and Levels of Governance in the US and EU* (Oxford: Oxford University Press, 2001).

[23] Michael Burgess, *Federalism and European Union – Political Ideas, Influences and Strategies in the European Community, 1972-1987* (London: Routledge, 1991).

[24] Finn Laursen (ed.), *The EU and Federalism: Polities and Policies Compared* (Farnham: Ashgate, 2010).

be achieved through the comparison, since – as the authors[25] of the "Integration through Law" project emphasised – comparison serves as a laboratory which permits us to test and verify the theoretical constructions and the risks connected to the absolutisation of the EU. With specific regard to the subject of this paper, undoubtedly the works by J.E. Fossum[26] about the comparability between Canada and the EU are fundamental in order to expand the concept of "constitutional odyssey"[27] beyond the Canadian boundaries. Fossum explained the reasons that allow us to compare Canada and the EU: among others, a high level of complexity in both cases, different coexisting conceptions of "belonging" (which caused the emergence of different forms of nationalism – from that in Québec to that of the "aboriginal people"). Fossum seems to compare what Russell called "mega constitutional politics"[28] with what de Witte defined as the semi-permanent Treaty revision process,[29] by showing their common features; lack of legitimacy and constitution making processes driven from the top, and exclusion of some actors from the constitutional dynamics (aboriginal people in the Canadian case):

> In a similar manner, albeit not portrayed as constitutional by the key actors involved, just since the mid-1980s, the EU has gone through three major treaty changes, the Single European Act of 1985, the Maastricht Treaty of 1991 and the Amsterdam Treaty of 1997 and is in the process of ratifying the fourth, the Nice Treaty 2000. At present the EU is preparing further reforms to make itself ready for enlargement. This lengthy and continuous effort at polity-building is now explicitly referred to as constitution making.[30]

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[25] Mauro Cappelletti, Monica, Seccombe, Joseph J.H. Weiler, *A General Introduction*, in M. Cappelletti, M. Seccombe, J.H.H. Weiler (eds.), Integration through Law. European and the American Federal Experience, Vol. 1 (Berlin: Walter de Gruyter, 1985), pp. 3-68.

[26] John Erik Fossum, *The Transformation of the Nation-State: Why Compare the EU and Canada*, at http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2002/wp02_28.htm.

[27] Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* First edition (Toronto: University of Toronto Press, 2004).

[28] *Ibid.*, pp. 73 *et seq.*

[29] Bruno de Witte, *The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process*, in P. Beaumont, C. Lyons and N. Walker (eds.), Convergence and divergence in European Public Law (Oxford: Hart Publishing, 2002), pp. 39-57.

[30] Fossum, *op. cit., supra*, note 26.

These constitutional processes thus display similarities: the necessity to involve citizens and national parliaments in order to overcome the democratic deficit of the Union, the difficulty of finding "a satisfactory and comprehensive constitutional settlement"[31] and the important role played by courts in reshaping the relation between centre and periphery. Moreover, both Canada and the EU have discovered the importance of alternative sources of constitutional update: intergovernmental agreements for Canada (see the importance of the Social Union Framework Agreement) and new governance products in the EU.[32] The importance of these alternative and non-legally binding sources of constitutional update produced another common feature; the asymmetry and flexibility that characterises the two constitutional experiences. This explains why B. Theret,[33] for instance, described Canada and the EU as two examples of multinational and asymmetrical federalisms. Before analysing such analogies, I briefly need to challenge any possible objection concerning the possibility of comparing the EU with federal experiences, by starting from a brief overview of the factors that make the EU and other pluri-cultural contexts (namely Canada and Switzerland):

- The coexistence of different languages, cultures and even legal systems;
- The coexistence of different patterns of welfare;
- The important asymmetries characterising the respective integration processes.

While I am going to deal with the second and the third point later on in this paper, the first element does not need to be explained in detail since it is self-evident. It refers not only to the factual co-existence of different languages and cultures in Canada, Switzerland and in the EU but also to the existence of particular forms of disciplines aimed at ensuring respect for and disciplining the use of such language diversity. This set of constitutional provisions makes a linguistic and cultural pluralism one of the fundamental principles of the constitutional core of these contexts.

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[31] Richard S. Kay, *Book Review Essay: Canada's Constitutional Cul De Sac*, in (2005) 35 *American Review of Canadian Studies*, pp. 705 *et seq.*

[32] Grainne de Búrca, *The. Constitutional Challenge of New Governance*, in (2003) 28 *European Law Review,* pp. 814 *et seq.*

[33] Bruno Theret, 2002, *L'Union sociale canadienne dans le miroir des politiques sociales de l'Union européenne*, at http://www.irpp.org/fr/pm/archive/pmvol3no9f.pdf.

As for Canada, such a multiculturalism has an impact on the nature of the domestic legal system, which has been often described as an example of mixed jurisdiction. The classical definition of mixed jurisdiction is that given by F.P. Walton, according to whom "mixed jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law".[34] The debate about the possibility of defining mixed jurisdictions in a clear and univocal manner is a very live one. According to Palmer, for instance, a mixed jurisdiction is characterised by the presence of three factors: a mix of elements of the civil and common law traditions that co-participate in founding the core principles of a given legal system;[35] and the legal actors' awareness of the dualist character of the law in a given legal system or, rather, the existence of these dual elements should be obvious to the ordinary observer.[36] Thirdly, the last element is the structural one, namely the predominance of the civil law tradition in the private law domain and that of the common law tradition in the public law domain. As for the Canadian case the roots of this particular system can be found in the Québec Act of 1774 the real starting point of the dual nature of the Canadian legal system. This acknowledged that "in matters of property and civil rights (private law), the civil law tradition, inspired by French civil law, applied in Quebec in the same way that the common law tradition, inspired by British common law, applied in such matters of property and civil rights outside of Quebec".[37] The bi-systemic nature of Canada has a great impact on the activity of the federal legislator as the example of bijuralism confirms. Bijuralism requires that

> Canadian legislation must not only be drafted in both official languages (bilingualism) but it must also respect the duality of two Canadian legal traditions: common law and civil law (bijuralism).[38]

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[34] Frederik P. Walton, *The Scope and Interpretation of the Civil Code* (Toronto: Butterworths, 1980), cited by W. Tetley, Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified), I, in (1999) 4 *Uniform Law Review*, pp. 591-618, at http://www.unidroit.org/english/publications/review/articles/1999-3-tetley1-e.pdf.

[35] Vernon V. Palmer (ed.), *Mixed Jurisdictions Worldwide, the Third Legal Family* (Cambridge: Cambridge University Press, 2001), pp. 7-8.

[36] *Ibid.*, p. 8.

[37] Marc Cuerrier, Sandra Hassan, Marie-Claude Gaudreault, *Canadian Bijuralism and Harmonization of Federal Tax Legislation*, in (2003) 51 *Canadian Tax Law Review*, pp. 133 *et seq.*

[38] *Ibid.*, p. 135.

In order to do that, a Legislative Committee of Bijuralism has been set up whose specific task is to

> ensure the application and unfettered accessibility of federal legislation in a country in which two official languages and two distinct traditions of private law serve as a backdrop. The goal of legislative bijuralism is to ensure respect for the essence of each legal tradition in both language versions of the Act.

One could perceive how a similar necessity inspires provisions like Article 345 of the TFUE or even Article 4 of the TEU, concerning the national (here understood as national-legal) identity of the Member States and is present in all the debates about the possibility of a European Civil Code. The necessity to deal with these diversities has forced all the European institutions to devise mechanisms aimed at respecting both the linguistic and the legal peculiarities of the Member States: examples of this can be found in the legislation regulating the publication of the official acts of the EU and even in the interpretative activity of the European Court of Justice.[39]

Of course there are also some differences between Canada and the EU, but the possibility to hazard the extension of the formula of "mixed jurisdiction" in order to define the EU has been endorsed by one of the major scholars of the notion, W. Tetley:

> Mixed jurisdictions and mixed legal systems, their characteristics and definition, have become a subject of very considerable interest and debate in Europe, no doubt because of the European Union, which has brought together many legal systems under a single legislature, which in turn has adopted laws and directives taking precedence over national laws. In effect, the European Union is a mixed jurisdiction or is becoming a mixed jurisdiction, there being a growing convergence within the Union between Europe's two major legal traditions, the civil law of the continental countries and the common law of England, Wales and Ireland.[40]

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[39] Lawrence M. Solan, *The Interpretation of Multilingual Statutes by the European Court of Justice*, in (2009) 34 *Brooklyn Journal of International Law,* pp. 277-588.
[40] Tetley, *op. cit., supra*, note 34, p. 591.

Having clarified this point, it is possible to introduce the notion of solidarity present in EU law. The following considerations will be based on the premise that "social solidarity and the state are not a necessary pair".[41]

2. Solidarity in EU Law

Some constitutional readings[42] of the social policies of the EU provided so far emphasised the role of the principle of equality as key to reading the welfare dimension of the EU. Other scholars,[43] instead, have focused on solidarity without giving a precise content to this concept. I agree with the second reading of EU social dimension but in my opinion it is necessary to add something.

First of all: what does solidarity mean in a supranational context? Then: why do we not include the cohesion policies in the content of EU social policies? Despite the absence of a fully-fledged European Nation, it is possible to speak of solidarity even in the EU context. EU Treaties (current and former versions)[44] employ this word in their texts[45] and of course

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[41] "Crucially, it is abundantly clear at this stage that a nation state is not a necessary platform for a system of social solidarity, which numerous sub-national social security systems demonstrate. This naturally diminishes even further the theoretical relevance of citizenship as a legal status of belonging to a state or other legal-political constellations in the context of the discussion of the design and functioning of social solidarity systems". See Dimitry Kochenov, 2014, *Growing Apart Together: Social Solidarity and Citizenship in Europe*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533522, p. 16.

[42] Antonio D'Aloia, *Diritti sociali e politiche di eguaglianza*, in M. Scudiero, Il diritto costituzionale comune europeo, Vol.I, III, (Napoli: Jovene Editore, 2002), pp. 841-887.

[43] Grainne de Burca (ed.), *EU Law and Welfare States: In Search of Solidarity* (Oxford: Oxford University Press, 2005).

[44] "The Maastricht Treaty refers several times to the notion solidarity. The preamble expresses the desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions". Article 1 stipulates that the task of the Union "shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples". Article 11 (2) stipulates that the Member States "shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity" and that they "shall work together to enhance and develop their mutual political solidarity". Article 23 stipulates that Member States shall act in "a spirit of mutual solidarity" in relation to Union action even when they abstain in a vote", Ottmann, *op. cit., supra*, note 12, p. 42.

[45] Limiting our attention to the reforms introduced to the Lisbon Treaty in the main text of the TFEU it is possible to find references to solidarity: for instance in the Preamble of the

another source of legal provisions concerning solidarity is, of course, the Charter of Fundamental Rights of the EU (CFREU),[46] whose Preamble reads:

> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

Moreover, an entire Chapter (Chapter IV) is devoted to solidarity and basically includes provisions concerning workers' rights, social security and health care, environmental and consumer protection. It is a very heterogeneous set of provisions.

Summing up, when looking at the fundamental EU Treaties and the Charter, one can find different meanings of the word "solidarity". J. Ottmann once proposed the following conceptual map when reconstructing the legal meaning of the principle of solidarity at EU Treaties level:

– Solidarity as a common value and an objective of the Union;
– Social rights;
– Solidarity as mutual loyalty;
– Solidarity as mutual support in case of terrorist attack or other disasters (Solidarity clause).[47]

I agree with this classification although something more will be written on this later on in the paper when recalling other sources of EU law (case law

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TFEU one can read: "intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations". Other reference can be found in Article 67, par. 2, TFEU, Article 80 TFEU, Article 122, par. 1, TFEU, Article 194, par. 1, TFEU and Article 222 TFEU. Massive references are also included in the TEU, for instance in the Preamble one can read: "desiring to deepen the solidarity between their peoples while respecting their history, their culture and their tradition". Other references can be found in Article 2 TEU, Article 3, par. 3 and par. 5 TEU, Article 21 TEU, par. 1, Article 24 TEU, par. 2-3, Article 31, par. 1, TEU and Article 32 TEU.

[46] For instance Article 27, Article 28, Article 29, Article 30, Article 31, Article 32, Article 33, Article 34, Article 35, Article 36, Article 37and Article 38.

[47] Ottmann, *op. cit., supra*, note 12, p. 42.

of the CJEU and common constitutional and national traditions). As recently P. Hilpold pointed out that there are "islands of solidarity" in EU law[48] that have been introduced in an incremental manner due to the "material expansion of the EU legal order".[49]

This was about the literal references to the word "solidarity" but of course EU Treaties and EU legislation are also rich in direct references to the idea of solidarity. A recent example of this is offered by the discipline governing the Euro-zone crisis, *in primis* the Treaty on Stability, Coordination and Governance (TSCG) and the Treaty Establishing the European Stability Mechanism (ESM). They do not refer to solidarity (except for the Treaty on the ESM in the Preamble),[50] but they are indeed relevant in this ambit.

Another important source is given by Article 6 TEU when referring to the common constitutional traditions of the EU.

Can we conceive solidarity as a common constitutional tradition of the EU? The considerations made by A. Pizzorusso[51] with regard to the impossibility of tracing the principle of substantial equality back to the European constitutional heritage could perhaps lead to a similar conclusion, even in the case of the solidarity principle. According to a

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[48] "As demonstrated above the whole EU legal order, from its very beginnings, has been based on the solidarity principle. Although this principle has been interpreted restrictively in the sense that it was closely connected to the reciprocity principle it has accompanied the entire material expansion of the EU legal order. With the growth of EU competencies and their enrichment in content and depth 'islands of solidarity' have formed out in EU law that seem to express an unrestricted commitment to altruistic solidarity. In reality, however, these 'islands' are again closely connected with the reciprocity principle, both internally via the principle of conditionality as externally, as these islands are important elements in an overall balancing system", Peter Hilpold, 2015, *Understanding Solidarity Within EU Law: An Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599725, p. 8.

[49] *Ibid.*

[50] "This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article"

[51] Alessandro Pizzorusso, *Il patrimonio costituzionale europeo* (Bologna: Il Mulino, 2002) p. 69.

reconstruction carried out by A. Somma,[52] it is nevertheless impossible to ignore the several references to a solidarity dimension (read not only as a framework for duties justifiable in the light of superior interests) present in the European constitutions (Articles 16, 22 and 24 of the Greek Constitution; Article 81 of the Portuguese Constitution, Article 9 of the Spanish Constitution). Somma also adds all those constitutional provisions related to the substantial side of the equality principle, disconnecting the notion of solidarity from the constitutional duties dimension (see, for example, Article 2 of the Italian Constitution). One can also stress further elements present in the Constitutions of the new EU Member States: Article 28 Constitution of Estonia; Articles 35 and following of the Constitution of Slovakia; Articles 64 and following of the Constitution of Poland).

Another important source of this supranational principle is given by the case law of the CJEU. Finally, there is a long list of cases where the CJEU referred to solidarity (e.g., in the area of citizenship, D. Kostakopoulou).[53]

Starting from these assumptions and looking at national constitutions, European Treaties and other "forms" of EU Law (CJEU case law, normative acts, including soft law and the Charter of Fundamental Rights of the EU), it is possible to provide some content to the supranational dimension of solidarity:

a) Solidarity as framework of rights of subjects characterised by situations of asymmetry (the reference to consumers as "weak subjects" ceases therefore to be a surprising one). This is solidarity according to the CFREU.

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[52] Alessandro Somma, T*emi e problemi di diritto comparato* (Torino: Giappichelli, 2003), pp. 179-213.

[53] For instance, C-184/99, Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve 2001 ECR I-6193, para 31; In the words of Advocate General Mazak with regard to Case C-158/07, Förster (ECR 2008 I-8507): "Thus, whereas rights to social benefits were originally linked to the pursuit of economic activities (in particular in the form of paid employment, which underpins the concept of a worker), they may now also be available to economically inactive citizens on the basis of the principle of non-discrimination. Whereas a Member State was previously required to assume full social responsibility and provide welfare for those who had already entered its employment market (26) and who thus made some contribution to its economy, such financial solidarity is now in principle to be extended to all Union citizens lawfully resident on its territory". On the non-univocal relationship between citizenship and solidarity see Kochenov, *op. cit., supra*, note 41.

b) Solidarity as a framework of duties (a key example being the second part of Article 2 of the Italian Constitution regarding binding duties) invoking a common belonging (former Article 10 TEC, whose content is now partly present in Article 4 TEU). The positive side of this "community building" is given by Article 308 of the Treaty establishing the European Community.

c) Solidarity as a principle aiming to characterise the Union (Preambles of the TEU, TFEU and CFREU).

If the first version of solidarity is admittedly vague, the second one is particularly relevant due to the fact that it testifies to the particular nature of the Community. The positive side of this "community building" with aims other than national aims is given in Article 352 TFEU (former Article 308 TEC). This is a genuine "catch-all clause" that provides for the possibility of the Council, acting unanimously upon a proposal from the Commission and after consulting the European Parliament, to take the necessary measures for the realisation of any one of the aims of the Union, should the Treaty not have provided the necessary powers for the Union.

3. The European Social Model: An Introduction to the Relevant Supranational Legal Provisions

After having recalled the relevant supranational provisions concerning the principle of solidarity, it is time to move to the "European Social Model", a complex phenomenon that, as we saw earlier, is sometimes reconstructed in light of the solidarity principles.

"European Social Model" is one of the most ambiguous formulae existing in EU studies, as it refers to a jungle of sources and acts (EU Treaties, secondary EU legislation, *soft law*):

> One of the fastest growing European catchwords at the present time - the 'European Social Model' (ESM) - is used to describe the European experience of simultaneously promoting sustainable economic growth and social cohesion. The use of the concept of European Social Model in academic and political debate is characterized by two main and interconnected features: on the one hand, the usually taken-for-granted assumption of the reality of the concept (the reality called 'Europe' becomes a naturally occurring phenomenon); on the other hand, the highly ambiguous and polysemic nature of this concept.[54]

[54] Maria Jepsen, Amparo Serrano Pascual, *The European Social Model: an exercise in deconstruction*, in (2005) 15 *Journal of European Social Policy*, pp. 231-245.

The European Social Model is described "in terms of values that include democracy and individual rights, free collective bargaining, the market economy, equal opportunities for all, and social protection and solidarity" (European Commission,1994).

It is based on "*good economic performance, a high level of social protection and education and social dialogue. An active welfare state should encourage people to work, as employment is the best guarantee against social exclusion*" (European Council, 2002).[55]

The necessity to stress the link between the principle of solidarity and the European Social Model has been pointed out, among others, by J. Ottmann:

> The reference to solidarity in these European legal texts underlines a continuous process of addressing social policy issues in the European Union throughout the past decades: Whereas the emphasis of the European Social Model lies, above all, in the creation of common labour law standards which are ultimately designed to enhance the European common market, solidarity is also considered one of the common values and objectives of the Union. In this respect, solidarity relates to the cohesion between Member States and their people(s) in a way that transcends the notion of a mere common market. This concept of solidarity is intended to create and enhance cohesion in a community – a European community. However, it has to be born in mind that the concept of community at the level of the European Union has to be distinguished from the concept of community at national level. The European Union is, above all, a community of law. Therefore, the discussion of solidarity in the European Union cannot simply revert to theoretical foundations in national solidarity; the discussion has to revisit periodically the universal philosophical foundations of social solidarity.[56]

One of the main reasons for scepticism towards the European Social Model is the high diversity in terms of welfare policies present at national level, almost never questioned by the EU because of the original "social frigidity"[57] present in the original Treaties.

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[55] As for the legal basis of this phenomenon, one could recall: Article 8 TFEU, Article 9 TFEU, Article 10 TFEU, Article 152 TFEU, Article 154-155 TFEU (governing the so-called "Social Dialogue"), Article 145-150 TFEU (governing the European Employment Strategy); the Chapter on Solidarity included in the CFREU; secondary legislation concerning labour law (among others, Council directive 2002/14, Council directives 94/45 and 2009/38).

[56] Ottmann, *op. cit., supra*, note 12, pp. 43-44.

[57] Giuseppe Federico Mancini, *Principi fondamentali di diritto del lavoro nell'ordinamento delle Comunità europee*, in AA. VV., *Il lavoro nel diritto comunitario e l'ordinamento italiano*, Atti del Convegno di Parma, 30-31 ottobre 1985 (Padova: CEDAM, 1988), pp. 23 *et seq.*

In their works on welfare policies, G. Espring-Andersen[58] and M. Ferrera[59] have distinguished at least three or four worlds of welfare coexisting in Europe.

This is one of the reasons for the difficulty of harmonisation in the field of social policies, and partly explains why the EU has resorted to soft law instruments and to the Open Method of Coordination (with questionable results in the majority of the cases, V. Hatzopoulos, 2007),[60] defined as

> an experimentalist approach to EU governance based on iterative benchmarking of national progress towards common European objectives and organized mutual learning.[61]

In this sense, the OMC is based on the idea of complementarity to the national action and policies.[62]

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[58] Espring-Andersen, *op. cit., supra*, note 5.

[59] Ferrera, *op. cit., supra,* note 6.

[60] Vassilis Hatzopoulos, *Why the Open Method of Coordination is Bad for You: A Letter to the EU*, in (2007) 13 *European Law Journal*, pp. 309-342.

[61] Jonathan Zeitlin, *EU Policy Coordination Beyond 2010: Towards an Inclusive Governance Architecture*, in (2009) 2:4 *La Rivista delle Politiche Sociali/Italian Journal of Social Policy*, p. 34. On the OMC see Mathew Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge: Cambridge University Press, 2011).

[62] The OMC is frequently associated to soft law but actually some scholars pointed out the existence of some differences between the two see this table taken from Susana Borràs, Kerstin Jacobsson, *The open method of co-ordination and the new governance patterns in the EU, in (2004) 11 Journal of European Public policy*, pp. 185-208, p. 188.

Table 6

Differences between the OMC and the traditional soft law

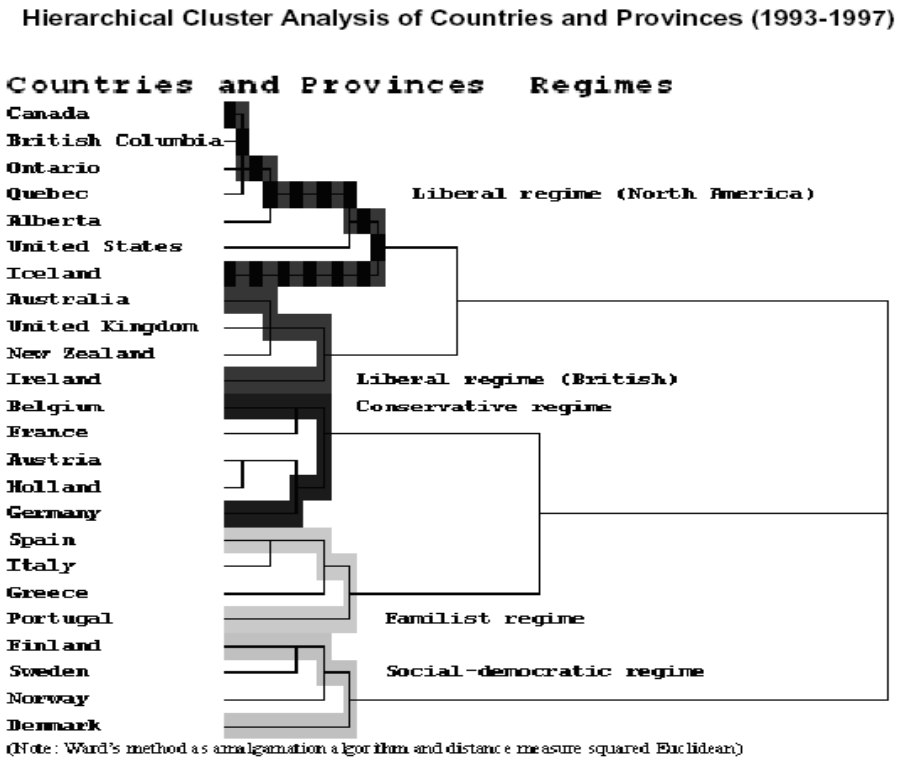
The open method of co-ordination	*The traditional soft law*
Intergovernmental approach: the Council and the Commission have a dominant role	Supranational approach: the Commission and the Court of Justice have a dominant role
Political monitoring at the highest level	Administrative monitoring
Clear procedures and iterative process	Weak and ad-hoc procedures
Systematic linking across policy areas	No explicit linking of policy areas
Interlinking EU and national public action	No explicit linking of EU/national levels
Seeks the participation of social actors	Does not explicitly seek participation
Aims at enhancing learning processes	No explicit goal of enhancing learning is stated

Actually, the argument of the absence of a unique welfare system in Europe does not impede - *per se* - the existence of a common sense of solidarity at supranational level.

On the contrary, asymmetry, in this respect, is common even in other contexts (plurinational-federal systems) characterised, like the EU, by a high level of social (in terms of policies) and constitutional differentiation.

A similar variety can be found in Canada, according to the studies by P. Bernard and S. Saint-Arnaud.[63] Remarkable differences exist among the Canadian Provinces and in this respect the Provinces of Alberta and Québec[64] represent two extreme points which can be traced back to the European patterns of welfare identified by Bernard and Saint Arnaud; the liberal, the familist, the social-democratic and the conservative regimes.

Figure 1



Source: Bernard-Saint Arnaud, 2004

[63] Bernard and Saint-Arnaud, *op. cit., supra*, note 7.

[64] Sylvie Morel, 2002, *The Insertion Model or the Workfare Model? The Transformation of Social Assistance within Québec and Canada* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.453.2518&rep=rep1&type=pdf.

Table 1

Indicators for which Provinces are Similar to the Various Regimes (Except for the Liberal Regime, which They Belong To)

	Characteristics for which the Province Is Similar to the Regime		
	Social-democratic	Conservative	Familist
Quebec	• Final government consumption expenditure • Payroll taxes as % of GDP (trend*) • Education expenditure • Rate of government employment (trend) • Infant mortality rate • Proportion of scientists and technicians	• General government expenditures • General government receipts • Percentage of public expenditure on health and public expenditure as % of total health expenditure • Female labour participation rate (trend)	• Social security transfers • Debt interest payments • Unemployment rate • Percentage of voter turnout • Daily newspapers read
Ontario	• Employment rate • Proportion of scientists and technicians	• Final government consumption expenditure (trend) • Rate of government employment	• Debt interest payments (trend) • Rate of union membership
Alberta	• Public expenditure on vocational training • Female labour participation rate		• Debt interest payments (trend) • Rate of union membership
British Columbia	• Education expenditure (trend) • Employment rate • Female labour participation rate	• Public expenditure as % of total health expenditure • Unemployment rate	• General government receipts • Daily newspapers read • Rate of union membership

* The use of the word trend indicates that the province's level on this indicator diverges from the level of the liberal model in the direction of another regime, but does not reach the latter level.

Source: Bernard-Saint Arnaud, 2004

The coexistence of different worlds of welfare can be explained keeping in mind the identity implications of welfare policies as confirmed by several studies on Québec nationalism.[65] Welfare is a matter of identity and culture; the social policies in Québec are seen as a distinctive element of the local identity: "*Solidarity conceptualised in terms of equality and social justice ties nationalism to the welfare state*", as D. Béland and A. Lecours powerfully pointed out.[66] Indeed the "jealousy" of Québécois for their social policies explains the reactions to some judgements of the Canadian Supreme Court – like *Chaoulli v. Québec*[67] for instance – perceived as imperialistic attempts to jeopardise the local specificity or the reluctance to participate in the *Social Union Framework Agreement*.

A similar variety of worlds of welfare can be found in Switzerland, as the studies by K. Armingeon, F. Bertozzi and G. Bonoli show,[68] focusing on social security, education, taxation and employment regimes ("The term denotes the patterns of employment and unemployment and the patterns of wage regulation").[69] The results of their research can be summarised in the two following tables:

[65] Béland, Lecours, *op. cit., supra*, note 9.

[66] *Ibid.*, p. 79.

[67] Chaoulli v. Québec (Attorney General) [2005] 1 SCR 791, 2005 SCC 35, Tom Bateman, *Legal Modesty and Political Boldness: The Supreme Court of Canada's Decision in Chaoulli v. Quebec*, in (2006) 11 *Review of Constitutional Studies*, pp. 317-345. See also Antonia Maioni, *Québec's blue period*, in R. Gibbins, A. Maioni, J. Gross Stein, Canada by Picasso (Ottawa, 2006), p. 135.

[68] Armingeon, Bertozzi, Bonoli, *op. cit., supra*, note 8.

[69] *Ibid.*, p. 25.

Table 2

SUMMARY OF THE OPERATIONALISATION OF VARIABLES FOR THE DIFFERENT ASPECTS OF THE CANTONAL WELFARE STATE

	Dimension 1	Dimension 2	Outcomes
Employment (a)	Level of public employment	Continuity of female employment	
	High	*High*	*Social democratic*
	Low	*Low*	*Conservative*
	Low	*High*	*Liberal*
	High	*Low*	*Unclear (statist-conservative)*
Taxation (b)	Level of taxation	Progressivity of taxation	
	High	*High*	*Social democratic*
	High	*Low*	*Conservative*
	Low	*Low*	*Liberal*
	Low	*High*	*Unclear (redistributive-liberal)*
Education (c)	Education expenditure and share of diplomas		
	High		*Unclear (social democratic or liberal)*
	Low		*Conservative*
Social Security (d)	Number of cantonal social security schemes and per capita social security benefits paid by canton and municipalities	Degree of familialism (birth grants, child benefits to 4th child minus expenditure on pre-school facilities)	
	High	*Low*	*Social democratic*
	High	*High*	*Conservative*
	Low	*Low*	*Liberal*
	Low	*High*	*Unclear (liberal-conservative)*

Source: Armingeon-Bertozzi-Bonoli, 2004, p. 31

Table 3

WORLDS OF WELFARE IN SWITZERLAND: CLASSIFICATION OF THE 26 SWISS CANTONS (EMPLOYMENT, EDUCATION, TAXATION AND SOCIAL SECURITY)

List of Cantons		Employment	Education*	Taxation	Social Security
AG	Argovia	2	2	1	1
AI	Appenzell Inner-Rhodes	2	2	1	1
AR	Appenzell Outer-Rhodes	1	2	2	1
BE	Berne	1	2	2	1
BL	Basle-Country	1	4	4	3
BS	Basle-Town	4	4	3	3
FR	Fribourg	3	4	3	2
GE	Geneva	3	4	3	3
GL	Glarus	1	2	1	1
GR	Grisons	4	2	1	1
JU	Jura	3	4	3	1
LU	Lucerne	2	2	2	4
NE	Neuchâtel	3	4	2	2
NW	Nidwalden	1	2	1	4
OW	Obwalden	1	2	2	4
SG	St Gall	1	2	2	1
SH	Schaffhausen	3	4	1	3
SO	Solothurn	1	2	4	4
SZ	Schwyz	1	2	1	4
TG	Thurgovia	2	2	3	1
TI	Ticino	4	4	4	3
UR	Uri	4	2	1	4
VD	Vaud	1	4	3	2
VS	Valais	1	2	2	2
ZG	Zug	2	4	1	2
ZH	Zurich	4	4	1	3

Notes:
1 = liberal
2 = conservative
3 = social democratic
4 = unclear, in case of employment '*statist-conservative*', in case of education either '*liberal*' or '*socio-democratic*', in case of taxation '*redistributive-liberal*', in case of social security '*liberal-conservative*'.
*only category 2 and 4 are possible under this dimension.

Source: Armingeon-Bertozzi-Bonoli, 2004, p. 35

According to these findings, it is not possible to trace back to any canton a precise univocal welfare pattern.

This variety in welfare models can also explain the social tourism which is due to the different quality and level of services performed by the cantons.[70] Some scholars argue that the strong autonomy of the 26 sub-systems has produced a series of inter-cantonal differences both in terms of financial effort and legal discipline passed.[71] The welfare state in Switzerland is based on

> [s]trong social security systems while also being coupled with a decent system of social assistance. The Swiss welfare state system does not apply large systems of general universal benefits, or social savings accounts. The Swiss health care insurance system is rather unusual, in the sense that public, subsidized private and fully private elements have been intertwined. Also, the decentralization of the health care system has been given rise to significant differences between cantons in terms of health care spending and provision.[72]

In Switzerland such a welfare differentiation is also caused by the fact that the role of cantons and communes in social policies is essential and has favoured the emergence of different systems of welfare.[73]

In other words: when looking at comparative law, one can see that the mere co-existence of different conceptions and models of welfare does not exclude the possibility of speaking of solidarity.

Indeed the above mentioned researches by K. Banting and W. Kymlicka, when looking at Canada, tried to explain that there is no trade-off between

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[70] Jean-Pierre Tabin , Véréna Keller , Kathrin Hofman , Sophie Rodari , Anne-Lise Du Pasquier, René Knüsel, Véronique Tattini, *Le 'tourisme social': mythe et réalité. L'exemple de la Suisse latine* (Lausanne : Editions EESP, 2004), Le dossier du mois de l'Artias, at https://www.eesp.ch/fileadmin/user_upload/publications/media_37-le_tourisme_social.pdf.

[71] Massimo Filippini, Luca Crivelli, Ilaria Mosca, 2006, Federalismo e spesa sanitaria regionale: analisi empirica per i Cantoni svizzeri, http://hpm.org/cerca/bul/pubblicazioni/eco/pdf/wp0304.pdf.

[72] Dominique Wang, Christian Aspalter, *The Austrian and Swiss Welfare State System in International Comparison*, in (2006) 5 *Journal of Societal & Social Policy*, pp. 25-49.

[73] Filippini, Crivelli, Mosca, *op. cit., supra*, note 71; Luca Crivelli, Massimo Filippini, 2003, *Federalismo e sistema sanitario svizzero*, http://doc.rero.ch/lm.php?url=1000, 42,6, 20051020140331-KM/1_wp0303.pdf. More info available at www. socialinfo.ch.

diversity and solidarity. There is undoubtedly a tension between solidarity and diversity but instead of resulting in a trade-off effect, it rather generates forms of asymmetry, in this case, social asymmetry. As we saw earlier, asymmetry is another element shared by the EU and Canadian constitutional experiences and, actually, it is also present in the Swiss context.

Switzerland is often described as an example of symmetric federalism but on closer examination it is characterised by strong asymmetries, given the important role acknowledged to the cantons in many key sectors (education, fiscal federalism – each canton has its own fiscal regime) and a confirmation of its asymmetrical nature is given by the *Réforme de la péréquation financière et de la répartition des tâches entre la Confédération et cantons* (RPT)[74] approved in 2004, and by the importance of the equalisation payments mechanism based on Article 135 of the Swiss Constitution.[75]

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[74] On this see: Eric Mottu, *Réforme de la péréquation financière et principe de subsidiarité*, in (1997) 3 *Swiss Political Science Review*, pp. 1-19; Katrin Cornevin-Pfeiffer, *La dynamique du fédéralisme suisse*, in L. Weber (ed.), Les finances publiques d'un État fédératif: la Suisse, (Paris : Economica, 1992), pp. 185-263; Bernard Dafflon, Marzio Della Santa, *Fédéralisme et solidarité: étude de la péréquation en Suisse* (Fribourg: Institut du fédéralisme, 1995); Departement federal des finances, 1996; Rene L. Frey, Andreas Spilmann, Bernard Dafflon, Claude Jeanrenaud, Alfred Meier, 1994, *La péréquation financière entre la Confédération et les cantons*. Berne: Administration fédérale des finances et Conférence des directeurs cantonaux des finances.; Anne-Beatrice Bullinger, 2007, *Equalization reform in Switzerland: ideal solutions, unpredictable outcomes,* http://www.uregina.ca/sipp/documents/pdf/Bullinger.pdf, at http://ourspace.uregina.ca/bitstream/handle/10294/6661/SIPP%20Public%20Policy%20Papers%2009.pdf?sequence=1l; Bernard Dafflon, 1999, Fiscal Federalism in Switzerland: A Survey of Constitutional Issues, Budget responsibility and Equalisation". at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.199.6388&rep=rep1&type=pdf.

[75] "The Confederation shall issue regulations on the equitable equalisation of financial resources and burdens between the Confederation and the Cantons as well as among the Cantons.

2. The equalisation of financial resources and burdens is intended in particular to:
   a. reduce the differences in financial capacity among the Cantons;
   b. guarantee the Cantons a minimum level of financial resources;
   c. compensate for excessive financial burdens on individual Cantons due to geo-topographical or socio- demographic factors;
   d. encourage intercantonal cooperation on burden equalisation;
   e. maintain the tax competitiveness of the Cantons by national and international comparison.

3. The funds for the equalisation of financial resources shall be provided by those Cantons with a higher level of resources and by the Confederation. The payments made by those Cantons with a higher level of resources shall amount to a minimum of two thirds and a maximum of 80 per cent of the payments made by the Confederation".

Further evidence of the asymmetric nature of Switzerland's federalism can be found in the wording of the Constitution which acknowledges great organisational autonomy (Article 37) with the only limitation being the necessity to have a Constitution (Article 51)[76] and to guarantee the exercise of political rights (Article 39) and by the constitutionalisation of the Communes (Article 50).

4. Role of Asymmetry in Pluri-cultural Contexts

The debate on the concept of asymmetry originates from comparative studies in the sixties after the publication of a seminal article by Charles Tarlton in the *Journal of Politics* (1965), whereby the author tried to fill a gap, highlighting 'a principal weakness in theoretical treatments of the concept of federalism'.[77]

On that occasion, C.D. Tarlton introduced two key concepts in the study of federal systems:

> Two concepts (…) can be introduced and their general content suggested here. The first, the notion of symmetry refers to the extent to which component states share in the conditions and thereby the concerns more or less common to the federal system as a whole. By the same token, the second term, the concept of asymmetry expresses the extent to which component states do not share in these common features. Whether the relationship of a state is symmetrical or asymmetrical is a question of its participation in the pattern of social, cultural, economic, and political characteristics of the federal system of which it is part. This relation, in turn, is a significant factor in shaping its relations with other component states and with the national authority.[78]

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[76] Art. 51: "Cantonal constitutions. "Each Canton shall adopt a democratic constitution. This requires the approval of the People and must be capable of being revised if the majority of those eligible to vote so request.
Each cantonal constitution shall require the guarantee of the Confederation. The Confederation shall guarantee a constitution provided it is not contrary to federal law".

[77] "Specifically what I want to suggest is that in studies of federalism the prevailing emphases avoid sufficient consideration of the diverse ways in which each member state in a federal system is able to relate to the system as a whole, the central authority, and each other member state", Charles D. Tarlton, *Symmetry and Asymmetry as Elements of Federalism*, in (1965) 27 *Journal of Politics*, p. 861.

[78] *Ibid.*

Despite the very broad definitions given to these two concepts, the piece by Tarlton has become a classic, a mandatory reading, where one can find many of the intuitions developed in the current debate about flexibility and uniformity in multilevel (not only in fully fledged federal systems) systems, including a certain scepticism towards asymmetrical arrangements which we can find even in European studies[79]. As M. Burgess (1993)[80] pointed out, within two broad types of preconditions of asymmetry (called 'socio-economic' and 'cultural - ideological' preconditions), it is possible to refer to a variety of factors that might lead a given polity to rely on asymmetry (political cultures and traditions, social cleaves, territoriality, socio-economic factors, demographic patterns). When listing the *pros* and *cons* of asymmetry R. Bauböck recalls that: 1) asymmetry can affect cohesion, i.e. "the glue binding the component parts together",[81] 2) asymmetric powers can translate "unequal representation of citizens in federal government and thus can be seen to violate a commitment to equal federal citizenship"[82] and 3) asymmetry may be perceived as a threat to the quality of democratic debate, making the polity less understandable by citizens[83] and creating "incentives for bargaining that will generate even more asymmetry even more asymmetry.[84]

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[79] "It seems clear that much of the ordinary optimism regarding the near magical qualities of federalism can profitably be reexamined. The most basic question that must be asked, then, is: To what extent can "federalism" be expected to sustain the stimulus to and the need for unity in the face of the pressures of separatism? The answer, plainly, is: To the extent that the forces of unity are dominant. Unless there is some factor or set of factors which clearly and inexorably push in the direction of commonality, then the pressures of asymmetry will increasingly present themselves, making continued federal existence nearly impossible. (…) Relieving the tensions and discord often attendant upon asymmetrical systems requires not further recognition of the elements of diversity and their protection in the complicated processes of ever-increasing federalization, but rather increased coordination and coercion from the centralizing authorities in the system. The implications of this kind of thinking about the federal process may entail serious skepticism regarding the feasibility of using federalism as a means of politically organizing local, regional, national, and international communities", Tarlton, *op. cit., supra,* note 77, p. 874.

[80] Michael Burgess, *Federalism and Federation: A Reappraisal*, in M. Burgess M. and A. G. Gagnon (eds.), Comparative Federalism and Federation (Toronto: Toronto University Press, 1993), pp. 3-14.

[81] Reiner Bauböck, *United in Misunderstanding? Asymmetry in Multinational Federations*, in (2001) nº 26 ICE Working Paper series, at https://eif.univie.ac.at/downloads/working papers/IWE-Papers/WP26.pdf.

[82] *Ibid.*

[83] 'Highly asymmetric federations become opaque for their citizens', *Ibid.*

[84] *Ibid.*

At the same time asymmetry is a resource for a polity which wants to recover disadvantaged minorities and which respects the equal dignity of its components.

In other words, asymmetry is a game between centripetal and centrifugal forces and here again one can find interesting clues from comparative studies: indeed the debate on the possible negative implications of asymmetry leads to the identification of the existence of a constitutional core of principles and values whose respect makes asymmetry 'sustainable': this is also the rationale of asymmetry in EU law as, for instance, it is evident from Article 326 TFEU. The EU already knows some forms of asymmetry[85] and enhanced cooperation[86] is just one of these, together with the opting-out mechanism[87] and the open method of coordination.[88]

Scholars have deeply studied the contours acquired by the idea of differentiation in EU law and its main sources, distinguishing at least three different models of differentiation.[89] Others have harshly criticised the

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[85] Watts, for instance, mentions the EU in his writings on asymmetry: Ronald L. Watts, 1999, Comparing Federal Systems, p. 29, at http://www.mqup.ca/comparing-federal-systems--third-edition-products-9781553391883.php.

[86] Among others: José María Beneyto, (ed.), 2009, "Unity and Flexibility in the future of the European Union: the challenge of enhanced cooperation", http://www.ceuediciones.es/documents/ebookceuediciones1.pdf; Carlo Maria Cantore, *We're One, but We're Not the Same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU*, in (2011) 3 *Perspectives, on Federalism*, pp. 1-21.

[87] Lee Miles, *Introduction: Euro Outsiders and the Politics of Asymmetry*, in (2005) 27 *Journal of European Integration*, pp. 73 *et seq.*

[88] Fritz W. Scharpf, 2008, *The European Social Model: Coping with the Challenges of Diversity*, http://ideas.repec.org/p/zbw/mpifgw/028.html.

[89] "Within the first order, differentiation stands for the range of both formal and semi-formal legislative, executive, and judicial techniques of regulation, whose regulatory outcomes (intentionally) fall short of requiring and establishing uniformity. They are normally explicitly authorized on the level of primary EU law—though they can be authorized implicitly—and are usually executed in the form of secondary EU law, sometimes following specific legislative techniques known as minimum or partial harmonization. … Second order differentiation encompasses more pronounced differentiated legal arrangements which occur on the level of primary EU law in the form of derogations from it. It comprises the so-called safeguard clauses, instances of various opt-outs with potential opt-ins, and other, usually protocol-based, derogations in favour of a selected member state […] As an exception to the uniformity rule, they are normally

asymmetric option, looking at it as something incompatible with an integration process. Finally, a last group of authors has insisted on the positive implications of a multi-speed Europe to overcome the difficulties present in the enlarged Union.[90] Enhanced cooperation definitely belongs to the universe of the asymmetric options: it aims to ensure, at the same time, unity and diversity. In fact, it allows Member States to experiment with different forms of integration without 'shutting the door' to those unwilling to take steps towards deeper integration in specific areas (*openness* is at the heart of Article 331 TFEU). Enhanced cooperation can be conceived as a sort of *extrema ratio* to be exploited when the Council realises that the goals of integration cannot be achieved within a reasonable period by the EU as a whole. The procedures to be followed in this case ensures the intervention and control of the other EU Institutions (Commission, Parliament) guaranteeing the *common agents' control*.[91] Enhanced cooperation under EU law also counter-balances (partly at least)[92] R. Bauböck's argument of the lack of transparency of asymmetrical dynamics, since according to Article 330 TFEU 'All members of the Council may participate in its deliberations' (although 'only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote'[93]). Finally, enhanced cooperation is conceived for specific areas and

established in favour of not more than one Member State, in a single and narrowly specified policy field, for an unlimited period of time. Finally, second order differentiation always arises out of intergovernmental negotiations as the Treaties do not contain any legal basis for its creation. Lastly, third order differentiation encompasses the most differentiated legal solutions for the European Union. These have been developed into several models: the à la carte model, the multi-speed Europe, the Europe of concentric circles, and the model of enhanced cooperation, which is currently institutionalized in the Treaty of Lisbon... However, the models constituting a third order differentiation are fairly heterogeneous and differ at least to the following three criteria: the scope of differentiation—narrow or wide; the content of differentiation—state-based or sector based; and the duration of differentiation—permanent or temporary", Matej Avbelj, *Differentiated Integration—Farewell to the EU-27?*, in (2013) 14 *German Law Journal*, pp. 193-195.

[90] Jean-Claude Piris, *It is Time for the Euro Area to Develop Further Closer Cooperation Among its Members,* (2011) n° 5 Jean Monnet Working Paper, at http://www.jeanmonnetprogram.org/paper/it-is-time-for-the-euro-area-to-develop-further-closer-cooperation-among-its-members/.

[91] Massimo Bordignon and Sandro Brusco, On enhanced cooperation, in (2006) 90 *Journal of Public Economics*, pp. 2063-2090; Cantore, *op. cit., supra*, note 86.

[92] Partly because the author mainly refers to the participation of citizens in the public debate.

[93] Article 330 TFEU.

> this a guarantee not only for those Member States without the political will to join enhanced cooperation from the beginning, but also for those which do not meet the objective requirements for joining the enhanced cooperation scheme.[94]

All these elements serve as constitutional safeguards since they make the asymmetry produced by enhanced cooperation sustainable under EU law.[95]

The use of enhanced cooperation in the field of divorce and patents[96] and the current debate on the possibility of employing the same mechanism for the introduction of a financial transaction tax,[97] on the one hand, and the adoption of the new Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), on the other, have been giving new blood to the debate on asymmetry in the life of the Union. Indeed within the new European economic governance the asymmetric dimension of the EU has been amplified by two main factors: first of all, because of the instruments employed since some of the measures recently introduced have been adopted out of the EU law frame, namely via the conclusion of international agreements. This factor has permitted the creation of a set of rules shared by a group of the EU Member States in the form of a public international law treaty. As B. de Witte has pointed out, this 'turn to international treaties' is not new; even in other cases this path has been followed.[98] The first reaction to

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[94] Cantore, *op. cit., supra*, note 86, E-16.

[95] See also Federico Fabbrini, *The enhanced cooperation procedure: a study in multispeed integration, Centre for Studies on Federalism Research Paper* (2012), http://www.csfederalismo.it/en/publications/research-papers/998-the-enhanced-cooperation-procedure-a-study-in-multi speed-integration-2.

[96] Council Decision of July 12, 2010 (2010/405/EU), OJEU, L 189/12 and Council Decision of March 10, 2011 (2011/167/ EU), OJEU, L 76/53. See Steve Peers, 2012, *Written Evidence, in House of Lords, Select Committee on the European Union, The euro area crisis. Oral and written evidence*, 2012, http://www.parliament.uk/documents/lords-committees/eu-select/euroarea crisis/Evidencevolume.pdf.

[97] Proposal for a Council Directive – implementing enhanced cooperation in the area of financial transaction tax COM (2013) 71 final - 2013/0045 (CNS).

[98] "And yet, what happened then, and what happened later when the ESM Treaty and the Fiscal Compact were concluded by groups of Member States, seems less shocking when seen within a broader evolutionary perspective of European law. In fact, there are numerous earlier examples of international treaties concluded between groups of member states of the EU. They have concluded, ever since the 1950's, agreements in areas such as tax law, environmental protection, defence, culture and education. The most prominent

this trend may be to interpret it as a return to intergovernmentalism and as a loss in terms of supranationalism. But, as F. Fabbrini has shown, the use of differentiated agreements among members of a union is known even in federal experiences.[99] The second main source of asymmetry in this context is connected to the contents of these measures and I dealt with this subject when writing on the use of enhanced cooperation advocated in the TSCG.[100] More in general, as we saw asymmetry has been frequently experimented with within federalising processes,[101] especially in those federal or quasi-federal contexts characterised by the coexistence of different legal and cultural backgrounds (Canada, for instance), a way, to 'accommodate diversity'.[102] One should take this into account before conceiving, for instance, enhanced cooperation as a form of 'constitutional

example of an inter se agreement (that is: an agreement between some but not all the EU member states) was the Schengen cooperation regime, composed of a first Agreement signed in 1985, and an implementing Convention adopted in 1990. The Schengen instruments were expressly designed as interim arrangements in preparation of a final regime at the level of the European Community, rather than as a rival co-operation regime. The same was true for the Social Policy Agreement concluded, as a separate part of the Maastricht Final Act, between 11 of the then 12 member states; and for the Prüm Convention later on. In the course of the evolution of European integration, the importance of international agreements between the EU member states has declined". See Bruno de Witte, *Using International Law in the Euro Crisis Causes and Consequences'*, in (2013) nº 4 *ARENA Working Paper*, http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp4-13.pdf.

[99] "As the comparative analysis makes clear, also the US Constitution is endowed with an instrument – the 'compact clause' – which allows states to pursue flexible and differentiated action within the American Union. Yet, the comparison reveals that this instrument is not subject to a specific finality and has consequently been utilized in the US for a wide variety of purposes having to do generally with interstate adjustments. In the EU context, instead, it emerges that the function of the enhanced cooperation is essentially circumscribed to ensuring multispeed integration in the EU. The identification of a clear pro-integrationist ratio in the structure of the enhanced cooperation mechanism, however, has important implications, both for the kind of cooperation that can be launched by the states and for the role of the EU institutions in policing the constraints that surround its use", Fabbrini, *op. cit., supra*, note 95.

[100] Carlo Maria Cantore and Giuseppe Martinico, *Asymmetry or Dis-integration? A Few Considerations on the New 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union'*, (2013) 19 *European Public Law*, pp. 463-479.

[101] For instance, Ronald L. Watts, 2005, A Comparative Perspective on Asymmetry in Federations, at http://www.queensu.ca/iigr/sites/webpublish.queensu.ca.iigrwww/files/files/WorkingPapers/asymmetricfederalism/Watts2005.pdf.

[102] Robert Agranoff (ed.), *Accommodating Diversity: Asymmetry in Federal States* (Baden Baden: Nomos Verlag, 1999).

evil' conducive to a 'disintegrative' multi-speed Europe.[103] Asymmetry might even serve as an instrument of constitutional integration, as comparative law shows. For instance, flexibility and asymmetry are two of the most important features of Canadian federalism, elements partly explicable by taking into account the cultural and economic diversity present in the territory as R. L. Watts pointed out: 'Federal symmetry refers to the uniformity among Member States in the pattern of their relationships within a federal system. "Asymmetry' in a federal system, therefore, occurs where there is a differentiation in the degrees of autonomy and power among the constituent units".[104] However, asymmetry does not refer to mere differences of geography, demography or resources existing among the components of the federation or to the variety of laws or public policies present in a given territory.[105] Even in international law, asymmetry is well known. A confirmation of this comes from the experience of the World Trade Organisation (WTO), which allows a member to sign Preferential

[103] "Among scholars of EU law, the idea of differentiation has also struck different chords. In general, they have not been very supportive of it. The degree of aversion to differentiation, however, is varied among scholars according to their theoretical visions of the Union. Supporters of the intergovernmental Union have found the pressure for differentiation self-explanatory in light of Member States craving for power and the desire to enhance their positions. The advocates of the supranational Union have, conversely, perceived it as an expression of national selfishness, which presents a regression in the process of integration. By breaking the chain of virtuous spill-over effects differentiation is also anything but compatible with the neo-functionalist understanding of the Union. At the same time, it does not fit well with the ordo-liberal perspective either, because of its potential to erect new obstacles to trade where there should not be any. Finally, differentiation understandably may not appeal to EU constitutional scholars, who view it as colliding with not only the very telos of integration, but also with the essential character of constitutionalism as a unity-furthering discourse', Avbelj, *op. cit., supra*, note 89, p. 208.

[104] Watts, *op. cit., supra,* note 101.

[105] The word asymmetry has acquired a variety of meanings: when talking about asymmetries one can distinguish between financial and constitutional asymmetry, or between de jure and de facto asymmetry. De jure asymmetry "refers to asymmetry embedded in constitutional and legal processes, where constituent units are treated differently under the law. The latter, de facto asymmetry, refers to the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation, and, as Tarlton noted, is typical of relations within virtually all federations", Watts, *op. cit., supra*, note 101.

Trade Agreements (PTAs) with one or more other members.[106] Thus, asymmetry is an institutional solution experienced by many constitutional and even international systems. In these contexts asymmetry works as a safety valve of some tensions generated by the coexistence of different cultures and a good example of this is given by social policies. Indeed, the idea behind the open method of coordination has been that to favour a kind of synergy in these sensitive areas of social policies (for instance) and it has been adopted even in areas where the EU could pass hard legislation in order to favour the consensus over certain practices, as a kind of 'waiting room'[107] for future harmonization. Similar flexible instruments have been used in social policy even in Canada and indeed the example of the Social Union Framework Agreement (SUFA),[108] for instance, show how these parallel and soft law measures have helped the Canadian order evolve despite the 'constitutional odyssey'[109] suffered by Canada, a country where all the recent attempts at amending the constitution has failed over recent years. And this leads to the second reason why asymmetry might serve as a useful tool for a complex system[110] like that of the EU. By 'constitutional odyssey' Russell refers to at least two different historical events that can be logically distinguished although they present themselves as historically connected: firstly, the struggle to 'bring the constitution home' after the formal independence of Canada from the United Kingdom; secondly, the attempt to heal the constitutional rupture with Québec after the approval of the Constitution Act of 1982, decided without the consent of Québec and with the support of the Supreme Court of Canada. Although these two events are closely connected one can understand the first as the logical cause of the second, which produced a series of (failed) attempts at modifying the constitution and recovering

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[106] Henrik Horn, Petros C. Mavroidis, Andre Sapir, 2009, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreement*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411066.

[107] Hatzopoulos, *op. cit., supra*, note 60.

[108] On SUFA see: Harvey Lazar, 2000, *The Social Union Framework Agreement: Lost Opportunity or New Beginning?*, at http://www.queensu.ca/sps/sites/webpublish.queensu.ca.spswww/files/files/Publications/workingpapers/03.pdf and Robert Gibbins, 2001, "Shifting Sands: Exploring the Political Foundations of SUFA", http://irpp.org/research-studies/policy-matters-vol2-no3/. For a comparison with the EU see: Theret, *op. cit., supra*, note 33.

[109] Russell, *op. cit., supra*, note 27.

[110] Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process: On Complexity as a Constitutional Theory of the EU*, (2012) *Yearbook of European Law*, pp. 198-226.

Québec. The agreements of Meech Lake (1987) and Charlottetown (1992), with a 'no' expressed by the people in a national referendum, seems to have slammed the door on mega-constitutional politics. The constitutional stasis caused by this situation has been partly softened thanks to the importance of flexible instruments such the intergovernmental agreements, providing an alternative pattern of evolution without reform.[111] This is what happened with some of the international Treaties concluded by Member States of the EU outside EU law, even the case of the TSCG. As we saw above, asymmetry was the price to pay in order to ward off a dangerous impasse, avoiding "going through the cumbersome and lengthy procedures of EU legislation".[112]

Concluding, asymmetry seems to be the natural response to the dialectic between integration and diversity in pluri-cultural contexts, even in the case of *sui generis* entities like the EU. In this respect the EU does not differ from fully-fledged federal systems. And just like in federal entities, asymmetry has been seen with suspicion by scholars in the EU. "Nothing new under the sun" one might say and perhaps, in this respect, the EU is not as special as the inventors of supranationalism would argue.

[111] "The most important changes of the Canadian federation since the Charlottetown Accord were achieved by intergovernmental agreements. This way, the regulations of inter-provincial trade have been coordinated and the spending power of the federal government was regulated in the Social Union Framework Agreement. The concerns of Aboriginal people have been dealt with in a number of agreements on land claims and self-government", Nathalie Behnke and Cesar Colino, *The Politics of Constitutional Change between Reform and Evolution*, in (2009) 39 *Publius*, pp. 228-229.

[112] See de Witte, *op. cit., supra*, note 98.

WHAT SHALL WE DO WITH LEGAL CONCEPTS? A EURO-ENGLISH-ROMANIAN PERSPECTIVE

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Abstract

Comprehensive studies dedicated to legal conceptualism seem to have been, for whatever reason, to a lesser degree the pet subject of the legal scientific field. One might argue that, owing to the fact that the "concept-theme" is as elusive and volatile as the "law-theme" itself, one could be inclined to approach the former with circumspection. Nonetheless, debates revolving around (legal) concepts, their relation to legal language and their role and function in law are highly topical due to the fact that the issue of conceptualism, i.e. concept formation, change and evolution is an intrinsic part of the process of law creation at the level of the European Union. EU law is a living mechanism; it undergoes constant changes and is being continuously fed into with 24 equally authentic language versions and 552 language combinations of legislation proposed and adopted. Against this background, terminological disarray is bound to exist and even persist. But, is there such a thing as conceptual disarray or incongruity allowed in multilingual law? How does language accommodate (difficult) legal concepts? The present article discusses some of the difficulties that translators and lawyer-linguists working at EU institutions come across in the process of translating legal texts. It engages first in a theoretical debate about legal conceptualism and gradually brings readers closer to some of the practical intricacies associated with the translation of law within the framework of the European Union.

Keywords: *legal conceptualism; legal concepts; legal translation; EU law*

Résumé

Apparemment, les études compréhensives dédiées à la conceptualisation juridique seraient, pour n'importe quelle raison, à un moindre degré, le sujet favori dans le

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domaine juridique de la recherche scientifique. Étant donné que le thème de la conceptualisation juridique est aussi élusif et versatile que celui de la loi, on pourrait argumenter que la seule approche qu'on serait tenté d'envisager envers celui-ci serait la circonspection. Pourtant, les débats concernant les concepts (juridiques), leur relation avec la langue juridique et leur rôle et leur fonction dans la règle de droit, sont vraiment des sujets d'actualité vu que la problématique de la conceptualisation (c'est-à-dire la création des concepts, les changements, les évolutions) est un élément intrinsèque du processus d'élaboration de la loi au niveau de l'Union Européenne. Le droit de l'Union est un mécanisme vivant ; il subit des changements constants et on l'entretient constamment par l'intermède de 24 versions linguistiques des textes, tous faisant également foi, et de 552 combinaisons linguistiques des projets de loi et de la législation adoptée. Dans ce contexte, les confusions terminologiques sont susceptibles de régner à cet égard et même de persister. Serait-il permis cependant que la confusion au niveau des concepts ou l'incohérence existe dans une législation multi-langue? Comment la langue s'adapte-t-elle aux concepts juridiques (difficiles) ? Cet article se propose d'analyser certaines des difficultés que les traducteurs et les juristes-linguistes qui travaillent aux institutions de l'UE rencontrent dans le processus de traduction des textes juridiques. L'article commence par une approche théorique de la conceptualisation juridique, se penchant ensuite progressivement sur les subtilités pratiques associées à la traduction des textes de la loi au niveau de l'Union Européenne.

Mots-clés: *conceptualisation juridique; concepts juridiques; traduction des textes juridiques; droit de l'Union*

Legal Conceptualism

The subject of legal conceptualism is not the appanage of a sole discipline, philosophy, or area of knowledge. That much is clear. For instance, depending on one's philosophical stance on the matter, one may choose to regard legal concepts as void formulas which merely provide terminological support (the positivist standpoint); as bearers of "substantive pre-legal content" (in natural law theory); or as "practical tools for a teleological and pluralistic theory of cognition and science" (according to hermeneutics).[2] Or, depending on the type of paradigm chosen – for instance, normativism or conceptualism – and, by taking into

[2] Stig Jørgensen, *On Concepts in Law*, in (2000) 40 *Scandinavian Studies in Law*, p. 135. See also Stig Jørgensen, *Lawyers and Hermeneutics*, in (2000) 40 *Scandinavian Studies in Law*, pp. 181-188.

account the relationship between concepts and norms, one may regard legal concepts as "little more than technical abbreviations representing legal norms",[3] or, on the contrary, one may acknowledge and defend the centrality of legal concepts to legal reasoning and interpretation and see them as "mental representations which are decisive for our understanding of the world".[4] Or, if one wishes to approach the issue from an interdisciplinary perspective, one may choose to make reference to *shared concepts*, i.e. "term[s] employed in different areas of discourse [which] share a core of extensions but might well have distinct intensions",[5] or may further break the analysis down into a distinction between concept and conception with reference, for example, to the controversial relationship between law, on the one hand and moral and political theory, on the other.[6]

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[3] Tomasz Gizbert-Studnicki, Mateusz Klinowski, *Are Legal Concepts Embedded in Legal Norms?*, in (2012) 25 *International Journal for the Semiotics in Law*, p. 554. Further to this issue, see also Alf Ross, *Tu Tu*, in (1957) *Scandinavian Studies in Law*, pp. 139-153. According to Alf Ross "[t]he sole function of legal concepts is to simplify normative information, as legal concepts are merely sets of inferential links […]. According to this standpoint on the law, one can fully describe the content of any legal system, even omitting the level of legal concepts, although such a description would be long and not transparent. The use of legal concepts may be a matter of convenience, rather than necessity and one could even imagine a system of law without any legal concepts." In Gizbert-Studnicki, Klinowski, *op.cit, supra*.

[4] Dietmar von der Pfordten, *About Concepts in Law*, in J. C. Hage, D. von der Pfordten (eds.), Concepts in Law (Dordrecht, Heidelberg, London, New York: Springer, 2009), p. 33.

[5] Ralf Poscher, *The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate*, in von der Pfordten, *op. cit., supra,* note 4, p. 101. For further reading on the relationship between law and other areas of knowledge, see Dan Claudiu Dănișor, *Juridicizarea conceptelor*, in (2011) 3 *Dreptul,* pp. 52-69; for a discussion on vague legal concepts and the incurrence of vagueness on the basis of the extension and intension of terms, see Ion Deleanu, *Repere ale controlului de convenționalitate, ale controlului de constituționalitate și ale controlului judiciar asupra conceptelor juridice „vagi" în materie procesual-civilă*, in (2013) 9 *Dreptul,* pp. 67-92.

[6] Poscher (*op. cit., supra,* note 5) examines the relationship between legal and extra-legal concepts by drawing an important distinction between concepts and conceptions. It is what Poscher calls 'the Midas quality of the law'. This means "[t]hat the law develops its own conceptions of concepts shared with other disciplines" (p. 102). Law does not simply borrow concepts used in other fields of knowledge and import them as such; instead, it "modif[ies] them to fit its specific needs" (p. 100). To make the distinction between concepts and conceptions clearer, Poscher uses the example of the blurry relationship between law and morality, i.e. between legal and moral concepts. Law may share concepts with other social sciences, but the "legal conceptions differ from their social sciences or moral counterparts [...]" (p. 106). Hence, that "law can inform itself about similar conceptions in moral or political philosophy" (p. 107) does not automatically lead to the conclusion that the law also employs the concepts used by those particular areas of knowledge. "Whatever

There exist as many ideological and philosophical vantage points from which legal concepts can be viewed as there are types of concepts in law. Thus, according to their function in law, one can distinguish between *concepts of law* or 'L-concepts', i.e. "concepts that are an integral part of law themselves"[7] and that "are used for stating the material legal content",[8] on the one hand, and *concepts about law* or 'J-concepts', i.e. concepts "that belong to the professional vocabulary of lawyers"[9] and "that are used for the juridical handling of the legal content",[10] on the other hand. Then again, one could also speak about *concepts in law* and consequently refer to four categories of legal concepts, according to the hierarchy of their level of abstraction, namely 'highly abstract legal concepts' (such as 'right', 'human dignity', or 'liberty'); 'rather highly abstract legal concepts' (such as 'contract', or 'negligence'); a 'medium level of abstraction'; and 'very concrete concepts' (which are usually encountered in technical norms and which normally belong to specialist fields).[11]

Of importance for the end point of this study is the relationship between legal conceptualism and practice and, specifically, between legal concepts and the process of their translation and transposition into national law in the context of the European Union. Why is practice important and how does it add value to the understanding and proper use of legal concepts? In spite of the differences of opinion on the matter of the role of practice in the understanding of law,[12] there are at least several strong arguments in

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insights such a consideration of conceptions in other areas of discourse might bring about, these insights will always have to be built into a specific legal conception that takes into account the specific legal history, methodology, forms of argumentation andinstitutional setting of the law" (*ibid*.).

[7] Ake Frändberg, *Legal Concepts*, in E. Craig (ed.), Routledge Encyclopedia of Philosophy (London, New York: Routledge, 1998), p. 491.

[8] Ake Frändberg, *An Essay on Legal Concept Formation*, in von der Pfordten, *op. cit., supra,* note 4, p. 2.

[9] Frändberg, *op. cit., supra,* note 7.

[10] Frändberg, *op. cit., supra,* note 8.

[11] von der Pfordten, *op. cit., supra,* note 4, pp. 29-30.

[12] With reference to this, see the Hart-Dworkin debate in Dennis Patterson, *After Conceptual Analysis: The Rise of Practice Theory*, in von der Pfordten, *op. cit., supra,* note 4, p. 123. According to Patterson, in understanding the law "Dworkin privileges 'theory' over practice". On the contrary, Hart believes that the answer to understanding law lies with practice. As such, "Hart explores the social dimensions of legal practice, rooting his positivism in the critical, reflective attitudes of institutional participants in law".

favour of the 'practice theory'. First, "it is our practices that give rules and norms their meaning and hence, their authoritative status in our practices".[13] The meaning of concepts is context-dependent and almost always the product of practice and constant interpretation. In translating EU law, actors assume a proactive role, i.e. the translator becomes the law creator, since all language versions are equally authentic binding law. Out of translation practices rises the meaning of legal concepts; and out of the meaning concepts have been endowed with, develops the law. Second, "law is guidance through language […]".[14] Languages, similarly to law, are vibrant organisms, marked by a process of continuous change, governed by the practices of the day. This aspect is all the more significant in a multilingual legal setting where it is often the case that the investment of legal concepts with meaning is the privilege of the translator. Third, law occurs in practice, becomes perceptible through judgements. It is the courts that make the law real, they are the ones that apply the concepts and throughout which they become legal concepts in the narrower sense. For instance, national courts revert to the concepts developed by the European Court of Justice. The Court, hence, is an active player in the field of concept formation. Even more so, if one takes into account the fact that cases lodged yearly are translated into all 24 official languages (either via direct translation or via the 'pivot' system), and that in 2015 alone, the number of pages translated rose to 1,113,427 million.[15]

Peculiarities of Legal Concepts: 'Culture-specificity', Meaning and Interpretation

There is virtually no consensus on what exactly a concept is. "Psychologists tend to use 'concept' for internal representations, for example, images, stereotypes, words that may be vehicles for thought in the mind or brain. Logicians and formal semanticists tend to use it for sets of real and possible objects, and functions defined over them; and philosophers of mind have variously proposed proper-properties, 'senses', inferential rules or discrimination abilities".[16]

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[13] Patterson, *op. cit., supra,* note 12, p. 125.

[14] Brian B. Bix, *Legal Interpretation and the Philosophy of Language*, in P. M. Tiersma, L. M. Solan (eds.), The Oxford Handbook of Language and Law (Oxford: Oxford University Press, 2012), p. 145.

[15] Presentation on "CJEU and Multilingualism", held at CJEU, December 2016.

[16] Georges Rey, *Concepts*, in Craig, *op. cit., supra,* note 7, p. 505.

Regardless of the general lack of agreement over the definition of concepts, their case in legal language is a special one and thus deserves particular attention. Law is essentially a social phenomenon, it is the creation of humans, hence the intimate relationship that develops between the law of a society and the society itself, i.e. its culture, mores and mentalities. There is something quintessentially unique in the influence that a certain legal culture exerts on the development of the language of law in the respective legal system. Because of the interconnection between the language of the law and the culture into which is born and out of which it subsequently develops, "legal rules differ in different legal orders. Legal concepts also differ, because in the final analysis they are crystallisations of legal rules".[17]

This is what literature has referred to as the 'culture-specificity' of legal concepts. Hence, the difficulties associated with the transfer or 'transplantation'[18] of legal concepts from one legal system to another. Though there tends to be more consensus regarding the meaning and equivalence of concepts pertaining to similar legal families – for instance, […]the legal concepts of England and the United States share much in common: English law was applied in the British colonies, and aspects of it retained following independence and the creation of the United States"[19] – this is by no means a generally applicable rule, since divergences are bound to occur within similar legal families, within the same legal system and even between different branches of law.

In some cases, there exists no linguistic counterpart of a concept in the target legal system into which it is being imported, which may further lead to discussions revolving around 'conceptual misunderstandings' and the often tense relationship between concept and term. Before clarifying this point, a brief explanation of the latter notion is required. Thus, "while the word *concept* refers to abstract figures created by the human mind, that is entities formed by features which are peculiar to a matter or thing, the

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[17] Heikki E. S. Mattila, *Comparative Legal Linguistics : Language Of Law, Latin And Modern Lingua Francas* (Farnham, Surrey, England: Ashgate, 2012), p. 137.

[18] With regard to the issue of 'legal transplants' in Romanian literature, see, for instance, Manuel Guțan, *Legal Transplant as Socio-Cultural Engineering in Modern Romania*, 2011, available at SSRN: https://ssrn.com/abstract=2207718 or http://dx.doi.org/10.2139/ssrn.2207718.

[19] Mattila, *op. cit., supra,* note 17.

word *term* designates the names of concepts, their external expression".[20] There is often an imbalance between concepts, on the one hand, and their linguistic expressions, on the other hand. Where there are differences between concepts of two legal systems, "the semantic domains of legal terms do not correspond with one another".[21] This is particularly true in the context of the "new pan-European law",[22] whose conceptual apparatus is "expressed either by new legal terms [the so called Euro-speak or jargon] or traditional terms used in a particular EU sense".[23]

Meaning is a focal point of debate, especially in multilingual legal contexts as the one mentioned above. "[C]oncepts are presumed to serve as meanings of linguistic items, underwriting relations of translation, definition, synonymy, antinomy and semantic implication".[24] But, what exactly does one have in mind when one refers to the meaning of legal words? The matter is itself elusive and obscure and calls for an interplay between semantics and pragmatics, contextualism and intentionalism, indeterminacy and interpretation. Several observations have to be made at this point.

First, meanings are never fixed, or stable. Quite the contrary, they evolve, adapt and fluctuate according to the particulars of the time, of a society or culture. This is particularly relevant for the application of the law to specific situations. Thus,

> when either legal or social circumstances have changed since a law's enactment, courts often will often take these changes into account, sometimes having them trump the intent of the enacting legislature in favour of an interpretation that is more responsive to the present.[25]

The interpretation of law should, hence, be made in the light of contemporaneity, by taking into account transformations in law and legal language, by adapting to current trends and changes; proof of this is

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[20] Heikki E. S. Mattila, *Legal Vocabulary*, in Tiersma, Solan, *op. cit., supra,* note 14, pp. 27-28.
[21] Mattila, *op.cit., supra,* note 17.
[22] Mattila, *op.cit., supra,* note 20, p. 29.
[23] *Ibid.*
[24] Rey, *op. cit., supra,* note 16, p. 507.
[25] Lawrence M. Solan, *Linguistic Issues in Statutory Interpretation*, in Tiersma, Solan, *op. cit., supra,* note 14, p. 95.

offered, for instance, by the language of the European Convention on Human Rights and Fundamental Freedoms and reflects into decisions taken by the European Court of Human Rights. From the Convention perspective, the question here is essentially how to ensure that the Convention, which was opened for signature more than sixty years ago, remains relevant in today's society. In interpreting the Convention, the Court relies on the rules set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969.[26] In particular, in line with the teleological approach indicated by Article 31 para. 1 of the Vienna Convention, the Court has long laid emphasis on the need to ensure that the Convention is interpreted consistently with its stated object and purpose of protecting individual human rights and maintaining and promoting the ideals and values of a democratic society.[27] At the same time, the Court has recognised that the scope of the rights set out in the Convention is not, as it were, suspended in time, but is liable to evolve as societal and political attitudes change. Since the Convention was opened for signature, there have been significant shifts in attitudes regarding, for example, homosexuals,[28] transsexuals[29] and children born out of wedlock[30] and numerous scientific and technological developments (such as the advent of the Internet[31] and techniques such as in vitro fertilisation[32] and DNA sampling[33]). Few, if any, of these changes would have been contemplated by the drafters of the Convention. Yet it would be unfortunate if the language of the Convention was considered immutable, incapable of adapting to modern conditions. In order to overcome this problem and to fulfil the Convention's underlying object and purpose, the Court adopted at an early date a dynamic or evolutive interpretation of the

[26] ECtHR, *Golder v. the United Kingdom,* 21 February 1975, § 25, Series A nº 18.

[27] Article 31 § 1 of the Vienna Convention provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

[28] ECtHR, *Dudgeon v. the United Kingdom,* 22 October 1981, Series A nº 45 (criminalisation of homosexual activities); ECtHR, *Vallianatos and Others v. Greece [*GC*],* nº 29381/09 and 32684/09, ECHR 2013; ECtHR, *Oliari and Others v. Italy,* nos. 18766/11 and 36030/11, 21 July 2015 (both concerning legal recognition of same-sex unions).

[29] ECtHR, *Christine Goodwin v. the United Kingdom* [GC], nº 28957/95, ECHR 2002-VI.

[30] ECtHR, *Marckx v. Belgium,* 13 June 1979, Series A nº 31.

[31] ECtHR, *Delfi AS v. Estonia* [GC], nº 64569/09, ECHR 2015.

[32] ECtHR, *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I; ECtHR, *Parrillo v. Italy* [GC], nº 46470/11, ECHR 2015.

[33] ECtHR, *S. and Marper v. the United Kingdom* [GC], nº 30562/04 and 30566/04, ECHR 2008.

Convention as a "living instrument".[34] This doctrine holds that the Convention is a living instrument which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States at the present time, not when the Convention was first opened for signature. Prevailing ideas can be determined from an examination of relevant standards issued by regional and international bodies (such as the Council of Europe and the United Nations),[35] and a comparative analysis of the domestic laws of the Contracting States.[36] Where a sufficient consensus is detected, the Court may decide that this is evidence that the content or scope of a particular Convention right has evolved".[37]

Second, legal language lies at the intersection between indeterminacy – which brings forth the "argument that meaning [is] always uncertain, and where it appear[s] certain it [is] due only to the agreement of elite groups"[38] and determinacy. Beyond the 'core of certainty' all legal concepts share, there is a 'penumbra of uncertainty'[39] which only augments the problem of vagueness in legal language.

Third, legal interpretation comports a latent tension between 'word meaning' and 'speaker meaning', that is between the "value of authority – giving priority to the choices (and preferences and intentions) of the law-maker – and the rule-of-law values – giving priority to 'word meaning', 'plain meaning', or the best current theory of an enactment' s concepts and categories".[40] Ultimately, at least from inferences deduced from this last point, understanding a legal concept seems to be neither the prerogative of linguistics, neither that of legal interpretation. The issue at hand is, rather,

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[34] ECtHR, *Marckx,* § 58.

[35] *See* ECtHR, *Christine Goodwin,* § 85: "The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals"; see also ECtHR, *Demir and Baykara v. Turkey* [GC], n° 34503/97, § 85, ECHR 2008, in which the Court's analysis regarding trade-union rights was based largely on international standards.

[36] The Court's conclusion that attitudes to "illegitimate" children and homosexuality had changed was based mainly on a comparative-law analysis in cases such as *Marckx,* § 41 and *Dudgeon,* § 60.

[37] Anonymous interviewee, July 2015.

[38] In Bix, *op.cit., supra,* note 14, p. 147.

[39] Herbert L. A. Hart, *The Concept of Law*, 2nd Ed.(Oxford: Clarendon Press, 1994), p. 123.

[40] In Bix, *op. cit., supra,* note 14, p. 153.

much more complicated and delicate. Understanding a concept presupposes subtracting its meaning out of an intricate web that involves "ideas about intention versus extensions, the interaction of meaning and reference, speakers' meaning versus word meaning, different levels or types of intentions, the problems of collective intentions, social and institutional facts, etc. […]".[41]

Fourth, all law is interpretation and "[a]ny good account of the meaning and interpretation of the language used in making law needs to deal with ways in which its legal effect depends on the context of its use".[42] Legal concepts are context-dependent; their meaning remains obscure and even irrelevant outside a context. Thus, in the absence of a given context, such nouns as 'right', 'obligations' or 'property' are void conceptual categories, or 'incomplete symbols'.[43] Thus, "it is the context of an *utterance* that gives a word a meaning".[44] This is particularly important in translating multilingual law. Seeking equivalents for given legal concepts and interpreting given legal texts involves a process of understanding and researching a particular context and keeping an acute awareness of the "'[p]ragmatic' effects of language use". Doing otherwise would just simply mount to a poor attempt to 'hammer away single words'.[45]

Legal Concepts in Practice: Challenges of Multilingualism and Translation in the EU

Law is created while being translated. In the context of the European Union,

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[41] In Bix, *op. cit., supra,* note 14, p. 155. Further, at a deeper level of analysis, one could also draw a "distinction between the meaning of words and understanding their meaning […]". For reference to this aspect, see Jaap Hage, *The Meaning of Legal Status Words,* in Hage, von der Pfordten, *op. cit., supra,* note 4, p. 59.

[42] Timothy Endicott, *Law and Language*, in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, 2016, available at https://plato.stanford.edu/archives/sum2016/entries/law-language/.

[43] In Ross Harrison, *Bentham* (London, Boston, Melbourne: Routledge & Kegan Paul, 1983), p. 66.

[44] Timothy Endicott, *Law and Language*, in J. Coleman, S. Shapiro (ed), The Oxford Handbook of Jurisprudence & Philosophy of Law, (Oxford: Oxford University Press, 2002), p. 947.

[45] Herbert L. A. Hart, *Definition & Theory in Jurisprudence. An Inaugural Lecture delivered before the University of Oxford on 30 May 1953* (Oxford: Clarendon Press, 1959), p. 8.

> language versions are not regarded as 'translations' but as authentic original language versions. […] An essential consequence of this is that language versions *are* the law. They are not just information about legislation applicable elsewhere but are equally authentic and legally binding in all Member States.[46]

Translation, hence, becomes the arena onto which legal concepts are born and die, clash with one another, are interpreted and acquire or loose meaning. If ever an understanding of legal concepts is to take place, then this is the environment where their formation and evolution should be studied. And, if ever a solution to problems raised by multilingualism, system- and culture-specificity and lack of equivalence is to be found, then this is the environment where such challenges can be analysed.

One of the biggest challenges translators and lawyer-linguists face is the 'system-specificity of legal terminology', each term relating to a particular conceptual 'organic ecosystem', which subsequently leads to a situation where no one-to-one relations exist.[47] Hence, the conceptual confusions and misunderstandings that are bound to occur, in spite of the official guidelines and examples of good practice[48] which plead for the clarity, straightforwardness and simplicity of legal language, but which, nevertheless, remain the equal subject of much interpretation themselves.

This is no longer a matter of translating between different legal languages but rather, one of translating between different legal systems.[49] As such,

> difficulties are more likely to arise when dealing with concepts originating from the domestic legal systems. The first issue for the translator will be to

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[46] Ingemar Strandvik, *On Quality in EU Multilingual Lawmaking*, in S. Šarčević (ed.), *Language and Culture in EU Law: Multidisciplinary Perspectives* (London, New York: Routledge, 2016), available at https://books.google.lu/books?id=I921CwAAQBAJ&pg=PT152&dq=authentic+versions+legislation&hl=de&sa=X&ved=0ahUKEwj7fXj4tvQAhXCKywKHVsdDy8Q6AEISjAG#v=onepage&q=authentic%20versions%20legislation&f=false.

[47] On the basis on Ingemar Strandvik's presentation, "EU terminology: business as usual or new approaches", held at the VIII EAFT Terminology Summit, Luxembourg, 14-15 November 2016.

[48] See, for instance, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* (Luxembourg: Publications Office of the European Union, 2015), available online at http://eur-lex.europa.eu/content/techleg/EN-legislative-drafting-guide.pdf.

[49] *Ibid*.

> identify the precise nature of the concept in the domestic system. Having established the nature of the concept, the translator will then seek an equivalent in the target language. This will normally be a functional equivalent. For example, a French "société anonyme" has functional similarities with an English "public limited company", even though there are a number of differences in the way they are structured, managed and run. […] In the absence of a satisfactory functional equivalent, it may be necessary to create a descriptive phrase indicating the nature of the concept (while adding the original term in italics). For instance, the classification of criminal offences, the names of criminal offences and legal remedies may be translated literally or given a succinct descriptive name".[50]

Perils associate with the exact transposition of legal concepts from the target language and the legal order of a member state to the legal terminology of the language into which the translation is drafted, without the alteration of their substance. A useful example in this sense is the principle of 'legal certainty' (from the German 'Rechtssicherheit') which, due to the influence of the English language, is often erroneously translated into Romanian as 'certitudine juridică' (the correct Romanian equivalent would be 'securitate juridică' – 'securitate' means much more than 'certitudine').[51]

Amidst the 24 official and working languages of the Union, English gradually rises as the *lingua franca*. Concerns have already been addressed, with a view to linguistic differences and, most importantly, in respect of incongruities between legal cultures, i.e. 'common law' and 'continental law'. The translation of law is not a value-free process; language always carries across a whole array of mentalities, cultural peculiarities, histories and identities. There are three questions which could be posed here: firstly, is it possible to encompass in the [legal] word the translation of [legal] worlds?; secondly, could one lingua franca – in the case of the EU, English – appease inherently different [legal] cultures, identities and mentalities?; thirdly, does the promotion of one common language automatically imply a common understanding of law(s)? All three questions could be answered negatively.

[50] Anonymous interviewee, July 2015.

[51] On the basis of a Romanian language version. Anonymous interviewee, November 2016.

> The promotion of one common language does not automatically lead to a common understanding of law. It rather leads to a consolidation of misconceptions and stereotypes as different speakers and participants have different levels of language skills. Over the course of time it may lead to a common understanding, but the trade-off will be the development of a real "lingua franca" or standard or pidgin [legal] English that will gradually replace the more sophisticated and organically-grown [legal] English.[52]

An interesting point to be made here is that some specialists do indeed believe that it is not the influence of English that translators and lawyer-linguists should fear but rather the rise of a so called 'Euro-English' dialect, a type of hybrid monster that is being fed by non-native speakers who draft original documents and, consequently, bear the responsibility of transferring legal content, but who, consciously or not, also carry across their own understanding of law, in the light of their own legal education and environment. It is throughout this process that the meaning of legal concepts is most likely bound to alter considerably; and, any meaning in change may in turn trigger unwanted legal consequences. Lengthy legislative drafts may contain several variants of terms referring to the same concept; time constraints often make it impossible for drafters to review pages before sending them off to translation.[53] Nevertheless, in these cases as well, it is still the translator's job to deliver a good quality translation and ensure that efforts are put into achieving conceptual uniformity in a document.

There is no such thing as perfect translation. What matters more is the guarantee of conceptual harmony throughout the translated texts. There are nonetheless cases when translation fails to accomplish this task, when, for instance, there exist different translated versions of the same term, between which there is no compatibility in the sense of their equivalence. Thus, Article 101 of the Treaty on the Functioning of the European Union mentions the term 'asociere de întreprinderi', while Regulation n° 1/2003 speaks about 'asociațiile de întreprinderi'. Both terms are translations into Romanian of the French legal concept of 'association d'entreprises'. Only

[52] Anonymous interviewee, August 2016.

[53] On the basis on Ingemar Strandvik's presentation, "EU terminology: business as usual or new approaches", held at the VIII EAFT Terminology Summit, Luxembourg, 14-15 November 2016.

that the two Romanian terms, namely 'asociere de întreprinderi', on the one hand, and 'asociațiile de întreprinderi' are not equivalent. 'Asociere' is the genus, and 'asociația' is the species. More importantly, depending on which one of the terms is used, significant legal consequences are triggered. Thus, the application of the norms of competition to 'asocieri de întreprinderi' (which does not take the form of the Romanian 'asociații') could be contested, if Regulation nº 1/2003 is invoked, due to the fact that it may be held that it is exempt from application.[54]

This example also serves as an illustration of the so called 'terminology tetrahedron', i.e. in translation, it always matters that terms refer to the same concept, it does not matter if terms are similar with one another.[55]

In law, especially in a multilingual context, conceptual harmonization is a must, though a continuous challenge as well. The challenge lies in the conceptual complexity of legal harmonization. EU law is incorporated into the national law of the member states and, though EU law is the same for all states, the relation between European Union law and national law is not the same.[56] Achieving conceptual homogeneity may be a demanding task.

> It must […] be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in community law and in the law of the various member states[57].

There is a tricky balance between the creation of new terms – which might only exacerbate the obscurity and inaccessibility of the legal Euro-jargon – and the use of domestic terms – which might be familiar to users, but which increase the risk of confusion due to potential shifts in meaning or

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[54] On the basis of a Romanian language version. Anonymous interviewee, November 2016.

[55] On the basis on Ingemar Strandvik's presentation, "EU terminology: business as usual or new approaches", held at the VIII EAFT Terminology Summit, Luxembourg, 14-15 November 2016.

[56] *Ibid.*

[57] Case 283/81 (CILFIT), CJEU, available at http://curia.europa.eu/juris/celex.jsf?celex=61981CJ0283&lang1=en&lang2=RO&type=TXT&ancre=.

references to completely different EU specific concepts. To all this, adds the 'branding or trade mark argument', which states that it is sometimes preferable to leave terms in their original language, without even translating them, which only adds to the cryptic character of the terminological and conceptual melange of EU legal language.

Conclusions

> [W]e live in a time of unparalleled effort to create supranational legal systems that cut across legal cultures and national boundaries and to harmonize the laws of individual legal systems so that cross-border transactions are not impeded by the fact that the participants do not communicate in the same language, and at times do not even share the same legal concepts. […] All of this creates a myriad of challenges, often engaging translation theorists, comparative law experts, and those trained in linguistics.[58]

The problems presented above represent only a small portion of the challenges translators and lawyer-linguists face in the process of translating EU law. Nonetheless, they also provide food for thought in the area of legal conceptualism, particularly in the sense of understanding how legal concepts and terms come into existence, who creates them, on the basis of which criteria and rationales and with what purposes in mind. A multi-angled context serves for a better and deeper reflection on the evolution of legal language and on the relationship between law and language. Concepts, including legal ones, are abstract categories, *inventions*, which are moulded, i.e. created, translated, and interpreted, by different actors. If there are challenges to be overcome, the solution lies with both the jurist and the linguist, since a network of knowledge which brings together a panoply of influences, be they language, law or otherwise related, does not represent a threat to the specificity of law or, in this case, to the specificity of legal conceptualism, but rather strips it off from its dogmatism.

[58] Peter M. Tiersma, Lawrence M. Solan, *Introduction*, in Tiersma, Solan, *op. cit., supra,* note 14, pp. 2-3.

THE LEGAL STATUS OF ASSISTED HUMAN REPRODUCTION IN ROMANIA. A BRIEF DISCUSSION ON SURROGACY

Elena BRODEALĂ*

"Now Sarai, Abram's wife, had borne him no children. She had a female Egyptian servant whose name was Hagar. And Sarai said to Abram, "Behold now, the Lord has prevented me from bearing children. Go in to my servant; it may be that I shall obtain children by her." And Abram listened to the voice of Sarai. So, after Abram had lived ten years in the land of Canaan, Sarai, Abram's wife, took Hagar the Egyptian, her servant, and gave her to Abram her husband as a wife. And he went in to Hagar, and she conceived. "

Genesis 16:1 - 16[1]

Summary

This article discusses the legal situation of assisted reproduction in Romania. It explains the main legal provisions in this field and how assisted reproduction came to be regulated in Romania. Moreover, the article also aims to illustrate some of the reasons that led to a relative lack of regulation in the domain of human reproduction in Romania and why a legal framework in this domain is needed by discussing the specific case of surrogacy. During State Socialism, Romania had one of the harshest anti-abortion legislations in the history of Europe. It is believed that between 1966 and 1989, the period during which this legislation was in place, around 10.000 women died because of illegal abortions, 2.000 were imprisoned and many others had to deal with serious health problems for the same reason. After the fall of State Socialism and after such a strong invasion of the State in the private lives of its citizens, Romanian law-makers were rather reticent to take a position vis-à-vis the power of the State to intervene in the domain of human reproduction. This inevitably resulted in a legislative gap in this field, which includes the area of

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[1] See text on-line at Bible Study On-line: http://biblia.com/bible/esv/Gen%2016.1-16.

assisted reproduction. As this article shows, there were several attempts to create a more comprehensive legal framework for assisted reproduction. However, none of these were appropriate for the complexity of the questions raised by assisted reproduction. Apart from the problematic content of the legislative proposals, discussing them and assisted reproduction as means of counteracting the current demographic crisis existent in Romania is also subject to criticism. This is because access to assisted reproduction is rather exclusive (and exclusionary) and it is generally granted to those who are informed about it and who can afford it. In the last part, the paper brings to light some of the problems that arise in practice because of the current legislative gap. To do this, the paper highlights how Romanian courts have dealt so far with surrogacy that occurs in Romania although no regulation surrounding it exists. Finally, the author concludes with a call for further inter- and multidisciplinary research (e.g. feminist, medical, legal, ethical) regarding the issues connected to assisted reproduction in Romania and for elaborating a proper legal framework in this area to prevent any kind of abuses and inequalities.

Keywords: *reproductive rights, assisted reproduction, surrogacy, Romania, Socialist legacy*

Résumé:

Cet article interroge la situation juridique de la procréation médicalement assistée en Roumanie. Il détaille les principaux dispositifs juridiques existant dans ce domaine et retrace l'histoire de la réglementation de la reproduction médicalement assistée en Roumanie. Il vise également à présenter certaines des raisons ayant conduit à un manque de réglementation dans le domaine de la reproduction humaine dans ce pays. Au cours du "Socialisme d'État", la Roumanie avait une des législations anti-avortement les plus "sévères" de l'histoire de l'Europe. On estime qu'entre 1966 et 1989, période durant laquelle cette législation a été mise en place, environ 10 000 femmes sont mortes à cause d'avortements illégaux, 2 000 ont été emprisonnées et beaucoup d'autres ont fait face à de graves problèmes de santé pour la même raison. Après la chute du "Socialisme d'Etat", caractérisé par une forte implication de l'Etat dans la vie privée des citoyens, les législateurs roumains étaient plutôt réticents à prendre une position vis-à-vis du pouvoir de l'Etat à intervenir dans le domaine de la reproduction humaine. Il en a résulté un inévitable "vide législatif", y compris dans le domaine de la procréation médicalement assistée. Comme le démontre cet article, plusieurs tentatives ont

voulu créer un cadre juridique pour la procréation médicalement assistée. Selon l'auteur, aucun d'entre eux ne permettait cependant de répondre à la complexité des enjeux soulevés par la procréation médicalement assistée. En dehors de leur contenu problématique, penser ces propositions législatives comme remède à la crise démographique actuelle en Roumanie est également sujet à de nombreuses critiques, notamment parce que l'accès à la procréation médicalement assistée est plutôt exclusif, et généralement accordé à ceux qui en connaissent l'existence et en ont les moyens. Dans la dernière partie, l'article soulève les problèmes que pose ce vide législatif dans la pratique. Pour cela, l'auteur examine le traitement fait par les tribunaux roumains de la gestation pour autrui, qui existe pour l'instant en Roumanie bien qu'aucune réglementation ne l'encadre. L'auteur conclut par un appel à une recherche interdisciplinaire et multidisciplinaire (féministe, médicale, juridique, éthique) sur les questions liées à la procréation médicalement assistée en Roumanie et à l'élaboration d'un cadre juridique adéquat dans ce domaine pour empêcher tout type d'abus et d'inégalités.

Mots-clès: *droits reproductifs, procréation médicalement assistée, gestation pour autrui, Roumanie, Héritage socialiste*

1. Introduction

When it comes to reproductive rights,[2] Romania is perhaps one of the most discussed cases due the anti-abortion legislation passed by the Communist leader Nicolae Ceaușescu, probably one of the toughest legislations of this type in the history of Europe.[3] During the 23 years' existence of Decree 770/1966[4] (between 1966 and 1989), it is estimated that around 10.000

[2] When talking about reproductive rights, one has to bear in mind that these do not refer only to the idea of not having babies (i.e. abortion) but also to the right of having a baby when one cannot or does not want to do so "naturally". In other words, within the purpose of this paper reproductive rights should be considered according to the definition provided by The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in Article 16 (1) (e) as encompassing "the […] rights to decide freely and responsibly on the number and spacing of […] children […]".

[3] See Gail Kligman, *The Politics of Duplicity: Controlling Reproduction in Ceausescu's Romania* (Berkley: University of California Press, 1998).

[4] The original decree in Romanian can be found in Elena-Simona Gheonea,Valentin Gheonea, *Statutul femeilor în legislația României comuniste* in C.L. Olteanu, E.-S. Gheonea, V. Gheonea (eds.), Femeile în România comunistă: studii de istorie socială, (București: Politeia-SNSPA, 2003), pp. 187–188.

women died, 2.000 women ended up in prison and many other faced serious health problems due to illegal abortions.[5] It is not surprising then that one of the first measures taken after the outbreak of the Romanian Revolution[6] and the execution of the Ceaușescus[7] was to abolish Decree 770.[8] Yet, the fall of State Socialism brought not only the de-regulation and the privatization of the reproductive sphere,[9] but it also brought the first In Vitro Fertilization ('IVF') clinics in Romania. The first child conceived through IVF in Romania was born on February 6, 1996, when there was no regulation on assisted reproduction. Until 2006 there had been no legal framework on assisted reproduction, meaning that the IVF clinics functioned for a very long time on the basis of their internal regulation or, at most, on the basis of the deontological code of the medical profession.[10]

Apart from the novelty of Assisted Reproduction Technologies ('ARTs') and the fact that most of the times technology advances much faster than the law, scholars like Enikő Demény argue that in the Romanian context this lack of regulation in the field of assisted reproduction might have been caused by two other factors. On the one hand, it might have been caused by the overall reticence of the Romanian decision-makers to re-open the debates on the role and the position of the State in matters of reproduction, given the disastrous consequences of Ceaușescu's pro-natalist policies. On

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[5] Abortion in Communist times was allowed in very limited circumstances. In all cases, a special commission had to approve the abortion. In case of an emergency, doctors were prohibited to perform an abortion unless they had notified the prosecutor in writing. The task of the prosecutor was to guard against illegal abortions. In case illegal abortions were discovered, the women and the ones who helped them were subject to penal sanctions. These sanctions were spelled out in Decree 771/1966 and later in the 1968 Penal Code in Articles 185 – 188. For example, if discovered, a pregnant woman who aborted risked spending between 6 months and 2 years in prison and the person who helped a woman performing an abortion risked up to 14 years of imprisonment.

[6] 16th of December 1989.

[7] Since they ruled together, Nicolae Ceaușescu was executed together with his wife, Elena.

[8] Point 8 and 12 of *Decree nº 1 from 26th of December 1989* on-line: http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=1.

[9] By using the phrase 'the privatization of the reproductive sphere', I am referring explicitly to the fact that, by legalizing abortion, the decision of becoming a mother or not was regarded as a woman's private matter, at least in the eyes of lawmakers.

[10] See Michal Rachel Nahman, *Romanian IVF: A Brief History through the 'lens' of Labour, Migration and Global Egg Donation Markets*, in *Reproductive Biomedicine & Society Online*, Symposium: IVF - Global Histories, 2 (June 2016), pp. 79–87.

the other hand, it might have been connected to the process of liberalization and privatization of the healthcare system that followed after the fall of State Socialism.[11]

It was not until 2006 that assisted reproduction started to be regulated in Romania.[12] Currently, provisions regarding assisted reproduction can be found in Law 95/2006 regarding the reform of the healthcare system and in the New Romanian Civil Code of 2009, adopted through Law 287/2009, yet serious legislative lacunae still remain. The purpose of this paper is to briefly outline the legal framework of assisted human reproduction in Romania and to point out a few of the legal and social problems left uncovered by the current Romanian law by using surrogacy as a case study. Towards this aim, I will proceed in three steps. First, I will briefly discuss the context in which assisted reproduction came to be regulated in Romania in 2006 by Law 95/2006 and the concrete provisions of Law 95/2006 and of the New Romanian Civil Code. Then I will briefly point to the main attempts to regulate this field and to the main controversies surrounding these attempts - for example, the social groups targeted when assisted reproduction was being discussed as a means of counteracting Romania's current demographic crisis.[13] Finally, by discussing the particular case of surrogacy I aim to further illustrate some of the most difficult issues that come up in practice due to the poor legal framework in the field of assisted reproduction in Romania.

2. The Current State of Regulation

A. Law 95/2006 Regarding the Reform of the Healthcare System

In Title IV Law 95/2006 regarding the reform of the healthcare system, adopted in 2006, aimed to transpose two directives of the European

[11] Enikő Demény, *Medically Assisted Reproduction: Challenges for Regulation in Romania,* in Judith Sándor (ed.), *Studies in Biopolitics*, (Budapest: Center for Ethics and Law in Biomedicine, 2013), p. 94.

[12] *Ibid*.

[13] See *Evoluția natalității și fertilității în România* [The Evolution of Birth-Rate and Fertility in Romania] (Institutul Național de Statistică/ Romanian National Statistics Institute, 2012), http://www.insse.ro/cms/files/publicatii/Evolutia%20natalitatii%20si%20fertilitatii%20in%20Romania_n.pdf.

Union[14] and it created for the first time in Romania a legal framework for assisted reproduction. As I will discuss below, Law 95/2006 would probably not have been perceived as regulating the area of assisted reproduction without the intervention of the European Union ('EU'). The provisions of Law 95/2006 do not tackle assisted reproduction *per se*, but just like the EU directives, they regulate the transplant of human organs, tissues and cells. The provisions that apply to assisted reproduction are those that regard the transplant of human cells. The provisions of the law are quite general. They mainly refer to the institutional structure surrounding transplantations, some general conditions under which a transplant can be performed, the financing of these transplants and the sanctions for non-compliance with the law.[15]

Even if, as I argue, the provisions that apply to assisted reproduction were adopted based on the influence of the EU, it has to be mentioned that human reproduction is generally a non-harmonization domain at the EU level. The area of reproductive rights raises a wide range of ethical and moral issues on which there is no consensus among the EU Member States. For example, when it comes to reproductive rights in what I call their 'negative sense' (i.e. not having babies), it is clear that the power to regulate them belongs exclusively to the EU Member States. Representative in this sense is the fact that, currently, four Member States (Poland, Ireland, Malta and Cyprus) prohibit abortion on request.[16] Still, this is not necessarily the case with reproductive rights in their positive sense of enabling individuals to become parents, and more specifically, to become parents using ARTs. Given that assisted human reproduction involves cells donation Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and

[14] One of them was *Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.* The other directive refers only to the transplant of human organs and it is *Directive 2010/53/EU of the EU Parliament on standards of quality and safety of human organs intended for transplantation*. The fact that these provisions aim to transpose two EU directives is explicitly mentioned at the end of Title VI of Law 95/2006. Romania had been a Member State of the EU since 2007.

[15] See Title VI of Law 95/2006.

[16] See Simona Maria Stănescu, Mirela Nemțanu, *Comparative Analysis of Abortion Liberalisation in the European Union*, in (2015) 16:1 *Calitatea Vieții*, pp. 3–15.

distribution of human tissues and cells becomes applicable in this field. This is one of the directives transposed in Law 95/2006, which, as stated above, contains the first legal provisions to apply to assisted reproduction in Romania. To understand how Law 95/2006 came to be applied to assisted reproduction, on overview of the context of its adoption has to be presented.

The European Commission started criticizing Romania for the failure to transpose the *acquis* on blood, tissues and cells in the 2004 Regular Report on Romania's accession to the EU.[17] Furthermore, in 2005 due to a serious scandal on transnational paid "ova donations" from Romania to the UK,[18] the pressure placed on Romania to adopt legislation regarding the conditions in which reproductive cells should be harvested and transplanted intensified. In March 2005, the European Parliament adopted a Resolution on the trade in human eggs cells[19] in which it made explicit reference to the Romanian-British case. In this Resolution, the Parliament also mentioned that it wanted "to see egg cell donation […] strictly regulated in order to protect both donors and recipients and to tackle all forms of human exploitation".[20] In the same year, in the Regular Report on Romania's progress towards accession, the Commission continued to criticize the failure of Romanian authorities to transpose the *acquis* in the field of human cells. At the same time, the Commission also underlined that Romania should have paid "particular attention"[21] to combating trade in human egg cells and should have ensured respecting "the principle of voluntary and unpaid donations of tissues and cells".[22]

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[17] The Regular Reports are the reports through which the European Commission gave Romania feedback regarding the progress towards its accession to the EU. The first Regular Report on Romania's accession to the EU dates from 1998 and the last one from 2006. Romania applied for membership to the EU in 1995 and became a Member State in 2007. See the 2004 on-line report: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_ro_2004_en.pdf, 94.

[18] See Demény, *op. cit., supra,* note 11, pp. 94–95. See also Susanne Lundin, *'I Want a Baby; Don't Stop Me from Being a Mother': An Ethnographic Study on Fertility Tourism and Egg Trade,* in (2012) 2:8 *Cultural Politics*, pp. 330–35, doi:10.1215/17432197-1575192.

[19] *Resolution on the Trade of Human Egg Cells, P6_TA(2005)0074*, 2005, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-20050074+0+DOC+XML+V0//EN.

[20] *Ibid.,* point 9.

[21] See Report on-line at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/sec1354_cmr_master_ro_college_en.pdf, p. 53.

[22] *Ibid.*

After all these events, the Romanian Parliament adopted the above-mentioned provisions of Law 95/2006. Their adoption was noted in a favorable manner in the last Regular Report before Romania's accession in 2007, yet the Commission urged the Romanian authorities to complete the investigations on the human cell trade and to further implement the newly adopted legislation.[23] These pressures certainly had positive effects and it can indeed be claimed that the EU was the motor that urged Romania to create a general legislative frame for assisted reproduction.[24] Nevertheless, no further comprehensive legislation on assisted reproduction has been adopted in Romania since 2006. It will be interesting to see if the EU will have any influence on the future regulation of assisted reproduction in Romania and if the equality and non-discrimination legislation adopted because of the process of European integration[25] will have a spillover effect or not. For example, will the principle of non-discrimination be applied in establishing the beneficiaries of assisted reproduction? Put differently, will

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[23] See Report: http://ec.europa.eu/enlargement/pdf/key_documents/2006/monitoring_ report_ ro_en.pdf, pp. 28 – 29.

[24] N.B. From a feminist perspective, the mandatory *pro bono* ova donation can be subject to criticism. This is because the unpaid ova donation generally corresponds to society's expectation that women's work related to reproduction and care should be non-remunerated and undervalued. Given the Directive 2004/23/EC, it is a matter of debate whether EU countries could adopt legislation to allow the remuneration of ova donors. In non-EU countries such legislation exists. For example, Israel allows the remuneration of ova donators with an amount up to NIS 20,432 (around 4,500 euro). See the official page of Israel's Ministry of Health: http://www.health.gov.il/English/Topics/fertility/Pages/ovum_ donation.aspx.

[25] As I showed elsewhere (see Elena Brodeala, *Women and Politics: The Impact of the European Integration Process on Women's Political Representation in Romania*, in (2015) 5 *Analize – Journal of Gender and Feminist Studies*, p. 19.): "The Act through which Romania aimed to transpose the equality *acquis* is *Government's Ordinance no. 137/2000 ('GO 137/2000') on preventing and sanctioning all forms of discrimination*. Yet, GO 137/2000 was not the only normative act adopted with regard to equality and non-discrimination. Because the European Commission promoted a "maximalist version of a largely non-binding *acquis*" for the candidate states, Romania also adopted a special law on gender equality, namely *Law no. 202/2002 on equal opportunities between men and women*. See also Heather Grabbe, *The EU's Transformative Power: Europeanization through Conditionality in Central and Eastern Europe*, Palgrave Studies in European Union Politics (Basingstoke: Palgrave Macmillan, 2006), p. 78; Cristina Chiva, *The Limits of Europenization: EU Accession and Gender Equality in Bulgaria and Romania*, in Cristina Chiva, David Phinnemore (eds.), *The European Union's 2007 Enlargement*, (Routledge, 2014), p. 203.

same-sex couples, single women or men[26] be included in the category of persons who could benefit from assisted reproduction? Will the principle of non-discrimination be applied in deciding, for example, the age of women who could become pregnant using ARTs?[27]

It seems however that, until now, the principle of equality in these matters has not been observed in by the Romanian legislator. For instance, in Article 153 of Law 95/2006 offered the possibility to publicly finance assisted reproduction. Consequently, in 2011 the Ministry of Health approved the conditions under which In Vitro Fertilization ('IVF') and embryo-transfer could be financed through Order no. 765/2011.[28] The eligibility conditions for financing such a procedure were not only very restrictive, but also rather exclusionary. More precisely, under Article 2 of the Annex of Order 765/2011,[29] only childless couples who had been

[26] The claim that GO 137/2000 on preventing and sanctioning all forms of discrimination should have a spillover effect when deciding the beneficiaries of assisted reproduction has already been made by a deputy when a legislative proposal on assisted reproduction that stated that only heterosexual couples should have been granted the legal right to become parents using ARTs was under parliamentary debate. See the parliamentary debates from 2nd of March 2004 on the adoption of Legislative Proposal Pl no 217/2003 available on-line at: http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=3870.

[27] This is particularly relevant in Romania where in 2005 a 66-year old woman gave birth to a child using assisted reproduction. This led to serious public debates. *See* Vivienne Muller, *'Age Shall Not Weary Them': the Case of Adriana Iliescu and the Older Maternal Body in (2006) 14 Outskirts Online Journal,* at *http://www.outskirts.arts.uwa.edu.au/volumes/volume-14/muller;* Daniela Cutas, *Postmenopausal Motherhood: Immoral, Illegal? A Case Study* in (2007) 8 *Bioethics,* p. 21.

[28] Full name of the act in Romanian: *Ordinul Ministrului Sănătății nr. 765/2011 privind aprobarea Normelor metodologice pentru realizarea și raportarea activităților specifice în cadrul subprogramului de fertilizare in vitro și embriotransfer*, publicat în Monitorul Oficial al României, Partea I, nr. 378, din 31 mai 2011.

[29] The Annex reads as following: "Norms for performing and reporting on specific activities in the subprogram for In Vitro Fertilization and Embryo Transfer.

Art. 1 – The subprogram for In Vitro Fertilization and Embryo Transfer, referred to as sub IVF/ET, is made in order to improve reproductive health.

Art. 2. - The objective of the subprogram regarding IVF / ET is to treat couple infertility by giving access to IVF procedure and embryo transfer to a limited number of couples selected on the cumulative fulfillment of the following eligibility criteria:

a) sterile couple, defined as a married couple who could not to reproduce without using birth control means for 2 years of conjugal life;

b) couple married for at least 2 years;

married for at least two years and could not procreate within those two years - during which no contraception method could be used- could qualify for public founding. Moreover, since same-sex marriage is prohibited in Romania, these couples were excluded by default from public funds for assisted reproduction. The same goes for single women or single men. In addition, the Order also imposed the condition that women applying for assisted reproduction should be between 24 and 40 years old, but no such limit was imposed on men. Such discrimination was most probably connected to the case of Adriana Iliescu, the Romanian woman who became a single mother in 2005 at the age of 66, challenging in this way the very definition of motherhood and of "what constitutes a 'good and proper' maternal body".[30]

B. The New Civil Code

Although Law 95/2006 provides some general principles regarding assisted reproduction, it is still inadequate for the complexity of problems related to assisted reproduction. The law does not regulate, for example, assisted reproduction techniques or the legal consequences of assisted reproduction, such as filiation, the legal regime of reproductive cells or of embryos and so on. One of these lacunae, namely assisted reproduction using a third party donor, is briefly regulated by Romania's New Civil Code in Articles 441 – 447.[31] Nevertheless, the provisions of the Civil Code are still quite

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c) at least one member of the couple has Romanian citizenship and has permanent residence in Romania;
d) at least one member of the couple was ensured in the national health insurance system for at least 2 years;
e) none of the members of the couple has a living child;
f) couple autologous (excluding donation of oocytes, sperm or surrogate);
g) women should be between 24 and 40 years old; […]" [My translation].

[30] Muller, *op. cit., supra.*, note 27.

[31] Articles 441-447 read as following:

Art. 441 The legal regime of filiation

(1) Medically assisted human reproduction using a third party donor does not determine any filiation link between the child and the donor.
(2) In this case, no action for damages can be started against the donor.
(3) Parents, in the sense of this section, can be only a woman and a man or a single woman.

Art. 442 Conditions

(1) Parents, who in order to have a child want to use medically assisted reproduction using a third party donor, must give their consent in advance, in conditions that ensure full

unclear and, arguably,[32] except if they are widely interpreted, do not cover all situations of medically assisted reproduction with a third party donor. The Civil Code seems to refer only to donations of sperm and the child's filiation towards the father, whereas ova donations and the filiation towards the mother seem to be completely ignored.[33] Concerning the

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confidentiality, before a public notary that will explain the consequences of their act with regard to filiation.
(2) Consent has no effect in case of death, applying for a divorce or de facto separation, occurred prior to the time of conception that occurred in medically assisted human reproduction. It may be revoked at any time, in writing, including in front of the doctor called to provide assistance for third party donor reproduction.
Art. 443 Challenging filiation
(1) No one can challenge the filiation of a child for reasons of medically assisted reproduction and no child born as such can challenge his/her own filiation.
(2) However, the mother's husband may deny paternity of the child, according to the law, if he did not consent to medically assisted reproduction performed using a third party donor.
(3) If the child was not conceived in this way, the provisions on denial of paternity remain applicable.
Art. 444 Father's responsibility
The one who, after having consented to medically assisted reproduction with a third party donor, does not recognize the child born out of wedlock is held liable towards the mother and the child. In this case, the child's paternity is established by court under Article 411 and 423 [of the Civil Code].
Art. 445 Confidentiality of information
(1) Any information on medically assisted human reproduction is confidential.
(2) However, if, in the absence of such information, there is a risk of serious injury to the health of a person conceived so or to the health of his/her descendants, the court may authorize the transmission of such information in a confidential way to the doctor or to the competent authorities.
(3) Also, any person descendent of a person conceived so can take advantage of this right, if the fact of being deprived of this kind of information may seriously prejudice his/her health or that of someone close to him.
Art. 446 The relationship between father and child
The father has the same rights and obligations to the child born through medically assisted reproduction with third party donor as he has to a child born through natural conception.
Art. 447 Rules applicable
Medically assisted human reproduction with third party donor, its legal regime, the way of ensuring the confidentiality of information pertaining to it, and the way of submitting it are established by a special law.
[My translation].

[32] See Teodor Bodoașcă, *Discuții în legătură cu reproducerea umană asistată medical cu terț donator în reglementarea codului civil*, in (2014) 7 *Dreptul*, pp. 51–71.

[33] For example, Article 441(3) states that only a woman *and* a man or a *single woman* could be parents according to the Civil Code's section on assisted reproduction. However, the Article

filiation towards the mother, the legislator seems to have preserved the old Roman Law principle *mater semper certa est*, meaning that, legally speaking, the mother should always be the one who gave birth.[34] Yet, in the context of the new reproductive technologies and of the fact that one can carry a child who, genetically speaking, is somebody else's through the practice of surrogacy, this principle starts to be rather obsolete. Unfortunately, as will be discussed further, Romanian law currently overlooks the problem of surrogacy. This, of course, has direct implications for single men, homosexual couples and for women who cannot bear a child. In case these persons want to have a child, they need to expose themselves to complicated procedures or take different risks and they are also left in a state of uncertainty about the civil status of the children or about the lawfulness of the procedure. Equally, this legislative gap puts women who take the role of surrogates in a serious position of vulnerability as well.[35] Before discussing more in detail the situation of surrogacy in Romania, I want to point out that certain proposals to regulate ARTs in Romania existed, but that they were rather problematic and did not have the potential to cover the current legal gaps.

3. Political Debates on the Regulation of Assisted Reproduction

Several attempts to regulate assisted human reproduction have been made in Romania. The first one dates from 2003,[36] two proposals date from

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does not mention anything about the situation of a *single man*. Then, Article 443 refers only to the right of the mother's husband to deny paternity if he did not consent to medically assisted reproduction using a third party donor and Article 444 specifically refers only to the father's responsibility once he consents to having a child through assisted reproduction using a third party donor. Finally, Article 446 states that a father of a child born through assisted reproduction using a third party donor has the same rights and obligations towards the child as he would have towards a child born through natural conception. The Article does not mention anything about the mother's obligations towards the child born through assisted reproduction using a third party donor. On this see also *ibid*., pp. 54–57.

[34] See Articles 408 (1), 415 (1), 422, 423 of the Civil Code and Adrian-Relu Tănase, *Noul Cod Civil. Persoana fizică. Despre familie. (art. 1-186, Art 252-534). Comentarii și explicații* (C.H. Beck: Bucharest, 2012), pp. 532–533, 545–550, 557–560.

[35] For example, if the commissioning parents change their mind regarding the child after the surrogate mother becomes pregnant.

[36] This legislative proposal was primarily meant to introduce the practice of dissuasive counselling in case of abortion, yet, it was later extended as to include the practice of human assisted reproduction. The official name of the proposal is *Legislative Proposal regarding*

2009[37] and two other legislative proposals are currently 'blocked' in Parliament.[38] The 2003 proposal was sent by the Romanian President for an *a priori* control of constitutionality. The Constitutional Court of Romania ('CCR') declared 23 articles of the 2003 proposal to be partially or entirely unconstitutional.[39] Even so, the subsequent proposals also contained problematic provisions and did not touch upon all the aspects related to assisted reproduction. For example, since Romania is currently facing a demographic crisis the aim of both legislative proposals that are currently under parliamentary debate, according to their memorandum, is to increase birth rates. Yet, the legislative proposals seem to target increasing birth rates only among certain groups of citizens, more precisely among those who *are informed* about assisted reproduction and *can afford it*. No legislative proposal makes reference, for example, to universal public funding for assisted reproduction.

In addition, in order to better understand the political context in which these proposals are discussed, one specific incident has to be mentioned. In 2013, in the same year when the second proposal came under parliamentary debate, Romania's President at that time, Traian Băsescu, was invited to a public meeting of the Business Women magazine during which he suggested that the women representing the magazine should have babies because, in the President's view, having babies is a "patriotic act"[40] and one of the

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reproductive health and assisted human reproduction. More on this proposal see Daniela E. Cutas, *On a Romanian Attempt to Legislate on Medically Assisted Human Reproduction*, in (2008) 1 (22) *Bioethics* pp. 56–63.

[37] As Sabin Guțan also notes, the first one came from the Romanian Association of Embryologists and the other one from six Democrat-Liberal senators. The 88-pages proposal of the Romanian Association of Embryologists was very complex. Yet, unfortunately, it was merely a translation of the UK Human Fertilization and Embryology Act of 2008. Surprisingly, the other proposal was nothing else but a "copy-paste" of the 2004 proposal and, as observed by the specialized commissions, even comprised the provisions that were already declared unconstitutional by the CCR. See Sabin Guțan, *Reproducerea umana asistata medical si filiatia* (București: Hamangiu, 2011), pp. 219–27.

[38] Please note that this is not an exhaustive list. These are the proposals I managed to track until now.

[39] See *Decision 418 of 18 June 2005 on the complaint of unconstitutionality of the law on reproductive health and medically assisted human reproduction, published in Official Gazette nº 664 of 26 July 2005*.

[40] *Decision 425 from 03 July 2013 of the National Council for Combating Discrimination* ('NCCD', i.e. Romania's main equality body), para. 2.1.

"fundamental missions of women".[41] At the same time, the President asked these women how it was possible that "a Roma woman[42] can have five-six children and the [ethnic] Romanian woman cannot",[43] underlying that, indeed, it might be connected to the fact that a Roma woman "is not [a] manager".[44] The Business Women magazine complained about the sexist and racist comments of the President at the National Council for Combating Discrimination, Romania's main equality body. Yet, surprisingly, the Council found that the President's comments fell under the protection of freedom of expression.[45]

4. A Brief Discussion on the Situation of Surrogacy under Romanian Law

The problem of surrogacy in Romanian law is rather complicated. There are no express legal provisions regarding surrogacy. However, surrogacy under Romanian law was discussed both by the Romanian Constitutional Court (RCC) and by Romanian ordinary courts. The RCC was confronted with the question of surrogacy in 2005 when a draft law on human assisted reproduction was under debate in the Romanian Parliament for the first time.[46] The President of Romania challenged the draft law at the RCC, among others, on the ground the draft law required the surrogate and the commissioning parents to conclude a special agreement before starting the assisted reproduction procedure. According to this agreement, the surrogate must have had her husband's consent in order to carry a child or to abort in case the commissioning parents requested so.[47]

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[41] *Ibid.*

[42] Roma people represent one of the largest minorities and the most marginalized group in Romanian society. There is historical evidence that Roma people in Romania were kept as slaves, see Viorel Achim, *The Roma in Romanian History* (Budapest: Central European University Press, 2004). The most common stereotype about Roma people, apart from their poverty and 'bad' character is the fact that they have large families and many children.

[43] *Decision 425 from 03 July 2013 of NCCD,* para. 2.1.

[44] *Ibid.*

[45] *Ibid*, part V.

[46] This is the same draft law that was initially designed to introduce dissuasive counselling in case of abortion that was mentioned in the previous section. Currently, there is only one decision of the CCR with regard to reproductive rights (i.e. Decision 418/2005).

[47] See first part of Decision 418 of 18 June 2005 on the complaint of unconstitutionality of the law on reproductive health and medically assisted human reproduction, published in Official Gazette n° 664 of 26 July 2005, 3 b) (CCR 2005).

Apart from stating that such a request was contrary to Article 26 (2) of the Romanian Constitution[48] and to the surrogate's mother right to dispose of her own body, the Court also referred to the overall content of the agreements that were supposed to be concluded between the commissioning parents and the surrogate mother according to Article 21 of the draft law. The Court was very radical and stated that, in fact, the entire Article 21 of the draft law, and not only Article 21 (d that was initially challenged by the President, was contrary to the Constitution. The argument of the Court had been that Article 21 was contrary to the Constitution because its provisions were contrary to the public order and morals. The Court stated that "the life and health of a person and of the conceived child[49] (sic!), but not yet born, cannot be objects to transactions". Additionally, the Court also explicitly emphasized that "all legal subjects have a constitutional obligation to protect these [moral] values" (i.e. the life and health of a person or of a conceived "child" that could become objects of a transaction).[50] Thus, surrogate contracts containing clauses such as those provided for in Article 21 of the draft law under discussion seem to have been deemed unconstitutional by the Court.

Nevertheless, the practice of surrogate motherhood is still present in Romania and Romanian ordinary courts have already been confronted with the question of children's filiation in case of surrogacy and whether legal motherhood should correspond to the genetic reality or to the reality of giving birth. Some courts have been rather conservative and have refused to recognize the biological mother as the legal mother of the child in accordance with Article 408 (1) of the Civil Code.[51] Yet, other courts have

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[48] Article 26(2) of the Romanian Constitution reads as following: "Any natural person has the right to freely dispose of himself/herself unless by this he/she infringes on the rights and freedoms of others, on public order or morals."

[49] The usage of the word "conceived child" seems to be a terminological mistake of the Court, rather than a phrase that should have meant that life, according to the Romanian Constitution, would be considered to start from conception.

[50] See Court's statement in the second part of Decision no. 418 of 18 June 2005 on the complaint of unconstitutionality of the law on reproductive health and medically assisted human reproduction, published in Official Gazette nº 664 of 26 July 2005, 3 (b (CCR 2005).

[51] See Civil Decision nº 8681/01.11.2012 of Bucharest First Instance Court nº 5. Establishing maternity. In vitro fertilization. Action against the surrogate mother (Sentința civilă nr. 8681/01.11.2012 a Judecătoriei Sectorului 5 București. Stabilire maternitate. Fertilizare in vitro. Cerere formulată împotriva mamei purtătoare).

been rather progressive taking into account Romania's civil law tradition and have bypassed the provisions of the Civil Code. Representative in this sense is a decision of the Timișoara Court of Appeal dating from 2013.[52]

The case concerned the filiation of two children born through surrogacy. The surrogate was the sister of the biological mother, so the surrogacy was considered an altruistic act. The Court of first instance refused to recognize the genetic parents as legal parents invoking the provisions of the Civil Code and highlighting that surrogacy breaches public order and morals. The genetic parents appealed the decision. On appeal, the tribunal that was in charge to adjudicate the case commissioned DNA tests to establish the genetic filiation of the twins. Even if the DNA tests showed that there were 100% chances that the children had been conceived by the ones who claimed to be their genetic parents, the Tribunal only recognized the genetic father as legal father and refused to give the same status to the genetic mother. The Tribunal grounded its decision in the fact that the Civil Code allows the denial of filiation based on DNA tests only to fathers[53] but not to mothers. Motherhood, in this case, could only be recognized towards the woman who gave birth according to the already mentioned principle *mater semper certa est*, the Tribunal claimed. In this way, the children became the legal children of the genetic father and of the sister of his spouse, i.e. the surrogate.

The genetic parents appealed the decision before the Timișoara Court of Appeal. Taking a very progressive stance, the Court decided that the principle *mater semper certa est* established by Article 408 (1) of the Civil Code should be applied only when a child was conceived without assisted reproduction and that, in this particular case, the genetic mother should have been recognized as the legal mother. With regard to surrogacy itself, the Court of Appeal re-asserted that Romanian law fails to regulate it.

[52] Civil Decision n° 1196/26.09.2013 issued by the Timișoara Court of Appeal in case n° 5101/1325/2012. (Decizia civilă nr. 1196/26.09.2013 pronunțată de Curtea de Apel Timișoara în dosarul nr. 5101/1325/2012). For a detailed discussion of these cases see Lidia Barac, *Câteva considerații privind implicațiile juridice ale tehnicilor de reproducere umană asistată medical,* available at *JURIDICE.ro*, March 3, 2014, http://www.juridice.ro/311847/cateva-consideratii-privind-implicatiile-juridice-ale-tehnicilor-de-reproducere-umana-asistata-medical-ruam.html.

[53] Articles 429, 414, 424 Civil Code.

However, in the Court's view, this did not mean that surrogacy was illegal. On the contrary, according to the principle 'everything which is not forbidden is allowed' which is generally applied in civil matters, surrogacy, the Court of Appeal stated, should be permitted.[54]

Nevertheless, this was not at the core of the argument that made the Court of Appeal recognize the legal motherhood of the genetic mother. What made the Court of Appeal bypass the principle *mater semper certa est* enshrined in the Civil Code were certain international provisions regarding children's rights. According to Article 20 (2) of the Romanian Constitution and Article 4 (2) of the Civil Code, international treaties and covenants regarding human rights in Romania prevail over national law, including the Constitution, unless national law or the Constitution comprise more favorable provisions. The main international provision that the Court of Appeal referred to was Article 8 of the European Convention on Human Rights ('ECHR') and to its interpretation given by the European Court of Human Rights ('ECtHR') regarding the right of the child to know her/his genetic origins in cases like *Pascaud v. France, Jäggi v. Switzerland, Mikulic v. Croatia,* or *Kroon v. The Netherlands*.[55]

Referring to the interpretation of Article 8 given in these cases, the Court of Appeal concluded that if it did not recognize the genetic parents as legal parents, it would unjustifiably disregard the children's best interest and their right to know their real genetic identity. This was even more pressing

[54] In the draft version of the Civil Code, Article 461 reads: "Any agreement having as an end procreation or carrying a child for another person is null and void". In favor of the Court's argument, it could also be said that if it had been the intention of the legislator to prohibit surrogacy, then the legislator would have not given up prohibiting it when the new Civil Code was drafted [My translation]. Original in Romanian "Orice convenție având ca scop procrearea sau purtarea sarcinii pentru altă persoană este lovită de nulitate absolută" taken from Gutan, *op. cit., supra,* note 37, p. 204.

[55] With regard to children's right to know their biological origins, the Court of Appeal also referred to Article 49 (1) of the Romanian Constitution, which states that: "(1) Children and young people shall enjoy special protection and assistance in the pursuit of their rights", to Article 3 (1) of Law 18/1990 regarding the ratification of Convention on the Rights of the Child (1990), Article 1(2), Article 2(1), (1 indice 1) and (3) of Law 272/2004 on the protection and promotion of children rights and to Article 263 of the Civil Code regarding the best interest of the child.

in the case under discussion in which, the Court showed, there was no reason to deny this right to children: surrogacy could not be thought as immoral as it had an altruistic character (the surrogate was the sister of the genetic mother) and the genetic parents had all "the moral and material means for raising, taking care of and educating the children", so there was no risk that they would need the material support of the State if their initial filiation was denied.

Apart from solving this case in favor of the genetic parents, the Court of Appeal also made a more general comment and stated that the State's omission to regulate all procedures of assisted reproduction technologies, despite tacitly accepting them, represented a disproportionate interference in the private life of children, which is guaranteed in different national and international documents. In this way, the Court suggested that it is the obligation of the State to fill this legislative void.[56]

What is even more interesting, is that, just one year after the decision of the Romanian Court, the ECtHR issued two similar decisions against France in which it stated that not recognizing children's filiation towards their genetic parents, when they were born through surrogacy, represented a breach of a child's right to have their identity legally recognized in French society, a right encompassed by Article 8 of the ECHR.[57] Because of the primacy of the ECHR over Romanian national law, it is very likely that these decisions, as the decision of the Court of Appeal Timișoara, will have a significant impact on the future regulation of assisted reproduction in Romania.

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[56] Civil Decision nº 1196/26.09.2013 issued by the Timișoara Court of Appeal in case nº 5101/1325/2012, extracts and commentary in: Lavinia Tec, *Problema filiației copilului născut din gestația pentru altul tranșată de cedo: aplicarea de către judecătorul național a articolului 8 din Convenția Europeană a Drepturilor Omului și a principiului interesului superior al copilului*, available at http://www.juridice.ro/329362/problema-filiatiei-copilului-nascut-din-gestatia-pentru-altul-transata-de-cedo-aplicarea-de-catre-judecatorul-national-a-art-8-din-conventia-europeana-a-drepturilor-omului-si-a-principiului-interesului-superior-al-copilului.html; See also Barac, *op.cit., supra,* note 52.

[57] See ECtHR, *Mennesson v. France* (2014) and *Labassee v. France* (2014). On the same topic, see also *Paradiso and Campanelli v. Italy* (2015).

5. Conclusion

The fall of State socialism had a crucial influence on the way reproductive rights were framed in Eastern Europe. In the case of Romania where abortion had been not only illegal, but was also very seriously sanctioned by the Communist regime, the fall of State Socialism led to a general de-regulation of the reproductive sphere. Yet, while the retreat of the State from the domain of human reproduction after 1989 led to the legalization of abortion, it also led to a lack of regulation in the field of assisted reproduction, which, as discussed in this paper, left the door open to an entire series of abuses like ova traffic or abuses and borderline legal situations resulting from assisted reproductive techniques like surrogacy. Additionally, for reproductive rights to be truly substantive, the State has to intervene through for example public funding for assisted reproduction, educational and information campaigns on sexual health or family planning, to tackle the issue of conscientious objection and so on. As the Court of Appeal Timișoara, different organizations from the Romanian civil society[58] and other scholars[59] noted, a legal framework on assisted human reproduction in Romania is seriously needed. Further research and debates on this topic from different perspectives should be a way to guarantee that such a legal framework will properly protect reproductive rights and will consider the situation of every group in society.

[58] See, for example, the official web-page of the 'S.O.S. Infertilitatea' NGO at the following address: http://infertilitate.com/.

[59] See, for example, Demény, *op. cit., supra,* note 11; Cutas, *op. cit., supra,* note 36; Nahman, *op. cit., supra,* note 10.

EUROPEAN CONCEPTIONS ON HARDSHIP – A COMPARATIVE STUDY ON GERMAN, ENGLISH AND FRENCH LAW

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Abstract

This paper tries to offer a comparative study on the concept of hardship as (and if) it is defined or accepted in German, English and French legal cultures. I will briefly explore the historical contexts of the mentioned private law cultures and try to establish the reasons why they differ in their conceptions of the notion of hardship. Finally, the article will also seek to determine which of the three conceptions is closest to the way it is defined in existing projects for a European Civil Code, such as the Principles of European Contract Law and the Draft Common Frame of Reference.

Key words: *hardship, pacta sunt servanda, autonomy of the will, rationalism, objective*

Résumé

Cet article essaye d'offrir une perspective comparée sur le concept d'imprévision tel que défini ou accepté (s'il y a le cas) dans les cultures juridiques de l'Allemagne, du Royaume Uni et de la France. L'auteur explore brièvement les contextes historiques des cultures juridiques de droit privé mentionnées et essaye d'établir les raisons pour lesquelles elles offrent des conceptions différentes sur la notion d'imprévision. Finalement, l'auteur essayera de déterminer laquelle des trois conceptions mentionnées est la plus proche de la manière dont l'imprévision est définie dans les projets pour un Code Civil Européen, tels que les Les principes en droit européen des contrats et le Cadre Commun de Référence.

Mots-clès: *imprévision, pacta sunt servanda, autonomie de volonté, rationnalisme, objectif*

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1. Introduction

While, at the level of *concept*, there could be a general and universal understanding of what the notion of hardship means, it is also true to affirm that different historical contexts gave birth to different *conceptions* of hardship. This article tries to ascertain how the historical background of the three legal systems of Germany, England and France gave birth to different views on hardship.

The discussion will be linked with the more general topic concerning the fading influence of the rationalistic-subjectivist view on contractual law, as the acknowledgement of hardship constitutes a test, not only for detecting which view (subjectivist, objectivist or mixed) on contract law has influenced to a greater degree a particular national system, but also for establishing whether the core of the subjectivist approach – the doctrine of the autonomy of the will – as well as its offspring – the principle of *pacta sunt servanda* – have been succeeded by a more objective approach that downplays internal will.

In the end, I will argue how the three views on these specific issues pertaining to the law on contract have inspired projects for the creation of a European Civil Code, such as the Draft Common Frame of Reference and the Principles of European Contract Law.

To summarise the general perspectives of the three legal systems, French legal history reveals a predisposition for a subjective interpretation of contract law and, consequently, to a disproportionate prevalence of the real, subjective and individual intentions that make a contract possible, while downplaying the parties' objective manifestations. The German view inherits the French subjective approach, but balances it by giving relevance also to the parties' manifestations, thus resulting in a generally mixed view on contracts. On the other hand, we find the English common-law view, the one least influenced by *jus commune,* as a more or less complete opposite of continental intellectually-driven legal conceptions. This last legal culture disregards abstract ideas and instead has a predilection for hard facts, so it would seem to have the most objective view on contract law.

The notion of hardship erodes the initial Roman-inspired *pacta sunt servanda* (and, for that matter, its source – the autonomy of the will), for, although classical contract law had seemed to exclude its existence,[1] further developments had since then built on the notion and expanded its reach. Canonists, for example, have infused law with a sense of Christian morality that went beyond the written letter of law. Borrowing, as a matter of fact, from Roman philosophers, the canonists reintroduced the notion of *just* (or equity) as opposed to *legal*.[2] Thus, hardship made its way into the realm of law, where it served as a safety net, in case the initial circumstances envisaged by the parties to a contract change fundamentally. *Clausula rebus sic stantibus*[3] was, henceforth, to be seen as a critical exception to *pacta sunt servanda.*

As a matter of fact, hardship is indeed also a very suitable battleground between subjectivist and objectivist theories, because the way in which German, French and English legal thought and trends define and deal with hardship is indicative of the theory that generally permeates their respective legal cultures.

2. The German Mixed Perspective

In Germany, for example, hardship did not initially make it into the codification process,[4] as the German legislator chose not to include the canonist *clausula rebus sic stantibus* that, ironically, was present in previous codifications such as the in articles IV 15, 12 Bavarian Code of 1756 (*Codex Maximilianaeus Bavaricus Civilis*) and I 5 378 of the Prussian Code of 1794.

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[1] C. Elisabeta Zamșa, *Teoria impreviziunii. Studiu de doctrină și jurisprudența* (Bucharest: Hamangiu, 2006), p. 5.

[2] *Ibid.,* p. 8.

[3] Canonist Thomas Aquinas is usually credited with coining the phrase – "*contractus qui habent tractum succesivum et dependentiam de futuro rebus sic stantibus intelliguntur"* (Contracts that comprise successive acts which depend on future events must be understood / appreciated in the same way as long as the circumstances remain the same). See Thomas Aquinas, *Summa Theologica*, *apud*. Sir Basil Markesinis, Hannes Unberath, Angus Johnston, *The German law of contract. A comparative treatise,* 2nd Ed. (Oxford-Portland, Oregon: Hart Publishing, 2006), p. 320.

[4] Hannes Rösler, *Hardship in German codified private law – In comparative perspective to English, French and International Contract law*, in (2007) 4-15 *European Review of Private Law*, p. 487.

However, due to the economic upheaval that followed the disasters of the First World War, as well as the debt that, according to the Treaty of Versailles, Germany would have to pay, the strictness of *pacta sunt servanda* had to be abandoned in view of a more flexible and just way of maintaining the equilibrium between parties to a contract.[5]

Because of the legislative gap, however, the *Reichsgericht*, the highest German court, had to find a basis for an equitable practical solution. Initially, it reached to the provisions of article 275 (1) BGB, relating to impossibility of performance, by creating the notion of *economic impossibility*.[6] By 1923, the *Reichsgericht* had changed its approach and started to find the basis for hardship[7] in article 242 BGB on the principle of good faith stating that the rules on impossibility were not apt to deal with the situations usually associated with hardship (such as economic devaluation).[8]

After the German reform on the law of obligations, the notion previously attested by judicial intervention and case-law was codified in article 313 BGB.[9] German courts have been consequently describing fundamental

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[5] *Ibid.*, pp. 487-488.

[6] *Ibid.*, p. 488.

[7] Or *Wegfall der Geschäftsgrundlage* (cessation or disappearance of the basis of the contract), as it was known. After the German reform on obligation law of 2001-2002, or *Schuldrechtsmodernisierung*¸ which fundamentally changed the BGB's approach on many private law-related issues, hardship would be known in German under the notion of *Störung der Geschäftsgrundlage*, which translates into "disturbance of the basis of the contract". Although there is a difference in language, the notion bares basically the same meaning as the former one. See Rösler, *op. cit., supra,* note 4, pp. 485-486.

[8] *Ibid.*

[9] Article 313 BGB reads as follows:

1. If circumstances which have become the basis of the contract have changed fundamentally after the contract was concluded, and the parties, had they foreseen this change, would not have made this contract or would have made a different contract, adaptation of the contract may be demanded insofar as one of the parties, considering all circumstances of the particular case and having regard especially to the contractual or statutory distribution of risk, cannot reasonably be expected to abide by the unchanged contract.

2. It is equivalent to a change of circumstances if essential assumptions which have become the basis of the contract turned out to be wrong.

circumstances to be "perceptions shared by both parties as evident at the closing of the contract, or perceptions of one party, discernible to and not objected to by the other party, of the existence, present or future, of certain circumstances that form the basis of their willingness to contract".[10]

The wording used by the courts seems to purport, at a certain level, a subjective approach, since it speaks of the internal perceptions of the parties. However, those perceptions envisaged by the parties must be *evident* to both, or, in the case of perceptions pertaining to only one party, *discernible* to the other. The opposition to the subjectively-inspired French legal thought is visible not only in German case-law, as mentioned above, but also in the way hardship operates and, as a matter of fact, in its very existence in German law.

As article 313 BGB reads, one of the parties to a contract could, if the conditions of paragraph (1) are met, "demand", i.e. call upon a judge to give a decision, that the contract be adapted to the changing circumstances. This would normally constitute a possibility for a party to avoid unjustifiably harsh contractual conditions that have occurred subsequent to the contract's conclusion. However, if adaptation is not possible or it would be too hard on one of the parties, paragraph (3) of the same article provides for the possibility of the aggrieved party to terminate the contract. Here, it can be clearly observed that adaptation takes precedence over termination, as *pacta sunt servanda* still has a strong presence. The article's text reveals the desire to keep the contract functional as much as possible, while termination of the contract is considered *ultima ratio*.[11] Ultimately, the German approach is a balance between the strictness of *pacta sunt servanda*, so authoritative under French law, and the flexible putting aside of the contract, as English pragmatic expediency would have it.

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3. If adaptation of the contract is not possible or would be too hard on one of the parties, the aggrieved party may terminate the contract. In continuing contracts termination is replaced by giving notice. Translation by W. Lorenz; cited according to Dagmar Coester-Waltjen, *The New Approach to Breach of Contract in German Law*, in N. Cohen & McKendrick (eds), Comparative Remedies for Breach of Contract (Oxford: Hart Publishing, 2005), pp. 123 at 155, *apud.* Rösler, *op. cit., supra,* note 4, p. 489.

[10] BGH 1.6.1979, BGHZ 74, 370, 372 *et seq*., BGH 28.4.2005, BGHZ 163, 42, 48, *apud.* Rösler, *op. cit., supra,* note 4, p. 488.

[11] Rösler, *op. cit., supra,* note 4, p. 509.

3. The English Common Law Pragmatic View

English common law, unlike its Continental counterparts, has a very different background. Its down-to-earth and pragmatic preference for hard facts instead of philosophic principles[12] stems from the fact that since the Norman invasion, common law or *commune ley* (in old Anglo-Norman) had an intrinsically procedural nature that had to be integrated with the pre-existing substantial customary law of the various fiefs.[13] The common-law installed by the Normal administration would in time become "the one law *common* to all the people, the law which swallows up all, or nearly all, the petty local and tribal peculiarities of which English law, at the time of the [Norman] Conquest, is full."[14]

Thus, early common law was synonymous to procedural law, as it only guaranteed the framework necessary for the system to work, while the substantive part was the job of the jury,[15] which would supply the objective, fact-centred, aspect of a litigation process.[16] This is the most basic difference between continental and common law jurists: while the former propose ideas, the latter have a very practical job of filling procedure with facts.[17] Even early English court officials were chosen more because of their oratory skills than for their doctrinal knowledge[18] and, although later on they became more and more specialised, they still lacked the philosophical background of their continental counterparts.[19] In one author's view, the worst judges were considered those "moral philosophers and school men who seek out broad principles of justice and right but are entirely out of touch with 'human affairs and conversations.'"[20]

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[12] Catherine Valcke, *Comparative history and the internal view of French, German and English private law,* in (2006) XIX-1 *Canadian Journal of Law and Jurisprudence,* p. 134.

[13] See André Maurois, *Istoria Angliei,* transl. by R. Joil (Bucharest: Orizonturi, 2006), p. 105 and Valcke, *op. cit., supra,* note 12, p. 153.

[14] Edward Jenks, *Law and Politics in the Middle Ages*, 2nd ed. (London: J. Murray, 1913), p. 36, 38, *apud* Valcke, *op. cit., supra,* note 12, p. 154.

[15] *Ibid.,* p. 155.

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] Gerald Postema, *Classical Common Law Jurisprudence (Part II),* in (2003) 3 *Oxford University Commonwealth Law Journal 1.*, pp I at 15, Valcke, *op. cit., supra,* note 12, p. 156.

English law has the notion of *frustration*[21] as the equivalent to hardship. Frustration can result in the setting aside of a contract if the circumstances had changed in such a manner so that the parties' performances have become drastically different from what they initially intended.[22] In the case of *Taylor v. Caldwell*,[23] for example, judge Blackburn held that "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance". Unlike continental approaches, English case-law seems to disregard party intentions. In the case of *Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*,[24] which concerned the impounding of a ship that was sailing through the Suez Canal, Lord Denning held that there was no frustration of the contract, even though the ship's charterers pleaded that the closure of the Suez Canal meant that they had to sail around the Cape of Good Hope to avoid the Canal, and that this would have meant that the contract would have changed radically, because the journey would have lasted 138 days, instead of 108. While considering that the change was not fundamentally different, Lord Denning also redefined what frustration meant:

> If it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision – so much so that it would not be just in the new situation to hold them bound to its terms – then the contract is at an end. […] It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract. […] We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract'. It must be

[21] In statutory law, the definition of frustration can be found in the Sale of Goods Act of 1979: "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of seller or buyer, perish before the risk passes to the buyer, the agreement is hereby avoided". See Rösler, *op. cit., supra,* note 4, p. 497.

[22] Rösler, *op. cit., supra,* note 4, p. 487.

[23] Taylor v. Caldwell, (1863) 3 B. & S. 826 (QB), *apud.* Rösler, *ibid.*

[24] Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia) [1964] 2 QB, *apud.* Rösler, *ibid.*, p. 499.

> more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound.[25]

The English doctrine of frustration not only emphasises facts over the parties' intentions, but also has a broader reach than the continental approach to hardship, dealing also with cases of impracticality and temporal or partial impossibilities.[26] Also, under the English law, the judges don't have the power to amend the contract.[27] This is left solely to the parties concerned, as they have the liberty to conclude another contract.[28]

4. The French Subjective Rationalistic Conception

On the other hand, at the heart of French private law stands the principle of *pacta sunt servanda*[29] and the theory of the autonomy of the will, by which contracts are viewed as semi-sacred bonds between the contracting parties.[30] In French legal thought, the contracting parties are the masters of the contract and their internal will is the only one that can make and also break the agreement. Hence, French legal thought found it initially difficult to recognise hardship as a way out of a burdensome contractual obligation. This is because French legal history shows us that the moral aspect of entering into a contractual agreement and keeping it in place has a superior position to that of factual changes. This hierarchy results from the fact that not only French Mediaeval legal scholars (the Glossators, the Commentators and the canonists), but also later enlightened and secular thinkers, such as Diderot and Rousseau, preferred general principles over

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[25] *Ibid*., pp. 226, 238 *et seq.*

[26] *Ibid*., p. 497.

[27] *Ibid*., pp. 499, 506.

[28] *Ibid.*

[29] *Pacta sunt servanda* establishes a Christian moral stratus to the parties' initial liberty as to what, where and with whom to contract. As the French *Code* asserts, at Article 1134, "agreements legally formed have the character of *loi* for those who have made them."

[30] Valcke, *op. cit*, *supra,* note 12, p. 142; I would be important to note that the Draft Common Frame of Reference seems to abide by the same subjective conception, as found in Article II-I:101: "A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect." This places the parties' internal wills and the meeting of their intentions as the general rule in contractual law. Following exceptions to the rule would be of strict interpretation.

concrete facts and deduction over induction.[31] The dualistic rationalist torch was carried also into the pages of the Napoleonic Civil Code,[32] which did not include hardship.

Consequently, French law and French courts reject the notion of *imprévision*. In the case *Canal de Craponne,*[33] the *Cour de Cassation* held that by adapting a contract signed in 1567 to the (then) present conditions, the *Cour d'appel d'Aix-en-Provence* had violated the rule of *pacta sunt servanda* contained in article 1134 of the Civil Code.[34] The French administrative court, the *Conseil d'Etat,* on the other hand, recognised hardship in the *Gaz de Bordeaux*[35] case, in which it adapted a contract concluded for the supply of gas to the city of Bordeaux. The alternative was the imminent bankruptcy of the gas company that would have interrupted the gas supply to the city.[36] There is, however, a proposal to change the law on obligations that would introduce provisions similar to those of article 313 BGB,[37] but it has not been

[31] Valcke, *op. cit., supra,* note 12, p. 139.

[32] *Ibid.*, p. 140.

[33] Cass. Civ., 6 mars 1876, Canal de Craponne, D. 1876.I.93, *apud.* Rösler, *op. cit., supra,* note 4, p. 500.

[34] *Ibid.*

[35] Conseil d'Etat, 30 mars 1916, Gaz de Bordeaux, S 1916.III.17, *apud.* Rösler, *op. cit., supra,* note 4, p. 501.

[36] *Ibid.*

[37] See the *Avant-projet de réforme du droit des obligations et de la prescription* for more details. According to the project, Article 1135 would be modified in the following manner:
Art. 1135. Conventions are binding not only as to what they expressly state, but also as to all that equity, usage or statute relate to an obligation according to its nature. It is necessary, in particular, to provide the existence in the contract of those clauses which are of common use, even though they are not expressly included.
Art. 1135-1. In contracts to be performed in successive stages or in increments, the parties may bind themselves to negotiate a modification of their convention should it happen that, because of the circumstances, the initial balance in their reciprocal prostrations has been so affected that one of the parties has no longer any interest in the contract.
Art. 1135-2. In the absence of such a contractual stipulation, the party who has no longer any interest in the contract may request the president of the tribunal de grand instance to order that a new negotiation take place.
Art. 1135-3. Should it be the case, the negotiations would be governed by the provisions of chapter 1st of this title. The failure of the negotiations, in the absence of bad faith, would give each party the right to rescind the contract without incurring either expenses or damages.

implemented yet. As expected, the French legal system, still heavily influenced by the doctrine of the autonomy of the will, as well as by its by-product – *pacta sunt servanda* – gives prevalence to the maintaining of the contract in its original form and hesitates to give judges the capacity to intervene between the parties to a contract.

However, in a fairly recent case,[38] the same *Cour de Cassation* imposed on the parties to a contract the duty to renegotiate it as a means to rebalancing their obligations.[39] The basis for this decision was the same as the one initially found by the German *Reichsgericht* in 1923 – the principle of good faith.[40] This change of mind, as well as the possible implementation of the above mentioned reform proposal would fundamentally change the traditionally subjectivist French legal landscape and bring it closer to a more balanced conclusion.

5. The "Lando" Principles and the Draft Common Frame of Reference

Now that we have established the particularities of each system's take on hardship, it should be useful to check which one, if either, has managed to "infiltrate" existing projects for the harmonisation of European private law.

For starters, in the Lando Commission's PECL (Principles of European Contract Law), according to Article 6:111, parties should still be "bound to fulfil [their] obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished".[41] Thus, the first paragraph postulates the general rule of *pacta sunt servanda*.

Translation by A. Levasseur and D. Gruning, *apud.* Rösler, *op. cit., supra,* note 4, p. 501. The project is available online at: http://www.justice.gouv.fr/art_pix/RAPPORTCATALA SEPTEMBRE2005.pdf.

[38] Cour de Cassation, Chambre civile 1, 16 mars 2004, Dalloz 2004, Jur. P. 1754, *apud.* Rösler, *op. cit., supra,* note 4, p. 501.

[39] Rösler, *op. cit., supra,* note 4, p. 501.

[40] *Ibid.*

[41] Article 6:111 (1) PECL.

The next two paragraphs are the ones that contain the rule on hardship. Accordingly, if performance of the contract becomes too excessive, the parties are *bound to enter into negotiations* as to adapt or terminate the contract.[42] If they don't arrive to a conclusion within a reasonable time period, the court may adapt or terminate the contract itself.[43] It's interesting to note that the PECL also oblige the parties to negotiate the contract's circumstances before going before a court. This duty does not exist in German and English law,[44] but it is present in the proposed reform of the French law on obligations.

However, there is no clear preference for either adaptation of the contract or termination. Consequently, according to the PECL, the court would be given the ability to terminate the contract without being bound to give preference to maintaining it, unlike the provisions of article 313 BGB. However, the rule that comes closest to what the PECL understands as hardship remains the German one, albeit without the prevalence of adaptation, but with an additional, *a priori* obligation of the parties to negotiate.

On the other hand, the German rules on hardship do not detail specific cases of changing circumstances, while article 6:111 (1) PECL does: "(…) performance has become more onerous, whether because the *cost of performance has increased* or because the *value of the performance it receives has diminished*". This seems to be in line with the German preference for abstract rules that need a powerful judge[45] to interpret their meaning.

The Draft Common Frame of Reference (DCFR), another legal instrument that has as its scope the harmonisation of EU law on contracts, seems to

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[42] Article 6:111 (2) PECL.

[43] Article 6:111 (3) PECL.

[44] Rösler, *op. cit., supra,* note 4, p. 508.

[45] As a matter of fact, the German *Bundesverfassungsgericht* declared that "legal science agrees that the principle of good faith constitutes an intrinsic border of the liberty to design contracts and hence provides an authorization for judicial content control". This view reflects the way German law has moved away from the subjective theory of French law and chose to let the judiciary assert its power of intervening between two individuals. See BVerfG 19.10.1993, BVerfGE 89, 214, 233, *apud.* Rösler, *op. cit., supra,* note 4, p. 509.

have adopted a view quite similar to that of the PECL[46] as it gives no prevalence to either adaptation or termination. The most visible distinction is that the DCFR does not impose any duty on the parties as to renegotiate the contract. In this sense, it resembles more closely the German view on hardship.

6. Conclusion

The aim of this article was to provide a discernible link between historical and cultural context, on the one side, and legal conceptions, on the other. We would contend, given the above comparative exercise, that the historical backgrounds of the three private law systems gave birth to different conceptions on hardship that were initially more or less circumspect of changing their viewpoints, although today, in part due to EU law and to globalisation in general, have started to converge. The French subjective view on contracts has probably changed the most, as it became ever more reliant on more objective ways of discerning the parties' intentions and has also recognised a duty to renegotiate an unfair contract as a big step in curtailing parties' autonomy of the will.

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[46] Article III 1:110:

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred;

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

There are, of course, national initiatives that aim to bring about, to a certain extent, harmonisation of private law, such as the already-into-force German revision of the law of obligations (*Schuldrechtsmodernisierung)* or the French proposal to change the same area of private law. EU law also plays an important part in accelerating these amendments. It will certainly be interesting to observe how similar changes will take place, if they do, especially in the case of English law.

II. Book Reviews

ECHILIBRUL BUGETAR: IMPACT NORMATIV ȘI INSTITUȚIONAL. EFECTELE ASUPRA DREPTURILOR FUNDAMENTALE [BALANCED BUDGET: ITS NORMATIVE AND INSTITUTIONAL IMPACT. IMPLICATIONS FOR THE PROTECTION OF FUNDAMENTAL RIGHTS], Elena Simina Tănăsescu, Eric Oliva (coordonatori), Hamangiu, București, 2015, 212 PP., ISBN 978-606-27-0481-0

Reviewed by Monica Amalia RAȚIU[1]

The book, published at the end of 2015 by the Hamangiu Publishing House and edited by Elena Simina Tănăsescu and Éric Oliva, is of special significance to the contemporary Romanian legal doctrine. The publication synthetizes the conclusions of a collaborative, multidisciplinary research project involving contributions from academics at the Faculties of Law of the Universities of Bucharest and Aix-en-Provence, also from experts in EU law, political scientists and economists. Using a comparative approach, through integrating relevant elements of constitutional law with public financial law, the publication proposes distinct mechanisms for the identification of a legal form that would enable a more effective implementation of the requirement of a balanced budget as stipulated in the 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (The Fiscal Compact Treaty).

The importance of this publication does not reside in the chosen subject area. The imperative of achieving a stricter balanced budget has been researched extensively in recent years and has generated a wealth of research output across member states. Rather, its originality rests in the interdisciplinary approach to the subject, the methodology chosen and the

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solutions proposed. Moreover, the book is accessible not only to scholars and students but also to interested non-expert readers who cannot afford to ignore the impact that this new perspective on the balanced budget has on public policy choices that affect the exercise of established economic and social rights.

The well designed methodology allows this study to deconstruct the concept of balanced budget through an in depth examination of its nature, value, efficiency and limitations. In addition, it examines the *locus* of the "golden rule" within the legal system and the impact of the balanced budget on the established constitutional order, particularly its effect on norms, institutions and fundamental rights. The methodological approach is demonstrably appropriate to the aims of this study and is validated by the end result, which represents a comprehensive, yet concise and innovative, analysis of the complex features and challenges posed by the concept of balanced budget. Furthermore, the authors deliver not only an integrated study with important practical implications but also a body of work that is exceptionally well researched. The analysis is based on a careful compilation of the existing legal norms in the 28 member states of the European Union and on a comparative examination of national policies and practices. This approach allows for the identification of specific solutions that could be used by decision makers and thus recommends this publication as a thoroughly researched study of incontrovertible practical value.

Moreover, through assessing the transposition of the Fiscal Compact in the national legal systems of member states, especially in national constitutional orders, the publication reviewed here cautions that the endeavour to reconcile European legal texts with national norms on budgetary procedure leading to the limitation of the budgetary powers of member states is a laborious and indubitably challenging enterprise.

The article by Simona Gherghina provides an in depth analysis of the normative characteristics of the balanced budget in Romanian law. The author correctly argues that the apparent solidity of the normative system conceals a number of significant vulnerabilities derived from the absence of a genuine unity of legal norms related to balanced budget and from a certain malleability of such norms, which allows for easy modifications.

Eric Oliva's article identifies three main effects of the implementation of the golden rule in the French legal system. These effects are identified in relation to the general characteristic of the legal norm in legal theory: validity, efficacy and effectiveness. First, any analysis of the golden rule should consider the necessity to ensure solid and sustainable public finances and to maintain budget deficits within reasonable limits.

The second implication, Oliva argues, is related to the effectiveness of EU law because the efficacy of the golden rule will reveal the capacity or incapacity of the European Union to enforce its own rules. Finally, the third implication is related to the sustainability of the golden rule in the diverse legal systems, economic and social orders of the member states. Here, the author defines legal sustainability as the capacity of the state to apply the golden rule to its legal order without disproportionate prejudice to the values and general objectives of the European Union or to its own constitutional order. The article argues that the golden rule should have a useful effect, which could be measured by using the proportionality principle. This involves establishing a balance between the advantages and disadvantages of including the golden rule in the national legal order. Hence, the mechanism of assessing the effectiveness of the golden rule is examined from this perspective.

The article by Elena Simina Tanasescu and Natașa Danelciuc – Colodrovschi examines the utility of establishing a fiscal council in the context of the Romanian and French legal systems. Thus, in analysing the organisation and operation of the Romanian Fiscal Council, Elena Simina Tanasescu notes that, although the Fiscal Council might appear as a graft incompletely assimilated by the national legal system, there is a viable basis for the consolidation of this institution in both, structural and functional terms. Such consolidation, the author argues, will secure an increased role of the Fiscal Council in the decision-making process related to public finances. Similarly, Natașa Danelciuc – Colodrovschi examines the organisation and functioning of the French High Council of Public Finance and notes its limited authority in French law. In addition, the author identifies a number of inconsistencies in the appointments procedure and in the guarantees of its independence. However, the author argues that such flaws should not prevent a gradual increase in the influence of this institution, even beyond the area of balanced budget.

A significant part of this book brings together studies of noticeable practical value, particularly in in relation to the consideration given by jurisprudence to the impact of the "golden rule" of balanced budget on fundamental rights, especially on economic and social rights.

Thus, Ramona Delia Popescu discusses the jurisprudence of the Constitutional Court in this area between 2009 and 2014, especially the opinions of the Court regarding measures adopted by the Romanian authorities that have resulted in restrictions to the exercise of some fundamental rights. In light of such limitations, the author remains concerned about the prospect of ensuring a genuine protection of fundamental rights once the current economic crisis comes to an end.

In her article, Aurélie Dort focuses her analysis on the jurisprudence of the European Court of Justice of the European Union regarding the effect of the application of the golden rule on the exercise of fundamental rights. Dort's argument is based on the premise that the Court of Justice controls not only the application of the golden rule in member states but also the non-excessive nature of the restrictions imposed on the protection of fundamental rights. In this context, the author provides a thorough examination of the proportionality of the measures adopted by member states for the purpose of securing the stability of the Eurozone.

Laura Maria Crăciunean's article further examines the tension between the two seemingly competing objectives: fiscal balance and the protection of human rights. In particular, the author investigates the reasoning of the European Court of Human Rights (ECHR) and of the European Committee of Social Rights (ECSR) regarding the economic and financial arguments invoked by states to justify the application of certain restrictions on fundamental rights. Following a detailed examination of the relevant jurisprudence, the author concludes that the ECHR has chosen a prudent approach by operating a clear distinction between the protection of civil and political rights and that of economic and social rights, while ECSR has chosen to distance itself from ECHR and to adopt a more safeguarding response.

Balanced budget: its normative and institutional impact. Implications for the protection of fundamental rights represents a valuable contribution to our

understanding of the complex nature of a balanced budget and of the renewed tension between the economic, the social and the political. It is well organised and unusually accessible for publications on such complex subject matters. In addition, the book's practical relevance and empirical value cannot be understated. Its theoretical and empirical breadth provides scholars, students and practitioners alike with a valuable source of intellectual inquiry and practical solutions to the issues addressed in its articles and represents a valuable addition to the literature on budgetary and fiscal matters.

CONTEXTUALIZING ROMANIA'S FRAGMENTED CONSTITUTIONALISM. COMMENTS ON BIANCA SELEJAN-GUȚAN: "THE CONSTITUTION OF ROMANIA: A CONTEXTUAL ANALYSIS"*

Bogdan Iancu**

For a long time after the collapse of state socialism, the countries that had just emerged from under the Iron Curtain were collectively referred to by the conceptual proxy of 'post-communism'. After twenty-years, with the benefit of hindsight, the multiplicity of discrete contextual factors (economic, historical, religious, etc.) bearing on each particular jurisdiction and distinguishing for instance the Czech Republic from Romania, Bulgaria from Croatia or Hungary from Poland are apparent. More nuanced and fine-tuned analytical approaches and methodological tools can now be considered.

In Romania, the dominant cultural discourse of modernization is still tributary to the framework theory, first advanced by local nineteenth-century modernizers, of "forms without substance".[1] Depending of where one stood in this resilient debate, the argument could either be that borrowing Western forms, including a constitution, would lead in time to genuine modernization (i.e., Westernization) by drawing substance into the form or that the exercise was fated to be a sham and that such posturing could not conceal the lack of contextual substance behind the façade (the empty forms of those adopted foreign rules and institutions). Emblematic for the latter standpoint, Nicolae Iorga, the country's eminent 20th century historian, described the 1866 Constitution (an adapted Romanian form of the Belgian Constitution of 1831) as "[a coat] made in fact by an excellent tailor, but one accustomed to tailoring suits for different kinds of bodies…with almost no effect on our political life other than having brought in yet another hypocrisy".[2] An iconic figure of the

* This review was also published in Int'l J. Const. L. Blog., Apr. 27, 2016, at http://www.iconnectblog.com/2016/04/book-review-bogdan-iancu-on-bianca-selejan-gutans-the-constitution-of-romania-a-contextual-analysis.

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19th century, I. C. Brătianu, prime minister between 1876 and 1888, referred in the same vein to the newly adopted court dress:

> It was not enough that they translated French laws word for word into Romanian, now they had to dress after the French fashion too. This is how we see our judges and barristers, clad in borrowed cloaks that in France might signify something, according to their traditions, but here, with us, only look ridiculous.[3]

Romania has adapted a Western-style constitution in 1866 and replaced it with another fundamental law in 1923 (in essence, a significantly amended version of its predecessor). This democratic tradition, imperfect and inchoate though it might have been, was abruptly terminated: the 1923 Constitution was suspended in 1938 and replaced with the royal dictatorship of Carol II, followed by a brief fascist regime (September 1940-February 1941), a pro-Axis military dictatorial rule by Marshall Ion Antonescu (during WWII), the Soviet-backed instauration of the Republic (1947) and the perpetuation of a particularly brutal form of state socialism until 1989. A Constitution was adopted in 1991 and amended fragmentarily and rather haphazardly in 2003 (in view of NATO and EU accessions). The current constitution is in many respects the result of transitional contingencies and open-ended "bricolage". Some institutions have been taken over fragmentarily from pre-WWII traditions (bicameralism is the best example), some were copied verbatim from various Western blueprints (the Ombudsman), some choices followed cultural path dependencies (semi-presidentialism, copied in truncated form from the French Fifth Republic), some have been adopted or overhauled at the behest of the EU Commission (the entrenched, extreme autonomy of the judicial system).

Due to these features, the country is an ideal case study for inquiries into the functioning of constitutional institutions and especially into the value of transplants to an unsettled contextual soil. Few authors are better equipped for such an undertaking than Bianca Selejan-Guțan, a professor of human rights and public law at the University of Sibiu and one of the foremost Romanian constitutional scholars of her generation.

The author's masterful introduction to Romanian constitutional law to an English language academic audience is centered on institutional analysis. The bulk of the volume deals with the political branches, the court system

and the Constitutional Court, whereas four relatively shorter sections analyze historical evolutions, the character of the state, fundamental rights, and amendment initiatives as predictors of future developments, respectively. Guțan strives to offer a cold radiography of the disparity, along each of these dimensions, between the purported objective of particular rules or institutional designs and their actual functioning. The book excels at this task and brims with intuitive and dissective analyses of particular constitutional arrangements, repeatedly stressing on the cultural limitations of normative institutions. For instance, the provision ofArticle 20, which provides for the direct effect of ratified international human rights treaties, has been in practice inoperative, due -–according to the author– to contextual reasons, namely, the fact that ordinary courts are both legal-culturally reluctant to assert such powers and methodologically ill-equipped to engage in such extremely sophisticated comparative exercises.[4]

The book shies away from trying to encapsulate Romanian constitutionalism in a simplified formula or label, perhaps as a result of the belief that practices are currently too unsettled and incoherent to warrant such an attempt. Overall, the picture one gleans from the volume is one of normative and institutional fragmentation and incomplete and segmented cultural rapprochement to Western systems. In Romania, the knee jerk reaction to all problems or crises is to suggest new laws, institutions, and constitutional amendments as panacea. In this respect, the author's insistence that some issues could be changed for the better at the level of good state practice rather than formal constitutional amendments stands refreshingly apart from the common, simplistically positivistic, belief in the efficiency and effectiveness of black letter law and institution-making: "[T]rue constitutional change in Romania, one that will matter in the future, at all levels of the system and at all levels of society, should be an informal one."[5]

The author focuses primarily and critically on the way in which internal contextual factors (failed past modernization, failed post-communist reception of tradition, failed confrontations with the communist past, systemic graft as a structural feature of local politics, etc.) impacted constitutional developments, whereas external causations are not engaged at the same depth of scrutiny. Needless to say, this is a reasonable space

limitation. At the close of most sections the positions of the Venice Commission and the EU Commission as to various Romanian constitutional evolutions are mentioned (how the EU Commission perceives the reluctance of Parliament to lift the immunity from arrest of MPs summarily, how the Venice Commission views the matter of separation of powers as "loyal cooperation", etc.).

The EU Commission makes such appraisals within the framework of the Cooperation and Verification Mechanism, a structure set up by the Act of Accession for evaluating by means of by-annual reports the progress undertaken by the country according to four benchmarks (essentially policies of judicial reform and combating corruption).

The Mechanism was initially scheduled to lapse after three years, in 2010, but has been maintained, apparently sine die. It had nothing to do initially with internal constitutional matters but the EU Commission has suddenly reckoned in 2012 that legal reform would after all include the rule of law and the rule of law has to do with the Constitution, whereas the Constitution is interpreted by the Constitutional Court. This elongated reasoning (or sleight of hand) has brought the local constitutional system under the Commission's scrutiny, counsel, and admonition. The overreach was occasioned and justified by an internal crisis related to an attempt to impeach the President but the dormant question is worth pondering whether the EU Commission has a blanket gubernatorial mandate to solve internal crises or a more limited one, in tune with legal basis and its institutional capabilities.

The Venice Commission is a consultative body of the Council of Europe, whose usefulness for providing an additional forum for debate and expertise in comparative constitutional matters is undeniable but whose methodology, membership, and positions in particular cases are by no means unassailable.[6] Moreover, these two bodies belong to different international organizations and have a different standing vis-a-vis domestic procedures and processes even though, more recently, cross-hybridization between the two commissions can be witnessed. These are selective cross-references also between local institutions and international bodies, for instance selective citation of international documents to rationalize and legitimize local preferences.

The author refers to the selective use (in essence, instrumental cherry picking) of the Venice Commission's Code of Good Practice on Referendums in Romanian Constitutional jurisprudence regarding the constitutionality of amendments to the local Referendum Law. Such external contextual factors (and their respective benefits and limitations) have become increasingly important and open avenues for future explorations of the volume themes in an international and supranational context.

The book offers its reader a superb, highly insightful and informative, introduction to the Romanian Constitution and the avatars of contemporary Romanian constitutionalism. Indeed, this is the first self-standing volume on the topic published in English, with an international press, for an international academic audience. It will serve as a standard reference for public law comparativists and political scientists interested in transitional systems, modernization, and constitutionalism in Romania and the region, for many years to come.

[1] T. Maiorescu, În contra direcției de astăzi în cultura română [Against the Contemporary Tendency of Romanian Culture] (1868).
[2] In Constituția din 1923 în dezbaterea contemporanilor [The Constitution of 1923 in Contemporary Debates] (București, Humanitas, 1990), pp. 25-53, at pp. 25-26. All translations are mine.
[3] T. Drăganu, Începuturile și dezvoltarea regimului parlamentar în România până în 1916 [The Beginnings and Development of Parliamentarism in Romania: 1866-1916] (Cluj Napoca, Editura Dacia, 1991), p. 354.
[4] At p. 232.
[5] Id. At p. 258 [citation omitted]. See also p. 256.
[6] Maartje de Visser, A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform, 63 Am. J. Comp. L. 963 (2015).

III. Events

BORDERS, OTHERNESS AND PUBLIC LAW – THE SECOND ANNUAL CONFERENCE OF THE INTERNATIONAL SOCIETY OF PUBLIC LAW, ICON-S BERLIN, 16-18 JUNE 2016

The German capital city was the perfect host for the third international conference organised by a new academic society: the International Society of Public Law (ICON-S), whose ambitious goal was to reunite public lawyers from all over the world under the generous yet controversial title of the conference: *Borders, Otherness and Public Law.* Where could this topic be more meaningful than in Berlin, the city that was torn apart by a cruel border, the city where otherness was once declared a crime, but also the city where public law was brilliantly taught by Franz von Liszt, Hugo Preuß or, more recently, Dieter Grimm or Susanne Baer?

The conference had an impressive participation: over 600 participants, 126 panels, 3 plenary sessions, including an extremely enriching live dialogue between the Presidents of the two European courts: the European Court of Human Rights and the Court of Justice of the European Union. The plenary sessions and panels were hosted by the buildings of the famous Humboldt University of Berlin, in the historic heart of the city, right near the former border on Friedrichstrasse that separated the Western and Eastern parts for almost 45 years.

The opening keynote speech[1] was given by **Professor Francoise Tulkens,** from Université Catholique de Louvain, former Judge of the European Court of Human Rights, who spoke about otherness as another kind of sameness. She reminded the audience that we are, at 500 years after Thomas More's *Utopia,* in the same permanent search for a better world. Legal comparison, in this respect, including comparing jurisprudence, is a useful tool for bringing together ideas in a changing world and for

[1] The welcome speeches, keynote speech and plenary sessions are available to watch on the ICON-S website: https://icon-society.org/previous-conferences/2016-conference/videos/.

influencing changes in national law, along side other `forms of legal globalisation", such as human rights. Professor Tulkens then analysed two concepts related to the main topic of the conference: the concept of 'foreigner' and the concept of 'border', from different perspectives: terminological, normative, jurisprudential. Thus, the 'forgotten' right to nationality was mentioned, in the context of nationality as a factor of both inclusion and exclusion. The speaker especially referred to the European Court of Human Rights case-law regarding nationality. For example, in *BIAO v. Denmark* (2016), the Grand Chamber of the Court found that a domestic measure regulating family reunification had an indirect discrimination effect in breach of Articles 14 and 8 of the Convention, on grounds of ethnicity and nationality. She also reminded the judgment in the case *Genovese v. Malta* (2011), where a discrimination was found on grounds of birth in or out of wedlock, regarding nationality. The other side of the right of nationality – as a factor of exclusion – was explained through the prism of the ECtHR case-law regarding discrimination.

The first plenary session, on "Migration and Movement", was chaired by Professor Helene Ruiz-Fabri and had as keynote speakers Professor Alexander Aleinikoff and Professor Philippe Sands. Professor Philippe Sands spoke about history as a lesson for Europe's current migration problems, having as starting point his new book "East-West Street". Professor Aleinikoff, from Columbia University, tried to identify "some core elements of the international forced migration system as it has developed over the past six decades and details the range and depth of the current challenges to effective protection of refugees." He also suggested "a number of policy and institutional reforms to respond to the present situation".

The second plenary session, that took place on the second day of the conference and was chaired by Professor Rosalind Dixon (University of New South Wales, Australia), was simply called "Inequalities". Here, Professor Susanne Baer, from Humboldt University of Berlin and Professor Catherine McKinnon from University of Michigan and Harvard University, tried to give an image on *Inequalities that matter* and on *Substantive Equality in Canada and in the World.* Professor Baer talked about the fact that, in the contemporary world, "the attention we pay to problems, or people, is contingent, with a struggle against the racist trade

of "the other" in slavery and the racist and sexist trafficking in women today, against democracy of the few ("women´s vote"), against criminalization of sex ("sodomy") or sexual identity ("transgender bathrooms"), against disrespect for the love of some ("gay marriage"), against barriers ("the disabled"), against a cultural hegemony of particular religions ("veil", "minaret", "state-church relations"), and so forth". She stressed the role of equality law in the understanding of these problems.

The third plenary session was actually a dialogue between the leading European Courts, through the dialogue of their presidents: Guido Raimondi, President of the European Court of Human Rights and Koen Lenaerts, President of the Court of Justice of the European Union, moderated by J.H.H. Weiler and Grainne de Burca. The main topic of discussion was the impact on the two courts of Opinion 2/13 of 18 December 2014, issued by the CJEU on the future accession of the European Union to the European Convention on Human Rights. Both Presidents declared themselves as supporters of the accession, as it would respond to both political and legal needs of contemporary Europe. Also, President Raimondi declared that the Strasbourg Court "completely trusts" the Luxembourg Court in matters of human rights interpretation.

Another interesting topic of the third plenary session was the difference of styles between the two courts, including the issue of dissenting opinions. President Raimondi stressed that dissenting opinions, as well as concurring opinions can be important for future case-law. Protocol no. 16 to the ECHR was also a topic, from the perspectives of both courts (as a non-compulsory advisory procedure for the ECtHR and as a procedure similar to the preliminary reference procedure for the CJEU).

The numerous **panels** that took place during the three days of the conference made choice very difficult. We particularly want to emphasize the panels on *The Processes and Implications of Constitutional Change* (participants: Rosalind Dixon, Yaniv Roznai, Richard Albert, Juliano Zaiden Benvindo); *The Rule of Law in Europe I: Structural Weaknesses in the European Legal Order*, chaired by Kim-Lane Scheppele; *Human Dignity As A Constitutional Category and its Impact on Asylum Law*, chaired by Rainer Arnold (participants: Selin Esen, Jiri Zemanek); *Global Constitutionalism And Human Rights* (participants: Rosalind Dixon, Ran Hirschl, Moshe Cohen-

Eliya, Gila Stopler, Mattias Kumm) and last, but not least, the panel on Romania after 25 years from the fall of the communist regime: *The Romanian Constitution At 25: A Critical Examination of Romanian Constitutionalism Through Its Others,* chaired by Silvia Suteu and having as participants Elena Brodeala, Paul Blokker and Bianca Selejan-Guțan.

The panel on Romania debated the way in which the Romanian constitutional system evolved in the last 25 years of democracy. Silvia Suteu, in her paper *The Multinational State That Wasn't: Romania as a "Unitary and Indivisible National State"*, critically examined the Romanian Constitution's unamendable commitments to the "national" and "unitary and indivisible" character of the State (Articles 1 and 153), as well as the origins these provisions, their interpretation in case law and their significance in Romanian constitutional discourse today. Bianca Selejan-Gutan referred to *The Constitutional Court and Others* in the last 25 years of Romanian 'new' constitutionalism, while Paul Blokker examined the way in which the Romanian Constitution encourages civic engagement. Elena Brodeala, a young Romanian researcher from the EUI, gave an interesting account on a topic that is rarely debated in Romanian doctrine: gender studies, in her paper on *Women as Others: the Changing Status of Women in the Romanian Constitution.*

The third annual conference of the ICON-S has been an extremely dense and enriching legal academic event, which enjoyed the presence of numerous public lawyers from around the world, but also of legal sociologists, anthropologists, historians and philosophers. It was a successful endeavour to bring to discussion, in the framework of a broad general theme, many issues of current preoccupation for the legal and political world. One can only look forward to the next edition, which will take place in July 2017 in Copenhagen.