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POLICY IMPLEMENTATION: SOME ASPECTS AND ISSUES

Anisur Rahman KHAN[1]

Abstract: *Policy implementation involves translating the goals and objectives of a policy into an action. The systematic study of policy implementation is relatively new in the broader domain of social science. This paper, through a content analysis, critically examines the theoretical issues associated with policy implementation, and the factors associated with implementation failure. Some practical strategies are suggested to overcome implementation performance and concludes with the proposition that implementation failure is also due to lack of theoretical sophistication.*

Keywords: *public policy, policy implementation, policy performance, implementation theory*

Introduction

Public policy is the guide to action and it connotes a broader framework to operationalise a philosophy, principle, vision or decision, mandate etc. which are translated into various programs, projects and actions. A policy entails the broad statement of future goals and actions, and expresses the ways and means of attaining them. It is a framework of governmental intervention covers a variety of activities. Anderson (2010) defines public policy as a purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern. Stewart, Hedge, & Lester (2008), on the other hand, define public policy as a series or pattern of government activities or decisions that are designed to remedy some social problems. What is called public policy must have to be implemented. The success of an adopted public policy depends on how successfully it is implemented. Even the very best policy is of little worth if it is not implemented successfully or properly. One of the problems of successful policy implementation is that it lacks in proper direction or guidelines on how to implement it. Markedly, such direction is supposed to be derived from the theories which it is supposed to follow. Unfortunately, there is a consensus amongst the scholars that the discipline "policy implementation" suffers from viable, valid, and universally accepted grand or good theories. In the discipline policy implementation, perhaps, there is no such grand or full-fledged theory, for instance, as comparable to Durkheim's sociological theory of anomie or other similar pattern of theoretical sophistication (Hill & Hupe, 2014). One of the reasons why there is no such grand theory in implementation because as a discipline it is still in its infancy (Goggin,

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Bowman, Lester, & O'Toole, 1990), and over the years, implementation has also been seriously overlooked in the broader domain of public administration which restricted the theoretical development of this discipline. Moreover, the implementation of a particular policy is very much context specific as it depends upon political, social, economic, organisational and attitudinal factors that influence how well or how poorly a policy or program has been implemented (Meter & Horn, 1975; Stewart et al., 2008), and it also varies considerably over time, across polices, and from one state to the next (Goggin et al., 1990). For instance; the implementation of any policy in a democratic country is often scrutinised by various stakeholders whereas it is very easy for an autocratic country to implement any policy as there are less opportunities for the stakeholders to be involved in the process. The contextual factors have also restricted the discipline for being adequately developed in terms of theoretical advancement. This paper sheds lights on the theoretical issues surrounding policy implementation and develops a linkage with implementation failure in order to expand our understanding about this discipline.

Theory and the State of the Discipline-"Policy Implementation"

In order to be considered as a good theory, the theory must follow the virtues such as uniqueness, parsimony, conservation, generalisability, fecundity, internal consistency, empirical riskiness, and abstraction which are applicable to all research methods (Wacker, 1998). It is suggested that a good theory in public policy should exhibit some characteristics such as validity, economy, testability, organisation/understanding, heuristic, causal explanation, predictive, relevance/usefulness, powerful, reliability, objectivity and honesty. Getting any single theory to reflect all of these traits would present serious challenges in any disciple, and it is highly unlikely that policy theory would contain all these characteristics (McCool, 1995). Ironically, this is a case with policy implementation. In this connection, Goggin et al. (1990) comment the lack of grand theory obfuscates what implementation is and is not. Nonetheless, although the discipline policy implementation lacks in having grand or classic theories, over a span of time, different theoretical models or approaches (at least two: top-down and bottom-up) (Stewart et al., 2008)**,** and case studies have been developed in the discipline of policy implementation. Based on the contextual premises mentioned above, in the following, some explanations have been given about the state of the discipline and the ways it has embraced various models and approaches in explaining and understanding how policy implementation proceeds on.

The term "policy implementation" has been defined by many scholars from various perspectives. Implementation is an important stage of the policy-making process. It means the execution of the law in which various stakeholders, organisations, procedures, and techniques work together to put polices into effect with a view to attaining policy goals (Stewart et al., 2008). Implementation can be viewed as a process, an output and an outcome, and it involves a number of actors, organisations and techniques of control. It is the process of the interactions between setting goals and the actions directed towards achieving them (Pressman & Wildavsky, 1973). Simon (2010)

views implementation as the application of the policy by government administrative machinery in order to achieve the goals. Specifically, policy implementation encompasses those actions by public and private individuals that are directed at the achievement of objectives set forth in prior policy decisions (Meter & Horn, 1975). The constituent element of most cited definitions of implementation is the gap that exists between policy intent and outcomes (Maznamin & Sabatier, 1989; Smith & Larimer, 2009). Implementation studies, therefore, place emphasis on understanding the success or failure of public policy by elaborating on factors that affect it. This concept of implementation helps to draw the attention of policy makers and implementers to study the processes that influence and establish the outcome of public policy (Bempah, 2012).

The first generation study of policy implementation has grown substantially since the seminal book "Implementation: How Great Expectations in Washington are Dashed in Oakland" of Pressman and Wildavsky was published in 1973. Until the publication of the book there was a period of academic debate about the meaning of implementation (Hill & Hume, 2014). As a case study, it explored the difficulties encountered by the Economic Development Administration in Oakland, California when trying to implement a job creation program during the 1960s. The research resulted in demonstrable progress in at least two respects. Firstly, there is now an enhanced understanding of the meaning of implementation and how it varies across time, polices and government; and secondly, it links policy design and implementation performance (Stewart et al., 2008). Another important first generation study was conducted by E. Bardach's (1977) the "Implementation Game" (Pulzl & Treib, 2007). The first generation studies were primarily concerned towards describing numerous barriers to effective policy implementation (Stewart et al., 2008). However, first generation studies have been criticised for being atheoritical, case-specific and noncumulative (Goggin et al. 1990), and the theory building was not at the heart of first generation research (Pulzl & Treib, 2007).

The second generation implementation scholars, on the other hand, worked for the development of analytical frameworks to guide research on the complex phenomenon of policy implementation. The second generation studies were more concerned with explaining implementation success or failure (Stewart et al., 2008), and made contributions towards developing analytical frameworks/models to guide research on implementation (Goggin et al., 1990). Second generation studies are broadly classified into top-down and bottom-up approaches of policy implementation (Stewart et al., 2008). This period was seemingly marked by the debate that was later dubbed as the top-down and bottom-up approaches/models of implementation research (Pulzl & Treib, 2007). Notable scholars like Meter and Horn, Maznamin and Sabatier illustrated top-down model in explaining implementation, while bottom-up scholars like Elmore, Lipsky emphasised that implementation consists of the everyday problem solving strategies of 'street-level bureaucrats' (Pulzl & Treib, 2007). Meter and Horn's (1975) top-down model depicts six variables to shape the linkage between policy and performance which include: 1. policy standards and objectives; 2. resources; 3. intergovernmental communication and enforcement activities; 4. characteristics of implementing agencies; economic, social and political conditions and 6. disposition of the implementers. Maznamin and Sabatier's (1989) top-down model involved 16

independent variables in the implementation process under three broader categories which include: 1. the tractability of the problem; 2. ability of the statute to structure implementation and 3. nonstatutory variables affecting implementation. Conversely, the bottom–up approach emphasises the role of administrators at the local level who are directly involved in implementation in accordance with their responsibility to accomplish the policy's aims and objectives (Birkland, 2005). The bottom-up approach suggests that implementation is best studied by starting at the lowest levels of implementation system or chain and moving upward to see where implementation is more successful or less so (Bachrach & Baratz quoted in Raadschelders, 2003). The bottom-up advocates make a focus on policy implementers at the local level, and it is activity of the bureaucrats. In this connection Lipsky, (1980) came up with the term 'street level bureaucrats', and state that they are the front-line public officials implementing government policies. Lipsky's concept views street level bureaucrats as the real policymakers and enhance the understanding of how discretionary powers and decisions made by policy implementers affects it successful outcomes. In similar opinion, Weimer & Vining (2011) emphasise that street-level bureaucrats or front-line implementers actually implement almost all policies. Unlike top-down approach, the bottom-up approach starts by identifying the network of actors involved in service delivery in local area and asks them about their goals, strategies, activities and contact (Stweart et. al., 2008).

Again, scholars tend to unify the two approaches or provide a hybrid one, and argue that policymakers should employ policy instruments based on the structure of target groups (Sabatier, 1988; Goggin et al., 1990). According to the hybrid approach, the implementation outcome is influenced by the central and local level factors (Goggin et al., 1990). Both the top-down and the bottom-up approaches are criticised for their limited explanatory ability of the dynamics of implementation from their respective analytical frameworks (Stewart et al., 2008), and no one has been able to validate the propositions derived from the earlier perspectives including the hybrid or synthesised one (Goggin et al., 1990). Notably, such third generation research attempted to bridge the gap between top-down and bottom-up approaches by incorporating insights of both camps into their theoretical models (Pulzl & Treib, 2007). The goal of third generation research was simply to be more scientific than the previous two in its approach to the study of implementation. Third generation research attempted to confront directly the conceptual and measurement problems that have impeded progress in the discipline (Goggin et al., 1990), and put emphasis on specifying clear hypotheses, finding proper operationalisations, and producing empirical observations to test the hypotheses (Pulzl & Treib, 2007). In the circumstances, it is clearly evident that the discipline implementation lacks in producing grand theory rather it has been flourished to its present level based on few theoretical models, frameworks or approaches. Therefore, many scholars of policy implementation now agree that the future phase of research in implementation must be directed towards theory development (Stewart et al., 2008). Thus, the discipline policy implementation appears to have been lacking in producing theory or grand theory although there are some theoretical models and approaches in literature of policy implementation. Lack of theoretical sophistication is a critical problem with policy implementation, and this desperately affects policy performance since the performance of a policy depends on

the guidance available to the implementers, and proper guidance is assumed to be derived from good theories. Despite having this problem, some scholars have focused on implementation failure in their own ways which can be summarised as follows.

Failure of Policy Implementation

The performance of policy implementation can be categorised into three dimensions such as; (1) output, outcome, and ultimate outcome of policy; (2) impact of policy; and (3) measurement whether the policy leads to the development of country/society as a whole. Brinkerhoff and Hoff (2002) state that successful policy outcomes depend not only upon designing good policies but upon managing their implementation. Until the early 1970s, implementation was considered unproblematic, and was regarded as simply putting the policy into practice. This viewpoint changed with the publication of Pressman and Wildavsky's "Implementation" in 1973. They studied the implementation strategies of the Economic Development Administration (EDA) in Oakland, California, USA. EDA was commissioned to create employment opportunities for the Black people through various measures such as; business loans, training and public works. Despite having a very good intention, the program could not be successfully implemented. The major factors for failure of EDA's programme include: 1. Faulty Program Theory: if a policy needs to be successful, it needs sound theoretical validity. But it was not the case with EDA. The economic theory of EDA was faulty because it aimed at the wrong target and such defect also exacerbated bureaucratic problems. 2. Unclear Goals and Objectives: Clarity of goals, targets and objectives encourages and fosters prompt implementation. EDA had difficulties in clarifying goals and targets because of its theoretical defects. For example; Pressman & Wildavsky (1973) observed that EDA wrongly subsidised the capital of business enterprises rather than paying the employees a subsidy on wages. They also asserted, "when objectives are not realised, one explanation is the assertion of faulty implementation". 3. Lack of Coordinated Planning: Lack of coordinated planning leads to policy failure. For example; EDA's terminal project seems to have suffered from lack of coordinated planning. Pressman & Wildavsky (1973), therefore, stated, "one must choose the right implementation plan-one must know the right way to apply the implementation plan". 4. Lack of Standardisation: A policy fails because of failure to follow a standard procedure. For example; EDA's "technical details" did not follow any standard procedure. 5. Intra-agency Antipathies: The arrangement of Mr. E. P. Folly, in charge of the EDA, had created intra-agency antipathies between his task force agents and programme superiors. Such intra-agency antipathy resulted in implementation delay. 6. Complexity of Joint Actions: One of the most important reasons for failure of EDA programme was complexity of joint action. The complexity of joint action happened in number of manners such as: i) Multiplicity of participants and perspectives: A large number of governmental and non-governmental organisations and individuals eventually became involved in the process of implementation. Each of the many participating groups had various perspectives about EDA operation, differences in outlook and sense of urgency, different opinions on leadership and organisational roles. Moreover, they had simultaneous commitment to and preference for other programmes. And, all that led to implementation failure. ii) Multiplicity of decisions and the decreasing probability of

program success: When program depends on so many actors, there are numerous possibilities for disagreement and delay. This was the case with EDA. EDA had number of decision and clearance points which prompted implementation delay. In opinion of Pressman and Wildavsky (1973), delays were being caused by the difficulty of obtaining required clearances. iii) Two goals and two decision paths: Rather than moving towards one goal, the EDA program aimed at achieving two major objectives: the construction of public works and the creation of jobs for the hard-core unemployment. Goal displacement was a major cause for EDA's program delay. iv) The emergence of unexpected decisions: Participants' differing perspectives and sense of urgency made it difficult to meet the urgency of number of decisions and clearances required for EDA. v) The anatomy of delay: Implementation delay is a function of number of decision points, the number of participants at each point, and the intensity of their preferences. The combination of delays had kept the EDA program away from realising its potential.

E. Bardach (1977), on the other hand, studied the implementation case of Mental Health Reform in California, USA. Bardach viewed implementation process as a pressure politics (pressure & counter pressures), messing of assent, administrative control process, intergovernmental bargaining, and complexity of joint actions, and features associated with each of the factors headed towards conceptualisation of the process as "a system of loosely related games". Bardach was concerned for those games which have adverse effects on policy implementation or factors that cause implementation delay or implementation failure. There are four types of adverse effects: (1) the diversion of resources, (2) the deflection of policy goals, (3) the dilemmas of administration, and (4) the dissipation of energies. The characteristics of the diversion of resources include easy money (most individuals and organisations who receive money from the government tend to provide less in the way of exchange), easy life (civil servants are protected by civil service rules, less concerned about their responsibilities), budget game (idea of all the money should be spent) and pork barrel (resources are diverted before implementation even starts or spreads to gain supports). The characteristics of deflection of policy goals include *piling on (*implementers are likely to add more goals), up for grabs (taking undue advantage/success), and *keeping the peace* (act of leaders, not the best leader). The dilemmas of administration include *tokenism* (attempt to appear contributing a policy element publicly but privately conceding a small token gesture), *massive resistance* (evading the responsibility specified in the policy mandate), social entropy (problem of incompetence, problem of variability, insufficient coordination) and the management game (no body's responsibility, no concrete decision). The dissipation of energies includes *tenacity* (concerned people do not want to change), *territory (competition for territory, rivalry),* not our problem *(failure to establish clear liability, nobody wants to shoulder the responsibility),* odd man out *(lack of moral authority, actors attempt to create their options and cut their losses in the event of uncertainty),* reputation (personal need and ambition).

Other scholars have talked about the constraints associated with policy implementation. Rossi et al. (2004) stated that many policies are not implemented or executed according to their design. A policy intervention may simply be poorly managed or be compromised by political interference. Sometimes personnel are not available or

facilities are inadequate; sometimes frontline implementers are unable to carry out the intervention due to a lack of motivation or expertise. Policy design may also be poorly structured or the original design may not be transmitted well to the staff. Moreover, the indented policy participants may not exist in sufficient numbers or may not be identified precisely or may be found to be non-cooperative. Some scholars confirm that proper implementation of any policy can be seriously undermined due to lack of sufficient resources (Meter & Horn, 1975; Mazmanian & Sabatier, 1989; Brinkerhoff & Crosby, 2002; Lipsky, 2010), lack of incentive (Meter & Horn, 1975; Bridgman & Davis, 2004), lack of a competent staff, implementors' negative disposition (Meter & Horn, 1975), lack of inter-organisational communication (Meter & Horn, 1975; Bridgman & Davis, 2004), lack of professional and technical resources (Goggin, Bowman, Lester, and O'Toole, 1990; Mazmanian & Sabatier, 1989), lack of official commitment to statutory objectives (Mazmanian & Sabatier, 1989), lack of delegation of authority and flexibility (Fox, Bayat, & Ferriera, 2006), lack of sufficient autonomy (Wali, 2010), inter-organisational complexity and conflict (Stocker, 1991), impact of economic, political, and social conditions, etc. (Meter & Horn, 1975), lack of specified technical know-how, lack of administrative capabilites, in prevelence of self-serving goals of street-level bureaucrats, and absense of administrative willingness (Vedung, 1997), increased demand for services; vague, ambiguous, or conflicting goal expectations; difficulties in goal achievements; and involuntary clients (Lipsky, 2010). Nevertheless, policy implementation is linked with the realities of a specific and dynamic environment and plays an important role in the practical implications of the nature and services rendered (Fox, et al., 2006).

Conclusion: In Search of Strategies for Overcoming Policy Failure

In the following, some key strategies are suggested to overcome policy failure or delay. 1. Good Theoretical Back-up: It is impossible to implement a policy that is defective in its theoretical conception (Bardach, 1979). EDA is the perfect example as such. Implementation requires appropriate 'causal theory' (Mazmanian & Sabatier, 1989). A good policy should have theoretical validity, and must be formulated based on appropriate theoretical basis. Without proper theoretical validity, a policy will give wrong directions in all ways. 2. Policy Legitimisation: In order to make progress with implementation, key decision-makers must view the proposed policy as legitimate (Brinkerhoff & Crosby, 2002). 3. Goals and Objectives: A policy must have clear, specific, measureable, attainable, rational and time-bound (SMART) goals and objectives. In addition to that, there must be consensus on the set goals and objectives as it is a critical feature of the policy (Meter & Horn, 1974). 4. Resource Accumulation: Money is critical in policy implementation and it also requires appropriate human and technical resources (Mazmanian & Sabatier, 1989). In fact, to implement a new policy, human, technical, material and financial resources must be allocated to the effort. There should be steady flow of resources (Brinkerhoff & Crosby, 2002). At the same time, appropriate technology also leads to implementation success. 5. Mobilising Resources and Actions: If policy has to achieve results, then resources and actions must be mobilised in the appropriate directions. Mobilisation of resources includes preparation

of complete plans, clarification of performance standards and conduct appropriate action plans (Brinkerhoff & Crosby, 2002). 6. Oragnisation Design and Modification: Appropriate organisational design is a necessary condition for successful implementation of a policy. Delegation of authority, harmonious organisation culture will enhance capability of the organisation in implementing a particular policy. Because of the difficulty in establishing new routines or tasks in organisations, it is politically more feasible to create new structures rather than overhaul older one (Brinkerhoff & Crosby, 2002). 7. Commitment and Skills of Frontline Implementers: Frontline implementers are the focal resources in policy implementation. They need commitment to policy objectives and necessary skills in using available resources to achieve policy objectives since incompetency of frontline implementers lead to implementation failure (Mazmanian & Sabatier, 1989). Frontline implementers must be motivated in their commitment and must be imparted necessary training so that non-compliance from their part does not take place. Competent personnel make implementation easier. 8. Make a Check and Balance of the Discretionary Power of the Frontline Implementers: Frontline implementers must enjoy sufficient discretion in discharging their responsibilities but there should be a check and balance between excessive or lack of discretionary power. Check and balance in controlling the behaviour of frontliners will guard against all sorts of intentional non-compliance. 9. Defined Roles & Responsibilities: There should be clear-cut task responsibilities about the concerned actors of policy implementation. This intervention will guard against what Bardach (1979) states, "not our problem". 10. Reward & Punishment: Introduction of reward and punishment system will help to perform tasks in accordance with standard procedure. 11. Monitoring: Implementation should not be done in isolation. Mechanism for monitoring the implementation process from internal and external authorities will enhance implementation performance. 12. Involvement & Engagement: Involving concerned stakeholders as co-producer and engaging actors in the process will enhance implementation success. 13. Active Leadership: Leadership is the key to policy success. Therefore, experienced and tested leader should be chosen to lead a particular policy intervention. 14. Overcoming Complexity of Joint Actions: Proper measures should be taken to guard against conflicts, contradictory criteria, fractions & divisions. 15. Choosing Correct Location: Right location should be chosen for implementation otherwise it will be waste of money and resources.

This paper has significant implications for at least two areas. Firstly, it reminds us about the need for undertaking efforts by the scholars towards producing substantial theories so that policy implementation holds water as a discipline in the domain of public administration. Secondly, it also helps us to revisit some of the major problems of policy implementation and suggest measures to overcome them. In the end, there is reason to argue that successful policy implementation also depends upon having a good theoretical base.

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DISCRIMINATION FORMS IN THE PROFESSIONAL AREA[1]

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Abstract: *When a group, irrespective of the species, uses identification elements/signals between its members and ones of differentiation against one or more individuals to adopt a certain delimitation attitude, we deal with discriminative behaviour. Always rooted in the prejudices widespread in the society, the nature and reasons of such behaviour depend both on the way in which society and its institutions are structured, and on collective representations and cultural patterns. The marginalisation or discrediting practices of the "weak" (women, elderly or disabled individuals) or of promoting a model of citizen with a certain cultural profile, physical aspect, and socio-professional condition involves, inherently, the existence of a part of population that is excluded to a certain extent. This paper presents the opinions of* Romanians *regarding minorities in general, and about their access to labour market, being the outcome of analysing data resulting from a 2011 survey.*

Keywords*: discrimination, tolerance, inclusion policies, minorities*

Relevant theoretical background for approaching the discrimination phenomenon

Discrimination (Latin discriminatio – separation) is a concept closely related to the one of difference. The original meaning of separation has the significance of a neutral act, even a passive one of establishing a difference – which is closely linked to the identification process. Territoriality is the one determining individuals to notice the presence of a different being in their proximity and, in the identification process, to

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adopt an attitude against this being, either aggressive or non-aggressive. Hence, when a group, irrespective of the species, uses elements/signals of identification between its members and ones of differentiation against one or more individuals for adopting a certain delimitation attitude, we deal with discriminatory behaviour, which does not presuppose any moral connotation. Thus, identity represents a "*posture adopted for the duration of an interaction, a possibility of an individual, (or of a group of individuals) to organise relationships against one another (...) From this perspective, the individual is not perceived as determined by his belonging because he is the one which gives a significance to the latter.*" (Ogien, 1987, p. 135)

In the fifties, under the influence of social movements, the negative connotation is developed with respect to the term of discrimination. The initial, neutral meaning, synonymous with the distinction, took over a pejorative connotation. Now, it is about differentiation actions either abusively or illegally, by separating a social group and treating another in a disfavouring manner, one way or the other. At the same time, the term of non-discrimination emerges, with the entire associated conceptualisation.

There are differences in the social contexts in which individuals practicing discrimination function. In the case of Europe, we might talk about a shared common definition of discrimination, and of its institutionalisation/regulation by laws, actions of repression taken by authorities against discriminatory acts. However, there are outside the democratic states, governments openly legitimising, in the name of morality, religion, or ideology, forms that we call discrimination. Examples therefore are the laws limiting fundamental liberties of women, or that deny the rights of indigenous people; it is a type of discrimination depriving *de facto* individuals from the viewpoint of human rights. As result, defining discrimination is related closely to the values of the societies. Some individuals may be discriminated based on the complex of elements constituting their identity, such as the case of an indigenous woman – she can be discriminated as woman, but also as person belonging to the indigenous populations.

According to the sociologist Mihăilescu Ioan (1993), discrimination represents any difference, restriction, exclusion, preference or differing treatment which disadvantages an individual/group, as compared to others in the same situations, or the use of unequal treatment against a person or against a group of persons in relationship with other categorical features: racial, ethnic or religious belonging, or class attachment. The term "*is used for describing the action of a dominant majority in relationship with a minority and involves a prejudice caused to an individual or to a group*". (Mihăilescu I., în Zamfir and Vlăsceanu, 1993, p. 177).

The discrimination represents, consequently, the differentiated treatment applied to an individual by its inclusion into a certain social group. Discrimination is an individual action, but if the members of the same group are treated similarly, then it represents a social model of collective behaviour (Banton, 1998). In social sciences, the term refers to the differentiated treatment against the large majority, with negative effects on the individual exposed to it.

The United Nations Organisation includes in discrimination "*any conduct based on the distinction operated in relationship with certain natural and social categories and which is not related to*

the individual capacities and merits, or to the actual behaviour of an individual". This type of unequal treatment still exists in all societies, to various degrees, and the evaluation is made in accordance with the social norms and values dominant within the society. It is relevant that in all democratic societies, it is legally prohibited any type of discrimination based on gender, ethnicity, race and religion yet, nevertheless, societies do not comply entirely with the constitutional provisions. (Mihăilescu, in Zamfir and Vlăsceanu, 1993, p.177)

At macro-social level, the discrimination phenomenon operates in relationship with two dimensions: the economic and the legal dimension.

The economic dimension refers to resources' distribution, to access to various occupations, to economic activities and welfare distribution in an equitable manner, justly and based on transparent and broadly accepted criteria. In order to attain these desiderates and avoid discrimination with an economic underlay, history showed that a democratic regime is one of the desirable forms of government, because any form of authoritarianism is associated with various forms of discrimination. Democratic regimes create a favourable framework for the operation of some institutions and non-governmental organizations enabled to fight with the display manners of discrimination within society. However, on the other hand, the capitalist economic regime, the social liberalism (Calves, 2006, p. 25-26) have generated competition on wide-scale among individuals and some groups are disadvantaged against others as part of this competition, because of their origin, religion, etc., and hence these groups are possible victims of discrimination.

Discrimination varies depending on the sectors of activity on the competitive market. In France, as Jean-François Amadieu shows *"it can be more often encountered in activities where contact to customer exists, in services and other trade activities"* (Amadieu, 2006, p. 82). Amadieu refers to the surveys achieved by the French International Labour Office for direct services, trade, hotels and restaurants. This Office shows that in 2005 an immigrant had four times less chances to be employed against a native candidate. Amadieu (2006) notices improvements and initiatives for fighting against discrimination. Thus, there are fields in which social dialogue practices were instituted with the role of democratising the access to resources, based on the participation of the population without symbolic power. The banks, for instance, attempt to measure the discrimination risk, just as they manage financial risk, and the industrial sector adopted a series of measures for diminishing the phenomenon.

From the legal perspective, discrimination aims rather the individual than the group. An individual is discriminated when in a certain circumstance, he/she is treated differently from the others without any substantial reason based on one or several illegitimate criteria. The legal dimension is so important, that it can be stated that: *"A difference of treatment is discriminatory whenever it is illegal"* (Mine, 2003, p. 15).

As result, it might be said that establishing discrimination presumes the existence of two elements:

- A competitive situation between candidates, based on objectivised criteria and actual stakes;

- The use of an illegitimate criterion by which the candidates are differentiated.

In order to re-establish balance between opportunities, democratic states commit to policies against discrimination. This fight may take several ways. Firstly, the legislation ensures protection for natural persons. On the other hand, an attempt is made to formulate rebalancing policies, called generically "positive discrimination", which aims to balance chances between groups. By "positive discrimination" we understand measures that some states take for removing inequalities the victims of which certain minorities are. One such measure is what is called generically „politically correctness". The correct expression from the political point of view *"consists in using systematically the euphemism in order to get rid of the suspicion of pejorative connotation. The anathema is cast on some terms assumed as promoting contempt against minorities, just as well"* (Deliège, 1999, p. 98). This reconstruction of language within the public space is achieved by adopting neutral verbal forms, sometimes even neologisms which comply with physical and any other differences.

However, there is also the risk of some perverse effects of these policies. *"Defending minorities might seem at first sight a display of multiculturalism, but often leads in the opposite direction, the one of a communitarianism closed in itself and, consequently, hostile to the coexistence of various cultures"* (Touraine, 1996, p.292). Institutionalised discrimination might enter the collective memory and creates a feeling of marginalisation and disobedience. Yet, symbols are not enough in promoting egalitarianism.

The most debated measure for fighting against discrimination is, as already shown, positive discrimination. Positive discrimination reverses the conventional operational way of classic discrimination by favouring groups that are usually disadvantaged. Indeed, the policies and right fight one another for re-establishing the balance between social groups, precisely because disadvantaged groups do not have the same possibilities as the others (the same cultural, social, and educational capital within the society) and, implicitly, their chances of accessing material resources and opportunities for social mobility are low. These groups are structurally disfavoured, even without undertaking a certain discrimination action. However, it is not enough to eliminate legal inequality (segregation, colonisation) in order to promote equitable treatment.

Positive discrimination was born in The United States under the name of affirmative action based on two objectives: first to compensate for structural socio-economic inequalities against historically inherited ethnic minorities (Afro-Americans and Indians), but also in order to improve representativeness based on meritocracy. The idea was exported (Europe, India, South-Africa, etc.) and diversified and thus extended beyond the limits of ethnic minorities to all discriminated social groups (Wuhl, 2007). Legal changes emerged in the area of social competition, intended to encourage disadvantaged groups, thus compensating for a de facto situation.

Discrimination may be either direct or indirect. In the first case, discrimination is obvious: it might be detected and denounced. However, as result of the evolutions in the fight against discrimination, hidden practices emerge. These practices have as purpose to eliminate indirectly candidates. The concept of indirect discrimination was introduced as an effort to reach a certain balance between various population groups.

The representation of the various groups in different sectors allowed detecting apparently irreproachable practices, but which generate damages for a certain group. Identifying direct discrimination might be done by legal analysis which may detect a difference in treatment, or might result from statistical analysis: it is identified by effects and not by reasons (Calves, 2004, p.46).

Indirect discrimination emerges whenever a practice, rule, criterion or an apparently neutral condition have, in fact, a disproportionate effect against certain individuals or categories of individuals, except for the case when this practice (rule, criterion or condition) cannot be justified. The governments are compelled to consider the relevant differences presented by the various groups in order to prevent indirect discrimination.

Discrimination is always rooted in the prejudices widespread within the society. The nature and reasons for discrimination depend both on the way in which society and institutions are structured, but also on collective representations and cultural patterns. With respect to law enforcement, abuses are possible whenever certain groups are regarded as "potential delinquents". These individuals are more susceptible to be arrested and jailed than any other population segments. They also might be probable victims of abuses or bad treatment whenever they are arrested / detained. Some authorities tolerate violence acts, motivated by prejudices. As result, there is the risk that certain groups or individuals would not enjoy equal protection against violence motivated by the existence of differences regarding religion, ethnicity or sexual orientation.

Level of confidence in other people

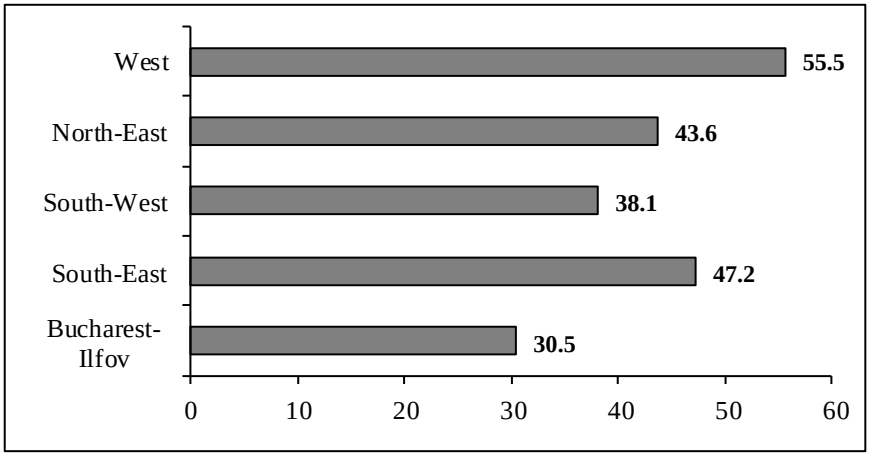
This section presents the opinions of the Romanian population regarding minorities, in general and about access to labour market. They are research data collected in a survey from 2011, part of the research in the project POSDRU/97/6.3/S/54973: "Support for women discriminated on the labour market". Various minority groups are investigated, as indicated by the first wave of the survey from 2010[1] and by other surveys undertaken in Romania, as being the most strongly discriminated ones: Rroma, people who were in prison, persons with disabilities, persons suffering from HIV/AIDS. At the same time, there are analysed the attitudes regarding access to labour market depending on age or gender, because most of the researches indicate a higher discrimination level against elderly on employment and against women regarding the access to management positions.

First of all, we have looked at the level of confidence in other people. The data analysis indicates that less than half of the population considers that they can have confidence in other people, in four out of the five analysed regions of Romania. The only exception is the West region, where the share is of 56%. At the opposite pole is placed Bucharest-Ilfov region, with the lowest level of confidence, less than one third considering that they can trust in most people. The low level of trust is explained by the

[1] See Tomescu C., Cace S. (2010). Studiu asupra fenomenului de mobbing şi a unor forme de discriminare la locul de muncă în România" [Study on the phenomenon of mobbing and some discrimination forms at workplace in Romania (Romanian language)], Expert Printing House: Bucureşti.

increased feeling of insecurity characterising large, agglomerated cities, with weak neighbourhood and community links like Bucharest.

***Figure 1**. Might one trust most of the people?*
(Share of those answering "yes")



In general, there are no statistically significant differences according to socio-demographic criteria. However, in two of the regions there are differences depending on gender: in Bucharest-Ilfov, women seem to have a significantly lower level of trust (26.4%) against the one of men (35.8%), while in the Western regions they have significantly higher level (59.1% against 51.1%).

Attitude against minorities

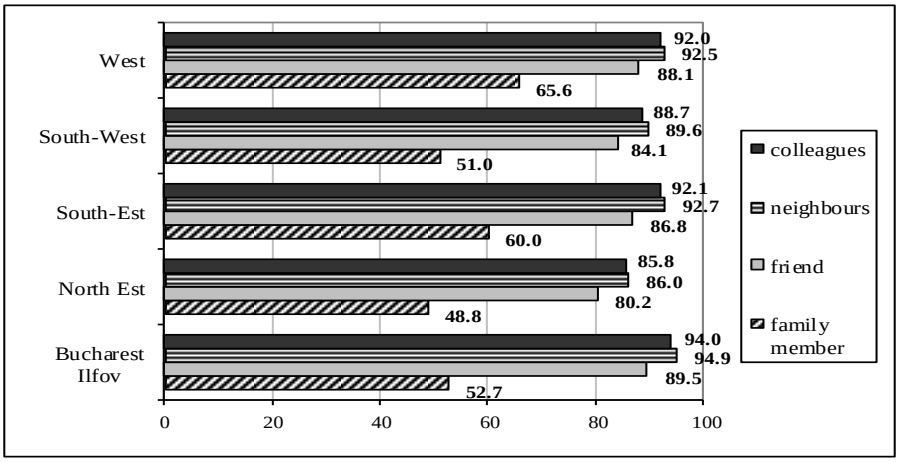
The survey intended to capture the attitude against three minority categories, identified in the first wave of research in 2010 as being most strongly discriminated: persons with disabilities, Rroma, and people who were in prison.

The acceptance of all three investigated groups follows, as it was expected, Bogardus's social distance model: the stronger and closer the supposed relationship between respondent and minority representative is, the more acceptance would be lower. The minority representatives are most accepted as colleagues or neighbours than as friends or even more, as family members. From the analysed groups, the highest level of acceptance is enjoyed by individuals with disabilities, then the Rroma and the most rejected are individuals who were in prison.

Individuals with physical disability are accepted widely by their colleagues (86% -94%) and neighbours (86%-95%), to the largest extent as friends (80% - 90%), and to a lesser extent as members of the family (49% - 66%). The highest acceptance of individuals

with physical disability is found in Bucharest-Ilfov region, followed closely by the West region and the least acceptance in the North-East region.

***Figure 2**. Acceptance of persons with disabilities*

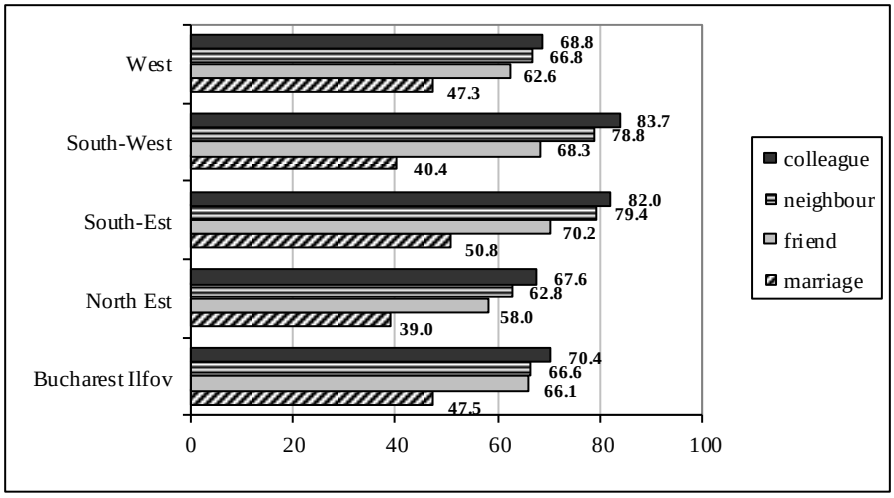


Note: The share of answers "total agree and "agree" with the statements "Would you agree to a person with a physical disability as colleague/neighbour/friend/marry you or another member of the family?"

The acceptance of Rroma takes the same pattern: the highest level agrees to have them as colleagues (68%-82%), then neighbours (63%-79%), friends (58%-70%) and to the least extent as family members (39%-51%).

The highest tolerance towards Rroma is encountered in the South-Eastern region (the only region where over half of the respondents states that they would accept that he/she or a family member would marry a person of Rroma ethnicity) and in the South-West one, probably because of a higher share of the Rroma population in the region. The more frequent are the contacts with Rroma, the more direct experience increases tolerance against them. The lowest levels of acceptance for Rroma are in the North-Eastern region (less than 40% would agree to marriage and only approximately two-thirds would accept them as colleagues).

Figure 3. *Acceptance of Rroma*

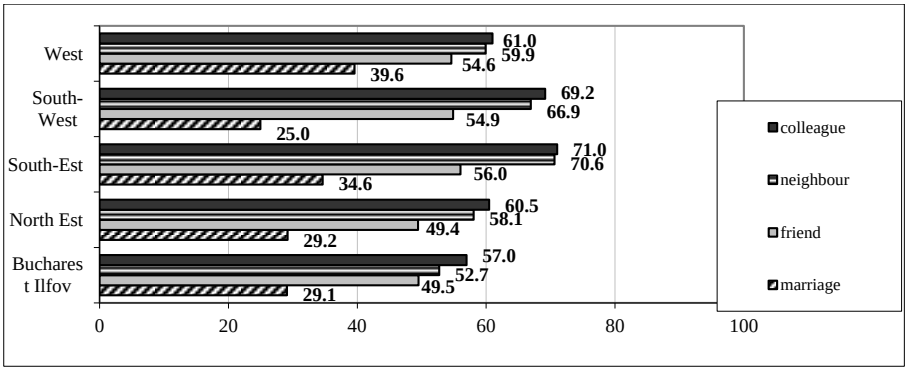


Note: The share of answers "total agree" and "agree" with the statements "Would you agree to a Rroma person as colleague/neighbour/friend/marry you or another member of the family?"

The acceptance of individuals who exited prison is the lowest from the analysed minority groups: the lowest level is registered in the case of marriage (29%-35%) and the highest in the case of colleagues (57%-71%).

The South-Eastern region is the most tolerant, registering the highest values for all four indicators, and the region Bucharest-Ilfov is the most intolerant.

Figure 4. *Acceptance of individuals who were in prison*



Note: The share of answers "total agree" and "agree" with the statements "Would you agree to a person who was in prison as colleague/neighbour/friend/marry you or another member of the family?"

The analysis regarding the acceptance of minorities, at regional comparative level, indicates a model where the regions with a high development level, such as Bucharest-Ilfov and West are tolerant towards individuals with disabilities, the Southern regions towards Rroma and persons who were in prison, while the North-Eastern region shows a lower acceptance of all analysed groups.

The main conclusions show that:

- The South-East and South-West regions are the most tolerant against Rroma and individuals released from prison.
- The region Bucharest-Ilfov is the most tolerant against individuals with disabilities and the least tolerant against individuals exiting prison.
- The Western region has an intermediary position, with high tolerance against individuals with disabilities and the somewhat lower regarding Rroma or individuals who were in prison.
- The North-East region is the most intolerant, with the lowest levels of acceptance regarding Rroma and individuals with disabilities, and low levels of acceptance for individuals who were in prison.

In most of the surveys, a relationship between the high economic and social development level and the more open, tolerant attitudes was discovered. The differences identified between the regions have several explanatory factors:

- The different economic welfare level: Bucharest-Ilfov registers highest incomes per household, followed by the region West, with high discrepancies to the South-East and South-West, while the North-East region is the poorest one.
- The different level of education: if in Bucharest-Ilfov the share of those with higher education is of 36%, or in West of 22%, for the other three regions, the share is of 16%-17%.
- The share of the rural area (with more conservative, traditional attitudes, but also with lower development level): if in Bucharest-Ilfov region or the West region only 9%, respectively 34% from the population reside in the rural area, in the North-East region, the most intolerant one, the share of the rural is the highest – 53%.

Regarding the entire sample (including all analysed regions) the acceptance of minorities depends on[1]:

- Area of residence (higher in the urban area);
- Education (higher in the case of those with higher level of education);
- Gender (higher for men);
- Age (higher in the case of younger generations)

[1] All other variables held under control at a significance level of p= 0.01

Acceptance of minorities at the workplace

To see the attitudes of individuals related to the acceptance of various minorities on the labour market, several groups were identified based on the survey from 2010[1], as well as based on other surveys, as the most rejected: Rroma, persons released from prison, persons infected with HIV/AIDS.

Even though, as seen above, there is a wide acceptance of Rroma and even of former detainees as colleagues (varying depending on region from 60% to 80%), faced with deciding and the responsibility of the option, their acceptance turns out lower. Almost half of the respondents from each region would refuse to recruit Rroma or persons recently released from jail, in a position of employer. About the same share of the respondents consider that minorities have too many rights in Romania.

Table 1. Attitudes on employment regarding Rroma and people who were in prison (on regions - %, partial and total agreement)

	BUC.-ILFOV	NORTH-EAST	SOUTH-EAST	SOUTH-WEST	WEST
If I were employer, I wouldn't hire Rroma because most of them are lazy and steal	44	**59**	43	43	51
Minorities have too many rights in Romania	52	**61**	42	56	48
Rroma don't need schooling because they don't make any use of it	18	**41**	17	24	**39**
If I were employer I wouldn't hire a person just out from prison	44	**55**	47	49	**55**

As the case with accepting minorities shown above, the region with the most discriminating attitudes against employment is North-East with 55% who would not hire former detainees, 59% who would not hire Rroma and 61% who consider that minorities have too many rights in Romania.

At the opposite pole is Bucharest-Ilfov and the South-East, both regions recording also the smallest percentages of Rroma discrimination regarding the right to education – only 17-18% of the respondents from this region considering that Rroma don't need schooling, against the other regions where the share reaches even 39-41% (West,

[1] See Tomescu C., Cace S. (2010) *Studiu asupra fenomenului de mobbing şi a unor forme de discriminare la locul de muncă în România*, [Study on the phenomenon of mobbing and of other discrimination forms on the workplace in Romania, (in Romanian)] Expert Printing House, Bucharest

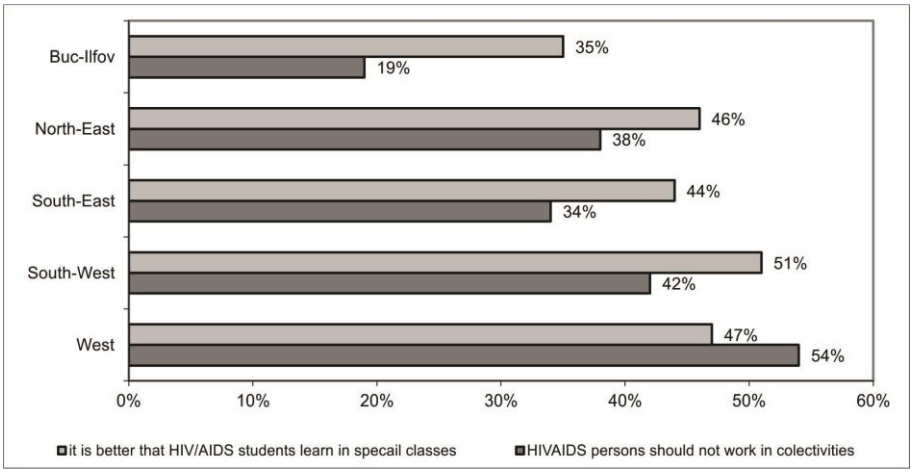
respectively North-East). On areas of residence, the rural discriminates more than the urban in this respect, in four out of the five analysed regions, the percentage of respondents against education for Rroma reaching a maximum of 51% in the North-Eastern rural, a region that also in this instance confirms the highest level of intolerance.

At the same time, the various age groups have different perspectives about the employment of individuals released from prison in all five regions, with a trend of the extreme age groups to show higher intolerance: individuals aged 55-64 in Bucharest-Ilfov (52%), South-East (52%) and West (69%), respectively very young age groups, 18 to 24 years of age in the North-East (63%) and South-East (52%).

The acceptance in communities of infected with HIV/AIDS individuals registers lower shares, however with some difference between the analysed regions. Thus, if for discrimination at the workplace, a relatively low percentage is recorded in Bucharest-Ilfov (19%), the Western area is more intolerant and the respondents agree with the isolation of the affected individuals by a share of 54%.

In four out of the five regions, high shares are recorded (between 44 and 51%) regarding the agreement for isolating those with HIV/AIDS. Bucharest-Ilfov shows again a less discriminating attitude, with an agreement of 35%. It should be noticed that regarding the discrimination of this group of individuals, Bucharest-Ilfov registers a homogenous attitude on all demographic sub-categories. For the other four regions, the rural area proves often more intolerant that the urban area, with a maximum of 59% in the rural South-West regarding education, respectively 61% in the rural West regarding the acceptance at the workplace.

***Figure 5**. Attitude towards HIV/AIDS infected individuals (share of those who answered "yes")*



By analysing age-groups, individuals from the two age-group extremes of the interval (youths with ages between 18-24 years, respectively elderly from 55 to 64 years) have the most discriminatory tendencies. Thus, youths from the West region record a maximum agreement share of 65% regarding the isolation of HIV/AIDS infected individuals from the community and in the South-West, both young and elderly mentioned above agree to educate these individuals in separate classrooms, by a share of 58%, thus registering another maximum on these statement, as compared with the other age groups.

With respect to the gender of the respondents, men prove less tolerant only in the South-West region (46% regarding job, respectively 55% regarding education), while in the other regions no significant differences were recorded.

Attitude against elderly on the labour market

Discrimination against elderly regarding access to labour market is shown in a significant proportion. Even though the majority agrees that if you are good in what you are professionally doing, then you will find a job irrespective of age, whenever put in the situation to chose, because there are only few jobs, over half of the respondents consider that youths should have priority against elderly on hiring in all five surveyed regions.

Table 2. Attitudes regarding access to labour market on age criteria

	BUCH.-ILFOV	NORTH-EAST	SOUTH-EAST	SOUTH-WEST	WEST
Whenever there are few jobs, on hiring, youths should be given preference against elderly.	56	73	68	**79**	61
If you're very good at what you're doing, you will always find a job, irrespective of what age you have.	60	75	77	**82**	75

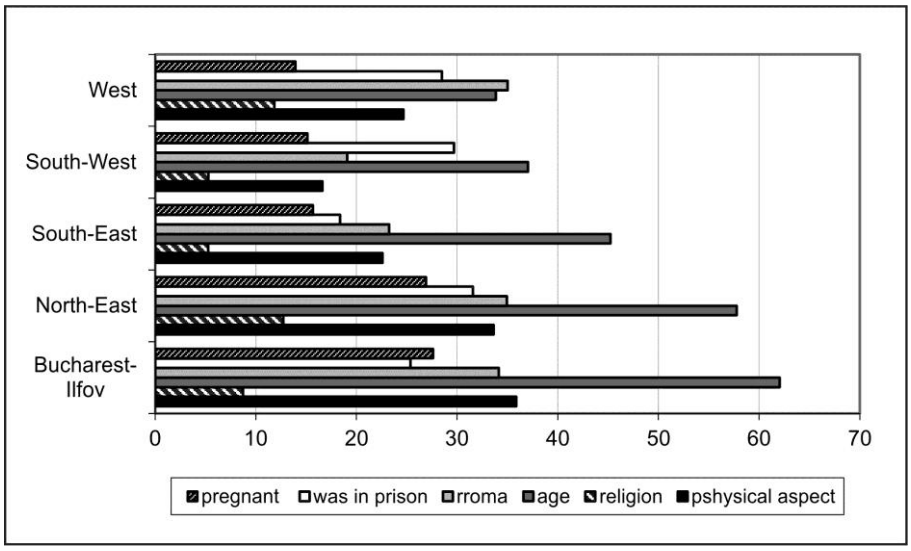
The South-West region is the most discriminating regarding access to market based on age criteria (79%, against the opposite pole represented by Bucharest by 56%). All respondents from South-West are the most confident about own capacities to the detriment of discrimination based on age. The smallest percentage is registered in Bucharest, with only 60% of the individuals agreeing with this statement.

Following the discrimination theory in view of supporting their group, youths aged between 18 and 24 years have a stronger bias than other age groups regarding jobs for the youths to the detriment of elderly, when the hypothesis is the one of a limited number of jobs. This attitude is recorded in four out of the five regions, with a maximum of 90% approving this idea in the South-West region, while in West region no significant differences are recorded between the interviewed age groups.

Discrimination on employment

Moreover, elderly discrimination on labour market results also from the statements of the participants to the survey, when asked if they know personally cases of individuals who were not hired based on other reasons than the professional ones. In four out of the five regions, not getting hired on age criteria was the most often mentioned one, save for the West region, where Rroma not getting hired is somewhat wider spread.

***Figure 6**. In your case, or of an individual you personally know, it happened that she/he did not get a job because of...*



After the elderly, the most frequently discriminated on hiring are Rroma and people who were in prison. Discrimination based on the physical aspect seems also to be more frequently encountered. Pregnant women are seldom discriminated (perhaps also because the situation in which they are hired while already pregnant is less frequent), and religious reasons as criteria in not obtaining a job are the most seldom encountered instances (the very high percentage of the Orthodox majority provides one explanation for the infrequency of the situation).

In Bucharest, there were mentioned the most instances of discrimination according to the majority of the investigated reasons (only religion and the former detainee did not record the highest values). To the contrary, in South-West and West the lowest values for all reasons are recorded.

Discriminations were more often mentioned in the urban area, save for the region Bucharest-Ilfov (the latter a more urban region of the county Ilfov bearing more the characteristics of a suburb) and South-West. The more frequent mentioning of

discrimination in the urban area should not surprise, because work experience, exposure to diverse situations and social contacts is higher in this area. The outcomes agree with the first wave of the survey from 2010, when such discriminations based on age where more frequently called upon, and the region Bucharest-Ilfov[1] seems to indicate a higher level of discrimination overall.

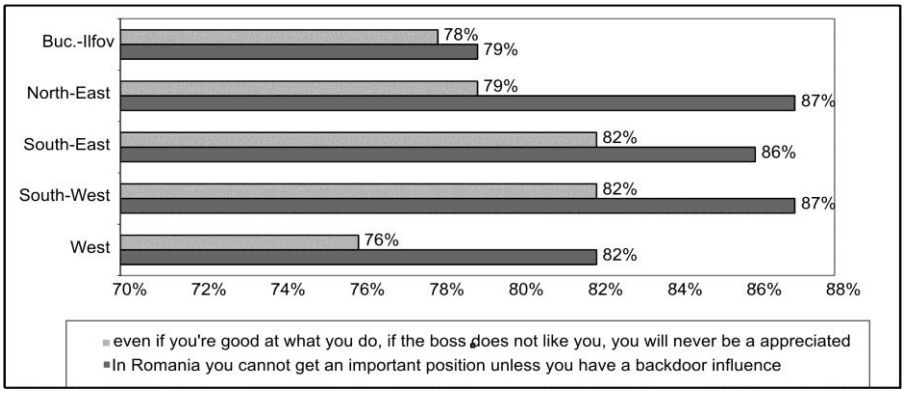
Attitudes regarding work acknowledgement and promotion on the job

With respect to the ways of acknowledging work and obtaining promotions the outlined attitudinal profile is a contradictory one: albeit, as seen, the majority believe that if you are good at what you are doing, you will always find a job at the same time they believe that also a high level of competences matters much less against personal preferences of the superior, or against "backdoor influence".

A percentage of 82% respondents from the South-East and from the South-West consider that you must be liked by the superior in order to be appreciated, against the other regions where percentages under 79% are recorded; also, in Bucharest and West smaller percentages are registered regarding the system's functioning based on "backdoor influence", by 79%, respectively by 82% as compared with the other regions, where over 86% from the respondents acknowledge the existence of these practices.

The differences regarding the other socio-demographic criteria are, by and large, insignificant with respect to these aspects. The rural area admits to a higher share the need for these discriminatory practices for promotion, as compared with the urban area in the South-West (85% against 79% regarding the preferences of the superior – 90% against 85% regarding the need for backdoor influence), North-East (82% against 76%, respectively 89% against 84%) and Bucharest-Ilfov (93% against 76%, respectively 90% against 78%) regions.

***Figure 7**. Attitudes about acknowledgement of work and promotion*



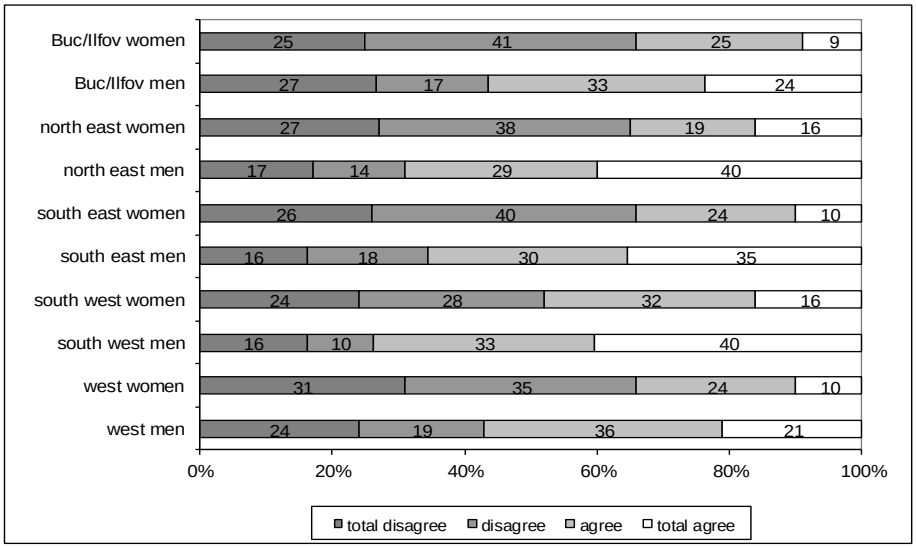
[1] See Tomescu C., Cace S. (2010) *Studiu asupra fenomenului de mobbing și a unor forme de discriminare la locul de muncă în România*, [Study on the phenomenon of mobbing and of other discrimination forms at workplace in Romania, (in Romanian)] Expert Printing House, Bucharest.

The Bucharest-Ilfov region is the only one recording significant differences about age, the youths with ages between 18 and 24 years standing out as the ones with the lowest percentage of agreeing with the requirement of "backdoor influence" for access to an important position by 72%, while at the opposite pole is the category of elderly, with ages between 55 and 64 years, by 86%.

Attitudes towards gender regarding management positions

Regarding access to management positions depending on gender, positive attitudes are balanced in relationship to the negative ones in all five regions. The West region and Bucharest-Ilfov record the smallest percentages in agreement with the better appreciation of men in management positions (44%), while in the South-West region this aspect is supported by 62% of the respondents.

Figure 8. *Men are more suitable as managers than women*



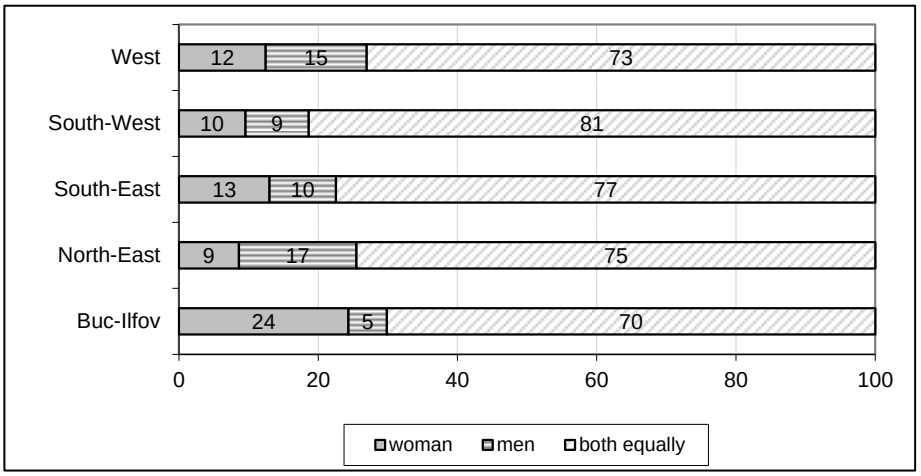
The situation shows differences on the two genders, the differences between the opinions of men and women in this respect being significant in all five regions. It should be noted, however, that women in the South-West (the region with the highest discrimination) register a considerable percentage (48%) in agreeing with the priority of men, thus reinforcing the disadvantageous perceptions about gender roles.

The opinions in this respect are polarised also depending on the area of residence in North-East, South-East and South-West, those siding with men residing in the rural area 64%, against 42% in North-East, 63% against 40% in the South-East, respectively 66% against 58% in the South-West. The same regions register significant differences also on age groups, youths and elderly being again the two categories with the highest

percentages regarding discrimination (by maximum 63% for those aged between 18 and 24 years of age in North-East, and 59%, respectively 70% for those with ages between 55 and 64 years of age in the South-East and in South-West).

When asked about the general situations, the majority believe that men are more appropriate to lead, while when asked specific questions on types of institutions, the respondents consider to their majority that it does not matter, that women and men are equally able to lead/manage. The most discriminatory attitudes are encountered in the case of town-halls and more egalitarian ones about schools.

Figure 9. *Who do you think is suitable to lead a school? (percentages for each region)*

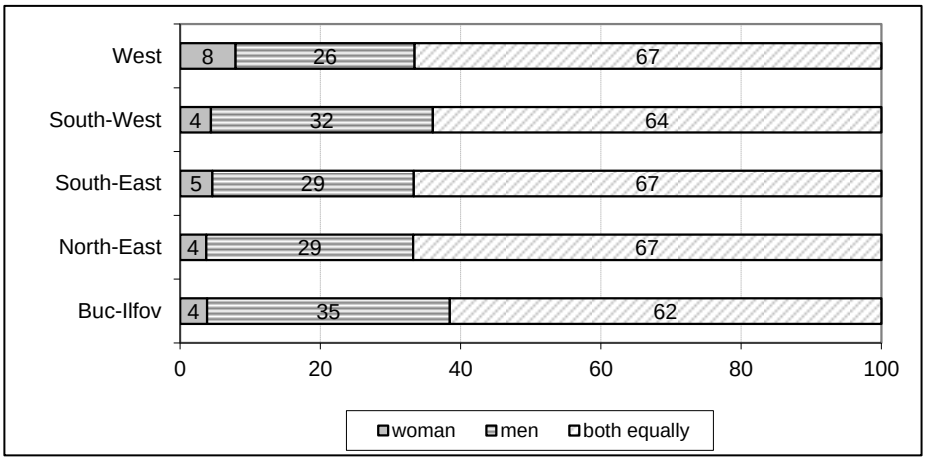


In the case of schools, the highest share is recorded for those considering that women are more appropriate to lead/manage, reaching to about a quarter of the respondents in the region Bucharest-Ilfov. The least egalitarian attitude is encountered in the North-East region.

The education system is one of the fields where the weight of employed women in managing positions is high. Hence, school is an egalitarian institution not only at objective level, but also at the subjective one, as it proves the attitudes identified during this survey. However, at the same time, this egalitarian attitude might hide the reproduction of the gender roles with the image of the woman as suitable to environments where they deal with the education of children and, implicitly, with the same pressure to assume more regarding their education.

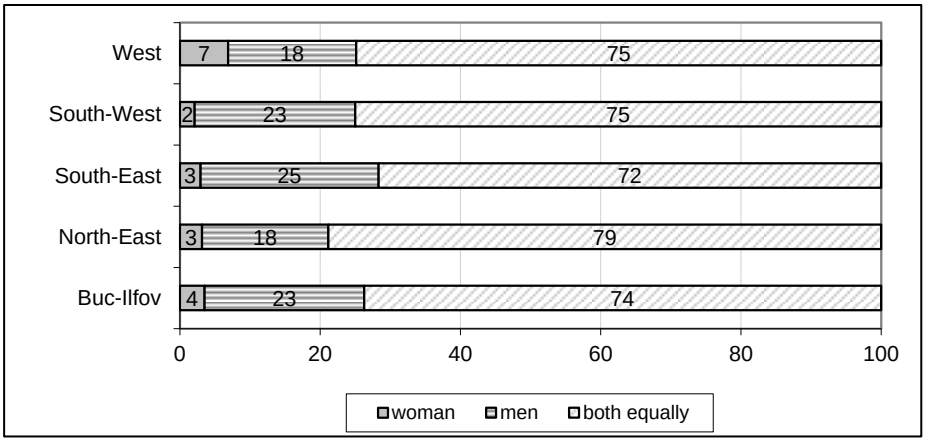
To the contrary, the political system is the field in which the participation of women is low and where conservative attitudes predominate. As result, even if the share of those answering that gender does not matter is high, there is a significant share – about 30% - who consider that men have the adequate competences. The most discriminatory attitude is encountered in Bucharest and lest discriminatory in the West region.

Figure 10. *Who do you think is suitable to manage the town-hall/ local council? (% for each region)*



Also in the case of companies, the weight of those considering that men should lead is higher, and the weight of those considering women more adequate to lead is lower for all analysed situations. The most conservative attitude is found in the South-East region, and the most egalitarian ones in the West and North-West regions.

Figure 11. *Who do you think is suitable to lead a company? (% for each region)*



Interesting is the case of the region Bucharest-Ilfov, where the highest share of those supporting women for managing/leading schools is encountered, along with the one of those supporting men for managing/leading town-halls, at the same time with a high share (at just small difference against the South-East and the South-West regions) of

those supporting men in managing/leading companies, as well. The profile taking shape in this region is a conservative one. The fact that women are supported for managing/leading schools is in this context an indicator of the same attitude – supported for managing positions, but in the only feminised system from the three analysed ones.

The outcomes agree with the survey of 2010, when the other 4 regions of the country were analysed along with the Bucharest-Ilfov region. Men were stronger supported in that survey as well for managing/leading town-halls (30-35%), then for managing companies (17-20%), and the shares are, as it can be seen, comparable. Women were supported, as well, to a higher extent for managing/leading schools, with comparable shares (9-13%), except for the Bucharest-Ilfov region where a considerable lower percentage was registered (15% then, in opposition to 25% currently). The differences can be related also to the sample, but also to the fluctuations in the attitudes of the subjects in the year since then.

Conclusions

The attitudes of the Romanians regarding the employment and workplace are somewhat conservative. The acceptance of minorities is at an average level, even low, and non-homogenous. The more developed regions (status according to education, income, the share of rural area) such as Bucharest-Ilfov, accept individuals with disabilities but to a lesser extent Rroma individuals and, especially, the persons who were in prison. The poorly developed regions, such as South-East and South-West show higher tolerance towards them, as compared to the developed ones. The poorest region of development, North-East, shows the lowest acceptance degree regarding all groups.

Regarding access to the labour market, it is remarkable the discriminatory attitude against elderly: the respondents consider that youths should enjoy priority on hiring. The attitudes from the micro-social level are found also in the institutional practices: most cases of discrimination on hiring known by the respondents involve also elderly. Thus, the discrimination of elderly takes double meaning: both subjective (based on the attitudes identified at the level of the respondents), but also objectively (the subjects know about most cases of discrimination also related to age inside their circle of acquaintances).

After the elderly, the most frequently discriminated on hiring are Rroma and people in jail. Discrimination based on physical appearance seems also to be frequently encountered. Pregnant women are not as often discriminated, and the religious reasons as criterion for not getting hired is rather an exception.

The Romanians have a lower level of discrimination based on gender. An important weight of the population believes that men are more apt to manage/lead, but faced with concrete situations, on types of institutions, the respondents consider that women and men are equally suitable to manage/lead. The most discriminatory attitudes are encountered in the case of town-halls and the most egalitarian ones in the case of schools.

The region with the most discriminatory attitudes against labour market and minorities, in general, are encountered in the North-East region, while the regions with the most open attitudes are Bucharest-Ilfov and the West region. The level of economic and

social development is also, in this instance, the most important factor in explaining the attitudinal differences between regions.

Marginalisation or discrediting practices of the "weak" (women, elderly or individuals with disabilities), or practices of promoting a citizen model with a certain cultural profile, physical appearance and socio-professional condition involves inherently the existence of part of the population which becomes excluded to a certain extent.

The grounds for discrimination can be diverse: religion, ethnicity, gender, disability or age. Discrimination is favoured by situations such as: insufficient knowledge about that group, generalising own experiences of life (one unpleasant experience of one member or of few members of the group to which they belong), ethnocentrism, the existence of stereotypes which coincide with various beliefs, previously formed opinions, and promoting prejudices about individuals with whom they enter competition.

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COMPETITION IN THE BANKING INDUSTRY: IMPLICATION ON FINANCIAL SECTOR DEVELOPMENT

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***Abstract**: The objective of this work is to examine the consequence or implication of competition in the banking industry for financial sector development. Whereas, competition is good for individual banks, the customers, and the banking system, excessive competition has implications which should be carefully identified and accorded the necessary regulatory attention. To examine the consequence or implication for financial sector development, a blend of exploratory, investigatory and descriptive technique was used. These methods were employed in order to capture the competition in the banking industry in Nigeria and its effects on financial sector development. Some of the implications identified to have direct bearing on the system's stability are related to supervision, risk management, corporate governance, market discipline, and self-regulation. Notwithstanding the enormous challenges posed by the keen competition in the industry as a result of consolidation, there is no doubt that the regulatory authority have been proactive and put in place policies to guarantee safety and soundness of the banking industry. The study concluded that the reforms introduced in the banking sector in the late 80's, raised the degree of competition and improved the level of efficiency of the Nigerian commercial banks.*

***Keywords:** Banking, Competition, Efficiency, Financial sector, Development.*

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Introduction

The banking industry plays an essential role in the economy in terms of resource mobilization and allocation and, is by far, the most important part of the financial system in developing economies, accounting for the bulk of the financial transactions and assets (Moyo, Nandwa, Odour and Simpasa, 2014). In addition, banks have recently expanded in other activities such as securities markets, fund management, insurance, among others, blurring the distinction between banks and other financial markets. Accordingly, it is expected that through reforms (increased competition), banks can potentially be the main source of financial innovation and efficiency or, in a worst case scenario, as a source of systemic risk to the financial structure through contagion, thus engendering macroeconomic instability and diminished investment and growth. The latter phenomenon was aptly evidenced by the recent global financial crisis which had its origin in excessive risk-taking behavior through the use of leveraged asset-price derivatives by financial institutions, mostly banks.

Notably, in developing countries, lack of well-developed domestic capital markets and access to international capital markets makes the banking sector ubiquitous and, therefore, any systemic bank failures would have serious contagious repercussions in such economies.

Competition in the financial sector matters for a number of reasons. As in other industries, the degree of competition in the financial sector matters for the efficiency of production of financial services, the quality of financial products and the degree of innovation in the sector. The view that competition in financial services is unambiguously good, however, is more naive than in other industries and vigorous rivalry may not be the first best. Specific to the financial sector is the effect of excessive competition on financial stability, long recognized in theoretical and empirical research and, most importantly, in the actual conduct of (prudential) policy towards banks. There are other complications, however, as well. It has been shown, theoretically and empirically, that the degree of competition in the financial sector can matter (negatively or positively) for the access of firms and households to financial services, in turn affecting overall economic growth.

In terms of the factors driving competition in the financial sector and the empirical measurement of competition, one needs to consider the standard industrial organization factors, such as entry/exit and contestability. But financial services provision also has many network properties, in their production (e.g., use of information networks), distribution (e.g., use of ATMs), and in their consumption (e.g., the large externalities of stock exchanges and the agglomeration effects in liquidity). This makes for complex competition structures since aspects such as the availability of networks used or the first mover advantage in introducing financial contracts become important.

Not only are many of the relationships and tradeoffs among competition, financial system performance, access to financing, stability, and finally growth, complex from a theoretical perspective, but empirical evidence on competition in the financial sector has been scarce and to the extent available often not (yet) clear. What is evident from

theory and empirics, however, is that these tradeoffs mean that it is not sufficient to analyze competitiveness from a narrow concept alone or focus on one effect only. One has to consider competition as part of a broad set of objectives, including financial sector efficiency, access to financial services for various segments of users, and systemic financial sector stability, and consider possible tradeoffs among these objectives. And since competition depends on several factors, one has to consider a broad set of policy tools when trying to increase competition in the financial sector.

Received evidence shows that in developing countries with transparent financial regimes where financial sector reforms have been implemented, competition in the banking industry has generally improved2 compared to countries characterized by less transparent financial sector regimes

(Ariss, 2010; Beck, Demirguc-Kunt, & Levine, 2009; Claessens & Laeven, 2004). For instance in the East African countries, studies have shown that financial sector reforms stimulated competitive pressures in the banking industry (Yildirim & Philippatos, 2007; Berger, Klapper, & Turk-Ariss, 2009; Mugume, 2007). The results are robust to entry of foreign banks and bank privatization (Čihák & Podpiera, 2005).

However, this evidence is not uniform. Other studies on SSA have reported limited effects of reforms on competition (Saab & Vacher, 2007; Buchs & Mathisen, 2005), with liberalization in some cases leading to financial crises (Fowowe, 2013). Less established, though, is the evidence on the relationship between financial liberalization (competition) and stability/fragility in the banking industry in these economies, particularly in SSA countries.

In all, this means that competition policy in the financial sector is quite complex and can be hard to analyze. Empirical research on competition in the financial sector is also still at an early stage. The evidence nevertheless shows that factors driving competition have been important aspects of recent financial sector improvements. To date, greater competition have been achieved by traditional means: removing entry barriers, liberalizing product restrictions, abolishing restrictive market definitions, eliminating intra-sectoral restrictions, etc. Making in this way financial systems more open and contestable, i.e., having low barriers to entry and exit, has generally led to greater product differentiation, lower cost of financial intermediation, more access to financial services, and enhanced stability. The evidence for these effects is fairly universal, from the US, EU and other developed countries to many developing countries. As globalization, technological improvements and de-regulation further progress, the gains of competition can be expected to become even more wide-spread across and within countries.

Conceptual framework

After more than two decades of financial repression, financial liberalization offered an opportunity for a revival of the Nigerian banking industry. As part of the broader economic reform package, financial reforms were in recognition that a well-functioning and competitive financial system is critical to the country's overall economic development. By 2005, the Central Bank of Nigeria embarked on Banking

Consolidation exercise, a widespread strategy aimed at strengthening financial sector infrastructure to enable it support sustainable economic growth. The implementation of the consolidation has helped address key bottlenecks in the financial system, including improving corporate governance of the banking sector, after the crisis of the pre 2004.

In 2008, the existing 25 banks were further pruned down to 17 through a rescue exercise by the central bank of Nigeria. Out of these, seven were first generation banks and others were new generation banks. Majority of these banks were instructed to divest from non-banking activities and this led to the provision of a unique feature of ownership, encompassing foreign financial equity stake, domestic private sector participation and public sector interest. Nonetheless, management rights reside with Nigerians. However, the Nigerian banking industry continues to exhibit a high level of concentration as very few banks dominate the financial landscape. In terms of assets and deposits, five largest banks accounted for sixty six percent between 2004 and 2013. The other banks captured the remaining one third. As per profitability, the two traditional profitability measures of ROA and ROC are employed. However, these measures alone are no longer adequate to measure banks profitability performance as they do not adequately meet the needs of stakeholders. Nigerian banks have been vibrant and generated earnings from loans, bonds and treasury bills.

The increase in the number of new entrants in the late 1990s lent credence to this view. The profitability level of most banks however nosedived between 1998 and 2011 due to a number of factors including, inadequate risk management capacity, ethical issues and poor corporate governance. ROA averaged about 6% for this period, the regulatory authority had to intervene to acquire the non-performing loans of these banks by 2009. At the same time, this performance led to acquisition of five distressed banks, at a time the whole industry also experienced a squeeze in earnings due to the global financial crisis.

To reinforce the Nigerian economy, the central bank of Nigeria announced a new 13-point reform agenda in mid-2004. Overall, the goal of this agenda is to promote soundness, stability and enhance international efficiency of the Nigerian banking industry. The highpoint of this reform is that all banks in the country should raise their minimum capital base to N25 billion, with a compliance deadline of 18 months. The efforts of banks to comply with this directive triggered merger and acquisitions. This also led to the increase of the share of the industry in the Nigeria Stock capitalization from 24% to 38% between 2004 and 2006. At this end of this deadline, 25 banks made it through out of which nine were first generation banks. (CBN, 2008).In spite of these positive developments, a new set of challenges merged in 2008 and threatened the financial system, coinciding with the global financial crisis

Effects of Competition in the Financial Sector

As a first-order effect, one expects increased competition in the financial sector to lead to lower costs and enhanced efficiency of financial intermediation, greater product innovation, and improved quality. Even though financial services have some special properties, the channels are similar to other industries. In a theoretical model, Besanko and Thakor (1992), for example, allowing for the fact that financial products are

heterogeneous, analyze the allocational consequences of relaxing entry barriers and find that equilibrium loan rates decline and deposit interest rates increase, even when allowing for differentiated competition. In turn, by lowering the costs of financial intermediation, and thus lowering the cost of capital for non-financial firms, more competitive banking systems lead to higher growth rates. Of course, they are not just efficiency and costs, but also the incentives of institutions and markets to innovate that are likely affected by the degree of competition.

Access to Financial Services

As a first-order effect, greater development, lower costs, enhanced efficiency, and a greater and wider supply resulting from competition will lead to greater access. The relationships between competition and banking system performance in terms of access to financing are more complex, however. The theoretical literature has analyzed how access can depend on the franchise value of financial institutions and how the general degree of competition can negatively or positively affect access. Market power in banking, for example, may, to a degree, be beneficial for access to financing (Petersen and Rajan, 1995). With too much competition, banks may be less inclined to invest in relationship lending (Rajan, 1992). At the same time, because of hold-up problems, too little competition may tie borrowers too much to an individual institution, making the borrower less willing to enter a relationship (Petersen and Rajan, 1994; and Boot and Thakor, 2000). More competition can then, even with relationship lending, lead to more access. The quality of information can interact with the size and structure of the financial system to affect the degree of access to financial services. Financial system consolidation can lead to a greater distance and thereby to less lending to more opaque firms such as SMEs.

Theory has shown some other complications. Some have highlighted that competition is partly endogenous as financial institutions invest in technology and relationships (e.g., Hauswald and Marguez, 2003). Theory has also shown that technological progress lowering production or distribution costs for financial services providers does not necessarily lead to more or better access to finance. Models often end up with ambiguous effects of technological innovations, access to information, and the dynamic pattern of entry and exit on competition, access, stability and efficiency (e.g., Dell'Ariccia and Marquez, 2004, and Marquez, 2002). Increased competition can, for example, lead to more access, but also to weaker lending standards, as observed recently in the sub-prime lending market in the US (Dell'Ariccia, Laeven and Igan, 2008) but also in other episodes.

These effects are further complicated by the fact that network effects exist in many aspects of supply, demand or distribution of financial services. In financial services production, much used is made of information networks (e.g., credit bureaus). In distribution, networks are also extensively used (e.g., use of ATMs). Furthermore, in their consumption, many financial services display network properties (e.g., liquidity in stock exchanges). As for other network industries, this makes competition complex (see further Ausubel, 1991, and Claessens, Dobos, Klingebiel and Laeven, 2003).

Stability

The relationships between competition and stability are also not obvious. Many academics and especially policy makers have stressed the importance of franchise value for banks in maintaining incentives for prudent behavior. This in turn has led banking regulators to carefully balance entry and exit. Licensing, for example, is in part used as a prudential policy, but often with little regard for its impact on competition. This has often been a static view, however, Perotti and Suarez (2002) show in a formal model that the behavior of banks today will be affected by both current and future market structure and the degree to which authorities will allow for a contestable, i.e., open, system in the future. In such a dynamic model, current concentration does not necessarily reduce risky lending, but an expected increase in future market concentration can make banks choose to pursue safer lending today. More generally, there may not be a tradeoff between stability and increased competition as shown among others by Allen and Gale (2004), Boyd and De Nicolò (2005) and reviewed recently by Allen and Gale (2007). Allen and Gale (2004) furthermore show that financial crises, possibly related to the degree of competition, are not necessarily harmful for growth.

Theory of the Determinants of Competition

In terms of empirical measurement and associated factors driving competition one can consider three types of approaches: market structure and associated indicators; contestability and regulatory indicators to gauge contestability; and formal competition measures. Much attention in policy context and empirical tests is given to market structure and the actual degree of entry and exit in particular markets as determining the degree of competition. The general Structure-Conduct-Performance (SCP) paradigm, the dominant paradigm in industrial organization from 1950 till the 1970s, made links between structure and performance. Structure refers to market structure defined mainly by the concentration in the market. Conduct refers to the behavior of firms – competitive or collusive – in various dimensions (pricing, R&D, advertising, production, choice of technology, entry barriers, predation, etc.). And Performance refers to (social) efficiency, mainly defined by extent of market power, with greater market power implying lower efficiency. The paradigm was based on the hypotheses that i) Structure influences Conduct (e.g., lower concentration leads to more competitive the behavior of firms); ii) Conduct influences Performance (e.g., more competitive behavior leads to less market power and greater social efficiency). And iii) Structure therefore influences Performance (e.g., lower concentration leads to lower market power)

Theoretically and empirically there are a number of problems with the SCP-paradigm and its implications that, directly and indirectly, structure determines performance. For one, structure is not (necessarily) exogenous since market structure itself is affected by firms' conduct and hence by performance. Another conceptual problem is that industries with rapid technological innovation and much creative destruction, likely the financial sector, may have high concentration and market power, but this is necessary to compensate these firms for their innovation and investment and does not mean reduced social welfare.

Most importantly, and different from the SCP-paradigm, the more general competition and contestability theory suggests that market structure and actual degree of entry or exit are not necessarily the most important factors in determining competition. The degree of contestability, that is, the degree of absence of entry and exit barriers, rather than actual entry, matters for competitiveness (Baumol, Panzar, and Willig, 1982). Contestable markets are characterized by operating under the threat of entry. If a firm in a market with no entry or exit barriers raises its prices above marginal cost and begins to earn abnormal profits, potential rivals will enter the market to take advantage of these profits. When the incumbent firm(s) responds by returning prices to levels consistent with normal profits, the new firms will exit. In this manner, even a single-firm market can show highly competitive behavior.

The theory of contestable markets has also drawn attention to the fact that there are several sets of conditions that can yield competitive outcomes, with competitive outcomes possible even in concentrated systems since it does not mean that the firm is harming consumers by earning super-normal profits. On the other hand, collusive actions can be sustained even in the presence of many firms. The applicability of the contestability theory to specific situations can vary, however, particularly as there are very few markets which are completely free of sunk costs and entry and exit barriers. Financial sector specific theory adds to this some specific considerations.

While the threat of entry or exit can also be an important determinant of the behavior of financial market participants, issues such as information asymmetries, investment in relationships, the role of technology, networks, prudential concerns, and other factors can matter as well for determining the effective degree of competition (see further Bikker and Spierdijk, 2008).

Empirical framework

Erol, et al (2012) carried out an empirical assessment of the market structure and the competitiveness of the Chinese banking sector particularly in the wake of China's accession to the WTO by employing the Panzar-Rosse H-Statistic as a non-structural model over the period 2004-2007. The empirical findings indicate that the banking sector in China was monopolistically competitive for the specified period. They also find that the Chinese banks, which operate in more monopolistic environments, are less efficient. The findings reject the state of conjectural variation short run oligopoly or natural monopoly in the industry for the period under consideration.

Casu and Girardone (2007) investigated the impact of increased consolidation on the competitive conditions of EU banking markets by employ both structural (concentration ratios) and non-structural (PanzarRosse statistic) concentration measures. Using bank level balance sheet data for the major EU banking markets, in a period following the introduction of the Single Banking License (1997-2003), the results seem to suggest that the degree of concentration is not necessarily related to the degree of competition. They equally found little evidence that more efficient banking systems are also more competitive. The relationship between competition and efficiency is not a straightforward one. Increased competition has forced banks to become more efficient but increased efficiency is not resulting in more competitive EU banking systems.

Bikker and Haaf (2002) investigated the relationship between competition and market structure in the banking industry for all banks in their sample and estimate a regression model where competition measure is tested against market structure (proxied by concentration indices and the log of the number of banks in the markets) and a dummy for EU/non-EU countries. Overall, they find support for the conventional view that concentration impairs competitiveness.

The general contestability literature has suggested specific ways on how to go about testing for the degree of competition. Klein (1971), Baumol, Panzar, and Willig (1982) were the first to develop a formal theory of contestable markets. They draw attention to the fact that there are several sets of conditions that can yield competitive outcomes, even in concentrated systems.

Conversely, they showed that collusive actions could be sustained even in the presence of many firms. Their work has spanned a large empirical literature covering many industries.

Two types of empirical tests for competition can be distinguished since they have been applied to financial sector (and other industries). The model of Bresnahan (1982) and Lau (1982), as expanded in Bresnahan (1989), uses the condition of general market equilibrium. The basic idea is that profit- maximizing firms in equilibrium will choose prices and quantities such that marginal costs equal their (perceived) marginal revenue, which coincides with the demand price under perfect competition or with the industry's marginal revenue under perfect collusion.

The alternative approach is Rosse and Panzar (1977), expanded by Panzar and Rosse (1982) and Panzar and Rosse (1987). This methodology uses firm (or bank)- level data. It investigates the extent to which a change in factor input prices is reflected in (equilibrium) revenues earned by a specific bank. Under perfect competition, an increase in input prices raises both marginal costs and total revenues by the same amount as the rise in costs. Under a monopoly, an increase in input prices will increase marginal costs, reduce equilibrium output and, consequently, reduce total revenues.

Buchs and Mathisen (2005) examined the degree of bank competition and efficiency with regard to banks' financial intermediation in Ghana. In the study they applied panel data to variables derived from a theoretical model and find support for the presence of a noncompetitive market structure in the Ghanaian banking system, possibly hampering financial intermediation.

Weill (2004) investigated the relationship between competition and X-efficiency using stochastic frontier method. The study regressed efficiency scores on competition measure and a set of independent variables including: macro factors (GDP per capita and density of demand); an intermediation ratio (loans/deposits) and finally a dummy that corresponds to the geographical location. The author finds evidence of a negative relationship between competition and efficiency in EU banking.

Ajisafe and Akinlo (2014) examined the relationship between bank competition and efficiency in Nigeria for period of 1990-2009 using pooled least square and dynamic panel generalized method of moment estimation techniques with fixed effect for the

data collected for fifteen selected banks in Nigeria. The result of the study showed that there was a positive and significant relationship between the degree of competition and efficiency of commercial banks in Nigeria.

Bashorun and Ojapinwa (2014) investigated the effect of bank consolidation in Nigeria on the structural characteristics of the banking market. They established that there is substantial increase in concentration for the post consolidation period with very high tendency to gravitate towards becoming a moderately concentrated market according to the USA merger guideline. Also, there is the emergence in 2012, of eight top dominant banks controlling more than 75% of the Nigerian banking business especially in the total assets market. The implication of this finding is that there is the need to forestall collusive and anti-competitive practices by stepping up the oversight functions of the regulatory and supervisory agencies while reviewing periodically the hurdles for new entrants to the industry.

A number of papers have applied either the Breshnahan or the PR methodology to the issue of competition in the financial sector, although mostly specific to the banking system.

One of the first papers using the Breshnahan methodology for banks is Shaffer (1989). He applies the methodology to a sample of U.S. banks and finds results that strongly reject collusive conduct but are consistent with perfect competition. Using the same model, Shaffer (1993) studies the competition conditions in Canada and finds that the Canadian banking system was competitive over the period 1965-1989 although being relatively concentrated. He also finds that the degree of competition in Canada was generally stable following regulatory changes in 1980. Gruben and McComb (forthcoming) applied the Breshnahan methodology to Mexico before 1995 and find that the Mexican banking system was super-competitive; that is, marginal prices were set below marginal costs. One of the few studies that uses the Breshnahan model with a relatively large sample of countries is Shaffer (2001). For 15 countries in North America, Europe, and Asia during 1979-91, he finds significant market power in five markets and excess capacity in one market. Estimates were consistent with either contestability or Cournot type oligopoly in most of these countries, while five countries were significantly more competitive than Cournot. Since the data refer to the period befo re the European single banking license was adopted, the result may, however, not be reflective of the current situation. Shaffer (1982) was also one of the first to apply the PR model to banks. He estimated it for New York banks using data for 1979 and found monopolistic competition. Nathan and Neave (1989) study Canadian banks using the PR methodology. The results for Canada also reject monopoly power for the Canadian banking system. Some other studies have applied the PR methodology to some non-North America and non-European banking systems. For Japan, for example, Molyneux, Thornton and Lloyd-Williams (1996) find evidence of a monopoly situation in 1986 1988.

A number of papers have applied the PR methodology to European banking systems. These papers include Molyneux, Lloyd-Williams, and Thornton (1994), Vesala (1995), Molyneux, Thornton and Lloyd-Williams (1996), Coccorese (1998), Bikker and Groeneveld (2000), Bikker and Haaf (2001), De Bandt and Davis (2000) and Hempel

(2002). The countries covered, the time periods and some of the assumptions used vary between the studies. Although the findings varied somewhat, generally, the papers can reject both perfect collusion as well as perfect competition and mostly find evidence of monopolistic competition. (Bikker and Haaf (2001) summarize the results of some ten studies.) Bikker and Groeneveld (2000), for example, find monopolistic competition in all of the 15 EU-countries they study.

To date, tests on the competitiveness of banking systems for developing countries and transition economies using these models are few. Using the PR-approach, Belaisch (2003) finds evidence of a non- monopolistic market structure in Brazil.

Gelos and Roldos (2002) analyze a number of banking markets using the PR-methodology, including some developing countries. They report that overall banking markets in their sample of eight European and Latin American countries have not become less competitive although concentration has increased. They conclude that lowered barriers to entry, such as allowing increased entry by foreign banks, appeared to have prevented a decline in competitive pressures associated with consolidation.

Levy, Yeyati and Micco (2003) find similar results using the PR-methodology for their sample of Latin America countries and find that the process of consolidation in the 1990s, if anything, may have led to more, rather than less, competition.

Philippatos and Yildirim (2002) investigate 14 Central and Eastern European banking systems using bank-level data and the PR-methodology. They find, except for Latvia, Macedonia, and Lithuania, that these banking systems can neither be characterized as perfectly competitive nor monopolistic. They also conclude that large banks in transition economies operate in a relatively more competitive environment compared to small banks.

Methodology

Generally, secondary data were used in this work. These data were time series and cross section. The data reflected the Capital/assets (%), Liquid & trading assets/total short-term funding (%),Gross bad debt ratio (%), Net interest margin (%), Cost ratio (%) , ROE (%), ROA (%)of selected commercial banks in Nigeria The data were sourced and extracted from existing documents and materials. These include the Central Bank of Nigeria (CBN) statistical Bulletin, CBN Annual Report and Statement of Account, CBN Bullion, National Insurance Commission (NAICOM) Annual Reports, text books, journals, and internet sources, among others.

The data collected for this work were presented in tables indicating the series of observations, the trend and movement of the variables studied. Percentages (%ages), diagram and ratios were computed to analyze the characteristic trend of competition in the banking industry. These tools made it possible to carry out empirical analysis describing the trend in Capital/assets (%), Liquid & trading assets/total short-term funding (%), Gross bad debt ratio (%), Net interest margin (%), Cost ratio (%), ROE (%), ROA (%) of selected commercial banks in Nigeria. Thus, the tools used in the article were descriptive and inferential in nature.

Empirical details and analysis

The main focus of this work is to examine competition in the banking sector and its implication on financial sector development in Nigeria. As part of the broader economic reform package, financial reforms were in recognition that a well-functioning and competitive financial system is critical to the country's overall economic development. Therefore, this section is set aside to present and analyze the data on the key variables examined in the article including Capital/assets (%), Liquid & trading assets/total short-term funding (%), Gross bad debt ratio (%), Net interest margin (%), Cost ratio (%), ROE (%), ROA (%) of selected commercial banks in Nigeria.

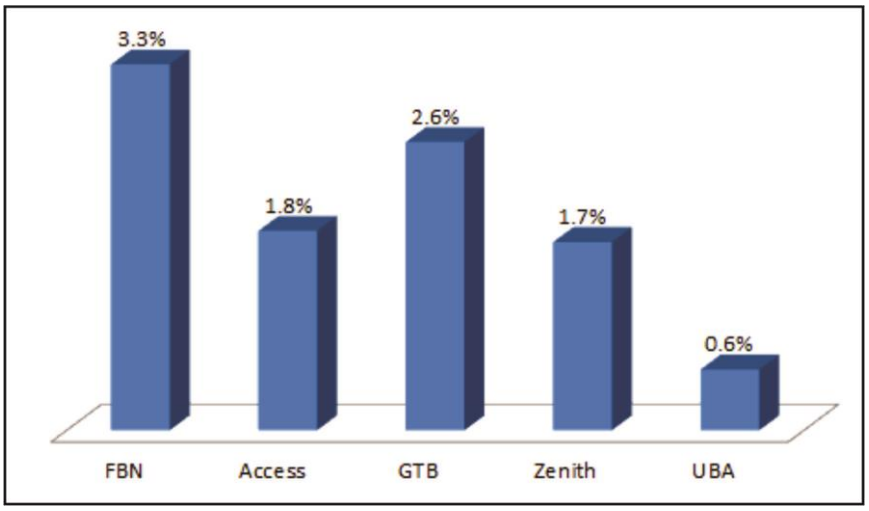
Table 1: Selected ratios of some commercial banks in Nigeria

Selected banks	First Bank	Zenith	UBA	Access	GT Bank
Year end 31 December 2012					
Capital (N'bn)	394.5	463.0	192.5	240.3	283.4
Total assets (N'bn)	3,079.8	2,566.1	2,260.2	1719.9	1,688.7
Net loans (N'bn)	1,563.0	989.8	687.4	608.6	783.9
Total comprehensive income (N'bn)	94.4	98.5	55.5	35.1	86.4
Capital/assets (%)	12.8	18.0	8.5	14.0	16.8
Liquid & trading assets/total short-term funding (%)	29.8	49.5	33.0	27.8	46.5
Gross bad debt ratio (%)	2.6	3.1	1.9	5.3	3.3
Net interest margin (%)	10.0	8.6	9.4	11.3	10.3
Cost ratio (%)	65.0	52.4	64.5	61.1	42.6
ROE (%)	24.5	23.0	32.3	16.2	33.6
ROA (%)	3.2	4.1	2.7	2.1	5.3

Source: Nigeria Bank Credit Rating Report (2013)

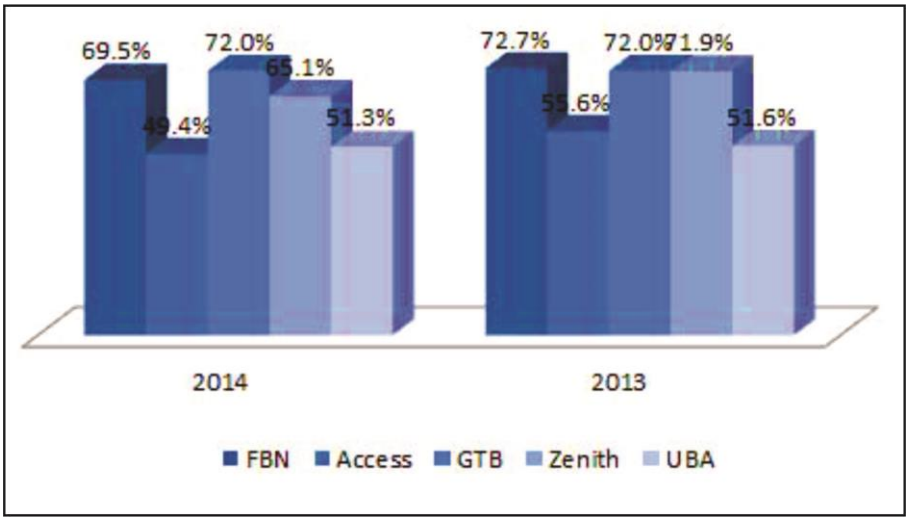
A care examination on the table above proved that there is a keen competition among the banks. In 2012, Zenith bank have N463b capital while first bank, UBA, Access and GT bank have a capital of N394.5b, N192.5b,N 240.3b and N283.4b respectively. Looking at the income of the banks under review, Zenith bank maintains the lead with N98.5b followed by first bank with N94.4b, GT bank N86.4b, UBA N55.5b and Access with N35.1b. The competition in the sector also reflects in the banks' returns on equity and assets. A close look at the table shows that there was a close margin in the returns of the banks. Return on equity was 24.5%, 23.0%, 32.3%, 16.2% and 33.6% for First Bank, Zenith, UBA, Access and GT Bank respectively. In the same manner return on assets shows 3.2%, 4.1%, 2.7%, 2.1%, and 5.3% for First Bank, Zenith, UBA, Access and GT Bank respectively. The information provided in the table above proved that there is actually a competition among the banks. Below are charts showing different indications of competition in different areas of the banks operations.

***Figure 1**: Non-performing loans to gross loans FY2014*



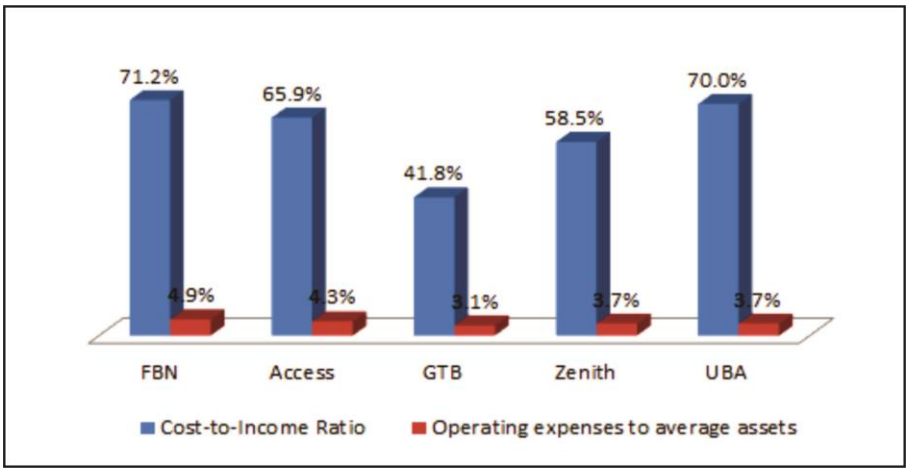
Source: Agusto& Co. (2015)

***Figure 2**: Net interest margin (FY2014)*



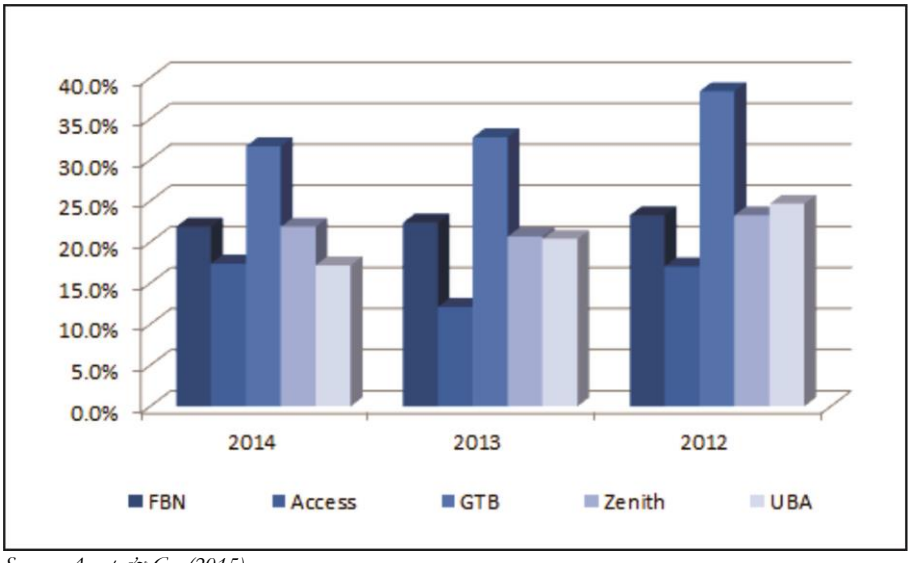
Source: Agusto& Co. (2015)

Figure: *Efficiency ratios (FY2014)*



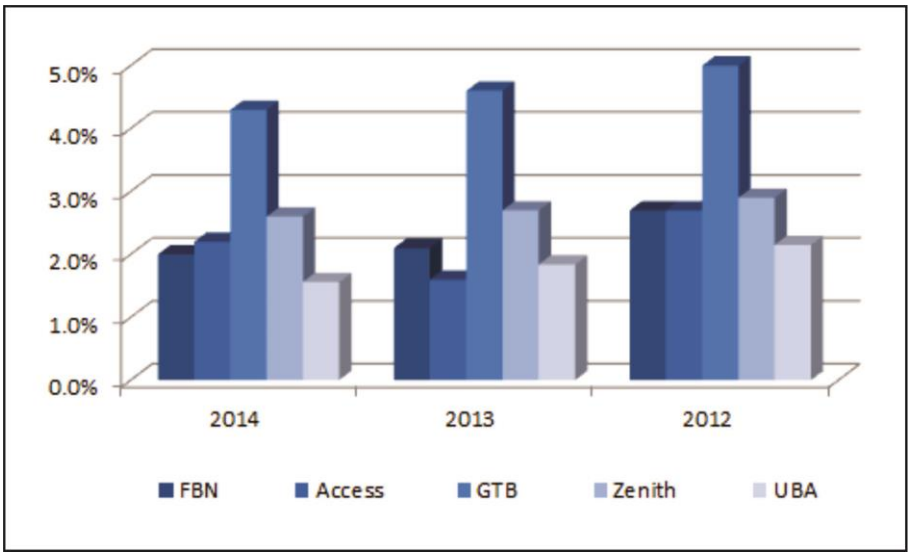
Source: Agusto& Co. (2015)

Figure 4*: Pre- tax return on average equity (ROE) FY2014*



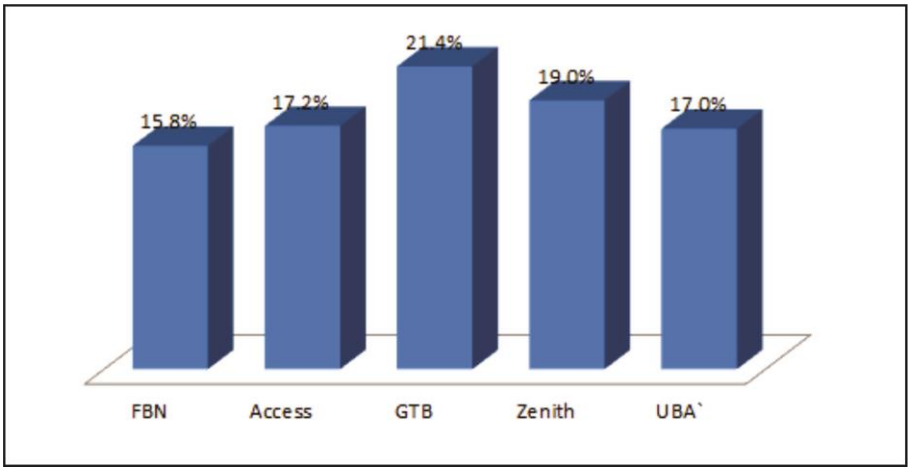
Source: Agusto& Co. (2015)

***Figure 5**: Pre-tax return on average assets (ROA) FY2014*



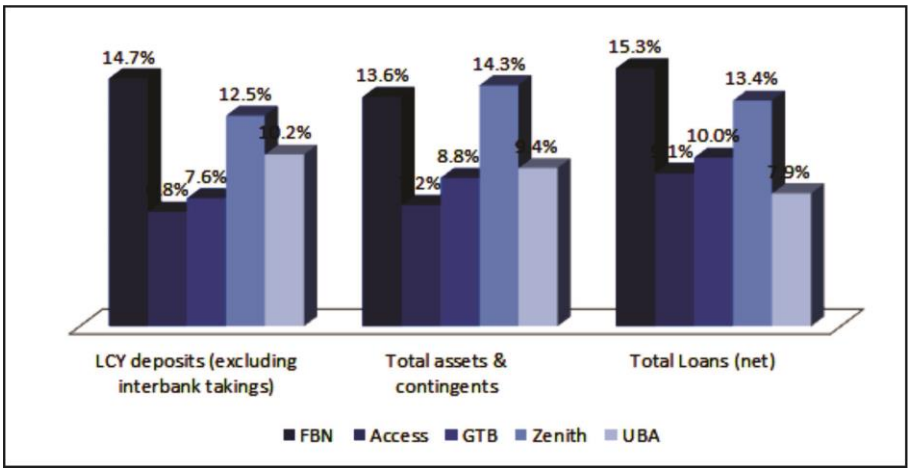
Source: Agusto & Co. (2015)

***Figure 6**: Basel II capital adequacy ratios (FY2014)*



Source: Agusto& Co. (2015)

Figure 7: *Market share (FY2014)*



Source: Agusto & Co. (2015)

Discussion and conclusions

Discussion

Whereas, competition is good for individual banks, the customers, and the banking system, increased competition has implications which should be carefully identified and accorded the necessary attention. In a broad sense, some of the implications of increased competition in the banking industry which have direct bearing on the system's stability include the following, among others:

- Effective supervision;
- Effective risk management;
- Strong corporate governance;
- Market discipline;
- Self-regulation.

Effective Supervision

The current supervisory approach in Nigeria which is transaction- and compliance- and is narrow in scope and uniformly applied to all supervised institutions. With consolidation, there is the need to adopt a robust, proactive and sophisticated supervisory process that should essentially be based on risk profiling of the emerging big banks. In other words, the adoption of an appropriate risk-based supervisory approach is imperative with consolidation. The approach entails the design of a

customized supervisory programme for each bank and it should focus more attention on banks that are considered to have potentially high systemic impact. The approach should enable the supervisory authorities to optimize the utilization of supervisory resources. That necessarily requires that supervisors should have a clear understanding of the risk profile of the emerging big, and sometimes, complex banks. There is therefore, the need for capacity building – in this area.

Effective Risk Management Systems

Although effective risk management has always been central to safe and sound banking practices, it has become even more important in the post consolidation banking era than hitherto as a result of the on-going bank consolidation programme. It is important to indicate that the ability of a bank to identity, measure, monitor and control risks under the emerging banking environment can make the critical difference between its survival and collapse. For a bank to efficiently and effectively play its role under the emerging dispensation therefore, the deployment of an effective risk- management system with the following key elements is imperative:

- Active board and senior management oversight;
- Adequate risk-management policies, procedures and exposure limits;
- Effective risk identification, measurement, monitoring and control framework;
- Comprehensive management information system; and Efficient internal controls.

Strong Corporate Governance

While good corporate governance has remained imperative in the banking system, its importance in our nation's emerging banking environment is based on the fact that managements of most of the 'new' banks would be insulated from abusive ownership. Besides, there are many other stakeholders with goals, interests and expectations that do not necessarily coincide, and as a result, they constitute major areas of frictions. Corporate governance is about building credibility, ensuring transparency and accountability as well as maintaining an effective channel of information disclosure that would foster good corporate performance. It is also about how to build trust and sustain confidence among the various interest groups that make up an organization. Disclosure and transparency are key pillars of a corporate governance framework, because they provide all the stakeholders with the information necessary to judge whether or not their interests are being served.

Market Discipline

The current information disclosure requirements in the industry are grossly inadequate to effectively bridge the information asymmetry between banks and investing public that consolidation has inevitably created. Under the consolidated banking environment,

it is important that the accounting as well as disclosure requirements of the consolidated banks be reviewed. This has become necessary to ensure that business decisions by the investing public are well informed under the new dispensation. Adequate information disclosure requirement will make banks to pay greater attention to reputational risk that could result in loss of confidence as well as patronage.

Self-Regulation and Self-Discipline

This development has become necessary in view of the realization that self-regulation and self-discipline are critical to the promotion of a sound, transparent, accountable and efficient I financial market. Effective self-regulation requires probity, transparency and accountability, which are yet to be fully entrenched in the system. Necessary steps should be taken by the regulatory/supervisory authorities to encourage these virtues and operators also needs to comply with rules and regulations to promote healthy competition since self-regulation does not amount to elimination of regulatory controls and supervision.

Conclusion

In this paper, an attempt has been made to discuss the competition the banking industry and its implication on financial sector development in Nigeria. In the main, some of these implications identified to have direct bearing on the system's stability are related to supervision, risk management, corporate governance, market discipline, and self- regulation. Notwithstanding the enormous challenges posed by the keen competition in the industry as a result of consolidation, there is no doubt that the regulatory authority have been proactive and put in place policies to guarantee safety and soundness of the banking industry .

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SOCIAL POLICIES REGARDING FINANCIAL RESOURCES WITHIN THE HEALTHCARE SYSTEM IN ROMANIA

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Abstract: *Romania has already a historical tradition regarding the allocation of the smallest share for the healthcare system from among all EU member-states. The public expenditures with health, of 4.36% from GDP (in 2012) and total health expenditures both public and private (of 5.56% in 2012) place Romania on the last position within the European Union, rather far from the EU average. Also in PPC (purchasing power per capita) terms we are placed at the lowest level and beyond our neighbours. During the past 20 years, the experts in health policies drew attention on the need to increase health expenditures at the European average level of 7%, by demonstrating the negative impact of maintaining expenditures at the current level. The investments in population's health were theoretically acknowledged as necessary, however these were permanently postponed because they did not deliver short-term outcomes with electoral impact and because the structural reform would mean social capital costs. It is necessary to assume political responsibility for long-term planned investments and for prioritizing the needs of the system.*

Keywords: *public health expenditures, health policies, challenges, resources*

Healthcare Policies Challenges

Currently, some issues seem to be redundant in debates about healthcare policies in all countries. First, it is the need of all healthcare systems for more efficient organisational management and for increasing the performance of the systems in terms of costs/benefits, considering the increased requirements of the population for quality and quickly available services from temporal and spatial viewpoint. The reforms of the healthcare systems are headed towards the decentralisation trend and the adoption of the public-private mix (public and private providers, the non-profit sector)

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accompanied by diversified choice opportunities of the patient regarding the services' providers. Still, these changes are faced with the resistance expressed by the organisational/institutional culture, and the one of medical professional associations to change and reforms.

A critic of consumerism is added, regarding the market of healthcare and the issue of equity and access of some groups to services. None of the healthcare systems have succeeded in completely diminishing the social inequality regarding access to services. All countries still have various groups of disadvantaged individuals. Most times, these belong to the groups of emigrants, to the poor, to those who are unemployed/ uninsured, and ethnic minority segments. Health policies have a limited capacity of diminishing factors that affect the health of the population. Population health depends on a complex of factors that are not only influenced by the healthcare system, but also by other components of the social: education services (prevention) and social protection services and benefits for supporting the quality of life. The question is which are the social needs regarding health and how does the state meet these needs? The care of a poor and ill individual, for instance, for a week in a hospital brings about only temporary improvement of his/her illness, if on returning home the living conditions are inadequate to maintaining a healthy state: improper housing, hygiene, and food, the lack of resources for continuing treatment, etc. In the absence of a complex of efficient social policies, that would combine both healthcare services, but also social protection ones, the resources of the sanitary system invested in the respective citizen do not provide the expected outcome and might generate a waste of resources.

The capacity of the state to achieve an efficient mix between various types of social policies: social assistance, health, community services and house care services should be increased. The demand for long-term care within communities must lead to the reform of the healthcare and social services. There is a need for the corresponding mix of social and healthcare services within communities. A series of medical issues have a social anomy component that needs to be solved, just as a series of social issues have also a healthcare component: alcoholism, drug dependency, child and elderly abandon, suicide attempts, etc.

Finally, we might state that we witness an over-medication of modern life. The modern times are found to have increased the dependency of individuals on healthcare institutions (Rădulescu, S. 2002). In medical units arrive all typologies of issues: from depressions, suicide attempts, unwanted and abandoned children to the homeless. Many of these issues are social in nature. Medication hides unsolved social origin, the social inequities and social anomies. The resort to medication, the hospitalisation for depression only turn into ways of temporary hiding dysfunctional issues of the modern individual, and do not solve them. These types of issues are just partially solved or remain unsolved by social protection system and induce expenditures to the healthcare system along with social costs, as well.

The consequences of over-medication of the modern world are reflected directly in the healthcare system. The over-medication trend has led to an increase in the healthcare costs and to higher numbers of medical documents. In this category are included, next to the above-mentioned (and which pertain to social anomy) also medical acts that are

not justified from the medical viewpoint but pertain to the psychological-social sphere: Caesarean section on demand, aesthetical surgery, etc. Most medical systems impose costs that are not covered by the system, auxiliary ones, paid out of the pocket by the patient for these medical interventions. Another challenge of the healthcare systems refers to the excess paradox. According to a report from 2000, in the US, 1/5 of the hospitalisation days, ¼ of the procedures, and 2/5 of medication weren't necessary (Bodenheimer S., Grumbach K., 2004). The need of a more efficient management of the financial resources emerges in the context of healthcare costs on increase in all European countries, on the background of growing life expectancy and population ageing, including here also the technological and medication advance in the medical field.

The analysis of the healthcare policy must be studied within the social context, but also according to the historical background of national health policy. In Romania, the policy adopted on the background of some reduced financial resources granted to the health and education system marginal positions for financing. At the same time, the reform policy of the healthcare system lacked enough daring to achieve major reforms, as in the other former communist countries, reforms that succeeded in improving the quality of services. The social, political, and ideological history of each state, and the role of trade unions or of some professional organisations have modelled the evolution of the systems. The professionals' associations within the British healthcare system, for instance, have played an important role in structuring the national system by determining the health needs and establishing priorities for expenditures within the system, as the British government attempted for the last 20 years to re-establish control by a series of organisational mechanisms.

Comparing health systems is useful for understanding the common issues faced by many of them, such as the increase in the requirements of the population and the growing costs with health on one hand, and the trends of meeting these requirements shown by the systems on the other hand. Even though the various European systems have known different historical developments, thereby reflecting varied social, political and cultural priorities, now they all are faced with similar contexts: population ageing, and the prevalence of the state in financing and providing services.

International comparisons about health systems face some difficulties: 1. the constitutive parts of the healthcare are different from one country to another; 2. The means of financing are diverse as sources and constitutive parts; 3. the borders between formal and informal care are hard to demarcate; 4. national data are not always directly comparable; 5. errors might appear in comparing countries with dissimilar social, demographic and political structure. The primary analysis of the share of expenditures with health in GDP is an indicator very often used, but this analysis must be supported also by the analysis of the quantitative and qualitative differences. In ample comparative studies, such as the OECD Health Data Survey, where several social indicators are analysed, such as GDP, the health public expenditures as share of social expenditures, the mortality rates or income inequalities, tend to ignore countries from the viewpoint of socio-cultural and political specifics.

How can costs be diminished? Eliminating services that are not strictly necessary is one way of diminishing costs. The reduction of the costs for managing the system is yet another alternative. There is an administrative excess within most of the systems. The advantage of high bureaucracies within the state system is that they provide jobs, in general, and particularly jobs for women. Cuts might imply unemployment in the field. The shift towards care as social component of the services that are rather more social than medical is also another alternative: house assistance, counselling for rehabilitation, child and elderly care. Thus, house care against hospitalisation, whenever possible.

If healthcare costs increase continuously in this manner, there are two options regarding the systems: diminishing the quality of the services (the systems identify perverse mechanisms to regulate deficits) or allocating new funds for health by bringing damages to other components of the social services: education, public administration, etc. In general, the public does not want to pay new taxes and whenever costs increase, the access decreases, and the most affected categories are poor individuals, elderly, people without insurance (unfortunately, those with low standards of living are more likely to be ill than those with high living standards).

The inertia of all policies and of the budgetary allotments are things that must be considered, annual budget operates based on historical data. Innovation, implementation of new measures, and sudden increases in financing are hindered by system bottlenecks. Even though policies might change gradually, in small steps, the policy instruments show inertia. Policies must prove internal and transversal coherence, activities resulting from the policy should be logically inter-correlated and coherent. Horizontal coherence is shown by the coherence between public policy areas. A factor that substantiates the health policies is the path dependency. This refers to the continuity of the public policies in the health field and to the importance of the options. The path dependency explains the stability of options and the resistance to change.

"The budget is an historical issue and budgetary allocations are made almost exclusively based on historical criteria. How much was allocated the previous year, as much shall be allotted this year. A growth or decrease indicator is used which is multiplied with what was the previous year. If the money runs out, on rectifying the budget something is added to it. But this is not the issue only of the Ministry of Health, but it is our operating way by and large. It is very hard to bring about something new, to push things towards something more important because you are hindered by this historical ballast. The budgets are anyway made very late very often" (director, the Ministry of Health, November 2014)[1].

The mechanisms determining one option are increasingly more restrictive as they are circumscribed to longer periods of time. These should deal with costs related to investments, to learning effects, to coordination and anticipative capacities. The change presumes investments in the capacity of foreseeing new behaviours, the changes in expectations and organisational stress. On the other hand, the mandates of those elected are on short-term and, thus they are pushed to opt for the least costly solution from the social and electoral costs viewpoint. A completely new solution has often immediate costs of implementation into practice and of learning, but shows advantages

[1] Interviews made by this article's author, within the OPHDR project "Pluri- and inter-disciplinary doctoral and post-doctoral programmes".

on long-term along with risks, and therefore it is not an option for political decision factors (Pierson P., 2000).

Public Health Expenditures in Romania

Romania has already had a historical tradition in allotting the lowest share of all EU countries for the healthcare system. Public expenditures with health are 4.36% of GDP (in 2012) and total health expenditures both public and private (5.56% in 2012) place Romania on the last position within the European Union at a distance to the EU average. Also, in terms of PPC (Purchasing Power per Capita), we register the lowest level and behind our neighbours.

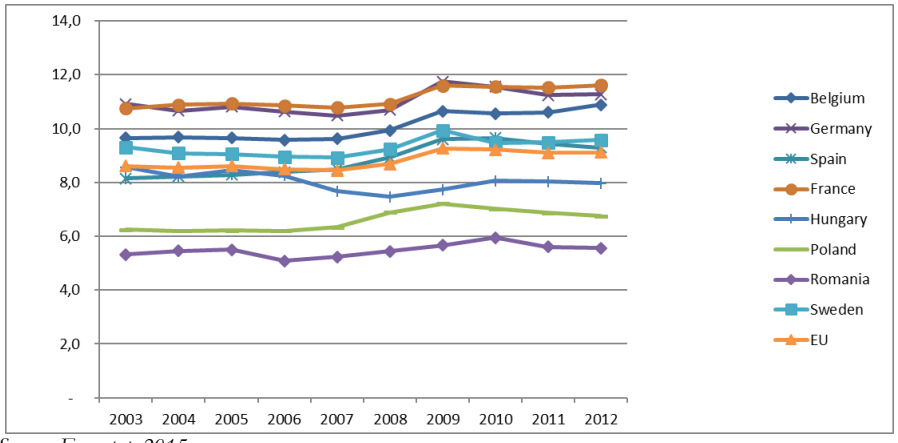
During the last 20 years, the Romanian experts in health policies drew attention to the need of increasing health expenditures to be closer to the European average, respectively 7%, by indicating the negative impact of maintaining expenditures at the current level. The investments in population health was theoretically acknowledged as necessary, but it was permanently postponed because it does not show short-term outcomes with electoral impact and because the structural reform would mean social capital costs. It is necessary to assume political responsibility for planned long-term investments and for prioritising the needs of the system.

Table 1: Public health expenditures – current EU level and targets for Romania 2035

Indicator	Current EU level	Romania's targets 2035
Public health expenditures as % of GDP	EU-18 average: 7,4 %	7 %

Source: Targets established by the IQLR team.

***Figure 1**: Total health expenditures (public and private) as share of GDP*



Source: Eurostat, 2015.

Between 1990 and 2010, the expenditures with health increased quicker than the GDP in all OECD countries (except for Finland). The increases in pharmaceuticals' expenditures were even higher than the increases in healthcare. At the same time, the public expectations grew regarding services, as there is a well-informed population (the medical industry and the internet boom contributed to an increased degree of information).

The EU countries do not spend similar shares of the GDP for healthcare services (the Eastern European states which accessed EU after 2000 have smaller expenditures as they have less resources available, while Spain, Greece and Portugal have a history of regions that ignored health and welfare for a period), but all developed countries grant an important role to health.

The financing in all European health systems has as source mostly the public system, by 70 to 80%, while the private market has only a minor role to play. The social role played by the state in ensuring intergenerational and intergroup solidarity (by protecting social groups at risk) remains one of the important pillars in the EU member-states.

The factors triggering costs' increases with health for the last decades are the demographic changes, the population ageing (because of increased life expectancy and of fertility decline). Thus, the dependency rate of those aged 65 years and over on the younger working age population increased and will continue to increase in the future, putting pressure on the European social protection systems: pension, health and social assistance systems and this means increased pressures for the year 2035 (OECD, 2014).

The importance of the public function of the state is diminished in Romania against other EU countries due to the low share of social public expenditures as percentage of GDP (34.9% in Romania, against the 49.1% average in EU-18). The social function of the states needs to be strengthened by increasing all social public expenditures and public health expenditures.

Table 2: The relevance of the social function of the state

		Romania targets 2035
State relevance: Governmental expenditures as % of GDP	EU-18 - 49,1 %	maximum - 49,1%
	EU-8 - 41,4 %	average - 45,2
	Romania - 34,9 %	minimum - 41,4
Relevance of the social function of the state: Social public expenditures as % of GDP	EU-18 – 20,3 %	maximum - 20,3 %
	EU-8 – 14 %	average - 17,1
	Romania – 11,5 % (2013)	minimum - 14

Source: Targets established by the IQLR research team for the Strategy 2035 of the Romanian Academy

Increasing the Financing Level in Health

A favourable forecast of GDP increase for the year 2035, as shown in the optimistic variant scenarios of the economists within the Romanian Academy, would mean

additional resources for social expenditures, including for health, but some elements specific to the year 2035 against the year 2015 should not be omitted, as they will require additional resources next to the GDP growth: a more elderly population, a decrease in the active population contributing to the Health Insurance Fund, the continuing developments in medicine, technology, procedures and medication all of these implying most probably increasingly costs for practicing the medical act at modern European standards, and last but not least, a population with accumulated health issues in time, without present adequate prevention. To these should be added, probably, a more informed and critical population regarding the acceptance of a medical act performed in any conditions.

The public financing of the system does not refer first to allocated incomes and expenditures from the state budget (resulting from taxation and covering public health programmes, salaries of those within the system etc.), but to collecting the compulsory social insurance bonuses (how they are collecting, the taxation base) and the way in which all available public resources are used: efficient use (cost-benefit), where are they necessary (identifying the needs), equitable financing (distribution between regions, social groups). As result, we deal with identifying mechanisms by which the resources that enter the system might be supplemented, but also with mechanisms for more efficient use of the existing resources.

Increasing the level of collecting and the taxation base for social health insurance bonuses against the current level would lead to an increase in the financing of the system. The currently collected amounts do not cover the needs of the system. The collected amount turns into a problem whenever the population contributing to the system is diminished against the population benefitting from the services.

In Romania, the numbers of employed population contributing to public taxes system, including to the social insurance and health insurance system diminished after 1990 due to early retirement, work on the black market, emigration of a part of the labour force and to large portions of the population involved in subsistence agriculture without paying any contributions to the public system, or involved in daily labour without legal forms (including in agriculture), and to other ways legally accepted in the past years for avoiding payment of social contributions and to the lacking social responsibility regarding the contribution to the system. Not long time ago, alternative forms to the labour contract were still used (such as civil conventions, copyright contract, authorised person form of contract), by part of those intending to avoid contributing to the social insurance and health insurance system and who resorted to such solutions as primary and not supplementary employment forms, as they were free of charges to National Fund of Social Health Insurances, according to the law.

Almost the entire population was eligible for medical services in 2010, but only a quarter of it paid to the National Fund of Social Health Insurances. In the same year, consequently, 10.7 million citizens were exempted from paying or did not pay (World Bank, 2011). The inclusion of pensioners with incomes to 740 lei and including also those with legal contractual labour forms other than the labour contract (copyright, civil convention) for the last years increased contributions to the Fund.

The amount of the contribution to the system (employee and employer) is of 10.7%, but still too small for covering the needs of the system under the conditions of exempting various social groups from the contribution and as compared with other European countries: Hungary and Slovenia 14%, the Czech R. 13,5%, Germany 14.9%. Nevertheless, this contribution is a burden for the Romanian contributor, as the level of incomes in Romania is low as compared with the ones in other European countries, and because the level of co-payments/out-of-pocket payments (additionally to the services provided based on the insurance) is high against the level of the households' incomes.

Increasing gradually the minimum/average salary level in Romania, up to the year 2035 would diminish the felt burden of the contribution and would also increase the financing level for the system. As the contribution, has been currently diminished, its increase can no longer be done without bringing about social reactions save by making use of windows of opportunity created during social crises.

Table 3: Targets for Romania 2035 - Minimum and average salary

	Present	**Targets Romania 2035**
Minimum salary (Euro)	EU-18 – 951	maximum – 951 Euro
	EU-8 - 393	average - 672
	Romania – 217,5	minimum - 393
Average salary (Euro)	EU-18 – 2.305	maximum - 2.305 Euro
	EU-8 - 655	average - 1.480
	Romania - 346	minimum - 655

Source: Targets determined by the IQLR team

The state maintained a rather strong social component regarding access to services, but to the detriment of the services' quality that could have been provided at optimum standards only in few centres, on the background of insufficient resources. The access of individuals from areas without ambulatory services' coverage was focused mainly on the endowed hospitals from university centres, implying high costs for the system (costs with hospitals are currently of about 50% from the budget, and primary assistance is underfinanced, with a share of only 7%), as the prevention medicine continues to be underdeveloped. Ambulatory and preventive treatments are less costly than in hospital treatment.

The current social policy in the healthcare field puts into discussion some principles of social solidarity. Those who have not contributed can, if necessary, quickly re-enter into the system and benefit of medical services by paying the insurance for the last 6 months, at a level of 5.5% of the minimum salary. Therefore, the social policy is favourable, theoretically, to the access to services, but attention should be drawn to the fact that it might lead to rational calculated risk behaviours of the youths without legal employment forms: they would pay, only if necessary. Other categories of beneficiaries are as well exempted from payment: for instance, home-wives if their spouses pay contributions.

The principles of the current welfare state affirm that health cannot be abandoned to the market mechanisms, and that the inter-generational social solidarity youths-elderly, healthy-ill, rich-poor should be maintained but many payment exemptions for various categories might pose some questions about the equity within the system for those monthly contributing.

Special attention should be granted to the increasing private expenditures. Public health expenditures in Romania are of 82% and private expenditures are of 18%. The share of private expenditures is lower in Romania as compared with other countries (27% in Lithuania, 28% Poland, 29% Hungary, 28% Slovakia, in 2008) and under the European average (of 26%). We refer, mainly, to the lower share of the incomes attracted from private sources, which diminishes thus the total level of health expenditures in Romania.

The higher level of expenditures with health services within EU is done not only from public sources, even though these are the majority, as already shown. The difference is given by the level of the higher private expenditures. For instance, in Poland, the public funds expenditures were of 4.43% of GDP in 2013, but there was an increase to 6.75% of GDP by the additional allocation of private expenditures. In conclusion, it is necessary to invest more private financial resources for healthcare in Romania, by continuing the further development of the private system as competitive alternative for those who dispose of a satisfactory level of incomes which allows for access to this type of healthcare. Additionally, the fiscal facilities along with legislative regulations for the swifter development of complementary private insurances as developed in most EU member-states would allow also for access to the private network at bearable costs.

Identifying Costs within the System. More Efficient Use of Resources

One issue of all healthcare systems in the world is the inflation of services that are not necessary, but for which settlements through the system are not limited. Technological advance was one of the reasons for increased costs, but studies show that technologies could be inappropriately used in some instances. Some of services are at optimum used for some patients, but poorly and inadequately used for other patients. Reducing unnecessary services might be one way of diminishing costs within the system.

Diminishing the management costs of the system is another alternative. The transition towards care as social component of the services is yet another option for diminishing costs: home care, counselling for psychological-social and medical rehabilitation, and caring for children and elderly. As result, home-care against hospitalisation in the cases where it is applicable and individual labour contracts with settlement through National Fund of Social Health Insurances for physicians, nurses and caretakers that provide for medical services at home.

In the system, there were a series of financial drains. These occurred either because of negligence, or due to corruption and system regulations that allowed to the staff with management positions to use legal 'escapes' for maximising costs in their own interest.

The reduction of the corruption within the system and an efficient management of the resources are primordial from this perspective.

It is necessary to identify the costs within the system. At national level, no unitary assessment of the hospitalised assistance was ever made, to highlight the financing needs, and thus it cannot be stated with certainty which are the necessary costs within the hospital sector in performing medical acts.

As shown by a study realised by National School of Public Health and Sanitary Management, it is necessary to "*better define the types of services, the way and the qualitative level at which these should be delivered, as well as the corresponding financing level. If in a private healthcare system these elements are self-understood, because first defined is the service, and thereafter the costs of supplying it and subsequently the determination of the price, within the public system the principle of universality and gratuity in accessing services makes this approach to come second, if it is ever considered or never.*

Hence, it is necessary to standardise all care on types of patients, respectively developing protocols of medical practice. Once developed and used, these might represent the basis for identifying and computing the costs for "standard" usual care, providing a realistic image about the resources used for treating the pathology within Romanian hospitals" (Haraga, Turlea, 2009: 12)

Cost control must be regulated by assumed policies and that can protect vulnerable groups. Otherwise, the system will regulate itself, because the financial ceilings that ensure free services are consumed and then damages cannot be controlled and, moreover, the costs for the services end by being paid out of the pocket by the patient. It is far better to have a strategy and a hierarchy, and to acknowledge that one cannot provide any type of service, in any area, at optimal standards based on the level of the current resources. In this way, one can control far better collateral social costs, and avoid impossibility of evaluating damages, because one doesn't have a cost-control evaluation within the system.

"The ways of settling accounts for a service are extremely random in Romania nowadays, and contain 99% incompetence, and 1% ill-intention. They must go in parallel with the intentions of the healthcare system, for the respective service to be used. If me, as society, am interested more about uterine cancer, then the settlement of accounts for screening should be higher, so that physicians attract and motivate patients to perform the check. Things should be done like this. Also, these account settlements should consider social priorities. In our case, account settlements are made, by and large, to ensure a number of evaluated patients, that is "to give something" to the patients that paid insurance, but without considering the complexity of procedures for the patients who should get something out of it, and the quality of services they finally benefit of.

For instance, in Great Britain, if you are in a hospital, say for obstetrics-gynaecology, the respective hospital receives from the Fund a certain amount of money. They state that from this amount of money we pay this and that, and we can ensure 10 births. The 11th birth is no longer ensured, because there is no money left. In our case, it is just the reverse. We say that, for you to be functioning, respectively to get your salaries and all the necessary things, you must ensure in the first month a number of 10 births and in the second month, you should be able to ensure 12 births. In the third month, the decision is made that you can ensure 20 births. Hence, there is no connection with working hours and used materials and with reality. So, how decisions are made? I have no idea. Everything started initially with this DRG (Diagnostic Related Groups) system which budgeted what happened according to a foreign

system. Someone there calculated the priorities and what needs to be budgeted. Thereafter, the system was transposed in Romania, where physicians remained open-mouthed because apparently banal procedures as were very well paid. And other things, regarded as apparently important weren't paid at all. Usual thinks were related, let's say, to the cholesterol level. Higher levels mean that at a given time an infarct or cerebral vascular accident is to be expected. If you don't die, you shall be very expensive for the medical system. Therefore, it is very important to do something about this little issue. Hence, it received a lot of points and lots of money. Things which were very important for us, like arthritis which implies pain and suffering and hardships but which never can be healed had less importance for the society and from here the discrepancy. That is, if we talk about my specialty, rheumatology, were patients are spending endless days in hospital and who were most of the hospitalised cases.

This is the reason for which physicians began to rebel, as they did not understand why some things are better paid and others less and then someone began to adjust, but adjustments were favouring own interests. If someone was a gynaecologist with a position within the ministry, the adjustment meant an increase for everything that was gynaecology, and reductions for all the rest. It didn't matter that neurology hospitals were screaming with patients suffering from cerebral accidents. The important thing was that the money went for gynaecology and everything was running well. It went on and on, in this style.

Solutions: the first and which is not applicable, is to tell people the truth. They should get something for the money they contribute with. At present, each of us lives with the impression that we can get anything because of the contributed money. Few are aware that the money they contribute with support yet another 4 to 5 individuals who do not pay at all. They too believe they can obtain anything, because it's their right. The co-payment formula was introduced, but it deviated from its straight line. (physician in Bucharest hospital, November 2014)[1].

The under-financing of the system is the reason why the ceilings are quickly used up, so that three out of four poor patients pay out of the pocket the required medical assistance, 62% of the poor population needing medication pay for it from their own money and thus, services are under-used by the poor. Thus, the benefits of subsidising the system are focused in favour of the rich and middle-class (World Bank, 2011).

The healthcare system does not provide currently a proper protection of the vulnerable groups. According to the World Bank, differences exist in accessing healthcare services between the population in the lowest and the highest quintile of income: in the case of chronic diseases, about 40% from the persons with incomes in the lowest quintile which claim to be affected by a chronic illness do not request assistance/care, as compared with 17% of those in the highest quintile.

According to the same report, in the period of economic growth (1996-2008), the access of the population to healthcare services increased from 61% to 71% in total. The global increase of access was due exclusively to the favourable evolution for the population segment with the highest incomes (from 65% to 80%) while for the poorest quintile no progress was recorded related to the access to services.

The more adequate use of the financial resources within the healthcare system means:

[1] Interviews made by this article's author, within the OPHDR project "Pluri- and inter-disciplinary doctoral and post-doctoral programmes".

- Identifying correctly the points where action should be undertaken based on data gathered in a unitary and credible manner;
- Investing in disadvantaged regions regarding entities/endowments as these have higher morbidity rates; there are not only inequities between regions, but also between disadvantaged socio-economic categories regarding the access to services;
- Gathering data in a unitary manner within the system and instituting a single unit at national level for gathering/supplying data in an integrated way (single national register);
- Computing within the system the right price of the procedures in correlation with the instituted therapeutic/protocol guides;
- Diminishing the number of cases treated within the tertiary, hospital system which implies high costs and strengthening primary and preventive medicine;
- Assuming political accountability for diminishing inefficient costs;
- Penal accountability for false statements in reporting expenditures for "inflated/unrealistic" DRG expenditures;
- Fighting corruption within the system for reducing the financial resources' drain from the system to various companies based on contracts with "dedication", at visibly higher prices;
- Efficient investments in the healthcare system by timely providing for/planning the necessary of consumables and the number of required physicians. If these cannot be ensured, then the investment is inefficient and non-functional.
- Even though it is a tough decision from the viewpoint of population's access to services, closing hospitals that are much under the imposed national standards because they don't have either the equipment or required staff must be put on the discussion table.

"Currently we are dealing with a major dispersion and lacking strategy regarding the few physicians and financial resources available to Romania in many medical entities. Everything begins with the impossibility of assuming politically such reforms that bear a political price." (Director, the Ministry of Health).

Among the most considerable shortcomings mentioned by interviewed ones are counted: the lack of a monitoring system for the quality of the healthcare services; the lack of information about the actual costs of the system; the chronic under-financing of some fields within the healthcare system; the impossibility of drafting a development strategy for hospitals which is both coherent and on long-term; the professionals leaving the system.

"They say let's not make decisions that would cost us politically. Closing a hospital means to pay the political price, even if for the future this means that you increase the level and quality of services in the respective area. And thus, because we run from paying the political price we waste money uselessly.

Neither hospitals ranked higher have physicians, nor lower ranked ones. Let's get realistic: any hospital with 5 physicians is not a hospital. A hospital must have line-shifts of minimum 5 physicians. You cannot have line-shifts with 2 people. Things aren't done properly and this has direct consequences for the patient. But one does not acknowledge these facts. I believe that the society might understand that certain reforms are essential, if actual discussion and efficient information took place." (Director, the Ministry of Health).

Conclusions

Medicine is part of a historic complex related to power, according to the theory of social conflict (Radulescu, 2002). The medical system is a dominant and power institution, the product of tensions and disagreements between groups with different interests thus, the social system begins to function better in favour of privileged groups. Healthcare institutions, pharmacies and physicians are ruled by two contradicting motivations: own financial profit or interests of any other kind on one hand, and expenditures deduction and health ensuring, on the other.

It is necessary to put a halt to the interests of some groups and to conflicts of interest. It might be cynical, but market economy and power structures operate in health and once marketing has been implemented in providing healthcare, the issue of social equity and of the morale has lost ground. The most eloquent case is the one of pharmaceutical companies and of the pharmaceuticals' suppliers where everything means maximising financial profits and therefore promotion campaigns are made for the products targeted at patients and at physicians, which even "corrupt" the physicians within the system by incentives, such as paying their attendance at congresses or offering them bonuses just to prescribe certain drugs.

The Control Body of the Ministry of Health mentions instances where understandings exist between physicians and pharmacies, and the physician indicates to the patient only some pharmacies, under the pretext that he/she can find only there the prescribed medication. Some physicians hide the conflict of interest they find themselves in: they work with private clinics or laboratories to which they direct the patients identified in the public system.

Increasing the financing of the system regarding healthcare should be a priority. Under the conditions of the crisis, in the period 2008-2011, all European member-states adopted pragmatic measure- packages to face the financial crisis, albeit reconsidering the role of the state and of its social functions were not considered. The measures aimed at restricting/controlling expenditures within the administration. The states with mature market economies considered measures for reducing taxation to stimulate economic growth.

In the healthcare sector, as well, as result of the necessity to diminish budgetary deficits, the governments are continuously faced with difficult political options in the immediate future. In case of economic growth stagnation, governments might be forced to diminish the increases in public expenditures for health, and certain healthcare fields, or to increase taxes or contributions to social insurances for reducing deficits. On the other hand, improving the efficiency of the expenditures in the healthcare sector might

contribute to keeping these pressures under control, for instance by evaluating more rigorously healthcare technologies, or using on a larger scale information and communication technologies (OECD, 2014).

Planned strategy decisions are required but not reactive answers. Not everything that governments undertake is the outcome of a policy and, as example, we might refer to the legislative ambiguities and improvisations of the law 95/2006 which regulates the entire healthcare system. This law was subsequently altered countless times. Moreover, healthcare needs to be stripped of political colours. Healthcare turns much too often into an object of political combat. Each electoral campaign, parties come up with the issue of the population health and the possibilities of the state to guarantee these expenditures. Appointing the management of the large medical entities for hospitals in the large urban area, public health directorates at county level, and thus everything turns into politics with consequences on the management quality.

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THE EUROPEAN LEGISLATIVE FRAMEWORK AGAINST DISCRIMINATION[1]. AN OVERVIEW

Oana BANU[2]

Abstract: *Discrimination is a phenomenon encountered in the majority of societies, and it reflects on various groups based by: race, nationality, religion, ethnicity, gender, sexual orientation, persuasions, belonging to a disfavoured group, age, handicap, non-transmissible chronic disease, HIV infection. Any individual may be exposed to discriminatory acts at a given time for one or the other reasons, in certain situations and contexts. Irrespective of the discrimination type to which an individual or a group is/are subject, it is important to act for combating and diminishing all forms of discrimination because any such form affects under one or the other aspect to a large extent significant groups of individuals. The present paper intends to analyse the European legal framework regarding discrimination, respectively mobbing on the labour market with emphasis on the situation of women. A series of normative acts at European level are presented and detailed which are intended to contribute in counteracting the discrimination and mobbing phenomena, as well as models from some countries of the European Union (Spain, Italy, France, Poland and Slovakia).*

Keywords: *legislative framework, discrimination, labour market, woman, equality of chances.*

The principle of non-discrimination is set at the core of general principles of the European Union legislation, and is mentioned in numerous provisions of the treaties and directives. The European directives are normative acts with enforcing the EU legal power over the Member-States, and they become part of the national law systems of Member-States by their incorporation in national normative acts or laws.[3]

The European Union legislation provides support to individuals who potentially might be discriminated, providing assistance and protection to all members of society against

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[3] The Guide for equality of chances, available at: http://www.mdrl.ro/_documente/publicatii/2006/Ghidul_Egalitatii.pdf, retrieved on 4.10.2011

discrimination on grounds of race, ethnicity, age, handicap, religion, beliefs, or sexual orientation being prohibited.

The European legislation in the field of discrimination is based on article 19 of the Lisbon Treaty (previously article 13 from the Amsterdam Treaty) which provides to the European Union competences toward combating or diminishing discrimination on grounds of race, ethnicity, religion, beliefs, handicap, age, gender or sexual orientation.

There are numerous European legislative documents addressing the issue of combating or diminishing discrimination, especially the provisions contained in treaties and directives, regarding access to work, equal payment, and treatment of employees on the job, maternity, and child-nurturing leave protection, social security and professional regimes of social security.

The European Union implemented strategy to combat discrimination and for applying the principle of gender equality, which is based on of the following directives:

- The Treaty of the European Union (The Treaty of Maastricht), 1992, art. 2 and art. 3;
- The Treaty of Amsterdam, 1997, art. 2, art. 3, art. 14, art. 137, art. 141;
- The European Union Charter of Fundamental Rights, 2000, art. 21, art. 23;
- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**;**
- Council Directive 2000/78/EC of 27 November 2000, *establishing a general framework for equal treatment in employment and occupation;*
- Directive 2002/73/EC of 23 September 2002, amending the Council Directive 76/207/EEC on the *implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions;*
- Council Directive 2004/113/EC of 13 December 2004, *on implementing the principle of equal treatment between men and women in the access to and supply of goods and services*
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the *implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;*
- Directive 97/80/EEC of 15 December 1997, archived and amended, regarding the *burden of proof in cases of discrimination based on sex*
- Directive 2010/41/EU of July 2010 *on the application of the principle of equal treatment between men and women engaged in an activity, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood*
- Directive 79/7/EEC of 19 December 1978 *on the progressive implementation of the principle of equal treatment for men and women in matters of social security.*

The Maastricht Treaty contains some anti-discrimination clauses such as: the principle of gender equality (art. 2, and 3), which is applicable to all policies and activities of the European Union; equality between women and men regarding employment and occupation (art. 141) and combating sexual discrimination on and outside job (art. 13). Further, article 13 stipulates: *"without disregarding the provisions of the other dispositions of the Treaty and within the limits of the powers conferred by it to the European Community, the Council acting unanimously at the proposal of the Commission and after consulting the European Parliament may take decisions necessary to combating discrimination based on sex, racial or ethnic origin, religion or faith, disability, age or sexual orientation".* On the basis of this article, the European Union gains the competence to *"take the corresponding measures for combating discrimination".*[1]

The Treaty of Amsterdam includes an article dedicated to the general principle of non-discrimination (equality). The European Union might take measures for combating any form of discrimination (on grounds of sex, race, ethnicity, disability, age, sexual orientation). The actions are undertaken by the Council of Ministers by unanimously approved decisions based on the proposal of the Commission and after the consultation with the European Parliament. Another important aspect highlighted by the Treaty of Amsterdam is related to the principle of equality between men and women on the job place. The principle of positive discrimination is included as well, based on which member-states may take action for favouring women in view of balancing the situation in the fields of professional activity.[2]

The European Union Charter of Fundamental Rights stipulates in article 21, paragraph (1) a series of provisions regarding the prohibition of any kind of discrimination, based on reasons such as gender, race, colour, ethnic or social origin, language, religion, political opinion, ethnic minority, handicap, age or sexual orientation. At the same time, any discrimination on nationality/ citizenship grounds is banned (article 21, paragraph (2)). Religious, cultural and linguistic diversity is underpinned in article 22 of the charter. According to the article 23, equality between men and women must be ensured in all fields, including with respect to workplace and remuneration process. The principle of equality considers maintaining or adopting measures that would provide specific advantages to the under-represented gender[3].

The principle of equal payment for men and women was introduced in the Treaty of Rome in 1957. In 1975 was adopted the Directive regarding equal pay which extends the provisions of the Treaty and defines the principle of equal remuneration as *"means for same work, or for work paid at the same value, by eliminating all discrimination based on sex, in all aspects and conditions of payment"* In December 1976, by means of the Directive of Equal Treatment, all aspects regarding employment were included. This directive

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[1] The Maastricht Treaty available at: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=uriserv%3Axy0026, consulted on 4.10.2011

[2] European Issues: Treaty of Amsterdam, available at http://ec.europa.eu/romania/documents/eu_romania/tema_24.pdf, consultat la 4.10.2011

[3] The European Charter of Fundamental Rights (2007/C 303/01), available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0001:0016:RO:PDF, retrieved on 4.10.2011

stipulates that *"no discrimination on reasons of sex, either directly or indirectly by reference to a certain civil or family status*.[1]

In 2000 were adopted the Directive regarding the equality of races, and the Directive of equality in employment. The directives stipulated that discrimination, harassment, and victimization in employment or vocational training are prohibited. In 2002, a modification is made regarding the directive for equal treatment by including the definitions for sexual harassment, direct or indirect discrimination.

The Council Directive 2000/43/EC from 29 June 2000 *for implementing the principle of equal treatment of persons irrespective of racial or ethnic origin,* has as fundamental attributions: implementing *the principle of treatment equality for all individuals irrespective of racial or ethnic origin; ensuring protection against discrimination on employment, in training, education, social security, health and access to goods and services*. The directive contains the definitions of direct and indirect discrimination, harassment and victimization. Another positive aspect stipulated in the directive is that it provides for the victims of discrimination the right to take legal action by administrative or judicial procedure, with respect to those acting discriminatory and provides sanctions for them. Limited exceptions are allowed for in enforcing the principle of equality of treatment, for instance in cases when the difference of treatment on racial or ethnic grounds means an actual occupational requirement. The burden of proof is divided between claimant and defendant, so that if an alleged victim determines facts from which it might be concluded that discrimination exists, the defendant is the one to provide evidence to the contrary and no infringement of the principle of equality of treatment exists. Based on this directive is established for each of the EU member-states the setting-up of a body for promoting equality of treatment and to provide assistance to the victims of racial discrimination.[2]

The Council Directive 2000/78/EC from 27 November 2000, regarding the *creation of a general framework in favour of equal treatment on employment and working conditions* implements the principle regarding the equality of treatment in the field of employment and training, irrespective of religion or belief , sexual orientation, age or disability. This directive includes identical provisions as the Directive regarding racial equality, and the definitions of discrimination and harassment; also the right to recourse is provided for, and for sharing the burden of proof. Employers are requested to create reasonable working conditions for persons with disabilities who have the skills for the respective jobs. In some instances, the Directive allows for exceptions from the principle regarding equality of treatment, for instance, for maintaining the special character of

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1 EUR-Lex: Access to European Union law, *Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions* (76/207/EEC), available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31976L0207&model=guichett, retrieved on 5.10.2011

2 Council Directive 2000/43/EC from 29 June 2000 *for implementing the equal treatment of individuals irrespective of racial or ethnic origin,* available at: http://www.cncd.org.ro/legislatie/Legislatie-internationala/Directiva-Consiliului-2000-43-CE-6/, retrieved on 4.10.2011

some religious organisations, or for ensuring special measures regarding labour market integration of the very young or very old[1].

Article 3, of the Directive regarding working relations (2000/78/EC) and the Directive on Race (2000/43/EC), have as purpose to prevent discrimination in the following common fields:

- Access on employment, occupation and profession;
- Working relations and conditions, including layoff and wage;
- Access to guidance and vocational training;
- Membership in trade unions or employers' associations.

The race directive (2000/43/EC) brings amendments that refer to education, social protection, including health services or social security, social advantages, access to public goods and services (access to housing).

The Directive 2000/73/EC from 23 September 2002 by which is modified the Council Directive 76/207/EEC regarding the *implementation of the equal treatment principle for men and women regarding access to employment, vocational training, promotion and working conditions* brings some amendments by which are introduced and replaced articles and paragraphs from the Directive 76/207/EEC. The concepts of "direct discrimination", "indirect discrimination", "harassment" and "sexual harassment" are introduced and defined. The member-states stimulated employers and individuals responsible about access to vocational training to take prevention measures against all forms of discrimination based on sex, against harassment and sexual harassment on the job (Article 2, paragraph 5).

Article 3 of the Directive 76/207/EEC is replaced by provisions regarding the enforcement of the principle of equality of treatment. The implications of this treatment mean the inexistence of direct and indirect discrimination, based on sex criteria regarding access to employment, or occupation, and access to all types and levels of vocational guidance and training, improvement and re-skilling, employment conditions, firing, remuneration, affiliation to and involvement in a trade union, or employers' association (Article 3, paragraph 1).[2]

The Council Directive 2004/43/EC from 13 December 2004 regarding the *implementation of the principle of equality of treatment between men and women regarding access to the supply of goods and services* has as objective to shape the framework for combating

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[1] Council Directive 2000/78/CE from 27 November 2000, for *creating a general framework in favour of equal treatment regarding employment, and working conditions,* available at: http://www.anr.gov.ro/docs/legislatie/internationala/Directiva_Consiliului_2000_78_CE_RO.pdf, retrieved on 4.10.2011

[2] Directive 2002/73/EC from 23 September 2002, altering the Council Directive 76/207/EEC regarding the *implementation of the principle of equal treatment for men and women regarding access to employment, occupation, vocational training, promotion and working conditions* available at: http://www.mmuncii.ro/pub/imagemanager/images/file/Legislatie/DIRECTIVE/Dir2002-73.pdf, retrieved on 5.10.2011

discrimination on criteria of sex regarding access to goods and services and the supply thereof, in view of enforcing within the member-states the principle of equality of treatment between men and women.

This directive is applicable to both direct and indirect discrimination. We refer to direct discrimination when based on sex criteria a person is treated less favourably than another person in the same circumstances (Art. 12). The indirect discrimination becomes noticeable when an apparently neutral fact, criterion, or practice might disadvantage especially persons of a certain sex as compared with persons of the opposite sex.

Persons supplying goods and services at the disposal of the general public and provided outside the field of private and family life are prohibited to discriminate (Art. 13).

Different treatment is acceptable only when justified by a legitimate objective, such as protection of victims against violence of sexual nature, reasons that are related to respecting private life and decency, promoting gender equality or of the interests of either men or women (Art. 16).

"The principle of the equality of treatment regarding access to goods and services does not require for supplied services to be always divided between men and women, on the condition that this type of supply does not favour one of the sexes" (Art. 17).

The inadequate treatment against men on criteria of pregnancy or motherhood is considered as a form of direct discrimination based on sex, and as result it is prohibited within insurance services and related financial services (Art. 20)[1].

Directive 2006/54/EC of the European Parliament and of the Council from 5 July 2006 regarding the *enforcement of the principle of the equality of chances and of the treatment equality between men and women regarding employment and occupation* contains provisions aimed at enforcing the principle regarding equality of treatment about: access to work (promotion, vocational training), working conditions (remuneration), social security systems (Art. 1).

In article 2 of the Directive are defined the following concepts: "direct discrimination", "indirect discrimination", "harassment", "sexual harassment", "remuneration", "professional systems of social security".

In title II, chapter 1, art. 4, is imposed the ban on any discrimination of the same type of work or equal work, direct or indirect discrimination being excluded from the all the elements and ways of remuneration.. When a system of professional classification is used for establishing remuneration, this system is realised based on common criteria for workers of both sexes, being established so as to combat discrimination based on the gender criterion.

The treatment equality within professional systems of social security is dealt with in chapter 2: the ban on any type of discrimination, the field of application depending on

[1] Council Directive 2004/43/EC from 13 December 2004, regarding the *implementation of the principle of equality of treatment between men and women regarding access to the supply of goods and services* available at: http://www.egalitatedesansa.ro/documente.aspx?articleId=29, retrieved on 5.10.2011

persons (it is applied for the active population and to those developing self-employed activities, workers whose activity is disrupted by disease, maternity, accident or involuntary unemployment, but also to persons seeking a job, to retired workers, to disabled persons and persons in the care of these workers[1].

The Directive 97/80/EEC from 15 December 1997 regarding the *burden of proof in cases of discrimination based on sex* is founded on the principle of the equality of treatment, which presupposes the inexistence of any (direct or indirect) discrimination based on sex.

The Directive has as objective to guarantee more efficiently the measures adopted by the member-states for the enforcement of the principle of the equality of treatment in order to *"enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies"* (Art.1).

Article 4, paragraph (1) contains stipulations about the burden of proof. In this case, the member-states must undertake the necessary measures, so that in cases where the individuals regard themselves as wronged, this persons must be able for provided in front of the court facts evidencing the existence of direct or indirect discrimination. In case if the defendant is found guilty, this one must to prove, according to his/her obligations that there has been no breach of the principle of equal treatment.[2]

Directive 2010/41/EU of July 2010, refers to *the principle of equal treatment for self-employed men and women, and the protection of women who develop self-employed activities in the period of pregnancy and maternity.* Article 2 (A and B point) of the directive stipulates the types of persons who are aimed by it: independent workers, all individuals developing self-employed activities, under the conditions provided by law, their spouses, who are not employed or associates when these are involved in the activities of the independent worker and fulfil the same tasks or complementary tasks.

The member-states examine under which conditions women who develop an independent activity and the spouses of self-employed may during the interruption of the occupational activity because of pregnancy or maternity, have access to existing social services without the right to monetary benefits in the framework of a social security regime or based on any other public system of social protection (Art. 8)[3].

Directive 79/7/EC from 1978, for *the progressive implementation of the principle of equal treatment between men and women in matters of social security* has as purpose to enforce

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[1] Directive 2006/54/EC of the European Parliament and of the European Council from 5 July 2006, regarding *the enforcement of the principle of the equality of chances and of the one of the equality of treatment between men and women regarding employment* available at: http://www.mmuncii.ro/ pub/imagemanager/ images/file/Legislatie/DIRECTIVE/Dir2006-54.pdf, retrieved on: 5.10.2011

[2] Directive 97/80/EEC from15 December 1997regarding *the burden of proof in cases of discrimination based on sex*, retrievable at*:* http://www.egalitatedesansa.ro/documente.aspx?articleId=23, consulted on 5.10.2011

[3] Directive 2010/41/EU from July 2010 regarding the *application of the principle of equal treatment between men and women engaged in an activity, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood,* available at: http://eur-lex.europa.eu/legal-content/ EN/TXT/?uri=CELEX%3A32010L0041, consulted on 5.10.2011

progressively the principle of equal treatment between men and women in the field of social security. The directive is applied to the active population, to persons developing independent activities, persons seeking jobs and retired or disabled workers developing self-employed activities (Article 1, paragraph 2).

Article 4 of the Directive provides an explanation about the meaning of the principle of equal treatment, respectively that there should exist any (direct or indirect) discrimination based on gender, in particular regarding marital or family status, referring to: application domain of regimes and access conditions to the aforementioned, the obligation of contributing and calculating the respective contributions, the calculation of services, including benefits owed to the other spouse of the persons in maintenance, as well as the conditions regulating the duration and maintenance of the right to benefits.

The member-states specify, within their national legal systems, the necessary measures for allowing individuals who consider themselves wronged by failure to enforce the principle of equal treatment to pursue the assurance of their rights by legal means, after resorting beforehand to other competent bodies[1].

All the above-mentioned directives are applicable to all persons residing on the territory of a member-state, against any discrimination act based on one of the provided for criteria (race, ethnicity, disability, religion, sexual orientation, etc.) irrespective of the nationality of the respective person. The directives exclude discrimination on the criterion of citizenship. Save for the anti-discrimination directives, there are provisions of the Treaty of the European Union which stipulate freedom of movement for individuals within the European Union.

In some member-states of the European Union (Denmark, Estonia, Greece, Italy, France, Cyprus, Poland, and Malta) the legislation against discrimination contains only the fields mentioned in the Directive regarding equal treatment on employment. Estonia, France, Greece, and Poland debate an extension of the legislation for combating discrimination phenomena. In the Czech R., Ireland, Latvia, Lithuania, Luxemburg, Hungary, the Netherlands, Finland, Sweden and the United Kingdom, the legislation against discrimination was partially extended to cover also other fields with the exception of employment. In Belgium, Bulgaria, Germany, Spain, Austria, Slovenia, Slovakia, and Romania, specific legislation is provided for employment, including here the legislation against discrimination on grounds of sexual orientation (on hiring, or for promotion), but also in the additional fields specified by the directive regarding race equality[2].

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[1] *Council Directive 79/7/EEC of 19 December 1978* on the progressive implementation of the principle of equal treatment for men and women in matters of social security available at: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=31979L0007&model=guichett, retrieved on 5.10.2011

[2] European Union Agency for Fundamental Rights, available at: http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-protection-law_RO.pdf, retrieved on 6.10.2011

The European legislation regarding the fight against mobbing phenomena

In the European Union member-states there are legislative provisions aiming to fight against discrimination and mobbing phenomenon. The member-states have the obligation to comply with the objectives stipulated by the European directives but they have a certain freedom when transposing the directives into the national legislation, depending on the specific national circumstances. The European legislation for combating discrimination and psychological harassment on the job brings benefits to workers within the European Union because it provides extended protection for all types of discrimination and harassment. The equality of treatment on the job and regarding working conditions are key-elements in guaranteeing equal chances for all individuals. These key-elements contribute to full participation of individuals to the economic, cultural and social life, and to the development of their professional and social potential.

The concept of *mobbing* is not fully known and included yet in the legislation of several member countries of the European Union. The approach is biased more towards legal provisions making reference to this fact, than from the viewpoint of psychological (moral) harassment on the job; however, there are countries that have included already in their national legislation this concept.

The victims of mobbing are often subjected to stress on the job which might be associated with psychological injury. To this end, the European Commission has implemented measures for ensuring the safety and health of workers on the job.

Directive 89/391/CEE from 12 June 1989 regarding safety and health of workers on the job represented a significant instrument for improving safety and health at the workplace. This directive guarantees the minimum requirements regarding safety and health on the job in the entire Europe (all states), while the member-states have the possibility of maintaining or establishing even stricter measures. The directive makes accountable the employers regarding the prevention of any type of injury, including injuries resulting from moral harassment[1].

The member-states have implemented this directive in their own legislation, and some member-states have even realised prevention guidelines for psychological harassment on the job. According to the approaches from the Directive 89/391/CEE for attenuating psychological harassment, the employers based on consultations with the employees should have as organisational objective the prevention of moral harassment, and to evaluate the risks of being morally harassed and adopt adequate measures for preventing the negative consequences.

At the level of the European Union, there are two Directives, respectively Directive 2000/43/EC, regarding the implementation of the equality of chances for individuals

[1] European Agency for Safety and Health at Work: *Framework-directive regarding safety and health at work* available at: http://osha.europa.eu/ro/legislation/directives/the-osh-framework-directive/the-osh-framework-directive-introduction, consulted on 6.10.2011

irrespective of ethnicity or race, and Directive 2000/78/EC on establishing the guideline measures regarding equality of treatment on employment and in occupation. According to the provisions of Directive 2000/78/EC, "*member-states shall, in accordance with their national traditions and practice take adequate measures to promote dialogue between the social partners with a view of fostering equal treatment, including through monitoring of workplace practices, collective agreement, codes of conduct and through research or exchange of experiences and food practice*" (Article 13, paragraph (1))[1].

Directive 2000/43/EC contains provisions mentioning that the Member-States have the obligation of implementing in the framework in their national legal systems the required measures for the protection of persons against any treatment that disfavours them, or against any consequence by which they are affected. (Art.9).

By article 11, paragraph (1), the Directive refers to the same type of provision as Directive 2000/78/EC respectively that member-states must ensure the existence of some measures for promoting social dialogue between the two representative parties, in order to promote gender equality, this promotion taking place also by monitoring practices at the workplace, collective agreements, conduit codes, the exchanges of experience and good practices[2].

By directives the objectives and main regulations are established, Member-States having the freedom of choosing the manner in which these directives are implemented.

The directives of the European Union do not involve *"the exercise on behalf of the Community bodies of any constraint of the states for the adoption of one set or other of legislative measures, but only are intended a guidelines towards a certain finality"* (2007)[3].

Article 31 of the Fundamental Charter of the European Union refers to equitable and just working conditions, stipulating that "*each employee has the right to working conditions complying with his/her health, safety and dignity"*[4].

Moral harassment is mentioned also in the Guide of European Commission regarding stress related to professional activity, which can be enforced also in the case of psychological harassment[5]. The European Parliament adopted a motion for a resolution

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[1] *Directive 2000/78/EC of the Council from 27 November* for the creation of a general framework in favour of equal treatment in employment and occupation, available at: http://www.egalitate-desansa.ro/documente.aspx?articleId=27, consulted on 7.10.2011

[2] *Council Directive 2000/43/EC of June 2000* implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML, retrieved on 7.10.2011

[3] Article: *"What do you know about mobbing?"*, published in June 2007, available at: http://www.121.ro/content/article_print.php3?article_id=4587&page_nr=1, retrieved on 7.10.2011

[4] *Fundamental Charter of the European Union*, available at: http://eurlex.europa.eu/ro/treaties/dat/32007X1214/htm/C2007303RO.01000101.htm, retrieved on 8.10.2011

[5] Guide regarding stress on the job "*The salt and pepper of life – or kiss of death?*"[Ghid privind stresul la locul de muncă "*Sarea si piperul vieţii – sau sărutul morţii?*"], European Commission 1999,

regarding moral harassment on the job. The Parliament of the European Union *"invites Member-States to examine and if necessary to amend, reanalyse, and standardise the definition of moral harassment in view of counteracting moral harassment and sexual harassment on the job*".

Currently, few member countries of the European Union have passed special legislation regarding moral harassment on the job. In some countries, the legislation is still in the stage of draft, while in other states actions of regulating this aspect have been initiated by adopting statutes, guides, or resolutions. In the majority of member-states that provide for regulations in order to combat the mobbing phenomenon, these adopted documents don't have any terms that include the term of "mobbing", but are rather known as measures intended to prevent moral harassment on the job. However, there are countries that included this concept in their legislative acts.

Regarding the implications and legal measures about the mobbing phenomenon, Sweden was the first country of the European Union that stipulated in its legislation the term of "psychological harassment" on the job. In this way, by the Ordinance on Victimization at Work passed in 1993, even if not concrete action was undertaken by using some remedies for individuals victimised at work, the importance of this document was related to acknowledging the concept and encouraging discussions about mobbing[1].

In France, already in 1960, the courts acknowledged moral harassment even before being introduced in the legislation in the field. The fact that an acknowledgement by the French judicial courts occurred, and that this concept was widespread at the level of the population, had as consequence the public demand of outlining legislation in this respect. In January 2002, the Law regarding the social modernisation of France (*Loi de modernisation sociale)*[2] was compliant with the requirements of amending the Labour Code and the Criminal Code with articles incriminating psychological harassment.

The French Labour Code stipulates that no employee should be victim of moral harassment which has as effect a deterioration of working conditions by harming rights and dignity of the respective employee with implications on the physical and mental health of the respective worker, because this fact implies risks for the professional future of the respective person. The Labour Code from France also provides information pertaining to the burden of proof which needs to be managed by the parties making the object of such a case. The employee is the one who needs to produce the proof that the constitutive elements of psychological harassment are given, and thereafter the employer must prove objectively that the kind of adopted attitude, that is the object of the complaint of the employee, is not mobbing[3]. Article 230-2 from

available at: http://europe.eu.int/comm/employment_social/h&s/publicat/pubintro_en.htm, retrieved on 7.10.2011

[1] Ordinance AFS 1993:17 – *Victimization at work*, available at: http://www.av.se/dokument/inenglish/legislations/eng9317.pdf, retrieved on 7.10.2011

[2] *Loi nr 2002-73 du janvier 2002 de modernisation sociale*, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000408905&dateTexte, retrieved on 7.10.2011

[3] Code du Travail, 2001-2002, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_191113.pdf, retrieved on 7.10.2011

the French Labour Code provides that *"it is the obligation of the head of the enterprise to undertake all necessary measures to prevent the acts referred to in article L122-49 and to protect the physical and moral health of the employees."*

In Italy, the mobbing phenomenon is combated by article 594 of the Italian Criminal Code as it incriminates the act of insulting by which the dignity of a person is prejudiced, as sanctions are increased, if the deed takes place in front of several persons (Art. 596-599). In article 595 of the Italian Criminal Code is stipulated that whenever the unfavourable behaviour brings prejudices to the dignity of the worker in his/her presence, and then this act is considered as defamation. Another article highlights the sanctions for mobbing, by incriminating the act of violence in article 582 of the Italian Criminal Code, by which sanction measures are imposed for persons attempting to harm the physical or psychical integrity of other individuals[1].

The Criminal Code of Spain contains in Title VII also provisions dealing with intimidation, pressure and other acts harming the moral integrity of a person. In article 173 of the Code is stipulated that whenever a person (either superior or colleague at the workplace) enact degrading treatments that harm the moral integrity of a person, by repeatedly acting hostile or humiliating towards the respective person, the persons displaying such behaviours shall be sanctioned with imprisonment from six months to two years. Article 174, stipulates that employers abusing by their superior position against employees, and resort to intimidation or pressure methods, or discriminate in any way their employees, are subjected to infringement procedures and shall be sanctioned for these deeds. Employers should not adopt attitudes by which the intellectual capacity or the knowledge competences of the employees are prejudiced or underestimated because in this way the moral integrity of the employees is endangered[2].

In Hungary, the provisions of the Hungarian Criminal Code contain several sections applicable to various forms of violence or harassment at the workplace and which are regulated specifically by measures taken in Court for the abuse of the employers against the employees. Paragraph (1) of section 358 underpins that whenever an employer insults visible one engaged, who is in a subordinate position, bringing harm to his/her human dignity and, if at the perpetration of this deed others are witness, then the employer commits a contravention and this is sanctioned with imprisonment from up to one year. In accordance with paragraph (3) if, the pressure of the employer against the employee brings with it considerable disadvantages on the job for the respective employee, the employer shall be sanctioned with imprisonment from one to five years. Section 359 describes the way in which an employer might abuse its superior power: by imposing a disciplinary sanction against some employees; by limiting their employees' rights to complaint regarding this fact; diminishing the remuneration of the employees and imposing them several tasks; by summoning them for private reasons; by adopting

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[1] Bogdan Camelia, *Regulation of mobbing in Romanian Criminal Justice* [in Romanian], available at: http://www.revdpenal.ro/Reglementarea_mobbingului_in_legislatia_penala_romana.pdf, retrieved on 7.10.2011

[2] *Organic Law 10/1995* , 23 November, din Spanish Criminal Code, Chapter 3, Title VII, available at: http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html, retrieved on 8.10.2011

a less favourable or disadvantageous treatment against some of the employees compared to other employees[1].

In Poland, the Polish Labour Code is associated at legislative level with the Parliamentary Council for Labour Protection, and the Constitution of the Republic of Poland, and the Act of 6 March 1981 regarding the National Labour Inspectorate and other documents, reports analysing the situations of mobbing and the psychological-social relationships at the workplace, these being prepared to be delivered to the Parliamentary Council for Labour Protection. The regulations stipulated in these legislative documents refer to preventing psychological harassment at the workplace, the type of sanctions to be applied to persons exercising undue behaviour against behaviour and to the way in which these employees might identify an attitude which implies mobbing[2].

In the legislation of Malta, the occupational health and safety, as well as labour force employment, the relationships at the workplace are stipulated by the national legislation in the Authority Act, chapter 424 and 452. These acts establish the main provisions that regulate labour force employment and prohibit discriminatory treatment in employment, and any type of harassment (Art. 29).[3] The equality of treatment is promoted by the occupation and labour force employment (Legal Advice 461 from 2004).[4]

In Slovakia legislative measures are provided for the issue of moral harassment and for violence at the workplace. These measures are found in the provisions of the Civil Code (no. 150/2004); the Labour Code (no. 311/2001); Law 379/1997 ZZ, which approaches the safety services at the workplace; Law 365/2004 Zz (the Anti-discrimination Law); Law 311/2001 Zz regarding adequate working conditions; the Constitution of the Slovak Republic, and the Criminal Code 301/2005.[5]

Other member-states of the European Union with legislative regulations for preventing the situations of psychological harassment at the workplace, but which are not all in their quasi-totality considered as *mobbing* are: Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, and Slovenia.

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[1] *Hungarian Criminal Code,* Act IV from 1978, available at : http://www.era.int/domains/corpus-juris/public_pdf/hungary_criminal_code.pdf, retrieved on 8.10.2011

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Conclusions

At European level, the legislation against discrimination sums up a coherent assembly of rights and obligations applicable in all member-states of the European Union. From the legal viewpoint, procedures are provided for that have the role of supporting victims subjected to some situations of discriminations and by which is guaranteed their protection against several types of discrimination: direct and indirect discrimination, psychological harassment, mobbing, in particular in the cases of discrimination based on gender and access to equal chances in all spheres of life.

The European provisions about discrimination and mobbing instances, as instituted based on directives and measures, support human rights and fundamental freedoms, and prohibit discrimination in a wide array of context and for a significant range of criteria. These norms and stipulations of the European Union intended to combat any kind of discrimination were transposed by the member-states in the national legislation of each country.

A series of directives at European level take into consideration and approach the vulnerable groups subjected often to various forms of discrimination, harassment, or mobbing instances. A particular concern is represented by the multiple discriminations of women. They are included among the vulnerable groups from the social viewpoint, fact which implies also vulnerability from the economic viewpoint, implicitly a higher risk of poverty.

The laws promoting equality of chances between women and men covers a wide range of fields (Tomescu & Cace, 2010), especially equal treatment in occupation and maintaining employment, equal treatment at the workplace, the protection of pregnant women and breast-feeding mothers, as well as the right to maternal or paternity leaves.

The field comprising the most complex stipulations regarding combating, preventing and sanctioning the discrimination situations, especially based on gender criteria, is the one of employment. This fact is due to the way in which the international legislation laid emphasis on the regulation of labour relationships by various normative documents of the International Labour Office, an agency of the United Nations.

In the context of building-up the European Community, negotiations were held for some Community regulations regarding the economic relationships and the Community employment, and the labour market field was the triggering factor imposing mentions related to the prevention, sanctioning and combating of the discrimination and mobbing situations. The discriminating practices encountered in the field of labour were the first to benefit of special attention from the European Court of Justice, the European Commission and the European Council.

With the purpose of attaining the objectives regarding equal participation to and non-discriminating treatment in the economic life, it is necessary to promote a non-discriminating attitude about the role of women in all spheres of life, such as: education, career, labour force employment. Increasing the productivity degree of labour and improving occupation must be correlated so as to result a compatibility with their private life, respectively with the social model and the living standard of the

European lifestyle. A defining element for ensuring progress in achieving the objective of equality of chances is represented by the promotion of good practices in the field at European level.

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STRUCTURAL SILENCE, EXCLUSION, AND ACCESS TO JUSTICE: A CASE STUDY OF AN INDIGENOUS GIRL IN NORTHERN KENYA

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Abstract: *Even though child marriage is a human rights abuse, the practice persists in many developing countries. About 39,000 young girls are married each day amounting to 15.1 million a year. In the past, half of these cases have occurred in Asia, while a fifth in Africa. While this remains a major challenge, there are limited studies focusing on the attempts by the victims to free themselves. Therefore, this study sought to examine socio-cultural and institutional factors that hinder marginalized persons to access justice. This is a qualitative case study of an indigenous girl who disappeared while seeking to free herself from forced marriage. The study shows that: conflict between customary values and mainstream justice values; negligence on the side of the local provincial administration; lack of concern from society; and interrelationships between poverty and family as well as culture and wealth constitute part factors that hinder access to justice. The study suggests that to be able to address the problem of access to justice effectively; there is need to reduce inequalities by empowering local communities with alternative to justice mechanisms which take into account the transformation of indigenous knowledge in order to make it competent enough to advance the development needs of the marginalized people in a globalized.*

Keywords: *structural silence; exclusion; access to justice; Kenya*

Introduction

Even though child marriage is a human rights abuse, the practice persists in many developing countries. By 2010, about 67 million women aged between 20-14 years had been married while young. About 39,000 underage girls are married each day amounting to 15.1 million a year, a trend estimated to continue till 2030. About 50

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million girls are at risk of being married before age 15 this decade. The trend indicates that if nothing changes, approximately 142 million young girls will be married in developing countries by 2020. In the next decade, 151 million more young girls will be married if the conditions remain the same. Lack of access to education, living in rural areas, and poverty largely contribute to child marriages (United Nations Population Fund, 2012).

While Kenya is not among the most prevalent countries in the world (United Nations Population Fund, 2012); cases of child marriages are still a major challenge in the country. About 26.4% of girls in Kenya are married before 18 years (UNICE, 2012). Most of these child marriages occur among indigenous communities which are largely marginalized. Indigenous communities in Kenya have their own geopolitical context, socio-political and historical realities that influence the way they are marginalized. The Samburu people of Northern Kenya for instance live in a region which was largely excluded from development since colonial times. Northern Kenya unlike other parts of the country is a rural remote semi-desert with limited infrastructure and complex geographical terrain.

During the colonial period, communities in Northern Kenya resisted colonialism by armed resistance. In response the colonial Outlying Ordinance Act of 1902 restricted movement into and out of Northern Kenya, expect by special pass. Special District Ordinance Act of 1934 gave colonial provincial administrators power to adjudicate over criminal and civil affairs in the region, including arrest, detention, restrain, and seizing of property. Over time, provincial administrators became more powerful and took central roles in settling civil and criminal disputes in the region, including ordering collective punishment. This led to the institutionalization of discrimination of the people of Northern Kenya. After independence, the Indemnity Act of 1970 passed under Kenya's emergency laws provided public officers in Northern Kenya immunity from prosecution if they committed any act, deemed in good faith, or in public interest (Republic of Kenya, 2010). Lack of accountability measures in regard to the application of this Act led to lack of accountability and transparency regarding the way public officers in Northern Kenya were doing their work.

The marginalization of indigenous communities was not only rooted in the Acts of Parliament or bureaucratic culture, but also in the absence of constitutional measures to protect the indigenous communities. Since indigenous communities are minority groups, they had little political influence on public policy. As a result, not much was done through legislation to address the problems of indigenous communities until the 2010 new constitution came into effect. The table below based on Abraham (2012) shows that Kenya's constitutions remained largely silent or was largely skewed against provisions for minority groups. This indicates a major historical setback for the minority groups seeking to compete for public policy benefits in modern Kenya. The table also indicates lack of intent or political will to effectively focus on the challenges affecting the minority groups.

Table 1: Indigenous Communities issues in Kenyan Constitutions

Rights Issues	Independence Constitution, 1963	Constitutional Changes 1967-2009	New Constitution (2010)
Land rights	Silent	Only property rights (section 75,114-117)	Community land tenure (Article 63)
Political participation	Regional assemblies & quota system	Reserved seats for special groups & regional assemblies abolished	Minority Representation in the Senate, National & County Assemblies
Revenue allocation	By executive but no specifics	By Parliament approval but no specifics	0.5%for marginalized areas & additional 15%country governments
Affirmative action	silent	silent	For minorities (Article 56)
Gender issues	silent	silent	Section 27 (8), gender representation secured. But no provision for women from minority groups

Source: Abraham (2012).

The new constitution of Kenya (Republic of Kenya, 2010) recognizes the rights of women, particularly gender equity including social justice, parity and fair representation. The constitution seeks to realize essential values of human rights, equality, freedom, democracy, social justice and the rule of law. According to Article 2 (4) any law, including customary law that is inconsistent with this Constitution is void, while according to clause (6) any international treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution. Article (10 (2b) provides for national values such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; while (2c) provides for principles of good governance such as integrity, transparency and accountability. The Bill of rights applies to all laws and binds all state organs. Article 21(3) provides for all public officers a duty to address the needs of vulnerable groups in society including women, minority groups, older members of society, and persons with disabilities, children, youth, and members of particular ethnic, religious, and cultural communities. Furthermore, Article 47(1) provides for the right of the individual to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In response to these provisions, the constitution requires the Judiciary to ensure that all people have equal access to justice. These reforms are partly is redistributive. This means that they are aimed at providing justice to marginalized communities that did not have access to justice before.

In the midst of this transition from the old constitutional order to a new constitutional dispensation; Samburu people continued to rely on their traditional dispute resolution mechanisms. This community has a well-functioning customary justice system, which they rely on in times of dispute. The Samburu community is ruled by council of elders. Decisions are made at village level. If the situation is more critical decisions are made at clan or tribe level (equal to a district in modern terms). Customary law demands that elders be consulted for any undertaking in the community (Lanyasunya, 2009).

Authority over the community to mediate in disputes is vested in the councils of elders who also regulate the way of life in the community and run customary courts, as an intervention into issues affecting the members of the society. Members of the community have been socialized to legitimate the customary courts by obeying the traditional laws, and by promoting such obedience through social expectation. As a result, adherence to customary rule of law prevails across social-economic disputes whether civil or criminal (Karimi, 2004). However, the continued exposure of the community to modern lifestyle indicates a gradual shift from the customary system, or a mixture of customary and mainstream legal elements (Cheserek, et. al., 2012). This indicates an opportunity to examine potential convergence between customary justice system and the mainstream justice system, particularly how marginalized people will interact within the two systems in their search for justice.

According to Karimi (2004) a man is allowed to marry many wives. Girls are married of soon after circumcision. This usually occurs at the age of 12 years. When there is a dispute, participants in the dispute resolution are: one's family; extended family; the neighborhood; peers; and the council of elders. When settling disputes, elders function as the court. They hear cases, interpret evidence, impose judgment, and manage the process of reconciliation, punishment or restitution. Court sessions follow open deliberation procedures, where both parties in disputes are heard, witnesses and evidence examined, past cases reviewed; crime site visits conducted, private consultations made, and public opinion sought. Sometimes decisions are made on the spot, while in other cases further consultations are made. Resolutions made in these sessions are largely enforced by social pressure.

Kenya's 2010 constitutional reforms brought into the lives of Kenyans especially indigenous communities values such as human rights which did not exist in these communities before. These values were crafted from the universal human right values and are intended to transform indigenous communities through mainstream justice systems. Some of these values for example the right of an individual to most fundamental decisions about life such as marriage, education, health, and freedom have far reaching implications since they determine the difference in development at personal, local, national, and international level. For indigenous communities in Kenya; these values come at a time when: (1) International norms and values are internalized in the international development strategies and discourse as part of a wholistic or sustainable international development agenda; (2) As a result of globalization choice of particular set of values could increase or reduce inequalities given that values are linked to opportunities and resources for development at all levels; (3) To be competent in a globalized arena; strategies for success involve transformation of value and knowledge

systems in ways that gives the individual competitive advantage to compete effectively with others in different contexts.

The purpose of this study is not to challenge the universal or customary values; but to explore the experiences of individuals seeking justice in this context with conflicting value systems; and to highlight areas that require change in order to empower the individual for development. This is a qualitative case study of an indigenous girl among the Samburu of Kenya who was seeking freedom from early marriage; a practice which is socio-culturally acceptable in this society. The girl did not succeed. Later on she disappeared. The Study seeks to answer the following questions: (1) What are the contextual factors limiting marginalized persons to access justice? (2) What larger ramifications (if any) emerge from this study?

The Incident and the Response

The incident occurred in June 2013. Lona (not her real name), the victim, was in her first year in high school when she returned home for mid-term break and found her parents making the final arrangements for her arranged customary marriage. She had learned that her parents were preparing to circumcise her then marry her off to a wealthy man in the village. The man had already paid some of the dowry, an unknown amount some of which her father was using to prepare for her circumcision ceremony. In response, she ran away from home to seek assistance at a nearby missionary station. The station had previously provided her with high school tuition scholarship. It also provided occasional temporary shelter for children or women at risk of domestic/communal violence. Before joining high school, Lona was among the bright girls in her district. She had often times told the missionaries that she wanted to become a doctor so that she could help her community achieve better health outcomes.

The first people to respond to Lona's case were two missionaries. One was Cara (not her real name), a white woman while the other was Isaac (not his real name) an African man from the local community. After hearing Lona's case; Carra wanted to call the children's department, human rights commission or the police but Isaac who was the head of the mission, and who came from the community refused the idea. Isaac argued that because of the larger relationship between the mission and the community; the suitable government authority to inform was the chief. The chief is a local provincial administrator, a civil servant appointed by government but also a member of the local community. Isaac argued that the chief would hear the case, talk to the parents, and determine whether to take the case to the police, inform the children's department, or the human rights commission. He observed that chiefs settled community disputes and mediated between government and the people. Therefore he was confident that the chief would fairly address the matter.

Isaac also thought that if they called the police, the police would arrest Lona's parents and beat them, the community would see that and distrust the mission, and Lona's parents would curse Lona. If they called the chief, the chief would settle the matter through dialogue and would warn the parents not to do so again. A day later, they reported the case to the chief who came to the mission and heard the case. He then asked them to report to his office the following day for a preliminary hearing.

On this day, a council of elders sat to hear the case. The chief first met separately with few elders, before he asked all people to gather under the tree, where the hearing was usually held. The hearing began with a traditional prayer to *Nkai* the god of the Samburu people. The men sat in the inner circle while Carra, Lona, Lona's mother and other women sat in the outer circle, according to the tradition. Isaac presented Lona's case before the elders, while Lona's father spoke for himself. He told the council that he was fulfilling his traditional and moral obligation to arrange a marriage for his daughter. He said it was a blessing that had been misunderstood.

While Isaac was still speaking, he was cut short by one elder who asked whether Isaac, one who had abandoned the traditions and joined Christianity had come back to them, with a case that he expected them to rule against their own traditions and beliefs. Elders were furious; some argued that the presence of Carra, a white woman was an insult to the reverence of their traditional council. The chief abruptly ended the meeting and called Lona and her parents in his office. After a short while, Lona's parents left with Lona. The chief remained in the office and did not come out to address the people. An administration police officer on duty did not allow Isaac or Carra to enter the office. Instead, he told them to go home because the case was over.

When Carra asked about the chief's judgment, the officer told him that he did not know Samburu traditions because he was not a Samburu, and that the best thing Carra would have done was to ask Isaac who knew well these traditions. When Carra insisted, the police officer told her, "Don't just blame the hyena for eating the goat. Blame the goat as well for wandering in the wilderness." Isaac later said this statement meant that Lona's parents were to blame for accepting dowry just as the wealthy rural man was to be blamed for bringing to an end a girl's education.

Elders continued to speak to each other under the tree as they looked at Carra and Isaac who stood that the door of the chief's office. The police officer soon got frustrated and furious asked them to leave. Isaac walked away to his truck, started the engine, and asked all people who had come from the mission to get in and go. "It's over, you can't do anything. You can't fight here" Isaac told Carra as they drove off. Later on they learned that Lona had disappeared.

Methodology

The study began four days after the incident and continued for six months. It took into account the following ethical considerations: informed consent; privacy; confidentiality and anonymity. The costs and benefits of the participants were discussed and mutually settled before the research begun (Boeije, 2010). Participants in the study were two missionaries who had tried to help Lona and thirteen members of the community who took part in the community council that handled Lona's case. Between three and fifteen participants are adequate for the study of an event narrative (Creswell, 2013, p.78-79). Give that this was a qualitative case study, secondary literature for example government records and research reports were included. The scope of the case was limited to the occurrence of the incident and how different actors responded to the case.

Participants were informed that this was not an investigation; but an academic inquiry that was meant to understand what happened and its implications to access to justice. The description of the incident and its interpretation was verified by providing the final draft to the participants who gave their feedback. In this case, participants were asked: to remark on the description and interpretation of the incident; whether the themes and interpretation was consistent with what they witnessed; and whether there were other issues left out which they wanted included in the account. To access participants, culture brokers were used. Culture brokers are selected based on their knowledge of the subject (Chilisa, 2012, p.169-170). The role of culture brokers is to recruit potential participants, link the researcher and the participants, and help interpret or clarify issues related to, or values of the participant's culture. They also help reduce misunderstandings (Liamputtong, 2010, p. 61-73).

Problem centered Key Informant Interviews technique was used to collect data from the participants. The method has been used mainly by German psychologists to study people or groups of people. Problem Centered Key Informant interviews are used by researchers to pursue a deeper understanding of a particular problem or issue. The interview is designed in a way that the informant is able to answer questions directly or by telling stories (Witzel, 2000 in Flick, 2006, p.161-162). Story telling approach was good for the study because the story was told in form of oral event narratives. Oral narratives take into account personal reflections of the individuals as story tellers (Creswell, 2013, p.70-73). When conducting research using storytelling, the main focus of the story is what happened and how the participants felt. Story telling sessions took between 1 to 1 ½ hours.

In storytelling, the researcher treats the story as a window through which the experience of the individual can be captured. The most important thing is the experience gotten from the story and not the story itself (Bernard & Ryan, 2010, p. 247-263). Therefore, the experience of the story teller is the main focus (Sarantakos, 2005, p. 279-281). This tool guides the researchers' understanding of the social process and can help explain events (Bachman & Schutt, 2012, p. 234-238). Story telling as case provides wisdom, insights, and engages the intellect and emotions in a way that people naturally learn by identifying with the situation (Simons, 2009, p.150). This largely occurs where the narrator has gone through particular struggles and has gained some insights or experiences to share (Gibbs, 2007, p.68).

Data comes from what people say, the thoughts and feelings expressed in what they say. Some data occurs naturally hence the researcher does not need to invoke such for example incidents and the way people react to it overtime (Loseke, 2013). To construct such data into a narrative, the researcher collects stories about the same phenomenon from different individuals, and then reorganizes the stories by focusing on: (1) the experience captured from the story (Bernard & Ryan, 2010, p. 247-263); (2) retelling the stories in a way that captures personal reflections; events and their causes (Creswell, 2013, p. 70-73); and (3) engaging the mind and the emotions of the reader (Simons 2009, p. 150).

Data analysis was based on hermeneutics as a qualitative approach to inquiry. Hermeneutics is also called interpretive analysis. It is based on the idea that the

meaning of a text can be obtained by interpreting the text through the lens of the historical and contextual conditions (Fernandez 1967 in Bernard & Ryan, 2010, p. 257-258). Interpretation involves linking experiences of the events in the text to the wider context in order to read out the meaning of the text, particularly in a different way than the phenomenon under study is usually understood. In this case, the text is Lona's story as narrated by participants. Therefore, interpretation focused on exposing factors that hinder marginalized persons to access justice; as opposed to the prevailing assumption that changing the constitution alone would be a panacea for providing access to justice for marginalized persons, through mainstream justice system. By describing and interpreting Lona's experience, this study adds the voice of the victim to the discussion about access to justice for marginalized persons.

Factors hindering Marginalized Persons to access Justice

The following issues were identified as factors affecting marginalized persons to access justice: conflict between customary values and mainstream justice values; negligence on the side of the local provincial administration; lack of concern from society; and interrelationships between poverty and family as well as culture and wealth constitute part factors that hinder access to justice.

Interrelationships between poverty, family, culture and wealth

Lona learned about the plan to marry her off as soon as she returned home for mid-term break. Her parents happily informed her of the decision to marry her off and asked her to immediately join the preparations. The man to marry her had financed the ceremony. Her parents were poor. They could not finance her high school education. As a result, she had been given a grant by the mission to pursue high school education. Lona represented the hope of those who are lifted from poverty to realize their dreams.

When she was informed of the marriage arrangements, she reluctantly accepted, but after a few hours of deliberation, she sneaked out and fled to the mission. In this remote region, Lona saw the mission as the safe place to run to. For years, this mission has helped hundreds of girls to secure their lives from early marriages, through cultural transformation programs. Usually, this programs use dialogue and education to encourage wiling indigenous families to educate girls. Like Lona, some girls are sponsored for secondary education.

Marrying at this age was a moral obligation for the family. It was a fortune too and through the eyes of the tradition; it represented successful parenting. Lona's parents would be honored on the wedding day. It was a great honor which would give them higher status in society. They had not acquired much wealth in their lifetime. "Successful parenting" meant a lot for them. It was going to be a kind of self-actualization. The bridegroom was an elderly wealthy man in the village. He had acquired wealth and had attained traditional reputation. He was influential, person members of the community would have wanted not to disappoint. He was known to the chief, the mission, and the members of the customary court. Lona was his choice; a young girl for old age. She mirrored a life renewed. However for Lona, this was death

to her future, the dream to complete high school, go to college, and become a doctor. This kind of future did not matter for those who had power to make decisions over Lona's life.

Conflict between customary values and mainstream justice values

While some of these traditional mechanisms help resolve civil cases; they lack values for the rights of the individual, particularly when they are used to handle cases in ways that are contrary to the constitution and other Kenyan laws. This was one of such cases where the values of the decision makers in Lona's case contradicted the values of law which required that in such events Lona should be protected and supported in order to complete her education. By asserting the right of the individual, Kenya's constitution assumes that the individual should be protected when his or her rights are at risk. It assumes that those who make judgments about rights whether experts or lay will have understanding enough to respect the rights of the individual. However, customary values do not clearly differentiate between the individual and the community. The individual is not independent of the community. The individual and the community are interwoven. In some cases such as this, the will of the tradition prevails over the will of the individual. These conflicting realities played in the case of Lona. Lona wanted her individual rights to prevail, while the customary courts and her parents wanted customary law to prevail. They interrupted Lona's plea and won the case by socio-cultural pressure.

Negligence on the side of the local provincial administration

"It is a case of a chief, a local provincial administrator who upon receipt of the sad news chose to take the case back to traditional elders, instead of taking it to the court and reporting it to the children's department or Human rights commission." Said a participant. This is a typical case of bureaucratic adjudication in local disputes. The chief chose to ignore the criminal elements of the case which meant that the parents in their action contravened the right of an individual, a child to pursue education. While child marriages are in fact illegal in Kenya; it remained unclear whether the chief in his intervention applied any orders protect the victim. There were no reports indicating how such orders if any, would have been enforced and monitored effectively and with transparency and public accountability, especially given the fact that they could have represented anti-customary values. Inquiries into the case after the incident did not bring to light what happened to the victim; since participants did not have access to such information. What was certain was that the girl, a complainant against her parents was returned into full custody of those who had attempted to commit injustices against her without measures to ensure that such an act would not happen again. A participant observed that the chief warned the parents that cases of this kind were becoming risky for everyone, since the government was getting interested. Afterwards the victim did not return to school and she went missing in the community.

This is an incident in which the girl disappeared and could not continue with studies, because her efforts to seek justice were thwarted under the watch of a provincial administrator, who chose to ignore public policy, and failed to observe justice and fairness, because he wanted to be loyal and bound to the tradition. The chief was a

member of the local community who derived his legitimacy from the community by demonstrating respect or tolerance to the traditions, even though some of the traditions contravene the law. The case points to the scenario that in the event community values in which the civil servant was socialized conflict with the legal values which the civil servant is required to uphold; there is a possibility the civil servant may choose to uphold the customary traditions even though government has given such an officer authority and resources to act otherwise.

The experience of the victims shows that how justice works depends on factors outside the control of the marginalized persons. Interviews with the participants indicated: the absence of infrastructure; lack of information and knowledge of rights; lack of judicial support mechanisms; difficulties in accessing the courts; unresolved entrenched inequalities; discrimination; prejudice; conflicting cultures in the pursuit of justice; inability to enforce the law; lack of legal aid; impunity; and failure to provide basic amenities prevails. In response, marginalized people tended to resort to traditional alternative mechanisms of dispute resolution.

Conflict of Interest

When social institutions such as families fail to protect the individual; belief in customary or mainstream justice would assume that the victim would get relief from the community institutions, government, or other agencies such as civil society and religious institutions. However, this was not the case for this victim since all institutions she accessed did not help her. The mission that often intervened in community disputes as part of its spirituality and work traded the well-being of the victim with its interest to pursue 'a soft' approach to the ills in the community; even if such ills would cost a child's education and future. While there was no unanimous consensus over this decision, the preference of the head of the mission prevailed even though there were doubts that such a decision would secure the victims rescue. The head of the mission when taking the case to the council of elders and the chief hoped that customary council which had ordained child marriages from ancient times would contradict itself in this particular case. That was most unlike to hope for but it would boost the image of the mission in the community and would avoid community distrust in the work of the mission. The victim was definitely not a priority factor in the decision that finally handed her to those who had intended to end her education-those she was running away from all along. The community council upheld its tradition against the victim's new found values and against the norms of mainstream justice. The chief who had powers to rescue the victim and secure her education chose a tolerant path to return the victim to the offenders blended with a warning. Community support for the offender was overwhelming. The victim's voice was not heard. The victim in this case lost her case and dream in life as the mission watched helplessly, because the head of the mission compromised the girl's future fearing that if he defended the girl, the church would become unpopular and hence would get few coverts among the community.

Lack of concern from society

Carra's efforts to call the police and the children's department went futile since they did not respond to her request to intervene. The victim's story sunk into silence day after day. Members of the community did not follow up on the case to find out what happened afterwards. Soon Cara gave up because the mission did not have the capacity and mechanisms to pursue the case. "It's over, you can't do anything. You can't fight here" Isaac had told Cara. Even in the presence of government authority, the police and the provincial administration; the law of culture prevailed. At the age of 15 years, in first year of high school, the victim's education sadly came to an end. Lona did not access justice because justice here was difficult to find under these circumstances. Her story reflects what other girls of her kind go through if and when they choose to pursue their rights against the will of the community; and when government and other institutions which ought to help are reluctant to do so.

Concluding Thoughts and Implications for Practice

This study presents only a slice of the factors that hinder marginalized persons to access justice in Kenya. However, this study means that it is difficult to access justice in Kenya because:

1. There are visible and invisible socio-cultural and institutional barriers which stand between the individual and the justice system.
2. The value for politics and the bureaucratic interests is higher than the value for the constitution even though the constitution is the highest law of the land.

The effects of historical marginalization particularly socio-political and economic exclusion strongly influence the approach to justice among indigenous communities for instance in this case. One of the ways marginalized people have attempted to address such challenges is to blend aspects of traditional dispute resolution with aspects of civil and criminal procedures stipulated in the law. While this may work at times, there are cases where such an approach becomes an impediment to justice. This may occur, when the decision makers have a strong interest in, or preference for the traditional approach to dispute resolution, either in its entirety or part of it. When this happens the one who seeks intervention from the justice system risks losing the case, because the goals and values of the traditional dispute resolution mechanisms do not always resonate with the goals and values of the mainstream justice system.

When the new constitution was promulgated in Kenya in 2010, the aspirations of the marginalized persons were raised. It has since then attracted public expectation that courts shall protect marginalized people, women, children and individuals who cannot defend themselves, because they are vulnerable to exploitative forces in society. However, it is not only the courts, but the entire justice system, which includes the provincial administration and internal security agencies. The Bill of Rights binds all organs of the state and provides for individual citizens and various non-governmental organizations like civil society to intervene in the affairs of the individual and provide assistance in order to promote rights-based-life.

However, as this case has shown, changing the constitution is not a panacea for marginalized persons to access justice. This case has shown that there are several invisible and visible barriers that stand in the way of marginalized people who try to seek justice from the mainstream justice system. This case raises awareness of the existing socio-cultural, economic, and bureaucratic barriers that stand between the courts and the individual. By doing so, one can hope to mobilize the reader around the narrative about the importance of breaking the identified socio-cultural and structural barriers, so that the courts can play a more effective role in enforcing rights and settling disputes in society as intended. One way of doing so is to seek a path to transform indigenous knowledge in order to make it competent enough to advance the development needs of the marginalized people in a globalized. By doing so, indigenous systems especially customary courts can provide alternative to mainstream justice by upholding universal norms that have mutual benefits to the community, the individual, and the global society. This will help implement the Bill of Rights among indigenous societies where implementation fails due to socio-cultural barriers emerging from value difference and historical exclusion and inequalities.

This study also shows the influence of the contextual conditions on policy compliance. Based on the Kenyan experience, the story shows a case where the context largely had a negative than a positive influence on policy compliance because of among other things historical exclusion. These findings are similar to other cases where constitutional measures were used to address access to justice as a redistributive policy to address historical inequalities and injustices. In South Africa for instance, socio-economic conditions like poverty, cultural diversity, and the legal systems may make it difficult for marginalized persons to attain justice (Cornwall and Molyneux, 2006, p. 1175-1191). This story is an invitation to think of rights as democratic values beyond mere majority rule, and to look beyond populist democratic rhetoric (Jowell, 2007, p. 3). It is also an invitation to look at rights not as merely what has been written in the constitution, but what is actually practiced in public life.

In most cases, the justice system is made up of the police, who investigate cases, make arrests, and initiate civil or criminal procedures; the courts where the cases are heard and determined; and the department of corrections. But in the British post-colonial states like Kenya, another institution, the provincial administration is part of the justice system. Provincial Administration is an institution that was created in the Office of the President to among other things assist in intelligence gathering and coordinate internal security operations. Because of these roles and direct accountability to the Office of the President; this institution has for decades grown powerful to the extent that it provides bureaucratic adjudication in matters of security and justice. The institution is also criticized as repressive, unaccountable, and corrupt (Bagaka, 2010). In most parts of Kenya, provincial administrators adjudicate civil matters such as marriage, land, and even petty crimes. In this story, the local provincial administrator's adjudication is part of the reason Lona did not get justice. Therefore, this story is one of the silent critiques to negative colonial legacies that have been enhanced in post-colonial Kenya.

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