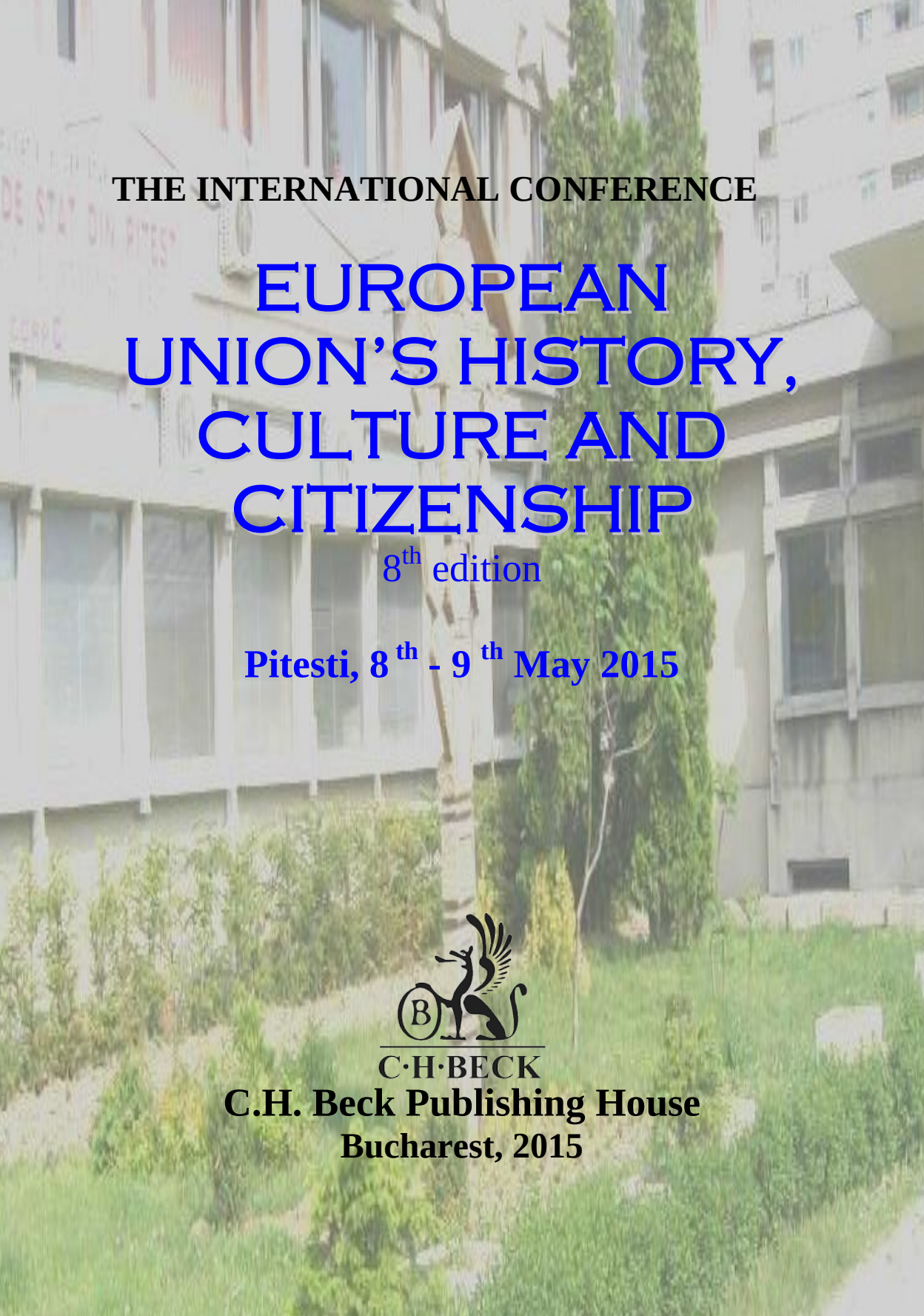

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THE STATE ORDER AND THE LAW OF THE INTEGRATING EUROPE

Herbert SCHAMBECK[1]

Abstract:

European diversity is justified on a manifold basis, namely in geographical factors, cultural life, social systems, economic systems and political factors that are constitutionalised and legalised by the law.

The legal unity of Europe was, for a long time, based on Roman and Canon law. They both formed the so-called common law, the ius commune. It was applied in all countries of Central and Eastern Europe. There was a single European jurisprudence, in which the language was Latin, that originated from all disciplines.

As for the constitutions of European states, they have come into effect at different times due to different traditions. Reference to the systems and the development of these constitutional systems of European states is not only important for the systems themselves and their people, but also for the EU.

Integrated Europe has chosen a path to reach a new form of cooperation by using the Community law instead of the earlier start of working next to, and unfortunately often against, each other. EU law encompasses characteristics of a constitution in the formal and material sense, but the EU does not construe a state but rather a federation of states sui generis. in various formats concerning governments and state organisations.

Key-words: *European legal history, common law, constitutionality, European integration, sui generis character of EU law*

Europe is expressed from a multiplicity in which the source of power is derived from one another, peace endowed and security granted. This diversity is justified on a manifold basis, namely in geographical factors, cultural life, social systems, economic systems and political factors that are constitutionalised and legalised by the law. This development also led to the integration of Europe.

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I.

When we speak of an integrated Europe today, it is because, after the painful experiences of two world wars in this century, the desire for cooperation arose between the almost-constant previous opponents and current friends Germany and France, and later the Benelux countries and Italy, so that from this Europe exemplary of economic considerations emanated a community of peace, in contemporary EU also regarding economics, currency, legality and a community of values encompassing 28 states. This has allowed an unprecedented period of lasting peace for this continent and even the occurrence of the reunification of Germany under the roof of an integrated Europe. The means for this integration was the law.

Walter Hallstein, the former President of the European Economic Community, has explained:"The Community is founded on the law, it is a creation of the law. Its founding act is a treaty, conferring standing as public international law. As such, it is not the product of a power struggle, with a winner and one defeated remaining. Rather it is founded on the free concurrence of wills. The law of continuously newly-confirmed consensus is inherent in the act of creation".[2]

The dynamic, which was already present at the onset[3] of European integration years ago, has continued to the present day.

The law has been the means for integrating Europe. Its importance reaches far beyond today's form and structure of EU law. This should not be forgotten!

When we are discussing law, and in particular positive law, we are referring to the law of each country and define that as Community law, which is formed within the framework of the EU through the cooperation of these states.It should not be overlooked that for a long time in Europe used to be a uniform law, including a certain level of European legal culture. Based on old traditions, that era spans from the late Middle Ages until the 18th century.

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[2] Walter Hallstein, *Die echten Probleme der europäischen Integration* (Kieler Vorträge, Neue Folge 37, Kiel: 1965), 6; see further: Peter Fischer/Heribert Franz Köck. *Europarecht, 3. ed.* (Vienna: 1997).

[3] See: Heinrich Neisser, Bea Verschraegen, *Die Europaische Union, Anspruch und Wirklichkeit* (Vienna-New York: 2001), 7 et seq., and Peter Fischer, Heribert Franz Kock, *Mareit Karollus. Europarecht, 4. ed.* (Vienna: 2007), 26 et seq.

The legal unity of Europe was, for a long time, based on Roman and Canon law. They both formed the so-called common law, the ius commune. It was applied in all countries of Central and Eastern Europe, with the exception of England, but probably also in Scotland. It was also taught at the universities of these countries. The Frankfurt law professor Prof. Dr. Helmut Coing stated it aptly in his lecture about European communities in the past, present and future titled "From Bologna to Brussels"[4] and states: "There was a single European jurisprudence, in which the language was Latin, that originated from all disciplines. Every German lawyer in the 16th and 17th century could quote Italian, French and Spanish authors".[5]

The Enlightenment and the Nation States also resulted in an increase and deepening of the state legislature; this, therefore, became a higher priority for jurisprudence. The State acted as a system of governance.

II.

The word "state" finds its root in the Indo-European word "sta" which resulted in the formation of various words, such as "standing" and "standpoint".[6]The Latin word "status" which is based on the verb "stare" means the type, location and action of standing.But that was not what was in the classical era referred to as "state".The Greeks used the word "polis" for that purpose and identified the state with the city.[7]In addition, for the Romans the state was the community of the citizens with full civil rights, the Civitas, a Community of People, the Res Publica or Popolus Romanus. The word "status" was therefore not used for that purpose, but for a status which also requires the genitive.In this sense, it also links in the Middle Ages to "Status Rei Publicae", "Status Imperil" and "Status Regnis", whereby the word "status" becomes the basic word for politics and law.

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[4] Helmut Coing, *Von Bologna bis Brüssel, Europäische Gemeinsamkeiten in Vergangenheit, Gegenwart und Zukunft, Kölner Jüuristiche Gesellschaft,* Band 9, Bergisch Gladbach-Köln: 1989).

[5] Coing, *Von Bologna bis Brüssel,* 8.

[6] Julius Pokorny, *Indogermanische Etymologisches Wörterbuch* (Bern: 1959), column 1004 et seq.

[7] Georg Jellinek, *Allgemeine Staatslehre, 3.ed.,* 6. reprint, (Darmstadt: 1959), 129 et seq.

A continuous and uniform development of the concept and word "state" is not clear, which is understandable since the emphasis of the Greek, Roman and Germanic notion of "state" varied in each case.For the Greeks, "state" encompassed the entities formed by citizens with full civic rights. However, for the Romans,[8]"state" clearly had the element of state power that characterised the empire, while the concept of a country in the Germanic frame of mind had a meaning similar to that of a modern idea of "state".[9] The word "state", therefore, encompasses in its conceptual framework various political factors combined in one system - factors undergoing change in their meaning.

The changing meaning of the concept of the word "state" took place varying from "state" as the monarch being the source of all power to the "state" being the principality as a "welfare state". It was found that, with the rise of the modern rational law doctrine, "state"has been based on the authority upon which society is based, which was initially represented by inception and professional standing, and later followed by the democratisation of the political parties and interest groups[10].

The democratisation of states commenced in the 18th century with its "constitutionalisation", which allowed for the birth of the democratic constitutional state.This was perceived in the 19th century as a form of government that was initially constitutionally monarchic and, in the course of time, a democratic republic.

Characteristically, this democratic constitutional law[11] encompassed a national state or a state consisting of various federal states, a form of government consisting of a monarchy or a republic, the democratic right to vote, the hierarchy of the overall legal and individual specific legal standards such as constitutional law, general laws, court decisions, administrative decisions, execution of law, exercising state

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[8] *Das Staatsdenken der Römer*, ed. by Richard Klein (Darmstadt: 1966).

[9] Karl von Amira, *Grundriss des germanisches Rechts*, 3. ed., (Straßburg: 1913); Otto Brunner, *Land und Herrschaft, Grundfragen der territorialenVerfassungsgeschichte Südostdeutschlands im Mittelalter*, 4. ed. (Vienna-Wiesbaden: 1959).

[10] Herbert Schambeck, *Politik in Theorie und Praxis, ed. by Helmut Widder* (Vienna-Graz: 2004) 325 et seq.

[11] See: Carl J. Friedrich, *Der Verfassungsstaadt der Neuzeit* (Berlin-Göttingen-Heidelberg: 1953); Herbert Schambeck, *Der Staat und seine Ordnung, ausgewählte Beiträge zur Staatslehre und zum Staatsrecht*, ed. by Johannes Hengstschläger (Vienna: 2002).

power in the three main state powers: legislation, jurisdiction, and parliamentary scrutiny, as well as the constitutional and administrative courts, the court for auditor control and public liability, including that for fundamental rights.

The order of this democratic constitutional law can be based on a procedure for qualified lawmaking concerning rules of law based on the highest level of the constitution in the formal sense or on the constitution in the material sense, which means exercising powers of state within the scope of the fundamental rights of the individuals as well as those rights that specify the purposes and goals of the state.

Ideally, a state constitution in the material sense merges into a constitution in the formal sense, as was the case in the Basic Law (GG) 1949 of the Federal Republic of Germany; however, this was not the case in the Republic of Austria, where in addition to the Federal Constitution of 1920 (B-VG), a variety of constitutional law sources exist. In such a form of constitution in the formal and material sense, a constitutional awareness within the state can emerge, which under the Basic Law of Germany and the European consensus resulted in the preamble by way of introduction in 1949 "the German people" ... "as an equal partner in a united Europe to serve the peace of the world".

When a state is characterised by an identity of constitution in the formal and material sense, then the constitutional right for a state, its society and the individuals can simultaneously fulfil a function for integration, representation and correction. This enables the state to be initiator as well as enabler of culture, welfare, business initiatives and business leading.

III.

As for the constitutions of European states[12], they have come into effect at different times due to different traditions.[13]

[12]For this purpose, inter alia, *Verfassungen der EU-Mitgleidschaften*, text edition with an introduction and asubject index by Adolf Kimmel and Christiane Kimmel, 5 ed. (Munich: 2000).

[13] Near: Herbert Schambeck, "Verfassungrechtliche Tendenzen europäischer Demokratien", in: derselbe, *Zu Politik und Recht*; Ansprache, Reden, *Vorlesungen und Vorträge, hrsg. von den Präsidenten des Nationalrates und den Präsidenten des Bundesrates in Zusammenarbeit mit der Österreichischen Parlamentarischen Gesellschaft*, (Viennaien: 1999), 97 et seq.

The problematic situation, especially in the 19th century, is still dominant today in relation to various individual European constitutions that are based on older texts, such as the constitutions of Denmark from 1953[14], of Sweden from 1975[15], and of the Netherlands from 1983[16], including when those have been revised.

A separate category consists of those constitutions within Europe[17], which came about after authoritarian times, such as those from the time after the Second World War, the Constitution of the Fourth Republic of France in 1946[18], Italy in 1948[19] and Germany under the Bonn Basic Law in 1949[20] that, in 1989 after the political change including the fall of the Berlin Wall and the end of the German Democratic Republic, also applied to the new former Federal States in Middle and East Germany[21]. This Bonn Basic Law of the Federal Republic of Germany became in the 1970s an example for many states in dictatorial times, such as Greece in 1975[22], Portugal in 1976[23], and Spain in 1978[24].

In addition to those democratic constitutional states mentioned previously, Central and Eastern Europe adopted after the Second World War the concept of "socialist state" under pressure from the Soviets; therefore, the impact of Marxism gave birth to the concept of "People's Democracy".[25]

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[14]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 41 et seq.
[15]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 487 et seq.
[16]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 293 et seq.
[17]Note: Klaus Stern, "Weltweite Verfassungsentwicklungen und neue Verfassungen", *Comparative Law* Vol.18 (2001), Nihon University Tokyo: 99 et seq.
[18]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 141et seq.
[19]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 249 et seq.
[20]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 57 et seq.
[21]Near: Deutsche Wiedervereinigung. Die Rechtseinheit, Arbeitskreis Staats- und Verfassungsrecht, Band V, Zehn Jahre Deutsche Einheit, ed. by Klaus Stern, Köln-Bern-Bonn-München 2001.
[22]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 163et seq.
[23]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 402et seq.
[24]Carl J. Friedrich, Verfassungen der EU-Mitgleidstaaten, 519 et seq.
[25]See: Peter Häberle, "Dokumentation von Verfassungsentwürfen und Verfassungen ehemals sozialistischer Staaten in (Süd)Osteuropa und Asien", in: *Jahrbuch des öffentlichen Rechts der Gegenwart*, N.F./Band 43, Tübingen (1995): 184 et seq.; continued in: *Jahrbuch des öffentlichen Rechts der Gegenwart*, N.F./Band 44, Tübingen

With the political changes in 1989/1990, these people's democracies have changed (their mostly Marxist-authoritarian and totalitarian regimes) to the democratic political systems of the Western tradition, in most cases by safeguarding their constitutional continuity. [26]

IV.

The reference to the systems and the development of these constitutional systems of European states is not only important for the systems themselves and their people, but also for the EU.[27]

The Treaty on European Union of February 7, 1992 mentions in Art. 6 that the basic principles of the Union refer to "the common constitutional traditions of the Member States", which are considered to act "as general fundamental principle of Community law" itself.[28]

In this context, also the decisions of the European Council of June 1993 in Copenhagen[29] must be referred to, in which for the first time, more detailed measures were mentioned, especially the conditions for a state to become a member of the EU. It encompasses economic and political requirements; the economic requirements are based on a viable market economy and the ability to cope with competitive pressure and market forces within the EU, requiring political conditions that indicate"the candidate must have institutional stability as a guarantee for democracy and rule of law, for the protection of human rights and respect for and protection of minorities." In addition, the Community acquis (Acquis Communautaire) must be adopted.[30]

If one observes these principles and requirements of the EU, one must not compare those with a state. The EU is not a state and can never

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(1996): 326 et seq., as well as *Jahrbuch des öffentlichen Rechts der Gegenwart*, N.F./Band 45, Tübingen (1997): 178 et seq., and *Jahrbuch des öffentlichen Rechts der Gegenwart*, N.F./Band 46, Tübingen (1996): 124 et seq.

[26]Note: Herbert Schambeck, "Politik und Verfassungsordnung postkommunistischer Statten Mittel- und Osteuropas", in: *Zu Politik und Recht*, (Viennaien): 121 et seq.

[27] *Der Staatenverbund der Europäischen Union*, ed. by Peter Hommelhoff and Paul Kirchhof (Heidelberg 1994).

[28] See: *Europarecht- Textausgabe mit einer Einführung*, von Claus Dieter Classen, 18. ed., (Munich: 2003), 5.

[29] *Tagung der Staats- und Regierungschefs der Europäischen Gemeinschaft* on 21. and 22. June 1993; ABI. (1993, Nr. C 194) 216 et seq.

[30]In addition: Peter Fischer, Heribert Franz Köck, Margit Karollus, *Europarecht*, 4. ed., (Vienna: 2002), 52.

be one; it is rather, as the Federal Constitutional Court of Germany has formulated, a union of states.[31] The EU is a community sui generis, that exists due to the volition of its member countries and continues to evolve.[32] The states are, according to the German Federal Constitutional Court, "the Masters of the Treaty".[33]This term should not be misunderstood: it is not that each individual Member State as such is a "Master of the Treaty", but only those Member States when they are acting together in unison.This way, they can change or revoke EU law without being tied to treaty procedures, even those of the EU itself. In contrast, no Member State can argue that, as also being a "Master of the Treaty", it is allowed to unilaterally disregard EU law.

The law established the European Union, which in turn started developing its own legislation.Within the scope of this regulation, the European Union was bound by the so-called primary Community law, which was decided by the Member States during the founding and development of the EU.This law establishes the Community, authorises its bodies, determines their powers and prescribes the applicable procedures.[34]

When comparing the Community law of the EU with the constitutional law of a state, one notices that it differs mainly in two ways: the constitutional law of a state contains basic provisions with a “totality” claim for the entire community, the primary Community law however, consists of limited conferred powers that can however be executed.[35]

Constitutions[36] are nowadays perceived as the result of a democratic decision-making process conducted by a constitutional parliament and possibly a subsequent referendum.EU law came into being as a contract

[31] B VerfGE (Decisions of the Constitutional Court89, 155.

[32]Note: Europa als politische Idee und als rechtliche Form, ed. by Josef Isensee, Berlin 1993, therein esp.Paul Kirchhof, Europäische Einigung und der Verfassungsstaat der Bundesrepublik Deutschland, p. 63 et seq.

[33] B VerfGE 2 BvR 2134/92, 2 BvR 21 59/2 EuGRZ (1993), 429

[34] “Regarding the European Community as acommunity of law”, see Bea Verschraegen, in: *Heinrich Neisser*; Bea Verschraegen, *Die Europäische Union, Anspruch und Wirklichkeit*, (Vienna: 2001), 245 et seq.

[35] In addition: Dieter Grimm, *Braucht Europa eine Verfassung?* (Munich: 1995), 28 et seq.

[36]Note: Werner Kägi, *Die Verfassung als rechtliche Grundordnung des Staates und Verfassung, Beiträge zur Verfassungstheorie*, ed. by Manfred Freidrich (Darmstadt: 1978).

and refers back to government officials.[37]However, it was ratified by the Member States in accordance with their respective constitutional law, and the respective national parliaments have, therefore, given their consent.

The integrated Europe has chosen this path to reach a new form of cooperation by using the Community law instead of the earlier start of working next to, and unfortunately often against, each other.The Community law established a legal community[38]; it evolved from treaties resulting from cooperation of states. At the beginning in the 1950s there were six states; in 2013 with the joining of Croatia there are 28 Member States in the EU. They shape the European legal system.

This new order of an increasingly integrated Europe requires mutual understanding: on the one hand, between the countries of the EU and on the other hand, an attunement of EU law with those of the Member States. This is very clearly shown in the homogeneity clause in Article 23, Section 1 of the Basic Law for the Federal Republic of Germany from 1992: "In order to achieve a united Europe, the Federal Republic of Germany shall participate in the development of the European Union which is obligated to uphold the democratic, constitutional, social and federal basic principles as well as the principle of subsidiarity and to ensure substantially similar protection of fundamental rights in this Basic Law".

Similar to how individual EU Member States each developed its own democratic constitutional law, this was also the case for the law of the integrating Europe, which resulted in the Treaty of Lisbon[39] 2007.

V.

This Treaty of Lisbon[40] reformed the structure of the EU and the

[37] Near: Fischer/Köck/Karollus, *Europarecht*, 303 et seq.

[38]In addition, re. *The European Community as a community of law*, ed. by Wolfgang Blomeyer and Karl Albrecht Schachtschneider, (Berlin: 1995); Manfred Zuleeg, *Die Europäische Gemeinschaft als Rechtsgemeinschaft, Neue Juristiche Wochenschrift* (1994), 545 et seq.

[39] *Der Vertrag von Lissabon, EU-Vertrag, Vertrag über die Arbeitsweise der EU-konsolidierten Fassungen*, Rolf Schwartmann (Ed.), 4. ed. (Heidelberg: 2011).

[40] See: Herbert Schambeck, *Über die Entwicklung des sich integrierenden Europa zum EU-Verfassungsvertrag und zum Reformvertrag von Lissabon*, European Union's History, Culture and Citizenship, (Pitesti: University of Pitesti 2009) 22 et seq.; Rudolf Streinz, *Europarecht*, 9. ed. (Heidelberg: 2012), 22 et seq.

way in which it functions.It has invigorated the people-centred and democratic legitimacy and the social responsibility of the EU, and introduced a clear division of jurisdiction between the EU, its Member States as well as counties and regions. This Treaty has transferred the function of guardian of the subsidiarity principle to the national and regional parliaments and also has reformed the EU institutions.

The Treaty of Lisbon has also declared explicitly that the EU Charter of Fundamental Rights, which was signed in Strasbourg on December 12, 2007 and entered into force[41] on December 1, 2009, has the same standing as that of the treaties.This EU Charter of Fundamental Rights recognised civil, political, liberal, economic, social and legal rights according to the definition of human dignity and the right to life in Title I.It grants each European citizen the right to enforce these fundamental rights in the European Court of Justice and national courts.

Both the EU Treaty and the EU Charter of Fundamental Rights are provided with value statements or a preamble that in the EU Treaty relates to the cultural, religious and humane Europe, "From which the inviolable and inalienable human rights of freedom, democracy, equality and the rule of law were developed as universal values". In the preamble to the EU Charter of Fundamental Rights it is emphasised: "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union".

These preambles determine the way of the integrated Europe while preserving tradition and continuity together with historical consciousness, as well as present responsibilities and future expectations.

When comparing this law of an integrating Europe[42] with the policies of the states in the context of their democratic constitutional law, it establishes incorporating constitutions in a formal sense in qualified legal propositions in primary EU law (founding treaties, general legal proposition principles for safeguarding EU law - State liability) secondary EU law (regulations, policies, recommendations for decisions, opinions), Single European Act (intergovernmental cooperation of the

[41] ABI. EU 2007 C 303/1.
[42] See: Streinz, *Europarecht*, 152 et seq.

Member States, international agreements within the scope of the EU, mixed agreements), as well as EU fundamental rights on the one hand, and comparing with the Constitution in a material sense within government organisations, fundamental rights and public purposes on the other hand.

Although EU law encompasses characteristics of a constitution in the formal and material sense, the EU does not construe a state but rather a federation of states sui generis[43], which does not construe a uniformity based of state power, but a variety of peoples, territories, and publics[44], which is also expressed in various formats concerning governments and state organisations.

This diversity of the international organisation of EU Member States is based on homogeneity within the EU community, which according to the core of the Treaty thereunder, allows the EU to grant a Member State status[45], which in turn contributes to the legal culture in the new European order.[46]

[43] Note: Herbert Schambeck, "Möglichkeiten und Grenzen der Verfassung in staatlicher und europäischer Sicht", in: Herbert Schambeck, *Beiträge zum Verfassungs- und Europarecht*, (Vienna: 2014) 367 et seq.

[44]In addition: Herbert Schambeck, *Von der Bedeutung der Medien für Europa, in Herbert Schambeck, Der Staat un seine Ordnung, ausgewählte Beitrage zur Staatslehre und zum Staatsrecht*, ed. by Johannes Hengstschläger, (Vienna: 2002) 741 et seq.

[45] Art. 6 and Art. 7 EUV.

[46] Hereunto: Christian Stark, "Die europäischen Institutionen und die Nationalstaaten – eine Rechtskulur im Bau Europas", in: *Wege gelebter Verfassung in Recht und Politik, Festschrift für Rupert Scholz*, (Berlin: 2013); Hans-Jürgen Papier, "Verfassungsfragen der Europäischen Integration", in: *Rechtsstaalichkeit, Freiheit und soziale Rechte in der Europäischen Union*, (Berlin: 2014), 11et seq.

RECALLING THE MAKING OF EUROPA IN CONTEMPORARY PERSPECTIVES

Heribert Franz KOECK[1]

Abstract

The paper takes up the vision of European History as it was expounded by the British historian Christopher H. Dawson in his epochal book "The Making of Europe".

Dawson sees culture and religion intertwined and believes that Europe cannot be fully understood without its Christian tradition.

The paper examines the legitimate place of religion in the modern pluralistic society an d points out that the religious freedom of the individual in particular and human rights in general guarantee religion its role as a social factor that will not become obsolete as long as man will be interested – in a positive or a negative way – in the phenomenon of religion. And since religion has to do with the most basic questions of man's nature and existence, it is unlikely that society (or its history) will ever be divorced from religion.

Key-words: *European history, culture, religion, pluralistic society, human rights.*

1. A deeper vision of Europe

Just one hundred years ago, in 1915, Christopher Henry Dawson (1889-1970), who has been called "the greatest English-speaking Catholic historian of the twentieth century", published his first article, entitled "The Catholic Tradition and the Modern State".[2] In his most famous opus, *The Making of Europe: An Introduction to the History of European Unity*, which appeared in 1932,[3] he presented the forces and processes which formed Europe after the decline of the Western Roman Empire and forged from the Romania of the West an entity that was in

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[2] "The Catholic Tradition and the Modern State", in: *The Catholic Review* Jan-Mar (1991) 24 et seqs.

[3] *The Making of Europe: An Introduction to the History of European Unity* (London: Sheed and Ward, 1932); (New York: Sheed & Ward, 1952); (Meridian Books, 1956); (Catholic University of America Press, 2003).

theory, if not in practice, a universal Christian state under a spiritual head, the pope, and a temporal head, the emperor.

This focus on the Empire of the West which considered itself in the tradition of the Old Rome, was facilitated by the fact that the Byzantine Empire built on the traditions of Constantinople as the New Rome was on a steady decline and used up its strength in an eight-hundred year long struggle against the onslaughts of ever new waves of peoples rallied under the green flag of the Prophet Muhammad. When it finally collapsed in 1453, the occident had, in spite of its complicated history with its great rivalries, first between Emperor and Pope, then between the Emperor and the King of France, finally with its religious wars following Reformation and (what is defined in a term of negation) Counter-Reformation, mastered enough resolution, strength and capacity to be able to repel and fend off the repeated attempts of the Ottoman Empire to enter into the heart of Europe, although it occupied the Balkans for four hundred and Hungary for two hundred years.

2. Culture and religion

Dawson's 'greatest historical contribution was his writing of history around the idea of Christian culture, an innovation which in turn expressed his conviction that culture is embodied religion. At the heart of culture lies religion.'[4]

a. Culture v. civilisation

'Dawson consciously decided on "culture" as a better word than "civilization" to speak of his interests. "Civilization," as derived from *civitas*, had too urban and intellectual an association for him. If he was to talk globally about human communal life, a good deal of which had not centered on cities, the better word was "culture," for, coming from *cultus*, this could designate any habit of being or shared pattern of life, urban, rural, nomadic, agricultural, familial, or monastic.'[5]

[4] Glenn W. Olsen, "Why we need Christopher Dawson", in: *Communio. International Catholic Review* 35 (Spring, 2008): 115-145, at 115.
[5] Glenn W. Olsen, "Why we need Christopher Dawson", 117 et seq.

b. Culture a *continuum* of cultures

Dawson saw European history not as a sequel of different cultures more or less independent from each other. Rather, cultures overlap in time; that was why he 'thought the best way to study any culture was over its life-cycle, from origin to maturity, the latter being the point at which its form was most realized (here he was closest to the Romantics), to decline and afterlife.'[6]

I agree with what has been said about the retreat rather than the death of culture. 'Few cultures actually die, most pass on something of themselves after their moment of greatest flourishing to successors, and in a sense live to the present. Homer and Sophocles are still read today. Thus it makes little sense to speak of a Roman period simply succeeding a Greek period. Rather, after a kind of fulfilment in the so-called Classical period of the fifth century B.C., Greek culture continued to develop in the Hellenistic period and was central, for instance, to the articulation of Christian theology. Strands of Greek culture passed eventually into many cultures and still live on today, though no longer in the best of health. The same in turn may be said of Roman culture. Indeed, so far as Western civilization is concerned, Rémi Brague, whose view of Europe as an open-ended series of appropriations of earlier civilizations is in important ways a continuation of Dawson's views, has argued that the West remains Roman in the sense that Rome was for it the gathering and transmitting culture, the point of reference for later thought and action.'[7]

c. What remains?

Would it be correct to state that culture, although they don't die, do phase out? I believe that this very much depends on whether a particular culture contains an idea that cannot die because it is intimately related to man as a human being, and will therefore be the (outspoken or unspoken) concern of any culture. And this ultimate concern is a religious one, if we understand by religion the relationship between man

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[6] Glenn W. Olsen, "Why we need Christopher Dawson", 118.

[7] Glenn W. Olsen, "Why we need Christopher Dawson",118; with reference to Rémi Brague, *Eccentric Culture: a Theory of Western Civilization*, trans. Samuel Lester (South Bend, Ind., 2002)., and to Glenn W. Olsen, "The Two Europes," in: *Actas of the Ninth International European Culture Conference*, Pamplona, Spain, and in *The European Legacy: Toward New Paradigms* 14, no. 1 (2009).

and the ultimate cause of his existence and the existence of everything that exists. No man can elude the underlying question, whether he is aware of it or not and whether he seeks to answer it, or accept an answer for it, or not. This is the reason why freedom of religion is one of the most fundamental human rights, even in his negative form as freedom from religion.

3. Society and religion

This brings us to the wider issue of the relationship between religion, society, the state and the international community. Since it is a fact that the individual's position towards religion is part of the individual's personality – regardless of whether this position is "religious", "a-religious" or "anti-religious" –, this fact must not be ignored by society and its various forms of organisation, especially its political organisation, the state. The question then is how to adequately respond to this fact.

This does not mean that we have to speak either of a religious or an a- (or even anti-) religious society. But we have to be conscious that society, even if its culture may be embodied religion, is not religious in a matter-of-fact way as this might have been the case until two- or three-hundred years ago. Society is – even if this may be the case in an exceptional case – not homogeneous, neither in it religion nor in its philosophy of life (what is denoted y the German term *Weltanschauung*).

This requires us to deal with the legitimate place of religion in society and state in principle.[8] We need to find the best possible form of coexistence between positive and negative religious freedom and to reach solutions which reflect the legitimate interests of all. The first question is to the place religion may have in society. In order to answer this question, we have to clarify what kind of society we are speaking of.

d. Pluralism

Therefore, we are speaking of the pluralistic society. The pluralistic society is characterised by the recognition of the fact that there exist – or, at least, may exist – different opinions about religious, philosophical, political and other questions which have to co-exist

[8] Cf., *inter alia*, Ann Dummett, "Race, Culture and Moral Education", in *Journal of Moral Education*, vol. 15, no. 1 (1986): 10-15.

because no one has been given the right to impose his or her conviction upon any other.[9] Pluralism must not be mixed up with concepts of separation of the secular from the sacred; it only forbids imposing one's own perception of their relationship upon anyone else.

To accept pluralism as a fact is the necessary condition for peacefully living together. The alternative to peaceful acceptance of pluralism would be inter-social violence because no one can be expected to suffer oppression without trying to resist it, even by force.

e. The values of the pluralistic society

So far, the values of the pluralistic society seem to have found their best expression in Article 2 of the Treaty on European Union, which states: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

4. Religion in modern society

It is on the basis of these considerations that we have to draw the necessary conclusions for the relationship between modern society and religion. In doing so, the following points have to be observed.

First, religion and modern society do not exclude each other. No one has to choose between religion and education. A religious person can be an educated person; and an educated person can be a religious person. A conflict between religion and education can only arise if one of them is instrumentalized for the purpose of curtailing the other.

f. Religious freedom

Second, the right to religious freedom, whether regarded in its positive form (i.e. the right to have, profess, and exercise a religion) or in its negative form (i.e. the right not to have, or not to profess, or not to exercise a religion), does not include the right not to be confronted with the religion of others. Neither majorities nor minorities have the right to

[9] See Heribert Franz Koeck, *Recht in der pluralistischen Gesellschaft* (Vienna: 1998).

impede the freedom of others to manifest – either individually or in community with others and in public or private – their religion or belief.

g. The European tradition of human rights

Yet, the fact that human rights reflect a "European tradition" does not mean that human rights are only or primarily something for Europeans; it only was in Europe that the idea of human rights was first developed. As the term human rights already indicates, these rights are rights of man as a human being; and there is no essential difference between European and other human beings.

Moreover, the idea of human rights has been embraced not only by European countries and those which have long since followed the European tradition or have even taken, like the United States, a leading role in embodying fundamental rights in their legal order, and more particularly in their constitution.

h. The universality of human rights

It has also been embraced by the international community as a whole, first in the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 and afterwards in the Human Rights Covenants adopted by the United Nations General Assembly in 1966, especially the International Covenant on Civil and Political Rights.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights clearly state the fundamental right to religious freedom.

Religious freedom is guaranteed together with the freedom of thought and conscience and includes "freedom to have or to adopt a religion or belief of one's choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."[10]

5. The multicultural society

What does this mean for the impact of European culture on globalising world?

[10] Article 18 of the Universal Declaration of Human Rights; Article 18, Paragraph 1of the International Covenant on Civil and Political Rights.

Today's world is characterised by a multicultural society, even if not recognised or accepted everywhere.

The multicultural society is characterized by the fact that different cultures, national, ethnic, religious groups – while all living within the same territory – do not necessarily come into contact with each other or even consider such contact desirable. Between the different groups there may exist passive tolerance, but not mutual acceptance or esteem. Difference is often viewed negatively and forms major justification for discrimination. In consequence, even where there are laws designed to stop discrimination, the law may not be enforced uniformly and its enforcement might even be not welcome. Thus is particularly true for the enforcement of rights which a particular group does not claim for its members and is reluctant to allow them for its own members. Here, culture is the ground for auto-separation. The multicultural society is a society where cultural groups co-exist but living together of people of different cultural groups is not accepted by all groups without interference.

6. The intercultural society

However, the objective should be to pass form the multicultural to the intercultural society. Intercultural societies are characterized by the fact that different cultures, national, ethnic, religious groups who all live within the same territory maintain open relations of interaction, exchange and mutual recognition of their own and respective values and ways of life. Between the different groups there exists active tolerance and the intention of maintaining equitable relations among each other where everyone has the same importance. The intercultural society is a society where people of different cultural groups can live together unfettered by their own groups.

Unfortunately, the multicultural society is still the rule and the intercultural society is still the exception. And even this assessment is not correct; rather it constitutes an over-optimistic exaggeration. The multicultural society which I have depicted and which is characterized by the peaceful co-existence of different cultural groups is by no means the rule. Freedom House, in its Report on Freedom in the World 2013,[11] classified only 90 states or 46 per cent out of 195 as "free states", while

[11] See *www.freedomhouse.org.*

58 states or 30 per cent were classified “free with reservations” and 47 states or 24 per cent were classified “unfree”. Since “free” means respect for and protection of human rights and since multiculturalism and interculturalism presupposes a society in which the human rights of members of different cultural groups are respected and protected, in more than half of all countries we cannot speak even of a multicultural society, let alone an intercultural society.

7. No globalised society in present day’s world

As regards multiculturality and interculturality, there does not exist, therefore, a globalised society. If we define globalization as being a process of international integration arising from the interchange of world views, products, ideas, and other aspects of culture,[12] or, more elaborately, as “a process of interaction and integration among the people, companies, and governments of different nations, a process driven by international trade and investment and aided by information technology”, a process that “has effects on the environment, on culture, on political systems, on economic development and prosperity, and on human physical [and we may add: mental] well-being in societies around the world,”[13] then we have to realize that this process so far has not been very successful. Rather, in those areas which are most important in the context of the rights of an intercultural society, is has come to a standstill, and even to retrogression.

8. Education for a globalised society

In order to secure recognition of pluralism and acceptance of multiculturality as a first step to interculturality, we need adequate education on a global scale. And since the idea of human rights has first been elaborated in Europe, Europe can serve as a case study.

Dawson, who argued that education should be about more than preparing students to support and function within a single national

[12] See, in general, Martin Albrow/Elizabeth King (eds.), *Globalization, Knowledge and Society* (London: 1990).

[13] “The Levin Institute - The State University of New York, What is Globalization?” In: *Globalization 101,* (New York: 2014), http://www.globalization101.org/what-is-globalization/

culture, thought Catholicism particularly suited to cultivating an idea of membership in a universal spiritual community.

'This could include certain forms of universalism, such as human rights, supported by many outside the Church, but at heart Dawson thought people need a contemporary form of Christian culture, that is, initiation through education into the full patrimony of Christianity.'[14]

There can be no objection to such approach because freedom of religion also includes freedom of education from a religious point of view. The relation between freedom of education and freedom of religion is governed by "a prior right [of parents] to choose the kind of education that shall be given to their children"[15]; and the "liberty of parents […] to ensure the religious and moral education of their children in conformity with their own convictions" has to be respected.[16]

'Dawson was by no means locked into the idea that a great culture eventually had to decline and, more or less, disappear. That was simply a description of what had happened in the past. Christian culture was for him still alive in the twentieth century; […] though Dawson viewed Christianity as long under siege and thought that most Christians themselves had never really appreciated the idea of Christian culture, he thought also that it was now up to Catholics to defend this idea.'[17]

9. Defending the pluralistic society

In a pluralistic society, the adequate means of defence are convincing and persuading. But what to do in a situation where pluralism, freedom, democracy, the rule of law and the respect for, and the protection of, human rights are put in question or simply ignored by some groups?

This brings us to the notion of militant democracy. Here, we are reminded of a principle that has been stated by Heraclitus as early as five

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[14] See Glenn W. Olsen, "Why we need Christopher Dawson", in: *Communio. International Catholic Review* 35 (Spring 2008): 123 et seq. See also Glenn W. Olsen, "American Culture and Liberal Ideology in the Thought of Christopher Dawson," *Communio: International Catholic Review* 22, no. 4 (Winter 1995): 702-720, at pp. 718 *et seq.*

[15] Article 26 Paragraph 3 of the Universal Declaration of Human Rights.

[16] Article 18 Paragraph 4 of the International Covenant on Civil and Political Rights.

[17] Glenn W. Olsen, "Why we need Christopher Dawson", in: *Communio. International Catholic Review* 35 (Spring 2008): 123.

centuries before Christ: The laws of a city-state are an important principle of order; therefore the people [of a city] should fight for their laws as they would for their city wall.[18] Of course, militant democracy, especially in a pluralistic society, has to justify itself against the background of the question whether a constitutional democracy can act legally in an antidemocratic manner to combat threats to its existence?

If we take the question at face-value, the legality of militant might appear unclear. But the lack of clarity is due to the phrase "act in an antidemocratic manner". Defending democracy as, indeed, pluralism by necessary, even if militant, means cannot be regarded "antidemocratic". There will always be the danger of abuse of power; but possible abuse of power is no argument against legitimate use of power.

i. No freedom for the foes of freedom!

At any rate, no fundamental right – and thus neither the right to religious freedom nor the right to education – "may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized [in the Universal Declaration of Human Rights[19] or the International Covenant on Civil and Political Rights[20] or at their limitation".

Fundamental rights, their recognition and protection are the cornerstones of any society. All and any of them cannot, therefore, be put in question, either by an individual or by a group, under any pretext. Fundamental rights, on their part, presuppose the acceptance of, and the respect for pluralism.

j. No inroads on human rights!

Societies which do not accept pluralism and therefore are not ready to respect it show themselves unwilling, and in fact unable, to recognize and protect fundamental rights in an integral manner. This is demonstrated by the Cairo Declaration on Human Rights in Islam, adopted by the member states of the Organisation of the Islamic Conference, which states that "[a]ll the rights and freedoms stipulated in

[18] DK22B44.
[19] Article 30 of the Universal Declaration of Human Rights.
[20] Article 5 Paragraph 1 of the International Covenant on Civil and Political Rights.

this Declaration are subject to the Islamic Sharia"[21] and that "[t]he Islamic Sharia is the only source of reference for the explanation or clarification of any of the articles of this Declaration"[22].

The Cairo Declaration on Human Rights in Islam has been denounced by non-governmental organisations and legal writers alike for undermining equality of persons and freedom of expression and religion by imposing restrictions, based on sharia, on nearly every human right. For this reason, "[t]he Cairo Declaration of Human Rights in Islam is clearly an attempt to limit the rights enshrined in the Universal Declaration of Human Rights and the International Covenants. It can in no sense be seen as complementary to the Universal Declaration."[23]

While the Cairo Declaration of Human Rights in Islam, being an international instrument, is an outstanding example for the disregard of pluralism and human rights, this attitude is by no means restricted to Islamic States. Other examples can be found in Sri Lanka with its Buddhist majority and in India with its Hindu majority.

Discussion, therefore, ends where pluralism and human rights are called into question. Since the plural society is a fact and not just a postulate, pluralism and the corresponding human rights are not negotiable.

10. Can the propagation of a deeper vision of Europe be politically incorrect?

Having said this, we are free to talk about the relation between Christianity and European history, and about the contribution Christopher Dawson made to the better understanding of this relationship. 'It is not just Dawson's ideas about culture in general, and Christian culture in particular, that continue to be fertile, but his ideas about how specifically the West was formed.'[24]

[21] Article 24 of the Cairo Declaration on Human Rights in Islam.
[22] Article 25 of the Cairo Declaration on Human Rights in Islam.
[23] Assessment by the International Humanist and Ethical Union submitted the United Nations (2008): 22.
[24] Glenn W. Olsen, "Why we need Christopher Dawson", in: *Communio. International Catholic Review* 35 (Spring 2008): 142.

The French historian and philosopher Rémi Brague, considered as 'one of France's premier contemporary thinkers',[25] is said to continues Dawson's views in important ways. 'Brague's idea that Western Civilization is essentially Roman, both formed as Rome was through an open-ended series of appropriations of earlier civilizations and also taking Rome as a point of continuing comparison, is very much in agreement with Dawson's observation of the layered nature of European culture, the way in which Europe or Christendom appropriated and put to new uses the various cultures it came in contact with, which, we might say, came to compose ever-developing, ever-changing Europe itself.'[26]

Does this view run counter that kind of political correctness that considers religion not a proper subject for discussion among "cultured" people? There are two answers to this question.

The first would be that – 'if we truly understand Dawson's way of viewing culture, what he has to say about education gains depth. It is not just that he desires an education which communicates the nature of Christian culture. [Dawson] wants an education which, by concentrating on the idea of culture, deepens our sense of education as an attempt to "know thyself," the self here being one formed in the dialogue with nature which forms culture.'[27]

The second is simpler and more direct. We just don't care. In a pluralistic society, no one has been given the function of arbiter so that he may decide for us what is politically correct or not. I am sure that the time will come when the notion of "political correctness" in its present restrictive understanding will cease to be a relevant benchmark for civilised discussion because we will have understood that attempting to prevent discussion of any topic in the name of political correctness is altogether politically incorrect.

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[25] Glenn W. Olsen, "Why we need Christopher Dawson", 142 *et seq.;* referring again to Rémi Brague, *Eccentric Culture: a Theory of Western Civilization*, trans. Samuel Lester (South Bend, Ind., 2002).

[26] Glenn W. Olsen, "Why we need Christopher Dawson", in: *Communio. International Catholic Review* 35 (Spring 2008): 142 et seqs.

[27] Glenn W. Olsen, "Why we need Christopher Dawson", 143.

CONVERGENCE OF CONSTITUTIONAL LAW: SOME REFLECTIONS ON FUNDAMENTAL RIGHTS IN A EUROPEAN PERSPECTIVE

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Abstract:

In Europe, threee major levels of Fundamental Rights exist, the national Constitutions, the European Convention of Human Rights and the EU Fundamental Rights Charter. These levels are autonomous but interconnected and interdependent.. There are mutual vertical and horizontal impacts and influences which lead increasingly to a significant convergence of the basic concepts. However, differences are also visible which have to be respected under the priciple of subsidiarity. The convergence of Fundamental Rights in Europe is one of the major reasons for the emergence of a body of European Constitutional Law. This process is of high influence on the evolution of a European constitutional culture.

Key words: *Convergence of Fundamental Rights, European Constitutional Law, European constitutional culture, EU Charter of Fundamental Rights, European Convention of Human Rights (ECHR), EU accession to the ECHR, Rule of Law*

1. Common tendencies of constitutionalism

Four common tendencies characterize contemporary democratic constitutionalism:

(1) the emancipation of the individual whose dignity, autonomy and freedom are considered to be the supreme values in State and society

(2) the normative confirmation of basic orientations for the exercise of public power by regarding them as "constituent elements" of the legal order, that means by constitutionalizing them

(3) the transition from a "closed", sovereignty – based State to internationalized, "open" statehood, with its advanced "supranationalized" form in the EU

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(4) the ongoing processes of vertical and horizontal differentiation of public power which in part strengthen and in part weaken the concept of separation of State functions.[2]

These processes connected with these four characteristic tendencies are functionally interdependent: the more the individualization in the sense of the first mentioned tendency advances, the more constitutionalization, the second tendency, gains importance and transforms legislation-based rule of law into a fundamental rights-oriented, constitution-based rule of law. The more the State opens its legal order towards the international community, the more universal and regional human rights concepts are integrated into the internal fundamental rights system. If open statehood makes progress, new forms of transnational cooperation appear which modify the traditional idea of separation of powers.

Mutual influence of each of these processes on the other entails common advance or common decline. Progress in strengthening rule of law is also the interest of the individual and means also consolidating the fundamental rights protection at the constitutional level. Respecting international law contributes to the internationalization of the rights of the individual and leads to a confirmation of the internal human and fundamental rights concept. Strengthening separation of power by an increasing differentiation of State functions is advantageous for rule of law and democracy. It corresponds to the idea of the "unity of constitutional law" which means that the various main aspects of constitutional developments as expressed by the above-mentioned four tendencies have a common finality which culminates in the efficient protection and promotion of the individual and in the setting up of a well-functioning institutional system as a condition for a"good governance". In the light of this common finality of all constitutional law it can be said that the mentioned tendencies are functionally complementary and interdependent.

[2] See Rainer Arnold, *Interdependenz im Europäischen Verfassungsrecht*, Essays in Honourof Georgios I. Kassimatis (Athen: 2004): 733 – 51.

2. The existence of various levels of constitutional law in Europe

This character of complementarity and interdependence originates a further important effect: convergence of the basic concepts at the various levels of constitutional law in Europe.

Constitutional law is the law which constitutes the basic legal order of a consolidated social unit, traditionally of a State. In Europe, such social units have developed besides and beyond the State: the supranational communities which have fused to the contemporary European Union. This social unit, called Union, is not a State[3] (or seems to be not a State), is, however, in its instruments to act and with regard to the large amount of competences a "State- like" unit. To characterize its legal basis as "constitutional" seems justified. Even if politics avoid using this term in connection with the European Union after the great project of a "Constitution for Europe" has failed it seems adequate to use it from a theoretical standpoint[4].

The qualification as constitutional law is also possible and adequate for the European Convention of Human Rights (ECHR) which is functionally a constitutional charter. The European Court of Human Rights itself has characterized Convention as a "constitutional instrument of the European public order"[5]. The "social units" for which the Convention gives value orientation, exercising by this a constitutional function, are the 47 member states of the Council of Europe obliged to comply with this Convention. The main aspect of justification for calling the Convention "constitutional" is the fact that it is a sort of "second" State Constitution, complementary and subsidiary, with the function of control. Internal law tries to be conform to the national Constitution seen in the light of the Convention. If the internal law does not satisfy the standards of the Convention, it has to undergo a process of adaptation and reform. This can often be done by interpretation but also active steps of reform might be indispensable. This adaptation process takes place without regard of the question in which way and for which rank the Convention is introduced into the internal legal order. In Germany, due to

[3] See the German Federal Constitutional Court (FCC), vol. 89, 155 (Maastricht decision).

[4] See also the jurisprudence of the ECJ case 294/83, Rep. 1986, 1339 para. 23.

[5] Loizidou (Preliminary objections) ECtHR 23.3.1995 Serie A 310, Z. 75.

the traditional transformation doctrine[6], the Convention has become a part of German law, has been transformed into ordinary federal legislation with a rank equivalent to it. The mentioned adaptation process did not regard the transformation mechanism as a hindrance to functionally "constitutionalize" the Convention. The Federal Constitutional Court (FCC) has developed as a consolidated interpretation principle the obligation of German interpreters to see the German fundamental rights in the perspective of the Convention[7]. This means a reception of the concepts defined by the Strasbourg jurisprudence. It seems that also countries where the Convention has been introduced into the internal legal order with the rank superior to legislation (but inferior to the Constitution) as in most European countries, in particular in many of the new democracies in Central and Eastern Europe, do not hesitate to respect the Convention as the supreme legal orientation in the field of fundamental rights. As a whole there is a significant tendency to be stated that the binding effect of the Convention on the European States as subjects of international lawis not diminished in its function with arguments of dualism. Normative hierarchies within the State will no longer fully count as a hindrance for the respect to be paid for international obligations, especially for the Convention which indicates Europewide value standards and has evolved through a dynamic jurisprudence of the Strasbourg court[8] of more than 60 years as a consolidated protection document. For all these reasons it seems to be clearly justified to denominate the Convention constitutional law.

3. Value convergence at the various levels of constitutional law

a) Convergence: mechanisms and impulses

aa) We can distinguish between institutionalized mechanisms creating law convergence and non-institutionalized reception processes which contribute to making concepts convergent.

While the first category is based on legal obligations resulting from binding treaties and legal orders which enjoy primacy over the "receiving" order, the second category refers to voluntary adaptations or

[6] Based on Art. 59.2 Basic Law (BL),

[7] http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.html, paras. 32,33,

[8] See Christoph Grabenwarter, Europäische Menschnrechtskonvention, 3. Auflage, 2008. S.39 (=§5 IV).

receptions for which no formalized legal duty exists. In the first case the reception is normatively prescribed, in the second case the impulse to this reception comes from a persuasive or convincing authority which pleads for this concept.

Institutionalized reception mechanisms exist outside and inside the State: outside the State in form of international obligations resulting from treaties to State concerned is part of.

In Europe, these mechanisms create impact on the signatory countries in an advanced form which differs from the relatively weak structure of traditional international mechanisms of universal character such as the International Covenants on Civil and Political Rights as well as of Economic, Social and Cultural Rights.[9]The ECHR system has gained its particular importance by the existence of the European Court of Human Rights whose jurisprudence plays an important role in creating convergent fundamental rights concepts in Europe. The impact of the EU system is even much more powerful due to its supranational structure[10]. However, converging processes in the field of fundamental rights are different as to these two systems because the ECHR is applicable in a parallel way to the national Constitution, in a cumulative way, while the EU fundamental rights charter applies to the member states only if they execute EU law. Application is here alternative and not cumulative.[11]

Institutionalized reception processes are going on also through the reception mechanisms for international law foreseen in the internal legal orders of the States themselves. These mechanisms depend in their structure and function on what the national constitutional law provides for. The possibilities are various: transformation or direct reception of international treaty law (including the ECHR), with different consequences for the rank of the international treaty concerned with international internal order: equivalence with ordinary law (such as in

[9] See R. Arnold (ed.), The Universalism of Human Rights, 2013.

[10] For the basic elements of supranationality see Costa/ENEL, ECJ 6/64, rep. 1964, 1141.

[11]See Nikos Lavranos, *The ECJ's Judgments in Melloni and Åkerberg Fransson: Une Ménage à Trois Difficulté*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309482 and Koen Lenaerts, *Die EU-Grundrechtecharta: Anwendbarkeit und Auslegung*, *Europarecht (EuR)* 2012, 3 et sequ.http://www.europarecht.nomos.de/fileadmin/eur/doc/Aufsatz_EuR_12_01.pdf.

Germany) or primacy over legislation but inferior to the Constitution (as in the majority of the European countries today[12]) with important consequence that the judges in general are able and obliged to apply the international treaty instead of the internal law in case of conflict. Besides these models the incorporation into national constitutional law as such (Austria) or the recognition of constitutional law equivalence (Switzerland) are possible. Independently from which reception mechanism has been chosen by the constitutional order of the State, international treaties can be recognized as having impact on the interpretation of the national Constitution. It can be seen as an explicit or implicit consequence of "open statehood"[13] that the international treaty binding from outside the State as a subject of international law is respected with regard to all the internal types of law, the Constitution included. Rule of law, in the light of this, means rule of internal as well external law. Harmonizing the international treaty and national constitutional law by interpretation, beyond the formal mechanism of international law introduction, seems to be a modern, conflict avoiding and widely accepted way.

Convergence of law and the emergence of a common legal culture depend, to an important degree, from these external and internal mechanisms which enable the encounter of different legal orders and even cultures. They give the chance for assimilating mutually legal thinking that contributes to the development of convergent concepts. The more intensive the impact of a legal order on another is the more probable is the development of common or similar legal ideas. Assimilation and convergence processes regularly have impacts on both sides, receiving impulses from and giving them to the other order. This reciprocal influence can be clearly stated within the European Union and within the ECHR system, though more intensively from the Convention to the signatory States than vice versa.

[12] See e.g. Art. 55 of the French Constitution.

[13]For this term see K.-H. Sommermann, "OffeneStaatlichkeit: Deutschland", in: *Armin von Bogdandy/Pedro CruzVillalón/Peter M. Huber* (Hrsg.), HandbuchIusPublicumEuropaeum, Bd. 2: Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht, (Heidelberg: 2008): 3-35.

bb) *Institutionalized processes* take place in Europe in the framework of the ECHR in relation with the signatory states (in the future also with the European Union which will accede to the ECHR[14]) and in relation of the EU fundamental rights charter and the member states through the primacy concept and the common values guarantee. It should be noted that most important in our context is the Charter of the EU which has binding force for the EU institutions but also for the member states executing EU law.

The ECHR is an international treaty in its form, with binding effect on the Council of Europe member states, constitutional in substance. With regard to convergence of constitutional concepts the normative impact which is exercised by this Convention falls within the first category. This impact is not only *interpartes* but has a more general effect by obliging the concerned State to adapt its legal to the Convention as interpreted by the Strasbourg court.

As it was underlined above, institutionalized adaptation and convergence processes have a twofold dimension: at the external level the international mechanism and, corresponding to it, at the internal level of the State the constitutional mechanism. If we take now the second mansion mechanism into consideration we can state that the variety in details throughout the European countries.

In Germany, the basic concept is that of dualism and transformation of international treaty law into the German legal order. However, the constitutional concept of open statehood, as indicated above, has urged to relieve the seriousness of dualism. As a parallel idea the internationalized understanding of constitutional law has been introduced into the argumentation by the Federal Constitutional Court interpreting article 1.2 BL[15] as a bridge from internal to external law. This article declares quite generally the acceptance of the international human rights developments by Germany.The FCC uses this provision which has more declaratory than strictly normative character to converge

[14] See the negative opinion of the CJEU on the accession agreement of the EU to the ECHR of December 18, 2014,
http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd12a7ddeaae564baa82add39523bb1965.e34KaxiLc3q.

[15] Para. 2 of this article reads as follows: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world".

German and ECHR rights. This step is seen as required by the German constitution because the interpretation of a German fundamental right not taking account of the relevant Strasbourg jurisprudence is deemed to be a violation of the German constitution, of the fundamental right concerned and not only of the ECHR. Consequently, such omission can be brought before the FCC with individual complaint.[16]

It seems that open statehood has a considerable harmonizing and converging effect.

If we have look at another constitutional system in Europe which is significantly traditional but also undergoing a process of Europeanisation and of growing convergence of internal constitutional law in the field of fundamental rights with European core standards of protection: UK. The key instrument of convergence with the ECHR is the Human and Rights Act which gives the judges of high levels of jurisdiction the right to make a so-called declaration of incompatibility indicating that a piece of legislation adopted by Westminster Parliament is not conform to the Convention[17]. This leads to the initiative from side of the government to reform the law with consent of Parliament. This mechanism has been used in a series of cases and has contributed to the introduction of Strasbourg concepts into the internal British law. Indeed, this is a new approach for the traditional doctrine of sovereignty of Parliament which reduces, in the field of human and fundamental rights, to reach of this doctrine. Also here, a modification of the existing constitutional system has taken place from outside, promoting convergence of English law with the continental concepts.

If we have a final look at the French constitutional order, we can state that article 55 of the Constitution establishes a monist system receiving directly international treaties into the internal order and giving them primacy over ordinary legislation. This has had a far-reaching consequence insofar as legislation has been set aside for application by ordinary judges for the reason of incompatibility with the Convention. The French Conseil cosntitutionnel has not extended its control beyond the Constitution refusing to consider the Convention when examining internal French law. However, the convergence with the Convention

[16] http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104.htmlparas. 62-63.
[17] See http://www.legislation.gov.uk/ukpga/1998/42/contents.

standards cannot be denied neither for the jurisprudence even of the Conseil constitutionnel nor for Parliament voting on legislation. Also here we can state a significant tendency towards convergence with European common concepts.

cc) The adapting process is much more significant within the European Union. EU law is directly valid in the internal order of the member states and enjoys primacy over national law. Therefore concepts, also constitutional concepts freely enter the member states orders if regulations, the strongest means of legislation, are concerned. They immediately bring in EU concepts which have to be in conformity with the valuespromoted by the EU. These values are defined mainly by the EU Charter of fundamental rights which themselves stem from various European sources: the member states constitutional traditions, the European Social Charter, the ECHR, primary EU law. The Charter itself provides for a harmonizing and therefore concept converging interpretation of the various parts of the Charter. This seems necessary in order to avoid a fragmentation of legal cultural throughout Europe.

Besides the Charter EU concepts are determined also by the basic provisions on common values which member states and European Union have to share. These values must be understood in harmony with the Charter on the one hand and with the member states values on the otherhand. The common values clause in EU law (Art. 2 TEU) is in itself an instrument for convergence. The difference with respect to the ECHR is that the latter has control and guaranteecharacter while the common values requirement of the EU law has constituting as well as control character. Constituting character means that these common values are constituent parts of the EU as a "functional unit" of the EU as organization and the member states.

The convergence processes within the member states of the European Union are mainly influenced by the European Convention of Human Rights. However in matters transferred to the European Union the EU Charter of Fundamental Rights is applicable which itself receives orientation to a great extent from the Convention. The convergence with the Convention standards even in EU matters is reinforced by this fact.

dd) Parallel to institutionalized convergence influences impulses from foreign legal orders are taken over by judges in other countries. An intensive judicial dialogue has developed which is open for convincing solutions found by judges in other systems. The readiness to assume ideas, concepts and solutions from other legal orders has been enlarged by the growing institutionalized coherence of different orders.

ee) As a conclusion it can be stated that contemporary constitutional law, especially in the field of fundamental rights, is characterized by increasing convergence of concepts which leads to the emergence of common principles of constitutional law, in Europe to a new body of European constitutional law.

THE CONTEMPORARY LOCAL SELF-GOVERNMENTS SYSTEMS

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Abstract:

The decentralization of public authority, expansion of social self-government, spreading autonomy of local governments is a complicated process which leads to local government's tasks. The constitutions of many democratic states establishes a very important rule concerning the position of the local self-government within the political system; it states that its independence is protected by courts. That should protect the self-government from the intrusions of executive bodies supervising its activities. The competence disputes between the bodies of the self-government and bodies of the government administration are settled by administrative courts.

The European integration do not affect directly the local government in member states. It stimulates the implementation of EU law and the international cooperation of local self-governments units.

Key words: *decentralization, local autonomy , local self-government, models of local self-government, European integration*

1. Constitutional frames of local autonomy and local self-government

Even though local self-government is now one of the basic institutions of a democratic state, its constitutional regulation is in most countries very modest and vague if not completely absent (e.g. USA). The territorial division of the state and local government's activity are regulated by the ordinary law. Statues are the main source of law when it comes to the local government. Although statutes create local government structures and regulate its tasks, it is permissible to impose further obligations by new acts. The decentralization of public authority, expansion of social self-government, spreading autonomy of local

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governments is a complicated process which leads to local government's tasks. That process might be funded either with local government's own revenues or grants from state budget.

Constitutions of democratic states should prevent the situations when the self-government was assigned the tasks of the government administration for execution of which there were no funds in the state budget and the self-government had to pay for them from its own funds.

The territorial system ensures the decentralization of public power. The self-government participates in the exercise of authority from the very beginning of the transformation of the system of government. The constitutional indications regarding the local self-government in democratic states are limited to the following:

- the local self-government performs public tasks not reserved by the by the Constitution or statutes to the organs of other public authorities,

- the inhabitants of the units of basic territorial division (commune, district**,** region) form a self-governing community, "representative democracy is the principal type of democracy at municipal level. The governing bodies [...] are elected by local voters, or by bodies which have been elected by local voters"[3].

- the commune is the basic unit of local self-government,

-the units of regional and/or local self-government satisfy the collective needs of the local society,

- units of local self-government enjoy the status of legal entity, possess legal personality and discharge public tasks in their own name, on the principles defined by the law,

- the independence of units of local self-government is under judicial protection,

- the units of local self-government have the right to set the level of local taxes and charges,

[3] C. Panara, "Conclusion – The contribution of local self-government to constitutionalism in the member states and in the EU multilayered system of governance", in: C. Panara. M. Varney (red.), *Local government in Europe. The 'fourth level' in the EU multilayered system of governance* (London – New York: 2013): 391.

- the units of local self-government perform their duties through constitutive and executive organs, elections to constitutive organs are universal, direct, equal and secret,

- the legality of action by a local self-government is subject to supervision exercised by the prime minister and head of province and regarding financial matters - regional audit chamber.

Constitutional principle concerning the territorial self-government is that it has the assigned competencies to exercise public powers. The Constitutions of many democratic states specifically say that the range of assigned public duties shall be specified by way of statutes. The self-government is to exercise such duties in its own name and on its own responsibility. That concerns both the political responsibility (the local units council before the electorate and its executive body before the council) and civil responsibility specified by the civil law. Those duties, in the constitutions, are divided into two groups :

- own duties, to satisfy the needs of the self-governing community;
- assigned duties, the duties assigned to the local self-government by way of statutes because of the justified needs of the state.

The constitutions of many democratic states establishes a very important rule concerning the position of the local self-government within the political system; it states that its independence is protected by courts. That should protect the self-government from the intrusions of executive bodies supervising its activities. The competence disputes between the bodies of the self-government and bodies of the government administration are settled by administrative courts.

Any changes concerning tasks and competences of territorial self-government units entail respective changes in the division of public revenue, which may assume various forms – from creating by the legislator a possibility of increasing units' own revenue to providing means in the form of an appropriate specific grant. In the case of dispute whether the changes in the division of public revenue are adequate to the changes concerning tasks and competences of territorial self-government units, the matter should be adjudicated by courts if the changes are made by the legislator.

Self- governments conduct the management of their finance independently. The basis for it is the resolution of the entitled entity. Self-governments' own revenues are determined by the separated acts and not

by the constitutional law. Self- governments are free to manage their finance, but first of all they have to realize tasks given to them by law. Self- governments have financial freedom in managing the rest of the sum of money.

Apart from the most general rules of the management of public finance, there are no legal restrictions on how local authorities should use their own revenues. The only binding rule is that the implementation of the voluntary tasks cannot endanger the fulfilment of the mandatory ones. Notwithstanding some legal regulations affect the financial management of local authorities in an indirect way.

Local government budget is an annual, financial plan of the intended revenues and expenditures. The budget is passed for one financial year, which is identical with a calendar year. The budget becomes a footing of a financial economy. All the financial decisions must be made in accordance with the budget. Considering the annual character of the budget, it is comprehensible that local government's financial planning is designed on an annual basis. Due to annual calculations and modifications of basic variables it can be difficult to evaluate the adequacy between the financial measures and local authorities activities. Long-term financial forecast should be realistic and defined for each year inter alia:

1. current revenue and current expenditure from the local government budget, including debt service, guarantees and sureties;
2. income from property, including income from the sale of property;
3. the amount of local government debt.

Long-term financial forecast is created not only for one financial year

The accepted rule associated with the transfer of further responsibilities to the local government is to guarantee funds for their implementation. Such guarantee can be implemented in two ways – either by an increment of their new income source or the participation in the assets of the central budget.

However, there is a risk that an own income as well as resources guaranteed by the central budget will not be sufficient to meet the expenditure of the local government. Therefore, local governments can count on their reserves.

Local taxes are the main source of municipalities' revenues. There is a strong tendency that local revenue system would aim at reducing subsidies and grants instead of increasing the participation of local governments in taxes.

2. The models of local self-government

Two basic models of local self-government may be distinguished:

1/ Anglo-Saxon

In this model local self-government constitutes a natural political institution, not only administrative; it is a specific equivalent of the idea of parliamentarism at the local level conducting its activity without local parallel presence of government representatives.

2/ Continental

This model is based on the principle of centralisation, i.e. a local self-government is a form of citizens' participation in governing and an institution serving the purpose of building democracy from below. Political activity of most citizens is no longer restricted to participating in elections every few years, but they are involved with the state by controlling local matters.

3. The units of territorial division of the democratic states

1/ Commune

A commune is the basic unit of self-government. A commune executes the duties of the self-government which are not reserved for other units. It is a self-governing community created under the law by the people living within a given territory. The commune executes public duties in its own name and on its own responsibility. It is the Commune, and not its organs (bodies), that is the subject of rights and obligations. "The term 'commune' was used to designate not only rural settlements, but also all urban settlements.

Individual states adopted various solutions concerning the system of commune bodies (commune's internal system). Allowing for indispensable generalisations the following models may be distinguished:

(1) Monistic. The council elected by the residents is the commune's only body, which has executive power and the capacity for passing resolutions. It appoints a person or a group of people to conduct administrative matters, who do not constitute a separate body but act as commissioned by the council, are accountable before and controlled by

the council. The model is common in the states remaining under the influence of Anglo-Saxon law. As a rule the council is small (e.g. councils in many big cities in the USA consist of a dozen or so councillors).

(2) Dualistic.

The commune has two bodies – one with the capacity for passing resolutions and the other vested with executive power. Both are as a rule elected by the residents, but the executive body may be elected by the commune's council. The council acts on the principle of presumption of competences and decides on all the matters which are not statutorily determined as the competences of the executive body. The latter is usually one person (e.g. mayor). In some countries the mayor chairs the commune council with a full right of vote. Sometimes he or she is a representative of state authorities performing the tasks of government administration. The model occurs, among others, in France, some federal states in Germany and some states in the USA[4].

(3) Trialistic.

The commune has three bodies of different scopes of competences. Only the representative body – the council – is elected by the residents. The council elects the commune board, which now as a rule performs executive functions, but in the 19th century it was the second body with the capacity for passing resolutions. To conduct the current administrative matters in the commune the board appoints a single-person body (mayor, president). The model occurs, among others, in some federal states of Germany (e.g. Hessen, Lower Saxony)

2/ District

A district constitutes the next unit of territorial self-government after a commune (all the inhabitants of a district constitute a self-government community) and a unit of territorial division of the state. Districts comprise the area of neighbouring communes.

3/ Region

There is no one, commonly adopted type of region in unitary states. Analysis of their systems prompts their division into the following types:

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[4] Cf. E. Nowacka, *Reformy samorządu terytorialnego w Polsce, Wielkiej Brytanii i USA*, (Poznań-Wrocław: 2002), 122.

(1) Autonomous region.

A territorial unit constitutionally guaranteed with autonomy and relative independence, comprising the possibility of passing laws by regional parliaments within their competences. The regions have their own governments and administration. They differ from the constituents of a federal state (states, federal states, cantons) in that they do not even have a part of state sovereignty, can not resolve their own constitutions and conclude international agreements. Regions are based on historical traditions, ethnic community (national and linguistic) and community of economic ties (social and economic infrastructure). Creating such regions must be regulated by constitutions. This type of region occurs, e.g. in Spain.

(2) Administrative – self-government region

A territorial entity with subjectivity in public law whose bodies are to perform the tasks of public administration in a given area. The self-government administration remains under the supervision of the state (review of legality); it takes over the tasks of state administration in terms of economic, social and cultural development of a given community. The council elected in general election is its body with the capacity for passing resolutions. Its executive body is the chairperson elected by the council.

This type of region in principle does not require constitutional regulation; it was introduced in France in the reform of 1982.

(3) Administrative – functional region

A territorial unit with subjectivity in public law and entitled to perform the tasks within the scope of public administration precisely determined by law. Self-government bodies are connected with government bodies functioning at the regional level. The region is equipped with a smaller degree of independence than the other two types. It occurred in France before the reform of 1982.

4. The Impact of the EU on Local Authorities

The very constitutional construction of decentralization of public authority complies with the standards of the EU. The matter of absolutely important meaning for the realization of the decentralization principle within the EU is including to the decision process wide perceived local communities. The EU elaborated here specific concept often defined as

“Europe of regions” or “cooperative regionalism”. This concept allows leading a true dialogue of the authority with the society based on the mutual interaction. The role of Committee of Regions, which growth under the Treaty of Lisbon, has become an inseparable part of the strengthening the local self-government units and their bodies.

The European integration do not affect directly the local government in member states. It stimulates the implementation of EU law and the international cooperation of local self-governments units. This is well revealed by the following example concerning Poland. Poland is one of the major recipients of regional funds and EU regional policy promotes the same trends towards political decentralisation and regionalism in Poland that it is claimed to have been promoted in other member states. Another example - the EU access highlights the need to develop systems of external audit of the local self-government and to restrict their indebtedness.

The European integration process played a significant role in recently discussed reforms of the local government. As by M. Brusis[5] observed the EU Commission's interest in regional self–governments with a substantial fiscal and legal autonomy has provided an additional rationale and an incentive to re–create regional self–governments. Advocates of regional self–government and an institutionalization of regions in the accession countries have referred to European trends and (perceived) EU expectations of regionalization. Thus, the Commission and the preaccession framework have become catalysts for a process in which most CEE regions have already enhanced and will further increase their political salience. However, the trajectories and outcomes of regional–level reforms can be better explained by a combination of domestic institutional legacies, policy approaches of reformers and their adversaries, and the influence of ethnic/historical regionalism.

[5] Governance 4/2003.

THE CONFIGURATION OF NEW RIGHTS THROUGH THE INTERPRETATION OF PRIVACY BY THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract:

The European Court of Human Rights has decided some cases using a new interpretation of the article 8 of convention for the protection of human rights and fundamental freedoms. we show how this position on new rights has important consequences for the member states of the european union concerning the regulation of euthanasia.

Key Words: *interpretation, new rights, privacy, euthanasia, Court of European Human Rights*

1. INTRODUCTION

The European Court of Human Rights (ECHR) was called again to decide on assisted suicide in the *Koch v. Germany* case (application no. 497/09. 17/12/2012). In this case, the applicant, Mr. Ulrich Koch, filed a complaint because the German administration refused to give to his late wife authorization to obtain a lethal substance in order to commit suicide. Assisted suicide is illegal in Germany. He went shortlythereafter to Switzerland with his late wife, where she committed suicide. In between, the couple introduced a complaint before the German Courts, who ultimately rejected their claims. Before the ECHR, the applicant complains that this refusal violated both of their rights to respect for private and family life as guaranteed by article 8 of the Convention. He also alleges that he lacked an effective remedy before the national courts, as those courts considered that, following his wife's death, he did not have an ongoing individualized legal interest in having his wife's case examined (article 13). The court decidedunanimously that art. 8 of the Convention was violated.

This case challenging the prohibition of assisted suicide raises serious issues. As to the admissibility: whether or not the applicant can be considered a victim of a violation of a right guaranteed by the

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Convention in his late wife's name or in his own. On its merits, this case revolvesaroundwhether a "right to be assisted to commit suicide" exists under the Convention, and of the positive obligations of the State in this field.

Assisted suicide per se, or euthanasia, is not legal in Germany. Indeed, the right to a private life does not include a "right to death", before as well as after birth;[2] it would be contrary to the right to life guaranteed under article 2 of the Convention.

Now, in German Law, in contrast to many other legal systems, complicity in a suicide is not punished. Put another way, an accomplice is not deemed criminally responsible for making possible the free death of another person with severe suffering who wants to end his life, for instance, by putting a poison of a pistol at their disposal. A representative case involves the physician *Hackethal*[3] who in the year 1984 gave poison (potassium cyanide) to a woman who was gravely ill and suffering from incurable cancer that was spreading through the brain. The patient drank the poison with water, whereupon she died shortly thereafter, peacefully, without indications of going through agony. The general attorney brought charges for assisted homicide (§ 216 StGB), but these charges were rejected by both the Court of Traunstein as well as the Appeals Court of Munich[4].Naturally, many questions arise here concerning the distinction between the lawful participation in suicide and the punishable act of assisted homicide or euthanasia[5].

I would like to highlightthat euthanasia is a troublesome and complicated matter for Criminal Law for three reasons: first, the positive legal regulations do not cover many questions that arise in concrete practice; secondly, the matter touches on existential questions and the

[2]*A. B. C. v. Ireland* [GC], no. 25579/05, judgment of 16 December 2010.

[3]"Nazi doctor killscancerpatient", *EIR*, Volume 11, nº 19 (May 15, 1984).

[4]Vid. OLG Múnich, NJW 1987, p. 2940. The case judged by the Superior Court of Munich was influenced in a decisive manner by an article authored by Herzberg, *NJW* 1986, pp.1635 y ss. Vid. Roxin, Claus: "Homicidio a petición y participación en el suicidio. Derecho vigente y propuestas de reforma", in *GoltdammersArchivfürStrafrecht*, vol. 160 (2013): 313-327. Translation by Alcácer Guirao, Rafael. Also in *ADPCP*, Vol. LXVI (2013).

[5]Roxin, Claus, NStZ (1987),345 y ss.; Roxin, Claus: *Selbstmordverhütung. AnmaßungoderVerpflichtung*, Pohlmeier, Hermann (Hrsg.), KeilVerlag, 1978); Roxin, Claus: *140 Jahre Goltdammer's Archiv für Strafrecht. Eine Würdigung zum 70. Geburtstag*, von Paul-GünterPötz, Decker, Heidelberg, 1. Januar (1993): 177 ss.

Law fails to properly define "the singularity of the process of mortality through its generalizing conceptualization"; and, lastly, because this is a subject in which different aspects are intertwined to reveal their medical, philosophical, theological, and legal character…[6]. Indeed, when the issue has a strong ethical dimension, the States are afforded a broad margin of appreciation in determining the question of whether a fair balance was struck [7] (*A. B. and C. v. Ireland*, § 233).

The word "euthanasia" comes from ancient Greek and means "good death". In modern times, the term designates the medical actions that hasten death in a terminalpatient [8], or, in the words of Roxin, "the help given to a gravely ill person, who by his own volition or at least in deference to his presumed volition, to make posible a death that is humanely dignified in correspondence with his own convictions."[9].

One can distinguish between euthanasia in the broader or in the stricter sense.The latter case is present "when the help is given after the mortal event has begun, such that death is near with or without said help"[10]. In other words, the death of someone who is "moribund" is accelerated. On the other hand, in the broader sense, as Margaret A. Somerville has put it, based on definitions from important English, American and Canadian institutions, one can define euthanasia as "a deliberate act that causes death, carried out by a person with the primary intention of terminating someone else's life to relieve that person's suffering"[11].

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[6] Roxin, Claus: "Tratamiento jurídico-penal de la eutanasia", *Revista Electrónica de Ciencia Penal y Criminología*, *RECPC* 01-10 (1999).

[7]As the Courtrecalled in *A., B. and C. v. Ireland* case: *"The acute sensitivity of the moral and ethical issues (…) allows a broad margin of appreciation (…) to the State in determining the question whether a fair balance was struck*"(§ 233).

[8]Siurana, Juan Carlos, "Lo que ya compartimos sobre la eutanasia", *Humanidades Médicas. Bioética, Jano* 15-21, Vol. LXVIII nº 1561 (abril 2005): 59.

[9] Roxin, Claus,"Tratamiento jurídico-penal de la eutanasia", *Revista Electrónica de Ciencia Penal y Criminología*.

[10] Roxin, Claus,"Tratamiento jurídico-penal de la eutanasia".

[11] Somerville, M.A., "Legalisingeuthanasia: whynow?" , *Australian Quarterly* 68 (1996): 3.

2. How to differentiate between un punishable complicity in suicide and assisted homicide or euthanasia?

It is not easy to properly distinguish between assisted suicide and homicide. As matter of fact, there are those who argue that no true differentiation can be made, in truth, between these two because they both touch on the same shared ethical principlesof our society. In line with majority opinion, the issue should be resolved in terms of the one responsible for the last act that inexorably leads to death. If this were the person committing suicide, then the cooperation of a third party would go unpunished; if, on the other hand, if the act is responsibility of the third party, then it is punishable assisted homicide. In this manner, the acts go unpunished of those, for instance, who mix the poison or lend the revolver with which a person ends his life. In contrast, that person, who at the request of another who is gravely ill, shoots a revolver or injects a poison is guilty of assisted homicide.

Often, this differentiation is not so easy in individual cases that arise in practice[12]. German legislation solely contemplates the autonomy of the act of suicide as being assured relative to possible external influences when the person who wants to die personally commits suicide, that is, when this person holds in his hands "the control over the moment that leads to death." So, for example, the person who shoots himself with the gun in his hand remains committed to his final decision to the end, and is thus responsible for his death. In contrast, the person who lets himself be shot has abandoned the irremediable act of pulling the trigger to someone else; had he put himself in the other's position, he might have repented of the act before carrying it out. In this case, the third party bears the ultimate responsibility for the death of the victim, and, for this reason, his deed is punishable.

A special problem arises when the deadly act is carried out by the person committing suicide but a third party intervenes thereafter. An example of this is the case *Scophedal*, which was decided by the Federal Supreme Court[13]. An aged physician, sick and bed-ridden, had decided, in full possession of his faculties, to end his life by injecting *Scophedal* (an analgesic with narcotic effects). As he feared that his strength might

[12]An exposition on borderline cases that can cause difficulties can be found in Roxin, Claus: *140 años del Goltdammer'sArchivfürStrafrecht*, 183-186.
[13]NStZ (1987): 365 with an article by Roxin, Claus, *NStZ* (1987): 345.

fail him, he asked his nephew to help if necessary. A few days later, he put his plan into action, falling into a deep sleep. When the nephew arrived, for fear that the attempt at suicide had failed, he administered an additional injection. The physician died an hour later. He would probably have died as well of the injection he himself had administered. What could be determined with certainty is that, in the absence of the additional injection, the physician would have lived at least one hour longer. The Federal Supreme Court, by majority opinion, found the nephew guilty of assisted homicide.

3. Assisted homicide or euthanasia. The case of Koch vs. Germany

In accordance with majority opinion, assisted homicide or euthanasia is punishable under all circumstances in Germany, inasmuch as it shortens life due to a volitional act that immediately leads to death. The patient can be suffering profoundly, be close to death, and be asking for a lethal injection: in all cases, the person performing the injection is criminally responsible under German Law.

This solution is not completely harmonious, as it is not common across other countries in Europe. For instance, Swiss Law permits active euthanasia as long as certain procedural guarantees are met[14]; even in Germany, certain illustrious scholars of criminal law argue for a limited decriminalization of euthanasia,based both on existing law and, in part, on *lege ferenda*.

Nevertheless, we have to recognize that these approaches did not play a role in the case under consideration (*Koch v. Germany*), because physicians, lawyers, and theologians, as well as influential organizations in Germany, such as the Foundation for Orphans, have treated active euthanasia, in the sense of directly causing death, as being completely impermissible and beyond debate. The commitment of the physician as a healer, the taboo surrounding death, the fear of indiscriminate use of such acts, as well as the memory of the so-called euthanasia program of the Nazi era, have posed clear barriers to advancing in such a direction.

[14]Vid. Scholten, in: Eser/Koch (Ed.), *Materialienzur Sterbehilfe. Eineinternationale Dokumentation* (Beitrageund Materialienausdem Max-Planck – Institut fur Auslandisches und Internationales Strafrecht Freiburg i. Br), (Freiburg im Breisgau: 1991).

But even if with the best of intentions we put these obstacles into context, and we emphasize the humane interest in stopping unbearable suffering and making a dignified end to life possible that lie behind the ideas held by the minority view, the drawbacks to wider admissibility of active euthanasia prevail[15]. The desire to favor the reasonableness of wanting to die or balance the countervailing interests for or against such acts, including under current law, creates an unnecessary legal uncertainty to which neither physicians nor patients should be subjected.

The adversaries of active euthanasia warn that, based on information provided by physicians, patients rarely ask for help in dying and that frequency of death wishes can be further reduced by practicing "assisted deaths", full of humane compassion and effective pain therapy, which reduces the motivation for requesting an early death (such as state of abandonment and unbearable suffering)[16]. Much research shows that many ill patients request euthanasia for fear of dying in abandonment, or being a burden to their families, or for fear of physical suffering. Likewise, another argument against euthanasia at the individual level is the potential abuse that could arise from its legalization, even more so in the face of a sharply aging population.

As if this were not enough, I would like to make clear that one of the dangers of supporting legalizing active euthanasia is that it opens the door to premature euthanasia and the destruction of life without value[17].For this reason, one of the first conclusions of this work, given the complexity of the topic, is that one should not objectify a human being. As such, I would clearly disagree with Roxin, among others, because, from my point of view, the issue cannot be resolved by quantifying the damages and opting, as a matter of Law, for the lesser evil in quantitative terms. I believe the matter is not quantitative, but rather qualitative. Moreover, from my point of view, the error of this

[15]See Recommendation 1418 (1999), text adopted by the Assembly Parliamentary in Strasbourg on 25 June 1999 (24th Sitting). Protection of the human rights and dignity of the terminally ill and the dying.

[16]Vid. Hoerster: *La eutanasia en el Estado secular,* 137 ss.; Schreiber, "Interrupción del tratamiento y eutanasia" in: Bottke Y Otros, *El alargamiento de la vida desde una perspectiva médica, ética y jurídica*, (1995): 129 - 141.

[17]This refers to homicide for the benefit of society of the mentally ill who have the capacity and will to live. The discussion was given impetus by the book by Binding/Hoche: *La liberalización de la destrucción de la vida sin valor* (1920).

perspective leads the defenders of the substantive right to assisted suicide to continually invoke statements and charters of Human Rights, for instance, in the case of Canada, the *Canadian Charter of Rights and Freedoms*[18], or as Koch did, in the case we are considering, alleging a violation of art. 8 of the Convention of Rome[19]. This confronts judges with a perspective that favors subjective arguments to the detriment of other objective considerations of the problem, such as the possible effects of legalization on medical professionals and hospitals, or the risk of abuses in the case of the terminally ill.

I will frame the issue in the form of the following questions:

First question: Can one equate human dignity and individual autonomy or does human dignity define the limit that not even individual autonomy can transgress?

The defenders of euthanasia, remarks Somerville, usually restrict their arguments to the subjective level: they focus on a person's liberty as though this were equivalent to his dignity, and usually mix in a large dose of maudlin sentimentality, appealing to compassion.

Second question: Can one dissociate the respect for one particular human life from that of human life in general?

It seems that human life, understood as something having value, has ceased to exist compared to life reflected in casuistry, which can lead to the eventual legalization of so-called "premature" euthanasia. Behind these terrible arguments there lies, from my point of view, the triumph of nominalism in society today, which converts the concept of human life into a mere label, a *nomen*, a term lacking essence and therefore lacking value. In short, I believe that behind this dissociation between the respect for human life in particular and respect for human life in general

[18]Sommerville, Margaret, "How do we want our great-great-grandchildren to die?", Mercator Net, Jun, 17, (2012). http://www.mercatornet.com/articles/view/how_do_we_want_our_great_great_grandchildren_to_die

[19]Article 8: "Right to respect for private and family life".

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

lies within the line of thinking developed by Peter Abelard, William of Ockham, and Duns Scotus, and, which with the impulse given, today is extending itself like a true tsunami of moral relativism and nihilism[20].

One can say that, with the decision Koch,the Court entered into a new era in condemning on the basis of principle the ban on assisted suicide in force in Germany, finding that courts should judge, case by case, the relevance of individual demands for suicide. Said case(n° 497/09, July 19th, 2012) should be connected with another one, *Alda Gross vs. Switzerland* (n° 67810/10) , May 14th, 2013,given that with this last decision the Second Section of the European Court of Human Rights has completed the formulation of an individual's right to assisted suicide (that is, euthanasia with consent) in the name of the right to a private life guaranteed by article 8 of the European Convention on Human Rights. With a slim majority of 4 to 3 votes, the Section justifies its judgment by the general consideration under which "in an era of increasing medical sophistication combined with prolonged life expectancies, many persons fear being forced to stop in old age or in states of psychological or mental decrepitude which contradict deeply held convictions that are rooted in one's personal identity."

In the case *Alda Gross vs Switzerland,* the Section condemned, essentially, the fact that the effective exercise of the right to assisted suicide is constrained by medical practices, and that these medical practices flatly deny the principled right of assistance to persons of good health. In this case, the request for suicide did not refer to a "medical case", but rather to an elderly person in good health who was "tired of living". This woman, having asked several doctors, was refused a medical prescription for a lethal dose of poison (sodium pentobarbital) on the grounds that she was in good health, and as such the request did not meet the conditions set by the Code of Medical Ethics and the ethical Directives of the Swiss Academy of Medicine.

According to Swiss Law, inciting or assisting suicide are only reprehensible when committed by "selfish motives". To the contrary, when the suicide is deemed to be for reasons that are not selfish, the Swiss Federal Supreme Court has stated, in virtue of legislation concerning drugs and medications, that the poison can only be issued by prescription and that the act of prescribing drugs by a physician for such

[20] Juan Federico, *Teoría General del Estado* (México: Trillas, 2015), 103-105.

purposes is subject to the rules of the medical profession, in particular the ethical directives adopted by the Academy of Medicine. These directives are tightly linked to the health status of the patient and that patient's ability to express his own wishes. In other words, the directives are designed to protect the patient from pressure and haste, so as to exclude the possibility that a lethal substance is given to a person in good health.

Third question: Can we call the right to a "voluntary interruption of old age" a new right?

The European Court in a decision issued May 14th against Switzerland (*Alda Gross vs Switzerland),* seems to support the right to a "voluntary interruption of old age." In fact, many think that this decision spells out a right to euthanasia. It is on this point that the Section censured Swiss Law, since it should not be ethical guidelines, but the law, that should set the conditions under which poison can be prescribed. This approach reflects the idea that suicide has acquired the status of a liberty or individual right and that, therefore, an ethical guideline should not hinder the exercise of such a right. The Law should instead provide the framework instead, even if this right is exercised using medical technology.

The tenor of the decision reveals the singular premises of liberal individualism regarding human rights and medicine whose mission is now to serve the individual will, including the will to die, rather than caring for and protecting persons. This polemical decision thus carries forward the liberal tone of the Court's jurisprudence, which gives individual autonomy the highest priority in the Convention, above the respect for life and the national rules concerning public order. It is obvious that this ruling highlights a liberal focus by considering that the decision to grant the poison does not belong to medical professionals but to civil liberties. It is, therefore, unsurprising that the Court has proceeded in a similar fashion concerning abortion in Poland and Ireland.

Fourth question: What may the reach be of rulings that run counter the European consensus against assisted suicide as well as counter to the Convention, whose article 2 obliges the States to respect and protect the life of "every person" and sets the principle according to which "no one should inflict death upon anyone intentionally"?

The decision *Alda Gross vs Switzerland* did not deem it necessary to address these issues, nor grant the leeway that Switzerland should have

regarding assisted suicide. Moreover, it did not refer to the Parliamentary Assembly of the Council of Europe, which recommended "the absolute prohibition against intentionally ending the life of the chronically or terminally ill" (Recommendation 1418 (1999)) and had declared that "euthanasia, in the sense of intentional killing, by action or omission, of a dependent person, in that person's supposed interest, must always be prohibited", as resolved by the Parliamentary Assembly of the Council of Europe on January 25th of 2012 in Resolution 1859 (2012).

In reality, both the case *Koch vs Germany*and *Alda Gross vs Switzerland*raise again the question of the existence of a so-called "right to die", "right to commit suicide" or "right to be assisted to commit suicide" derived from the right to life (article 2) or from the right to respect for private and family life (article 8), as guaranteed by the Convention. Those questions have been answered already in two important cases, *Pretty v. UK*(n° 2346/02, 29.04.2002)[21] *and Haas v. Switzerland*(n° 31322/07, 20.01.2011).

- In *Pretty v. UK*,[22] the Court issued its first judgment on the merits of these questions. It concerned a woman who was suffering from an incurable and degenerative disease and who wanted to obtain from the internal authorities a guarantee not to prosecute her husband for assisting her to commit suicide. Coming to the Court, she invoked firstly the right to life, claiming that this article protects "*not only the right to life, but also the right to choose whether or not to go on living*." The Court, after recalling that "*the Court's case-law accords pre-eminence to article 2 as one of the most fundamental provisions of the Convention*," stated that "*article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. (…) no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from article 2 of the Convention*" (§§ 39 and 40).

[21] Rey, Fernando: "La protección jurídica de la vida ante el Tribunal de Estrasburgo: un derecho en transformación y expansión", *Revista del Centro de Estudios Constitucionales*, Año 7, 1 (2009): 331-360.
[22]*Pretty v. UK*, no. 2346/02, judgment of 29 April 2002.

Secondly, the applicant argued that the right to private life implies a right to self determination which would encompass "*the right to make decisions about one's body and what happen[s] to it*," "*the right to choose when and how to die and that nothing could be more intimately connected to the manner in which a person conducted her life than the manner and timing of her death*." Therefore, the refusal of the authorities to give a guarantee and the State's blanket ban on assisted suicide interfered with her right to private life. Importantly, the Court accepted, for the first time, that the notion of "personal autonomy" derives from the right to private life as guaranteed by article 8 of the Convention: "*although no previous case has established as such any right to self determination as being contained in article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees*" (§ 61).

Therefore, as ruled in *Pretty v. UK*, there is no right to die or a right to self-determination deriving from the right to life, but that there is a right to personal autonomy deriving from the right to respect for private life. Since then, the Court has continuously extended the scope of article 8 under various aspects of the personal autonomy, such as giving birth within the privacy of family home[23]or having masochist practices.

- In *Haas v. Switzerland*, the Court ruled recently on an application concerning a man who wanted to have access to a lethal substance without a proper medical prescription in order to commit suicide. He relied on the right to private life, claiming that his "right" to put an end to his life was not respected, as the access to the lethal substance was restricted by the State to certain conditions that he did not fulfill. The Court rightly observed that the applicant was not seeking recognition of his right to self determination, but to institute a positive obligation on the State to take measures allowing for rapid and painless suicide (§ 53). The Court established that the right to private life includes the right to decide how and when to die, but only under two conditions: the free will of the person concerned and his/her capacity to take appropriate action, in so far as it can be implemented by the person concerned. (§ 51)

- In *R.R. v. Poland*, another recent case, the Court asserted that there is no right, under the Convention, to have access to free medical care or to

[23]*Ternovszky v. Hungary*, no. 67545/09.

specific medical treatment or medication. Therefore, it seems quite impossible to argue that a State would have a positive obligation to facilitate the acquisition or to provide a lethal drug.[24]

Due to the similarities of the *Haas* and *Koch* cases, if the Court accepts that the applicant enjoys victim status on behalf of his late wife or of his own, and if it will assess this case under the positive or negative obligations of the State, it should take a similar decision concluding to the non-violation of the rights of the applicant's late wife and of the applicant under article 8 of the Convention. Moreover, contrary to Switzerland, Germany does not permit assisted suicide with a lethal substance at all. Whereas Hass could allege to suffer from an unjustified difference of treatment compared to other patients who fulfilled the conditions for assisted suicide, Koch cannot, since assisted suicide with a lethal substance is not legal under any circumstances in Germany.

In contrast, a much different perspective is offered by the British justice system upon rejecting on August 17th of 2012 the appeal of a man who asked that a physician put an end to his life in a legal manner. This patient exhibited locked-in syndromeafter suffering a cerebral infarct that left him paralyzed from the head down in 2005; this paralysis prevented him from ingesting a lethal dose of pills even were someone to prepare such a dose. The British Supreme Court heard the case of Tony Nicklinson, but this mere fact did not imply that they were going to side with him. Keep in mind that euthanasia and assisted suicide are illegal in the United Kingdom. In fact, the three judges of the Supreme Court that considered the case, although they recognized the tragic nature of his situation, found the law to be clear: «Voluntary euthanasia- that is, intentionally induced- is murder», no matter what the motive.The judges found that Parliament would have to change the law: «It is not in the purview of the Court to decide whether the law on assisted dying should be changed, and, in such a case, what safeguards should be adopted. In our system of government, this is the responsibility of the Parliament».This case leads us to pose the following question.

Fifth question and conclusion: Can one legally end the life of a patient? One aspect that should be taken into consideration to answerthis question are the dignity of the medical profession, the relationship between the doctor and the patients, which is based on trust and the

[24]*R.R. v. Poland*, no. 27617/04, judgment of 26 May 2001.

incompatibility between the palliative care and assisted suicide. Asking a doctor to participate in killing a patient is against the nature of his profession, which is to save lives and to heal ill persons. It is for this reason that German law only permits drugs to be dispensed for life-preserving purposes and that the Court's case-law establishes in respect of the medical profession (individuals and institutions) a right to conscientious objection. Allowing assisted euthanasia will also create a climate of insecurity and fear between the medical professionals and the patients and will be detrimental to the medical system which is based on trust between the patients and the doctors. The Council of Europe calls on the member States to develop their palliative care systems and to reflect on the enlargement of this concept to chronic and non-fatal diseases, making it one of the rights of the patients. Permitting easy access to lethal substances is against this principle.

Letus not forget that rights are triumphs over the majority, in the words of Dworkin. As Dr. Fergusson, speaker of CNK (Care Not Killing), stated regarding the case of Nicklinson, this case confirms that "also in free and democratic societies there are limits on the freedom of choice. Every law limits the freedom of choice and prevents certain persons from doing what they desperately want to do, but this is necessary to protect others, especially the most vulnerable in our society".

Precisely addressing the debate on assisted suicide in the Council of Europe and the profound contradiction hereto by the Court of Strasbourg in the case *Koch vs Germany*, Professionals for Ethics sought the opinion of Roger Kiska, representative of the Alliance Defending Freedom (ADF), who stated—and I end with his words: "The State reserves the right to preserve life. It should not be obligated to eliminate it. The decision [in the case *Koch vs. Germany*] undermines the right to declare the existence of a substantive right to assisted suicide. Claiming that Germany has violated the privacy rights of a person by refusing him the lethal drugs he requested to allow his wife to commit suicide is a nightmare without precedent and without any foundation in the European Convention on Human Rights. The Court found "shadow" procedural rights that do not exist under article 8 of the Convention, and this gives opens the door to confusion and abuse."

THE CREDITORS'S PERSONAL GUARANTIES

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Abstract:

Guarantees are those means which are intended to protect creditors against debtors insolvency . Guarantees are of two kinds: personal guarantees (consisting of commitment of a person other than the debtor , to perform the debtor's obligation if he does not) and security interests, which involves taking security over an asset in order to enforce the fulfillment of the obligation. The Civil Code of 2009 regulated as being personal guarantees: the pledge (or fideiusiunea), the letter of guarantee and the letter of comfort . Personal guarantees add to the general guarantees of a debtor the general guarantees of other persons, therefore increasing the chances of the creditor to have the debt repaid.

Key words: *security interests, personal guarantees, pledge (fideiusiunea), letter of guarantee, letter of comfort*

1. Preliminary issues

The creditors'right over all the goods which exist within the patrimony of their debtors is named by the doctrine: "the creditors'general pledge right"[3]. The creditors who do not benefit from any other token but this only one in order to satisfy to their claims are named: "ordinary creditors" or "unsecured creditors", while these creditors'claims are designated as: "unsecured claims"[4].

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[3] T.R. Popescu thus justifies the name of general security: "the name of security discloses its function as guarantee, as it regards the performance of the obligations assumed, and the qualification as general security shows that (…) it states the right of the creditor to initiate the enforcement procedure against any of the debtor's assets". T.R. Popescu, în T.R. Popescu and P. Anca, *Teoria generală a obligaţiilor*, (Bucureşti: Ştiinţifică, 1968), 343.

[4] The doctrine has divided the claims into 3 categories: unsecured loans, subordinated claims (which are paid after the unsecured ones, being disadvantaged because of their cause, such as the claims received on a free basis) and the privileged claims or with real guarantee. P. Vasilescu, *Drept civil. Obligaţii*, (Bucureşti: Hamangiu, 2012), 95.

The law does designate the creditors'right over all the goods which exist within the patrimony of their debtor as: "the creditors'common guaranty"; therefore, the Civil Code, in its art. 2324 par. (1), does state that: "Who is obliged in his person is liable through all of his mobile and immobile goods, either present or future ones. They serve as a common guaranty for his creditors." Consequently, should the debtor not fulfill willingly the obligations by which he is tied, his creditors would be entitled to sue him for whatever among the goods which exist within his patrimony.

The debtor's patrimonial assets, which do constitute the existing guaranty for his unsecured creditors, does contain the goods which do effectively exist within the debtor's patrimony at the moment of the concerned obligation's birth as well as the ones which do effectively exist within the debtor's patrimony at the moment of its payment, that is to say the debtor's future goods too.

Apart from this "common guaranty" which is the most general one, accessible to all of the creditors, the law does also institute other guaranties, which the doctrine does designate as "special guaranties" and which do endow the respective creditor with certain rights and prerogatives which are supplemental in respect to the ones that are usually acknowledged to the unsecured creditor[5].

The doctrine does designate as "special guaranties"(that is to say properly effective guaranties) as well the personal guaranties (the fidejussion, the letter of indemnity and the comfort letter) the privileges and the real tokens (the pledge, the mortgage and even the lien, which is included to this category because it does indeed resemble to the real guaranties). Yet, it is only the real tokens which allow the special assignment of a good in respect to a payment to be done (res, non persona debet). Consequently, the concerned good's revaluation is, in terms of priority, reserved for the solution of the claim of which the good is itself the token ; in what personal guaranties are concerned, what they can only do is to add to the debtor's general pledge other general pledges which do belong to other persons, thus increasing, for the concerned unsecured creditor, the odds in what concerns the fulfillment of his claim. The Romanian Civil Code from 2009 has instituted, under the general

[5] The guarantees are those means with the purpose of protecting the creditors against the insolvability of their debtors.

designation of "personal guaranties": the fidejussion, the letter of indemnity and the comfort letter[6].

2. Fidejussion

a) Concept. The actual Civil Code does state a legal definition for fidejussion; therefore, according to its art. 2280: "The fidejussion is the contract through which one side, the fidejussor, does oblige itself towards the other side (which, in the frame of another relationship of the obligational type, does have the quality of creditor) to fulfill, either for free or in exchange of a remuneration, the debtor's obligation, should this latter not fulfill it." Consequently, the sides of the fidejussion contract are only the creditor and the fidejussor (which the doctrine also designates as personal guarantor or bondsman). For the conclusion of this contract, the given consent of the main debtor is not required. Furthermore, according to the C.C.'s art. 2283: "Fidejussion may be assumed in the absence of the awareness of this fact by the main debtor and even against this latter's will."

b) Types of fidejussion. Taking into consideration as a criterion its juridical grounds, the doctrine does distinguish among three types of fidejussion: the conventional type; the legal type; the judiciary type.

Fidejussion is conventional when the debtor's obligation of constituting a guaranty in respect to the fulfillment of his duties has as juridical ground the will of the contract'sides.

Fidejussion is legal when the debtor's obligation of constituting a guaranty does result from a legal disposition (for example: according to the C.C. in its art. 726 , the usufructuary is obliged to deposit a guaranty amount in respect to the fulfillment of his obligations, except for the case when some legal stipulation should exist which would exempt him from the above mentioned requirement; or either, according to the C.C. in its art. 1722:"The purchaser who finds out about the existence of an eviction cause is entitled to suspend the price's payment until the respective

[6] The Romanian Civil Code of 1864 has stated a single form of personal guarantee, namely the suretyship, the other autonomous forms of guarantees being assimilated by it. The new Civil Code states differently the letter of guarantee and the letter of confort. (http://ro.scribd.com/doc/169985333/GARAN%C8%9AIILE-PERSONALE-IN-NOUL-COD-CIVIL#scribd).

disturbance would cease or until the seller would offer an appropriate guaranty").

Fidejussion is judiciary or judicial when the debtor's obligation of constituting a guaranty is imposed by a judicial court which has been invested with the power of resolving a litigation conflict[7].

c) Fidejussion's juridical nature. No matter what might be the nature of its juridical ground (the law, the court's decision or the sides'will agreement), the fidejussion's juridical institution itself is of a conventional nature. The law or the court's decision do only state the obligation of creating the deposit consisting of a personal guaranty, but the fidejussion's juridical institution is created in virtue of the convention which has been concluded between the fidejussor and the creditor. As for the rest, all the other guaranties are instituted by a conventional type of source, except for the case of privileges[8].

Unlike the other guaranties, fidejussion does generate the effect of the concerned claim's personal pledging for, because of the fact that the fidejussor does become liable in its respect through the totality of his own patrimony (more precisely, through the totality of his own assets which do exist within it) in regard to the payment of the guarantied debt, in exactly the same way as an ordinary debtor should do.

d) Fidejussion's juridical features. The fidejussion contract has the following juridical features: it is an accessory contract and a solemn-type one; it also may be unilateral or bilateral or either a gratuitous or an onerous one.

In respect to the main obligation which does tie the debtor in respect to his creditor, the fidejussion contract is an accessory one. From the fidejussion's feature of being accessory, the following consequences

[7] For instance, it refers to the legal suretyship in the following legal provisions: Art 177 of the Civil Code, which states that the guardianship court may decide that the guardian to offer real or personal guarantees, if the interests of the minor requires such measure; Art 217 of the Civil Code which states that with the submission of the action for the annulment of the acts issued by the organs of the legal person, the plaintiff may ask the court, using the presiding judge's order, the suspension of the enforcement of the appealed acts and, in order to approve the suspension, the court may force the plaintiff to submit a security.

[8] In the same sense, see C. Stătescu, in C. Stătescu and C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, IX-th edition, reviewed and updated (Bucureşti: Hamangiu, 2008), 420; Vasilescu, *Drept civil. Obligaţii*, 120.

are generated[9]: (i) only valid obligations might be guarantied through fidejussion [C.C., art. 2288 par (1)]; being an accessory contract, to fidejussion the rule accesorium sequitur principale is to be applied; consequently, the main obligation's relative or absolute nullity does as well determine the respective nullity of the fidejussion contract; (ii) being an accessory contract, fidejussion could not be extended beyond the initial limits within which it was concluded [C.C., art. 2289 par. (1)][10]; in other words, the principles are instituted that the fidejussion's extent could not be larger than the contracted obligation itself and that the fidejussor's liability could not be more onerous than the one of the main debtor; should the contracted fidejussion step beyond the limits of the main obligation, it would not be touched by nullity, but it should remain valid, yet only within the limits outlined through the main obligation [C.C., art. 2289 par. (2)]; (iii) the rule is that fidejussion is due to cover the totality of the main obligation, including this latter's accessories, even the expenses which are posterior to the notification which is addressed to the fidejussor and the expenses pertaining to the respective subpoena itself; an exception from this rule is constituted by the situation when a contrary stipulation would exist within the fidejussion contract itself [C.C., art. 2290 par. (1)], in the sense that fidejussion may be contracted for only a part of the main obligation or either under less onerous conditions, for example by limiting the fidejussor's obligation to the capital's payment only (C.C., art. 2291); within the frame of the procedures directed vs. the main debtor, the expenses pertaining to the lawsuit and to the coerced distrain which had been made by the creditor should be owed by the fidejussor only in the

[9] V.D. Zlătescu, *Garanţiile creditorului* (Bucureşti: Academiei, 1970), 110; in the same sense, see L. Pop, *Drept civil. Teoria generală a obligaţiilor*, second edition (Iaşi: Fundaţiei „Chemarea", 1996), 406 and S.I. Vidu, in L. Pop, I.F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile* (Bucureşti: Universul Juridic, 2012), 783.

[10] Usually, the suretyship has as landmarks of its limits the amount, the nature or conditions in which the main obligation has been assumed. In the doctrine have been given examples of limits for the suretyship: a) the fidejussor cannot compel himself to perform another obligation than the one to which the main debtor has already compelled himself; b) even if the fidejussor would have compelled himself to pay an amount of money higher than the one owed by the main debtor, he is not compelled until the concurrence of this latter amount; c) if the suretyship has been limited by a certain amount of money, the fidejussor cannot pay that amount plus interests.

case when the former had notified him in due time about them [C.C., art. 2290 par.(2)]; (iv) the simple extension of the term allowed to the main debtor by the creditor does not liberate the fidejussor (C.C.art. 2301 thesis I); however, the prorogation of the main obligation's term does generate the following consequences: on one side, the fidejussor is able to oppose to a possible lawsuit entered against him by the creditor through invoking the benefit of the main obligation's prorogation; on the other side, should the creditor have granted to the debtor a new delay for the payment without the fidejussor's consent, this latter, in the case he had obliged himself *with* the debtor's agreement would be entitled to enter a regressive lawsuit vs. the debtor even before paying, since the moment when the concerned debt has reached to its initial deadline, should he consider that the prorogation of the main obligation's term would cause him to endure significantly greater risks than the ones he had anticipated at the moment when he had chosen to oblige himself; for example, the respective risks could significantly increase due to the possible insolvency of the debtor, a case in which it would be useless for the fidejussor to exert his regressive right [C.C., art. 2312 par. (2)]; (v) the main debtor's lapse of time does as well generate effects upon the fidejussor (C.C., art. 2301 final thesis); should a suspensive term have been stipulated for the debtor's benefit, the lapse from it would generate, as a consequence, the immediate exigibility of his obligation; since fidejussion is an accessory contract, this sanction is as well opposable to the fidejussor.

The fidejussion contract is a solemn one, because the law requires that the fidejussion contract's ascertaining document should bear a precise form (it has to be either authentic or under private signature); the sanction for this disposition's disrespect would be the absolute nullity[11]. Fidejussion is not to be presumed: it has to be willingly and openly stated (C.C., art. 2282).

The fidejussion contract is an unilateral one, because only one of the sides of this juridical relationship is obliging itself, namely the

[11] According to the Civil Code of 1864, the suretyship contract was consensual, because the simple agreement of will concluded between the creditor and fidejussor was enough for its valid conclusion. The written form was necessary only to prove the contract concluded, under the legal conditions required by the law to prove any legal act. (see, in this sense, Stătescu, in Stătescu and Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, 421; Pop, *Drept civil. Teoria generală a obligaţiilor*, 405.

fidejussor does oblige himself towards the creditor to guaranty for the debtor's obligation[12].

Through its nature,the fidejussion contract is a gratuitous one because, usually, when he does conclude a fidejussion contract, the fidejussor does not aim for obtaining a subsequent benefit. However, the Civil Code does stipulate, for the fidejussor, the possibility of assuming the guaranty obligation in exchange for a remuneration (C.C., art. 2280). Since it is in the debtor's interest to bring in a guarantor, it is him who will be due to pay the respective remuneration; this fact does imply that the debtor should be a side within the fidejussion contract. Gratuitous fidejussion could be either a disinterested act (where the fidejussor who pays for the debtor's due does lawfully subrogate himself into all the creditor's rights and, thereby, comes to own a regression right vs. the debtor) or a liberality creating the effects of an indirect donation. Doctrine has issued the opinion that, in the absence of a regressive intention towards the main debtor, we would be no more in the presence of a fidejussion "but of a *constitutum*, that is to say of a commitment about simply paying somebody else's debt"[13].

e) Fidejussion's juridical requirements. Alike any other contracts, the fidejussion one has to fulfill the essential validity conditions for a contract (C.C., art. 1179). In what concerns its form's requirements, the law states that fidejussion ought to be assumed through a written document, either authentic or under private signature, disrespect being sanctioned by absolute nullity (C.C., art. 2282).

Apart from these general conditions, the fidejussion contract is also due to fulfill some special requirements, which pertain to the fidejussor's person and to the guarantied obligation[14].

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[12] The doctrine has emphasized the fact that is not of the essence of the suretyship contract the unilateral feature. Thus, when the creditor compels to a counter-performance in the favor of the fidejussor, the contract is synallagmatic. For instance, it is a counter-performance the obligation of the creditor to bring other guarantees in order to ensure the performance of the guaranteed claim or to reduce the amount of the main obligation. (see, in this sense, Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 782 and the works cited therein).

[13] Vasilescu, *Drept civil. Obligaţii,* 122.

[14] See, in this sense, Stătescu, in Stătescu and Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, 421; Vasilescu, *Drept civil. Obligaţii,* 124.

i) The special requirements pertaining to the fidejussor's person do concern, respectively, her solvency and domicile. According to the C.C.'s art. 2285, the debtor who is obliged to constitute a fidejussion ought to introduce, to this purpose, a person who is legally capable, is endowed with solvency conditions, that is to say she owns and maintains in Romania an amount of goods which would be sufficient in order to satisfy to the concerned claim and who has chosen to domicile in Romania. Should one among these conditions not to be fulfilled, the debtor would have to introduce another person as fidejussor. Should the debtor introduce several fidejussors, the law's requirements ought to be fulfilled by each of them latters. Yet, these rules are not to be applied when the creditor himself has requested for a certain person to be the fidejussor.

We have to remark the fact that the fidejussor ought to fulfill the special requirements concerning his solvency and domicile at the moment when the fidejussion contract is concluded but as well afterwards, until the main obligation would be fulfilled (the legislator says: "she owns and maintains in Romania an amount of goods which would be sufficient in order to satisfy to the concerned claim") because, in the contrary case, the debtor would have to introduce another fidejussor. Should litigations appear concerning the suitability of the respective fidejussor goods'amount or about the money amount offered instead of a fidejussion, these would be solved by the judicial court, through the procedure of a Presidential Ordinance (C.C., art. 2287).

ii) Theoretically, whatever obligation may be guarantied through a fidejussion contract, even the *intuitu personae* ones[15]. Yet, in practice, fidejussion is made use of in order to guaranty mostly pecuniary obligations, especially the ones issued from loan contracts.

Through fidejussion may be guarantied the obligations which already exist at the moment when the fidejussion contract is concluded but as well future obligations or obligations which would be affected by a condition, that is to say bearing no precise deadline [C.C.,art. 2288 par. (3)]. Natural obligations could also be guarantied through fidejussion,

[15] For the intuitu personae obligations “the fidejussor must present the same qualities as the main debtor, because it remains valid the rule of the performance in nature, the suretyship itself does not presume a datio in solutum (payment) or a performance by equivalent”. Vasilescu, *Drept civil. Obligaţii,* 123.

should the fidejussor be aware of this feature [C.C.,art. 2288 par. (2)]. Fidejussion could also be constituted for obligations issued or not from contracts, for undetermined obligations or even for expected ones[16]. When it is provided in view of covering some future or undetermined debts or either for an undetermined time period, fidejussion is taken into consideration as concluded for a period of three years and (should, in the meantime, the respective claim have not become exigible) the fidejussor may denounce it at the fulfillment of this interval through due notifications made to the debtor, to the creditor and to the other fidejussors. In the case of the judiciary fidejussion, this rule is not to be applied (C.C.,art. 2316).

f) Fidejussion's effects. The effects of fidejussion are ruled by the law through taking into consideration the existing relationships among the persons involved to such a juridical operation: the ones between the contract'sides (creditor and fidejussor), the ones between debtor and fidejussor and the relationships among fidejussors (should there be several of them).

Effects of fidejussion generated between creditor and fidejussor. These effects are explained, on one side, through the existence of the fidejussion contract between the creditor and the fidejussor and, on the other side, through the fact that the fidejussor's obligation is an accessory and subsidiary one in respect to the main debtor's obligation[17].

From the features of the fidejussor's obligation that consist in being accessory and subsidiary, the following consequences do result: Should the main debtor not execute his obligation, the creditor would have a right to option between entering a lawsuit vs. the main debtor and requesting from the fidejussor to execute his own obligation; however, the fidejussor required to fulfill the main obligation is able to oppose towards the creditor some defense means and the general type of exceptions; should he be sued prior to the debtor, the fidejussor is able to

[16] The doctrine has stated that a practical application of the possible suretyship is the suretyship contract required for the employment of administrators stated by the Law No 22/1969 regarding the administrator, warranty deposits and the liability in case of administration of public companies, authorities or public institutions. (Official Gazette no.132 – 18 nov.1969).Vasilescu, *Drept civil. Obligaţii,* 123.

[17] Zlătescu, *Garanţiile creditorului*, 114.

oppose towards the creditor the exceptions which specifically pertain to his own obligation.

The creditor's right to option when the debtor's obligation is not executed. In the case when the debtor would not fulfill his obligation, the creditor could either sue the main debtor or request from the fidejussor to execute his own obligation; for this to be done it would not be necessary for him to first request for the coerced distrain in regard to the main debtor and, eventually, to bring appropriate evidence of this latter's insolvency (because the juridical ground of the creditor's right to option is the C.C.'s art. 2280, according to which the fidejussor does oblige himself to execute the debtor's obligation, should this latter not perform it; the C.C.'s art. 2293 develops the idea from the C.C.'s art. 2280, by making the precision that the fidejussor would indeed be due to fulfill the debtor's obligation but only should this latter not fulfill it). Therefore, in order to be able to request from the fidejussor the fulfillment of the debtor's obligation, the creditor should, previously, prove the fact that the debtor did not execute his obligation, because the fidejussor's obligation is a subsidiary one - thus, the creditor has to prove either the fact that the debtor finds himself lawfully put in delay [C.C.,art. 1523 par. (4)], or the fact that the creditor himself has summoned this latter to this purpose according to the C.C.'s art. 1522, that is to say through a written notification requesting for the obligation's fulfillment or through a subpoena. Should the main debtor, once being under lawful delay or being put into it, not execute his obligation, the creditor would be, therefore, entitled to subpoena the fidejussor or either, should the law grant to the fidejussion contract the power of an executory title, the creditor would be enabled to proceed in suing the fidejussor's goods[18].

General-type exceptions which the fidejussor may oppose. The fidejussor, once summoned to execute the main obligation, may oppose to the creditor either some means of defense or some general-type exceptions, which are grounded either within the main obligational relationship (the one between the creditor and the main debtor) or within the subsidiary obligational relationship (the one between the creditor and the fidejussor, namely the fidejussion contract). Thereby, the fidejussor,

[18] C. Irimia, in Fl.A. Baias, E. Chelaru, A. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2264* (Bucureşti: C.H. Beck, 2012), 2234.

as a subsidiary debtor, may oppose towards the creditor not only the exceptions which the main debtor could have opposed by himself, but as well his own personal exceptions[19].

Doctrine provides, as examples within the category of personal exceptions for the fidejussor, issued from the fidejussion contract, the following: the ones pertaining to the fidejussion contract's validity (like the lack of general capacity, the lack of consent, the vice of consent, the lack of the written form, the special incapacitating causes) and the clauses stipulated within the contract, concerning the guaranty's extent, the terms and the conditions[20].

Specific exceptions to be opposed by the fidejussor. Should the creditor not sue the main debtor first, the fidejussor would be able to oppose towards him some exceptions which are specific to his own obligation, namely: the exception of the discussion benefit and the exception of the division benefit.

The discussion benefit (beneficium discussionis).It is a faculty imparted to the fidejussor which consists in the possibility of requiring from the creditor who has entered a lawsuit against him to sue first for the main debtor's goods (C.C., art. 2294). The fidejussor owns the right of invoking the discussion benefit, but he is not obliged to do so.

For the exception of the discussion benefit, the admissibility conditions are the following(C.C., art. 2295): (i) the fidejussor ought to invoke the discussion benefit before the court's deliberations upon the essence matter of the lawsuit concerning the fidejussor; (ii) the fidejussor ought to indicate to the creditor what goods of the main debtor may this latter be sued for and ought to provide to the former the necessary sums in order to sue for these goods.

Once admitted, the exception of the discussion benefit does generate, as a result, the suspension of the lawsuit against the fidejussor. Should the lawsuit for the debtor's goods bring the total, or either partial

[19] The doctrine gives as example of exceptions which are not inherent to the debt of the main debtor, but his personal exceptions, the ones based on the vices of consent (error, dole or violence) or on his lack of discernment. (Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile* , 785).

[20] Irimia, in Baias, Chelaru, Constantinovici and Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2264*, 2237; Stătescu, in Stătescu and Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, 423; Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 785.

only, realization of the creditor's claim, the fidejussor's obligation would be extinguished at the extinction moment of the main obligation, totally or either partially. Should the creditor's claim not be extinguished, or should it only partially diminish, the lawsuit against the fidejussor would be resumed[21].

After the indication, by the fidejussor, of the goods to be sued for belonging to the main debtor, should the creditor, by his own fault, be late in suing the debtor, he would be, therefore, liable towards the fidejussor for the afterwards supervened insolvency of the main debtor, yet only within the value limits held by the amount of the indicated goods [C.C., art. 2295 par. (2)][22]

The division benefit (beneficium divisionis)**.** The division benefit is a faculty, acknowledged to the fidejussor by the law, of requesting from the creditor to first divide his own lawsuit and to consequently reduce it to the respective parts of each, under the hypothesis that several persons have constituted themselves as fidejussors of a same debtor for a same debt [C.C., art. 2298 par. (1)].

Should a plurality of fidejussors exist, art. 2297 does institute the principle that each of them is obliged for the debt's whole and thereby could be sued as such; yet, the sued fidejussor may invoke the division benefit, thus cancelling the rule consisting in each fidejussor's own liability for the debt's whole.

Should one among the co-fidejussors be touched by insolvency, the consequences produced by the exception of the division benefit would be different, in respect to the moment when insolvency has occurred: i) Has it occurred before the concerned fidejussor has thought of invoking the division benefit, he will therefore remain proportionally

[21] According to Art 647 Para 2 of the Civil Procedure Code: "when it is aimed only the fidejussor third-party or mortgage guarantor, all documents referring to the enforcement shall be communicated in the same time for the main debtor, who shall be inserted ex officio in the procedure of forced execution".

[22] Therefore, if the value of the assets showed by the fidejussor is higher or equal with the claim, the creditor no longer has the right to follow the fidejussor; if the value of these assets is smaller than the claim, the fidejussor may be followed for the difference between the value of the assets showed by the fidejussor for enforceability and the value of the claim. Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligațiile*, 786.

obliged for this insolvency, as the other fidejussors are [C.C., art. 2298 par. (2) first thesis]; ii) has the insolvency of one among the fidejussors occurred after the concerned fidejussor had invoked the division benefit, the fidejussor who has obtained the division will not be liable for this insolvency, because it is the creditor who takes on himself the respective risk [C.C., art. 2298 par. (2) final thesis].

Should the creditor himself have divided his action of suing the co-fidejussors, he could no more be entitled to retract his choice of division, because it does signify the renunciation in respect to the possibility of suing each of the co-fidejussors for the debt's whole, even if fidejussors touched by insolvency might have existed before the moment when he had operated the division. Consequently, he would have to bear with the respective fidejussor's insolvency, even if it had occurred before the division's moment (C.C., art. 2299).

The division benefit could not be invoked when the fidejussor has chosen to give it up(C.C., art. 2297 final thesis) or when he has obliged himself "together with the main debtor under the titles of solidary fidejussor or solidary co-debtor"(C.C., art. 2300).

Effects of fidejussion between main debtor and fidejussor. Between the main debtor and the fidejussor, the occurring effects ought to be referred to the fact that the fidejussor does own a recourse right towards the main debtor, usually exerted after the payment was done; yet, exceptionally, the former might exert such a right even before paying for the debtor's main due.

The recourse right. The fidejussor who has paid the main debtor's due does own a recourse right vs. this latter[23], that he may exert either through a personal lawsuit grounded upon the juridical institutions of mandate or of business'administration, either a subrogatory lawsuit grounded upon legal stipulations (C.C., art. 2305).

In the case when he should make use of a personal lawsuit (of the personal recourse, as doctrine has designated it), the extent of the fidejussor's recourse right would be different in respect to the ground upon which the lawsuit is built: upon a mandate (that is to say with the

[23] The right to sue for compensation of the fidejussor against the main debtor is the essence of the suretyship, "because it is very natural to ask him the refunding of the payment he performed". (C. Hamangiu, I. Rosetti Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol. II, (Bucureşti: Naţională S. Ciornei, 1929), 1051.

main debtor's agreement) or upon a business'administration procedure (therefore the debtor was a third side in respect to the fidejussion)[24].

The fidejussor's recourse lawsuit grounded upon a mandate is admissible when the fidejussor had obliged himself to guaranty for the debtor's obligation with this latter's agreement. In this case, the fidejussor may request frrom the main debtor everything that he had paid for (that is to say the capital, the interest and the expenses) as well as the subsequent indemnifications pertaining to whatever prejudice he might have suffered because of the respective fidejussion. He may also request for interests in respect to whatever money amount he might have had to pay towards the creditor, and that even if the concerned main debt had produced no interests at all [C.C., art. 2306 par. (1)]. Consequently, had the fidejussion been concluded with the main debtor's agreement, the paying fidejussor's recourse right ought to be total.

The fidejussor's recourse lawsuit grounded upon a business'administration procedure is admissible when the fidejussor had obliged himself to guaranty for the debtor's obligation without this latter's consent or, in more appropriate words,without this latter's awareness about this fact. In this case, the fidejussor might recover from this latter only what the debtor would have been obliged to pay by himself (indemnifications included) without even the existence of the fidejussion contract. The fidejussor may also request from the debtor the pertaining expenses he might have covered after he had notified towards the debtor the payment of this latter's main due [C.C., art. 2306 par. (2)].

Apart from the personal lawsuit, the fidejussor does also dispose of the subrogatory lawsuit, through which he could claim for the restitution of the money amount he had previously paid to the creditor. According to the C.C. in its art. 2305, the fidejussor who, being notified by the creditor, has paid to this latter the debtor's due is thereby lawfully subrogated into all the rights that the creditor had previously owned against the debtor. In this case, the fidejussor's recourse right is grounded upon the legal personal subrogation, which provides the disadvantage that the fidejussor may request from the debtor only the

[24] As an exception, for the incapacity of the main debtor, when he is freed of the obligation invoking his incapacity, the fidejussor has the right to sue for compensation only within the limits of the debtor getting rich (Art 2307 Civil Code).

restitution of the payment he had previously done towards the creditor, but it also provides the advantage that the fidejussor is entitled to preserve for himself all the tokens that the creditor had held for the execution of his claim[25]. The fidejussor is also preserving for himself the solidarity benefit in regard to the debtors for whom he had paid. Therefore, in the case when the fidejussor had guarantied for several solidary debtors, he is thereby entitled to pretend from whatever among these latters the restitution of the payment he had previously forwarded to the creditor (C.C., art. 2308)[26].

Should the fidejussor have assumed the guaranty obligation against the main debtor's will, the only way through which he could exert his recourse right would be the subrogatory lawsuit (C.C., art. 2309).

Anticipated recourse. The rule is that the fidejussor comes to own a recourse right vs. the debtor after the fulfillment of the main obligation.Through an exception, the law does acknowledge the right to an anticipated recourse (that is to say performed before the fulfillment of the payment by the fidejussor) only to the fidejussor who has obliged himself with the debtor's agreement. This type of recourse right could be exerted in the following situations (C.C.'s art. 2312): a) when the fidejussor is judicially sued for the concerned payment; b)when the debtor is touched by insolvency; c) when the debtor has obliged himself to liberate the fidejussor within a certain term which has just passed; d) when the due debt has reached to its deadline, even if the creditor, without the fidejussor's consent, might have had granted to the debtor a

[25] The doctrine has stated that the fidejussor may cumulate the advantages of the two actions (personal and subordinated), by using the unsecured loans to receive what he has paid to the creditor, case in which are maintained the warranties accompanying the claim guaranteed and the personal action to receive possible compensation or damages (for the exposure of this idea…). Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 789 and other authors cited therein.

[26] If the fidejussor has guaranteed only one of the joint debtors, the doctrinarian opinions are divergent. One opinion states that by the effect of the subrogation, the fidejussor is substituted to the creditor and shall be able to follow any of the joint debtors for the whole claim, while another opinion states that the fidejussor cannot have more rights than the guaranteed debtor, reason for which he shall be able to follow the other debtors only for the part to which he is entitled to (for presenting this idea…). Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 789, footnote no.2 .

new term for the concerned payment; e) when, due to the massive losses suffered by the debtor or due to the debtor's own fault, the fidejussor might come to bear significantly greater risks than the ones he had accepted at the moment when he had obliged himself;

Effects of fidejussion among several fidejussors. When several persons have offered fidejussion to the same debtor and for the same obligation (either through a same convention or through different contracts, concluded between the respective fidejussors and the creditor), their solidarity is presumed and, therefore, each of them may be obliged to pay the whole debt, unless the sued fidejussor would invoke the division benefit or if he would have clearly given it up (C.C.'s art. 2297). In the case of a fidejussors' plurality, the one among them who has paid the whole debt does own a recourse right: on one side vs.the main debtor and, on the other side, vs. each of the other fidejussors for their respective parts of the debt (C.C.'s art.2305), [C.C.'s art. 2313 par. (1)][27].

The recourse right of the paying fidejussor vs. the other ones may be exerted (even if he had not, previously, made use of the recourse right vs. the main debtor) in the situations stipulated by the law (C.C.'s art. 2312) for exerting the anticipated recourse [C.C.'s art. 2313 par. (2)], but he is entitled to do that only after he has paid the concerned debt. After the solidary obligation has been extinguished through payment, it becomes thereby divisible; so, the paying fidejussor becomes entitled to sue each of the other fidejussors for these latters'respective parts only. As the main debtor's insolvency risk is equally assumed by all of his fidejussors, analogously, the insolvency risk pertaining to a fidejussor is proportionally divided between the other fidejussors and the one who has effectively paid for the concerned debt [C.C.'s art. 2313 par. (3)].

g) Extinction of the fidejussion's obligation. The doctrine does underline the fact that, generally, guaranties do extinct either directly (through the principal way) through one of the known general or specific modalities used for the obligations'extinction or indirectly (through the

[27] The action stated by Art 2313 Civil Code regarding the right to sue for compensation of the fidejussor is a personal action based on business management. If the payer-fidejussor understands to use the unsecured loan shall be able to ground his action on Art 1595 Let c) and Art 2305 Civil Code). For comments on these issues see Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 790-91 .

accessory way), due to the extinction of the main obligation, in virtue of the principle accesorium sequitur principale[28].

The fidejussion's obligation is extinguished through the principal or direct way in the following cases: a) confusion between creditor and fidejussor (C.C.'s art. 1626); b) compensation supervening between creditor and fidejussor ; the fidejussor's debt remission [C.C.'s art. 1633 par. (2)]; c) the loss by the fidejussor of the subrogation benefit, due to the creditor's deed (C.C.'s art. 2315)[29]; d) denouncement of the fidejussion offered for future or undetermined obligations or either offered for an undetermined period in time (C.C.'s art. 2316) ; e) the creditor's lack of diligence in suing the main debtor (C.C.'s art. 2318); f) the fidejussor's death does lead to the fidejussion's ceasing, even in the presence of a contrary stipulation (C.C.'s art. 2319); g) the fidejussion constituted in consideration of a certain professional office held by the main debtor does also cease at the ceasing moment of the respective appointment [C.C.'s art. 2320 par. (1)].

The fidejussion's obligation is extinguished through the indirect or accessory way due to the extinction of the main obligation through the modalities duly stated by the law (C.C.'s art. 1615), that is to say through payment, (C.C.'s art. 1496), payment in kind (C.C.'s arts. 1492 and 2317), compensation [C.C.'s art. 1621 alin. (1)], confusion due to the reunion of the qualities of creditor and debtor (C.C.'s art. 1626 first thesis),debt remission made towards the main debtor [C.C.'s art. 1633 par. (1)], fortuitous impossibility of execution, prescription of the lawful term for

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[28] Irimia, in Baias, Chelaru, Constantinovici and Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2264*, 2250; Stătescu, in Stătescu and Bîrsan, *Drept civil. Teoria generală a obligaţiilor*, 424; Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 791 and foll.; Vasilescu, *Drept civil. Obligaţii*, 131; V.D. Zlătescu, *Garanţiile creditorului*, 125-126.

[29] For instance, the creditor's action may consist of the renunciation to a real or personal guarantee, losing the rank of preference by not enlisting a real guarantee in the publicity registers etc. The consequence of the creditor's action must be the inefficiency of the unsecured loan. If the unsecured loan of the fidejussor has become impossible only partially, he shall be liberated only partially. The fidejussor may ask for his liberation in the litigation initiated by the creditor against him, not before this date. C. Hamangiu, N. Georgean, *Codul civil adnotat*, vol. IX, (Bucureşti: Librăriei Universala Alcalay & CO., 1934), 323, notes 25 şi 26.

the lawsuit concerning the main obligation (C.C.'s arts. 2296 and 2514), novation [C.C.'s art. 1613 par. (1)], fortuitous loss of the concerned good, should it extinct the debtor's obligation (C.C.'s art. 1634) etc.

The fidejussor does remain obliged for all the debts which could exist at the moment of the fidejussion's ceasing, even should these be submitted to a condition or to a term [C.C.'s art. 2320 par. (2)].

3. Letter of indemnity

1. Concept. Usually denominated as letter of banking indemnity, because it is mostly issued by the banks of commerce, the letter of indemnity (which nisruled, together with the comfort letter, by the Civil Code in its V-th Tome, Title X , Chapter III entitled "Autonomous Tokens") is defined as being:" the irrevocable and unconditioned commitment through which a person, denominated as issuing, does obligate herself, at the solicitation of a person denominated as chief accountant, in virtue of a pre-existing obligational relationship which, however, is independent from the issuing, to pay a sum of money to a third person, denominated as beneficiary, in conformity with the terms of the commitment she has assumed" [C.C.'s art. 2321 par. (1)].

From the present legal definition does result the existence of three distinct juridical relationships, among which a causal connection does operate: a "pre-existing relationship" (the sides of which do have the respective qualities of creditor and debtor), also denominated by the doctrine as initial, principal, fundamental etc. relationship; a second pre-existing juridical relationship, which is created between the chief accountant and the issuing of the concerned letter of indemnity and a third juridical relationship which is subsequent to the other two (concluded between the issuing of the letter of indemnity and its beneficiary, which has the quality of creditor in this third relationship, but also in the initial relationship). In the third juridical relationship, the chief accountant is not a side of the contract, but he is, however, involved to this juridical operation due to the second juridical relationship, which does exist between himself and the issuing of the letter of indemnity and which does entitle the chief accountant to solicit from the issuing the payment of a sum of money towards the beneficiary of the letter of indemnity. The purpose of the concerned letter of indemnity is to guaranty for the execution of the obligation which had been assumed by the chief accountant (who is the debtor in the initial juridical relationship)

towards the beneficiary (who is also the creditor in the initial juridical relationship).

a) Juridical features of the letter of indemnity.

The juridical features of the letter of indemnity are the following[30]:

a) it is an unilateral contract[31], concluded between the issuing (under the quality of debtor) and the beneficiary (under the quality of creditor). This contract is created due to the fact that the issuing's offer does come to be accepted by the beneficiary;

b) it is irrevocable [C.C.'s art. 2321 par. (1)], which means that the issuing could not withdraw the constituted guaranty during the validity period of the respective letter of indemnity;

c) it is a formal contract, because the limits of the letter of indemnity do result from the contents of its ascertaining written document. The letter of indemnity ought to contain all the necessary elements (the sum which ought to be paid, the currency, the term, the place, the conditions etc.) so that the bank could be able to fulfill the payment towards the beneficiary. In this respect, the C.C.'s art. 2321 par. (1) does stipulate that the issuing will pay the concerned sum of money to the beneficiary:"in conformity with the terms of the commitment he has assumed";

d) it is unconditioned, because the commitment assumed by the issuing is to be executed on a first and simple request from the beneficiary [C.C.'s art. 2321 par. (2) first thesis], with no possibility for the issuing to ask for the fulfillment of whatever condition[32]. As an exception, should the letter's text stipulate the fulfillment of a certain condition for the guaranty's execution (for example, the presentation of certain written documents),the beneficiary would have to obey to it [C.C.'s art. 2321 par. (2) final thesis];

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[30] Irimia, in Baias, Chelaru, Constantinovici and Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2264*, 2259; Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 795-796; Vasilescu, *Drept civil. Obligaţii*, 135-136.

[31] There is also the opinion that the letter of guarantee is a unilateral legal act.

[32] If the issuer must perform the guarantee automatically, at the first and simple request of the beneficiary, the issuer cannot delay the payment “by rising exceptions of division, of discussion or of losing the right to sue for compensation, as for the suretyship”. (Vasilescu, *Drept civil. Obligaţii*, 135, footnote no.4).

e) In respect to the initial contract, by which it was determined on a logically causal chain, it is, however, a juridically autonomous act. Through the issue of the letter of indemnity, the issuing does not assume the obligation of paying the debt owed by the chief accountant (who is the debtor within the initial juridical relationship) to his own creditor, but assumes a new obligation, the one of guaranting for the appropriate execution of the initial obligation. The issuing's obligation has an existence of its own, which is autonomous in respect to the obligation for the guaranty of which the letter of indemnity had been issued. This new obligation's object does consist in a sum of money, no matter which might have been the due deed pertaining to the initial juridical relationship.

The fact that the issuing's obligation is juridically independent does mean that the issuing is a main debtor, and this circumstance does generate the following consequences: i) the issuing cannot oppose towards the beneficiary the exceptions which would be grounded upon the obligational relationship which is prior to the commitment assumed through the letter of indemnity" [C.C.'s art. 2321 par.. (3) first thesis][33], as he would have been entitled to should his obligation have been an accessory in respect to the guarantied claim and should he have owned the quality of a subsidiary debtor (as the fidejussor is); ii) the transmission of the rights and/or obligations from the pre-existing obligational relationship does not determine as well the transmission of the letter of indemnity itself, except for the case when a convention would exist which would be contrary to this rule that the legislator has enforced [C.C.'s art. 2321 par. (5)]; yet, its beneficiary may transmit the letter of indemnity separately from the claim it does guaranty for, should this right of his have been duly stipulated within the letter's text [C.C.'s art. 2321 par. (6)].

b) Effects of the letter of indemnity. The effects of the letter of indemnity are the following:

a) the beneficiary does acquire the right of requesting from the issuing the fulfillment of the letter of indemnity, while the issuing becomes

[33] For instance, the issuer shall not be able to refuse the payment, by opposing the beneficiary with exceptions such as nullity, termination or performance of the obligation in the initial contract. (Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 796).

obliged to pay the guaranty, as a principle, upon the first and simple request from the beneficiary. Yet, the issuing is also obliged not to pay, in the cases of an abuse or of an obvious fraud committed by the beneficiary [C.C.'s art. 2321 par. (3) II-nd thesis];
b) the issuing who has fulfilled the payment does own a recourse right vs. the chief accountant who has requested for the letter of indemnity [C.C.'s art. 2321 par. (4)]. This recourse right is justified by the second pre-existing obligational relationship, which has been created between the chief accountant and the issuing of the letter of indemnity.

Unless the text itself of the letter of indemnity should stipulate otherwise, it does generate effects since the moment of its issue till the fulfillment of the stipulated term, when its validity does lawfully cease, should the original of the letter of indemnity be remitted or not [C.C.'s art. 2321 par. (7)]. The issuing's obligation may also cease through the extinction modalities which are common for all obligations (payment, payment in kind, compensation, confusion, debt's remission, fortuitous impossibility of execution).

4. Comfort letter.

a) Concept. Usually denominated as "letter of intent", the comfort letter is defined by the Civil Code as:" the irrevokable and autonomous commitment through which the issuing does assume an obligation to do or to do not, for the purpose of sustaining another person, denominated as debtor, in view of the execution of this latter's obligations towards one of her creditors. The issuing could not be able to oppose towards the creditor whatever modality of defense or exception which could be derived from the obligational relationship which does exist between the creditor and the debtor." [C.C.'s art. 2322 par. (1)]. This form of commitment may be encountered especially in what concerns the relationships which exist between founding ("mother") societies and their own branch offices, in what concerns the relationships which exist between founding ("mother") societies and other societies to them economically subordinated[34] and in what concerns the relationships which exist between commerce banks and their own clients.

[34] Vasilescu, *Drept civil. Obligaţii*, 137.

b) Juridical features of the comfort letter. Doctrine has pointed out the following juridical features of the comfort letter[35]:
a) it is an unilateral act (a contract) through which the issuing does assume an obligation to do or to do not towards the commitment's beneficiary[36]. The contract is created due to the fact that the issuing's commitment is accepted by the beneficiary, thereby acquiring the value of a guaranty. The commitment's beneficiary does have the quality of creditor within a contractual relationship of which the commitment's issuing is not a side; analogously, the debtor from the respective contractual relationship is not a side in the contractual relationship which concerns the issue of the comfort letter. The obligation assumed by the issuing may be a result one (for example, the founding society does oblige itself to provide financial help to the debtor) or a modalities'one (for example, the founding society does oblige itself to develop its highest diligence for the purpose of fulfilling the obligations assumed by its own branch office);
b) it is irrevokable [C.C.'s art. 2322 par. (1)], because the issuing could not withdraw the constituted guaranty during the validity period of the respective letter of comfort;
c) In respect to the initial contract, by which it was determined on a logically causal chain, it is a juridically autonomous act. In this former contract, the beneficiary of the letter of comfort does own the quality of creditor, since the issuing does not assume the obligation of paying the debt owed by the debtor to the creditor but assumes a new obligation (to do or to do not), with the purpose of sustaining the debtor in the fulfillment of this latter's obligations towards the creditor. Since the letter of comfort is a juridically autonomous act, the law does stipulate that the issuing could not oppose towards the beneficiary the means of defense or the exceptions which would be derived from the obligational relationship existing between the creditor and the debtor [C.C.'s art. 2322 par. (1) final thesis];

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[35] Irimia, in Baias, Chelaru, Constantinovici and Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2264*, 2263; Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 799; Vasilescu, *Drept civil. Obligaţii*, 138-139.
[36] There is also the opinion according to which the letter of comfort is a unilateral legal act (for pros and cons to this opinion, see Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 799, footnote no.1).

d) it is a formal contract, because the issuing's commitment and the limits of the letter of comfort do result from the contents of its ascertaining written document. The letter of comfort ought to contain all the necessary elements from which could result the debtor's capacity of fulfilling the obligations he has assumed towards the creditor (the validity duration of the letter of comfort, eventually the possibility of its prolongation, the highest amount of money in view of which the letter was issued, the precised sum of money that the issuing does oblige himself to place at the debtor's disposition for financial support, in the case of such a commitment, ought to be stated, etc.).
e) for the debtor as well as for the creditor, it is an *intuitu personae* contract[37].

c) Effects of the comfort letter . The effects of the comfort letter are the following:
a) The comfort letter's issuing may be obliged to the payment of indemnifications towards the creditor , should the debtor not execute his obligation. The creditor has to bring evidence for both the fact that the comfort letter's issuing has not fulfilled the obligation he had assumed through it and for the amount of the prejudice he had to suffer due to the issuing's lack in fulfilling his obligation. [C.C.'s art. 2322 par. (2)];
b) the comfort letter's issuing of whom the claims vs. the creditor have fallen does own a recourse right vs. the debtor [C.C.'s art. 2322 par. (3)]. The issuing's recourse right vs. the debtor may be realized through a personal lawsuit, grounded either upon the mandate (when the comfort letter was issued with the debtor's agreement) or upon the business administration procedure (when the debtor was not aware of the comfort letter's existence).The issuing's recourse right may not be exerted through a subrogatory lawsuit, because the issuing's obligation is an autonomous one and because the issuing does not effectively pay for the debtor's due so that he could substitute himself into the rights formerly held by the creditor vs. the debtor[38].

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[37] Irimia, in Baias, Chelaru, Constantinovici and Macovei (coord.), *Noul Cod civil. Comentariu pe articole, art. 1-2264*, 2263.
[38] Vidu, in Pop, Popa and Vidu, *Tratat elementar de drept civil. Obligaţiile*, 800; Vasilescu, *Drept civil. Obligaţii*, 138-138.

The obligation of the comfort letter's issuing does cease through the extinction modalities which are common for all obligations (fortuitous impossibility of execution, payment, payment in kind, compensation, confusion, debt's remission). Should the debtor's obligation be extinguished, the issuing's obligation would as well cease, since it would remain without its object.

5. Conclusions

By ruling over the creditors' guaranties, the new Civil Code is surprising us through some innovations operated in its employed terminology (for example, instead of the syntagma: "the creditors'general pledge right", in order to designate the creditors'right over the whole amount of goods from their debtor's patrimony, the following new syntagma is made use of: "the creditors'common guaranty".

Other innovations are of a substantial nature, because the legislator does institute new juridical instruments, frequently employed by the domain's professionals: the letter of indemnity and the comfort letter. Together with the fidejussion, these two juridical instruments do constitute personal guaranties for the creditors and their practical utility is beyond any doubt.

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SOLIDARITY, DIALOGUE AND THE COOPERATION OF SOCIAL PARTNERS AS A PART OF SOCIAL MARKET ECONOMY

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Abstract:

The Polish Constitution of 1997 regulates the socio-economic system relatively widely. It treats the cooperation of social partners as a part of the social market economy. The constitutional concepts have been analyzed in the legal doctrine and constitutional jurisprudence. The dialogue is implemented by such instruments as tripartite committees, collective bargaining agreements and worker participation.

Key words: *social market economy, cooperation of social partners, tripartite committee, collective bargaining agreements*

INTRODUCTION

The Polish Constitution of2 April 1997[3]regulates the socio – economic system relatively widely, including such issues as economic, social and cultural freedoms and rights of citizens, as well as the principles of that system. In order to present a general overview as the most important should be mentioned the constitutional right to ownership, other property rights and the right of succession and they legal protection (article 64), the freedom to choose and to pursue his occupation and to choose hisplace of work, as well as the obligation of public authorities to pursue policies aiming atfull, productive employment by implementing programs to combat unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention (article 65). Moreover, the Constitution provides that everyone has the right to safe

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[3]The Constitution of the Republic of Poland, published in the Official Gazette DziennikUstaw of 1997, No 78, item 483, with later amendments.

and hygienicconditions of work (article 66). Citizens have the right to social security whenever incapacitated for work by reason of illness or invalidism as well as having attained retirement age (article 67). Everyone has also the constitutional right to have his health protected (article 68).

What is more, some of the constitutional political rights and freedoms should be also perceived asoperatively coupled with the above mentioned economic and social rights. The Constitution guaranteesthe freedom of association (article 58), including the freedom of association in trade unions, socio-occupational organizations of farmers and in employers' organizations (article 59 p. 1). According toarticle 59 p. 2-4, trade unions as well as employers and their organizations have the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective bargaining agreements and other agreements. Trade unions have the right to organize workers' strikes or other forms of protest within the limits specified by law. The scope of the freedom of association in trade unions and employers' organizations as well as other trade union freedoms can be subject only to such limitations that are acceptable by international treaties binding Poland. It should be added that the Polish Constitution also guarantees (article 60) that Polish citizens enjoying full public rights have a right of access to public service on equal terms. The Constitution guarantees equal rights for men and women also in social and economic life - in particular, equal rights regarding education, employment and promotion, the right to equal compensation for work of similar value,to social security as well as to hold offices and to receive public honors and decorations (article 33).

The above quoted constitutional regulations concerninghuman rights and freedoms are complementaryto a number of constitutional principles expressed mainly in Chapter I ("The Republic") of the Constitution. For example, the Constitution ensures freedom for the creation andfunctioning of trade unions, socio-occupational organizations of farmers, societies, citizens' movements and other voluntary associations and foundations (article 12). It also protects ownership and the right of succession (article 21), the freedom of economic activity (article 22), provides that family farms are the basis of the agricultural system of the state (article 23) and work shall be protected by the state (article 24).

SOCIAL MARKET ECONOMY IN POLISH CONSTITUTION

A particularly relevant regulation is included in article 20 of the Constitution, which provides that "a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland".The concept of the social market economy has its origins in the views of German doctrine after World War II (Ordoliberalism) and Christian social ethics[4]. The concept is supposed to reconcile two equivalent objectives - economic efficiency and social justice. In order to interpret article 20 of the Constitution it is therefore necessary to refer to the above mentioned citizens' rights and freedoms and the principles of the Republic, as well astwoaxiologically and substantively fundamental principles provided by article 1 and article 2 of the Constitution. They provide that the Republic of Poland shall be the common good of all its citizens and a democratic state ruled by law and implementing the principles of social justice. Such constitutional background must be perceived as the foundation of the principles of solidarity, dialogue and cooperation between social partners. As indicated, the above mentioned principle is one of three basics of social market economy - along with the freedom of economic activity and ownership.

However, solidarity, dialogue and the cooperation of social partnersare relatively newconcepts of constitutional law in Poland. As has been emphasized in the literature "it is more difficult to determine their legal significance than the established institutions, such asthe freedom of economic activities or the right to ownership. They seem to give an expression of the general idea of negotiating the settlement of disputes (...)"[5]. Another author haspointed out that "these concepts are inherent in the integrative function of the Constitution, the essence of which is that the basis of all cooperation is, or at least should be, a consensus, which can only be determined in the process of negotiations

[4]Among extensive literature on the issue see the latest publication: Pułło, Andrzej, *Zasadyustrojupolitycznegopaństwa. Zarys wykładu* (Gdańsk: 2014) 177-181.
[5]See: Garlicki, Lech; *Polskie prawo konstytucyjne. Zarys wykładu* (Warszawa: 2014) 80.

on contentious issues or problems"[6]. It can be also referred to more general context of the preamble to the Constitution, which clearly states that social dialogue is an axiological background of the Constitution. This is a clear commitment to the ordinary legislatorto shape the mechanisms of the settlement of disputes and social tensions.It should be also added that the method of negotiations between social partners is also recognized in European institutions[7] and the very concept of a dialogue between social partners has been present in the documents of the European Union since the Single Act of 1986.

In one of recentcommentaries to the Constitution it has been stated that the concepts of article 20 (solidarity, dialogue and cooperation between social partners) appear to be - on one hand - the "plane of the joint development and decision-making"and on the other handthey create "duty to enable these entities active participation in the process of shaping the principles of market economy and a preference for the method of resolving social conflicts by negotiation (....)"[8]. Previously, it was also highlighted that these formulas should be primarily understood as an indication of certain values and a framework for making social and economic decisions (material and procedural aspects)[9].

The Polish Constitutional Tribunal has also referred to this matter stating that the social market economy based on solidarity, dialogue and cooperation between social partners presupposes the concept that the interests of market participants should be balanced and at the same time their autonomy should be extended.This creates a constitutional guarantee that disputes shall be settled by negotiations, which allows to overcome the tensions and conflicts in the management process. The principle of social solidarity, which is the basis of article 20 of the Constitution, means that social life shall be based on interdependence and shared responsibility of all its participants. Itassumestheir obligation to participate in burdens to society as well as mutual understanding between

[6]See: Witkowski, Zbigniew (ed.*); Prawo konstytucyjne* (Toruń: 2013), 105.
[7]See:Matey – Tyrowicz, M,*Dialog społeczny jako instytucja konstytucyjna i europejska* (in:) Kruk, M., Trzciński, J., Wawrzyniak J. (ed..); *Konstytucja i władza we współczesnym świecie. Doktryna – Prawo – Praktyka* (Warszawa: 2002), 82-85.
[8]Banaszak, Bogusław;*Konstytucja Rzeczypospolitej Polskiej. Komentarz (*Warszawa: 2012), 165.
[9]Garlicki, Lech; Teza 12 do art. 20 Konstytucji RP (in:) Garlicki, Lech (ed.*); Konstytucja Rzeczypospolitej Polskiej. Komentarz (*Warszawa: 2005), t. IV.

individuals, social groups and the state. This speaks for the preference for negotiating mode of settling disputes. Solidarity should be understoodin a way that all citizens, both employers and employees, shall berequired –to the extent appropriate to their abilities - to sacrifice certain privateinterests for the common good. At the same time, values expressed in article 20 of the Constitution should be treated in a comprehensive and complementary way, recognizing necessary balance between them[10].

The forms of dialogue between social partners are varied. Occasionally, the general idea of "social pact" is realized, but collective agreements and negotiations (article 20 in conjunction with article 59 p. 2 of the Constitution) are the oldest and most often practiced.The dialogue can be also conducted in a form of employees' consultation according to rules provided by law[11].Another distinctive example is the institutionalization of the dialogue and the cooperation between social partners in the form of the "Tripartite Commission for Socio – Economic Affairs".

TRIPARTITE COMMISSION FOR SOCIO – ECONOMIC AFFAIRS

The Tripartite Commission was originally introduced by the resolution of the Council of Ministers No. 7/94 of 15 February 1994. It finally got its statutory basis in 2001.[12]. According to the statute, theTripartite Commission is a forum for social dialogue held in order to conciliate interests of employees, employers and common good. Itaims to achieve and maintain social peace through holding social dialogue on such matters as salaries, social benefits and other social or economic

[10]The decision of the Constitutional Tribunal of 30 January 2001, case number K 17/00, OTK 2001, Nr 1, it. 4.

[11]The Law of 7 April 2006 r. on Informing and Consulting Employees; published in the Official Gazette DziennikUstaw of 2006, No 79, item 550, with later amendments.

[12]The Law of 6 June 2001 r. on the Tripartite Commission for Socio – Economic Affairsand on Provincial Commissions of Social Dialogue; published in the Official Gazette DziennikUstaw of 2001, No 100, item 1080, with later amendments; the Regulation of the Prime Minister of 22 February 2002 r. on Provincial Commissions of Social Dialogue; the Regulation of the Prime Minister of 13 November 2001 on the Rules of Procedure of the Tripartite Commission for Socio – Economic Affairs; published in the Official Gazette DziennikUstaw of 2001, No 130, item 1455, with later amendments.

matters. It is also competent totasks set out in separate acts (art. 1). The Tripartite Commission is composed of representatives of government, employees' and employers' parties. Each party has the right to: 1)introduce matters of great social or economic importance if they are considered as necessary for maintaining social peace, 2) take a stand - also together with another party of the Commission - on any matter concerning social or economic policy, 3) to call the other Commission party to take a position on a matter which is regarded as having considerable social or economic importance (article 2 p. 1-3).

The parties of the Commission that represent employees and employers may enter into the multi-establishment collective agreements and the agreements setting out the mutual obligations of the parties, according to the provisions of the Labour Code(article 2 p. 4-5). What is more, all parties of the Commission may enter into agreements on the mutual obligations of the parties in order to implement the objectives of the Commission (article 2a). The matters of a regional scale can be referred by the Commission to the provincial committees of social dialogue (article 2b).

The extensive provisions of article 3 of the act regulate in detail the temporaland objective scope of the responsibilities and competences of the Commission, including proceedings in the case of no consensus. First, the government presents the preliminary forecast of macroeconomic variables, which are the basis of the work on the budget bill for the next year. Next, employees and employers parties submit a joint proposal on the growth of wages inthe national economy in the next year, including the public sector, as well as minimum wages and pensions from the Social Insurance Fund. In the absence of a joint proposal the parties can present separate proposals or even the proposals ofthe organization whose members represent the party in the Commission. Then the government side presents to the Commission the state budget assumptions for the next year in order to take a position - in the same mode - bythe parties of employees and employers. The next round of the proceedings concerns the draft of the budget act and takes place sufficiently in advance before bringing it to the Sejm.The dates of particular stages of the proceedings are provided by law but they may be altered by the Commission at the request of the government. If parties do not submit their proposals or opinions on time they are treated as if they have resigned from the right to do it.

The Trilateral Commission consists of the representatives of the government, employees and employers. However, the representatives of local government, the President of the Polish National Bank and the President of the Central Statistical Office shall also participate in the work of the Commission with an advisory vote (article 4). The government side is represented in the Commission by the representatives of the Council of Ministers appointed by the Prime Minister (article 5). The employees' side is represented in the Commission by the representativesof trade union organizations which meet the representativeness criteria specified by the Act on the Tripartite Commission for Socio – Economic Affairs (article 6). The employers' side in the Commission is represented by the representatives of the organizations of employers which meet the representativeness criteria established by the act (article 7). All organizations referred to in article 6 and article 7 of the act have an equal number of representatives in the composition of the Commission. The exact number of representatives is determined by the Commission itself in its resolution. The number of representatives of the Council of Ministers in the composition of the Commission and the number of representatives of local government participating in the work of the Commission aredetermined by the Prime Minister (article 9).

As a rule, the Commission shall sit in plenary sessions, but it is also acceptable to adopt a resolution by a correspondence vote. The correspondence vote is valid on the condition that all organizations and the government have taken part in it. The adoption of a resolution by a correspondence vote requires the consent of all participants of such voting (article 10). The meetings of the Commission shall be held at least once in two months. The Commission may, by its resolution, establish permanent and *ad hoc* task teams. The Commission shall adopt its rules of procedure, which determinedetailed rules and procedures of the Commission's work, the Bureau of the Commission and task teams, as well as the competences of the Commission members relating to the participation in its work (article 13). In the voivodeshipsthe provincial commissions of social dialog can be created under statutory principles (articles 16 –18).

In practice, the dialogue in the Trilateral Commission often focuses oncurrent affairs and is carried out in the atmosphere of limited trust and tender, leading even to breaking talks and suspending the

activities of the Commission. Therefore, the experience in this regard is only moderately positive but the works on the new shape of the act are continued.

COLLECTIVE BARGAINING AGREEMENTS

When it comes to collective bargaining agreements in Polish law,an extensive legal regulation of the institution is contained in the Labour Code[13]. This act comes indeed from 1974, so from the previous political system, however, it has been amended on several occasions. The provisions on collective bargaining agreements were added to the Labour Code in 1994, so soon after the political transformation of the late 1980-ies and the beginning of 1990-ies. Collective bargaining agreements which are regulatedby the provisions of the Labour Code have been classified as normative agreements. On one hand they are created through collective negotiations between trade unions and employers or employers' organizations. They are therefore the expression of a compromise reached through a social dialogue. The Labour Code provides that collective bargaining agreements are the sources of law therefore their provisions governing the rights and obligations of employees and employers have normative value.

The Labour Code distinguishes two types of collective bargaining agreements – within a company and multi-company ones. Company collective bargaining agreements cover only employees of one employer, while multi-company ones are concluded for employees of many employers. They may have industrial, professional, regional, etc. nature. Collective bargaining agreements regulate the working conditions and the wages of employees who work in a company where such agreement is effective. It is often emphasizedin the literature that due to the extensive regulation of national labour law (Labour Code and other laws) the parties of a collective bargaining agreement do not have much the so-called negotiating space. Although collective bargaining agreements can regulate matters that have been already regulated by statutory provisions,according to the so-called principle of the privilege for employeescollective bargaining agreements cannot be less favorable to employees than the provisions of state law. In practice, this causes that

[13]The Law of 26 June 1972 – Labour Code, consolidated text published in the Official Gazette DziennikUstaw of 2014, p. 1502, with later amendments.

the parties of an agreement often limit the scope of its regulation to copying the content of statutory provisions. Such practice, of course, has nothing in common with the idea of social dialogue.

Collective bargaining agreements require registration for their validity. Company agreements are registered by a district labour inspector and multi-company agreements by the Minister of Labour. Although collective agreements are considered the most important instrument of social dialogue in the modern world, they play a minor role in Poland. The weakness of the social partners, especially trade unions which ceased to be mass organizations long time ago, causes that only a small proportion of employees (approx. 10-15%) is covered by collective bargaining agreements. These are mainly company agreements. Multi-company agreements are almost never concluded in Poland. It should be also noted that employers themselves are not much interested in entering into collective bargaining agreements and weaktrade unions are not able to get them to change their attitude in this respect.

Therefore, all kinds of informal agreements between employers and trade unions operating at the level of a company are more important for the practice of collective bargaining in Poland. Such agreements are usually concluded in conjunction with the organizational transformations of employers (mergers, divisions, etc.).In addition, the legislature has imposed on employers who do not apply collective bargaining agreements an obligation to provide remuneration regulations. These acts are unilaterally implemented by the employer, however, they require the consent of trade unions (if there exist such).

All in all, it must be assumed that collective bargaining agreements between social partners which are the most important form of social dialogue are of minor importance in Poland.

WORKS COUNCILS

Larger expectations have been related to the functioning of workers' representation that is not associated with trade unions, which implement the rights to collective information and the consultation of employees.Among these representations the most important are employees' councilsoperating under the provisions of the Act of 7 April 2006 on Employee Information and Consultation which implements the provisions of the Directive 2002/14 / EC of the European Parliament and the Council of the European Union adopted on 11 March 2002 which

establishes a general framework for informing and consulting employees in the European Community.

Employees' councils may be appointed only in enterprises (employers engaged in economic activities) employing at least 50 employees. As a result, employers operating in the public sphere (like schools, hospitals, etc.) are exempt from the operation of employees' councils. Councils shall be elected by the crew of workplaces in democratic elections from candidates proposed by a group of employees. They consist of 3 to 7 members, depending on the company's size. The costs associated with elections and the operation of councils shall be borne by the employer.

Employees' councils are bodies entitled to receive information on matters of the workplace from the employer and to express their opinion (to take part in consultations) on some of these matters on behalf of the crew. It can be noted thatemployers' councils are a kind of mediators between the employer and employees. The information obtained by the council should be made available to all employees.

The scope of matters about which the employees' councils must be informed is as followed: 1) business and economic situations of the employer and expected changes in this field, 2) the status, structure and expected changes of employment as well measures to maintain the level of employment, 3) actions that may result in significant changes in work organization or employment.The employer shall provide information in the event of anticipated changes or intentional actions and at the written request of the employees' council. Furthermore, the matters referred to in point 2 and 3 should be preceded by obligatory consultation.

CONCLUSIONS

It should be noted, however, that employees' councils play much smaller practical role than expected. Since 2006, whenprovisions that allowed the appointment of employees' councils entered into force, only in approx. 10% of companies such institutions have been created. However, after the first term of office this percentage decreased drastically. The works of employees' councils were extended for another term of office only at approx. 2% of companies.

On the other hand, in transnational companies the right to information and consultation has been guaranteed by the Council Directive 94/45 / EC of 22 September 1994 on the establishment of the

European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees[14]. In Poland, the Directive has been implemented by the Act of 5 April 2002 on European Works Councils, which entered into force on 1 May 2004. This act fairly faithfully complies with the provisions of the Directive 94/45.

In conclusion it should be stated that despite extensive legal solutions for the social dialogue in Poland, this dialogue does not exist in practice or is very weak. Unfortunately, this sad observation applies to all levels of dialogue - national, regional, industrial and company.

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JUSTICE AND FREEDOM

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Abstract:

The present study starts from the idea of the law as equity. Therefore, it is proven that the fundament of law is the moral, the law being just a means for the achievement of justice. Justice is not a legal concept, but a moral one, such as the human freedom.

The relation between justice and freedom is considered to the metaphysical fundament of the law. The balance between these two concepts leads to the discovery of the ontological good, which in the social area is presented as to-be-together-with-other-individuals.

***Keywords*:** *justice, freedom, law, good, morals.*

INTRODUCTION

It is important to mention the fact that justice is not a concept belonging to the law. The concept of justice is a moral one. Nowadays, justice usually represents a structure formed by the totality of the organs performing the law. In such thinking justice can be mistaken with the law. Really, when we talk about the relation between justice and law, we talk about a relation as from a whole to a part, because the law is one of the means for the achievement of justice.

1. THE RELATION BETWEEN FREEDOM AND JUSTICE

The fact that the law has been considered as part of the moral concept of justice is proven also by the fact that Aristotle included the law in a treaty on ethics, namely in his paper *Nicomachean Ethics*, and Kant included the theory of law in his paper *The Metaphysic of Morals*.

In daily practice of the courts, the purpose is not the law, but justice, which is a moral concept, the law being only the means for achieving justice. State organs establishing norms of law must have as purpose the achievement of justice. The achievement of justice assumes the knowledge of reality, which implies an epistemological step, because

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justice is an objective reality and no way subjectively grounded. This approach is the origin of rules.

If we dig deeper, we shall discover that the rules are based on the native "feeling" of just, of which the human being cannot ignore. Starting from the existence of the just are established rules. Justice, moral concept, is nothing else but a reflection of the preexistence of the just, namely of the equitable. Starting from here, Aristotle considered the law as equity, in other words, the law as an accomplishment of justice, namely of fairness.

In the *Nicomachean Ethics*, Aristotle gave the following definition: "justice is an absolutely perfect virtue, because its performance is that of a perfect virtue; and it is perfect because the one who owns it may use its virtue also in favor of others, not only for himself"[2]. Starting from this idea, the philosopher says that "from this reason, justice is the only one of the virtues which can be good for somebody, manifesting itself in favor of another one"[3]. As a conclusion, "justice is identical with the virtue, but their essence is different, because, to the extent to which is related to other persons, it is justice, and to the extent to which is a so-called habitual condition is a virtue"[4].

Aristotle's thinking is not random, fitting within a tradition passed over centuries. We must not forget what was carved on the frontispiece of the Temple of Delphi, namely the phrase "Know thyself. Nothing in excess." Here is a joint between individualism and justice as right measure. Self-knowledge frees the individual, but with the condition of limiting everything he does, namely to avoid excesses[5].

The last phrase makes us think to the relation between freedom (*eleuteria*) and justice (*dikaiosyne*). These two concepts are in an exclusion relationship with each other, but also are mutually presumed. In this contradictory relation, they tend towards balance. To give a proper clarification to the spontaneous relation established between rules and rights, when we talk, for instance, about human rights, we shall have to

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[2] Aristotel, *Etica nicomahică* (Bucureşti: Ştiinţifică şi Enciclopedică, 1988), 106.
[3] Aristotel, *Etica nicomahică*, 106.
[4] Aristotel, *Etica nicomahică*, 106.
[5] Gheorghe Dănişor, *Filozofia drepturilor omului* (Bucureşti: Universul Juridic, 2011), 139.

use the etiology of two words considered by the Greek antiquity, namely: justice and freedom. We talk about freedom as of one of the most important rights, the one which, actually, is the fundament for all the rest. *Dike* means justice, equity, the law sending to its *diken* root (*diko*), which means to extricate oneself, to free oneself. *Eleuteria* means freedom, and *eleũteros* designates the one who is free, but also honest, generous. What means to be honest? It means to be fair, namely just. From what it is noticed, each of these words comprises the other. The two principles of metaphysics meet in a single principle. Following the etiology of these two words we can consider that the human being is free when it is honest to her, and, as an effect, also in his relations with others. An individual is free to the extent to which he considers the others, namely he practice justice which, in Aristotle's thinking, is a social virtue.

In modernity, there was a separation between these two principles thus freedom is understood as independence, with no relation with honesty, namely with what is just. In this way is just what satisfies my ego. Therefore, freedom is purely egoism. The unique metaphysical principle, for Greeks, resulted from the union of justice and freedom, assumed the contradictory uniqueness of the two principles: *dike* signified the measure (*dikaios*), equality; *eleuteria* signified crossing boundaries, which cannot be measured. Their contradictory uniqueness shows us that a certain balance occurs: *dike* tempers the *eleuteria* (freedom), and freedom does not allow *dike* to become operative. It is also said that too much justice leads to injustice. On the other hand, if freedom leads to the promotion of individuality, justice leads to social cohesion. In this case, the individual with society are subjected to a unifying principle between measure and freedom. This unifying principle is the *Good*, whose manifestations in balance are justice and freedom. If freedom manifests itself when we consider the other, it means that justice generates freedom or, i.e. freedom appears only where there is social justice. We are not talking about subjective rights, but about the freedom of a society considered as an ensemble in the name of a proper justice, because Good as principle is not mine or yours, but of all individuals together. In this way, Good (*agathon*) is an ontological principle, because *agathon* represents the one holding and preserving everything together, at a cosmic, as well as at a social level, and even from the perspective of an individual.

Thereby, good is in every person and in the city, beyond us, but still with us. In such situation, it can be said that “freedom is for each of us and justice for all of us”.

True freedom is stated based on social justice, a justice spontaneously discovered, beyond the game of power. How did the law contributed in the achievement of justice? It contributes using its function of sharing assets.

There are two types of justice: Distributive justice and Corrective justice. For the distributive justice it is about sharing the assets within society. In this case, the existing assets from the society at a given moment shall be distributed between its members based on everyone’s merits, thus establishing a social hierarchy based on merits, on every individual’s value. This generates a certain respect for the merits of the individuals socially framed. In other words, this means of justice contributes to the hierarchy of values and to the structure of society depending on values.

For the corrective justice, it is about sharing the assets between individuals in front of the court. Regardless of the social position of individuals they all are equal in front of justice.

Thus, it is shaped an equitable society in which individuals are appreciated for their merits and ranked, and if necessary, in case of conflict, all citizens shall be equal in front of the law.

Thereby, it is avoided the individualism, but equality is emphasized in such a manner that the essence of human beings is to be with others (*zoon politikon*) and to participate in the ontological Good (*agathon*), which holds together everything that exists.

CONCLUSIONS

As a conclusion, the essence of human being is to be with other individuals. It is thus created a correspondence between being with others (*zoon politikon*) and the ontological Good (*agathon*), which holds together everything that exists. Thus, the individual fits within the *Cosmos* by that “being with others”. One can say that being with others can be extended from the relations between humans to the relations with things, in general. The essence of the individual is to be together with everything that exists, hence being trained in the permanent achievement of Good in its ontological meaning (*agathon*) – which holds together and preserves the entire existence.

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THE CARETAKING AND LIFE ANNUITY CONTRACTS ACCORDING TO THE NEW ROMANIAN CIVIL CODE

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Abstract:

Although sales represent the most frequent instrument in the field, the periods of economic hardship encourage purchasing assets by means of other mechanisms, such as caretaking and life annuity, which have actually become quite popular in some areas.

In this context, we consider that it would be interesting to carry out an analysis of the legal regime acknowledged by the Romanian Civil Code for the two contracts mentioned above which, although they are similarly regulated, are different and constitute distinct legal regulations.

Key-words: *aleatory contract, annuity, for life, caretaking duty.*

INTRODUCTION

Relevant for the category of aleatory contracts[2], life annuity and caretaking contracts have also captured the attention of the drafters of the new Civil Code[3] so that at present the two contracts benefit from modern regulations, in agreements with the needs pointed out throughout time by both the legal literature and practice. In this context, the present work shall analyze the legal regime dedicated to the two contracts by the provisions of the new Civil Code currently in force, which provide them with the attractive character that they currently enjoy. Naturally, the work will also make references to the former regulations, in order to provide a complete approach of the matter.

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[2] For more details on aleatory contracts, see Francisc Deak, *Tratat de drept civil. Contracte speciale* (Bucharest: Actami, 1998) 378-381.

[3] Law No. 287/2009 on the Civil Code was published in the Official Gazette No. 511 from 24th July 2009, modified by Law No. 71/2011 and amended in the Official Gazette No. 427 from 17th June 2011 and Official Gazette No. 489 from 8th July 2011.

1. THE LIFE ANNUITY CONTRACT

1.1. Regulation, definition and ways to constitute it

The essence of the field is represented by the provisions of the Civil Code, included in Book V, Title IX "On special contracts", Chapter XVII, articles 2242-2253.

Unlike the former Civil Code, which did not provide a clear definition to the life annuity contract, article 2242 paragraph (1) of the new Civil Code defines this type of contract, in agreement with the legal literature and practice. According to law, life annuity is the contract by means of which a certain part called *annuity debtor* takes upon the commitment to provide on behalf of another person called *annuitant* periodical performances, consisting in amounts of money or other fungible assets. The legal definition of the contract also points out another novelty element, consisting in the fact that the periodical performance of the annuity debtor can have not only an amount of money as object, but also fungible assets. At the second paragraph of article 2242, the lawmaker is interested in the term of the contract, instituting a presumption for this matter. Thus, it is provided that, in the absence of a clear stipulation regarding the constitution of the annuity during the annuity debtor's life, the annuity shall be considered to be constituted for the duration of the annuitant's life; this aspect also underlines another distinction from the former regulations, in which the contract had a life character related to the annuity debtor, so that the annuity was to be paid in all the cases during his life.

At article 2243 of the new Civil Code can be encountered both similarities and distinctions in comparison to the 1864 Civil Code.

Thus, at first paragraph of article 2243, the lawmaker systematizes the former regulation regarding the ways to constitute the annuity and the formal conditions applicable, providing that it can be constituted both by onerous and free title. At the same time, law reiterates the rule according to which, when a life annuity contract is concluded, will also be enforced the rules typical to the legal acts governing it, such as sale, donation and so on. By exception, similarly with the former regulations, article 2243 paragraph (2) provides that, when a life annuity is stipulated on favor of a third party, even if the latter receives it by free title, there is no need to meet the formal requirements typical to donations. Thus, unlike the former regulations,

the legal text no longer provides that when the life annuity takes the form of a liberality, even on favor of a third party, is subject to limitation.

According to article 2244 of the new Civil Code, a life annuity can be constituted also during the life of more persons, case in which the legal text contains the rule according to which, in the absence of a contrary clause provided by the contract, the death of one of the annuitants does not lead to the partial extinguishment of the annuity, as this will be paid to survivors and shall cease at the death of the last annuitant.

When there are more annuitants involved, article 2245 of the new Civil Code brings changes in relation to the former regulations, as it institutes the indivisible character of the duty to pay the annuity. The 1864 Civil Code, although did not contain a clear provision for this matter, was accepting divisibility in the absence of a contrary stipulation made by the parties.

1.2. Legal features and validity conditions

The following legal features insure the individuality of the contract:

a) Life annuity is an *aleatory* contract, as the existence and extent of the parties' duties depend on a future uncertain event (the time when the annuitant shall be alive), so that there are both gain and loss chances for the contracting parties. The contract loses its aleatory character if the periodical performance in money is paid on a determined term[4], as it is lost the fundamental element "for life", which is the essence of the contract in question[5].

b) Life annuity is usual a contract *by onerous title*, as both parties aim to obtain a gain. It is *an aleatory contract by onerous title*; when it is constituted by free title, life annuity loses its aleatory character, by being a *liberality*, as the annuitant stands no chance of losing, while the annuity debtor stands no chance of gaining.

c) Life annuity is a *synallagmatic* contract, as it generates duties for both parties. The exception is the situation when the annuity takes the form of a donation, as in this case only the annuity debtor has obligations.

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[4] Deak, *Tratat de drept civil.* 450.

[5] Liviu Stănciulescu and Vasile Nemeș, *Dreptul contractelor civile și comerciale în reglementarea noului Cod civil* (Bucharest: Hamangiu, 2013) 523.

d) Life annuity is a *consensual* contract, being validly concluded with the simple consent of the parties. When is involved the transfer of a real estate right of the annuitant, the contract is subject to the authentic form. Life annuity is not subject to pre-emption right, as the aleatory character of the contract prevents this right from being exerted[6].

e) Life annuity is a *property transfer contract*, as the annuitant is conditioned by the guarantee duty belonging to the seller. In what the transfer of the property right is concerned, we remind that in the case of real estate rights, this is done when it is registered in the real estate register [article 885 paragraph (1)].

From the perspective of validity conditions, should be reminded the special rules instituted by law. Thus, article 2246 of the new Civil Code clearly provides that the annuity constituted during the life of a third party who was dead when the contract was concluded is affected by absolute nullity. The text is in agreement with the former regulations[7], an aspect which also applies to the provisions of article 2247 on the lack of effects of the annuity contract concluded during the life of a person who, when the contract was concluded, was suffering from a disease which caused his death within at most 30 days from that date. The distinction between the two regulations consists only in the fact that the term provided for by the new Civil Code is of 30 days, instead of 20, as it was previously stipulated.

As a rule, the object of the parties' performance is double:

- The annuity debtor performs periodical performances, comprising amounts of money or other fungible assets [article 2242 paragraph (2)];
- The object of the annuitant's performance consists in a capital of whatever type [article 2243 paragraph (1)].

2. THE EFFECTS OF THE LIFE ANNUITY CONTRACT

2.1. The annuitant's duties

In agreement with the mentions already done, due to the property transfer character of annuity, the annuitant has the *duty to hand in the*

[6] Deak, *Tratat de drept civil.* 50.

[7] To be accurate, we mention that the previous regulations were stating that the annuity consituted for the life of a third party who was dead when the contract was concluded had no effect.

"capital" and to offer guarantees to the annuity debtor, who becomes the owner of the asset, for eviction or hidden flaws. With the purpose of protecting the annuitant's creditors for losses caused by the alienation of assets upon which they have a general pledge, contracting parties are forbidden to report the annuity which cannot be pursued. By exception, the life annuity constituted by free title can be declared not pursuable by contract, with the clear mention that this stipulation produces effects only within the limits of the value of the annuity which is necessary to annuitant for insuring the maintenance (article 2253).

2.2. The annuity debtor's duties

The main duty of the annuity debtor is that of paying the annuity during the annuitant's life or until the death of a third party. The annuity shall be paid at the value and terms stipulated by the contract. Regarding the way to pay the annuity, article 2248 of the new Civil Code introduces an additional rule, by stating that in the absence of another agreement between the parties the annuity installments shall be paid quarterly in advance and shall be indexed according to the inflation rate. Yet, the same legal text says at the second paragraph that the annuity debtor cannot demand the restitution of the annuity paid in advance when before the period for which the annuity was paid according to the agreement of the parties intervenes the annuity's death.

Article 2250 of the new Civil Code institutes a set of rules to be enforced for insuring the forced execution of the installments guiltily not paid. Thus, the first paragraph regulates the possibility of the buyer which was also acknowledged by the former regulations to demand the seizure and the sale of the annuity debtor's assets, until reaching the amount of money capable to insure the payment of future installments. The provisions of paragraphs (2) and (3) regulate as a novelty element the way in which the amount in question is established and paid, that is by an expertise elaborated according to the calculation methodology enforceable to life insurances. Moreover, when the amount is established, shall be taken into account the installments already cashed by the annuitant, but also his age and state. The amount thus obtained is recorded at a credit institution and shall be paid to the annuitant according to contractual clauses. If the debtor entered liquidation, the annuitant has the possibility to have his right accomplished by registering the debt resulting from the annuity in the Register of Creditors [article 2250 paragraph (4)].

The annuity debtor's duty of payment has a patrimonial character and not *a personal basis (intuitu personae)*, as it is transmitted to his heirs[8].

Regarding the statute of limitations applying to the right to take action for reporting the annuity installments not paid, it is unanimously acknowledged that, since the annuity has a life character, the right to it *shall not be subject to any statute of limitations* "even if during a longer period of time (of more than 3 years) no one has claimed the payment of the due annuity installments"[9].

The annuity debtor has also a guarantee duty, illustrated by the provisions of article 2249, which introduce the possibility for the annuitant to benefit from the privilege of the seller, in its form regulated by the provisions of article 1723 of the new Civil Code, in order for the duty to pay the annuity constituted by onerous title to be guaranteed.

In strong connection to the debtor's duty to pay the annuity installments, article 2251 from the new Civil Code takes over a series of provisions from the former regulations regarding the termination of the life annuity contract, in a modified draft. Thus, at the first paragraph, the lawmaker maintains the possibility to terminate the life annuity contract constituted by onerous title, if the debtor does not pay or diminishes the promised guarantee. At the second paragraph, unlike it happens with the former regulations, it is clearly introduced the termination possibility for the simple lack of enforcement of the contract. Consequently, the simple non-payment of annuity installments triggers the possibility to terminate the contract, a fact clearly forbidden by the 1864 Civil Code. The provisions of article (3) institute the rule according to which, in the absence of a clear clause of the contract, the debtor has no right to have reimbursed the amounts already paid if the termination of the contract intervenes.

2.3 The cessation and prosecution of life annuity

The life annuity contract ceases when the annuitant or another person benefitting from annuity dies.

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[8] Deak, *Tratat de drept civil*, 453; Stănciulescu and Nemeș *Dreptul contractelor civile.* 526; Florin Moțiu, *Contractele speciale în noul Cod civil,* II edition, revised and updated (Bucharest: Universul Juridic, 2011) 325.

[9] Deak, *Tratat de drept civil.* 455.

Article 2252 of the new Civil Code institutes the irrevocable character of the life annuity contract, by reiterating the principle clearly regulated by the 1864 Civil Code, regarding the impossibility to unilaterally denunciate the contract, even if the enforcement of the annuity has become a burden for the debtor. At the same time, as an effect of the aleatory character of life annuity, the debtor has no possibility to end the contract unilaterally, by simply giving back the asset out of his will or the capital acquired during the contract and not even by giving up on the restitution of the amounts of money already paid.

According to law, only the annuity constituted by free title can be declared not pursuable by contract (article 2253). Nonetheless, after having already seen, the law provides for the possibility to pursue even the rent constituted by free title and declared not pursuable by the parties, but only for the part exceeding the value necessary for the annuitant's maintenance. As a consequence, the life annuity constituted by onerous title is pursuable, representing the equivalent of the alienated asset or the amount of money paid[10].

3. THE CARETAKING CONTRACT

1.3. Regulation, definition and legal characters

The essence of the field is represented by the provisions of the Civil Code, included in Book V, Title IX "On special contracts", Chapter XVIII, articles 2254-2263, where is regulated the caretaking contract as a novelty element. We are speaking about novelty as the caretaking contract was not legally regulated before, being a not named contract; however, its frequent practical use, pointed out by the legal doctrine and practice, has determined the lawmaker to acknowledge it by law.

According to law, the caretaking contract establishes that one party takes the commitment to provide all the performances necessary to the maintenance and care for a certain period, on behalf of the other party or a third person [article 2254 paragraph (1)]. The legal definition points out that, unlike how it happens to annuity rent, the debtor's duty consists in providing maintenance and care for a certain period of time, and not a periodical amount of money. At the same time, from the legal text it results that the lawmaker clearly regulates the duty to provide care,

[10] Deak, *Tratat de drept civil*, 455.

leaving in charge of the parties to establish the onerous or free character of the maintenance contract. It is precisely the specific feature of this duty which generated all, under the circumstances in which it was traditionally considered that the caretaking contract made so that maintenance was due in the exchange of transmitting an asset or an amount of money, a fact which transformed caretaking a contract by onerous title.

At the second paragraph of article 2254, the lawmaker institutes the same presumption as in the case of life annuity, for the situation in which the parties did not provide for the duration of caretaking, or was provided only its life character, by considering that the caretaking is due for the whole life of the creditor.

The parties of the contract are the creditor and debtor of the caretaking duty, also known legal doctrine as the *beneficiary and caretaker*[11].

The distinct regulation of the caretaking contracts leads to the existence of the following legal characters:

a) Caretaking is an *aleatory* contract as there are both gain and loss chances for both contacting parties, which depends on a future uncertain event, namely the *length of the creditor's life*. The contract loses his aleatory character when the caretaking is free and granted for a certain term;

b) Caretaking is in principle a contract by *onerous title*, as both parties aim to obtain a patrimonial advantage. The contract can be validly concluded and by free title, the onerous character being provided by the nature and not the essence of the caretaking;

c) Caretaking is a *bilateral* (*synallagmatic*) contract, by means of which both parties take commitments upon themselves. As an exception, when the caretaking is constituted by free title, the contract is unilateral, as it generates duties for only one party – the debtor of the caretaking.

d) Caretaking is a *solemn* contract, which is concluded in authentic form. For this matter, the provisions of article 2255 of the new Civil Code institute the authentic form for the valid conclusion of the contract; when these are not observed, the contract becomes null.

[11]D. Chirică, *Drept civil. Contracte speciale (*Bucharest: Lumina Lex Publ. House, 1997) 123.

e) Caretaking is a contract of *property transfer*, which produces effects just like the selling contract;

f) Caretaking is a contract with *successive enforcement*; the duty to provide caretaking must be permanently complied with, during all the life of the beneficiary, due to its life character;

g) Caretaking is a *intuitu personae* contract, being concluded by taking into account the personal qualities of the parties. Due to the strictly personal character of caretaking, the debt having caretaking as object cannot be ceased nor subject to forced execution, according to principle instituted by article 2258 of the new Civil Code. Although caretaking has a personal character, this will nonetheless not be invoked by the parties in their defense, for rejecting the actions related to the revocation of the contract or the derivative actions for the latter's enforcement (article 2259).

4. DISTINCTION FROM OTHER CONTRACTS

The contracts considered in the context of the confusion frequently emerging in practice are: life annuity, sale and donation.

4.1. Distinction from life annuity

The common characteristics of the two contracts determine important similarities between them, but they must not be confounded, as they are distinct special contracts. From here emerge considerable differences, among which:

- Life annuity creates the *duty to give* in charge of the annuity debtor, while the debtor of the caretaking contract has the *duty to do*;
- While life annuity is *transmittable*, the debt related to caretaking is par excellence *personal* and cannot be sent to another person;
- The annuity is usually pursuable while caretaking cannot be pursued by the creditors, as it cannot be reported.

4.2. Distinction from sale

An issue frequently dealt with by the legal literature[12] has been

[12] Deak, *Tratat de drept civil.* 458-460; Stănciulescu and Nemeș *Dreptul contractelor civile*, 532-533; Florin Moțiu, *Contractele speciale în noul Cod civil*, II edition, revised and updated (Bucharest: Universul Juridic, 2011) 329; Dumitru C. Florescu, *Contractele civile în noul Cod civil*, II edition revised and updated (Bucharest,

that to determine the legal nature of the contract, by means of which an asset is alienated both in exchange of caretaking and an amount of money. For delimiting the caretaking contract from the sale one, it must be established the main duty, more exactly "the main purpose pursued by the parties at the conclusion of the contract"[13]. Thus, in the absence of other criteria, the performance in money shall be reported at the value of the asset alienated and if the price in money overcomes half of this value, the contract shall be qualified as sale, while if the price is less than half of the value of the alienated asset, the contract will be a caretaking one. It remains essential to determine the main duty of the debtor as, if this consists in providing caretaking, the contract shall be a maintenance one even if its content stipulates a price of the alienated asset.

4.3. Distinction from donation

In practice, the caretaking contract is mistaken with the donation of duties. Yet, the distinction element consists in the fact that, when it comes to donation, the duties imposed to the acquirer are not proportional to the value of the asset donated, the fact which actually reveals the intent of the parties to make and receive a liberality; when it comes to the caretaking contract, the parties agree to insure mutual advantages, as one acquires the asset while the other obtains caretaking for the rest of his life. Consequently, the objective criterion of the value of the caretaking must be doubled by the criterion regarding the cause (purpose) pursued by the parties, precisely for determining if the person alienating the asset concluded an *animus donandi* or just attempted to insure caretaking for life[14].

5. VALIDITY CONDITIONS

For the valid conclusion of the caretaking contract, the contracting parties must have the capacity to make disposition acts and, respectively, *the full power of exercise*. This is justified by the fact that the beneficiary of the caretaking has one duty to give, by transferring the property upon an asset or amount of money, while the caretaker has the duty to do, which, if not met, determines the payment of damages.

Universul Juridic, 2012) 333 – 334.

[13] Deak, *Tratat de drept civil*, 459.

[14] C.Stătescu and C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor* (Bucharest: ALL, 1992) 34-36.

Just as it happens with synallagmatic contracts, the object of the caretaking contract is double: the *asset alienated* or the *amount of money* paid by the beneficiary in exchange of the caretaking and the *performance of the caretaking*, which is done in kind and according to the conditions established by contract.

6. THE EFFECTS OF THE CARETAKING CONTRACT

6.1. The duties of the creditor of the caretaking contract

In a caretaking contract, the creditor has the same duties as the seller, as he has to hand in the asset and to offer guarantees for vices and eviction. If the beneficiary fails to meet his duties, then the debtor-caretaker who started his caretaking performance can demand to the court the execution of the duty assumed.

The current regulation allows the debtor – caretaker to demand the rescission of the contract, but only when the behavior of the beneficiary "renders impossible the enforcement of the contract in conditions according to good customs" [article 2263 paragraph (2)].

Here should be mentioned the provisions of article 2257 paragraph (5) of the new Civil Code, which provide for the lack of effects of an eventual clause by means of which the creditor of caretaking would commit to the provision of some services, in exchange of the caretaking having an object defined at the second paragraph, namely food, clothes and so on. The lawmaker forbids to the parties within the contract to foresee such clause out of need to counter their possibility that, by means of a caretaking contract, avoid the imperative provisions provided for other legal operations.

6.2. The duties of the caretaking debtor

The main duty of the caretaking debtor is that to provide the caretaking in kind, according to the conditions provided for by the contract. For this matter, article 2257 paragraphs (2) and (3) defines *the object of the caretaking*, by stating that this comprises mostly the insurance of food, clothes, footwear, housekeeping and according use of a house, while when it comes to a disease, the care and expenses required by this state. Apart from these, when caretaking has a life character, it also includes the funeral duty, when the creditor dies before the debtor.

As the caretaking itself cannot be qualified by contract, by being different according to the real needs of the creditor, paragraph (1) of article 2257 institutes the principle according to which when the *extent* of

the caretaking performance is established it will be taken into account the value of the capital and the creditor's previous social condition, not also that of the debtor.

According to law, the caretaking continues to exist also in the case when the asset which constituted the capital perished totally or partially or diminished its value, out of a cause for which the creditor cannot be blamed [article 2257 paragraph (4)].

Due to its mainly alimentary character, caretaking must be provided on a permanent basis, being a duty which is complied with every day [15].

Article 2261 of the new Civil Code regulates the possibility to replace caretaking with annuity. Thus, the text of paragraph (1) provides for the possibility of the court to rule, on demand of any of the parties but also in the absence of an agreement reached by the parties, that the caretaking duty in kind is replaced, even only temporarily, with an according amount of money. Moreover, according to article (2), the court can also rule the increase or diminishment of the amount established in the exchange of caretaking according to article (1), when the performance or the receipt in kind of caretaking can no longer continue, due to the guilt of one of the parties. In these cases, article 2262 establishes the rule according to which become enforceable the provisions regulating the life annuity contract, in all the cases in which caretaking was replaced with an amount of money. Yet, even so, law maintains the principle of the indivisible character of the duty to pay the rent, if the parties stipulated no contrary provision.

7. THE TERMINATION OF CARETAKING CONTRACT

Article 263 of the new Civil Code regulates the special cases in which the caretaking contract is terminated, namely: the expiry of the term for which the caretaking was established to be provided, the death of the caretaking creditor, the behavior of one of the parties rendering impossible the good enforcement of the contract, the guilty lack of enforcement of the caretaking duty by the debtor.

When the caretaking duty is not complied with out of guilty reasons, paragraph (2) excludes the possibility of the conventional termination of the contract on the basis of commissoria lex, as already

[15] Moțiu, *Contractele speciale în noul Cod civil*, 333.

pointed before.

Paragraph (3) clearly institutes the impossibility to demand the termination for the situation in which the performance or reception in kind of caretaking can no longer continue out of objective reasons. In this case, there is the possibility to replace the caretaking duty with the payment of an amount of money, according to legal conditions.

Article 2260 regulates as a novelty element a special revocation case on behalf of the persons to whom the caretaking creditor owes food supplies, according to law. The revocation can take place only when, as a result of the contract termination, the caretaking creditor has remained out of the possibilities or means which would have allowed him to accomplish his legal caretaking duty. According to article (2): "Revocation can be demanded even when there is no fraud from the caretaking debtor and irrespective of the moment when the caretaking contract is concluded". This is due to the fact that revocation is not seen as a sanction for the person alienating the service, but as a protection measure on favor of the persons to whom the creditor is bound to provide caretaking.

Paragraph (3) also contains a regulation with a novelty element, stating that there is possible to safeguard the contract from special revocation by means of the possibility which the court has to rule that the debtor can insure himself food supplies to the persons to whom the creditor owes a legal duty, without for this diminishing the performances owed by the caretaking creditor. This possibility is excluded in the absence of a clear agreement of the debtor for this matter.

CONCLUSIONS

If when it comes to the life annuity contract the new Civil Code preserves a great part from the previous regulations, to which it naturally brings important changes, when it comes to the caretaking contract, this currently enjoys its own special legal regulations, by becoming a named contract, after the lawmaker has answered to the regulation need pointed out by the legal doctrine and practice in the field.

As it also emerges from the current analysis, the current regulation of the life annuity contract and the caretaking one is characterized by progress and modernism, but contractual relations which shall be created based on its ground will underline concretely both the advantages and disadvantages of the legal text.

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THE RIGHT TO A HEALTHY ENVIRONMENT – CONSTITUTIONAL CONCEPT

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Abstract:

Social and economic changes in Romania focused on economic centralism for a society that wants a set of value based on market economy system determine system and structure changes. These changes are accompanied by change in the law since the Constitution. The privatization process in the 1990's was not accompanied by performance legislation on environmental conservation and protection. Many privatized companies were mishandled and soon reached the liquidation and asset recovery as scrap metal. I some cases, previous technological processes with chemical compounds polluted soil, subsoil, groundwater with hazardous chemical waste. Decontamination is the responsibility of anyone; public administration has no property right, but has interest in environmental law principles. Such a situation analyzes the effects of pollution from Turda, Cluj County chemical waste from the former company, chemical Turda plants.

Key words: *environmental law, environmental law principles, decontamination, chemical waste*

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1. BACKGROUND OF THE CONCEPT OF THE RIGHT TO A HEALTHY ENVIRONMENT

Environmental concept, notion chameleon, as characterized by Michel Prieur[4] knows many facets and meanings used with more or less different in many environments of human society.

Scientists, economists, lawyers, politicians, ministers arts imperative aware of paramount importance to environmental protection and natural resources, highlights certain aspects of the environment, which, in fact, is unique. Medium term remains, however, a general concept, difficult to synthesize a definition that satisfies everyone.

For the European Community "environment" means all elements in the complexity of their relations, the framework, environment and conditions of people's lives, as there are or as understood. As the field of inter-state and international regulation, environmental protection and conservation has been the subject of a new classification in the science of Law - Environmental Law.

Training and affirmation of international environmental law occur, in fact, in the late 1960s, when international ecological crisis took valences and was favored by the joint action of a multitude of factors which have made cooperation between states as a means of stopping and mitigation its effects. This does not mean that earlier era, there were a number of regulations aimed directly or indirectly protecting the environment. Much time, the essential problems of human communities, including ecological, were laid and were regulated mainly local and national. Scientific and technical development and increasing human impact of socio-environmental impact caused a process of internationalization of these problems and favored the emergence of interstate relevant regulations. By their nature, environmental problems imposed international cooperation as a result of the Trans boundary nature of pollution and global implications appearance. Moreover, this reality has imposed gradual affirmation of a concept "mondialist".

From a historical perspective, since the Middle Ages have been some legal action, including through international cooperation, for example to diminuate the effects of pollution such as smoke, noise, pollution of watercourses, etc.

[4]Michel Prieur, *Droit de l`Environnement* (Paris :Dalloz, 1991), 1.

Romania also has a rich historical experience environmental protection. Some researchers[5] appreciate that while they took a series of anti-pollution measures for nature protection by means of regulations, such as Regulation for unhealthy industries (1894); Rules for councils of hygiene and sanitation; Regulations for housing construction (1894); Rules to protect public health against the exploitation of oil (1889); Rules for hunting allowed by the state properties (1899).

In the nineteenth century there is a series of international treaties devoted to fishing, but their provisions referred, above all, to the delimitation of fishing and fish less protection as economic or ecological resource.

Treaties aimed mainly for concrete actions aimed primarily occasional economic or public health objectives. For example: Treaty between France and Basel in December 19, 1781; Treaty between the United States and Creek Indians from August 7, 1790; Treaty between Italy and Austria between 5 and 29 November 1875 on the protection of birds useful to agriculture, which forbade the killing of these birds during autumn and winter.

However, in 1893 appears the first element of case law: arbitration between the US and British Columbia in the Bering Sea seals business, which established rules hunters, seals designed to avoid extinction.

Protecting species[6] is manifested by traditional instruments as at the beginning of the twentieth century and extends until the fourth decade of the century, being considered as phase "pre-ecologic". Now appear the first international multilateral conventions on the protection of species of wildlife. For a long time, the loss of biological diversity was treated with total indifference to public opinion and official powers, only few naturalists were interested. At the beginning of the last century, concerns about the risks weighing on African wildlife and certain birds wanted for their plumage often considered useful for agriculture generate the first warning signs.

[5] Lucretia Dogaru, *Environmental Law* (Tg. Mureș: *Petru Maior* Publishing House, 2008)

[6] Mircea Duțu, *Environmental Law* (București: Economic, 1996)

The rise of liberal globalization has meant the decline in international cooperation on global environmental problem solving.

At the end of this training and incursions in the historical development of international environmental law, there are required some observations on its current stage of affirmation. First, it appears that environmental law is an international law as a consequence of nature and size of pollution. International environmental law is a branch of public international law in full development; this process has accelerated in recent decades under the diversity and number of legal instruments adopted and institutions established by them. To the above observations we can add that we have a specialized development of this law rules and a considerable expansion of their field of application.

Moreover, environmental law uses all varieties of international action and normativity: soft law (such as statements of three UN Conference on Environment: Stockholm (1972), Rio de Janeiro (1992) and Johannesburg (2002), such policies made incite implemented under the aegis of the United Nations Environmental Programme (UNEP), especially in the "Agenda 21", preventive measures (for example, those provided by the MARPOL Convention of 1973), the possibilities or the use of original techniques such as re-cut specific surface areas according to the needs of environmental protection (as in marine areas) or recognizing a right of intervention on the high seas in cases of pollution (or risk of pollution). Finally, environmental law tends to reconcile the "irreconcilable", member entitled to full development of all possible risk to pollute, and the right of all states to safeguard their environment, compliance with legislation supranational sovereignty of increasingly burdensome for the state; equality of states and shared responsibility, but their differential environmental protection tasks

2. THE RIGHT TO A HEALTHY ENVIRONMENT IN ROMANIA.

Romanian Constitution[7] expressly provides in 35 Article that "The State recognizes the right of everyone to a healthy environment and

[7]Romanian Constitution - amended by Revising Law of the Constitution, Act no. 429/2003, published in Official Gazette of Romania, Part I, no. 758 of 29 October 2003; republished, by updating the denominations and for the texts a new numbering in

ecologically balanced." Romanian state constitutional concept provides the legal right to exercise this right to a healthy and ecologically balanced environment. Constitution also establishes the duty they have natural and legal persons to protect and improve the environment.

To meet legal commitments entered internationally, Romania has ratified a number of 36 governmental and ministerial treaties in force in environmental protection and water management as defined in the attached list. EU environmental acquis covered over 450 directives, regulations and decisions, which are horizontal legislation and sectorial legislation[8] on environmental protection.

According to Art. 17 (1) of the Treaty on the Functioning of the European Union (TFEU) "the Commission shall promote the general interest of the Union and take appropriate initiatives to that end. This ensures application of the Treaties, and measures adopted by the institutions pursuant thereto. Shall oversee the application of Union law under the control of the Court of Justice of the European Union (...) ". There are three types of violations of environmental laws that determine the onset of the infringement procedure by the Commission, namely: a) omission of notification of national laws transposing and implementing directives - Member States are required to notify the transposing legislation and one that ensure implementation; b) non-compliance of national legislation with Community rules - Member States have national legislation to be in full compliance with EU requirements; c)

the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. The Revising Law of the Constitution, the Act no. 429/2003 was approved by national referendum on 18-19 October 2003 and got into force on 29 October 2003, following its publication in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003, the Constitutional Court Decision no. 3 of 22 October 2003 confirmed the result of the national referendum on 18-19 October 2003 in connection with the Revising Law of the Constitution of Romania. Romanian Constitution, in its original form, was published in the Official Gazette of Romania, Part I, no. 233 of 21 November 1991 and got into force after its approval, by the national referendum from December 8, 1991.

[8]Horizontal legislation includes those regulations that consider transparency and flow of information, facilitating decision making, development activity and involvement of civil society in environmental protection.

misapplication of EU laws - States are required to ensure effective enforcement of the provisions transposing Community.

The Romanian Constitution requires the State to provide the necessary conditions to increase the quality of life and to take necessary measures to ensure a decent living. Law no.137 / 1995 on Article 6 establish state obligations in this way, and responsibility as follows: "Environmental protection is an obligation of central and local public administration authorities and all natural and legal persons" attributing environmental responsibility both central environmental authorities and territorial agencies.

Article 20 of the Constitution provides that constitutional provisions on environmental law will be interpreted and enforced in accordance with the Universal Declaration of Human Rights, with the covenants and the other treaties to which Romania is a party. In paragraph 2 of Article 20 of the Constitution provides: "If there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions[9].

Sectorial environmental regulation was achieved through the legislative process. Environmental framework law governing social relations on environmental protection and conservation of sectorial and cross-sectorial perspective.

In the content of the law are established: the principles of environmental law; strategic elements of sustainable development; ways to implement the principles and strategic elements; definition of the right to a healthy environment and determining its components; authorization procedure of economic and social impact on environmental law; regime of substances and hazardous waste and other wastes; regime of chemical fertilizers and pesticides; regime for the protection against ionizing radiation and safety of radiation sources; protection of national resources and biodiversity conservation (water and aquatic ecosystems, atmosphere, sphere, soil, subsoil and terrestrial ecosystems, protected areas and natural monuments, human settlements); National institutionalization of environmental law and powers of central and local

[9]Stefan Tarcă, *Environmental Law* (Bucureşti: Lumina Lex , 2008), 40.

environmental authority; forms of liability for breach of environmental law.

Framework Law on Environmental Protection establishes the unitary system and completely legal techniques specific environmental protection and conservation: ecostandards, authority system, impact assessment, zoning, targeted sanctions in environmental law (environmental licensing refusal, withdrawal agreement and / or permit environmental, economic suspension and termination pollutants), criminal, administrative and civil.

Special laws environmental law, which regulates in detail the social relations with sectorial and cross-sectorial protection of the environment, on environmental protection and conservation and its ecofactors highlight the content and essence of this branch of law.

So, we can speak of a development of environmental legislation in the main sectors of economic and social activity: water, air, soil (land for agriculture), chemicals, waste, nuclear activities, sustainable development, protected areas, forest fund, fisheries, wild animals.

Regulations in environmental legislation and legislation accompanying social economic legislation, but in Romania legislature did not consider a subsidiary component of economic and social processes during the privatization of the industry. Legislation organizing framework by which to carry out the activities of the transfer of ownership from public to private companies in the economic nature has not provided two situations had to be covered: intellectual property (value and right) and ecological relationships and environmental protection.

Legal aspects of intellectual property and trademark we speak in this material has other meanings doctrine of law. Relations between ecological and environmental protection of new privatized company with the surroundings and society are a subject that we want to approach it without succeeding to discern.

3. CONCEPT CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT APPLIED IN THE CASE OF THE FORMER CHEMICAL PLANT COMPANIES TURDA

It is known that during the years 1970-1980 economic centralism no interest to enforce environmental protection legislation is overly punctual as it affected the relations of production, the country's economic

capacity factors and performance in relation to markets. Moving from a centralized economic system to an economy based on supply and demand in the new context of Romania The authorities have moved to a process of privatization of these commercial society through the tools existing legal. In no law to predict what happens to the assets of companies that are affected by chemical, biological, physical degradation or unusable heritage affecting ambient pollution.

In retrospect we can say that there have been cases of successful privatization, but also many cases where new owners have used scrap assets that have not cleaned up after the territorial area leaving unresolved environmental issues. Public administration has no right to enter into a private area, and the owner is in the area of judicial liquidation (sometimes with uncertain state). The population suffers from infecting neighboring water, air and soil of the entity.

We will not refer in this material to numerous companies in the mining and steel or chemical plants often abandoned. In this article we will open a page about legal relationships and responsibilities arising from the privatization of enterprises Chemical Turda.

Chemical Trading Company SA Turda, with Chemical manufacturing activity profile was established in 1911, the former location soda factories, as the Group of Factories Salvoy. After June 11, 1948, with the nationalization of the factory was renamed in Turda chemical plants. Here producing lime, chlorine, hydrochloric acid, sodium chloride, chloride of lime, potassium chloride, sodium hydroxide and potassium, and salts Trilon B photo industry. After the Second World War, from 1953 until the mid '60 at chemical plants in Turda was made famous DDT. Waste from the production of this substance have contributed to the creation of a lunar landscape, on the left bank of the river Aries. Trees and trees planted there in 1970 - 1975 were able to reproduce after many years, natural look that area which, under the control of DDT mounds seemed drawn from apocalyptic films about life on Earth after a nuclear war.

In addition HCH (hexachlorocyclohexane), chemical plants occurred from potassium carbonate Turda, liquid chlorine, calcium chloride, calcium hypochlorite, cupric oxychloride, organic polymers, etc. rodanură potassium, about 18 chemicals. In the 80s, the production of

HCH was stopped. After the activities, the soil was so polluted industrial platform, as well as the landfill sites in neighboring areas.
According to the specialists who worked at chemical plants in Turda, bet on the period 1970 - 1980, the factory was one of the products and "lindane". Known under this name, isomer "gamma" of hexachlorocyclohexane bet on agriculture was used as fertilizer. What is bet on deposits in Turda and caused "milk scandal" to start as 2000s, is "lindane" but waste consisting of four other HCH isomers. They did not have any economic usage however therefore are known under the generic name of "inactive". Back when chemical plants producing "linden" inactivity was used by the inhabitants of Turda to combat unwanted rodents and insects, but nobody ever authorized use of HCH isomers in such purposes.

Chemical plants in Turda known economic peak during economic centralism "glory", for Turda when producing fertilizer plant, substances necessary for the photographic industry, all kinds of salts and other products, especially export requirements.

Alert governmental institutions were initiated with the construction of Transylvania Motorway which intersected with a history of hazardous chemical storage, chemical plants from Turda. After verification, it was found that both the former chemical plant platform and surrounding areas with this field contains hexachlorocyclohexane (inactive), mercury, acids and heavy metals. These substances, there are in negligible concentrations, caused soil infestation and endanger groundwater. There were also identified 72 tons of potassium cyanide, stored in a closed space of the former factory area and mercury inside the former of electrolysis section. The results of analysis by the Environmental Protection Agency Cluj - Turda concluded that there are about 15,000 tons of HCH[10]; substance contained about 60,000 tons of waste stored inside even bet on the former chemical plants.

Situation quantities of HCH and mercury that is in soil, groundwater and debris Source: Research Centre for Prevention of Major Industrial Accidents - Faculty of Environmental Sciences - University Babes-

[10]INSECTICIDE used in agriculture in the past. Its use was banned worldwide in 2009.

Bolyai University of Cluj-Napoca, 2005: HCH in soil: between 212 and 1833 milligrams / kilogram; The conclusion of the researchers: "There HCH significant pollution of soil and groundwater." Mercury: Permissible limit: 4 mg / kg; The threshold for intervention: a quantity of 7-10 milligrams / kilogram; The quantities of metallic mercury from masonry, plaster, soil and underground station "Electrolysis" The plaster: 21100 milligrams / kilogram - the 5275 times more than the limit! In the soil: from 590-1100 mg / kg: 275 to 147.5 times more than the limit! Dechlorination Sodium: 8100 mg / kg: 2025 times more than the limit! Dechlorination Potassium: 960 mg / kg: 240 times more than the limit! (Extract from the minutes of the committee established consisting of representatives of the Environment Agency and the Inspectorate for Emergency Situations Cluj, returning to chemical plants, conducted August 28, 2007)

Turda chemical plant was demolished and dismantled in 2001-2002, after it was bought by an Arab businessman, who has used old metal. Tons of hazardous substances remained buried in the ground, and for 26 years it pollutes the environment that affect people's lives. In terms of economic ownership transfer procedures were performed in compliance with the law at that time, permissive legislation not anticipates side effects. Social effects were "solved" by the passage of time and methods of retraining. The environment is still affected and affects human life, plants and animal kingdom and cannot be restored easily. As a private company, undercapitalized, perhaps deliberately, Turda public authority cannot access funds to be environmentally friendly, with no right to act on private land. The investor is no longer to be found, because he abandoned the company and its assets.

A potential solution is bankruptcy by liquidation, nationalization of land with the inventory that exists on it and then through an intensive program to recover greening your environment by removing harmful elements (chemical residues).

This case is not unique in Romania. There are many cases of post privatization management wrong or fraudulent. It was not taken into account the fact that the effects of remediation and ecological processes are often more expensive than the business or profits. There are many situations in which investors had no financial resource to bring

companies to European environmental standards and have abandoned the business. Greening costs were not taken into account. The only recovery action items were sold as scrap metal. In this case investors remained profit from the sale of assets as scrap, and the Romanian state and local governments are left with environmental and ecological issues. The process of blaming managers and accountability for damage to collectivities is hard and difficult. The legislation was adjusted and perfected much later after the occurred phenomena. In this case we can say that retroactive legislation is a principle of doctrine.

CONCLUSIONS

Legislative gaps that damage the environment by individual interests stronger than the public interest created social, economic and ecological problems.

Straightening these situations cannot be made only by correcting dysfunctions through firm measures which should reach to act nationalization of the Company located in liquidation and environmental issues.

The adoption of a code is for any field of law and for the more recent and complex branches, such as environmental law, full maturation and expression of its definitive taxation, both within the legal system and the legal theory[11].

As a general regulation in a particular area the Code best meets the need for comprehensive approach to environmental protection issues. However, due to the stage of development of regulations in the field encodings are rare. Some codes that address specific areas of concern and nature protection issues, such as the Forest Code, approved by Law no. 26/1996.

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MOLDOVAN LANGUAGE OR ROMANIAN LANGUAGE IN THE CONTEXT OF EUROPEAN LINGUISTIC CULTURE

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Abstract:

Currently, there is no country with its entire population to be homogenous by the criteria of race, color, ethnicity, language, culture, religion. The rights on the people who belong to some minorities begin, of course, with equality of rights and nondiscrimination continuing with the right to ethnic, linguistic, cultural and religious identity; these people enjoy all rights and fundamental human freedoms, just like any other person. The present study highlights certain aspects of the controversies that have been ongoing for years in regards to the name of the mother tongue of the native population of the Republic of Moldova but also about the followed linguistic policies. Taking into account the actuality of the issue we come with some historical and juridical arguments that, in our opinion, would allow the citizens to fully understand the scientific truth concerning the correct name of the state language of the Republic of Moldova.

Key words: *Romanian language, Moldovan language, Moldovan speech, state language, linguistic identity.*

During the four decades of Soviet domination, the most debated issue historiography of Moldova was the existence of "Moldovan people" and "Moldovan language". Together with Roesler's theory, this "theory of Moldovenism" is the second major challenge Romanian point of view on the formation of the Romanian people. The theory is rejected by the vast majority of Western scientists.

In essence, theory mention immigration, like that of Roesler. According to it, people would come Romance east of the Carpathians until XIV century, long after the Slavs, which would thus be the oldest inhabitants of the territory. Slavs mixture with newcomer would have resulted Romanic "Moldovan people". This was the official view of the

[1] Doctor of Law, university professor (ULIM, of Moldavia), Republic of Moldavie.
[2] Doctor of Law, university professor (ULIM, of Moldavia), Republic of Moldavie.

Soviets about the issue of the Romanian people, but many historians and politicians continued - even after independence Moldova - to support this theory. Since 2009, the gradual opening of the archives of Moldova and the Ukraine and Russia showed that Moldovenism theory was created by the Soviets in purely political reasons to justify inclusion in the USSR Bessarabia[3].

The phrase *Moldovan language*, in the opinion of the philologist Raymund Piotrowski from Pedagogical University "A. I. Hertan" in St.-Petersburg, has been used permanent like "instrument of the Tsarist imperial policy, as well as Stalinist-Bolshevik imperial policy". In scientific conference session *Romanian language is the correct name of our language in July* 1995 Russian scientist found unequivocal: "The purpose of this tool was to isolate Bessarabia and later the Republic of Moldova from Romanian area"[4].

After the adoption of the Constitution of 29 July 1994, where in Articles 13 and 118 was stipulated the glotonim Moldovan language, fierce disputes between opponents did not take over. They continue with the same intensity today. Considering the actuality of the issue, we come with some historical and juridical arguments, which, in our opinion, would allow honest citizens to acknowledge the scientific truth about the correct name of the state language of the Republic of Moldova.

Scientific research proves that the language spoken by the majority population of the country is Romanian. We recall that already in the first Code of Laws of Moldavia, promulgated by Vasile Lupu in 1946 and edited in Iasi, even on the cover was noted that this monument of law as the Principality was developed in Romanian language with the title: *Cartea romaneasca de invatatura de la Pravilile imparatesti si de la alte giudeate cu dzisa si cu toata cheltuiala lui Vasile Voievodul si Domnitorul Tarii Moldovei di in multe scripturi talmacite di in limba ileneasca pre limba romaneasca,* edited in Iasi in 1646[5].

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[3]A., Lupuşor, „*Sunt moldovenii români sau nu? Despre teoria moldovenizmului*". http://www. historia.ro/exclusiv_web/general/articol/sunt-moldovenii-rom-ni-nu-teoria-moldovenismului

[4] R. Piotrovskii, *„O limbă cu două denumiri?". Revista de lingvistică şi ştiinţă literară,* 5 (1995), 47.

[5] *Carte românească de învăţătură.* Critical edition. (Bucureşti: Academiei R.S.R, 1961), 32-33.

Romanian Book of Learning in 1646 by some fragments included in the Preface largely clarified the concept that Moldovans were Romanians in terms of ethnicity and that they speak Romanian. We refer to these passages, the chancellor Eustratie said that he had interpreted the Rules "*den scrisoare greceasca pre limba romaneasca ca sa poata intelege toti*"[6]. Through these rows scholar Lawyer, reflecting objective reality, finds that in year "40 of the eighteenth century the inhabitants of the Principality of Moldova spoke in Romanian language.

Public and ecclesiastical authorities of the State of Moldova also considered Romanian language as the language of the population of the Principality. This is demonstrated by the fact that on the title page of the Book of teaching Romanian was mentioned that the translation was made *di in limba ileneasca pre limba romaneasca.* The finding is not only the position of the group of scholars who have made the Code of laws in 1646, and official vision problem ruler of the Principality, that supreme state power in the Moldova. Only Romanian Book of Learning was developed and published under the direct control of Vasile Lupu, with its financial and material support.

The monarch had a consistent position regarding that country's inhabitants were Romanians and appearance of their ethnicity and that they speak Romanian.

Supreme ecclesiastical official position of Moldova on glotonim of the spoken language mainly found its reflection in Cazania published in Iasi in 1643. Even on the title of the work Varlaam (? -1657), mentioned in the previous paragraph, it was indicated is translated directly to "*din limba sloveneasca pre limba romeneasca*"[7].

Namely Romanian Book of teaching of Vasile Lupu contributed to the crystallization of ethnic consciousness of the population of the Principality. In its preface chancellor Eustratie directly called the inhabitants of the State of Moldova Rumanians. Thus, considering the significance of the Romanian Book of teaching from 1646 legal culture of the population of the Carpathian-Danubian-Niester area, he wrote: "*Aceastea intelepciuni si aceastea invataturi ne-au dat si ne-au lasat noo*

[6] *Carte românească de învăţătură.* Critical Edition. 38.
[7] *Carte românească de învăţătură.* Critical Edition. 38.

tuturor rodului romanesc ca sa ne fie noo de pururea izvor de viiatia in veaci nescadzut si nesfarsit"[8].

This is not an innovation of Chancellor Eustatie. It develop and deepen the concept of secular consciousness of ethnic identity of the population of the Romanian Principalities. According to the Chronicle of Moldova attestation of the chronicler Grigore Ureche (ca. 1590-1647), the Greek monk Maximian persuaded in 1506 the lord of Moldova Bogdan Voda (1504-1517) to conclude peace with lord Radul-Voda of Wallachia (1495-1508) saying that "*being Christians and tribe*"[9].

By the terms Romanian fruit, seeds, Romanian medieval scholars understood the Romanian people. Namely Romanian people was noted in 1643 by the Prince of Moldavia Vasile Lupu in the boiler predislovia Varlaam, when he wrote: "*But mercy and peace of the whole Romanian everywhere what are*"[10].

An important role in the crystallization of consciousness native population of the Carpathian-Danubian-Dniester area, the sense of ethnicity to Romanian people had employments in the works of scholars of the term nation, and the phrase Romanian nation. The highest dignitary of ecclesiastical power in the State of Moldova, Metropolitan Varlaam, considered the native inhabitants of a nation with the native Transylvania Moldavia. In "response against Calvinist catechism" he wrote Transylvanian are "a romanian nation with us". In another fragment of the work mentioned, Varlaam concluded that and residents of Moldova and Wallachia were also those of the Romanians. Referring to the spread of Calvinist Catechism, Metropolitan wrote: "This little book came to us, to Romanians of Moldova and the Romanian Country"[11].

But to determine the correct ethnonym and glotonim residents of Country Moldova had difficulty, not only ordinary people but also some personalities of national culture.

The Grigore Urecher (c. 1590-1647), governor of the Principality, a division of Chronicle of Moldova entitled "Our Moldovan language",

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[8] *Carte românească de învăţătură.* Critical Edition. 38.
[9] Gh. Ureche., M. Costin, I. Neculce. *Litopiseţul Ţării Moldovei. Cronici* (Chişinău: Hyperion, 1990), 67.
[10] Varlaam. *„Opere”*. (Chişinău: Hyperion, 1990), 67.
[11] Varlaam. *„Opere”*. (Chişinău: Hyperion, 1990), 480.

and did not use the phrase Moldovan language text, but most of our speech[12]. Therefore, the chronicler does not distinguish between the notions language and speech, perhaps considering them as identical.

The eminent savant Dimitrie Cantemir (1673-1723), member of the Berlin Academy in 1714 regarding glotonim used by the inhabitants of Moldavia and their ethnonym initially had some opinions that are subsequently changed noticeably. In encyclopedic treatise *Description of Moldova*, Chapter IV of Part III is entitled on Moldovan language. The author, in our opinion, mentioned that Moldovans, as inhabitants of the Principality, they had their own language. As a savant of European fame and knowing the reality of the other two Romanian countries, D. Cantemir specified that "inhabitants of Wallachia and Transylvania were talking one and the same language with Moldovans"[13]. Therefore, the great savant has made a judicious statement, noting that the natives of Moldavia, Wallachia and Transylvania were talking one and the same language. He was aware of the existence of dialects of Moldovan language and, to some extent, succeeded to the most important specific dialects of character, including that spoke of his citizens.

Investigating the *Treaty Description of Moldova*, we managed to point out what D. Cantemir which was not materialized that glotonim and ethnonym used by Moldovans. Basically the job is not shown that inhabitants by ethnicity were Romanian and Romanian-speaking. No term or phrase Romanian and Romanian language were not used in the description of Moldova. Therefore, use of the term Moldovan / Moldavians gives the impression that D. Cantemir had in mind that it was the ethnonym characteristic for residents of the Principality.

But the terms Moldavia/Moldavian mean in legal political aspect of state residents belonging Moldavia. From the text book "*Description of Moldova*" we cannot determine precisely what was the significance of the terms Moldavian / Moldavians scientific conception of thinker D. Cantemir.

Later in the process of developing the "*Chronicle of the Roman vechimei Moldovan-Vlachs*" D. Cantemir further studied 150 works of

[12] Ureche, Costin and Neculce. *„Litopiseţul Ţării Moldovei. Cronici”*, 25-26.

[13] D. Cantemir. *„Descrierea Ţării de odinioară şi de astăzi a Moldovei”.* Vol. II. (Bucureşti: Institutul cultural român, 2007), 315.

chroniclers and historians of previous European states. New information gained allowed him to clarify various aspects of the historical evolution of the native population of the Carpathian-Danubian-Dniester area, including aspects of the ethnonym and glotonimul of the natives. As a result, in Chapter XII of Book II of the Prolegomena Chronicle thinker reflected both the historical origins of the population of Moldova, Wallachia and Transylvania, and who were materialized in the early eighteenth century natives in terms of ethnicity: "*De aicea dara si dintr-acestea romani s-au inceput neamul nostru a romanilor. Si Traian, marele imparat, iaste saditoriul si rasaditoriul nostru; romanii sint buciumii viii Dachiii noastre si noi vlastarile lor. De atunce, pana acmu, pentr-atatea clatiri si mutari de vremi, nestarpiti si nedezradacinati inverdzind si dreapta si adevarata roada de slava si cinstea si vitejiia romaniasca*"[14]

The author of *Chronicle* has exposed conclusive opinion about glotonim of Moldovans language. Even on the title of the treaty is expressly stated that the work was developed in Romanian language. And in his treatise D. Cantemir mentioned that after completion of the Chronicle in Latin language deemed necessary "*de iznoava din limba latineasca iarasi pre cea a noastra romaneasca*" to improve[15].

The research conducted shows that under the pressure of Russian Tsarism Moldavian dialect was replaced in the consciousness of people from East of Prut as Moldovan language. With this designation inadequate in scientific, indigenous native of the population east of Prut was used in documents of the Russian Empire until 1773 and 1917.

To speed the process of denationalization and Russification subsegment of the members of the Romanian ethnic territories from the east of Prut, tsarist autocracy in normative acts and other official documents forged the glotonim and their ethnonym, hoping thus easier to deform their national consciousness and make them forget who they really are. Romanian language in comparison with the native language of Bessarabia and Transnistria, and national origin ethnonym Romanian represents the native inhabitants of the regions mentioned, were not used during 1792/1812-1917 or in an official document nor in any legislation,

[14] D. Cantemir. „*Hronicul vechimii a romano-moldo-vlahilor*". Edition carryed out by Stela Toma. Vol. I. First part. (Bucureşti: Minerva, 1999), 89.
[15] D. Cantemir. „*Hronicul vechimii a romano-moldo-vlahilor*", 57.

enacted by the Government of the Russian Empire or the colonial administration in the region. Through such processes, Romanians Moldovans in the territories from the east of Prut are gradually inculcate the idea that they were speaking a different language than the one used by others to the west of Prut and that would be particularly look them over and ethnicity.

Regulation on the establishment of the provisional administration in Bessarabia in 1812 stated that as stewards could be elected only Moldovans. Therefore, the term Romanian which according to scientific investigations of local scholars: Coresi Eustratie chancellor, Prince Vasile Lupu, Metropolitan Barlaam and Dosoftei, chronicler Miron Costin, encyclopedic scholar Dimitrie Cantemir etc., was real and correct ethnonym of the natives, but it was not on the please of Russians, was substituted by the term Moldovan/Moldavians, which represent the political-legal state residents belonging Principality of Moldova.

The names of glotonim and ethnonym of indigenous inhabitants of Bessarabia were also denatured in other legislation and official documents of the tsarist autocracy, which have governed the legal status of the region:

1. Instructions given by P.V. Ciceagov Scarlat Sturza;

2. The establishment in 1813 of two departments and the General Assembly;

3. establishments obrazovaniei *oblastei* Bassarabiei 1818;

4. establishments for 1828 Bassarabiei ruler *oblastei*[16].

An eloquent example by imposing forced tsarist autocracy as glotonim the phrase "Moldovan language" not only the inhabitants of Bessarabia, and the population of the Principality of Moldova, held in 1833. The resident Emperor Nikolai I in the Romanian Principalities during military occupation by Russian Empire in the years 1829-1834 Wallachia and Moldavia, General P. D. Kiselev in connection with the translation of the Greek Code Calimach in Romanian, ordered on the title of the document to be printed translated the following: *Code Civil de Moldavie. Publié pour la première fois en langue Moldave sous la Présidence de S. E. Monsieur de Kisseleff, Président plénipotentiaire des Divans de Moldavie et de Valaquie, Lientenant Général, Aide de camp*

[16] D. Poştarencu, *„O istorie a Basarabiei în date şi documente (1812-1940)”*. (Chişinău: Cartier, 1998), 66-70.

Général de S.M. L'Empereur de toutes les Russies, Chevalier grand croix de plusieurs ordres. Iassy, Imprimerie de l'Abeille, 1833[17].

State officials and people of culture from Moldova not accepting the inclusion of the phrase "Moldovan language" in the title of the collection of laws, because they did not want to cheat Principality population in terms glotonim true national language of the country of Romanian citizens. Order Russian general was not fulfilled[18].

Tsarist colonial administration in Bessarabia distort not only the ethnonym and glotonim of the natives, but also of members of national groups, established by migrants and their descendants. For example, in the census of Russian population Empire 1897, conducted by the tsarist autocracy officials, natives of Bessarabia was incorrectly mentioned as speakers of Moldovan language, Russians-like speaker of language "*voolikoruse*", Ukrainian-speakers of language "*moalorosiene*", Gagauz – like speakers of turkish language.

But some local cultural personalities from Bessarabia did not accept the substitution glotonim of native language with the phrase "Moldovan language" or that of the ethnonym by the term Moldovans laid down in laws and other documents of tsarist colonial administration. They, like the scribes and scholars and native predecessors, mentioned above, in their works published either in Chisinau, either in St. Petersburg and used correctly specifies how to prospective readers that the proper name of the language was the language of the natives of Bessarabia Romanian and ethnonym - Romanian.

Gabriel Bănulescu-Bodoni (1746-1821), Exarch of the Metropolitan of Chisinau and Hotin in his speech at the Missal in 1815, published in typography Metropolitan of Chisinau, said the need to publish books of prayers (sacred books) in the language of the population of Bessarabia, using just 9 times in the text the phrase "language Rumânească". The term "Rumânească", usually beginning with a capital **R**[19]. Bibliography Alexander David (1910-1935) on the basis investigations carried, stated in 1934 that Bănulescu-Bodoni Gavriil Exarch speech was sent to all churches in Bessarabia and Transnistria as

[17] *„Codul Calimah"*. Ediţie critică. (Bucureşti: Academiei RPR. 1958), 56-57.
[18] *„Codul Calimah"*. Ediţie critică. (Bucureşti: Ed. Academiei RPR. 1958), 860-67.
[19] A. David, *„Tipăriturile româneşti în Basarabia sub stăpânirea rusă (1812-1918").* (Chişinău: Universitas, 1983), 28.

a separate circular to inform priests and the laity[20]. "Romanian language" was mentioned in other Orthodox Christian books, published at that time for the needs of churches in Bessarabia and Transnistria: *Molebnic* (Chisinau, 1815), *Thanksgiving Service on Christmas day* (Chisinau, 1816), *Ceaslov* (Chişinău, 1817) *Panihidei ordinance* (Chisinau, 1817), the *Bible* (SPB., 1819), the *New Testament* (Spb., 1819), *Debts elders for the people* (Chisinau, 1823), *Thanksgiving Service on Christmas day* (Chisinau, 1826)[21].

Stephen Martela (1783-1850), author of methodological and didactic works for schools in Bessarabia, in 1827, published in the Public Education Department printers in St. Petersburg manual "*And Romanian Russian Grammar*". In the preface manual specifies that in Bessarabia, as well as the territories to the west of Prut, lived romanians that speaking Romanian language[22]. The scribe therefore used glotonim Romanian and Romanian ethnonym, reflecting the objective reality of the region, ignoring the false inoculated population by followers of denationalization and Russification policy - which the peoples annexed by the Russian tsarism.

Hâncu Iacob (known in Russian historiography Ghinculov named Iacob, (1800-1870), originally from the town. Ovidiopol left bank was in Chişinău Theological Seminary teacher at the school from 1839 - lector, and in 1854 - a substitute teacher at the Department of Wallachian-Moldovan language at the University of St. Petersburg. In his work he reflected scientifically objective the the linguistic and ethnic situation, the existing fourth decade of the nineteenth century in the Carpathian-Danubian-Dniester area, including the territories from the east of Prut.

The Transnistrian professor distinguished linguist, showed the existence of single Romanian of language both to residents of Moldova and Wallachia those. In the Preface to his scientific the Treaty (about 600 pages) description Wallachian-Moldovan grammar, published in 1840 in the Imperial Academy of Sciences printers in St. Petersburg, he emphasized in the Romanian of language there are two dialects: 1)

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[20] A. David, *„Tipăriturile româneşti în Basarabia sub stăpânirea rusă (1812-1918”),* 28-30

[21] David, *„Tipăriturile româneşti în Basarabia sub stăpânirea rusă (1812-1918”),* 31-69.

[22] David, *„Tipăriturile româneşti în Basarabia sub stăpânirea rusă (1812-1918)”*, 69.

Moldovan - speaking residents of the geographic area east of the Carpathians, including those from Bessarabia and Transnistria; 2) Vlach - speaking residents geographical area south of the Carpathians[23]. The author, based on the names of these two dialects, along with glotonim Romanian language, the name used in parallel and Wallachian-Moldovan language, considered by him as identical. The scientist also said that the local population in the area Carpatho-Danubiano-Nistrean use ethnonym "Romanian". Iacob Hâncu, in this context, the Preface wrote: "Even the appointment (correct - name) Romanian is not accidental. Until the founding of the principality of Moldova, residents of both principalities were known Romanian joint[24].

And John Donchev (1821-1885) pedagogue and author of manuals for schools in Bessarabia, through teaching and scientific work that has repudiated Tsarist government dignitaries allegations that the term, may be called glotonim Moldovan and Moldavians term residents as ethnonym local region annexed by the Russian Empire in 1812. both in the preface to the manual "*Cursulu primitivu de limba rumână, compusu pentru sholile elementare şi IV clase gimnaziale, cât şi în Prefaţa la Abeceda Rumână*", both books published in Chisinau in 1865, used only glotonim Romanian and Romanian ethnonym "[25]. Both books have been banned for use in training children in schools in Bessarabia, because they, by their content, were contrary to Russian Tsarist policy, aimed deformation Moldavians national consciousness of Romanians from Bessarabia, denationalization and Russification their cation.

"Theory of moldovenism" was used by Soviet propaganda in the 20s to challenge the union of Bessarabia with Romania. In 1924 the Soviet authorities decided to create a "Moldovan Soviet Socialist Republic" in Transnistria, which is composed of Soviet Ukraine. The new republic was officially born October 12, 1924, and the purpose of its creation was to "fight for the restoration of unity divided Moldovan people of Romanian bourgeoisie". In fact, the existence of MASSR was a way of undermining the Greater Romania.

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[23] David, *„Tipăriturile româneşti în Basarabia sub stăpânirea rusă (1812-1918)"*, 83-101.

[24] David, *„Tipăriturile româneşti în Basarabia sub stăpânirea rusă (1812-1918)"*, 84-93.

[25] David, *„Tipăriturile româneşti în Basarabia sub stăpânirea rusă (1812-1918)"*, 144-163.

According to archive documents, by creating MSSR Gubernium Odessa Committee Secretariat of the Communist Party of Ukraine has appointed a commission charged with propaganda efforts. The three members of the committee were AL Grinstein, II Badeev and Gr. I. the condition. The question of the existence of the Moldovan language was discussed intensively, especially after the birth of anti-Romanian propaganda publication Red Ploughman, published on 1 May 1924. The question was raised language to be published in this journal. The language spoken by the Romanians in Transnistria did not have a unitary character or literary, it is not cultivated Russian government schools. With this issue, the committee was divided: Starii thought that had used Romanian language and Latin script, while the other two held that there was a "Moldovan language" distinct from the Romanian. Obviously none of them was a specialist in philology so be somehow entitled to issue such opinions.

Starâi It was argued that it was impossible to create a new "Moldovan language", and that this cannot be the result of arbitrary political decisions. Instead, Badeev said there is a "Moldovan language" other than Romanian, Russian as Ukrainian differ. In addition, he argued that there is a literary Moldovan language, but that the two languages are in the process of differentiation continues, Romanian receiving influences from the West, and "Moldovan" in Russian. And of course, for publications in the "Moldovan language" Slavic script to be used. On the other hand, condition argued that since the ultimate goal is to proclaim the Soviet Romania, Romanian language would be the best (and most affordable) way propaganda.

All these discussions the committee ended in a Badeev report by the end of August 1924. It is the first official Soviet document speaks of "Moldovan language". Following discussion the committee decided to end the "popular Moldovan language development" and to use Cyrillic. That shows "Moldovan language", the result of a political decision taken without consultation of an expert in philology.

When MASSR was born in October 1924 used the term "Moldovan people", much of which is "subdued Romanian bourgeoisie." The official Soviet viewpoint was that Bessarabia is part of MSSR and should be freed from "Roman yoke. "After the Molotov-Ribbentrop pact and the annexation of Bessarabia was organized east of Prut Moldavian Soviet Socialist Republic. Soviet authorities imposed historiographical

theory which claimed the existence of people and Moldovan language. As the historiography of Romania take a prominent national course in the 60s, one in Moldova suffered from Soviet propaganda work very intense. During this period appear studies and N. Mochov Ja. Mosul signed, Soviet historians emblematic of the "theory Moldovenism"[26].

During the communist dictatorship some authors voluntarily, others due to the constraints of the political regime, the Directive has committed forge name of the language used in the documents of legal and linguistic history. The magazine October (Октябрь) 1956 was published article “Rules of Vasile Lupu” - a monument of Moldovan law and the Moldovan language. At p. 82 was written black on white that Vasile Lupu language is Moldovan. In 1967, vol. I of the Treaty academic history Moldavian SSR stated that Rule of V. Lupu 'has a particular interest as a source for studying the early stages of formation and development of Moldovan literary language"[27]. The same information we find on p. 310-311 of vol. 5 Moldovan Soviet Encyclopedia, at p. 151 of vol. I Encyclopaedia of Literature and Art Moldova[28], on p. 634 of the work *Краткая энциклопедия: Советская Молдавия*[29] etc. Such works and straightening were published in editions of thousands and tens of thousands of copies. With the abundant literature libraries were completed all educational institutions, public libraries in towns and villages. Therefore, when someone is interested in what language was written and edited “*Rules of Vasile Lupu*”, he was informed of the many Soviet publications that first code of laws of Moldavia would have seen the light of day in the Moldovan language. Through such ideological manipulation and falsification of scientific historical truth on covering legal and political documents language was deformed consciousness of grandparents and parents Moldovan residents.

Especially after 1964, after the appearance of the third volume of the History of Romania in Bucharest (which speaks about the problem of

[26] Lupuşor. „*Sunt moldovenii români sau nu? Despre teoria moldovenizmului”*, 2.
[27] История РСС Молдовенешть. Вол. 1. (Кишинэу: Картея молдовеняскэ, 1967), 295.
[28] Енчиклопедия советикэ молдовеняскэ. Вол. 5. (Кишинэу: Ед. ЕСМ, 1975), 310-311.
[29] Советская Молдвавия. Краткая Энциклопедия. (Кишинев: Изд-во МСЭ, 1982), 634.

Bessarabia) and work Karl Marx. Notes about Romanian, records show a serious concern of the authorities to fight the MSSR "Romanian nationalists". In addition, in 1965 held a demonstration in favor of introducing writers Moldovan Latin script. Numerous documents show the existence of an intense correspondence between Chisinau and Moscow regarding this issue. Chisinau authorities show that penetration Romanian press in Moldova, Romanian radio and television and radio stations Western "confuses the Moldovan people". Thus, in 1967 decided realization of "scientific studies" about the existence of "Moldovan people". Also, 1966 is prohibited studying Romanian books from public libraries and entry into MSSR works of authors such as Nicolae Iorga, Octavian Goga, Lucian Blaga etc. Soon, the only Romanian books were accepted technical, medical and dictionaries. History books were strictly forbidden. In addition, it was decided jamming Western radio stations[30].

The first work "scientific" in Soviet Moldova History MSSR was published in two volumes in 1951 and 1955. The authors claimed "theory of the two peoples Romance" Romanians and Moldovans would have the same ancestors, namely "Vlachs", a population comprised of Romans and Slavs. From their coexistence with the East Slavs would be born in the XIV century, "the Moldovan people".

According to the paper, in the centuries II-IV of the Carpathians and the Dniester territory was inhabited by various tribes considered (without any serious arguments) Soviet historians as being predominantly Germanic, Slavic predominant or mixed. Including a presence there would be Getic, wire or "late Scythian". Then in the fifth century, there had been a massive depopulation of the territory of Moldova, probably due to the devastation of the Huns. Between the V-VIII, the area was filled with Slavs. They were here "Slavic culture", joined by other populations.

All these theories were formulated on the basis of archaeological finds. In the 70s and 80s Soviet historiography claimed that most of the early medieval archaeological finds from the area investigated region belonged to the Slavs. Overall, it was found that during this period the Eastern Carpathians there was a Roman population. In X-XI centuries, migrations late (Hungarians, wet, Pechenegs) have severely affected the Slavs, but they were able to remove these migrants. Then the Golden

[30] Lupuşor. „*Sunt moldovenii români sau nu? Despre teoria moldovenizmului”*, 3.

Horde attack triggered a period of decline in the thirteenth and fourteenth centuries, preventing the formation of powerful slave state formations. Only in the XIV century in the region would appear "Vlachs" ancestors "Moldovans". Again, archaeological findings (in fact unclear) are used to support these ideas. According to Soviet historians, Hungarians began in the twelfth century conquest of Transylvania and they pushed the Vlachs in East and South Carpathians. "Wallachians" Romanians and Moldovans ancestors were a people consisting of mixture of Romanesque South Slavs in the South and North of the Danube. Come Hungarians in Transylvania before they were pushed by Country Romanian and Moldova. So we have a theory immigration. Native population of East Carpathians were Slavs, from a mixture of the Romanic was born "Moldovan people" and the southern mountains Romanian people. Formation of "modern Moldovan nation" had occurred in Bessarabia, after its inclusion in the Russian Empire![31]

To support the theory Moldovenism, Moldovan historians have used various arguments. First, the arguments are ethno folk: Soviet scientists insist that "Moldovan folk" shows the origin of this people as offspring of Vlachs and Slavs. According linguistic arguments, there is a Moldovan language different from Romanian. However, the Soviets could not even linguists argues Moldovan language belonging to the family of Slavic languages. Finally, "experts" were raised and arguments paleoanthropology: Soviet anthropologists have tried to reach some conclusions about joining "Western Romanic" with the Slavs, but the evidence is not conclusive.

For political reasons, the existence theory "Moldovan people" was supported by historians and politicians 1991 in Moldova and promoted phobia Voronin's regime. At the same nationalist spirit in 2008 was created the Order of Bogdan I the Founder, to be awarded for achievements in developing and strengthening the stability of the Republic of Moldova. In the same year, a law criminalizing "defamation of the state and Moldovan people" in an attempt to ban claim that "Moldovans" are actually Romanian. In 2009, they celebrated 650 years since the foundation of the Moldovan state government in 1359. Changing Voronin made a number of changes, and opening the archives

[31] Lupuşor. „*Sunt moldovenii români sau nu? Despre teoria moldovenizmului”*, 3.

has facilitated the demonstration that the whole question of the existence of the Moldovan people is purely political, and not scientific[32].

Although there USSR or Soviet censorship, though some officials, party leaders, scientists, political reasons continues to ignore cases of glotonim use of the Romanian language in official documents and works of the Principality of Moldavia scholars, sometimes pretending not to notice, and sometimes distort their vision they have developed convenient formulation presents the aims pursued by stating incorrectly that it was written in the so-called Moldovan language. For example, the doctor habilitate Vasile Stati history in the book "History of Moldova" mislead readers by stating that Rule Eustratie's chosen scribe of 1632 Romanian Teaching Book (boiler) of Metropolitan Varlaam of 1643 Romanian Teaching Book (Rule) in 1646 of Vasile Lupu was allegedly written in the Moldovan language[33].

Lacking any scientific argument is the statement circulated by some to this day, the native language of the Republic of Moldova is Moldovan, since it corresponds of politonim Moldova. However, there are dozens of countries where the official language name does not match the name of the respective states.

For example, according to Article 13 of the Constitution of Brazil, the official language of the state population is Portuguese. In all other Latin American countries official language is Spanish. In about 18 countries in the Middle East and North Africa there is no invented languages such names as: Syrian, Libanian, Iraqi, Egyptian, Tunisian, Algerian, etc. The constitutions of those States stipulated that the inhabitants of some 18 countries use as official language Arabic. Syrian Constitution of 1950 by art. 4 mentions Arabic the official language. It was enacted as an official language in Lebanon by article 11 of the Constitution of 1926, Article 17 of the Constitution of Iraq in 1925, Jordan - through art. 2 of the Constitution of 1952 in Egypt - through art. 3 of the 1956 Constitution and art. 5 of the Constitution of 1964 in Tunisia - through art. 1 of the Constitution of 1961, in Algeria - through art. 5 of the Constitution of 1963 and art. 3 of the Constitution of 1976. And no catastrophe happens because the inhabitants of the countries

[32] Lupuşor. „*Sunt moldovenii români sau nu? Despre teoria moldovenizmului”*, 3.
[33] V. Stati, „*Istoria Moldovei în date”*. (Chişinău: Tipografia Academiei de Ştiinţă a Moldovei, 1998), 144.

listed in their constitutions have regulated Arabic as the official language of 18 countries in the Middle East and North Africa[34]. From this is outlined universal jurisprudence formula: population states linked by origin and historical development community through multiple fraternal relations spiritual, cultural, economic, political and legal secular speaks the same language.

Recall that the constant efforts of the authorities of the Russian Empire and the USSR totalitarian communist regime for more than two centuries (1768-1991) the native population of Moldovan territory from east of the Prut, through legislation, administrative and political forms, schools, church, newspapers, magazines, textbooks, scientific articles, monographs, encyclopedias, radio and television, was inoculated Moldovan blatantly false idea that speech even as her literary language, and this idea has led to aberrant deformation of national consciousness of hundreds grandparents and great-grandparents of thousands of natives; however, thanks to the work of outstanding personalities of Romanian culture in Bessarabia as: Metropolitan Gabriel Bănulescu Bodoni, Alexandru Sturdza, Alexandru Donici, A. Russo, Stephen Martel, Ghinculov Jacob, John Donchev, Hasdeu, Zamfir Arbore Ralli, in the nineteenth century and in the twentieth century by Constantin Stere, Alexei Mateevici Ion Dic Dicescu, Writers Union members and other cultural associations; militants national liberation movement in the years 1940-1991; of teachers from different schools and higher education institutions, students, despite the pressures they faced, they managed to preserve and transmit from generation to generation of scientific historical truth, that the Moldavian dialect, as well as Wallachian dialects, Banat and Maramures Crisan were and continue to be parts of the Romanian literary language. The speeches mentioned in the scientific aspect instance do not have their own forms of verb conjugation, declension of nouns. They also do not have any numbers or pronoun distinct from those of the Romanian literary language. All dialects are guided by the same joint scientific grammar "*Romanian literary grammar*"[35].

[34] V. Cuşnir and D. Grama. *„Limba română sau limba moldovenească. Argumente istorico-juridice”*. (Academos, nr. 3 (34) (2014)), 26.
[35] V. Cuşnir and D. Grama. *„Limba română sau limba moldovenească. Argumente istorico-juridice”*. (Academos, nr. 3 (34) (2014)), 25.

Considering that the Declaration of Independence of the Republic of Moldova on 27 August 1991 as epochal historical document, drafted and adopted by the members of the first Parliament of our country without being conducted by the government of the Kremlin, the content of which was approved by the vote of hundreds of thousands of participants in the Grand National Assembly, meeting in the center of Chisinau, the officially stated that the language of indigenous inhabitants of the country is Romanian; Silviu Berejan that scholars philologists specialists, Nicholas Bileţchi, Anatol Ciobanu, Haralambie Corbu, Nicolae Corlăteanu others, the concept presented at the enlarged meeting of the Presidium of the Academy of Sciences of 9 September 1994 and submitted in response Moldovan Parliament on the use of history Moldovan glotonim showed conclusive arguments that the historical truth and scientific language (official) Moldova is Romanian; that the President Mircea Snegur, by legislative initiative of 27 aprilie1995 proposed Parliament to amend the Articles 13 and 118 of the Constitution for the purpose of fixing the correct name of the state language by glotonim Romanian; that scientific conference meetings that Romanian is the correct name of our language, organized at the request of Members of Parliament in the days 20 to 21 July 1995, renowned scholars philologists from Moldova, Ukraine and the Russian Federation: Haralambie Corbu, Nicolae Corlăteanu, Silviu Berejan, Anatol Ciobanu, Dirul Alexandru Ion Eţcu, Raimond Piotrowski, Stanislav Semcinski Vitaly Marin, Maria Cosniceanu, Basil Paul, Anatol Eremia, Arcadia Evdoşenco, Nicholas Raevschi, Anton Bors, C. Dumitru Grama[36] lawyer backed by the text of the resolution adopted showed again that the correct name of the state language of the republic is glotonim Romanian; that the judgment of the Constitutional Court of the Republic of December 5, 2013 it was established that the decision of the Declaration of Independence on the Romanian language as the language of the Republic of Moldova precedence over Article 13 of the Constitution which stipulates that the Moldovan language as the official language; we can say that national scientific bodies under several cogent arguments have demonstrated the need to repair errors in the text of Articles 13 and 118 of the Constitution of 1994 by replacing the phrase Moldovan, which is actually only spoken

[36] Cuşnir and Grama. *„Limba română sau limba moldovenească. Argumente istorico-juridice”*, 26.

dialect name, and fixing glotonim Romanian language, which is the correct name of the literary language of the indigenous population in the country.

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HISTORY, NATIONALITY AND DUAL CITIZENSHIP

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Abstract:

Institution of citizenship is exclusively a product of the European political thinking, which has gradually established itself all over the world. Given modern states were established on the basis of nation-states, the new states of Eastern Europe and Balkans still rely on the presumption that citizens of other ethnic origin have their own national state, this generating a difference between nationality and citizenship. The perspective of an extended united Europe and European citizenship nourish the hope of these differences fading away. The article also examines ECtHR case-law, including the case of Tănase vs. Moldova related to dual citizenship and the right to stand for parliamentary elections, considering also the historic and ethnic background of the Republic of Moldova.

Key words: *History, citizenship, ethnicity, European Union, Moldova*

INTRODUCTION

Evolution, development and the role of the institution of citizenship in Europe is being attributed a special place in the framework of modern debates, both within the European Union and beyond its boundaries. It is not by chance that the most extensive and substantial debates on this subject are taking place in Europe. How can this be explained?

First, the institution of citizenship is exclusively a product of the European political thinking, which has gradually established itself all over the world. The notion of citizenship appeared for the first time in the Greek city-states, later it enjoys a new development in the Ancient Rome, eventually reappearing during the French Revolution of 1789, being combined for the first time with the notion of human rights.

Second, at present, a unique project in the whole history called the European Union is in the process of emerging on the European continent. The EU is a political, economic and cultural structure, aiming to approach to the moral ideals of the republican Rome. The harmonization of values, systems and institutions of the EU Member States has marked in a fundamental way the evolution and the attitude towards the

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institution of citizenship, which manifestly goes beyond the traditional relationship between the state and the citizen. It is merely the construction of a united Europe that made contemporary debate in political and social sciences to be dominated by the analysis of the institution of citizenship.

In the context of European realities, namely of the processes of institutional harmonization that are currently taking place in EU Member States, the subject related to *dual or multiple citizenship* represents a special topic of discussions.

The analysis of certain regulations or institutions, apart from any historical context or background, may lead to inaccurate or completely wrong conclusions.

Any regulation, regardless of its nature, should take into account a number of circumstances which, if ignored, are likely to make the norm a non-functional one or to generate effects that are different from those pursued. When it comes to certain democratic institutions, especially in the case of "new democracies" that appeared as a result of the collapse of the communist system, the historical context represents one of the key elements.

I. NATIONALITY DEVOID OF CONTENT IN A GLOBALIZED CONTEXT

A lot of debates take place nowadays on the rights, freedoms, national citizenship, European citizenship, nationality and national identity, without a thorough knowledge of these concepts or without a full understanding of political and legal dimensions of these terms.

1. CITIZENSHIP: HISTORY OF A CONCEPT – CORRELATION BETWEEN NATIONALITY AND CITIZENSHIP

The human rights have been for the first time associated with citizenship by the French revolution of 1789, in the "Declaration of the Rights of Man and of the Citizen". One of the most influent liberal thinkers of the nineteenth century, John Stuart Mill, has developed this approach and gave a definition to the term of citizenship, as meaning first of all, the rights and freedoms offered to the individual. In contrast to liberal values, at the expense of human rights, the communism promoted collectivism as a value. In the Soviet system, citizenship represented an ideologically justified supranational form of civics. In

fact, the Party which represented the state was repealing political pluralism and any form of civics.

We owe nowadays' multidimensional sense of citizenship (political, civil and social) to the British sociologist, T.H. Marshall, presenting in his book *Citizenship and Social Class* a unique approach that implies the responsibility of the state towards its citizens. This approach managed to raise the attention of researchers towards this paradigm. Since then, citizenship dominates contemporary debates in political and social sciences.

At first, the term designating the person's belonging to a State was "nationality". With the evolvement of the modern state and the development of the principle of nationalities, legal experts were making attempts to delimitate and gradually renounced to the word "nationality", replacing it with the term "citizen". The reason was that nationality expresses affiliation to a social body based on other type of rules, while citizenship expresses legal affiliation to a state. It was the French legal doctrine that has substantiated the difference between the concepts of citizenship and nationality, despite the fact that today the same doctrine and legal practice uses them as synonyms.

Today, the greatest number of constitutions and laws use the term "citizenship" to designate an individual belonging to the state, still in some constitutions the term "nationality" can be found even nowadays.

In Western European countries nationality means the affiliation to a country.

In Central and East European states, including in the Republic of Moldova, there is a distinction between nationality and citizenship. In these states, the term "nationality" defines the affiliation of an individual to a nation.

The explanation of this difference of concepts is based on the fact that all modern states have emerged on the basis of nationalities. Due to the fact that the states of the Western Europe have finalized this process earlier that those of the Central and Eastern Europe, in the case of Western Europe states the national element has diminished in importance. On the other hand, the process of formation of new states in Balkans and Eastern Europe (Czech Republic and Slovakia, the independent states previously forming Yugoslavia Federation or the Soviet Union) is also based on the national idea and encourages the use

of the difference between nationality and citizenship throughout the region.

The consequence of this fact results in the assumption of states from this region that people of a different ethnic origin have their own national state, which explains why they are not treated as individuals, but as members of a community.

The European Convention on Nationality adopted in Strasbourg in 1997 and ratified by the Republic of Moldova in 2000, offers an explanation and not a definition; however the fact that it states that *"nationality" means the legal bond between a person and a State and does not indicate the person's ethnic origin*, is quite significant.

The prospect of achieving a united enlarged Europe and the creation of a European citizenship inspires a hope for a possible extinction in future of this distinction and for a slight difference between the terms of "nationality" and "citizenship".

2. THE VALENCE OF CITIZENSHIP IN INTERNATIONAL LAW

Despite the fact that not all the individuals are yet registered as "citizens of the world" as it was advised, as early as in 1963 by thirteen worldwide famous personalities, including several Nobel Prize Winners, the international law has contributed significantly to the diminution of valence attributed to citizenship by recognizing the rights inherent for non-citizens, as well.

The principle of non-discrimination was raised up to the status of human rights within international instruments[2], while when referring to the recognition of certain rights, citizenship is perceived as an unlawful criterion of distinction between citizens and foreigners. Thus, if the citizens and foreigners enjoy the same rights, citizenship should be no

[2] In addition to the International Convention of 21 December 1965 on the elimination of all forms of racial discrimination, there may also be quoted Art. 26 of the International Covenant on Civil and Political Rights of 19 December 1966, prohibiting, *inter alia*, discrimination on any ground such as race, color or national origin. Art. 14 of the European Convention on Human Rights also enshrines the principle of non-discrimination and addresses expressly affiliation to a national minority.

longer regarded as a criterion able to justify a difference of legal nature and its existence could be challenged[3].

The European Court of Human Rights has addressed several issues related to civil rights (the right of individuals, family law, property rights, inheritance), the exercise of which traditionally is subordinate to citizenship. Thus, it has built a case law that ignores citizenship and outlines a personal European status, which gradually becomes more and more homogeneous among the States Parties to the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Within the scope of the right of residence on a territory, the absolute character of which is basically an attribute of citizenship, the European Court of Human Rights, in its judgments in *Moustaquim*[4] and *Beldjoudi*[5] cases, tended to recognize the quasi-absolute right to benefits of foreign citizens as well, when no connection with their country of origin substantiated their citizenship and expulsion would have been a disproportionate interference with the right to respect privacy and family life, guaranteed under the Art.8 of the European Convention on Human Rights and Fundamental Freedoms.

The Human Rights Committee of the International Covenant on Civil and Political Rights also strives to strengthen the rights of foreigners to entry and reside under Art. 12 of the Covenant, which provides that "no one shall be arbitrarily deprived of the right to enter his own country". In a general comment on the foreigners in the light of the Covenant (No. 15) of 11 April 1986, the Committee considered that if "it is in principle a matter for the State to decide who it will admit to its territory", nevertheless "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of

[3] A. Dionisi-Peyrusse, *Essai sur une nouvelle conception de la nationalité*, Coll. de thèses, t. 31, préf. P. Courbe, (Defrénois: 2008), 6.

[4] ECHR, *Moustaquim v. Belgium*, 18 February 1991 – relating to a Moroccan who committed 147 crimes in Belgium and in respect of which the Court held that expulsion would breach Article 8 of the European Convention because, outside of his nationality, he had very few links with Morocco.

[5] ECHR, *Beldjoudi v. France*, 26 March 1992 - relating to an Algerian recidivist sentenced to eight years in prison, whose expulsion was considered contrary to Article 8 of the European Convention because, outside of his nationality, he had very few links with Algeria.

inhuman treatment and respect for family life arise". In the communication Stewart v. Canada, of 16 December 1996, the same Committee has formulated a broad interpretation of the term "own country" enshrined in Art. 12 of the International Covenant on Civil and Political Rights, which should not be understood only as a country of citizenship. The Committee argued that "an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien".

In terms of social rights, the European Court of Human Rights has also blurred the distinction between citizens and foreigners. In the judgment *Gaygusuz v. Austria*, of 16 September 1996, it stated that subordination of the issuance of an emergency allocation for the unemployed to the condition of holding a citizenship is contrary to Article 14 of the European Convention on for the Protection of Human Rights and Fundamental Freedoms, which enshrines the principle of non-discrimination, as well as a violation of Article 1 of the Additional Protocol to the Convention[6]. This jurisprudence was reiterated in the case *Koua Poirrez v. France* concerning a social security benefit[7].

The European Community Law has established this evolution, primarily by eliminating the distinction between own citizens and the citizens of other Member States or countries that have signed with the European Union agreements in this respect, as well as by recognizing the right to benefit from "social security, social assistance and social protection, as defined by national law" for long-term residents from third countries, which have not signed with the European Union agreements on social rights[8].

3. THE CRISIS REGARDING THE CONCEPT OF NATION

The concept of nation, that has emerged during the French Revolution and has expanded during the IIIrd Republic, is currently in a crisis facing, according to the historian Pierre Nora, movements in opposite directions, which are exposing it to the risk of an explosion: at the top, due to difficult and uncertain integration within Europe, and at

[6] ECHR, *Gaygusuz v. Austria,* 16 September 1996.
[7] ECHR, *Koua Poirrez v. Franţei*, 30 December 2003.
[8] Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents.

the bottom, due to decentralization, which particularly promotes the regions. Drawn vertically in opposite directions by these pressures, the concept of nation is horizontally undermined by transnational ideologies (previously the Communism, and now - ecology), globalization, individualism and communitarianism[9].

Among the conditions of crisis of the concept of nation, there can be identified: the alteration of parameters of sovereignty: territory, borders, military service, currency, disintegration of forms of authority, such as families, churches and parties, urbanization of the territory and of the population, as well as the new wave of immigration which complies in a more difficult way to local legal norms and customs.

The sense of national affiliation following such a transformation is more invested more in sports games or landscapes, traditions and rich cultural heritage, than in military operations or in defining the general interest.

The idea of a "democratic" nation is on the agenda now.

II. DIFFUSE CITIZENSHIP, CONFUSED NATIONALITY

The philosopher Jürgen Habermas in his book ”Republican Integration”[10] undertakes a reflection on the challenges faced by a destabilised national state upon the emergence of multicultural societies and the development of economic globalisation. Opposing any attempt to hold onto an idea of the nation-state, the German philosopher is advancing the idea of democratic state based on the rule of law, a basement of democratic values, which would form a democratic order and would be widely spread in a ”post-national constellation.”[11] According to Jürgen Habermas, it is possible for a multinational and multicultural society to be consolidated by a democratic integration and a civic integration, by a form of diffuse citizenship. The thinking of the German philosopher could be sum up as follows: subsequent to proving that the age when the national idea was able to replace religion aiming at

[9] Pierre Nora, "Le nationalisme nous a caché la nation" in *Le Monde*, 26.03.2007. Source: http://www.lemonde.fr/societe/article/2007/03/26/pierre-nora-le-nationalisme-nous-a-cache-la-nation_884396_3224.html.

[10] J. Habermas, "Republican Integration, Essays in Political Theory" published in French by Fayard, (Paris: Rochlitz, 1998).

[11] J. Habermas, *Die postnationale Konstellation. Politische Essays* (Frankfurt am Main: Suhrkamp, 1998.

a symbolic unification of modern societies came to an end, he launches a vibrant pledge for the democratic rule of law to be extended beyond the nations and urges for transnational democratic institutions and public spheres to be created, particularly at the European level, in order to permit an extended political integration.[12] According to the philosopher Tzvetan Todorov, in a democratic rule of law, the relations of the state with citizens are not a part of affection: the democratic rule of law does not require the citizens to like its institutions, just to be loyal. This implies a feeling of belonging based on universal principles provided by a Constitution, a sort of constitutional patriotism, particularly a European one.

This brings into discussion the correlation between national citizenship and EU citizenship. The draft of EU Constitution provided in Article 7 for the citizenship, namely the EU citizenship, showing that: any individual holding the nationality of a Member State shall be a citizen of the Union. The Treaty of Maastricht, which amended the Treaty of Rome and which included a chapter entitled "Citizenship of the Union", providing "for the citizenship of the Union to be established. Every person holding the nationality of a Member State shall be a citizen of the Union". By the virtue of this last treaty, the European citizen was enjoying a number of rights deriving exclusively from this capacity of his: the right to vote in municipal elections, legal protection on behalf of the authorities of any Member State, the right to petition the European Parliament and the right to apply to the European Ombudsman.

Now, under the Treaty of Lisbon, the rights of the citizens of the Union are extended in some respects: the right to free movement and residence within the territory of EU; the right to vote and to stand as a candidate in elections to the European Parliament and at municipal elections; the right to benefit from protection by the diplomatic or consular authorities of any of EU countries; the right to petition the European Parliament and to apply to the European Ombudsman. The Treaty also prohibits discrimination on grounds of nationality.

The Lisbon Treaty came with a new form of public participation for EU citizens - the citizenship initiative. On this basis, a million of citizens holding the nationality of a significant number of EU states may take the

[12] Y. Sintomer, P. Hassenteufel, "Jürgen Habermas, L'intégration républicaine", *Politix*, vol. 12, 46 (1999): 173-177.

initiative of directly inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters of interest for the citizens.

The Union Law does not provide for its own system of granting EU citizenship, it automatically deriving from the citizenship of the Member State. Citizenship of the Union is additional to and does not replace national citizenship (Art. 20 of TFEU).

Moreover, the rights of citizens of the Union are of an evolving nature, as the Council may adopt provisions aimed at amending these rights.

III. EXCEEDING DOMESTIC FRAMEWORK: UNPRECEDENTED DEVELOPMENT OF MULTIPLE CITIZENSHIP

For a long time, situations where individuals would be able to hold and acquire the statute of citizen of more than one state seemed to be only a matter of research or a theoretical reflection. Hermetic boundaries and the relatively local nature of traveling, generally, were not encouraging people to develop worldwide connections.

Yet the revolutions in transportation and telecommunications, as well as the revival of migration flows have operated a deep change in the components of this problem, by promoting a significant growth of the number of persons with more than one nationality.

Although in the Republic of Moldova there is no real statistical data on this issue, some indications suggest that the number of dual and multiple citizenship holders has grown significantly. Overall, the number of multiple citizenship holders who live in the country could reach 1.5 million citizens. The situation of dual and multiple citizenship is also characteristic to Moldovans living abroad.

In many cases, multiple citizenship reflects the multitude of links created by a population that becomes more and more mobile and open to the world. But, if the heart has reasons unknown to mind, this phenomenon raises a number of delicate issues: first of all legal issues, due to the fact that citizenship implies applying certain provisions that influence the rights of individuals rights; second, political issues, as multiple citizenship represents a lack of practical choices, raising equally difficult questions on the feeling of affiliation.

Multiple citizenship is known from ancient times. In times of the emperor Augustus, Roman law provided for dual citizenship. It is common to observe multiple citizenship, as a mass phenomenon, mostly in those states whose societies were formed based on immigration: USA, Australia, and Canada.

In Europe, the phenomenon of *multiple citizenship* emerged particularly in newly created states by the former Soviet provinces. Diabolic social experiments conducted in former USSR, aimed at building *"the new homo sovieticus"*, were actually made up of the territorial rapt of states neighbouring USSR, forced ethnical assimilations of non-Russian people, ethnic cleansing, deportations of people (*the case of Tatars of Crimea*) and artificial changes of ethnic proportions by massive transfers of population from Russia to these territories.

IV. DUAL CITIZENSHIP: MOLDOVAN TOLERANCE

1. HISTORICAL CONTEXT

The territory of Basarabia was occupied by the USSR on 28 June 1940 as a result of Molotov-Ribbentrop Pact with the Nazi Germany. In the aftermath of the WWII, about 70 percent of Basarabia territory, populated by 80 percent of its inhabitants, became the Moldovan Soviet Socialist Republic. The remaining territory of Basarabia became part of the Ukrainian Soviet Socialist Republic. Those living in Basarabia lost their Romanian citizenship and became Soviet citizens while Romania became a "satellite" state of the Soviet Union. On 27 August 1991, on the territory of the former Moldovan Soviet Socialist Republic the independence of the Republic of Moldova was proclaimed. The Declaration of Independence condemned, *inter alia,* the annexation in 1812 of the territory of the Principality of Moldova by Russia and the annexation in 1940 by the Soviet Union of its territory from Romania. Shortly afterwards Moldova joined the United Nations and was recognized by international community.

2. REGULATORY FRAMEWORK OF THE INSTITUTION OF CITIZENSHIP FOLLOWING INDEPENDENCE

In 1991, the Parliament of the Republic of Moldova passed the Law on citizenship. The Republic of Moldova "proclaimed" as its citizens all the inhabitants of the former Moldovan Soviet Socialist Republic prior to its annexation, as well as their descendants.

Initially, based on the provisions of Art. 18 of the Constitution of the Republic of Moldova adopted on 29 July 1994, which entered into force on 27 August 1994, the citizens of the Republic of Moldova were not prohibited to hold the citizenship of other states, except for outstanding situations. Despite these, the respective prohibition was ineffective in practice, as many descendants from the Republic of Moldova made use of provisions of Romania's laws in order to demand for their lost Romanian citizenship. *(In 1991, the Parliament of Romania passed a new law on citizenship granting the possibility to those who lost their citizenship prior to the year of 1989, for reasons not imputable to them, and to their descendants to demand for Romanian citizenship)* At the same time, a big number of Moldovans of other ethnical origin acquired other citizenships, such as Russian, Ukrainian, Bulgarian or Turkish.

In 2002, the provisions of the Constitution of the Republic of Moldova prohibiting multiple citizenship were repealed. On 5 June 2003, following the repeal of constitutional provision prohibiting multiple citizenship, the Parliament of the Republic of Moldova amended the Law on citizenship, repealing the provision prohibiting Moldovan citizens to hold other citizenships. The amendments provided to the holders of other citizenships equal rights similar to the holders of the citizenship of the Republic of Moldova, with no exception.

On 10 April 2008, the Parliament of the Republic of Moldova adopted a new reform comprising 3 amendments to the electoral legislation: raising election threshold from 4% back to 6%; instituting a ban on all forms of electoral blocs and coalitions; and **the ban on holders of dual or multiple citizenship to become members of Parliament. The draft law also provided that only the persons holding exclusively the citizenship of the Republic of Moldova could occupy high positions in the Government or hold certain positions in public service and stand for elections.**

On 27 April 2010. the Grand Chamber of the European Court of Human Rights delivered a judgment in the case *Tănase v. Moldova* (application no. 7/08). The case referred to the infringement of provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms by the authorities of the Republic of Moldova, by the Law no. 273-XVI which imposed restrictions on holding public office for holders of multiple citizenships.

The Court found a violation by the Government of the Republic of Moldova of the right to free elections when passing the law that prohibited holding of the mandate of a Member of Parliament of the Republic of Moldova to the holders of multiple citizenship.

The Grand Chamber noted in its judgment that in a democracy, only loyalty to the State, not to the Government, should constitute a legitimate aim justifying restrictions imposed on election rights. It is clear that MPs, particularly those from opposition, had an important role in ensuring the accountability of the governing party and in pursuing different, sometimes opposing goals, which were necessary in promoting pluralism.

While MPs are in principle under the duty to respect the Constitution, laws, institutions, independence and territorial integrity of the country, this obligation does not mean that they cannot promote the amendment of the Constitution and the laws and change state institutions, as long as these actions are undertaken in line with the law of the State. Therefore, the fact that Moldovan MPs with dual citizenship may wish to pursue a political programme which is considered by some persons to be incompatible with the current principles and structures of the Moldovan State does not make it incompatible with the rules of democracy.

Regarding the proportionality of the law, the Court considered the argument that the measure was necessary to protect the laws, institutions and national security of Moldova to be far less persuasive.

Unfortunately, even it paid close attention the historic context of the Republic of Moldova (§11-18), in the appreciation of this judgment the Court emphasized particularly the negative effect of the Law no. 273 on the opposition, and it refrained from delivering a substantiation of multiple citizenship under particular historic conditions of the Republic of Moldova.

V. TOWARDS A MULTITUDE OF LOYALTIES AND INTERESTS?

When acquiring a citizenship, one actually acquires the privilege to fully exercise political rights related to exercising sovereignty. Holding capacity of being eligible and to elect, the citizen actually takes part, directly or through his/her representatives, to drafting laws, defining and monitoring public policies. Therefore, he/she has a word to say with

regards to both current issues and those impacting the destiny of the community.

Nevertheless, the loyalty of citizens holding more than one citizenship does not necessarily question loyalty, even if the possibility to take part in the exercise of sovereignty of several states shatters the models underpinning the traditional concept of citizenship.

The development of multiple affiliations, be they national, regional, infranational and supranational, of the competition between nationality and citizenship, of the European and universal constitutional patriotism made common for us the idea of Kelsen, according to which the state could deprive itself of the institution of citizenship.

According to Hans Kelsen, "if a legal system encompasses only provisions applicable also to citizens of foreign states, the institution of citizenship is not necessary" and that "for a state, in the meaning of international law, it is not essential to have citizens, but mere legal subjects, namely individuals who inhabit its territory and who are imposed obligations and conferred rights by state order."[13]

CONCLUSIONS

Globalisation will have a fundamental impact on our life and will push the states to make changes - probably slow, but necessary ones. None of the social, political or legal processes and phenomena will be the same as they were half a century ago. Borders are fading, as well as "hermetically closed" states and the free movement of people, goods and money will impose the states to carry out a number of changes, including on matters of citizenship, so that in the near future the nature of this institution will be perceived in a completely different way.

Observing the development of the institution of citizenship from the moral ideal of republican Rome to the concept of nation and the association of the notion of *citizenship* to that of *human rights,* emerged during French Revolution, it becomes obvious that its evolution has always been dependant on the evolution of the corresponding societies. Subsequently, it is obvious that in the future the institution of citizenship will have an ongoing development, depending on the values embraced by societies in the future.

[13] H. Kelsen, *Théorie générale du droit international public. Problèmes choisis*, t. IV, (Hague: 1932), 244.

If the development of the civilized world will not be disrupted by major crises or world conflagrations, the next probable phase of development for the institution of citizenship is *the "democratic" nation.* It will encompass people who have embraced and proved their attachment for democratic values.

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INTERNATIONAL ORGANIZATIONS, PROMOTERS PROCESS OF EUROPEAN ORGANIZATION: INTERGOVERNMENTAL APPROACH

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Abstract:

European Idea deep furrow history, its evolution beeing constant of ancient Greece more than 2,000 years ago until today. The construction of a United Europe is, in essence, the desire of peoples to create a region to be removed the military conflicts, poverty and disorder.

Until the appearance of the Schuman Plan, the projects of European organization were more theoretical attempts and less practical aplication.

The disastrous results of the two World Wars, the division of postwar Europe into two areas with different political, social and economic regimes and last but not least, the appearance of "cold war" between West and East, determines Western European countries to consider that overcoming this situation could be solved through gradual economic integration and political rapprochement.

The concerns regarding the european organization during this period[*] will be based on the creation and appearance of the first international european organizations, and knows two approaches, corresponding to the two phases of european construction, namely: intergovernmental approach (or interstate) - corresponds to the first phase - the phase of classic cooperation between states (or phase of european cooperation), when a number of international organizations set up by intergovernmental cooperation / classic interstate organizations; community approach - corresponds to the second phase of the european construction process - european unification phase, when there is the

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[*] The main artisans of this process are W. Churchill (England), Jean Monnet and Robert Schuman (France), Konrad Adenauer (Germany), Alcide De Gasperi (Italy), George Marshall (USA) etc.

establishment of international organizations supranational / supranational (also called integration organizations).

In the following, we will refer to the intergovernmental approach.

***Key words**: international organizations, promoter's process of European organization, intergovernmental approach, European cooperation*

THE INTERGOVERNMENTAL (INTERSTATE) APPROACH

Starting the real construction of European unification is based on establishment of international organizations aimed at cooperation between states (governments), reason why they are called *international organizations (inter)governmental and (inter)state.*

In essence, *intergovernmental approach* means that in the first European organizations created, the states cooperate with each other, but retain full sovereignty. It's the case of *the classic interstate organizations (international organizations intergovernmental cooperation).*

Specifically speaking, the most important *initiatives* whose result is the appearance of *European intergovernmental organizations /classic interstate*, initiatives of some explicit, others only mentioned in speeches, they are presented in chronological order, as follows:

- In October 1942, Winston Churchill conceives a memorandum regarding the United States of Europe;

- In November 1942, General De Gaulle declared in a speech that "... France is ready to do everything in the future for Europe, with those whose interests, concerns and needs for defence go hand in hand with its development and they can unite in a practical and sustainable way"[1];

- In 1943, *David Mitrany* publish a study on the organization of the functional base regions, continents and ultimately even the world, a study which apparently influenced Jean Monnet in his projects of European construction;

- at 5 September 1944, the governments in exile of Belgium, Netherlands and Luxembourg shall develop a project of *Economic Union* (expected to be headquartered in Brussels), project which was to be applied immediately after release. Originally conceived as a customs

[1] Mihai Luţaş, *European Economic Integration* (Bucharest: Economic, 1999), 60.

intergovernmental union and then economical, *The Organization of Benelux will be the first subregional structure* in Europe after the war;

- Between 25 to 28 June 1945 takes place Conference in San Francisco, during which arises *The Organization of United Nations (O.N.U.)*, as the follower of the "defunct" *League of Nations*[2]. Between July 17 and August 2, 1945, takes place the Potsdam Conference of Heads of the Governments of the USSR, England and the USA, taking decisions regarding the regulation of European post-war situation, as well as the status and borders of Germany;

- In August 1946, representatives of federalist groups in Western Europe and some countries in Central and Eastern Europe, met near Locarno, laying the foundations of the *European Federalists Union*. It will hold several meetings (Luxembourg - October 1946, Amsterdam - April 1947; Montreux - August 1947) where they analyzed ways accomplishment western European unification[3]. We can appreciate that *the European Federalists Union is the first major pan-European event after the war*. In 1949, the European Union Federalists turns into European Federalist Movement;

- On 19 September 1946, W.Churchill in a speech held at the University of Zurich, is launching a call for the Franco-German reconciliation and the unity of the continent, suggesting the creation of "a Council of Europe"[4];

- June 5, 1947, the US general Marshall, in a speech held at Harvard University, proposes to Europe the help of United States of America through a *"general plan of reconstruction of the continent"*. A conference held in Paris - begun at June 27, 1947 - ends on 16 April 1948 by a convention establishing *the Organisation for European Economic Cooperation (OECE*), which regroup at the date of establishment, a total of 16 countries from Western Europe. Headquarters is established in Paris and the main objective was Marshall aid distribution and then

[2] The League of Nations, founded in 1919, after the First World War is the first international intergovernmental organization with a universal vocation, with the fundamental purpose of maintaining international peace and security, purpose which could not fulfill.

[3] Emilian Dobrescu, *Integrarea economică,* second edition (Bucharest: All Beck, 2001), 50.

[4] Fontaine Pascal, *European construction from 1945 to today* (Iasi: European Institute, 1998), 5-7.

intergovernmental cooperation in economic and financial fields. In 1960, O.E.C.E. is converted to *O.E.C.D. (European Organization for Cooperation and Development)*, and *by joining the US, Japan, Australia, New Zealand and Canada, the organization's regional character* turns into a global nature (euro-atlantic and pacific);

- At the Eduard Heriot's initiative, is created *the French Council for a United Europe*, because in 1946, at the initiative of former Belgian Prime Minister Vaan Zeeland, take rise *the European League for Economic Cooperation*, and in 1947 at the initiative of Candenhove - Kalergi is formed the *European Parliamentary Union*. Also in 1947, at London it is an *International Committee of Studies and Action for the United Socialist States of Europe*, whose aim was to create a unified socialist Europe. At the end of 1948, this Committee becomes *English Movement for United States of Europe*, which, in turn, in 1961 became *the European Left*. Christian democratic parties in Italy, France and Germany created in 1947, the *"New International Teams"*, closer to the federalist thesis, and in 1965, the "New International Teams" to change the name in *the European Union of Christian Democrats* ;

- On 11 October 1947 in Paris, is a meeting of the federalist doctrine and doctrine functionalist (or functional) and delegates: The English Movement for a United Europe; French Council for a United Europe; the Economic Belgian League for European Cooperation; The European Union Federalists; other movements of this nature. On this occasion, they formed *the International Committee for European Unity Movement Coordination*[5] and agree of the implementation of functionalist projects in achieving the goal that they proposed. On December 14, 1947, delegates *Committee*, meeting in Paris all, decide to convene the *Congress of Europe*;

- On 17 March 1948 is signed *the Brussels Treaty*[6] signed between France, England and the Benelux countries (Netherlands, Belgium and Luxembourg), the establishment of Western Union (W.U.), which sought to strengthen intergovernmental cooperation in the economic (through training a customs union open to all European countries), political and military field (WU Western Union represent a

[5] Irina Moroianu Zlătescu and Radu Demetrescu, *Prolegomene la un drept institutional comunitar* (Bucharest: Ed. Economică, 2003), 50-64.
[6] Brussels Treaty is known also as the Brussels Pact.

mutual security treaty on term of 50 years, against an armed attack upon the member states)[7];

- On March 26, 1948, was signed in Turin - France - a protocol between France and Italy for the creation of the Customs Union FRANCITAL. On the other hand, France, Italy and the Benelux countries were to form FIBENEL, and Great Britain and the Scandinavian countries - UNISAN. The three projects were not actually materialized.

- On 4 April 1949 is created at Washington (USA), *"the North Atlantic Pact"* (NATO), military organization aiming to defend peace and security in the North Atlantic Region. Also in 1949, on 23 May, is constituted the Federal Republic of Germany (FRG), and on October 7, 1949 arises the German Democratic Republic (GDR). In response to the establishment of NATO, on 14 May 1955, the countries of the communist camp will be a military bloc, known as the *"Warsaw Pact"*.

- *The International Committee for European Unity Movement Coordination* convene between 8 to 10 May 1948 the *Congress of the Hague* (also called the *Congress of Europe*), which will set broad support for the cause of European unity. The *Congress Europe* will require the creation of a *Council of Europe* and the outstanding results of the *Congress* will determine the French Foreign Minister, George Bidault, on 19 July 1948 to propose the signatory countries of the Brussels Pact (France, UK, Benelux countries) the creation of a *European Assembly*[8].

- On 25 October 1948, the same International Committee (which created Europe Congress) will create *European Movement* - standing organization, non-governmental organization, aiming to bring together into one whole, favorable groups to European unification. On this occasion, the *European Movement* honorary presidents were elected: Leon Blum, Winston Churchill, Alcide De Gasperi and Paul Henri Spack. Following the *Congress of Europe* (Hague, May 8 to 10, 1948) and the creation of the *European Movement* (25 October 1948), on 5 May 1949 will be signed in London *Constitutive Treaty of the European Council*[9], representatives of the 10 founding countries: France, United

[7] Emilian Dobrescu, *Integrarea economică,* second edition (Bucharest: All Beck, 2001), 227.

[8]Emilian Epure, *Romania in Wider Europe* (Bucharest: Tribuna Economic, 2002), 10.

[9] Council of Europe should not be confused with the European Council nor with the Council of Euopean Union (also called the Council of Ministers)

Britain, Denmark, Ireland, Italy, Belgium, Netherlands, Luxembourg, Norway and Sweden. *Political* organization, the Council of Europe has established in Strasbourg, with the main objectives intergovernmental cooperation - cultural, social, technical - and the conclusion of the European Convention. As a political forum among states, the Council of Europe adopted on 4 November 1950 in Rome, *European Convention on Human Rights*, which entered into force on 3 September 1953[10].

Lack of legislative power to the Council of Europe organs (Committee of Ministers and the Parliamentary Assembly), broad objectives that it has proposed and slow economic transformation system, led to the failure of integration formulas and to the orientation of the Western states to formulas better suited to the aims pursued respectively a real economic cooperation between states.

Currently, the Council of Europe is a organical structure under the aegis of the United Nations Organization (ONU) and operates mainly in the field of human rights.

- During 1952, Denmark, Finland, Iceland, Norway and Sweden formed the *Nordic Council*, an intergovernmental organ of economic, cultural, technical and scientific cooperation, and during 1953 signed the Paris Convention, which arises Organization / European Convention for Nuclear Research (CERN).

- In October 1954, following the London and Paris agreements between France, West Germany, Belgium, Netherlands, Italy and the UK, are established *Western European Union (WEU)*, a military alliance inside which recreates a German army, the WEU beeing in fact an intergovernmental organ of military cooperation and cultural, based in Paris.

CONCLUSION

In conclusion, the *intergovernmental approach* is typical classical phase of *cooperation between countries* (also called *phase of European cooperation*) at this stage producing the appearance of international organizations of Classic cooperation (also called *international*

[10] Anton-Florin Boţa, *European policies on sustainable development* (Jean Monnet Module: Pitesti University Press, 2004), 31-32.

organization of intergovernmental cooperation or classical interstate organizations), as for example:

- Council of Europe (CE), established in 1949;
- European Organization of Economic Cooperation (OECE), established in 1948 and transformed in 1960 in the Organisation for Economic Cooperation and Development (OECD);
- Western Union (WU) or the Brussels Pact, established in 1948;
- North Atlantic Treaty Organization (NATO), established in 1949;
- Western European Union (WEU), established in 1954;
- Conference on Security and Cooperation in Europe (CSCE), established in 1975, transformed in 1994 in Organization for Security and Cooperation in Europe (OSCE) etc.

In the *communist bloc*, in 1949 will be set the Unions Council (UC), an international organization of cooperation in economic field, having an open character, which, however, after the fall of communist regimes from the member countries, will be abolished during the year 1990. The founding members of the UC were: R. P. Bulgaria, R. S. Czechoslovakia, R. P. Poland, R.S. Romania, R. P. Hungary and U.R.S.S. Afterwards join the UC, becoming members of the organization, R.P. Albania - in 1949, which will withdraw from the organization in 1962, R.D. German (1951), R. P. Mongolian (1962) and R. P. Cuba (1972).

Also, a seven-communist countries in Europe, plus the USSR, will be established at May 14, 1955 *"Treaty of Friendship and Mutual Assistance in Warsaw"*, known as the *Pact or Warsaw Treaty*. Founder members of the organization were: USSR, RP Albania, R. P. Bulgaria, R. S. Czechoslovakia, R.D. German, R. P. Poland, R. S. Romania and R. P. Hungary, the latter State withdrawing from the organization in 1968. *The Pact / Warsaw Treaty* is an organization that place the armed forces of seven European Communist states under Soviet single command. Conceived as a counterweight to N.A.T.O. (North Atlantic Organization), the Treaty / Warsaw Pact will be abolished after the fall of communist regimes in Eastern Europe, in two phases: 1990 and 1991.

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THE JURIDICAL EFFECTS OF TIME IN THE REGULATION OF THE CIVIL CODE

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Abstract:

This study aims to present some of the juridical valences which the legislator has conferred on time under civil law. The topic is approached from two perspectives: the effect of time on the civil law itself and its effect on the acquisition or loss of rights by the individual.

The first case deals with the activity of the laws and the so-called conflict of laws in time, which is solved by resorting to two principles: the principle of non-retroactivity of the civil law and the principle of immediate application of the new civil law.

In the second case, we are considering the value of time as origin of the concrete civil legal relationship (event). In this regard, we have attempted to highlight two major juridical effects of time: the creative effect and the destructive effect.

The creative effect occurs when the passage of time or a specific moment in a person's life leads to the acquisition of certain rights, as it happens in the case of civil capacity and the acquiring of real rights as a result of possession exercised during and under the conditions foreseen by law.

The destructive effect consists of the loss of certain rights that were not exercised within the time period prescribed by law or even by the parties to a juridical act, as is the case of extinguishing prescription and of decay, but not restricted to these.

Although the creative and the destructive effect of time are present in the case of two modalities of the civil juridical act - term and condition -, we preferred to treat them separately, due to their complexity.

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Key words: *(5-7 words) conflict of laws, juridical fact, capacity to use, capacity to exercise, term, condition, retroactivity, possession, prescription, decay.*

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1. ON THE JURIDICAL SIGNIFICANCE OF TIME. *Tempus irreparabile fugit!*

Unnoticeable, unstoppable and irreversible, time is involved in everything that surrounds us and that happens to us. The awareness of its flow, an ever faster flow, is a topic for meditation for everyone. Scientists, philosophers, writers and artists have tried to define it, to interpret it, to represent it. Any attempt to freeze it, other than in memory, however, is doomed to failure (with Salvador Dali the watches themselves, which are merely instruments for measuring time, are flowing in their stillness!).

As a social, thus human phenomenon, civil law could not ignore the passage of time. However, juridical concerns do not claim to decipher its objective nature, its structure and the relations of time with other natural phenomena, nor its philosophical, poetic or artistic meanings, but they rather seek for more pragmatic purposes. To achieve its goals, civil law related to the major events that occur in a person's life (birth and death), gave a juridical significance to his/her age and has located his/her most important actions. In other words, time was the "raw material" out of which juridical institutions were built.

Following this line of thought, time itself was conceptualized from a juridical point of view and became an event, that is a natural fact that occurs independently of human will and to which the law gives the effect of producing juridical relations. Thus, in civil law, time represents one of the sources of the concrete civil legal relationship. [2]

Indeed, by the source of a civil legal relationship one is to understand the factor that is generating a social relationship, falling under the hypothesis of the juridical norm.

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[2] For the inclusion of time in the category of sources of the concrete civil legal relationship, please see I. Dogaru, R. Nițoiu and Cr. Stanciu, *Some Considerations on the Flow of Time as a Juridical Event (Câteva consideraţii privind curgerea timpului ca eveniment juridic)*, in I. Dogaru, *Juridical Texts (Texte juridice)*, (Bucureşti: Universul Juridic, 2011), 407; O. Ungureanu and C. Munteanu, *Civil Law. The General Part (Drept civil. Partea generală)*. (Bucureşti: Universul Juridic, 2013), 92.

The sources of the concrete civil legal relationship are likely to be classified according to two criteria. Thus, their relation to human will distinguish between human actions and natural facts, whilst their scope will distinguish between *lato sensu* juridical facts and *stricto sensu* juridical facts.

Of interest to our demonstration is the first classification, which, after dividing human actions in juridical acts (i.e. actions committed with the intent to produce juridical effects) and *stricto sensu* juridical facts (i.e. actions committed without the intent to produce juridical effects, effects that, however, are produced under the law), relates to natural facts, also called events. Together with time, the category of events includes death, birth, natural disasters and others of the type.

Analysing the situation from this perspective, "time as a juridical event is a natural and perpetual fact, a natural permanence without beginning and without end, which exists and occurs independently of the will of man, but with whose flow the law links the occurrence of certain juridical effects."[3]

The juridical effects produced by time may have a creative or destructive character, which we will attempt to present throughout our study. Of course, these effects occur only on account of the fact that law confers juridical significance on time.

Nevertheless, the relation established between law and time is much more complex! It is enough to state here that the very existence and enforcement of law lie under the seal of time.

2. TIME AND LAW. The laws passed by mankind are not immutable, their existence and content being determined by social realities which the legislator wants to regulate or to generate. However, as priorities of the legislator, these realities are in a perpetual dynamics, resulting in the amendment, complementation and even replacement of certain laws with new ones.

Firstly, we conclude that the civil law itself possesses a certain duration; therefore, it is subject to time. This raises the question of the time limits of civil law enforcement.

Secondly, many of the social realities do not disappear with the disappearance of the old law which regulated them, but continue to exist

[3] Dogaru, Niţoiu and Stanciu, *Some Considerations*, 414.

under the rule of the new law. Which of the two, i.e. the the old law and the new law, will regulate a juridical situation produced in the past and continuing to exist? This raises thus the question of conflict of laws in time.

2.1. Time Limits in the Enforcement of Civil Law. The "life span" of a law has a duration that is marked by two moments: its coming into force and its repeal. Thus, a law is said to be active, which means that a law is said to apply, in the time interval lapsed between its entry into force and its repeal.

According to article 78 of the Constitution, "The law shall be published in the Official Gazette of Romania and shall come into force 3 days after its publication date or on a subsequent date stipulated in its text."

The repeal of a law occurs by abrogation, which may be express (direct or indirect) or default.

A special category of normative acts is represented by temporary laws that are adopted for the regulation of juridical situations with a limited duration (e.g. the law approving state budget) or in order to solve emergency situations and which are repealed either at a due date referred to therein or when circumstances that have led to their adoption ceased to exist.

2.2. Conflict of Laws in Time. The scope of the conflict of laws in time consists of the juridical situations which arose under the aegis of the old law, but persist after it was replaced by a new law. These conflicts can be resolved by applying two principles: the principle of non-retroactivity of the civil law and the principle of immediate application of the new civil law.

2.2.1. The Principle of Non-Retroactivity of the Civil Law. The principle of non-retroactivity of the civil law represents the rule of law according to which a civil law applies only to situations that arise in practice after its entry into force, and not to previous situations. The relations that developed in the past, under the law in force at that time, cannot be abolished on the grounds that the legislator understands to provide them with a different regulation.

The constitutional foundation of this principle is to be identified in article 15 paragraph (2) of the Constitution, according to which "The law shall only act for the future, except for the more favourable criminal law".

The Romanian Civil Code (Law no. 287/2009) also stipulates this principle in article 6 paragraph (1), which has the following wording: "Civil law shall be applicable as long as it is in force. It shall not be retroactive."

In the standard hypothesis, which covers only the juridical situations that are being constituted, modified, extinguished and produce all their effects under the rule of the same law, any new law regulates only the juridical situation arising after its entry into force, whilst the old law applies to juridical situations arising before its repeal.

For juridical situations whose duration spans over the time periods when two or more civil laws are in force, it is necessary to distinguish between the constitution, modification or extinguishment of a juridical situation and the effects it produces.[4]

The facts of constituting, modifying or extinguishing juridical situations, performed entirely before the entry into force of the new law, as well as the effects produced before this moment (*facta praeterita*), do not therefore fall under it. However, from its entry into force, the new civil law will apply not only to the juridical situations that will arise, change or extinguish after this date, but also to the juridical situations that are in the process of being constituted, modified or extinguished at the time of its entry into force (*facta pendentia*), as well as to the future effects of past juridical situations (*facta futura*). In both cases, the legislator may, however, opt for the survival of the old law.

The Civil Code, especially Law no. 71/2011, which comprises juridical rules implementing the Civil Code, enact numerous applications of the principle of non-retroactivity of the law.

[4] Other criteria of non-retroactivity of civil law have also been proposed, among which the theory of the acquired rights and of expectations, the theory of abstract and concrete juridical situations, the theory of objective and subjective juridical situations, the theory of facts consumed, satisfied or performed. For the presentation and argumentation of these theories, please see C. Hamangiu, I. Rosetti-Bălănescu and Al. Băicoianu. *A Treaty of Romanian Civil Law (Tratat de drept civil roman),* vol. I, (Bucureşti: 1928); Ph. Malaurie and P. Morvan. *Introduction au droit*. Ed. a 4-a. (Paris: Defrénois, 2012), 221-228; M. Nicolae. *Solutions to conflict of laws in time. In search of the ideal formula: from the acquired rights theory to normative theory (Soluţii la conflictul legilor în timp. În căutarea formulei ideale: de la teoria drepturilor câştigate la teoria normativistă)* (I). R.R.D.P. 6(2012), 157 and foll.; idem, *Solutions to conflict of laws in time. In search of the ideal formula: from the acquired rights theory to normative theory (II),* in R.R.D.P. 1(2013), 140 and foll.

For exemplifying purposes, we would like to quote article 6 paragraph (2) of the Civil Code, according to which "The juridical acts and facts concluded or, if necessary, performed or produced before the entry into force of the new law cannot generate other juridical effects than those provided by the law in force at the closing date or, where appropriate, at their commission or generation", as well as article 6 paragraph (3) of the Civil Code, which provides that "legal acts void, voidable or affected by other causes of inefficiency from the entry into force of the new law are subject to the old law, as they cannot be considered valid or, where appropriate, effective under the provisions of the new law". [5]

2.2.2. The Principle of Immediate Application of the New Civil Law. The principle of immediate application of a new civil law represents the rule of law us according to which, once adopted, the new civil law applies to all situations arising after its entry into force, excluding the application of the old civil law.

In what the immediate application of the principle of civil law is concerned, there is the exception of ultra-activity (survival) of the old civil law, which means the application, in some determined cases, of the old civil law, and not of the new law that came into force. The old law can be applied after its expiry in two situations: if the new law expressly provides for this and if it contains suppletive rules.

The Civil Code enshrined the principle of immediate application of the civil law through article 6 paragraph (5), according to which "The provisions of the new law shall apply to all acts and facts concluded or, where applicable, produced or committed after its entry into force, as well as to the juridical situations arising after its entry into force". In addition, paragraph 6 of the same article provides that "The provisions of the new law shall also be applicable to the future effects of juridical situations arising before the entry into force, derived from the condition and capacity of persons in marriage, parentage, adoption and legal obligation of maintenance in relation to property, including the general

[5] For an analytical presentation of these provisions, on matters (juridical act; extinctive prescription, decay, etc.), please see G. Boroi and C.A. Anghelescu. *A Course on Civil Law. The General Part (Curs de drept civil. Partea generală)*.2nd edition, revised and updated. (Bucureşti: Hamangiu, 2012), 23-38.

status of goods, and neighbourhood relations if the juridical situation persists after the entry into force of the new law."

The other provisions of the Civil Code or of Law no. 71/2011 expressly regulate certain cases of ultra-activity (survival) of the old civil law, which constitute exceptions to the principle analyzed.

For example, article 6 paragraph (4) of the Civil Code states that "Prescriptions, decays and usucaption (usucapio) initiated and unfulfilled at the entry into force of the new law are entirely subject to the laws they have set", and article 56 paragraph (2) of Law no. 71/2011 postpones the entry into force of the provisions of the Civil Code until the date of completion of cadastral works for each administrative-territorial unit and up to the opening, on request or ex officio, of the real estate registries for the respective buildings.[6]

3. TIME AND CIVIL CAPACITY. Civil capacity represents a component of the juridical personality, the latter being the general ability to have rights and obligations. [7]

According to article 28 paragraph (1) of the Civil Code, civil capacity is acknowledged to be possessed by all persons. It can be divided into the capacity to use and the capacity to exercise.

The juridical definition of the capacity to use is provided by article 34 of the Civil Code, according to which "The capacity to use is the ability of a person to have civil rights and obligations."

Similarly, article 37 of the Civil Code stipulates that "The capacity to exercise is the ability of a person to enter into civil juridical acts by oneself."

Time is involved in both the acquisition and the cessation of both components of the civil capacity.

3.1. Acquisition and Cessation of the Capacity to Use. Article 35, sentence I of the Civil Code includes the rule according to which the capacity to use coincides with the birth of the individual. The rule stated includes an exception, which is governed by article 36, sentence I of the

[6] For the timely enforcement of the dispositions of the Civil Code on real estate registries, please see E. Chelaru, *Civil Law. The Main Real Rights (Drept civil. Drepturile reale principale).* 4th edition. (Bucureşti: C.H. Beck , 2013), 444-445.

[7] For the relationship between civil capacity and juridical personality, please see F. Zenati-Castaing and Th. Revet, *Manuel de droit des personnes*, (Paris: Presses Universitaires de France, 2006), 16-17.

Civil Code, according to which "a child's rights are acknowledged from its conception, but only if it is born alive". In other words, in order not to deprive it of its rights, the legislator deems that the conceived child exists even before it is actually born, but under the condition that it be born alive. This represents a transposition of the famous Roman adage *infans conceptus pro nato habetur quotiens de commodis ejus agitur* in modern legislation.

Such an approach to the starting moment of the capacity to use (partial beginning because it refers only to the acquisition of rights, not of obligations) prompted the legislator to establish rules for determining the moment of a child's conception. Thus, article 412 paragraph (1) of the Civil Code states that "The time period between the three hundredth and the one hundred and eightieth day before the birth of a child shall represent the legal time of conception. It shall be calculated on a daily basis". At the same time, the legislator allows to prove a child's conception within a certain period from the interval that represents the legal time of conception by means of scientific evidence. Through such evidence it can even be proved that the child was conceived outside this temporal interval.

The cessation of the individual's capacity to use occurs at his/her death (article 35, sentence II of the Civil Code), which can be ascertained physically or pronounced legally (article 49 of the Civil Code).

The date of a person's death is registered in the death act that is drawn up and on whose basis the death certificate is issued.

In the case of physically ascertained death, respectively when the corpse is examined, the date of death is to be filled in either based on the date specified in the medical death act or on the date specified in the declaration of the individual who notified a person's death to the Division Registrars, unless a death certificate was issued by a medical examiner.

The legally pronounced death is a presumed death which is avowed by court ruling and refers to persons who disappeared under circumstances enforcing the idea that their disappearance is a consequence of death. In all cases of judicial declaration of death, the corpse could not be identified and examined, this being one of the

reasons for which the date of death will be established by declaratory judgment of death, with an irrevocable status. [8]

The date of the presumed death is determined based on evidence that was known when the judge ruled the declaratory judgment of death. If new evidence is discovered later, showing that the death moment was different, the law provides for its rectification. According to article 52 paragraph (3), sentence II of the Civil Code, the court may correct the date of death "if it turns out that the person who was declared dead could not have died at that time."

Establishing the exact date of death is important not only for determining the moment when the civil capacity of individuals ceases, but also because it links to other important civil juridical effects. At that moment, the succession of the person concerned will open and the life rights that he/she had will terminate; the one-year term provided by article 1103 of the Civil Code for exercising the right of a heir to accept or to forgo a succession will start to run; if the person declared dead was married, the marriage will cease (article 259 paragraph (5) of the Civil Code).

However, as far as the legally pronounced dead is concerned, the term of the right of a heir to accept or to forgo a succession will begin to run from the date of death registration in the register of births, and, if the successible was aware of the death or of the death-ruling judgment at an earlier date, the term of the right to accept or to forgo a succession will begin to run from this latter date (article 1103 paragraph (2) letter (b) of the Civil Code.)

3.2. Acquisition and Cessation of the Capacity to Exercise. Unlike the capacity to use, which has a general character, the acquisition of the capacity to exercise is conditioned by discernment, i.e. the individuals' ability to represent the juridical consequences of their acts and deeds. However, this condition is not fulfilled by all people.

The legislator worked with assumptions in this area, considering that from a certain age the individual matures mentally and juridically, thus acknowledging his/her capacity to exercise starting from that moment. Thus, the time factor is involved in this process by relating to

[8] For the procedure of judicial declaration of death and the effects of the declaratory judgment of death please see E. Chelaru, *Civil Law. The Persons (Drept civil. Persoanele)*. 3rd edition. (Bucureşti: C.H. Beck, 2012), 54-58.

the individual's age.

However, mental maturation represents an evolutionary process and the legislator took account of this by regulating the limited capacity to exercise, as an intermediate stage between the lack of the capacity to exercise and the full capacity to exercise. From the interpretation of article 41 of the Civil Code it follows that a minor who has just turned 14 acquires limited juridical capacity. As a consequence, the child will be able to close certain civil juridical acts alone or with the legal guardians' consent.[9]

There are three waivers from the rule according to which a minor under the age of 14 has limited juridical capacity: the minor who was put under a ban (article 164 paragraph (2) of the Civil Code) is deprived of his/her capacity to exercise; the married minor who has full capacity to exercise and the minor who turned 16 and to whom the guardianship court granted full capacity to exercise.

Full juridical capacity is acquired at the time when the person becomes an adult, i.e. at the age of 18 (article 38 of the Civil Code).

Full juridical capacity terminates in the following cases: by the death of the individual, by placement under judicial interdiction and by annulment (dissolution) of marriage before the married minor reaches the age of 18.

4. TIME AND THE CIVIL JURIDICAL ACT. Of the modalities of the civil juridical act, two are closely related to time, namely term and condition.

4.1. Term. The term (*dies*) is the modality of the civil juridical act that consists of a future event whose fulfilment is certain, a term up to which the commencement or termination of the exercise of civil rights and the enactment of the subjective correlative obligations are delayed.

The term may be classified according to several criteria, the most important classification being the one referring to the effects produced. According to this criterion, the term is suspensive or

[9] For the presentation of the juridical documents that can be entered into by a minor with limited juridical capacity, please see E. Chelaru, *The New Civil Code. Commentary by Articles (Noul Cod civil.Comentariu pe articole),* coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici and I. Macovei, (Bucureşti: C. H. Beck, 2012), 46-48.

extinctive.[10]

The *suspensive term* defers until its fulfilment the execution of the civil subjective law and the exercise of the correlative obligation, whilst not affecting their existence (article 1412 paragraph (1) of the Civil Code). Since the subjective right exists and only its exercise is deferred until the date (maturity) of the term, the civil juridical act will produce some effects even before maturity. We would like to mention here the dispositions of article 1023 of the Civil Code, according to which the advance payments made by the debtor are valid, it also having the significance of abandoning the benefit of the term. [11]

The extinctive term, at its maturity, results in the termination of the subjective right and the cessation of the correlative obligation. By the time of its fulfilment, the extinctive term does not have, however, any influence on the civil juridical act, which is why the rights and obligations of the parties exist and are enacted just as in the case of a merely juridical act.

4.2. Condition. According to article 1399 of the Civil Code, "Condition affects the obligation whose effectiveness or decay depends on a future and uncertain event."

Therefore, condition is the modality of the civil juridical act consisting of a future event that is uncertain from the point of view of its achievement, on which the effectiveness or abolition of subjective rights and correlative obligations belonging to the parties depends.

It follows from the above that it is still time that marks the fulfilment or non-fulfilment of the condition.

In terms of the effect it produces, the condition is suspensive or resolutive. [12]

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[10] As regards other criteria, the terms can be certain or uncertain (just as the expiration date is or is not known at the conclusion of a civil juridical act); for the benefit of the creditor, for the benefit of the debtor or for the benefit of both sides (depending on the person in whose favor the term was established); conventional, juridical or judicial (depending on its source).

[11] For the effects of the juridical act affected by a suspensive term, please see Boroi and Anghelescu. *Curs de drept civil. Partea generală*, 188-191.

[12] The condition is susceptible of other classifications as well: causal, potestative and mixed (depending on the relationship that exists between the events on which the fulfilment of the condition depends and the will of the parties to the juridical act); possible and impossible; legal and moral, unlawful and immoral. Please see P.

Suspensive condition is the condition whose realization depends on the effectiveness of the obligation (article 1400 of the Civil Code). By this it affects the efficiency of the juridical act itself.

As a result, *pendente conditione* (within the period between the moment the juridical acts is concluded and the fulfilment of the condition) the juridical document is deterred from producing juridical effects or from giving rise to rights and obligations. [13]

Eveniente conditione (during the time interval subsequent to the period when the condition was supposed to have been met), if the suspensive condition has been achieved, the juridical act is being enhanced, being considered retroactively, ever since its conclusion, that it was not affected by this modality (article 1407 of the Civil Code).

If the suspensive condition is not met (*deficiente conditione*), the parties are deemed never to have entered the juridical document.

The *pendente conditione* resolutive condition has no effect, the juridical act is deemed not to have been affected by this modality, so that it can produce its full effects.

Eveniente conditione, if the resolutive condition was fulfilled, the effect will be represented by the retroactive abolition of the juridical act, the parties being rebrought to the situation prior to its conclusion, the main consequence being the mutual restitution of benefits (article 1407 paragraph (3) of the Civil Code.)

If the resolutive condition was not fulfilled, the juridical act is reinforced retrospectively, being deemed that it was never affected by this modality.

5. THE CREATIVE EFFECT OF TIME. Fulfilment of certain terms, associated to other conditions, may result in the acquisition of certain rights. In such cases we can talk about the creative effect of time.

Of course, in the already mentioned cases, the creative effect of time is present (we would like to recall here only the acquisition of juridical capacity at the age of majority), but it is a matter of definite

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Vasilescu. *Introduction to Civil Law (Introducere în dreptul civil)*, by I. Reghini, Ş. Diaconescu and P. Vasilescu.(Bucureşti: Hamagiu, 2013), 569-571.

[13] For the effects of condition please see E. Chelaru. *The General Theory of the Civil Law (Teoria generală a dreptului civil)*. (Bucureşti: C.H. Beck, 2014), 151-154.

conspicuousness in the case of the acquisition and possession of real rights.

According to article 916 paragraph (1) of the Civil Code, "Possession represents the actual exercising of the prerogatives of ownership of property by the person who owns it and who acts as an owner." The second paragraph of the law text cited reads that the juridical provisions on possession also apply if the holder who acts as holder of other real rights (other than ownership), except for real rights of warranty. To produce the effects provided by law, possession must have certain qualities, that is to be continuous, undisturbed and public (article 922 paragraph (1) of the Civil Code.)

It follows from the foregoing that the possession the legislator protects involves the element of time.

The possession exercised during and in the conditions foreseen by law produces the following juridical effects:

a) It creates a presumption of property for the benefit of the owner (article 919 paragraph (3) and article 935 of the Civil Code);

b) The bona fide purchaser of a movable, by means of a juridical document concluded with a non-proprietary, becomes the owner of the property (article 937 paragraph (1) of the Civil Code);

c) The bona fide possessor of a frugiferous good acquires ownership of the fruit of this good (article 948 of the New Civil Code);

d) The possession of immovable property is protected by possessory actions;

e) The possession exerted on a movable that does not belong to anyone leads to acquisition of ownership by occupation (article 941 of the New Civil Code);

f) The possession exercised during and under the legal conditions foreseen by law leads to the acquisition of ownership of the movable or immovable owned property by usucaption (usucapio).

We will look briefly at the cases when time has a creative effect.

5.1. The Acquisition of Ownership of Movables. According to article 935 of the Civil Code, "Whoever is at a time in possession of a movable is presumed to have a way of acquiring ownership of it." Therefore, there was established an ownership presumption for the benefit of the holder of the movable.

The foundation of this assumption lies in the manner in which the juridical movement of movables is carried out. Thus, when acquiring a

movable through a juridical act, most often, an ascertaining document that could constitute a title deed is not concluded. [14]

As a consequence of this assumption, article 937 paragraph (1) of the Civil Code stipulates that: "A person who, in good faith, concludes with a non-proprietary an onerous ownership transfer act having a movable as an object becomes the owner of the respective movable from the moment of his/her effective entering into its possession. The *de jure* creative effect of *bona fide* possession was thus enshrined, and, thereby, the creative effect of time, the acquirer becoming the owner, under the law, from the moment he entered into possession of the movable, despite the fact that the transmitter was not the actual owner."

5.2. The Acquisition of Ownership of the Fruit. The fruit represents the regular products of a certain good, which do not affect its substance. According to article 948 paragraph (1) of the Civil Code, "The *bona fide* owner acquires ownership of the fruit of the good possessed".

The possessor is a bona fide possessor when he/she is convinced that he/she is the owner of the good, under an ownership transfer act whose causes of inefficiency he/she does not know and should not know, according to the circumstances (article 948 paragraph (4) sentence I of the Civil Code.) From the law text cited it follows that, in order to acquire ownership of the fruit, the possessor should be in good faith and should own the good under a title.

The title may not only be a declaratory ownership act, but also a declarative rights act and even a putative one, i.e. one that exists only in the imagination of the owner.

Good faith (*bona fide*) shall be assessed at the time of collecting the fruit and shall be presumed, according to article 14 paragraph (2) of the Civil Code.

5.3. Occupation.[15] According to article 941 paragraph (1) of the New Civil Code, "The holder of a movable that does not belong to anyone becomes its owner, by occupation, starting with the date of possession entry, but only if this is carried out under the conditions

[14] Please see Chelaru, *Civil Law. The Main Real Rights (Drept civil. Drepturile reale principale)*, 319.

[15] For a further analysis of occupation as a a manner of acquiring the ownerhsip right, please see V. Stoica, *Civil Law. The Main Real Rights (Drept civil. Drepturile reale principale)*. 2nd edition. (Bucureşti: C.H. Beck, 2013), 326-332.

stipulated by the law". From the law text cited it follows that occupation is a manner of acquiring the right of property that may cover only tangible movables.[16]

As public property movables are inalienable, they cannot be acquired by occupation.

For the right of property over a movable to be acquired by occupation two conditions shall be fulfilled:

a) The movable entered into the possession of the individual invoking occupation;

b) There is no owner of the movable.

The subject of occupation may be represented by the movable that has either been abandoned by its owner or by that movable which, by its nature, has no owner. This last category includes, for example, thesauruses. According to article 946 paragraph (1) of the Civil Code, "A thesaurus is any movable that is hidden or buried, even involuntarily, in whose case no one can prove to be its owner".

The right of property over the thesaurus found in an immovable or in a movable is acquired through occupation, in equal shares, by the owner of the immovable or movable asset in which it was discovered and the discoverer.

Cultural movables are exempted as they belong to the state.

5.4. Natural Accession. Accession is a way of acquiring ownership of a movable or of a least important immovable, considered to be the best accessory that belongs to another person, by incorporating it into the more important asset, believed to be the main asset. The owner of the main asset also becomes the owner of the less important one (accessory).

From the viewpoint of its being or not being the result of a person's activity, accession is classified into natural and artificial.

The Civil Code regulates the following cases of natural accession to land, leading to the acquisition of the right of property after a period of time: alluvium (article 569), the land left behind by flowing waters (article 570), avulsion (article 572), riverbeds, islands and gravel (article 573) and the natural accession with respect to animals (article 576).

[16] For a presentation of occupation as an effect of the passage of time please see Dogaru, Niţoiu and. Stanciu, *Câteva consideraţii privind curgerea timpului ca eveniment juridic*, 411.

Alluvium is a form of natural accession with respect to land that consists of acquiring ownership of the land additions by depositing the silt (earth or gravel particles in suspension) carried by flowing waters on the banks. Article 569 of the Civil Code states that "Land additions on the banks of flowing waters belong to the owner of the riparian fund only if they are formed gradually" (sn – E.C.), which leads to the conclusion that alluvium is the result of the natural action of flowing waters, as well as of time.

A similar treatment is valid for islands and gravel as well – the right of property over these is acquired through accession, by the owners of the riverbeds where they were formed (article 573 of the Civil Code.)

Moreover, article 570 governs the riparian owner's acquisition through accession of the land left behind by flowing waters which gradually receded from the shore.

Avulsion consists in the breaking of a piece of land, as a result of the action of flowing waters, and its annexation to a riparian land belonging to another owner.

Article 572 of the Civil Code provides that the owner does not lose his/her right over that piece of land, if there is a claim within one year after its detachment. If the owner does not claim the piece of land separated by water power, the owner of the land to which those additions were annexed acquires ownership of them by accession. The time factor is involved in the acquisition of ownership by the one-year decay term, during which the action for the recovery of possession should be exercised.

Finally, in accordance with article 576 paragraph (1) of the Civil Code, domestic animals that go astray on the land of another person will belong to the latter if the owner does not claim them within 30 days from the date of the declaration made by the owner of the land to the town hall.

5.5. Usucaption. Usucaption (usucapio) or the acquisitive prescription represents the manner of acquiring the right of property or of other real rights – dismemberments of the right of property – through the prolonged possession of property, immovable or movable, under the terms and conditions provided by the law.

Both movable ownership and immovable ownership can be acquired by usucaption. In both cases, the condition of exerting a

possession that lasts in time is essential for the acquisition of the right of property.

Real property usucaption is classified into two categories: tabular and extra-tabular.[17]

In the case of the tabular usucaption, the owner tabulated a main real right in the register in good faith under a title unfit to serve to its acquisition. The tabular usucaption is regulated by article 931 of the Civil Code, a law text that imposes the following conditions for the acquisition of ownership of a property:

a) the holder is supposed to have acquired the asset under an invalid title;

b) the right the title refers to is supposed to have been registered in the real estate register;

c) the holder is supposed to be a bona fide holder;

d) the possession is supposed to be non-vitiated;

e) the holder is supposed to own the real estate for 5 years since its registering in the real estate register.

The usucaption has an extra-tabular character when a person other than the holder was registered as the holder of the right in the real estate register or when the possession was exerted over a building that had not been registered in any land registry. Extra-tabular usucaption is regulated by article 930 of the Civil Code. The first paragraph of the law text cited provides that "Ownership of a property and of its dismemberments may be entered in the real estate register, under usucaption, for the benefit of the person who has owned it for 10 years if:

a) the owner registered in the real estate register died or ceased to exist;

b) the declaration of property release was registered in the real estate register;

c) the real estate was not registered in any real estate register."

As far as real property usucaption is concerned, which is a matter of novelty in the Romanian civil law, article 939 of the Civil Code states that the person who possessed someone else's movable for 10 years may acquire ownership unless the conditions provided by law for the acquisition of property through possession in good faith have been met.

[17] For the conditions to be fulfilled in the cases of the two types of usucapption please see Stoica. *Drept civil. Drepturile reale principale* , 389-395.

Movable usucaption is therefore an alternative way of acquiring the right of property by possession exercise for 10 years under the terms provided by law.

6. THE DESTRUCTIVE EFFECT OF TIME. As is the case in any other field, the passage of time has a destructive effect in civil law as well, which is reflected by the disappearance or loss of rights. Quite often, the creative and the destructive effect occur simultaneously and the distinction can and should be made only for methodological purposes. For example, in almost all cases of acquisition of ownership of a movable or immovable, which implies the time factor, the destructive effect manifests itself in the sense that the right of property of the original owner ceases. The destructive effect is thus implicitly associated with the creative effect of time.

There are also situations when the destructive effect of time is specifically established by the legislator. We have already presented the effects of the extinctive term, of the unfulfilled suspensive condition and of the fulfilled resolutive condition.

There are two other juridical institutions that form the favourite field of the destructive effect of time: extinctive prescription and decay.

6.1. Extinctive Prescription. Extinctive prescription represents a means of extinguishing the substantive right to action by non-exercising that right within the time period prescribed by law.

Evoked by the legislator through the phrase “time period prescribed by law” (article 2500 paragraph (1) of the Civil Code) wherein the substantive right to action must be exercised, the passage of time has a destructive effect through the fact that the holder of the violated civil subjective right sees himself/herself as deprived of the possibility of benefitting from justice support in order to exploit it.

Unlike the old regulations, contained in Decree no. 167/1958, with the Civil Code the destructive effect of time does not operate automatically, but only if the person sued invokes the exception of extinctive prescription, by filing a statement of defence, or no later than the first hearing which the parties are legally summoned at. According to article 2512 paragraph (2) of the Civil Code, “The competent jurisdiction body cannot apply prescription ex officio.”

Furthermore, the person in whose benefit the prescription runs may give up both the fulfilled prescription and the benefit of the period elapsed for the started and not fulfilled prescription.

The parties to a juridical act can change the duration of prescription terms or can modify the course of prescription by setting its beginning or by modifying the legal causes for suspension or interruption, as appropriate. The prescription terms prescribed by law may be reduced or extended, by explicit consent of the parties, but with the new duration not being less than one year and more than 10 years, except for the 10-year or even longer prescription terms, which can be extended up to 20 years (article 2515 paragraph (4) of the Civil Code.).

6.2. Decay. The decay represents a measure of juridical constraint that consists of the extinguishment of a subjective right or of the faculty to give rise to a unilateral act as a result of its non-exercise within a particular term. [18]

Article 2547 of the Civil Code provided that, if the law or the agreement between the parties does not state with full certainty that a term is a term of decay, the prescription rules shall be applicable. Decay is thus a civil penalty and the decay terms have an exceptional nature.

On the other hand, we should note that the decay terms may be legal or conventional. Article 2546 of the Civil Code prohibits parties to a juridical act from setting a decay term that would excessively burden the exercise of rights or the commission of the acts by the interested party, under penalty of absolute nullity of the provision in question.

From the provisions of article 2549 of the Civil Code it follows that decay terms are either of public policy or of private interest.

Public policy decay terms are those that protect the general interests and originate exclusively in law.

In the case of the public policy decay terms the body of jurisdiction is obliged to invoke and apply the decay term ex officio, whether or not the person concerned puts it into question.

[18] Reghini and Diaconescu. *Introduction to Civil Law (Introducere în dreptul civil)*, 755. In other legal systems the decay term is designated as "prefix" term, "forfeiture" or "nullity". Please see M. Nicolae. *A Treaty on Extinguishing Prescription (Tratat de prescripţie extinctivă)*, (Bucureşti: Universul Juridic, 2010), 138, text and notes no. 2 and 3.

The parties cannot waive the public policy decay terms, neither in advance nor after the commencement of their course, nor can they modify these terms, by decreasing or increasing them, as appropriate (article 2549 paragraph (2) of the Civil Code).

Private interest decay terms protect the interests of a private individual or of private individuals. They can be set either by legal rules enacted for private interest, or by a juridical act.

Decay terms set in private interest, whether established by law or by a juridical act, can be opposed only by the interested party, by filing a statement of defence or at the latest at the first hearing when the summoning procedure was legally performed. The jurisdiction body cannot invoke such terms ex officio.

The solution chosen by the legislator is a curious one, because in this way it can lead to a situation where the court will grant protection to a civil subjective right that has ceased to exist, as a result of the expiration of the decay term.[19]

The expiration of the decay term institutionalised for the exercise of a right results in the loss of the subjective civil right. If the term was set for committing a unilateral act, the effect consists of preventing the party concerned from committing this act.

Since decay terms result in the very loss of the subjective civil right, not only in the extinguishment of the right to obtain judicial protection for the defence of the right infringed, their scope is broader than prescription terms. The difference is that this area is not limited to the rights that can be defended or exercised only by bringing an action in court, but also includes the rights whose exercise does not involve recourse to justice.

7. CONCLUSIONS. As human existence and actions take place in time, the juridical conceptualization of the latter was a matter of ineluctability.

Civil law has also capitalised time, in every single one of its aspects.

[19] Please see Chelaru, *The General Theory of Civil Law (Teoria generală a dreptului civi)*, 270.

Thus, the past, the present and the future have been taken into account with a view to adjusting the application of laws adopted successively in the same field.

Duration is essential when it comes to the creative effect of time and we would like to remind here the effects of possession, which, if exercised during and under the law, lead to the acquisition of certain rights. Things are the same in the case of the term as well, conceived as a modality of the civil juridical act, of extinguishing prescription and decay.

In the case of condition-modality of the civil juridical act, the time is present, primarily, by duration, which involves its natural flow. In the case of the fulfilled condition, be it suspensive or resolutive, the legislator also resorted to a juridical fiction, creating a genuine return in time. We are certainly talking about the retroactive effects of the fulfilled condition.

At other occasions, the legislator has conferred juridical significance on certain important moments in themselves or considered to be important in human life; we are referring to the acquisition and loss of civil capacity and of its two components.

Of course, the present study is quite brief. It could have approached other issues, such as, for example, the nullity of the juridical act, in which retroactivity, thus the resort to one of the dimensions of time, is present or could have deepened each of the subjects treated. No matter what we could have done, however, we would have remained aware of the inexhaustible nature of the topic.

So it is our declared intention to dwell on it again!

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THE LEGAL STATUS OF THE LEGAL INTEREST ACCORDING TO THE GOVERNMENT ORDINANCE 13/2011, IN COMPARISON WITH ROMANIAN FISCAL REGULATION

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Abstract:

Of the solutions taken from the commercial matter by the Romanian new Civil Code, there is also the fact that the rule of the legal elapsing of interest to the money obligations is applicable to the legal rapports deriving from the exploitation of a company for lucrative purposes, in other words, the debtor is legally late (as per art. 1535 paragraph 1 of the new Civil Code), and the creditor is entitled to interests (as per art. 1535paragraph 1 of the new Civil Code, corroborated with art. 2 of Government Ordinance 13/2011).

Given the importance of the jurisprudential effects of these changes implemented by the new Civil Code, we deem it useful to present some theoretical comments.

As against the simplicity of the solution of applying a legal interest, in an amount established by normative acts, we regret the complexity of the legal provisions that require the corroboration of several normative acts (new Civil Code., Government Ordinance 13/2011, Law 31/1990,Fiscal Code), reason for which we will express our opinions in a final section entitled conclusions, where we will also formulate a few notional delimitations.

Key words: *remunerating interest, penalizing interest, legal interest, conventional interest*

1. THE OBLIGATION TO GIVE A SUM OF MONEY

When the performance of the debtor's obligation is made by a payment of a sum of money, we are found in the situation in which the word "payment" is used in its regular meaning (as we have seen in many cases the payment, in its legal meaning, represents the performance of other services, not expressed in money). In this case, the debtor is liberated by the remission by the creditor of the owed nominal sum of

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money (according to Art 1488 Para 1 of the new Civil Code). The means of paying the sum: either is a national or a foreign currency, that it is materialized (on paper) or dematerialized, all the alternatives stated by the law can be used, but the means of payment used can be the regular one for the location in which the payment is performed (according to Art 1488 Para 2 of the new Civil Code). In other words, the Civil Code uses the rule of determining the currency based on the local customs of the place in which the payment is performed.

When the payment is made using debt securities such as: bill of exchange, promissory note or check, is discharge only if the payment instrument has been honored and performed by the person entitled to perform it (according to Art 1448 Para 3 of the new Civil Code).

For instance, for the payment using a bank check on paper, the stages of the payment are the following:

- The issuer fills in the form and delivers it to its beneficiary;
- The check's owner endorses it in favor of his bank (where he has a current account) mentioning on the check's reverses (operation named endorsement). The endorsement may reflect the mandate given to the bank to cash in the amount of money (or it can be a term of payment, when using the amount stated by the check the owner intends to repay his own credit in relation with the crediting bank). The receiving bank, accepting the check shall transpose its content into an electronic format (by electromagnetic imprint) and delivers it in this form to the issuing bank (named draw in cambial language, talking about the bank paying in the issuer's account). This shall debit the account of the check's issuer (with the condition that the instrument to be honored, namely to exist available cash in the issuer's account) and shall transfer the sum to the beneficiary's bank, which shall credit his account. This is the moment when the payment is considered to have been performed.

Of course, a shorter way of using the check is its cashing from the issuer's bank, directly by the beneficiary, his representative or by a person to whom the check was endorsed (see I. Turcu "*Tratat teoretic şi practic de drept comercial*", 4th Vol., C. H. Beck Publ.-house, Bucharest, 2009, p. 510).

2. CIVIL INTERESTS

According to Art 1489 Para 1 of the new Civil Code, the interest may be negotiated by the parties, hence the name of conventional interest

or, in the absence of any statement of the parties shall be applied the legal interest. The maximum amount is stated by the Government Ordinance No 13/2011; exceeding this amount shall be sanctioned with the absolute nullity of the mentioned interest.

The regime of the legal interest is stated by G.O. No 13/2011, according to which its level is placed at the level of the N.B.R's reference interest rate.

The capitalization (interest for interest or the compound interest – anatocism) is stated by Art 1489 Para 2 of the new Civil Code, with the condition that it should be stated by the law, to be an effect of the will of the parties or to be requested by the court (case in which the capitalization aims only the period after the submission of the sue petition).

It shall not be allowed the plurality of the interests with the delay penalties (see the below section "Notice of delay").

3. NOTICE OF DELAY OF THE DEBTOR

Earlier we saw that also the creditor may be noticed for delay during the procedure of the real offer followed by the saving.

According to the new Civil Code, the notice of delay is the unilateral manifestation of the creditor's will to pretend from the debtor, within a reasonable period of time, to perform the service for which he is in debt.

The notice of delay of the debtor may be performed by the creditor (either by written notification [a] or by the sue petition [b] – according to Art 1522 of the new Civil Code; or it shall act by the operation of law [c] – according to Art 1523 of the new Civil Code).

a) The **written notification** by which the creditor requests from the debtor the performance of the obligation has the effect of the notice of delay of the debtor with the condition that the latter one to have a reasonable term for performance, whose length is not expressly stated by the legislator, who states only two cumulative criteria which must be considered in its calculation: the nature of the obligation and the circumstances in which it is applied. The notification shall be communicated to the debtor by a judicial executor or by any other mean insuring the proof of communication (i.e. letters, telegrams, fax).

b) The **sue petition** of the debtor has the value of his notice of delay. In order to protect the interests of the debtor, the legislator of the

new Civil Code states that if the sue petition was submitted without the prior notice of delay of the debtor, he shall have the right to perform the obligation within a reasonable period of time, calculated from the date when the sue petition was received, case in which the adverse legal expenses shall be charged from the creditor (considering that by performance the debt was extinguished and the litigation has no object) – the legal fructification of the money (*dies interpellat pro hominem*).

c) The debtor shall be notified for delay in the following cases:

- When the contract states the fact that the debtor is legally in delay by the simple fulfilment of the term established for performance; this case takes the solution stated by the commercial law where, in order to insure the celerity of the transactions and the security of the creditor, the debtor is in legal delay from the date of the claim's chargeability, without being necessary the notification for delay, nor other prior formality (thus violating a classic principle of the civil law expressed by the Latin wording "*dies non interpellat pro hominem*" = the term does not summons the debtor);
- When the obligation could not have been effectively performed than in a certain period of time, which the debtor has let to pass, or when he did not performed it immediately, thought there was an emergency;
- The action of the debtor has made impossible the performance in nature of the obligation or when he violated the obligation of not doing; thus, the debtor has placed himself in delay by doing something that he should not have done in the first place;
- The debtor has clearly stated to the creditor his intent of not performing the obligation or when we are talking about an obligation with a successive performance, he refuses or denies to repeatedly perform it;
- The obligation to pay a sum of money has not been performed, assumed in the exercise of an economic entity's activity;
- The obligation is born from an extra-contractual illicit offence.

The effects of the notice of delay are:

- From the date of the notification of delay shall be owed the moratory damages (deferred interests) – according to the principle *qui in mora est culpa non vocat* = who is in delay is not without fault;
- From this date, if the debtor refuses to perform the obligation the creditor is entitled to ask for compensations;

- When the object of the obligation is to give to another individual a determined asset, the risk is no longer bared by the debtor of the obligation to give, but by the creditor who did not took the asset (according to Art 1274 of the new Civil Code);

- If the asset which has not been delivered in time has become useless for the creditor, he is entitled to ask for the legal retroactive termination of the contract (according to Art 1516 Para 2 of the new Civil Code – for details see I. Adam, *op. cit.*, p. 692 - 693);

In the civil law, according to Art 1530 of the new Civil Code, any person who engages in the performance of a service is indebted to fulfil it, under the sanction of paying damages.

The **legal** evaluation is stated by the law and it refers to the prejudice supported by the creditor for the obligations regarding a sum of money, which can always be performed in nature. In this case, the debtor owes only damages for the delay (moratory), which are cumulated with the performance of the obligation. If the performance consists of a sum of money, the damages are presumed, and therefore, shall no longer be proved by the creditor, being expressed in the form of the interests for the outstanding amounts (Art 1535 of the Civil Code). According to Art 1535 of the Civil Code "if a certain amount of money is not paid at its date, the creditor shall have the obligation to damages, from the date of payment until the effective payment, in the amount established by the parties, or in its absence, in the one stated by the law, without having to prove any damage. In this case, the debtor does not have the right to prove that the damage suffered by the creditor as consequence of the delay of the payment would be smaller" (Para 1).

Art 1535 is not applicable for the obligations to give (which have other objects than sums of money) or to do, nor for the obligations born from offences or quasi-offences.

The same article states the following rules:

- The creditor must not prove that by delay he suffered a prejudice: being deprived of the money the value of the prejudice is equal with the interests owed during the delay;

- The creditor can claim as equivalent of the prejudice only the interests stated by the law; no other compensation can be cumulated with the legal interests for the delay;

- Compensations are owed usually from the date of the sue petition, the simple notification from the court enforcement officer not

being enough (*dies interpellat pro hominem*); as an exception the interests shall legally run in the area of the mandatory contract (Art 2025 of the Civil Code);

- Compensations stated by Art 1535 are moratory damages (created to sanction the fulfilment with delay of the pecuniary obligations);
- The prepayment of the remunerator interests may be performed for maximum 6 months, the interests thus charges cannot be returned (Art 7 of the G.O. No 13/2011).

4. DEFINITION OF THE "LEGAL INTEREST"

According to Art 6 of the G.O No 9/2000: "the legal interest defines not only the amounts of money named with this title, but also other services with any name or title, to which the debtor is obliged as equivalent of the use of capital". According to Art 7 Para 13 of the Civil Code, the interest represents any amount of money which must be paid or received for the use of money, regardless it must be paid or received within a debt, in relation with a bank deposit or in accordance with a financial leasing agreement, sale in installments or any other sale with a delayed payment.

Without any doubt regarding the legal feature of the interest defined by the Fiscal Code, we wonder which is the reason for which the legislator, instead of using the definition stated by G.O. No 9/2000 has proposed a new, different formula.

While the wording "amount of money paid or received for the use of money" makes us think to the **reparatory** feature of the interest, the wording "within a debt" corresponds with the remuneration feature of the interest.

We cannot see the arguments for which Art 7 of the Fiscal Code refers to the leasing agreement, to the sale by installments or any other sale with delayed payment. Both the leasing and sale have as foundation the will of the parties, namely the agreement, and in the area of the conventional interest the situation is already stated by G.O. No 9/2000 (even in the case in which the state is part of such agreement, acting as a private law subject).

We consider improper the definition stated by Art 7 of the Fiscal Code, it would have been enough the simple reiteration of the definition

given by G.O. No 9/2000 (see S. Cristea, "*Cumulul dobânzilor cu penalităţile de întârziere*", in RDC No 6/2004, pp. 86-88).

Actually, the new Civil Code states that if a sum of money is not paid at its date, the creditor is entitled to receive moratory damages (Art 1535 Para 1), as well as it is delay **any professional**, for the obligations of paying a sum of money when it was assumed during the exercise of an economic entity (Art 1523 Para 2 Let d)).

The **unprofessional debtor** (for which the rule of Art 1865 of the Civil Code has been modified) can be noticed for delay not only through the sue petition, but also by a written notification sent by the court enforcement officer or by any other mean which insures the proof of communication, by which the creditor claims the performance of the obligation (Art 1522 Para 1-2).

According to G.O. No 13/2011, the parties are free to establish within the agreement the interest rate for the delay of a monetary obligation (Art 1); when the obligation carries default interest, when the parties have not established its amount, shall be paid the legal default interest (Art 2), at the level of the of the N.B.R's reference interest rate plus 4 percentage points; in the relations which are not the effect of the exploitation of a profit organization (Art 3 Para 3 of the new Civil Code) the legal interest rate shall be diminished by 20% (Art 3 Para 2-3).

The terminology of the new Civil Code has been modified by G.O. No 13/2011 (Official Gazette, Part I, No 607/29 August 2011) regarding the legal remuneration interest and default interest of monetary obligations, as well as for the settlement of certain financial-fiscal measures in the banking area, according to which the interest owed by the debtor of the monetary obligations for non-performance of his obligation at its date is named **default interest** (Art 1 Para 3), and the **remuneration interest**, is the one owed by the debtor of the obligation to give a sum of money at a specified date, calculated for the period prior to the fulfilment of the obligation's date. Corroborating these provisions with the ones above analyzed, we see that both forms of interest may have not only a monetary form, but also the form of other services.

5. THE CONTRACT INTEREST

According to Art 1 of the G.O. No 9/2000: "the parties are free to establish within the agreement the rate of interest for delays in the payment of a monetary obligation".

If the parties have not stated within their agreement the interest rate, shall be applied the legal interest to the extent to which, according to the law or to the contract, the obligation carries interests.

The principle of the free will in establishing the interest within a contract shall be differently applied based on the nature of the legal relations:

- In commercial law relations (between professionals), the parties may establish the interest for the delayed performance of monetary obligations, according to the freedom of will, without any limitation;
- In exchange, in civil law relations the interest cannot exceed the legal interest with more than 50% per year (Art 5).

If Art 5 of the G. O. No 9/2000 is violated, the contractual clause establishing a higher interest null and void, and shall be replaced with the legal norm establishing the legal interest, namely Art 3 Para 3 of the same legal text, as it has been modified by Law No 356/2002.

According to Art 10 of the G.O. No 13/2011, Art 1535 and next shall be applied for default interests; *per a contrario*, these shall not be applied for the remuneration interest. In another opinion (I. Adam, *op. cit.*, p.706), the reasoning of the legislator was to force only to the payment of the default interest, because before the date, the debtor owes remuneration interests which have been stated by the contract or the law (in the silence of the parties).

It is important to note that in the case of the contractual interest, applicable in commercial and civil matters, this must have been stated by a written document. In the absence of an exteriorized written agreement shall be applied the legal interest.

Also, the legislator stated in Art 7 of the G.O. No 9/2000 the possibility of the prepayment of interests, but only for maximum 6 months. The interest thus charged by the creditor remains valid regardless of the future variations. Thus, the creditor and/or debtor shall not be able to ask for a subsequent recalculation of the already cashed in interest by the creditor interest.

6. ANATOCISM

Anatocism – or the interest to an interest – is that agreement by which the parties agree that the interest should be capitalized, namely to be added to the owed amount and the interest to be recalculated.

Anatocism has been prohibited by Decree-law on the establishment of interests and the fight against usury even since 1938, both in civil and commercial matters, except the contract for a current account, stated by Art 370-373 of the Commercial Code. Same prohibition was stated by Decree No 311/1954.

In the past, namely prior to the adoption of the laws of 1938 and Decree No 311/1954, the anatocism was allowed in commercial matters, and in civil matters was applied Art 1089 Para 2 of the Civil Code of 1865, according to which:

- The interest for interest is stated by the contract or by the sue petition;
- The interest for interest could be offered only for a complete year, except the incomes owed as fines, rents, life-annuities, refunding of fruits, these producing interests from the date of the agreement or from the day of the sue petition;

Nowadays, according to Art 8 Para 1 of the G.O. No 9/2008: "the interest shall be calculated only for the borrowed amount of money".

There is an exception from this rule, which shall operate only under the conditions stated by the legislator.

Thus, according to Art 8 Para 2, interests may be capitalized and may produce interests based on a special agreement concluded with this purpose, after their date, but only for interests owed for at least 1 year.

Hence, the anatocism is allowed only if the following conditions are fulfilled:

- The agreement referring to the "interest for interest" must be in force from the due date;
- The "interest for interest" shall be calculated only for interests owed for at least 1 year.

These provisions are applicable only for default interests, because Art 8 Para 3 of the G.O. No 13/2011 may be capitalized and may generate interests.

7. REMUNERATION *V.* DEFAULT INTERESTS

7.1. *Similarities*:

- Both may be:
  - Conventional
  - legal

- When the term used is “interest”, without any mentions, G.O. No 13/2011 refers to them both;
- In the definition given by G.O. No 13/2011 for the “interest”, in addition to the Romanian Civil Code, it is also about other services, under any title or name, not only amounts of money! According to us, it is unfortunate the use of the wording “to which the debtor is compelled, as an effect of the use of money”, because it refers only to the remuneration feature, not to the sanctioning (penalty) one;
- When there is no statement from the parties, shall be applied the legal interest;

7.2. *Differences*:

♦ The remuneration one is calculated for the period prior to the fulfilment of the obligation’s due date (remuneration feature);

♦ The default one is owed for the non-performance of the obligation at its due date and thus it is valid for the period of time after the due date and until the full payment of the debt (penalty = sanctioning feature);

♦ The quantum of the remuneration one = the level of the N.B.R’s reference interest rate = monetary policy interest;

♦ The quantum of the default one = the level of the reference interest rate+ 4 percentage points;

♦ The legal interest, when it does not result from the legal relations between professionals (for instance: one of the parties represents an economic entity) may be reduced with 20% compared with the reference interest rate; the quantum is mentioned by the Official Gazette, Part I, with the curtesy of the N.B.R;

♦ When there is an international element, legal interest = 6%;

♦ When the legal relations are not the result of the exploitation of a productive entity, the conventional interest can overcome the legal one with maximum 50% per year => any statement violating this provision shall be null and void and the sanction is, that in this case, the creditor cannot claim the legal interest;

♦ The interest must be stated in writing; only by an agreement subsequent to the due date and only for interests owed for at least 1 year (is not valid for contracts for current accounts);

♦ The interests from special areas have a special regulation, i.e.: the ones paid by the N.B.R, by the Ministry of Finances (see the Fiscal Code/Fiscal Procedure Code).

Interest, remuneration interest and default interest, according to Art 1 of the G.O. No 13/2011[2] "the parties are free to establish, in their agreements, the interest rates both for the refunding of a financial loan, as well as for the delayed payment of a monetary obligation".

"The interest owed by the debtor of the obligation to give a sum of money at a due date, calculated for the period prior to the fulfilment of the due date is named remuneration interest" (Para 2).

"The interest owed by the debtor of the monetary obligation for the non-performance of that obligation at its due-date is named default interest" (Para 3).

"If are no contrary provisions, the term interest from the present ordinance refers both to the remuneration, as well as to the default interest" (Para 4).

"The interest defines not only the amounts of money with this title, but also other services, under any title or name, to which the debtor is compelled as equivalent to the use of capital" (Para 5) (it is about the remuneration feature, A/N S. Cristea).

Art 2 states that "if, according to the law or to the agreement, the obligation carries remuneration and/or default interests, and in the absence of the express statement of their level by the parties, it shall be paid the legal interest due to each of them".See also Art 3, 4 and 5 of the G.O. No 13/2011

INSTEAD OF CONCLUSIONS - The definition of interest according to the Fiscal Code. Comparison between the fiscal and civil codes

According to Art 7 Para 16 "interest – any amount of money which must be paid or received for the use of money, regardless if it must be

[2] G.O. No 13/2011 on legal remuneration interest and default interest for monetary obligations, as well as for certain financial-fiscal measures in the banking area, published in the Official Gazette No 607/29 August 2011, Art 10 entering into force on 1 October 2011, and the rest, on 3 days from the publication date (namely 1 September 2011), approved by the Law No 43/2012, published in the Official Gazette No 183/21 March 2012.

paid or received within a debt, in relation with a deposit or in accordance with a lease agreement, sale by installment or any sale with delayed payment".

1. *Similarities civil/fiscal*

- Definition: any amount of money – according to Art 1535 of the Civil Code shall not be applied for other obligations of to give, to do!!!
- Art 7 Para 16 of the Fiscal Code

- We are talking about the remuneration feature (the amount of money owed for the use of money; see the "fructification of money"), but also the sanctioning one, when we use the word penalty/late-payment penalties;
- The prejudice caused by the delayed performance by the debtor, shall not be proved by the creditor.

2. *Differences:*

❖ Definition:

- In the <u>fiscal</u> area – the amount of money – paid or received for the use of money
- **The remuneration feature**:
  - Within a debt:
    - ✓ Deposit
    - ✓ Financial leasing
    - ✓ Sale – with installment
      - – with delayed payment
- In the <u>civil</u> area:

a) The creditor has the right to moratory damages (compensations) = for the delayed performance of the obligation;

b) Without having to prove any prejudice (dies interpellat pro homine; wording used by Paulus, meaning "the term notifies the individual/debtor");

c) It is stated that it shall be applied either the interest stated by the parties (= conventional), or the legal one;

d) The debtor cannot prove that the prejudice suffered by the creditor, as an effect of the delayed payment, would be smaller (we understand that it cannot be smaller than the quantum of the legal interest!). Corollary, (as a consequence), if the interest owed before the due date was bigger than the legal interest, the debtor shall owe the same level after the due date!!! = see Para 3 above mentioned.

❖ On in the civil area we are talking about the legal remuneration and default interests, with the application of their quantum based on the G.O. No 13/2011; in the fiscal area are other rules!

❖ Only in the fiscal area we have late-payment penalties (sanctioning feature) and only for debts owed to local budgets!

Unlike the importance of the legal regime applied to legal interests (proved by the numerous jurisprudential solutions in this area) we consider as necessary the following observations:

- The determination of the rate applicable compels to a special probation regime: the interest must be mentioned in writing; the absence of the document leads to the application of the legal interest (according to Art 6 of the G.O No 13/2011);

- In relation with the previous legislation (both the Civil Code of 1864, as well as the G.O. No 9/2000 repealed by the entrance into force of G.O. No 13/2011) which referred only to moratory damages (penalty interest), the new regulation (G.O No 13/2011) states express provisions regarding the interest applied prior the due date, which is called remuneration after the remuneration feature of the interest[3], unlike the sanctioning feature which explains the name of penalty interest (sanctioning the delayed performance of the obligation);

- When the legal regime of the legal relation has a mixed feature (one of the parties is a profit entity, the other one is not, as in the case analyzed by Section 2 of this paper), the means of resolution corresponds with the situation of the mixed facts of commerce stated by the Commercial Code in the application of the rules of the legal relations generated from the exploitation of a profit entity.

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[3] About the features of interests see also Silvia Cristea, "*Cumulul dobânzii cu penalităţile de întârziere*", in R.D.C. No 6(2004) : 88

CO-POSSESSION OF COMMON PARTS OF THE BUILDING - THE ATTRIBUTE OF OWNERSHIP RIGHT OF APARTMENT OWNERS IN CONDOMINIUM

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Abstract:

The common property in multi-apartment buildings is still not yetregistered in the Real Estate Register for the benefit of apartment owners. This is probably explained by the fact that the Law on Privatization of Housing Fundstipulates the term of "co-possession" instead of "co-ownership" for the common parts of the building, that has led to multiple errors in other regulations on state registration of real estate, and to stagnation of process for the establishment of appropriate management of housingfund by the apartment owners.

Simultaneously, the Law on Condominium in Housing Fund provides for the owners' shared ownership right over the common property elements.

The present work proposes an analysis of situation, favoring the registration of housing buildings together with the ownership right on the share in the common property in the benefit of the apartment owners in that buildings.

In conclusion, the authors emphasize that the concept of 'co-possession' does not represent an impediment for the registration of ownership right, taking into account that the concept of 'co-possession' is an attribute of this ownership right and, in this sense, does not exclude the ownership right as a whole, - such position is strengthened by relevant provisions in the Law on Condominium in Housing Fund.

Also, we find that the local government bodies are unduly delaying the transmission of buildings to the owners and stagger the building management organization process required by law. This situation needs to be remedied urgently, as the buildings need to be maintained and repaired properly, to avoid degradation of constructions which already are under increased risk of destruction.

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Key words: *apartment building, condominium, Homeowners association (HOA), common property, co-possession, housing, share in the common property, owner, multi-apartment building.*

The need to elucidate a few aspects regarding the owners' rights on assets in multi-apartment buildings is being urged by the current situation in the housing fund management where the apartment owners are artificially marginalized. We are witnessing a variety of attempts to develop the buildings by constructing annexes, attics, superstructures, etc., attracting undue enterprises that try to take advantage of the assets which doesn't belong to them. And this situation intensifies daily and people are passive in action… for various reasons - do not know their rights, do not have necessary resources to hire qualified lawyers, while public authorities are incapable to solve problems and are the first to admit infringements.

The privatization of housing in Moldova was the first essential step in the reorganization of this area by transition of state property to private ownership of apartments' tenants. Along with the privatization process the powers of public authorities have changed, with all housing-communal issues being shifted to local authorities. The transfer of ownership obviously generated a new method of management of residential buildings. But let's look at how these changes took place.

The Chapter III of the Law on Privatization of Housing Fund[4]has been dedicated to the maintenance and repair issues of privatized housing. Thus the legislature ensured that the transfer of state property to private individuals will not interrupt the maintenance of buildings with apartments under privatization. In this respect, the law foresees obligations for both, apartment owners and public authorities. Apartment owners were given the obligation to finance these works and local public authorities to ensure the organization and monitoring processes. (Art. 20 to 27, Law on Privatization of Housing Fund).

Now, let's clarify who owns the building (i.e., the "building" means a multistoried building with several apartments, including spaces with other destination than housing, with all networks and infrastructures

[4]*Law on Privatization of Housing Fund* nr.1324-XII from 10.03.1993. nr.5 from 13.01.2000.

as parts (elements) of this building, and without which, the building does not have functionality).

For a better understanding of the addressed problem, we must define the property rights in an apartment building with several owners - 1) exclusive ownership right over the apartment / room, space with other destination than housing, which are registered and determined by name in the Real Estate Register, belonging to natural or legal person[5] and 2) shared ownership right on the common parts of the building, attributed to all apartment owners in that building.

1) With regard to ownership right on the apartment / room, space of other destination, all procedures on ownership occurrence are completedunder the law, by its registration in the Real Estate Register.

2) Ownership right on shared common parts of the building (building structure, foundation, roof, stairwells, common areas, equipment, utility networks, - what we generally determine as apartment building or housing block) are not registered in favor of apartment owners in the Real Estate Registry. Apartment buildings arrestill registered as property of the Republic of Moldova or administrative-territorial units.With a few exceptions, eventhe new buildings constructed by private investments failed to be registered as property of apartment owners.

However, in this regard we have to mention that ownership right on common property shares is being valid without being registered in the Real Estate Register. Thus, art. 37^6 paragraph (1) of the Law on Real Estate Cadastersprovides that the right acquired by the effect of a legislative act is valid without being registered in the real estateregister.

This article also addresses and solves the situations when the owner is not motivated to undertake registration procedures of real estate.

Thus, according to the Law on Condominium in Housing Fund, art. 6 (3), the homeowners are the rightful owners of the common property. According to this law, common property includes all parts of the building of common use (ground, walls, roof terraces, chimneys, stairways, hallways, basements, cellars and technical floors, garbage pipes, elevators, engineering equipment and systems inside or outside the house (rooms), serving more houses (rooms) adjacent land borders with

[5]*Law on Real Estate Cadastrenr*. 1543 from 25,02,199, nr.44-46 from 25.05.1998.
[6]*Law on Real Estate Cadastre* nr. 1543 from 25,02,199, nr.44-46 from 25.05.1998.

greening elements and other facilities for servicing the condominium property).

The same rules are found in the Civil Code: Article 355 (1)[7] states: "If in a building there are spaces for housing or other destinations, having different owners, each of them holds a shared ownership right, forced and perpetual, on the parts of building which relates to use of spaces that cannot be used otherwise but in common.

Therefore, these two laws comprise provisions confirming the shared ownership right on the common parts of the apartment building and the Law on Real Estate Cadasters determines this right without being registered in the Real Estate Register.

Thus, we are witnessing a confusing situation, contradictory to legal provisions mentioned above, when the shares of common property owned by apartment owners (private individuals and legal entities, state) are registered in the Real Estate Register as owned by the state. This has given to municipal enterprises all responsibility for housing management, as the buildings are registered on the balance sheet of local authorities (state), which, *de facto and de jure*, should not belong to the state (municipality).

Why this happens? Why public authorities do not transmit the real estate to the rightful owners and continue to retain them as state property, to manage them, using considerable resources, both financial and administrative, rather than being concerned with the areas that have not been privatized.

The main reason claimed by the local authorities is that condominium associations were not created and that there are no formalized entities entitled to such property. It is, actually, a half-truth. Art. 24 of the Law on Privatization of Housing Fund provides for the transmission in management by associations of free spaces and not of common parts of buildings.

Associations, indeed, failed to be created for various reasons (and here we must mention the ineffectiveness of local governments), having available only the status of rightful owners of common property - the owners of privatized apartments, and in the new buildings - the owners

[7]*Civil Code of theRepublic of Moldova* nr. 1107from 06.06. 2002, nr. 82-86 from 22.06.2002.

who funded / purchased apartments. This is recognized by the Law on Condominium in Housing Fund (Article 6 (3)) and the Civil Code (art. 355). However, authorities are trying to argue their own inaction with respect to art. 8 (1) of the Law on Privatization of Housing Fund that stipulates that "owners of privatized apartments are co-possessors of engineering installations and communications, places of common use of the building, and the adjacent land to this building".

So, in their view, they are not owners of the building, but co-possessors, so the buildings must not be registered for the benefit of apartment owners. This contradiction with the Law on Condominium explains why the cities, especially Chisinau, are suffocated by the maintenance problem of the housing fund, while delaying the complete transfer of the buildings to owners. And here the half-truth is being speculated.

Indeed, the Law on Privatization of Housing Fund recognizes the apartment owners' right to possess the common property and says nothing about co-ownership right on such property. But there are none of any provision in any of laws expressly indicating that ownership on common property belongs to the state. And, if one takes into account the existence of the aforementioned rules and also applies to doctrines, the one must make clear that possession is a statement of fact, while the ownership is a statement of right. Then, when the possessor is the owner as such, the possession becomes an attribute of ownership right. In this case, the actual exercise of the fact overlaps the exercise of the right, and the person who holds the property has a double role - as possessor and owner, - possession being not considered as a separate exercise[8]. So, possession, which actually involves the factual exercise of ownership prerogatives by the possessor, cannot exclude in any case the holder's ownership right.

As a conclusion, the provision of Article 8 (1) of the Law on Privatization of Housing Fund does not preclude that the possessor of the common property is also the owner of the common property. Most often, the possession as statement of fact is exercised by an entitled owner of

[8] Joseph R. Urs**,** *Considerations on regulating possession and precarious detention in the new Romanian Civil Code*, , Law, new series (2008), http://analedrept.utm.ro/Numere/Anale%202008%20final.pdf

that property. While the Law on Privatization of Housing Fund does not fully cover the status of common property as a property belonging to apartment owners, we apply to the Civil Code and the Law on Condominium in Housing Fund.

We must take into account that the Law on Privatization of Housing Fund, which sets the rules for the privatization process of housing fund, the principles and conditions of privatization, does not substitute all applicable civil legislation regulating civil relations among owners. Moreover, the Civil Code, the Law on Condominium in Housing Fund[9]are organic laws, so in this sense, these laws have the same legal power as the Law on Privatization of Housing Fund, however, given the time of their adoption, these laws have superiority over the latter one.

It was clearly pointed out above, that the apartment owners are also the owners of the common parts of apartment buildings in accordance with the provisions of that two laws. Therefore, as stipulated by the Law on Privatization of Housing Fund, the co-possessors are concomitantly the co-owners of that common parts being attributed all rights and obligations arising from this right. Their right, however, is limited by actions of local public authorities which do not transfer the assets, and moreover, continue to use this property without owners' consent. As examples are the permits related to construction approvals for attics, superstructures, annexes to buildings, placement of advertisements on building facades, thus - illegal privatization and use of common parts of buildings…. All these actions can be approved only by owners and in no case by the authorities, who fraudulently assumed the owners'role over the others property.

Following the judgment of above, in order to exercise their ownership right on the building and ensure the management of common property, the registration of the owners' right on shares in the common property is not being mandatory. But things are not so simple - it should be understood that the owners are very indolent in terms of fulfilling the requirements to carry out maintenance works which are strictly necessary to maintain the safety and comfort of housing block. Even under such circumstances, the public authorities must transfer the buildings to the

[9]*Law on Condominium in Housing Fund*, nr. 913 from 30.03.2000. M.O.nr.130-132 from 19.10.2000.

rightful owners and find the mechanism by which to persuade the owners to accept "the gift". In this respect there could be two ways:

1) Homeowners Associations (HOAs)have to be created and the authorities shall subsequently transmit the building to HOA for management (administration), taking into account that ownership of the building belong to apartment owners of that building, under the laws. In this case, the HOA, using specific tools and acting on behalf of the owners, calculates the sizes of shares in the common property for each owner and organizes their registration in Real Estate Register.

2) The authorities organize the entire process of calculating the shares and transmit the buildings to apartments owners with subsequent registration of common property shares in the Real Estate Register in accordance with the legislation. After that, the owners decide on the establishment of the HOA and management method of the assets they have in common ownership.

Both ways require substantial involvement of public authorities, by carrying out actions requiring considerable resources. But it is necessary to recognize that without consistent actions undertaken by authorities, the organization of buildings' maintenance on a qualitative level will not be possible.

In conclusion, in authors' opinion there are no impediments for the registration of ownership right on the common parts of the building for the benefit of apartment owners living in these buildings. Moreover, public authorities must take certain steps for the transmission of buildings to rightful owners by organizing all necessary processes - inventory, calculation of shares for each owner, registration in the Real Estate Register.

The delay of process will further aggravate the already critical situation in the housing area, while the owners being fully excluded from the management process of assets belonging to them.

The fact that the HOAs were not created can not be a reason for not registering the ownership of buildings by those who have ownership right on the apartments in that building. The building and its common elements belong to apartment owners, as shared common property, but not to HOAs. Owners may delegate the management to the established HOA which will undertake the building maintenance activities, on behalf of owners and in accordance with the owners'decisions.

Obviously, these actions require substantial financial resources, and nobody should admit that the owners will finance the process. Public authorities should identify necessary resources in public budgets, as the owners apparently are very reluctant to any additional costs, considering that their responsibility will increase while registering their property.

The authors would like to underline that the registration of ownership rights over common property should not be seen as an end in itself. The recognition of the validity of ownership of each owner over the common parts of the building is required in order to impose responsibility, including obligations for maintenance of these buildings. To set these activities up, it is necessary to elaborate also technical mechanisms specifying the conditions and procedures for officers who will perform the work in question. These mechanisms can and have to be developed by the competent authorities, with the identification and approval of necessary budgetary resources, both from the state and local budgets.

Afterwards, the public authorities would remain with control functions over the technical conditions of privatized housing fund, use according to its destination and execution of necessary maintenance works under normative legislation - a huge responsibility which should not be substituted by the direct management of buildings belonging to private owners, moreover - taking decisions for the rightful owners.

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DEBATABLE OPTIONS OF CURRENT CIVIL CODE IN TERMS OF REPARATION OF PREJUDICE IN RELATION TO DELICTUAL RESPONSIBILITY

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Abstract:

The reparation of prejudice is the most important matter of civil responsibility, the one that renders efficient the immanent law concept neminem laedere. Regulating this reparation requires a more exigent elaboration than any other area in the civil law, because it is the one that optimizes the mechanism of responsibility rightfully arranged. Unlike the old regulation, the current Civil Code advances a more detailed regulation of prejudice reparation. It is our intention to analyze its texts and to highlight a few deficiencies of legal terminology used, of matter systematization, and more importantly, to draw attention to a few debatable solutions, contrary to the European tendencies in the matter of delictual responsibility.

Key words: *repairable prejudices, victim's right to reparation, prejudice assessment, reparation of prejudice in kind, proliferation of repairable prejudices, classification of prejudices, victim's obligation to diminish the prejudice (mitigate of damage), corporal prejudice.*

1. INTRODUCTION

Conceived in order to re-establish the broken balance as a consequence of damaging legitimate interests of the victim, the institution of reparation of prejudice is probably the most sensitive regulatory zone of the entire delictual responsibility and not only. Irrespective of how elaborated the legal regulations may be in this matter, they cannot fully suppress the prejudicial effects experienced by the victim, many of them being, by their nature, irreversible, so that full reparation of prejudice in order to reinstate the victim *in statu quo ante* remains a mere desideratum, most times a nice illusion.

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The current Civil Code sets forth detailed normative solutions of great impact in practice, to some controversial aspects such as victim's right to reparation, scope of reparation, timing of assessing the prejudice claimed, forms of reparation, and most importantly, popular "reparation" of moral prejudices. Subjected to a thorough examination, we observe that many of the new normative acts are ambiguous or even lacunose, that the systematization of the matter is defective and that some of them are in disagreement with European orientations in the matter. Although, subsequent to the Civil Code taking effect, several important works (cited hereinafter) have been published with comments on the normative provisions in the matter of prejudice reparation in relation to delictual responsibility, we notice a certain reticence in their critical evaluation. Therefore, we have chosen to highlight a few drawbacks of the new regulations, starting from the text analysis and hoping that, sooner or later, they will be remedied.

2. SEMATICS OF THE COLLOCATION "REPARATION OF PREJUDICE"

From a terminological point of view, the classic collocation "reparation of prejudice", though crossing centuries, being theorized by Jean Domat ever since the 17th century and taken over by French encoders in art. 1382 French Civil Code, and by the whole doctrine, is nothing more than a way of saying, a "given" taken over as such by the universal legal language. In reality, being a change in assets owned, a loss, a void, the prejudice may not be susceptible of actual reparation, yet only of *coverage*. The reparation concerns only the values owned and may occur, if required, by restituting some assets of which the victim had been unjustly deprived, by removing some detrimental works performed unrightfully and, most times, by *compensation*, by paying some compensating amounts. All these are meant to *remove* the damage and not to repair it. In its turn, the compensation implies replacement of a value with another one, by any means satisfactory to the victim. In practice, few are the times when the victim is compensated other than by *paying an indemnity*, this being the reason why, according to the best known legal dictionary, "to repair means to indemnify"[3], noticing that *reparation* is abusively preferred to *indemnification*. This term comes

[3] G. Cornu, *Vocabulaire juridique* (Paris : Presses Universitaire de France, 2008), 803.

from the Latin *indemnitas* and means compensation, removal of damage (*damnum*). The indemnification is related to the victim, not to the prejudice. Nevertheless, the doctrine uses them together, the latter, i.e. "indemnification of prejudice"[4], being a genuine pleonasm (compensation of prejudice).

The object of the reparation has been impeccably defined by the author of the most complete works dedicated to delictual responsibility, as being "{…}forcing person summoned to account for the removal or the compensation, most efficiently and appropriately possible, of harmful effects caused by the illicit action"[5]. Consequently, the reparation legally involves *suppression* of harmful effects relating to prejudice, and not their reparation (re-enactment and restoration). When the famous author mentioned above was referring to "most efficient and appropriate compensation", he was considering both indemnification and any other action meant to reinstate the victim in his/her previous situation, in relation to the victim's current situation, which is nowadays called "réparation appropriée"[6] by the French doctrine.

Given the fact that the delictual responsibility is a binding relation, and the victim's right to compensation is *receivables,* the reparation may only have as object the victim's affected assets, the assets which are to be restored by the replacement value of the loss suffered, as an effect of the real subrogation standing universally. As we will see, this mechanism may not operate in case of moral prejudices, unsusceptible of coverage by exchange value. In this case we can speak only of potential *remedies appropriate for the unfair situation of the victim*. One should remark that more and more modern regulations avoid the collocation "reparation of prejudice" and prefer terms such as *compensation in specific form* (art. 2058 Italian Civil Code or art. 944 Brazilian Civil Code) or *indemnification* (art. 483 Portuguese Civil Code).

[4] C. Jugastru, *The Prejudice – Romanian Landmarks in the European Context*, (Bucharest: Hamangiu, 2013), 262.
[5] M. Eliescu, *Delictual Civil Responsibility* (Bucharest: Academiei, 1972), 448.
[6] Ph. Le Tourneau, L. Cadiet, *Quoted works*, 565.

3. DOES ANY PREJUDICE ENTITLE COMPENSATION?

The normative enunciation in art. 1381 par (1) Civil Code, according to which "all and any prejudice entitles reparation", entails serious reserves from the very first reading of the text.

The selection of repairable prejudices is the object of one of the most animated doctrinary and jurisprudential debates, in the context of an "inflation of subjective rights" phenomenon[7], which inevitably determines the proliferation of repairable prejudices. Subjected to such pressure, the positive law acknowledges more and more repairable prejudices, such as those caused by damage of simple interest[8] or the one caused by loss of chance[9], evolution greeted by the Civil Code in force, by regulations in art. 1359 Civil Code and art. 1385 par (3). Starting from these tendencies, the classic morality standards are more relaxed, so that the jurisprudence faces nowadays, more and more frequently, compensation actions for most peculiar prejudices, such as the prejudice caused by the violation of a claimed right of not being born, invoked in the action grounded on *wrongful birth*[10], existential prejudice, deception prejudice, anxiety prejudice, a series of "fashionable" prejudices and others. As already stated, "the exacerbation of subjective rights may destabilize the right of civil responsibility, which it tends to absorb"[11].

Considered in this context, the enunciation in art. 1381 par (1) Civil Code according to which "All and any prejudice entitles to reparation" is striking and equally exhortative. Similar to the old text "all and any human action{…}", the collocation "all and any prejudice {…}" is not the most inspired legal construction, because, just like not all human actions entitle a person to repair the prejudice caused to another, not all prejudices are repairable. Unlike the responsibility exonerating legal causes, in the presence of which the prejudices suffered by the victim are not subject to reparation by the persons appointed to account,

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[7] X. Pradel, *Le préjudice dans le droit de la responsabilité* (Paris : Librairie Générale de Droit et de Jurisprudence, 2004), 123.

[8] S. Neculaescu, "The Prejudice Understood as Damage of an Interest in the New Romanian Civil Code", *Romanian Law Studies no. 2 (2010):* 121-141.

[9] S. Neculaescu, "Loss of Chance, Repairable Prejudice", *Romanian Law Studies no. 4 (2009):* 323-335.

[10] Cazul Perruche commented in X. Pradel, *quoted works*, 157.

[11] J. Carbonnier, *Droit et passion du droit sous la V-e République* (Paris: Flammarion, 1995), 122.

there are numerous other prejudices which may not *de plano* aspire to reparation. Moreover, in order to be repaired, the prejudice is known to have to comply with some requirements expressly laid down by the law. If it is obvious that there is no right to reparation without prejudice, it is equally obvious that "existence of a prejudice is not sufficient"[12].

We are provided with the explanation of this lacunose enunciation by the evolution of the preparatory works of the new normative texts. The bill of the new Civil Code, adopted by the Senate on September 13 2004, stipulated in art. 1121 par (1) that "the reparation is owed in case of all and any material, corporal or moral prejudices, caused by an illicit action". This text has been amputated as a consequence of an amendment according to which "corporal prejudice is not a species of repairable prejudice". This is why the current Civil Code avoids all and any reference to corporal prejudice, preferring the collocation "damage of the corporal or health integrity" (art. 1387).

Classification of repairable prejudices constitutes today a subject of most vibrant doctrinary debate. In line with the classical theory, prejudices may be assets-related or not[13] (moral). This thesis is sometimes supported with the motivation that "corporal prejudices have no conceptual independence, being deprived of legal consistency because corporal damages may be constituted in both assets-related and non-assets-related"[14]. Yet, more and more French[15] and Romanian[16] authors classify the repairable prejudices into three: corporal, material and moral prejudices, in an order that expresses the respect to the person's physical

[12] Fr. Terré, Ph. Simler, Yv. Lequette, *Droit civil. Les obligations, 10-e édition* (Paris : Dalloz, 2009), 713.

[13] In our opinion, one should use the syntagm "moral prejudices" because all notions have to be determined by what they actually are and not by antithesis.

[14] Ph. Brun, *Responsabilité extracontractuelle* (Paris : Litec, 2009), 135; R. Cabrillac, *Droit des obligations, 10-e édition* (Paris : Dalloz, 2012), 254-256.

[15] Fr. Terré, Ph. Simler, Yv. Lequette, *Droit civil. Les obligations, 10-e édition* (Paris : Dalloz, 2009), 723 ; Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations, 4-e édition* (Paris : Défrénois, Lexstenso édition, 2009), 137-143 ; A. Bénabent, *Droit des obligations, 13-e édition* (Montchrestien, Lextenso édition), 485-487.

[16] L. Pop, *Legal Illicit Actions and Other Legal Extra-contractual Actions causing Prejudices (Civil Delictual or Extra-contractual Responsibility)* in *Elementary Civil Law Treaty. Obligations, according to New Civil Code* (Bucharest: Universul Juridic), 415; C. Jugastru, *The Prejudice – Romanian Landmarks in the European Context* (Bucharest: Hamangiu), 175.

integrity and health. Moreover, in order to harmonize the national political regimes in this matter, by Resolution 75-7 of the Committee of Ministers of Council of the Europe held on March 14 1975, the state members have been called to elaborate a set of principles applicable to reparation of prejudices in case of corporal lesion and death, in the context of some increasingly consistent concerns relating to building a European law of corporal prejudice[17]. The argument according to which the corporal prejudice has no identity of its own, because it may be both material and moral, does not contradict its conceptual independence. The fact that such prejudice is the result of a damage of some primordial values, such as person's health and integrity, calls for priority protection of both of its components. In fact, this is the reason why in art. 1387 and following of Civil Code, special solutions are set forth in case of loss and failure to earn (art. 1388), minor's wounding (art. 1390), compensations for prejudice caused by death (art. 1390). These are regulations which, in a more thorough systematization (one of the big issues relating to current Civil Code), should have been grouped in a special section. In fact, the Civil Code of Quebec, one of our encoders' sources of inspiration, does not formally operate such delimitation either. The difference is that the text in art. 1457 par (2) CCQ states that the doer of the prejudicial action is forced to repair the "corporal, moral or material prejudice", by respecting the same order of preference.

Seen from a different perspective, i.e. that of the stylistics of the normative speech, the sententious enunciation "*all and any prejudice entails reparation*" denounces an inacceptable airiness of the normative expression. Regardless of how serious and unfair the prejudice caused may be, it is not such prejudice that "entitles to reparation", idiom evoking the private justice when the Law of Retaliation was enforced. The obligation of the reparation is a penalty which only the positive law may institute and guarantee by state law (*sanctio praecepti iuris*). Subsequently, the fact that the current regulations include no stipulation stating that prejudices are repairable, except the so called "non-assets-related prejudices" (art. 1391 Civil Code), of which vague determination is made by antithesis with the assets-related ones, a less objectionable wording may be "all and any corporal, material or moral prejudice is

[17] Yv. Lambert-Faivre, *Droit du dommage corporel, Systèmes d'indemnisation* (Paris : Dalloz, 2000), 68.

repairable, in accordance with the law". Another more complete wording is the one used by Catalan Project[18], by which collective prejudices, which are ampler and ampler today, as well as ecological and consumers-related prejudices, are also targeted. However, for the prejudice to be repairable, it must have been *unjustly* caused to the victim. This condition is increasingly accepted by the doctrine, following the model in art. 2043 Italian Civil Code. Thus, an enunciation avoiding such criticism may be the following: *"all and any unfair corporal, material or moral prejudice, individual or collective, is repairable in accordance with the law"*.

Systematization of norms referring to reparation of prejudice is also a source of objections. Although own regulations are reserved to the text in art. 1359 Civil Code, located inside the responsibility for own actions, it concerns "reparation of prejudice consisting in damage of an interest", contrary to legislative technique norms regarding avoidance of parallel regulations of the same matter. This option is objectionable, not only from formal perspective, but also because it entails inacceptable consequences. One may falsely believe that the prejudices caused by damage of an interest may be repairable only when caused by own actions, not due to another person's fault.

4. MOMENT OF BIRTH OF RIGHT TO REPARATION

According to art. 1381 par (2) Civil Code, "the right to reparation comes to life on the day of causing the prejudice, albeit this right may be immediately turned into account". This is an important enunciation as it opens another perspective of approaching the delictual responsibility, mechanism which is triggered by a *prejudice*, and not by *any human action*, according to the classical wording of delictual responsibility. Or, given the above, we should speak of "the responsibility for prejudice" and not of "responsibility for own action" or for "somebody else's action"[19].

In the comments made in this text, professor Liviu Pop says "{…} the binding relation, in the content of which the right of the creditor exists, namely of the side prejudiced, and the correlative

[18] Art. 1343. Est réparable tout préjudice certain consistant dans la lésion d'un intérêt licite, patrimonial ou extra-patrimonial, individuel ou collectif.

[19] For details, see S. Neculaescu, *Sources of Obligations in the Civil Code (art. 1164 – 1395). Critical and Compared Analysis of the New Normative Texts* (Bucharest: C.H. Beck, 2013), 695.

indebtedness to reparation, responsibility of the person at fault, appear at the time of prejudice occurrence, when all conditions of taking civil delictual responsibility are complied with"[20].

We will feel free to have a more expressive opinion, stating that at the time of prejudice occurring, the right of the victim looks rather like a *vocation to reparation* than an actual right. The occurrence of the binding relation, which is by definition a personal relation, implies identification of the person liable for reparation of prejudice. If there are situations in which both times coincide, more frequent are the cases when responsibility mechanism occurs later, just like not all damages caused to the victim may be imputed to a specific person, in order to be able to speak of compliance with delictual responsibility conditions. For instance, when the owner finds his or her vehicle damaged in the parking lot, he or she suffers damage. It may have different causalities, which are first to be clarified. Consequently, we speak of receivables only when the damage may be quantified and we know the passive subject of the binding relation, so that "one should not mistake the damage with its value"[21]. The French author himself, cited by professor Liviu Pop, in the argumentation of the thesis according to which the binding relation is born at the time of prejudice occurrence, mentions that "the harmful action gives birth to the victim's right to reparation which, at this point, seems to be an *amorphous receivable*, which shall become liquid and enforceable at the time of trial"[22].

This line is clearly highlighted by Mihail Eliescu, who, analyzing the right to compensations, affirms that such right "appears at the time of harmful action and is completed, by materialization of the object of the correlative obligation, either by agreement between the parties, or by turning the decision into a final one"[23]. (The only objection may be that it is not the action that triggers the responsibility, but the damage suffered, the one that may or may not be attributed to an action. The affirmation of our great civil code researcher must certainly be analyzed in the context of the classical conception on culpable action of a person, as unique

[20] L. Pop, in *Treaty…*, *quoted works*, 558.
[21] Fr. Terré, Ph. Simler, Yv. Lequette, *Droit civil. Les obligations, 10-e édition* (Paris : Dalloz, 2009), 609.
[22] Ph. Brun, *Responsabilité extracontractuelle* (Paris: Litec, 2009), p. 371.
[23] M. Eliescu, *quoted works*, p. 469.

grounds of responsibility. In reality, the *damage* is the premise of responsibility. The one legally in charge of repairing the damage is to be identified, this being the time when we speak of *repairable prejudice*, which is the legal expression of damage[24]).

From the time of occurrence of right to reparation until the time when the victim has a liquid receivable which he or she may capitalize, a whole evolution takes place. This explains why the normative text in art. 1381 par (2) Civil Code provides that the right to reparation is born on the day of prejudice occurrence, even if such right may not be immediately turned into account". We may not agree with the statement according to which the final mention would be useless, with the motivation that "the right to reparation depends on an objective act, that of prejudice occurrence, without being influenced by the creditor's possibility to turn it into account"[25]. Just as it is important to distinguish between damage and its scope, it is also important for the victim, in order to capitalize his or her claims, to obtain a deed acknowledging his or her liquid receivables, which means quantification of prejudice, in contradictory conditions, specific to any civil litigation.

From this perspective, interesting discussions are also provoked by the legal provision in art. 1381 par (3) Civil Code, according to which "to the right to reparation apply, from its birth, all legal provisions regarding execution, conveyance, change and termination of obligations". According to the doctrine, "effective the day the prejudice was caused, {…} shall generally apply all provisions regarding legal operations and mechanisms by which the dynamics and the termination of obligations are achieved {…}"[26].

A question waiting for an explicit answer is whether such legal provisions also apply to the right to reparation which, though born, cannot be turned into account immediately, according to the legal distinction made by the provision in the previous paragraph of the same article.

Both the right to reparation and the correlative obligation of reparation of prejudice caused to the victim, components of assets, are

[24] For details, see S. Neculaescu, *Sources of Obligations…, quoted works*
[25] R.L. Boilă, in *The New Civil Code. Comments on Articles*, coordinators Fl . Baias, E. Chelaru, R. Constantinovici, I. Macovei (Bucharest: C. H. Beck, 2012), 1457
[26] L. Pop, in *Treaty… , quoted works*, 558.

universally conveyable as consequence of legal or testamentary inheritance, or as consequence of the legal methods of obligation conveyance (debt assignment, subrogation, debt takeover, novation). It is equally true that the real debtor is rightfully late when the obligation appears as an effect of an extra-contractual illicit action[27], according to art. 1523 par (2) letter e) Civil Code. However, provisions regarding conveyance and termination of obligations, as stipulated by the text in art 1381 par (3) Civil Code, cannot be applied to this right. Speaking of an amorphous receivable, which is not *liquid* yet, has a practical importance. One method of terminating obligations, inapplicable at this time, is *compensation.* Pursuant to art. 1617 par (1) Civil Code, it operates "{…} as soon as there are two uncontested, liquid and enforceable debts, irrespective of their source, and whose object is an amount of money or a certain quantity of fungible goods of the same nature". Or, the victim's mere right to reparation does not meet this condition. Similarly, according to art. 1391 par (3) Civil Code, "the right to compensation for prejudices brought on the rights inherent to the personality of any rightful subject may be assigned providing it was established through a transaction or a court decision". Moreover, the provision at par (4) stipulates that "the right to compensation, acknowledged in accordance with the provisions of the same article, is not conveyed to heirs."[28]. Therefore, under such circumstances, all "legal provisions regarding conveyance of obligation do not apply to this right either"[29].

5. REPAIRABLE PREJUDICE ASSESSMENT

In close correlation with the previous discussion on the time of birth of the victim's right to compensations, another question with legal

[27] The syntagm "extra-contractual illicit actions" is inappropriate. This would mean that we also admit, *per a contrario,* the existence of some "contractual illicit actions", an expression which is even more unusual. In terms of terminology, the syntagm "extra-contractual responsibility", though correct and specific to the French legal language, is not used by our Civil Code, which prefers "delictual responsibility", option which had to be used in all normative provisions relating to it.

[28] We take this opportunity to mention that in legal language the rights do not "pass" to heirs, they are "conveyed" to them.

[29] One should notice that Title VI reserved to conveyance and change of obligations concerns only inter *vivos* legal operations, despite the fact that their conveyance may also be the subject of legal or testamentary inheritance. This may be the very reason why the Catalan Project prefers the syntagm "des operations sur creances".

consequences considerable for the court practice arises. It concerns the date of the repairable prejudice assessment, current question in the matter of prejudice reparation, to which any judge in charge of settling claims shall have to offer an explicit answer. The answer shall also clarify whether the decision awarded in the lawsuit initiated by the victim has a right *declarative* or a right *constitutive* character.

For a long time, the doctrine and the jurisprudence considered that the equitableness requires that the prejudice is assessed at the time of its occurrence, without considering the previous fluctuations of the market. Is has been considered that this solution would be imposed by the finality of the delictual responsibility, that of reinstating the victim in previous situation, namely the one existing at the time of prejudice occurrence. Therefore, in the case of stealing or destroying a work of art, the value considered at the time of establishing the compensation was the one which such asset had at the time the prejudicial action took place. Once the process of monetary erosion came to pass, one notices however that the assessment made at the time of prejudice occurrence is to the detriment of the victim, forced thus to receive a compensation slightly diminished in relation to replacement prices for the goods destroyed valid at the time of court decision. This is the reason why both jurisprudence and modern doctrine have chartered that "if the right to reparation is born at the time of prejudice occurrence, the reparation has to take place in relation to the assessment of the prejudice at the time of trial"[30].

Then, some prejudicial effects take place in time, after occurrence of prejudice, as is the case of corporal prejudices, idea which we will revisit. Given the importance of the prejudice assessment at the time of trial, by Resolution 75-7 of the Committee of Ministers of Council of the Europe held on March 14 1975, which we mentioned in the context of the European preoccupations to harmonize regulations regarding repairing of corporal prejudices, 19 basis principles applicable to reparation of such prejudices have been set forth, of which two are fundamental: re-establishment of a situation most closed to the status of the victim previous to occurrence of prejudice and calculation of indemnity to settle on the date of trial.

According to art. 1386 par (2) Civil Code, "Upon establishing the compensation, one shall consider, unless otherwise expressed by the law,

[30] A. Bénabent, *quoted works*, p. 512.

the date of the prejudice occurrence". Interpreting the new normative texts in their succession, we will see that the marginal denomination in art. 1386 Civil Code concerns "the forms of reparation" and not the "scope of reparation", matter already regulated in the previous text in art. 1385 Civil Code. As the forms of execution are the ones stated at par (1) of art. 1386 Civil Code (in kind reparation or full compensation or periodical provision of services), it would be logical to consider that the "establishment of the compensation" concerns the choice of one form of reparation. However, in a reasonable interpretation of the text, beyond the letter and the systematization of the matter (both defective), the doctrine which made comments on the new provisions has considered that the text refers to "establishment of the compensation quantum"[31]. In other words, in a more personal way of expression, it is about "assessment of compensation".

In substance, the new solution was criticized because, "though logical, it is inequitable and against the judiciary practice, which imposes establishment of the value at the time of sentencing the reparation"[32].

Siding with these considerations, we will add that the new regulation is in disagreement with the European orientations in the matter, favorable to the victim interested in the value of the prejudice at the time when the receivables become liquid. Therefore, according to the French Catalan Project regarding obligations law and statute of limitation law, the judge assesses the prejudice at the time of sentencing, taking into consideration all circumstances which may have affected the consistency[33]. The same solution was constantly awarded in the French Cassation Court, according to which "receivables born as a result of a delict or quasi-delict do not exist before the date they were legally established, and the victim holds by that time no debt security and no right which he or she may stand on"[34]. The solution advanced by the current Civil Code is actually in disagreement with its own regulations in the matter of corporal prejudice, assessed at the time of trial, as long as

[31] R.L.Boilă, in the collective work *Comments on Articles… quoted works,* 1463.

[32] P. Vasilescu, *Civil Law. Obligations (As Understood by the New Civil Code)* (Bucharest: Hamangiu, 2012), 668.

[33] Art. 1372. Le juge évalue le préjudice au jour où il rend sa décision, en tenant compte de toutes les circonstances qui ont pu l'affecter dans sa consistance comme dans sa valeur, ainsi que de son évolution raisonnablement prévisible.

[34] Apud Ph. Brun, *quoted works*, 370

ubi eadem est ratio, eadem solutio debet esse. Pursuant to art. 1387 par (1) Civil Code, in case of corporal integrity or health damage, compensation has to cover the expenses incurred with medical treatment as well as expenses triggered by increase of life needs of the person who suffered the damage and all and any other material prejudices[35], which may not be known before the time of trial and sentence. This explains why, according to art. 1387 par (3) Civil Code, in such situations "{…} the court may grant the person injured a temporary compensation for coverage of urgent needs", which means that the final compensations will be assessed at the time of trial on the merits.

There are situations when the victim has used his or her own money to remove the prejudice suffered, repairing, for example, the assets deteriorated. In this case, the compensations shall be related to the date of repair performed, within the limits of the expenses made.

6. FULL REPARATION OF PREJUDICE, MYTH OR REALITY?

Similar to "reparation of prejudice", "full reparation" is a ritual-like wording in the matter. Nowadays it is under more and more debate[36]. The practice has proven that reinstatement of the victim *in statu quo ante* is, most times, impossible, by force of circumstances, as reparation of prejudice may not be full either, in the true meaning of the word, while reparation in kind is very rarely feasible. The law may only target to "most exactly reestablish the balance affected by damage", according to a more reasonable wording adopted by the French jurisprudence. Thus, this is how the more expressive text in art. 1385 par (1) Civil Code, according to which "The prejudice is fully repaired provided there is not otherwise expressed by the law". Although this provision was harshly criticized and there were opinions according to which "limitation of victim's right to claim coverage of full prejudice by adoption of some special provisions would potentially violate provisions of art. 6 par (1) of European

[35] The solution to grant the victim, in case of damage of corporal integrity or of health (corporal prejudice), compensations for "any other material prejudices", without further determining them, is inacceptable. Such "other material prejudices" for which the victim may claim compensations are to be strictly circumscribed to the effects produced by the damage of corporal integrity or of health (to which psychical integrity of the victim should be added).

[36] For details, see collective work elaborated under the aegis of the French Court of Cassation, *Les limites de la réparation du préjudice* (Paris: Dalloz, 2009).

Convention on Human Rights{…}"[37], in our view, it is rational, as it merely acknowledges a series of other reasons which impose such limitation. Therefore, under the pressure exercised by the movement of consumer protection, in the context of solidarity ideas, there emerges a new wave of moralization of full civil responsibility. Recognizing the judge's right to intervene in contracts, by even adapting them beyond the will of parties, new positioning of the laws in relation to harmful contracts, instituting new loyalty and good will obligations in the whole evolution of the contract, the creditor's obligation to take actions in order to limit the prejudice caused by the debtor (issue which we will revisit hereinafter), are new solutions trying to find their way towards delictual responsibility. However, they are differently set and motivated. If the Catalan Project recognizes the judge's right to moderate, even ex officio, the compensations agreed between the parties, when they are obviously excessive[38], art. 944 in the Civil Code of Brazil, producing effects since 2002, acknowledges the judge's right to equitably reduce the reparation quantum, whenever there are excessive disproportions between the seriousness of the fault and the damage caused to the victim. This solution is also advanced by the Principles of the European Group on Tort Law (EGTL). This time, the reduction of compensations granted to the victim may be ordered when they became "oppressive" in relation to the financial situation of the victim[39]. In such situations, the transaction between the parties regarding compensations may be objected to in case of lesion[40].

Without taking it too far-fetched, our Civil Code institutes in art. 1386 par (4) the possibility of revising the compensation. Therefore, "In case of future prejudice, the compensation may be increased, reduced or

[37] Cr. Zamșa, in the collective work *Comments on Articles…, quoted works*, 1461.

[38] Art. 1383. Lorsque les parties ont fixé à l'avance la réparation due, le juge peut, même d'office, modérer la sanction convenue si elle est manifestement excessive.

[39] Art. 10:401. Dans un cas exceptionnel, si à la lumière de la situation financière des parties la compensation intégrale constituait une charge oppressive pour le défendeur, le montant des dommages-intérêts pourrait être réduit. Pour décider si cette réduction doit avoir lieu, il devra notamment être tenu compte du fondement de la responsabilité, de l'étendue de la protection de l'intérêt et de l'importance du préjudice.

[40] In a previous work, I supported the thesis of admissibility of the lesion in case of transaction, contrary to the provision in art. 1224 Civil Code. See S. Neculaescu, *Sources of Obligations…, quoted works*

suppressed, regardless of the form in which it was initially granted, providing that, after it was established, the prejudice was higher, lower or ceased". Therefore, all these later amendments are exclusively determined by changes in prejudice, and not by the financial situation of the parties or the solvability of the person accountable.

A surprising solution and in dissonance with all present or projected regulations in the matter of reparation of prejudice, which will create serious difficulties in practice, is the one in art. 1386 par (1) Civil Code, according to which, if the victim is not interested in reparation in kind, the prejudice shall be repaired by payment of a compensatory amount, established by agreement between parties or, in absence, by court judgment. This normative text has been criticized by the doctrine, considering that it encourages the abuse by the victim who "may claim payment of compensations in cases when coverage of damage in kind is also possible"[41]. There is also a contrary opinion according to which the victim is "the only one entitled to discretionarily choose whether the prejudice should be repaired in kind or in money"[42].

In our opinion, recognition of a discretionary right of the victim to choose between the two methods of reparation encounters at least two obstacles. It is firstly admitted that the reparation in kind has to come as a priority, being the only way for the victim to be reinstated in the situation previous to occurrence of prejudice[43]. Secondly, according to art. 1384 par (4) Civil Code and as already mentioned, the judge may amend the quantum of the compensation. Moreover, there are also regulations which enable the judge to order reparation of prejudice only by equivalent, when the reparation in kind proves to be excessively onerous to the debtor (art. 2058 par 2 Italian Civil Code)[44].

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[41] L. R. Boilă in *Comments on Articles, quoted works*, 1464.
[42] P. Vasilescu, *quoted works*, 667.
[43] A. Bénabent, *quoted works*, 511.
[44] Art. 2058 (2). Tuttavia il giudice può disporre che il risarcimento avvenga solo per equivalente, se la reintegrazione in forma specifica risulta eccessivamente onerosa per il debitore. The solution advanced by the Italian Civil Code represents an argument for the thesis which I supported in relation to admissibility of the lesion in case of transaction as well, contrary to the provision in art. 1224 Civil Code according to which "One may not appeal for lesion the random contracts, the transaction, as well as other contracts expressly stated by the law. For details, see S. Neculaescu, *Sources of Obligations.., quoted works*, 235-237.

7. THE VICTIM'S OBLIGATION TO MINIMIZE THE PREJUDICE SUFFERED, EXPRESSION OF THE SOLIDARISM IN CIVIL LAW

The creditor's obligation to minimize the prejudice suffered by taking reasonable measures, of Anglo-Saxon origin (*Duty to Mitigate Damages*), constitutes nowadays the object of doctrinary and jurisprudential controversy. The idea to sanction the victim for not having taken the measures at hand, meant to reduce the prejudice caused to him/her by another person, is not new. Ever since the 17th century, referring to delictual responsibility, Jean Domat considered that one has to examine whether the victim had the possibility to minimize the damage suffered or not[45]. Much later, René Demogue, theorizes this obligation, as an expression of solidarism equally applicable to both delictual responsibility and contractual responsibility, starting from the principles of goodwill and collaboration between the parties[46]. In line with this conception, the victim who failed to take all reasonable measures at hand in order to limit the prejudice caused by the author and claims from the latter reparation of prejudice in full, is deemed to abuse his or her right.

7.1. ***Mitigate of Damage*** **in Comparative Law.** Loyal to principle of full reparation of prejudice, the doctrine and the jurisprudence in the French legal space have shown hostility to recognition of such obligation, with principle motivation of the Court of Cassation according to which "the victim is not forced to limit the prejudice to the benefit of the person accountable for it"[47]. As the solution proved to be too rigid, risking to encourage a potentially negligent or even deliberate attitude of the victim, who may allow increase of the prejudice caused so that he or she could force the person at default account for this, under the influence of the doctrine and the new ideas of moralizing the civil responsibility, the same court moderated their position by admitting, in the matter of corporal

[45] J. Domat, *Les lois civile dans leur ordre naturel* (Paris : Rollin et Fils), 162.
[46] R. Demogue, *Traité des obligations en général*, Arthur Rousseau, t. IV, Paris, nr. 46 bis.
[47] J. Flour, J-L. Aubert, É. Savaux, *Droit civil. Les obligations. 2. Le fait juridique*, 13-e édition (Paris: Dalloz, 2009), 474.

prejudice, that the victim has an implicit obligation to reduce his or her damage.

According to art. 44 par (1) Swiss Code of obligations, "the judge may reduce the damages or may refuse them whenever the victim has consented to the lesion caused to him or her or when the actions of the latter have contributed to occurrence or increase of damage or when they have aggravated the debtor's situation". The Convention of United Nations on contracts for the international sale of goods in Vienna on April 11 1980 (CVIM) states in art. 77 that "the party calling breach of contract shall take reasonable measures, in line with the circumstances, in order to limit the loss, including the gain unearned as a result of such breach. Should such party neglect to do so, the party at default may demand a reduction in damages to the same proportion of the loss which should have been avoided".

The same obligation is instituted by art. 7.4.8 par (1) of Unidroit Principles applicable to international contracts, text according to which "the debtor does not account for the prejudice to the same extent to which the creditor could have diminished it by reasonable means". In order to encourage the diligent behavior of the creditor, the text in par (2) of the same article provides that he or she may be reimbursed for the reasonable expenses incurred with a view to diminishing the prejudice.

As a consequence of this evolution, the French bills on obligations law explicitly institute the victim's obligation to minimize the prejudice caused to him or her, apprehending that in case of failure to take reasonable and proportional measures in order to reduce the scope of prejudice, the compensations to which the victim had been entitled shall be reduced, providing such measures brought no prejudice to physical integrity[48]. Along the same lines, the Civil Code of Quebec establishes that the obligation to minimize the prejudice is the victim's, so that the

[48] Art. 1373 Pr. Catala. Lorsque la victime avait la possibilité, par des moyens sûrs, raisonnables et proportionnés, de réduire l'étendue de son préjudice ou d'en éviter l'aggravation, il sera tenu compte de son abstention par une réduction de son indemnisation, sauf lorsque les mesures seraient de nature à porter atteinte à son intégrité physique.
Art. 53 Pr. Terré. Sauf en cas d'atteinte à l'intégrité physique ou psychique de la personne, le juge pourra réduire les dommages et intérêts lorsque le demandeur n'aura pas pris les mesures sûres et raisonnables propres à limiter son préjudice

person responsible does not account for the aggravation of the prejudice which he or she could have avoided[49].

The regulation was also taken over by the Principles of the European Contract Law (PECL-Proiectul Lando) in art. 9:50, as well as by other legislations, such as the Civil Code of Ethiopia.

In the American law, the theory of "avoidable consequences" (avoidable consequences) was adopted by a consistent jurisprudence, according to which the creditor has the right to be reimbursed for the reasonable expenses incurred in order to minimize the prejudice, just like the prejudice which could have been avoided by taking the same measures is not subjected to reparation.

Referring to the future of the *mitigation theory*, the prestigious authors consider that it will become "a general law principle in the matter of the civil responsibility"[50].

7.2. *Mitigate of Damages* in Current Civil Code. The victim's or the creditor's obligation to minimize the prejudice suffered characterizes both responsibilities. This is the reason why, if the current Civil Code had targeted to adopt it, this obligation could have been explicitly included in the common provisions, following the model of the Civil Code of Quebec mentioned above[51]. Or, in our opinion, the regulations on reimbursement of expenses made in order to limit or avoid the damage, about which some authors consider that they would have as "inspiration source" the obligation to diminish the prejudice (*the duty to mitigate the damage*), are equivocal.

Therefore, according to art. 1385 par (3), reserved to the scope of reparation in case of delictual responsibility, the compensation has to

[49] Art. 1479. La personne qui est tenue de réparer un préjudice ne répond pas de l'aggravation de ce préjudice que la victime pouvait éviter.

[50] Ph. Malinvaud, *Droit des obligations* (Paris : Litec, 2007), 510.

[51] Through a defective systematization, the provisions regarding exonerating clauses in section 2 of chapter IV of book V, although they both concern responsibilities, are regulated differently in general provisions of section 1, which triggers questions regarding their applicability. Then, the regulations in sections 3-5 regarding responsibility for own actions, another person's actions and prejudices caused by animals or things, are not subsumed to delictual responsibility as it should have. It is section 6, reserved to reparation of prejudice, that makes references to delictual responsibility. Then, the option of defining both responsibilities within the same general provisions imposes reserving some principle provisions applicable to contractual responsibility, following the Catalan Project.

include, among others, the "expenses incurred by the victim with a view to avoiding or limiting the prejudice". Or, the fact that the victim has the *right* to reimbursement of such expenses does not mean that he or she also has the *obligation* to diminish them. Then, the syntagm"avoiding or limiting the prejudice" is not clear enough. "Avoiding" involves the victim's intervention through *previous measures*, meant to prevent occurrence of prejudice. If such measures have not been taken, the omission of the victim shall fall under the causal antecedence of prejudice, with the consequence of proportional reduction of reparation. In this case the victim shall be compensated only to the extent to which the prejudice caused may not be imputed to the victim, in accordance with the distinctions of the Unidroit Principles[52]. On the contrary, "limitation of prejudice" is *subsequent* to it occurrence, according to the same normative landmark[53]. Mitigate of damage is also *avoidance to aggravate* it, as Catalan Project, above mentioned, distinguishes (see footnote no. 49).

Equivocal is also the provision in art. 1371 par (1) Civil Code regarding common fault and plurality of causes, according to which "In case the victim has deliberately or guiltily contributed to occurrence or increase of prejudice or failed to avoid it, in full or in part, although he or she could have done so, the one called to account shall be responsible only to the extent to which he or she contributed to prejudice". As both the normative text and the marginal denomination of the norm indicate, *the victim's contribution* is seen as one of the cause of prejudice occurrence, increase or failure to avoid it. The syntagm "non-avoidance of prejudice" is vague because it is not clear whether it also includes the increase of prejudice, the only situation in which one may speak of *mitigation* (limitation, minimization).

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[52] Art. 7.4.7. *Partial Prejudice Imputable to Prejudiced Party.*

When the prejudice is partially imputable to an action or omission of the prejudiced party or to another event for which the party took the risk, the value of the damages is reduced to the extent to which such factors have contributed to occurrence of prejudice, bearing in mind the conduct of each party.

[53] Art. 7.4.8. *(Mitigate of Damage).*

(1) The party at fault does not account for the prejudice suffered by the other party to the extent to which the latter could have avoided it by reasonable means.

(2) The party prejudiced is entitled to be reimbursed for all and any reasonable expenses incurred in the attempt to mitigate the damage.

In the matter of contractual responsibility, art. 1534 par (2) Civil Code provides that "the debtor owes no compensation for prejudices which the creditor could have avoided with minimum diligence". Similarly to previous cases, only prejudices imputable to the creditor are considered, the ones which have occurred in the absence of reasonable measures taken by the creditor so that the prejudice should be avoided. While the text in art. 1479 of Civil Code of Quebec takes account of the "*aggravation of prejudice* which the creditor could have avoided", the Romanian text refers to "the prejudices which the creditor *could have avoided* {…}", following the Italian model of which text has been taken over to the letter[54]. To avoid such interpretation exercises, the regulation in the Civil Code of Quebec could have been taken over, code of which regulation in the matter is closer to the institution of *mitigation of damage*.

On the other hand, the normative text analyzed is located within the contractual responsibility. Or, in accordance with art. 1350 par (3) Civil Code, its rules may not be removed from enforcement in favor of other rules which would have been more advantageous unless the law expressly provides otherwise.

8. OBJECTIONS REGARDING REPARATION OF NON-ASSETS-RELATED PREJUDICES

Far from clarifying the classic controversy of "repeatability" of moral prejudices, the current Civil Code complicates it even further. We continue to comment on the provisions reserved to non-assets-related prejudices[55], synthesizing the main objections.

8.1. Regulation in art. 1391 Civil Code does not concern all assets-related prejudices, as the norm marginal denomination suggests. It only refers to prejudices caused in case of damage of corporal integrity or of health. As these values are the object of a non-assets-related law of those provided at art. 252 Civil Code, it would have been expected to place the legal provisions mentioned within the matter specific to defense of non-assets-related rights, all the more so as the marginal denomination

[54] Art. 1227. Il risarcimento non è dovuto per i danni che il creditore avrebbe potuto evitare usando l'ordinaria diligenza

[55] For details, see S. Neculaescu, *Civil Delictual Responsibility in the New Civil Code. Critical Outlook*, The Law nr. 4/2010, 45-64.

in art. 1391 suggests such filiation. Therefore, novelty reference in art. 1391 par (5) according to which "Provisions in art. 253-256 shall continue to apply" (as if otherwise had also been possible) would have been avoided[56].

For the same reasons, the provision in par (4) of the same article, according to which "The right to compensation, recognized in line with provisions of this article, is not conveyed to heirs"[57], should have been included in art. 253 Civil Code, contiguous to the one by which "{…}the right to compensations or, if required, an assets-related reparation for the prejudice which is even non-assets-related {…}" is instituted.

8.2. Pursuant to art. 253 par (4) Civil Code, the person suffering the prejudice claim "*compensations* or, if required, an *assets-related reparation* (s.n.) of the prejudice caused, even if such prejudice was non-assets-related". The enunciation is defective, as it is not clear whether the encoders consider that both compensations and assets-related reparation may be claimed only for non-assets-related reparation, or whether it was only an intention of distinguishing between compensations, applicable to assets-related prejudices, and assets-related reparation, typical of non-assets-related prejudices. In both hypotheses the text is liable to criticism. The unusual distinction between "compensations" and "assets-related reparation" could make sense providing that, according to the new regulation, the compensation would concern only the assets-related prejudice, while the assets-related reparation would be granted only for violation of non-assets prejudices. Nevertheless, as, according to art. 1381 par (2), the court will be able to grant *compensations* for the *sorrow* experienced as the result of the victim's death, one has to understand that the distinction mentioned is arbitrary.

8.3. In substance, the syntagm "reparation of non-assets-related prejudice" is in fact a genuine *contradictio in terminis*, if one considers that, by definition, such a prejudice may not be reduced to an exchange

[56] One may not really debate on whether provisions mentioned "remain" or "do not remain" applicable; one can do so only if they apply appropriately, usual reference wordings.

[57] The wording "the right to compensations {…} is not passed to heirs" is inappropriate. No right *passes* to heirs, it is *conveyed* to them. The provision in art 256 par (1) Civil Code, according to which the action to reinstate the non-asset-related right violated may be *initiated* when the usual wording is to formulate (initiate) it, is also inappropriately used as legal term.

value, therefore it is not repairable in accordance with rules of delictual responsibility[58]. The sanction against the author of the moral prejudice may not result in reinstating the victim *in statu quo ante*, but only in indemnifying him or her, or in other measures apt to produce an equitable satisfaction[59], a relief from moral distress, a possible remedy for the unfair situation of the person. In such cases, the damages have a punitive character (in the Anglo-Saxon law, *punitive damages*), concept taken over by the Catalan Project[60] and supported from a doctrinary point of view ever since 1947 by Boris Starck[61]. In terms of principles, the opinion that the civil responsibility also plays the role of private punishment[62] is more and more consistent. By exception from the principle specific to civil responsibility, according to which the extent of reparation is rendered by its scope, in case of moral prejudices, the remedy suitable to an unfair situation of the victim is also distributed in proportion to the degree of guilt of the agent and the intensity of his or her prejudicial actions.

Including non-assets-related prejudice in the repairable prejudice does nothing more than to convert the victim's right to indemnification into a right which is non-assets-related in its essence, compromising therefore the classic distinction between assets-related and non-assets-related rights. Thus, we cannot agree with the author of a manual on civil obligations, according to whom "the legal operation of understanding the damage through prejudice is performed with the view

[58] S. Neculaescu, "Critical Observations in relation to Regulation on Moral Prejudice Reparation as Understood by the New Romanian Civil Code", *The Law no. 5: (2010)*, 39-57.

[59] C-R. Popescu, *Reparation of Prejudice in the European Context of Human Rights* (Bucharest: Hamangiu, 2013), 236.

[60] Art. 1371. L'auteur d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêt.

[61] B. Starck, *Essai d'une theorie théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée*, L. Rodstein, (Paris : 1947).

[62] S. Carval, *La responsabilité civile dans sa fonction de peine privée* (Paris : Librairie Générale de Droit et de Jurisprudence, 1995). See also J. Flour, J-L. Aubert, É. Savaux, *quoted works*, 477.

to making all other damages repairable"[63] so that the prejudice would be a legal category which allows rendering all and any concrete damage into an assets-related issue (material or not). The fact that the prejudice is the legal expression of damage does not mean that the moral damage (improperly called "harm") would convert into an element relating to assets. In their turn, the prejudices may be assets-related or moral. If the latter have been assimilated by jurisprudence to assets-related prejudices, using the interpretation argument *ubi lex non distinguit…*, at present, the victim's indemnification for moral prejudices may not longer be similarly sustained. This is the reason why the fact that the responsibility principle for own actions instituted in art. 1357 Civil Code continues to aim the prejudice in general, with no distinction, could be considered as an indication that the remedies of moral prejudices may not be qualified as "reparation", option which is contrary to regulations of Civil Code of Quebec and those of the Catalan Project (cited above, footnotes no. 22 and 23).

On the other side, despite the fact that the principle provision in art. 1359 Civil Code "{…} forces the author of the illicit action to repair the prejudice also in cases when such prejudice is a consequence of harm caused to another person{…}", the reparation of non-assets-related prejudices, regulated by art. 253-256 and art. 1391 Civil Code, is circumscribed to the violation of non-assets-related rights, contrary to the Principles of the European Group on Tort Law (EGLT), which generically consider the prejudices caused by harm related to the legally protected interest[64]. Therefore, the civil responsibility for moral prejudices is not contingent on prejudice brought to non-assets-related rights. Although related, they are distinct legal institutions.

8.4. The syntagm "limitation of family and social life possibilities" in art. 1391 par (1) Civil Code, taken over to the letter from art. 367 in the Civil Code Bill in order to designate the moral prejudices caused by harm of corporal integrity and health, is a vague determination of the prejudices it implies. Preferable would have been the well-known wording ("agreement prejudice"), the moral component of the corporal prejudice, which exclusively targets the psychical sufferings, the

[63] P. Vasilescu, *quoted works*, 572.

[64] Art. 2:101. Préjudice réparable. Le préjudice consiste en une atteinte matérielle ou immatérielle à un intérêt juridiquement protégé.

frustrations produced by a corporal harm of the victim (impediments to practice his or her favorite sport or recreational activities or to benefit from the usual joys previous to harming), shortly "being aware of the shortcomings caused"[65]. Limitation of family and social life possibilities also imply assets-related prejudices, such as costs required for prostheses, wheel chairs, expenses with medical assistant etc.

8.5. The solution in art. 1391 par (2) Civil Code, in the matter of indirect prejudice, according to which "the court will also be able to grant compensations to ascendants, descendants, brothers, sisters and spouses, for the sorrow caused by the death of the person, *as well as to any other person who, in their turn, could prove the existence of such prejudice"* (s.n.), unjustifiably widens the circle of the persons entitled to such compensations. It is contrary to the recommendation in the Resolution 75-7 of the Committee of Ministers of Council of the Europe held on March 14 1975, regarding the reparation of prejudices in case of corporal lesions or death. According to art. 19 of this Resolution, "The legal systems which currently do not grant a right to reparation for psychical sufferings of a third person due to death of the victim should grant such reparation to other persons, i.e. fathers, mothers, husbands and wives, fiancé(e) and children of the victim, providing that such persons had been closed to the deceased at the time of death. In the legal systems which currently grant such right to certain persons, the right must be widened neither in terms of people who are entitled nor in terms of indemnification size".

In order to potentially conclude, as already stated, if we continue to speak of "reparation of non-assets-related prejudices", the discussion will not have the finality we envisage, namely that of finding the real solutions to one of the greatest concerns of the civil law doctrine.

[65] C. Jugastru, *The Prejudice – Romanian Landmarks in the European Context*, (Bucharest: Hamangiu, 2013), 270.

FEW POTENTIAL SOLUTIONS FOR CONFLICTS OF LAWS WHICH CAN BE ENCOUNTERED IN THE FIELD OF INHERITANCES

Ilioara GENOIU[1]

Abstract:

In our opinion, it is of interest both from a theoretical but particularly practical perspective to discuss and furthermore propose some solutions for certain controversial issues related to succession law, such as the resolution of a conflict of laws in time. Consequently, the present work aims to point out a few of the forms which the temporal conflict of laws can take in the field of inheritances and to state a few points of view which could be interesting particularly for practitioners, by determining them to reflect on the topic.

Key words: *conflict of laws in time, lack of retroactivity of the new civil law, ultra-activity of the former civil law, immediate enforcement of the new civil law.*

INTRODUCTION

Although more than three years have passed since the entry in force of Law No. 287/2009 on the Civil Code[2] and the latter's institutions are or should be relatively well known and understood, law theoreticians still identify some aspects presenting a controversial potential. The practitioners activating in the legal field (judges, lawyers and notaries public) come and confirm this, by showing that some institutions of civil law (for us being of interest those related to succession law) are inappropriately or too briefly regulated or that the provisions of the current Civil Code are differently and non-unitarily enforced by the legal professionals (judges and notaries public in particular).

By starting from this reality, we shall discuss a few aspects which are of interest for the enforcement in time of civil law (more precisely the provisions of succession law), by correlating the relevant regulations for the theory of civil law with those of succession law.

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[2] Republished in the Official Gazette No. 505 from 15th July 2011.

THE ENFORCEMENT IN TIME OF SOME OF THE PROVISIONS OF THE CIVIL CODE HAVING INCIDENCE IN THE SUCCESSION FIELD

According to the provisions of article 91 of Law No. 71/2011 on the enforcement of Law No. 287/2009 on the Civil Code[3], "The inheritances opened before the entry in force of the Civil Code are subject to the law which was in force at the opening of inheritance". These provisions are therefore in accordance to the those of article 6 of the Civil Code, having the indicative title "The enforcement in time of the civil law", according to which, from a temporal perspective, the civil law (including that having incidence in the field of inheritances) is governed by the principle of the lack of retroactivity of the new civil law (which does not include any exception in the civil field) and that of the immediate enforcement of the new civil law (which is subject to the exception regarding the ultra-activity of the former civil law)[4]. By correlating the two principles mentioned before, it can be reached the conclusion that the inheritances opened before the 1st October 2011 shall be subject to the rules instituted by the 1864 Civil Code[5] (currently abrogated), while those opened after this date shall be subject to the prescriptions of the current Civil Code.

This represents only a simple approach regarding the enforcement in time of the succession law, as when it comes to inheritances certain legal situations can be encountered, which appeared under the governance of the former Civil Code (that is when an inheritance was opened before the 1st of October 2011) and whose

[3] Published in the Official Gazette No. 409 from 10th June 2011 and amended in the Official Gazette No. 489 from 8th July 2011.

[4] For the issue regarding the enforcement in time of civil law, see: E. Chelaru, *Teoria generală a dreptului civil* (Bucharest: C.H. Beck, 2014), 22 and the following; G. Boroi and C.Al. Anghelescu, *Curs de drept civil. Partea generală,* 2nd edition revised and updated (Bucharest: Hamangiu, 2012), 14-38; C.T. Ungureanu, „Aplicarea legii civile", in *Noul Cod civil. Comentarii şi jurisprudenţă,* volume I, written in co-authorship (Bucharest: Hamangiu, 2012), 16-20; I. Genoiu, *Drept civil. Partea generală. Persoanele. Caiet de seminar* (Bucharest: C.H. Beck, 2015), 21-24; I. Boghirnea, *Teoria generală a dreptului* (Craiova, Ed. Sitech, 2013), 77-82.

[5] We are speaking about the 1864 Civil Code, which was published as it follows: art. 1-347 in the Official Gazette No. 271 from 4th December 1864, art. 348-1914 in the Official Gazette No. 7, 8, 9, 11 and 13 from 1865.

successive effects last for long or extremely long periods of time. For instance, in terms of a succession law relation, we can speak of the opening of inheritance, its transmission and partition (hence steps taking places most of the times during periods lasting for decades). Also, it should be mentioned that the current Civil Code acknowledges important novelty elements regarding all these legal institutions, by even reforming some of them. From here emerges the need to know the answer at question such as:

a) On the light of which normative act shall be assessed the validity of a will concluded long before the opening of the inheritance, therefore under the 1864 Civil Code, under the circumstances in which the inheritance was opened after the 1st of October 2011?

We believe that the answer to the question above is simple and easy to find, as in this case can be applied the principle *tempus regit actum,* so that it will be analyzed whether were observed the validity conditions of will, by taking into account the moment when it was drafted (here according to the former Civil Code) and not the date when the inheritance was opened, which succeeded the entrance in force of the new Civil Code[6]. Consequently, the testator had to have the capacity to leave a will, as it was regulated by the 1864 Civil Code, being known the fact that the latter was identifying will – as a whole – and legacy - the main provision of the will – by requiring the testator to have full power of exercise. Yet, nowadays a distinction is made between the capacity of the person leaving provisions *mortis causa* (who disposes of his assets by means of legacies) and that of the testator who inserts in his last will act other provisions than those with a patrimonial character (for instance the acknowledgement of filiation, provisions related to funerals, his body after death or the sampling of his organs, tissues and human cells for therapeutic and scientific purposes)[7]. The other validity conditions of will (consent, object, cause and form) must be analyzed too by taking into account the former Civil Code. Consequently, we will consider valid the mystical will, which abides by the requirements provided by law when it was drafted, although at present such a testamentary form, actually too seldom used in the past too, is no longer regulated. Will also

[6] G. Boroi and C.Al. Anghelescu, *Curs de drept civil...,* 35.
[7] For all these distinctions, see also I. Genoiu, *Dreptul la moştenire în Codul civil,* 2nd edition (Bucharest: C.H. Beck, 2013), 115 and the following.

be deemed valid only those privileged wills regulated by the former Civil Code, although at present they have a larger scope and the length of their validity is shorter[8].

However, when speaking about the effects of the will considered here, we believe that should be taken into account the legal prescriptions which are in force when the inheritance is opened, so that it can also be discussed for instance, in the current legal circumstances, the issue of forced heirship or the special share available to the surviving spouse.

b) What moment should be taken into account for checking whether a certain person meets the (general and special) conditions to inherit?

The answer to the question above seems as well easy to find, although there could be also identified some controversial aspects which will be pointed below. Thus, we shall consider that a person has succession capacity, vocation to inheritance and that he or she is not unworthy to inherit by taking into account in principle the legal prescriptions which are in force when the inheritance is opened and not when it is debated. It is important to identify the normative act enforceable to an inheritance, as the current regulations in the civil field bring several novelty elements related to the conditions to inherit, both the general ones mentioned above and the special ones (disinheritance, legal inheritance and ingratitude, for testamentary inheritance). For instance, according to the existing laws, are clearly regulated the situation of the persons sharing a simultaneous death (which also covers the situation of the persons who died at the same time, but in different circumstances), but also succession vocation. Then, the causes triggering the revocation of one person's right to obtain an inheritance are nowadays differently regulated as they were by the 1864 Civil Code, by being currently made a distinction between the unworthiness by law and the judicial one, governed by a different legal regime. The current Civil Code no longer sanctions the 1st degree descendants of the unworthy person and clearly provides for the possibility to forgive the latter by means of will or an authentic act performed before the notary public by the one leaving the inheritance (article 961 of the Civil Code). Also,

[8] For more information about privileged wills, see also L. Stănciulescu, *Curs de drept civil. Succesiuni*, 2nd edition revised and updated (Bucharest: Hamangiu, 2015), 133 and the following.

according to the existing laws, the person unworthy to inherit can be represented[9] and at present unworthiness is a general condition required for inheriting, both when the inheritance is legal, but also when is a testamentary one[10].

The difficulties to resolve a conflict of laws in time, which were referred to at the beginning of the previous paragraph, are encountered in our opinion particularly when it comes to unworthiness to inherit. Concretely speaking, the Civil Code currently in force regulates at article 959 paragraph (1) letter b) the deeds of hiding, altering, destroying or forging in bad faith the will of the deceased. If these deeds are committed after the entry in force of the new Civil Code, although the dead of the testator involved happened under the former Civil Code, can they be attributed to the heir-author as unworthiness causes, so that he is deprived of his right to obtain the inheritance under debate? Perhaps an affirmative answer would not be unreasonable and should be taken into account by those who shall have to acknowledge or declare unworthiness, depending on the case, in such a case file[11].

A specific mention should also be done regarding the conditions to inherit and the extent of the succession rights enjoyed by the surviving spouse. In our opinion, they will also be determined by taking into account the moment when the inheritance of the deceased spouse was opened. Nonetheless, it must not be forgotten that this issue must be differently approached, even during the period between the entry in force of the 1864 Civil Code and that of its abrogation, as a reasonable legal regime for the surviving spouse was not acknowledged until Law No. 319/1944 on the right to inherit of the surviving spouse[12]. As a consequence, only when it came to the inheritance opened after the entry in force of this "revolutionary" normative act could the surviving spouse

[9] Regarding the representation to succession, see D. Văduva, *Moştenirea legală. Liberalităţile* (Bucharest:Universul Juridic, 2012), 39-43.

[10] We remind in this context too that the current Civil Code overlaps some of the unworthiness causes with those of ingratitude, so that it is unfortunately created the situation in which the testamentary heir is sanctioned more severely than the legal one, although both committed one and the same deed. For more details, see B. Pătraşcu and I. Genoiu, "Despre cauzele ineficacităţii legatului", in *Noul Cod civil. Studii şi comentarii*, II volume, ed. M. Uliescu (Bucharest:Universul Juridic, 2013), 852-855.

[11] See also G. Boroi and C.Al. Anghelescu, *Curs de drept civil...*, 35.

[12] Published in the Official Gazette No. 133 from 10th June 1944.

claim, obviously if he met the conditions demanded by law to inherit, a right to inheritance in competition with any of the heir classes, a homestead right on the living house and a special right upon the furniture, household goods and wedding gifts. After the entry in force of the current Civil Code, the surviving spouse can acquire the same hereditary shares in competition with the classes of legal heirs, is entitled to acquire under certain condition a homestead right upon the living house and a special right upon the furniture and household goods. Yet, according to the same regulations, the surviving spouse can no longer invoke a special right upon wedding gifts[13].

c) If case of a conflict of laws in time (that is an inheritance opened under the former Civil Code, but which is accepted or not under the new Civil Code), which are the rules enforceable to the act of accepting or disclaiming the inheritance?

We consider that the answer to this question is not at all easy to find, its identification raising real problems for both the legal authors and practitioners. This is due to the fact the act of accepting or disclaiming an inheritance does not have a self-standing character, independent and separated from the inheritance in relation to which is exerted. If it were separately regarded, independently of the inheritance which it regards, then would be applied the principle *tempus regit actum*, so that the validity of the act would be assessed by considering the legal provisions which were in force when it was drafted (as it happens to wills for instance). Thus, in terms of an inheritance opened under the former Civil Code, but which is accepted or not after the 1st October 2011, we could say by following the logics above that, in the given case file, the option to accept or disclaim the inheritance should be governed by the rules of the current Civil Code[14]. This would lead to the situation in which the remainderman[15] would have a small choice of succession options,

[13] Regarding the succession rights of the surviving spouse, see also I. Genoiu, *Ce drepturi are soţul supravieţuitor la moştenirea soţului decedat?* (Bucharest: C.H. Beck, 2013).

[14] See for this matter also D. Văduva, *Moştenirea legală...,* 18; V. Stoica and L. Dragu, *Moştenirea legală* (Bucharest: Universul Juridic, 2012), 34.

[15] According to the provisions of the article 1100 paragraph (2) of the Civil Code, "*Remainderman* signifies the person who meets the conditions provided by law for being able to inherit, but who did not exert his or her right to choose between accepting or disclaiming the inheritance".

reduced only at accepting or giving up the inheritance, and a longer term for exerting them, of one year. It must be nonetheless mentioned that in the case mentioned above the patrimonial interest of the remainderman accepting the inheritance would not be neglected, as he would have to bear the debts related to inheritance only within the limits of its assets.

The same opinion according to which the option of accepting or disclaiming an inheritance is subject to the law in force, irrespective of the moment when the concerned inheritance is opened, has also been expressed by reputed professors of succession law, before the entry in force of the modern Civil Code, adapted to the new social Romanian realities. According to them[16], "the acts performed after the opening of an inheritance – such as the acceptance or disclaim of a succession or the succession procedure of partition between the heirs – are governed by the law in force when they are performed, on the virtue of the rule according to which the new law is enforced immediately to the acts concluded or deeds which intervened after its entry in force (the principle of the immediate enforcement of the new law)".

Yet, we consider that it could also be upheld the contrary point of view, according to which the option related to an inheritance should be governed by the rules in force at the moment when the inheritance concerned is opened, as the option to accept or disclaim it represents only one of the relevant moments for an inheritance, in other word only a link in the succession chain, which most of the times takes up several years. It is useful to quote here also the provisions of article 6 paragraph (5) of the Civil Code, according to which "The provisions of the new law are enforced to all acts and deeds concluded or, depending on the case, produced or committed after its entry in force, but also to the legal situations emerging after its entry in force" and the provisions of article (6) paragraph (6) of the Civil Code, according to which "The provisions of the new law are also enforceable to the future effects of the legal situations emerging before its entry in force, deriving from the state and capacity of the persons involved, marriage, filiation, adoption and legal caretaking duty, relations of property, including the general assets

[16] M. Eliescu, *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România* (Bucharest: Academiei, 1966), 63 şi Fr. Deak, *Tratat de drept succesoral*, II edition updated and completed (Bucharest: Universul Juridic, 2002), 32.

regime, and from neighborhood relations, if these legal situations continue to exist after the entry in force of the new law".

In relation the legal prescription already mentioned, we consider that the option to choose between accepting or disclaiming an inheritance, albeit a legal act (unilateral, willing, irrevocable in principle, indivisible, simple and clear and enunciating rights) does not belong to the category of acts considered by the lawmaker at article 6 paragraph (5) of the Civil Code, as the text contained by law refers in our opinion to independent legal situations, concluded after the entry in force of the new Civil Code, having no connection to previous legal situations. Nonetheless, when it comes to the option related to an inheritance, between the act establishing it and the opening of the inheritance is an unquestionable connection. The source of the succession law relation is represented by the death of the natural person. This automatically triggers by law the opening of the inheritance and determines the possibility of the remaindermen to make a decision of accepting or not their share form that inheritance, according to their interests. The act of accepting or disclaiming an inheritance is not the same with the donation, lease or sale contracts, which can be concluded independently of any previous legal situation. The option for accepting or refusing an inheritance is possible precisely because there is an opened inheritance. The indestructible relation established between the opening of the inheritance (generated by the death of the natural person) an the option related to its acceptance or disclaim also results from the provisions of article 956 of the Civil Code, according to which the option act performed before the opening of the inheritance is null[17].

We also consider that the act under discussion cannot be qualified either as a future effect of a legal situation emerging before the entry in force of the current Civil Code, for the purposes considered by the lawmaker at article 6 paragraph (6) of the Civil Code, as it does not regard any of the cases mentioned.

[17] Article 956 of the Civil Code: "If law contains no other provision, are affected by absolute nullity the legal acts having as object potential rights upon an inheritance not opened yet, such as those for accepting or disclaiming it, before it is opened, or those alienating or allowing for the alienation of some rights which could be acquired upon the opening of the inheritance".

Without considering to have offered the best and unquestionable solution[18] to the problem debated, we consider that the legal practitioners in particular should reflect too on the last point of view expressed and consider valid the act of accepting or disclaiming an inheritance which observes the validity conditions regulated by the law in force at the opening of the inheritance and not when the act is committed, as it is also stated at article 6 paragraph (2) of the Civil Code: "The acts and deeds concluded, committed or produced before the entry in force of the new law cannot generate other legal effects than those provided for by the law in force at the moment when they were concluded, committed or produced". Another argument which should be also taken into account in our opinion is that, when it comes to an inheritance opened under the former Civil Code, it must be observed the 6 months term to accept or disclaim it, and not the current one which is of one year. Following this reasoning, we shall consider the following concrete example: The inheritances of the deceased X and Y (who did not have mutual hereditary vocation) were opened on the 1st of August 2011. From than moment on, the remaindermen had a term of 6 months to exert their option to accept or disclaim the inheritance, with all its three forms (pure and simple acceptance, acceptance under the inventory benefit and disclaim of inheritance[19]). The remaindermen of X exert their right on September 28th 2011, under the legal provisions in force at the moment when the inheritance is opened, that is the 1864 Civil Code. The remaindermen of the other deceased Y exert their option after the 1st October 2011, namely on November 1st 2011. In the latter case, can we consider just that the validity of the act performed, although it concerns an inheritance opened at the same date with that of the deceased X (for which the option to accept it or disclaim it was expressed) should be assessed by taking into account the provisions of the new civil law? Which should be the reasons to justify the enforcement of some different legal provisions for the options expressed in relation to two inheritances opened at the same date, particularly under the circumstances in which the new legislation brings major novelties regarding the field under

[18] See also P. Perju, "Despre legea civilă", in *Noul Cod civil. Comentariu pe articole*, ed. Fl.A. Baias et al. (Bucharest: C.H. Beck, 2012), 9.

[19] For more details, see Fr. Deak, *Tratat de drept…*, 411-450, I. Genoiu, *Drept succesoral*, (Bucharest: C.H. Beck, 2008), 295-328.

discussion? Could it be that the remaindermen of Y benefit from a longer option term regarding their inheritance, of one year, and from the possibility to choose only between accepting and giving up on the inheritance? As we have also mentioned in another context, the remaindermen under debate would only have to gain if the provisions of the new Civil Code are enforced, as the term within which they have to express their option is longer, while their patrimonial interests are protected, as according to the existing laws once the inheritance is accepted the liabilities related to it are exclusively supported by its assets. Still, is it just to enforce different rules to the option of inheriting, although the opening of the inheritances rendering it possible took place at the same date? We tend to believe that the answer to this question could only be a negative one.

Finally, a last argument is brought to uphold our point of view, namely the following: article 6 paragraph (4) of the Civil Code, according to which "The statutes of limitations, revocations of rights and acquisitive prescriptions started and not accomplished when the new law enters in force are completely subject to the legal provisions which instituted them". Yet, the 6 months term to accept or disclaim an inheritance has been qualified as one typical to the statute of limitations[20]. If it is subject to the former legislation, which ultra-activates, isn't it just to also be subject to the rules of the former legislation for all the aspects involved by the act of accepting or disclaiming an inheritance (owners, validity, valences, effects and so on)? In our opinion, the answer would be yes.

d) Which will be the procedure to follow when it comes to an inheritance opened under the former law, but debated under the influence of the new one?

As to us, we consider that the succession procedure which must be observed in this case will be the one regulated by the legislation in force when it was gone through. It is true that not many novelty elements can be encountered from this perspective, as the normative act regulating the friendly succession procedure is Law No. 36/1995 on the notaries

[20] On the light of the provisions of the current Civil Code (article 1103), the option term of one year is a revocation of rights one, subject to the rules typical to the statute of limitations, regarding the suspension and reinstatement of the term.

public and their activity[21]. Although this law was placed in agreement with the new Civil Code and the new Civil Procedure Code, by being republished, the not-contentious succession procedure which it acknowledges has remained overall unreformed. The same thing can be told about the contentious succession procedure, even if Law No. 134/2010 entered in force in the meanwhile, regarding the Civil Procedure Code[22].

e) What effect does the partition act of an inheritance opened before October 1st 2011 produce, when it was accomplished after this date?

We consider that the answer in this case should be the following: the partition shall determine the constitutive affect even if it concerns an inheritance opened before the entry in force of the current Civil Code, but which was obviously performed after that date. This is due to the fact that, according to article 66 of Law No. 71/2011, the provisions of article 669-686 of the Civil Code (acknowledging the constitutive effect of partition among others) will be enforced both to partition agreements concluded after the entry in force of the current Civil Code and judicial partition, when the summons before the court has been introduced after the moment mentioned before.

The same point of view is also encountered in the "Notarial Guide"[23], where it is mentioned that the "Partition act concluded after the entry in force of the New Civil Code shall have a constitutive effect even if the heir certificate on the basis on which it was released did not have a property title, but only proved the quality of heirs".

This issue has an important significance, as according to the existing laws the partition generates a constitutive effect, and not just a declarative on (as it happened according to the former regulations), while the heir certificate proves not only the quality of heir, but also the property right upon hereditary assets. At present too, as before the entry in force of the new Civil Code, the heir certificate represents a way to provide a rightful possession on hereditary assets ever since the opening

[21] Republished in the Official Gazette No. 444 from 18th June 2014.
[22] Published in the Official Gazette No. 485 from 15th July 2010 and republished in the Official Gazette No. 247 from 10th April 2015.
[23] The National Union Notaries Public from Romania, *Codul civil al României. Îndrumar notarial*, volume I (Bucharest: Monitorul Oficial, 2011), 442.

of the inheritance to the heirs not enjoying this benefit (only the heirs considering entitled to this benefit according to the new Civil Code are partially others than those qualified like this by the former Civil Code[24]).

Thus, the hereditary partition shall produce constitutive effects even if it is based on a heir certificate, released by the notary public under the former civil regulations. Even more will have this effect a partition act performed on the basis of a heir certificate, released on the basis of the current legislation. Thus, also the certificate released by the notary public on an inheritance opened before October 1st 2011, but debated after that moment, shall have the effects regulated by the current legislation, by constituting not only a means to prove the quality of heir and a way to provide a rightful possession on hereditary assets ever since the opening of the inheritance to the heirs not enjoying this benefit, but a property title itself. On the basis of the certificate, the heir becomes owner of his share from the hereditary patrimony, retroactively from the date when the inheritance is opened (on the basis of article 1114 paragraph (1) of the Civil Code), while when it comes to the assets to which he is entitled by the partition act, he will become their exclusive owner since the date provided for by this act, but not earlier than its opening (on the basis of article 1133 of the Civil Code).

f) Who will be entitled to vacant inheritances opened before October 1st 2011, but which were not yet assigned, while the 6 months term to accept or disclaim the inheritance did not expire?

In our opinion, the inheritances opened under the former Code, which are totally or partially vacant, shall belong without distinction to the Romanian state. Yet, vacant inheritances opened after the entry in force of the new Civil Code shall belong, according to the distinctions made by law, to the village, town or locality or to the Romanian state. Thus, according to the provisions of article 1138 thesis one of the Civil Code, "Vacant inheritances shall belong to the village, town or locality on the territory of which the assets were at the opening of inheritance and shall enter their private field…". Moreover, article 553 paragraph (3) of

[24] According to the existing laws, are considered persons entitled to inherit ever since the opening of an inheritance the surviving spouse, the privileged descendants and ascendants, hence those heirs enjoying forced heirship (article 1126 of the Civil Code). According the former legislation, this legal character was enjoyed by the hereditary rights of the surviving spouse, of descendants, and privileged and ordinary ascendants.

the Civil Code states that "Vacant inheritances (…) which are abroad belong to the Romanian state". In fact, article 55 of Law No. 71/2011 provides that the provisions of article 553 paragraph (2) of the Civil Code, on the assignment of vacant inheritances which are found abroad to the Romanian state, are enforceable only for inheritances opened after the entry in force of the new Civil Code.

CONCLUSIONS

As we have tried to point out before, a conflict of laws in time can be encountered in the succession field, having a quite high frequency. For this reason, we consider useful to discuss the way in which it could be solved. In our opinion, we have managed to capture a few of the aspects which a temporal conflict of laws can regard and to offer some potential solutions for it.

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THE CANCELLATION OF THE ARBITRAL DECISION ACCORDING TO THE NEW CODE OF CIVIL PROCEDURE

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Abstract:

The cancellation of the arbitral decision using the action for annulment, as procedure which returns in front of the court the litigation subjected to arbitrage, requires an analysis from the perspective of its legal nature, towards the texts stating its legal regime, as well as the clarification of certain aspects regarding the cancellation, as were interpreted by the jurisprudence based on the previous Code of Civil Procedure, whose provisions are not substantially modified by the new Code of Civil Procedure.

Key words: *arbitral decision, action for annulment, reasons for annulment, new Code of Civil Procedure (NCPC).*

1. PRESENTATION AND LEGAL NATURE

The Code of Civil Procedure states the action for annulment of the arbitral decision as mean of legal control, by which the court stated by the law is required to consider, within the limits of expressly stated reasons, the legality of the jurisdictional act.

Traditionally, the action for annulment was stated by the previous regulation acts as an appeal against the arbitral decision[3], the legislator leaving for the parties also the possibility of attack it with ordinary or extraordinary means of appeal stated for court's decisions.

The way in which was elaborated the action for annulment by the legislator reveals similarities both with a mean of appeal, as well as with

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[3] I. Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale* (Bucharest: Lumina Lex Publ.-house, 2005), 16.

a common law action. Thus, the court, invested with competence to solve the action for annulment, has the possibility to either cancel the jurisdictional act and to issue a new ruling as when the parties would have never before concluded the arbitrary convention, or to practically proceed in solving the litigation.

The legal nature of the action for annulment has generated debates in literature[4], also in comparison with the jurisprudence of the High Court of Cassation and Justice.

Under the rule of the previous Code, the conclusion upon the nature of the action for annulment has remained debatable amid the changes brought to the Code by the Law No 219/2005, as an effect of the adoption by the Supreme Court – the Joint Chambers of the decision for appeal in the interests of the Law No V/2001[5]. Thus, the court has established that, by applying Art 364 of the Civil Procedure Code, the action for annulment against the arbitral decision represents a means of appeal, considering that a ruling involves a devolution review of the litigation, which could not be performed, if the solving of the case would be performed within certain preset limits, such as those stated by Art 364 Let a) – i) of the Civil Procedure Code.

Subsequently, the action for annulment has received procedural rules determining its qualification as a direct action, and not as a mean of reforming the arbitral decision, because the court did not act as a court of appeal, because the law referred to the composition of the panel of judges from the first court[6], to the administration of new evidences and to the awarding of a solution on the main issue of the matter on trial, within the limits of the arbitral convention.

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[4] T. Prescure, R. Crişan, *Arbitrajul comercial, modalitate alternativă de soluţionare a litigiilor a patrimoniale (*Bucharest: Universul Juridic Publ.-house, 2010) 246-247; I. Deleanu, S. Deleanu, *Arbitrajul intern şi international* (Bucharest: Rosetti Publ.-house, 2005) 293-295, V.M. Ciobanu, "Din nou despre natura juridică a acţiunii în anulare a hotărârii arbitrale", *Dreptul* No 1(2002): 76-83.

[5] Published in the Official Gazette No 675/25 October 2001.

[6] Art 366[1] of the previous Civil Procedure Code stated that "for all cases regarding the arbitral decision, the action for annulment submitted according to Art 364 shall be ruled upon by the panel of judges stated for the awarding of a solution on the main issue of the matter on trial, and the appeal shall be ruled upon in the panel stated for this means of appealing".

Nowadays, the new Civil Procedure Code states that the action for annulment shall be solved by the court of appeal, by its panel stated by the law for the awarding of a solution on the main issue of the matter on trial which is, corroborated with the reasons for which it can be submitted and with the means in which the court may solve the action, determines the conclusion that it has a dual nature, being a procedural mean by which it is insured the control over a jurisdictional act issued by an authority outside the legal system[7]. Thus, though the reasons of Art 608 of the NCPC does not regard the solidity of the solution given by the arbitral court, but it regards the legality, which could characterize the "action" as a means of appeal, the fact that is named "action", that is subjected to trial according to the rules of judicial organization stated for the first court, that it allows the reexamination of the merits of the case, that if it is admitted the decision subjected to appeal could qualify it as an independent action.

The court could find as grounded the action for annulment for certain cases, considering the procedure to solve the arbitral request, such as those given by the fact that: the arbitral tribunal has not been formed in accordance with the arbitral convention; the party has missed the hearings and the procedure of summoning has not been legally fulfilled; the arbitral tribunal ruled upon things that were not asked or gave more that it has been asked; the arbitral decision does not state the operative part or the reasoning, the date and place of issuance, nor it is signed by the referees; the arbitral decision violates the public order, the good morals or imperative provisions of the law; after the arbitral decision is issued, the Constitutional Court ruled upon the exception invoked in that matter, declaring the unconstitutionality of the law considered in solving the litigation.

[7] I. Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale* (Bucharest: Lumina Lex Publ.-house, 2005), 32-33; I. Leş, *Noul Cod de procedură civilă, Comentariu pe articole, 1-1133* (Bucharest: C.H. Beck, 2013), 871; V.M. Ciobanu, Tr. Briciu, C. Dinu, *Drept procesual civil, drept execuţional civil, arbitraj, drept notarial, curs de bază pentru licenţă şi masterat, seminare şi examene* (Bucharest: Naţional, 2013), 605.

2. REASONS FOR THE CANCELATION OF THE ARBITRAL DECISION

2.1. The litigation is not susceptible of settlement by arbitration

If unlike the area in which the parties have concluded their arbitration convention, the arbitral procedure is not admitted, either determined by the nature of the disputed rights (civil status, the legal capacity of the persons, the inheritance division, family relations), or by the impossibility of the parties to decide upon them, the arbitral decision is susceptible of annulment.

In the analysis of the extent of the arbitration area are considered the litigations susceptible of arbitration, in relation with the quality of the aimed subjects of law or the provisions of the special laws, in relation to certain categories of public contracts[8].

2.2. The arbitral tribunal has solved the litigation without an arbitral convention or based on a null or inoperative convention

In this case, the arbitral decision is susceptible of annulment because of the very absence of the grounds for which the litigation may be solved by the arbitral tribunal. The conventional nature of the arbitrage derives from the existence of the parties' agreement regarding the solution of their litigation by arbitrage, thus the absence of this convention determines the competence of the courts regarding that particular litigation. Such situations can be determined by the vagueness of the arbitration clause, the reference made by the parties to a contract stating an arbitration clause or by the intention of the parties to submit their litigation, by that clause, to a mediator, and not to a referee.

The nullity of the arbitral convention[9] assumes the existence in the agreement between the parties, but it is affected by a cause of nullity

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[8] Regarding the patrimonial nature of certain actions, see V. Stoica, *Rezoluţiunea şi rezilierea contractelor civile* (Bucharest: All, 1997), 131. Also, see Decision No 32/2008 ruled by the High Court of Cassation and Justice in the appeal in the interests of the law.

[9] High Court of Cassation and Justice, Commercial Chamber, Decision No 3451/2004 and the Supreme Court of Justice, Commercial Chamber, Decision No 2756/2005, in M. Tăbârcă, Gh. Buta, *Codul de procedură civilă*, 2nd Edition commented and annotated (Bucharest: Universul Juridic, 2008), 1170-71.

resulted from the violation of certain imperative norms specific to contracts or to arbitrage, stating substantive and formal issues[10].

2.3. The arbitral tribunal has not been constituted in accordance with the arbitral convention

When the parties state in their agreement the organization and composition of the arbitral tribunal, the judgment issued by other referees or non-compliance with the express provisions of the arbitral agreement shall generate the nullity of that decision[11].

Being a relative exception, the wrong organization or composition of the arbitral tribunal must be invoked by the parties in the first hearing under the penalty of preclusion.

Therewith, NCPC states that every exception regarding the composition of the arbitral tribunal, the limits of the referees' attributions and the performance of the procedure shall be invoked until the first hearing to which the party was legally summoned, at the latest at this hearing, if a shorter term has not been established, under the express penalty of preclusion – Art 592 of the NCPC, aspect justifying the legislative solution stated by Art 608 Para 2 of the NCPC[12].

2.4. Non-compliance with the principles and rules for the performance of the arbitral procedure

A special case for annulment of the arbitral decision is the one in which the party has missed the term for hearings and the procedure for summoning was not legally performed, as a guarantee of the principle of contradiction and of the right to defense, stated by law also in the area of arbitrage.

If the arbitral tribunal ruled upon things that were not asked or gave more that it has been asked, it is violated the principle of litigant-led conduct of litigation, thus its solution is susceptible of annulment. The

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[10]R.B. Bobei, *Arbitrajul intern şi internaţional. Texte. Comentarii. Mentalităţi* (Bucharest: C.H. Beck, 2013), 181.

[11] High Court of Cassation and Justice, Commercial Chamber, Decision No 1134/2008 M. Tăbârcă, Gh. Buta, *Codul de procedură civilă, 2nd Edition commented and annotated* (Bucharest: Universul Juridic, 2008), 1172.

[12] Cannot be invoked as reasons for the annulment of the arbitral decision the irregularities which were not reported according to Art 592 Para 1-3 NCPC.

arbitral tribunal must rule within the limits of the request for arbitration, exceeding the limits of investment can attract the need for re-trialing the main issue of the matter on trial by the court, since the arbitral tribunal either solved the content of inexistent demands, or it gave more. Such cases are possible when the request aims more heads of claim, different interpretations being possible especially when some of the requests could exceed the area admitted for arbitrage, their resolution being made by the court. Certain accessory aspects of the demands stated by the parties, such as the court charges, must be solved by decision of the arbitral tribunal, especially when the parties did not agreed upon who shall support them.

Also, the equal treatment of the parties during arbitration must be respected under the sanction of absolute nullity of the arbitral decision, none of the parties being disadvantaged than the other one, on the contrary the principle of equal arms being violated.

When the arbitral decision does not state the operative part and the reasons, or it does not points out the date and place of issuance, or is not signed by the referees, it shall be null, thus the action for annulment can be submitted, in order to initiate a trial on the merits of the case, which the parties did not have. The mandatory mentions of the arbitral decision, in debate, guarantee for the parties the performance of a fair procedure, namely the assumption of the solution by those who issued it, this in their absence sanction shall be the arbitral decision's annulment. The motivation of the arbitral decision shall be maintained as principle similar to the court's decision for the insurance of the right to a fair trial[13], given the jurisdictional nature of the arbitral decision. The date and place of the ruling, as well as the referees' signatures, stated under the sanction of nullity, are meant to insure the possibility for the court invested with solving the action for annulment to verify the legality of the arbitral decision regarding the compliance with the term of arbitrage, with the principle of contradiction, equal treatment and right to defense, as well as the arbitral convention regarding the referees' appointment.

Also, if the decision was issued after the expiration of the term stated for arbitrage, despite the fact that the parties have raised the

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[13] C. Bîrsan, *Convenţia Europeană a Drepturilor Omului. Comentariu pe articole*, 2nd Ed. (Bucharest: C.H. Beck, 2010), 512-515.

exception of caducity[14], at least one of the parties stating that he understands to avail himself of this aspect, and the parties did not agreed with the continuation of the litigation. As such, the arbitral convention is void given that the parties have settled their litigation using other means or the caducity of the arbitrage has occurred, case in which the issuance of an arbitral decision was no longer possible.

2.5. The arbitral decision is issued with the violation of public order, good morals or of the imperative provisions of the law[15]

Certainly when the arbitral tribunal fails to rule upon a head of claim an action for annulment shall not be submitted, but Art 604 of the NCPC shall become incident, being possible the completion of the decision.

The same text covers also the situations in which the operative part of the arbitral decision states provisions which cannot be fulfilled, the impossibility of performing the arbitral decision determining the inefficiency of running through the procedure, being necessary to solve the contradictions by a clarifying judgment.

Though stated as distinct point among the causes for nullity of the arbitral decision, Art 608 Let h) of the NCPC also refers to important causes of nullity which may affect the arbitral decision, the distinction being represented by the fact that in this case are framed all the other situations for non-complying with the imperative and of public order provisions regarding the legality of the arbitral procedure not covered by the above-mentioned cases. Also the aspects related to the reasoning of the decision, mentioning the date and place of the ruling, the referees' signatures are of public order, thus these two situations would overlap. Another conclusion according to which only Let h) refers to the violation of certain imperative and of public order norms cannot be accepted, the other situations being also stated to insure the compliance with the mandatory and of general interest norms.

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[14] Bucharest Court of Appeal, V-th Commercial Section, Decision No 886/2006, "*Buletinul jurisprudenței*" No 1 (2006): 140.

[15] R.B. Bobei, *Arbitrajul intern și internațional. Texte. Comentarii. Mentalități* (Bucharest: C.H. Beck, 2013), 195.

Here are integrated the aspects connected with the compliance of the principles of the arbitral procedure, to which Art 575 of the NCPC refers to and with the procedural rules stated by Art 576 of the NCPC, which have the feature of public order or are imperative.

This debated reason for annulment cannot be the ground for a request criticizing the solution on the main issue of the matter on trial ruled by the arbitral tribunal[16], or invoking the non-compliance with the contractual provisions, such hypotheses could not represent the violation of the norms of public order or good morals[17].

2.6. Another reason for nullity is determined by the possibility of invoking the exception of unconstitutionality also in front of the arbitral tribunal.

Thus, if the exception was invoked, the tribunal has notified the Constitutional Court, but it did not waited for a solution and after the ruling of the arbitral decision, the Court has ruled upon the exception by declaring as unconstitutional the law, ordinance or a provision of a law or of an ordinance which represented the object of that exception or of other provision from the appealed document, which, necessary and obviously, cannot be dissociated from the provisions mentioned by the notification, can be asked the annulment of the arbitral decision issued based on the unconstitutional norm.

Therefore, to all those used above is concluded that the nullity of the arbitral decision cannot be requested for reasons of solidity, censoring the opportunity cannot be allowed for the court. It could not be stated that the limitation of the judicial control on the arbitral decision only to reasons of legality affect free access to justice of citizens[18], given the conditions that in this area the above mentioned principle meets with the parties' free will which, even if it does not have a constitutional rank,

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[16] Bucharest Court of Appeal, Commercial Section, Decision No 3243/1999, and the Bucharest Court of Appeal, V-th Commercial Section, Decision No 124/2006, "*Culegere de practică judiciară în materie comercială pe anul 2006*" 2nd Volume, p. 353 in M. Tăbârcă, Gh. Buta, *Codul de procedură civilă,* 1172-73.

[17] High Court of Cassation and Justice, Commercial Section, Decision No 1393/2006 . 1173.

[18] For a contrary opinion, see T. Prescure, R. Crişan, *Arbitrajul comercial, modalitate alternativă de soluţionare a litigiilor a patrimoniale* (Bucharest: Universul Juridic, 2010) 224.

cannot be totally affected by the censorship allowed to the court. This is why the arbitral decision can be annulled only in certain cases, which fall under Art 608 of the NCPC, one being able to consider that, in the conclusion of the arbitral convention the parties, being aware of these provisions, have understood to derogate from the state's justice. Besides, Art 21 of the Constitution refers to the possibility of the citizen to notify the court for the protection of his rights, freedoms and legitimate interests, no other law limiting this access, without mentioning the extent of the control performed by the court, under the conditions of the law, the convention being the law of the parties.

Also, another aspect of availability, left by the legislator to the latitude of the parties' will, is given by their possibility that, after the ruling of the arbitral decision, to waive the right to appeal the decision by an action for annulment. This right is not prior characterized by availability, at the moment when the arbitral convention is concluded, because Art 609 of the NCPC states that the parties cannot waive by an arbitral convention to the right to submit an action for annulment of the arbitral decision, such waive being possible only after the ruling of the arbitral decision.

3. COMPETENCE AND LEGAL PROCEEDINGS

The action for annulment shall be solved by the court of appeal on whose territory the arbitrage took place.

The proceedings for solving the action for annulment shall be the regular one, stated by the code for trial, being limited only to documentary evidences[19].

Upon request, the court may suspend the enforcement of the arbitral decision appealed by an action for annulment, a security deposit being required, according to Art 484 of the NCPC, which shall be properly applied[20].

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[19] Under the previous law, see also M. Şandru, E. Oprina, "Discuţii în legătură cu posibilitatea anulării hotărârii arbitrale de către instanţa de executare", *Dreptul Magazine* 2(2012): 148-167.

[20] A. Tabacu, *Drept procesual civil*, 2nd Ed revised and amended (Bucharest: Universul Juridic, 2014), 335.

By a decision, the court may overrule the action or may admit it, case in which the arbitral decision shall be canceled.

For the second case, if the litigation is under trial, the court must send the case file to the arbitral tribunal or to the competent court, and when sending it is not necessary to award a solution on the main issue of the matter on trial, within the limits of the arbitral convention, thus if this solution is possible in the same hearing, based on the evidenced administer by the arbitral tribunal, shall be ruled a decision, susceptible of appeal. But if in order to award a solution on the main issue of the matter on trial other evidences are necessary, the court shall order their administration in the same hearing or in the next one. When the case file is postponed for this purpose, the case file shall have two solutions, namely the decision to cancel the arbitral decision and the solution on the main issue of the matter on trial, being appealed together[21].

The notification shall be submitted to the competent court, for the cases stated by Art 608 Para 1 Let a), b) and e) of the NCPC, because the litigation could not be solved by arbitrage, and for the other cases the court shall send the case file for re-trial to the arbitral tribunal, if at least one of the parties expressly requests that. Therefore, the silence of the parties shall attract the competence for solving the litigation in favor of the court.

The remedy at law against the decision regarding the action for annulment is only the appeal, if the action for annulment was admitted, the appeal being ruled by the supreme court in the panel stated for this means of appeal, namely of 3 judges.

The extraordinary remedies at law shall be used under the conditions of the common law against the decisions ruled to solve the request for annulment of the arbitral decision. The latter one cannot be subjected to the appeal for annulment or to revision, the only way in which it can be reformed being stated by Art 608 of the NCPC, whose

[21] Similar to the solution of the Decision No XXXIII/16 April 2007, published in the Official Gazette No 772/14 November 2007, according to which the appeal submitted against the decisions ruled by the courts of appeal, canceling, totally or partially, the procedure used, as well as the appealed decision, holding the case file for trial, except the case in which the court of appeal has noted its own competence is inadmissible.

reasons also include cases for which a decision may be appealed using the two above mentioned extraordinary remedies at law.

CONCLUSIONS

From the perspective of the legal nature of the action for annulment, it represents a procedural way of insuring the control over a jurisdictional act issued by an authority outside the legal system, having a dual nature, not being considered as strictly a means of appeal or as an action of first instance.

The reasons for annulment of the arbitral decision, mostly found also in the previous Civil Procedure Code, have generated over time a rich jurisprudence, which cleared the meaning of the notions used by the legislator, observing that they mainly aim procedural aspects, and not the solution on the content of the legal relation subjected to arbitrage.

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CERTAIN ASPECTS ON LEGAL REGIME OF THE PUBLIC DOMAIN'S PROPERTY IN THE LEGISLATION AND PRACTICE OF REPUBLIC OF MOLDOVA

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Abstract:

The legislation of Republic of Moldova accepted the theory of "public domain", thus the public property was divided into two categories of property: property of the public domain and property of the State's private domain or of the administrative-territorial unities.

Theoretically, this division on domains of the public property aimed the resolution of at least two matters. The first – not all the public property is imprescriptible, indefeasible and inalienable as the state property was during the soviet regime, but only the property belonging to public domain. The second, the idea that during the soviet regime it was excluded from legislation the term "private property", and once this term was declared in the Constitution of 1994, it shouldn't be confused with the property from State's private domain or from the administrative-territorial units.

In this work, we will analyze certain aspects related to the legal regulations of the public domain property from our country and the way of interpreting and application of these regulations.

Key words: *public property, property, public domain, private domain, public services*

GENERALITIES ON PUBLIC DOMAIN PROPERTY

The notion of "public domain" appeared in the 19th century, although even in antiquity the Roman Law was defining a category of property that could not belong to one person only, as for example the shores, the ports, rivers, theatres, parks, public markets, temples, graves, and others, property that constitute the public domain. The inclusion of the term "public domain" in the civil codes (French, Belgian), adopted at

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that time, aimed the protection, by law means, of the property belonging to the state and that should serve the entire community, being made in this way the difference between the public and private domain, but without defining in these codes the public domain or specifying the property belonging to this domain[3].

According to the model of the French Civil Code, it was included the term of public domain in the Civil Code of 1864 in Romania, being developed in the Constitution of 1866, 1923, 1938. But, during the totalitarian regime, this legal institution felt into disuse, being replaced with the terminology specific to that time – *socialist property of the entire nation*[4], being reentered by the legislation after 1989.

Professor Antonie Iorgovan was mentioning that the public domain "*is a traditional institution of the administrative law, and its research launched over time countless discussions, outlining different theories about the notion's content and the legal regime applicable to the category of property, this notion evokes. The doctrinaires' interest for the public domain in the modern period, beyond the traditions transmitted from Roman public law, relies on the political-social-economic relations, specific to the free society"*[5].

The current perception of the public domain starts from the idea that the State and local public communities are, along with private persons, owners of property, and this property is classified in two big categories: property of public domain and property of private domain. The distinction between public and private domain is not a formal one, it is expressed practically by the fact that to the both domains are applied different legal regimes. It is important to mention that the legislator refers to these two categories of property that is the public property of the State or of the administrative-territorial unity, provided with legal personality of public law, and do not refer to the property of legal and physical persons-subject of the legal regime of private law.

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[3] See Ioan Alexandru, Ion Popescu-Slaniceanu, Mihaela Carausan, Cosmin-Ionut Enescu, Dragos Dinca, *Administrative Law* (Bucharest: Economica, 2003), 237 and the following.

[4] A wide analysis of the notion's evolution of public domain in Romania, see Verginia Vedinas, *Administrative Law, The 7th Reviewed and Updated Edition*, (Bucharest: Legal Universe, 2011), 212 and the following .

[5] Antonie Iorgovan, *Treaty of Administrative Law, Vol. II*, (Bucharest: Nemira, 1996), 5.

The Constitution of Republic of Moldova (1994) although specifies the property that belongs to the public domain, do not use in its text the term *of public domain,* but the term of *public property*[6], leaving on the organic laws the definition of this term and the determination of the property that belongs either to the public domain or to the private domain of the State or of the administrative-territorial unities.[7]

In what measure our legislator managed to understand the theory of the public domain and to determine by clear regulations the property that belongs to this domain, we will analyze further.

Thereby, according to the article 296 of Civil Code provides: "*Property belonging to the state or to administrative territorial units shall be private domain property, unless transferred to the public domain by or under law. The public domain of the state or of administrative territorial units shall comprise property determined by law and property that by its nature is of public use or interest.*"

As we can see this law text has a formulation of maximum generality according to which the property of the private domain constitutes the rule, and the property of the public domain – the exception. In other words, the property of the public domain are determined expressly through a law text, or by another way assigned by the law, and the property of the private domain are all others. Therewith, we can draw out two legal criteria of framing a property into public domain and namely: a) the property to be assigned accordingly by the law, by express dispositions and b) property, which by its nature is of "public use" or "public interest".

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[6] According to the article 127 of the Constitution of Republic of Moldova and article 296 paragraph 3 of the Civil Code of Republic of Moldova: *all underground resources, the air space, the waters and forests used for the benefit of the public at large, the natural resources of given economic regions and of the continental shelf, the communication ways, as well as other assets stipulated by law, constitute the exclusive province of public property.*

[7] For example the article 75 of the Law on local public administration nr. 436 of December 28th, 2006//The Official Gazette of Republic of Moldova nr. 032 of March 9th, 2007 provides: *"At the category of public domain property of local interest can be reported the lands on which are located constructions of local public interest, portions of basement, roads, streets, markets, separated aquatic objectives, public parks, buildings, monuments, museums, forests, protection areas and health areas and other objectives, according to the law, do not belong to the public domain of the state."*

The property of *public use* is the property that by its nature is of general use as: public parks, markets, cemeteries, forests, etc. Thus, all the members of the society have access to this property. The property of *public interest*, in turn, is the property that is used or exploited within a public service, for the performance of certain activities that interest the entire society or community, but without any person has access to its concrete and direct use, as follows: railways, distribution networks of electricity and heat, water supply systems and sewerage, technical-urbanistic facilities, buildings of schools, hospitals, museums, theatres and public libraries, billets, etc.

The framing of this property into the category of *"public use"* or *"public interest"* is made by the state bodies or, if appropriate, by the administrative-territorial unities according to its legal competence, depending on criteria established by the law.

Along the same line, the Law on local public administration defines these notions as follow: "*the public domain of the administrative-territorial unity comprehends the property determined by the law and the property, which by its nature,* ***is of local public use or interest. The public interest*** *presumes the property belonging to a public service or any other activity that complies with the needs of the community, without supposing its direct access to the use of the property according to the destination"*. (paragraph(1), article 75, Law nr. 436/2006).

This law provides also that "*the property of the administrative-territorial unities of first and second level is divided into property of public and private domain*", and "*the executive local public authorities ensures, according to the law, the separate delimitation and evidence of the property of public and private domain* (paragraph (3) and (4), article 74, Law nr. 436/2006).

Nevertheless, it was not drawn up so far separate registers for the registration of these two property categories in the administrative-territorial unities from our country. In these conditions, it is difficult to apply correctly the appropriate legal regime and to manage with maximum efficiency the property of the state's public domain and local community.

In the spirit of the abovementioned norm, *the public interest is the property belonging to the public service*. Therewith, the systems that provide the local public services (for example, water and sewerage service) and are useful for all the citizens of the community belong to the

public domain of the administrative-territorial unity. In confirmation of what was said, the article 4 of Law on public utility services nr. 1402 of October 24th, 2002 provides: "*Public utility services systems, including the related lands, being of public use, interest or utility belong by their nature or according to the law to the public domain of administrative-territorial unities*". The same provisions we find in the Law on public service of water supply and sewerage nr. 303 of December 13th, 2013[8] ascertaining that the water supply systems and sewerage belong to the public domain of administrative-territorial unities. Namely the belonging of the public systems of water supply and sewerage, and the quality to meet a general interest, justifies their appurtenance to the public domain of the administrative-territorial unity.

THE LEGAL REGIME OF THE PUBLIC DOMAIN PROPERTY

Every country has property that by its specificity cannot be appropriated, owned by physical or legal persons, but it belongs to the state and to the administrative-territorial unity. This property cannot be alienated but only capitalized (managed) through legal means provided by the legislation; our legislator declares, for example, that *the public domain property of local interest is inalienable, imprescriptible and indefeasible* (article 75, paragraph (3), Law nr. 436/2006).

By the *inalienable* feature understands that the public domain property is removed from the civil circuit; it cannot be alienated or privatized voluntarily and it cannot be expropriated. More than that, it is forbidden the dismemberment of the ownership by the creation of the derived real rights as: usufruct, use, habitation, proper easements and the superficies, or the gage and its mortgage. The legal acts concluded by infringing the inalienable feature of the public domain property are considered absolutely null.

The public domain property is *imprescriptible* under extinctive and acquisitive aspect. The extinctive aspect is expressed by the action for recovery of the public property right can be introduced anytime and as follows the substantive right of action do not extinguish, once it was not exercised. Under acquisitive aspect, we understand by imprescriptibility that the property of the public domain cannot be

[8] Law on public service of water supply and sewerage nr. 303 of December 13th, 2012, published in the Official Gazette of Republic of Moldova nr. 60-65 of March 14th, 2014.

acquired as private property by any person through usucaption, in case of immovable property, and possession of good faith, in case of movable property.

The *indefeasible* feature of the public domain property is a consequence of its inalienability. This property cannot be executed by the creditors of the owner of the persons owning it on a valid title and it cannot be subject of foreclosure.

In this context, the article 10 of the Law on administration and denationalization of public property nr. 121 of May 4th, 2007 provides expressly the legal regime of the public domain property. So: *"The property of the public domain is inalienable, indefeasible and imprescriptible, particularly: it cannot be alienated neither through privatization, nor deposition into social capital of a legal person; it cannot be the subject of pledge or of other real guarantee; it cannot be foreclosed, not even in case of insolvability of the legal persons it manages; its ownership do not extinguish through non-use; it cannot be acquired by legal or physical persons through usucaption…"*

As we mentioned above, the legal acts concluded by infringing the legal regime of the public domain property are considered absolutely null. The matter that rests unsolved is the lack of the separated registers of the public domain property in the administrative-territorial unities; this fact prevents the detection and the removal of the mistakes from the managing legal acts of the public property domain, and their declaration as null, if appropriate.

THE MANAGEMENT OF THE PUBLIC DOMAIN PROPERTY

The management competence of the public domain property (also the private one) of the village (commune), town (municipality) belongs to the local council (article 14, Law nr. 436/2000). The legislator established the management ways of the public domain property. So "*the public domain property of the administrative-territorial unity* ***can be administered*** *by the municipal enterprises and public institutions,* ***granted, leased or lent****, if appropriate, based on the decision of local or district council, according to the law*" (article 77, Law nr. 436/2006). Hence, the public domain property of the administrative-territorial unity cannot be alienated, more than that, the management ways are strictly determined: ***it can be administered, granted, leased or lent.***

Analyzing these norms, we observe that our legislator accepts the management of the public domain property to be made by administrative contracts and by civil contracts.

The term of civil contract is missing from our legislation, being applied just once in the Law of contentious administrative matters (nr. 793/2000) in order to justify their legality control according to the administrative justice. We consider that the management of the state's public domain and administrative-territorial unity should be made only through administrative contracts, well formulated specifications in order to protect and to manage with maximum efficiency this property, which is of public use or aims to meet a general public interest.

The fact that the legislator does not distinguish clearly the civil contracts and administrative contracts, led to the situation that almost all lakes (water basins) from local communities were leased to private persons, without specifications, or any compulsory obligations established unilaterally by the local council, through which the water basin be capitalized efficiently, as property of the public domain. This in case that the article 911 of the Civil Code provides: "*The lease is a contract between a party that is owner, usufructuary or other legal possessor of land plots and other agricultural property (lessor) and the other party (lessee) regarding utilization of such property during a fixed period and for a mutually agreed price.",* that means the object of the lease contract is the land plots or other agricultural property.

Without having a legal ground to lease the lakes, the local public authorities invented one, stipulating in the lease contract that: the water basin is leased with a specific surface, and at the dissolution (expiration) of the contract "the lessee will return the land with the same surface and bonitation". Several years later, many local authorities understood the mistake they made and that this public property serves to a single person and not to the entire community; but they do not have a legal ground for dissolution of the contracts and do not assume the guilt for this situation, because our legislator specifies the lease as management way of the public domain property.

These mistakes are due greatly to the lack of the coherence of normative regulations for the public domain. Once the property of the public domain is declared as ***inalienable, imprescriptible and indefeasible***, it is removed from the civil circuit and it cannot be managed through civil contracts. In order to manage this property we

have at hand the administrative contracts (although the legislator avoids to call them administrative and to assign them delimitation feature), as for example, the concession contract, which by its definition meets the rigors submitted toward the management way of the public domain property. According to the article 1 paragraph (1) of Law nr. 534-XIII of July 13th, 1995: "*The concession is a contract by which the state grants (transmits) to an investor (physical or legal person, including a foreign person) in return of royalties, the right to deploy the activity of prospecting, exploring, capitalization and recovery of the natural resources on the territory of Republic of Moldova, to provide public services, to exploit objects that are state(municipal) property that according to the law are removed integrally or partially from the civil circuit, also the right to deploy certain types of activity, including those that constitute the state monopoly, assuming the management of the concession object, presumptive risks and patrimonial liability*." Thus, the object of the concession contract constitutes exclusively the **property of the public domain, public services and public works.** It is not clear in this situation, why the legislator establishes the concession along with the lease as alternative way of managing the public domain property of the administrative-territorial unity, generating by this fact many mistakes that lead to the misappropriation (lost) of the public domain property.

In conclusion, we can say that the public domain is that part of the patrimony of the administrative-territorial unities that ensure the wealth of the people and the continuity of the ascending development of the society. Thus, the State has to establish clearly which is the property of the public domain, its legal regime, appropriate ways and tools of its management, so that this property serves fairly to all the members of the society.

So important for the development of the society is the property of the state's private domain or of the administrative-territorial unities, because it is not removed from the civil circuit and it can be managed, even alienated through civil contracts.

The legislator establishes, for the management of this property, the rule of being managed or alienated only through public auction. This is a rigorous procedure assumed by the public authorities, aiming to ensure the transparency of decision and the management efficiency of the public property, but it has no influence on contract's nature, be it civil or administrative. That is, the lease contract that has as subject a property of

the State's private domain, do not become into an administrative contract from the reason that the lessor is the state; it rests always as civil contract, subject of the legal regime of the civil law and the respect of all rigors submitted toward civil contracts.

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STRENGTHENING AND DIVERSIFYING THE MEANS OF MONITORING THE STATE OF DECENTRALIZED AUTHORITIES AS A RESULT OF EUROPEAN UNION LAW

Constanţa MĂTUŞESCU[1]

Abstract:

By the jurisprudence of The Court of Justice of the European Union it was established that the decentralized authorities of the Member States must provide, within their powers under national law, the application and enforcement of EU law, leaving, if necessary, unapplied any contrary provisions of a national law. However, Member States remain responsible to the European Union for the proper performance of this task by their administrative authorities, under the general duty devolving upon them to actively promote compliance with European law. This paper aims to highlight that the sole responsibility of the State for violations of European law due to the behavior of decentralized entities resulted in a limited capacity for action and their autonomy within the national legal order, because the state has strengthened and diversified means of monitoring its regional and local authorities.

Key words: *decentralized authorities, autonomy, European Union law, controls, surveillance*

INTRODUCTION

While the European Union is, above all, a construction based on the states, it has an essential role in the European integration process, the dynamism of European integration, which involved an extension of the powers of the Union with each revision of the Treaties, and held in parallel with accelerating regionalization processes in the various Member States, it arised the question of what extent and with what effect the rules adopted at European level are required at territorial levels of powers existing within the Member States. Treaties do not directly designate the subnational collectivities as the recipient of EU law and,

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despite some advances made by the Lisbon Treaty, they are not benefiting of a formal recognition by the Treaties.

In a pragmatic approach, for reasons pertaining to ensure effectiveness and uniform application of EU law, the Community judge established an important obligation for national administrative authorities for cases in which a conflict arises between provisions of national law and provisions of EU law. Thus, if there is a conflict between a provision of national law and a directly effective provision of EU law, all administrative authorities are obliged to set aside the provision of national law if consistent interpretation of the latter is not possible, and eventually to apply the directly effective provisions of Union law instead[2]. Subnational communities are thus assimilated to Member States and subjected to the same obligations as those incumbent upon them with regard to application of Union law. This implies that those authorities must apply all EU rules which fall within their remit, back and joint lowest priority task of ensuring that EU law within its powers, leaving unapplied provisions of national law which are in conflict with European standards. Such an obligation is not negated if the State failed to transpose a directive timely whose provisions are unconditional and sufficiently precised. Although their assimilation to the state bodies seems to offer them some immunity because only answerable to the European Union for violations of its territory is the state[3], in reality this assimilation resulted in a limited capacity for action and their autonomy within national legal order, because the state has strengthened and diversified means of monitoring the decentralized entities. Concerned to ensure effectiveness and uniformity in its application, EU law does not preclude to such an event to strengthen state control over local communities. Moreover, it calls for strengthened supervision of the state of its component communities[4]. Reaffirming the free state to determine different competent authorities to adopt regulations implementing

[2] See for example Case 103/88 Costanzo (ECLI: EU: C: 1989: 256); Case C-224/97 Ciola (ECLI: EU: C: 1999: 212) and Case C-97/11 (ECLI: EU: C: 2012: 306).

[3] See in this respect Case C-302/97 Klaus Konle (ECLI: EU: C: 1999: 271); Case C-494/01 Commission/ Ireland (ECLI: EU: C: 2005: 250).

[4] Raccah, Aurélien. "Les Effets de l'Application Directe du Droit de l'Union par les Autorités Régionales et Locales Européennes sur l'Ordonnancement Juridique des Etats Membres: Les Exemples Allemand, Britannique et Française", *European Journal of Legal Studies* 1 (2008): 272.

measures, the Court added its obligation to coordinate action taken by the various authorities to ensure the proper application of Community law[5]. In turn, the European Commission considers that the existence and proper functioning of a centralized coordinating of the various ministries and / or various regional and local courts is a prerequisite to proper application of Community law by Member States[6].

STATE CONTROL OVER THE ACTION OF DECENTRALIZED AUTHORITIES IN THE IMPLEMENTATION OF EU LAW

As a constant in all legal systems of European countries, apart from the fact that local decisions can be appealed to the court, specialized courts or common law within the administration itself are different possibilities surveillance provided decentralized authorities[7], without this to mean the establishment of hierarchical relations between the central government and the local. Most of these methods have been introduced primarily for monitoring the application of national law. For a good time, they were extended to the application of European law, but in recent years, especially amid the constraints of application of Union law and dynamic interpretation by the Court of Luxembourg did this right, appeared more and more interrogations related to the effectiveness of these methods to ensure implementation and enforcement of EU law. Against this background, and reduce the risks of seeing engaged responsibility for acts that are not their actual, Member States had to consider, on the one hand, general methods of surveillance strengthening decentralized authorities that can be applied to each of their action, no matter where it occurs, when the issue is the application of European law. On the other hand, there is a tendency in many countries to implement special means of surveillance in areas where there is a high risk of violation of European law by local authorities, enabling them to oblige the central administrative authority change an act or decision or not to apply national law in favor of a provision with direct effect of Community law that is inconsistent rules of national law. Finally, a

[5] Case 40/78 Atalanta Amsterdam BV / Produktschap voor Vee en Vlees (ECLI: EU: C: 1979: 160).
[6] White Paper on European governance, COM (2001) 428.
[7] For a detailed analysis, see Combat, Pascal (dir.). *Les contrôles de l'Etat sur les collectivités territoriales aujourd'hui.* Paris: Harmattan, 2007.

limited number of states even established legal means of financial accountability of local and sub-national state for sanctions by the Union institutions as a result of failure by such authorities of Union law requirements.

a. Strengthening general control mechanisms

In most EU countries, there is at a local state a representative acting in an administrative police, general administration and control of local acts. The central authorities of Member have various forms of control that allow monitoring more or less pronounced on local business. These are, first, about the control called the "guardianship" administrative, for the purposes of judicial review in strictly determined by law and shall ensure that they protect the general interest of the State, local collectivities that these may come in contradiction, in particular by issuing administrative acts inconsistent with the law. This task supervision of the legality may be entrusted to a central authority of the state or territorial one. For example, in legal French, Romanian[8], Greek and Italian, the role of administrative control of the legality of local authority rests with the prefect, state representative in the territory, the Belgian system, the governor of the province, and in the German adviser the land.

There are significant differences between the forms that this control can have. Supervisory Body may be entitled to approve the acts of the authorities inspected and to replace them in the adoption of an act can have the right to cancel or control authority act only right to refer to the court on act we consider unlawful to its cancellation. It notes, however, that as decentralization expansion possibilities of central control over local becoming weaker. Thus, France has replaced since 1982, acts as control allowing local approval by the central authorities and cancellation of administrative acts, with a more flexible control of an objective nature, the supervisory body (prefect) limited only the legality of acts, not the timeliness, annulment of which may be made only by the courts.

[8] By Administrative Litigation Law no. 554/2004 (published in Official Gazette no. 1154 of 7 December 2004) the exercise of administrative control is entrusted to the guardianship and the National Agency of Civil Servants, too,which could monitor the compliance with legal norms in civil service.

A similar system operates in Romania, the prefect, representing the Government[9] in the territory[10], unable to reform or abolish acts deemed unlawful, but only to request the issuing authority of the act (in a prior - graceful appeal, which however is not mandatory) or court to conduct such operations. As in France, local authorities are required to submit their documents much of the prefect[11]. Once the act in question is attacked by prefect before the administrative courts, the law is suspended. Prefect has discretionary powers regarding administrative acts and, although the Government may order its bringing proceedings before a court, can not be a substitute for the exercise of control. At the same time, local government authorities have at hand any constitutional mechanism by which to censor a possible abuse of rights of the prefect or actions taken by exceeding its constitutional and legal powers.

In the French system, if prefect proceedings in the court does not exercise and it causes damage to the illegality of decentralized authority concerned (eg obliges to repair the damage suffered by individuals as a result of the illegal act, passed by the court), the central state is responsible if a finding of "serious errors"of the prefect (gravity there where if the illegality of the act was obviously)[12]. This possibility is not provided in Romanian legal system.

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[9] In accordance with Article 102 para. (1) of the Romanian Constitution, republished, "The government, according to its government program ccepted by Parliament, ensures the implementation of domestic and foreign policy of the country and oversees the government." Under Article 29 of Law no. 90/2001 on the organization and functioning of the Romanian Government and of ministries (published in Official Gazette no. 164 of 2 April 2001), the Government is are in the collaboration with the autonomous administrative authorities.

[10] Under Article 123 para. (2) of the Constitution, republished, "The prefect is the Government's drive locally and decentralized public services of ministries and other central government bodies of territorial administrative units". At the same time, under Article 1, para. (3) of Law 340/2004 regarding the prefect institution, it is "the guarantor of respect for law and public policy at the local level." Article 3, para. (1) of the Law no. 554/2004 provides that the prefect may appeal directly to the court of administrative acts issued by local government authorities if they consider illegal action formulatec into terms and conditions provided by law and are exempt from stamp duty.

[11] Under Article 115 para. (7) of Law of local government. Nr.215/2001, 'The disposition of the Mayor, local council decisions and rulings of the County Council are subjected to review by the prefect in the law which govern it. "

[12] See the judgment of 6 October 2000 of the French State Council, Case *Commune de Saint Florent*, Rec., p. 395.

Prefect has therefore in both legal systems to play an important role and their control may cause removal of a large number of cases of infringement of EU law, for this control extends to most acts of local authorities[13]. On the other hand, the administrative control over the decentralized state services and coordination of these services incumbent prefect are likely to facilitate the implementation of the right union and European policy coordination at the county level or the departments and regions in France. Although it exercises control retrospectively by the effect of suspending the contested measure, fulfills a preventive role, allowing to limit the risk "*a posteriori*" and financial costs of the annulment thereof. At the same time, there are limits in the sense of the possibility of being totally eliminated in this way violations of union. On the one hand, these stem from the extremely large number of acts that should be analyzed[14] and the high level of legal expertise in relation to European Union law that applies in this prefectural level. On the other hand, if the contrariety with Union law stems from a refusal by the local authority to act, the prefect can not replace that authority and act instead.

For France, the authorities imposed prefect to exercise vigilance in respect of acts adopted in areas covered by EU law. Emphasizing that this administrative control aims at the "enforcement of laws, and generally protect national interests, moreover, and the implementation of international commitments to this end"[15], commitments include those arising from participation European Union through various internal circular was ordered prefects to control especially public tendering procedures, environmental measures and state aid, areas where there is a high incidence of European standards. Of course, this call to vigilance comes amid France unpleasant experience regarding the various

[13] Can be controlled both legislative acts and the individual ones. According to Article 2 letter c) of Law no. 554/2004 on administrative procedure "shall be treated as administrative acts and contracts concluded by the public authorities whose purpose enhancement of public property, works of public interest, public services, public procurement; may be provided by special laws and other administrative contracts subject to jurisdiction of the administrative courts ".

[14] For example, in 2009, over 155,000 acts of local authorities were under consideration at the county prefect institution Dîmboviţa, of which 72 were submitted to the administrative courts.

[15] A finding belongs to French Constitutional Council, as contained in the judgment of 25 February 1982 on the law relating to the rights and freedoms of communes, departments and regions (Case 82-137 DC, Rec. p. 38).

measures adopted annoyance of local union law established by the Court of Justice of the European Union. In addition, in public procurement, prefect of France has, under a special procedure (called *"référé précontractuel"*) under Article L551-1 of the Code of Administrative Justice, the possibility of appeal before the administrative court proceedings public procurement, before concluding the contract, thus forcing local authorities to comply with European standards in the field. The contract shall not be concluded until after the judgment of the court seised favorable, hitherto being suspended execution of any decisions on it. Article L 551-10 of the same law provides that such a procedure may be initiated by the prefect when European Commission notified when a breach of EU rules on tendering procedures. Also closely related to European legislation, and notwithstanding from the general rules, the prefect of France is allowed under a special law[16], as in the case of inaction of local authorities (regional or departmental councils) in the control of waste, to be able to replace them (developing or revising plans for waste control)[17].

In Romania, although the High Court of Cassation and Justice expressly ruled on an appeal on points of law that the prefect is "even guarantee to carry out the provisions of the constituent treaties of the European Union and other European regulations binding"[18], there is not a central concern for strengthening and modernizing the purposes of judicial review prioritization of its verification of local authorities adopted in areas that interfere with union law and where there is a risk of violations of this right. Also we consider objectionable the solution that eliminated the Romanian legislator, Article 7 paragraph (5) of Law 554/2004, the obligation incumbent prefect for at least 10 days before the action the administrative court to require the authorities who issued with the necessary motivation, reconsideration of the considered unlawful act, to amend or, where appropriate, its revocation. This requirement allowed in practice, eliminating many cases of unlawful of administrative acts at this stage and avoid litigation. Such a binding of the preliminary

[16] Article L-541-15 of the Code of Environment.
[17] This provision was introduced following the conviction of France to lack in certain areas of such plans (Case C-292/99 Commission/France (ECLI: EU: C: 2002: 276)).
[18] Decision no. 24 of 14 November 2011 on the interpretation and application of the statutory provisions with respect to pollution tax (Case no. 9/2011), published in Official Gazette no. 1 of 3 January 2012.

procedures had particular relevance where in discussion was a possible violation of European rules, given the limited capacity of local authorities to know some law enforcement mechanisms union. In consideration of its role as guarantor to comply with the provisions of EU law, it should be kept from the obligation to advise local authorities and enable them to return themselves on the act in conformity with EU law, before promoting legal action.

Starting mainly from the French example, it can be seen that if the traditional instruments of supervision of local authorities have weakened over time, due to the evolution of the decentralization process, when in the issue is the application of provisions arising from European law mechanisms are more stringent oversight, allowing derogations from the general regime. This conclusion is confirmed by the legislative developments produced in other EU Member States. For example, in the case of the Netherlands, where preventive control instruments (approval decisions) and repressive (cancellation of administrative decisions, by royal decree, for contrariety to law or public interest) available to central authorities were reduced considerably as incidence[19] was considered that they no longer ensure the correct application of EU law. Consequently, it was recently adopted a new bill on the rules of supervising the application of EU law by public entities[20], which provides the power ministers to give orders to administrative authorities do not adequately meet their obligations under the European law and where the administrative authority does not comply with the order, the minister has the opportunity to take action on behalf of himself and on behalf of the administrative authority.

b. Creation of special means of surveillance in areas where there is a high risk of violation of European law by local authorities

Two sensitive areas at the application of European law - public procurement and state aid are those that have determined, in most

[19] Verhoeven, Maartje. "The Costanzo Obligation: Obligations of the national administrative Authorities in the case of incompatibility Between national law and European law". *Intersentia* 93 (2011): 268-270.

[20] Act of 24 May 2012 laying down the procedures for compliance with European regulations on public entities (Wet Naleving Europese regelgeving Publieke entiteiten - NErpe DICHT).

Member States of the Union, the implementation of specific mechanisms of control over local authorities.

Referring only to the case of Romania, on public procurement there were established special rules[21] under which enforcement regulations lies in the National Authority for Regulating and Monitoring Public Procurement (ANRMAP) to assess, before submission for publication of the invitation for participation/notice, in cases covered by the legislation on public procurement, compliance acts of local authorities as contracting authorities within the tendering and contracting authority issuing permission to open tender procedure. Where non-compliance is found, it will reject the publication of the notice/invitation, with the consequent of inability to proceed with the award. As contracting authorities, local authorities have the obligation to send the National Authority for Regulating and Monitoring Public Procurement any information requested by the Commission on the application of procurement procedures and contracts awarded. It was also created, an independent administrative-jurisdictional activity - National Council for Solving Complaints, which has jurisdiction to hear, under a special procedure, complaints about the award procedure. It may, at the request of persons who consider themselves injured in a right or a legitimate interest by an act of the contracting authority, in violation of the law on public procurement, to annul an act of the local authorities in their capacity of contracting authoritiesoblige them to issue an act or take any other steps necessary to remedy the acts affecting the award procedure but may decide not to award a contract to a particular economic operator. After being invested, it has the possibility to suspend or cancel the award procedure of a document issued in that proceeding. The decision by the Council cancels all or part of the contested measure is binding on the contracting authority. If the Council decided to take remedial action, monitoring their fulfillment is entrusted to the National Authority for Regulating and Monitoring Public Procurement.

[21] Mainly Emergency Ordinance no. 34 of 19 April 2006 on the award of public procurement of public works concession contracts and services concession contracts, published in the Official Gazette no. 418 of 15 May 2006. This was tested with amendments by Law no. 337/2006 (Published in the Official Gazette no. 625 of 20 July 2006) and amended several times.

Regarding matters of public aid (state aid or de minimis), the national legal provisions[22] adopted specifically to implement European legislation, requires authorities and central and local government institutions to notify any State aid measure that intends to provide and inform about state aid measures which fall within the scope of the block exemption from notification (de minimis aid schemes), the Competition Council. It issues an opinion, whether inconsistencies, establishes the measures necessary to ensure compliance with union rules in the field. However, if the applicant does not agree with the proposed changes to the regulations union by the Competition Council may require notification or information transmission by the European Commission in the form he wants.

Also, any aid provider (central or local administrations, etc.) is required to submit the Competition Council, in the format requested by it, all the data and information necessary to monitor national state aid, including reporting and information necessary for performing Romania as a member state of the European Union. Inventory data and information needed state aid granted by local government authorities relate to territorial competition inspectorates which provides expert advice.

c. Mechanisms for recovery of sums illegally granted in relation to EU law and to appeal against local state guilty in case of conviction by the Court of Justice of the European Union

Most often states have provided legal instruments to allow recovery of sums granted by way of unlawful as state aid or financial corrections by the Commission as a result of irregularities in the management of structural funds, where the repayment obligation is the consequence behavior of decentralized authorities. In France, such mechanisms have been established since 2004 by the Law on local freedoms and responsibilities[23]. Thus, Article 44, paragraph 1, para. 2 of

[22] Emergency Ordinance no. 117 of 21 December 2006 on national procedures Aid (published in Official Gazette no. 1042 of 28 December. 2006) recently replaced by Emergency Ordinance no.77 of 3 December 2014 on the national procedures of state aid and competition for amending Law no. 21/1996 (Published in the Official Gazette no. 893 of 9 December 2014).

[23] Law no. 2004-809 of 13 of August 2004 on local freedoms and responsibilities, published in the Official Journal of the French Republic no. 190 of 17 August 2004, p. 14545.

the Law, local authorities (regions) granted by way of experimentation, management of EU funds, suports the cost of the corrections and financial sanctions decided as a result of national and Community controls or decrees of the Court of Justice. Also, in accordance with Article L. 01/01/1511 General Code of territorial collectivities, amended in 2004, in addition to reporting requirements of state aid, local authorities are obliged to proceed immediately to recover the aid that have granted if such recovery is ordered by a European Commission decision, even provisional, or by a judgment of the Court of Justice. Local authorities and their groups support in the area of State aid, the financial consequences of the conviction that the state may result in delayed or incomplete execution of recovery decisions. In both cases, the financial implications of the commitments arising from EU law are "mandatory spending" of the respective communities.

In the Netherlands there is also from 2002, a provision entitling the central government to recover amounts arising from financial corrections (including interest) applicable to EU funds if the repayment obligation is the consequence of the behavior of a decentralized authorities[24].

Romania also set specific rules in the two areas where EU law has a strong impact, but they are much less onerous for local authorities. Thus, under the Emergency Ordinance no. 77/2014 on the national procedures of state aid, where a decision of the European Commission has ordered recovery of unlawful aid or aid misused by public authorities providing state aid are required to take the measures necessary legal application of the European Commission decision[25]. The penalty for failure to fulfill this obligation is a fine of between 5,000 lei and 40,000 lei[26]. As regards the financial consequences resulting from improper management of EU funds, Romania adopted a law in 2011 that provides rules relating to the prevention, finding and sanctioning irregularities occurred in the collection and use of European funds and/or their respective national public funds[27], but it covers only incidental local

[24] See in this respect Verhoeven, Maartje. "The Costanzo Obligation: Obligations of the national administrative Authorities in the case of incompatibility Between national law and European law". *Intersentia* 93 (2011): 269.
[25] Article 34 paragraph (3) of the Emergency Ordinance no. 77/2014.
[26] Article 45 paragraph (2) b of GEO. 77/2014.
[27] Emergency Ordinance no. 66/2011 on preventing, finding and punishing irregularities occurred in the collection and use of European funds and/or their respective national

authorities, as beneficiaries of EU funds, to the extent that the duties of management and payment authority for structural funds is exercised by those authorities. This legislation lays down that implementation of the principle of proportionality to be established not charged excessive debts for beneficiaries of EU funds, including public institutions financed from the state budget. Under Article 2 letter n) of GEO 66/2011, in accordance with the principle of proportionality, "any administrative measures adopted must be appropriate, necessary and appropriate to the aim pursued, both in terms of resources committed to finding irregularities and in terms of establishing budgetary debts from irregularities, given the nature and frequency of irregularities and their financial impact on the project / program concerned".

The binding mechanism which can determine subnational entities to respect the right of a Union is to regulate the general possibility of state action against them if the state suffered a financial convicted as a result of conduct contrary to EU rules that can be assigned to those entities, regardless of the area in which they occur. Such mechanisms of repercussions of the penalties imposed as a result of the failure state of a judgment of the Court of Justice, the communities actually responsible for such failure shall be provided at this time only in two European countries, Belgium and Austria, both federal organization . Thus, Article 169 of the Belgian Constitution allows the federal state to pass on a community or region expenses resulting from the breach by it of international action and hence, *a fortiori*, a breach of an Union. This can take the form of deductions on funds that the state had to pass under the law, community or region concerned. Also in Austria, where the federal state is required to pay a penalty, it may bring an action for recourse against Land assembly through a liaison office. Through a collaboration of the Länder are to determine which or to whom the task of actually repay the fee in question. The German system also knows such a system, but as a co-responsibilities, Article 104a, paragraph 6 of the German Basic Law provides that the Federation and the Länder support in accordance with the internal division of powers and duties, obligations

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public funds, published in Official Gazette no. 461 of 30 June 2011, approved with amendments by Law no. 142/2012, published in Official Gazette no. 501 of 20 July 2012.

arising from a breach supranational or international obligations of Germany.

In France, where an action for recovery against local state is limited, as I stated above, only two areas of competence of these communities (state aid and structural funds, the latter only for regions assumed to their management experience themselves), since 2003 were developed several reports of the State Council proposing completing the legal framework by introducing a joint responsibility of the actions and territorial authorities, or any act of the state if the conviction is the result of action or inaction of those communities. It means, therefore, not only placing greater control in areas where this is necessary due to the high incidence of Union legislation, but providing a general mechanism for the state to permit it to exercise general supervision over local authorities. Such a mechanism, which would be applicable to all local powers, would have a preventive role in ensuring compliance by such authorities of EU law.

The Netherlands has also recently introduced by the act of 2012 , a State's general course of action against public entities through which the ministers may establish by decree public entities in charge distribution which is due to direct breach of European law, the amounts resulting from State financial penalties under Article 260 TFEU[28]. This overlaps the previous mechanisms invoked existing already in the field of EU funds, which are incorporated in this document.

CONCLUSION

As a conclusion of the above, it is evident that although the means to monitor the state of decentralized entities, which are designed not only to end violations but in some cases, to prevent them, vary from state to state, there is still a tendency of most legal systems to equip themselves with particular surveillance on the application of European law. Set rather to the role to deterrent EU infringement, they are nevertheless important tools available to central government that can implement when the situation requires. The state's oversight mechanisms for such decentralized communities are developed to increase the constraints

[28] Article 7 of the Act of 24 May 2012 laying down the procedures for compliance with European regulations of public entities (Wet Naleving Europese regelgeving Publieke entiteiten - NErpe DICHT).

arising from European law for the latter, greatly reducing their freedom of expression. Doctrine[29] notes the existence of a paradoxical situation in which the central government supervision by the compliance of decentralized authorities often targets union law provisions adopted even by it with failure to ensure compliance of national legislation with EU law (eg inadequate transposition a directive), the supervision of decentralized entities but ordering them not to comply with these provisions. In other cases, local authorities are called upon to fill the inaction of the central government and to direct application of the rules on which it has not taken steps to transposition and implementation. Compared to the existence, most often, of a shared responsibility between states and their sub entities for breach of EU law, the application by the State of different possibilities for sub-national surveillance communities should be adapted to each case, taking into account the capacity of the community concerned to fulfill its European obligations. A flexible application of these mechanisms would therefore be welcomed.

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THE INVOLVEMENT OF NATIONAL PARLIAMENTS IN THE INTERPRETATION OF THE PRINCIPLE OF SUBSIDIARITY

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Abstract:

The Protocol regarding the application of the principles of subsidiarity and proportionality annexed to the Treaty of Lisbon provides (in areas which do not fall within the exclusive competence of the European Union) that each institution must always ensure compliance with these principles, monitoring the compliance of union legislative proposals with the former.

Regarding the involvement of national parliaments, we retain their competence to verify the compliance of the union projects with the principle of subsidiarity.

Key words: *principle of subsidiarity, European Union, national parliaments*

1. Introductive aspects regarding the concept and area of application of the principle of subsidiarity

Art 5 of the Lisbon Treaty states the principle of subsidiarity, and in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

According to the principle of subsidiarity in the areas which are not in the exclusive competence of the Union, it is allowed for it to become active only if the objectives aimed cannot be fulfilled in a nationally satisfactory measure by the Member States, being possible to be materialized at a communitarian level[2]. In the meaning of Art 5 Para 2 EC the intervention of the Union's institutions through the principle of subsidiarity assumes the fulfilment of three conditions: *i*) in must not be an area placed under the exclusive competence of the EU; *ii*) the objectives of the action considered cannot be fulfilled in a satisfactory mean by the Member States; *iii*) the action can be performed better, given its dimensions or effects, by an intervention of the Community.

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[2] Elise-Nicoleta Vâlcu, *Drept comunitar instituțional*, (Craiova: Sitech, 2012), 53.

The principle of subsidiarity is applied only in the areas shared between the European Union and its Member States. Though, the line between them is fluctuant because of the fact that the areas of competence of the Union may be extended in the virtue of Art 308 EC, if one of its actions appears as necessary for the fulfilment of certain objectives of the Treaty[3].

The principle of proportionality assumes, according to Art 3B of the TEC inserted by the Maastricht Treaty the fact that the communitarian measures must be proper to the objectives aimed and to correspond to the necessity, excesses being forbidden. In other words, the principle "requires" that the means used be proportional with the purpose aimed[4].

The principle of proportionality interferes only after the analysis of the subsidiarity issue, in the meaning that it determines with priority the application of competence, where appropriate, either of the communitarian institutions, or of the Member States[5].

According to Pct. 3 of the Amsterdam Protocol, we can see that the subsidiarity has a dynamic feature (or *ambivalent*), namely: Subsidiarity is a dynamic concept, which should be applied in the light of the objectives previously mentioned by the Treaty. This concept allows the expansion of the Union's action, within the limits of its competence, if the circumstances require so and the reverse, the limitation and termination of that action if these are no longer justified. Therefore, in the E.U. the subsidiarity functions both for the expansion of the E.U's action ("comunitarization"), as well as for the restriction of the competences ("nationalization") previously performed by the E.U.[6]. Moreover, the principle of subsidiarity may be ambivalent even in the text of a single European legislative act: while a series of attributions are being transferred to be performed by the E.U's institutions, other

[3] Paul Craig, *Dreptul Uniunii Europene*, (Bucharest: Hamangiu, 2009): 58.
[4] Augustin Fuerea, *Manualul Uniunii Europene*, (Bucharest: Universul Juridic, 2006): 133.
[5] Marius Andreescu, *Principiul proporţionalităţii în dreptul constituţional*, (Bucharest: C.H. Beck, 2007): 1.
[6] An example for this latter situation is the proposal for rules regarding the possibility of Member States to restrain or to prohibit the cultivation of MGOs within their territory.

provisions of the same act may leave for Member States competences in other regards[7].

2. The statement of the principles of subsidiarity and proportionality in the Lisbon Treaty

The Lisbon Treaty states the principle of subsidiarity in its Art 5 and in the Protocol No 2 on the application of the principle of subsidiarity and proportionality, annexed to the Treaty. Important provisions regarding the role of the EU's Member States' parliaments are also stated by Art 12 of the TEU and in the Protocol (No 1) on the role of national parliaments in the European Union, annexed to the Treaty.

Specifically, by the adoption of the Lisbon Treaty, for the first time the national parliaments receive a clearly defined role in the European affairs, different than the one of the Member States' governments, the effect of this approach being the one of a large representativeness of the citizens in the European decision-making process.

The Lisbon Treaty inserts novelty elements, especially regarding the control of the compliance with the principles of proportionality and subsidiarity[8], according to which the Union does not perform actions (except the areas under its exclusive competence), if these are no more efficient than the actions performed nationally, regionally or locally, and none of the Union's actions must exceed the level necessary for the fulfilment of the objectives stated by the Treaty. Also, the Lisbon Treaty *inserts* the notion of *inter-parliamentary cooperation*[9], organized and promoted both by the European Parliament, as well as by the national parliaments.

The Lisbon Treaty has expanded and consolidated the instruments placed at the disposal of the national parliaments by establishing their communitarian attributions and limits, namely: *i*) Art 5 Para 3 TEU states that the national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No 2)

[7] This is the case of providing the general framework in the Union regarding the maintenance of certain aspects of that matter in the area of the Member States' competences

[8] Protocol (No 2) on the application of the principles of subsidiarity and proportionality

[9] Protocol (No 1) on the role of National Parliaments in the European Union.

on the application of the principles of subsidiarity and proportionality; *ii*) Art 12 of the TEU states that the National Parliaments contribute actively to the good functioning of the Union enlisting all relevant competences; *iii*) Art 10 Para 2 TEU underlines the democratic accountability of the Governments towards their National Parliaments, which has mostly a symbolic importance in the light of the sovereignty and autonomy of the Member States.

The Lisbon Treaty establishes the rule of direct forwarding by the European Commission to the National Parliaments of consultation documents (green and white papers) together with the annual legislative program of the Commission and any other instrument of legislative planning or policy (Art 1 of the Protocol [No 1] on the role of national parliaments in the European Union). Their communication is simultaneous with the forwarding of those documents to the European Parliament and to the Council[10].

Art 2 of the Protocol (No 1) on the role of National Parliaments in the E.U. and Art 3 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality define using identical terms the "draft legislative acts": "proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice for the adoption of a legislative act".

Protocol (No 1) on the role of National Parliaments in the E.U has as purpose the encouragement of their increased participation in the E.U's activities and the consolidation of their capacity to express their point of view regarding the draft of legislative acts of the Union, as well as regarding other matters with a potential special interest for them. Referring to the involvement of the National Parliaments, Art 3 of the Protocol states that they shall be able to send to the President of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[10]O.B. Jarka, *Structuri de cooperare interguvernamentală instituţionalizată*, (Bucharest: C.H. Beck, 2009): 98.

The Protocol (No 2) on the application of the principles of subsidiarity and proportionality inserts a mechanism of early alert, known as "the procedure of the yellow and orange card", which allows the National Parliaments to examine the draft legislative acts and to allow reasoned opinions regarding the compliance with the principles of proportionality and subsidiarity. This mechanism offers the National Parliaments a direct and immediate role within the legislative process[11]. Thus, a National Parliament may, within 8 weeks from the presentation of a draft legislative proposal, issue a reasoned opinion stating the arguments for which it considers the draft not being compliant with the principle of subsidiarity.

CONCLUSION

The exertion of the competences of the E.U is subjected to the principles of subsidiarity and proportionality. In the areas outside the exclusive competence of the E.U, the principle of subsidiarity states the protection of the capacity of decision and action of Member States and legitimates the intervention of the Union if the objectives of an action cannot be satisfactory fulfilled by Member States, "due to the dimensions and effects of the expected action".

These principles are mandatory for all communitarian institutions, a legislative or administrative act or measure adopted with the violation of these principles being illegal and being cancelled by the Court of Justice of the European Union, which is competent in deciding upon the actions regarding the violation of these principles.

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[11] Also, according to Art 352 TFEU, the European Commission draws the National Parliaments' attention on the proposals that the Council, from the Commission and after the approval of the European Parliament, shall adopt if a European Union's action proves to be necessary.

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RESULTS AFTER 65 YEARS SINCE THE DEBUT OF THE EUROPEAN INTEGRATION PROCESS

Dumitru VĂDUVA [1]

Abstract:

After the entrance into force of the Lisbon Treaty this phase of reforms has ended, at least for a while. The new text, despite its weaknesses, answers to a number of matters remained in cliffhanging starting with the Maastricht Treaty: the functioning of the European Union and the reforms of its institutional framework.

Essentially, the Lisbon Treaty inserts a new system of majority voting for the Council, which has entered into force in 2014, easier and more adjusted to the subsequent enlargements, and has stated new representatives of the Union: the permanent president of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy. This Treaty has concluded a phase of intense reforms of the European Union initiated in the 1990s.

Key words: *European Union, Lisbon Treaty, institutional reforms, the limits of integration, federalization*

INTRODUCTION

Of all regional integration unions, the European Union is the most advanced one from all perspectives: integration, political institutions, and the most important one: wealth, population and territory, number of member states (Costa and Brack, *Le function*, 8). It is also the only one which has generated independent supranational institutions endowed with a certain authority, based on an original right, exceeding the intergovernmental cooperation framework by inventing a communitarian method with the purpose of a broader integration (Oberdorff, *L'Union*, 5), the states agreeing to share the sovereignty and the transfer of competence necessary for its existence and associates the citizens in decision making by their representation in the European Parliament (P. Dollat, *Droit européen et droit de l`Union européenne*, p. 7, p. 18). At 65 years since the debut of the European integration, we must notice the undeniable success of this unique experience.

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The history of the European continent was many times the scene of wars between the European nations (Dollat, *Droit européen*, 18).

1. EUROPEAN UNION, AN ATYPICAL LEGAL CONSTRUCTION

A first benefit, pursued since the initiation stage of creating the European Communities, is the rapid and total pacification of the relations between the Member States, as well as of a need emerged immediately after the Second World War: the Cold War (Lescot, *Institutions européennes*, 6-7). After the Berlin Wall has fallen, the Union has had to solve no diplomatic crisis with the eastern empire of economic, military or of sovereignty problems and, on the other hand, by the initial establishment of the three communities and after that of the Union, has had to solve no internal crisis or any other form of conflicts between its members, even if some national feelings are felt.

Also, though the European citizens do not necessarily manifest a tight attachment to the Union, because the Euro-barometer shows 53% attachment of the citizens to it, they would not conceive to be tempted to start a war with their neighbors, nor that they would waive the benefits of free movement or the rights guaranteed by this supranational construction (Oberdorff, *L'Union*, 6-20).

Nowadays, the Union, a particular interstate construction, has an impressive worldwide visibility, being the first world economic power and by far the first one assisting developing states. Even if its power is essentially civilian, it is a key player in the international relations contributing in the promotion of peace, human rights democracy and global multilateralism (Oberdorff, *L'Union*, 6-20).

2. THE LISBON TREATY AND THE COMPROMISE AT THE EXPENSE OF PERFECTING THE EUROPEAN UNION

With the entrance into force of the Lisbon Treaty on 1 December 2009, also called the simplifying treaty or the modifying treaty (Dollat, *Droit européen*, 21) and the establishment of new representatives of the Union, stated by it: the permanent president of the European Council and the High Representative of the Union for Foreign Affairs and Security Policy, the Union has concluded a phase of intense reforms started in the 1990s. It has been dictated by the integration of the new states from the Central and Eastern Europe as an effect of the fall of the soviet empire

and of the need to rapidly end the opposition between the east and west started by the Cold War.

The reform was also dictated by the increased interest of the public opinion regarding the European construction after 1990, and especially after the Maastricht Treaty. Even if this treaty aimed to approach the Union of its citizens in order to legitimate the extension of its competences, numerous opinion leaders and simple citizens have stated their opposition to the European construction.

Trying to solve the difficulties related to different forms of resistance to the process of European integration, the European leaders have aimed to solve the real issues generated by this process, especially: the functioning of the European Union and the reforms of its institutional framework.

It was thus reached to the repeated reformation of the Treaties, an important step in this process being the establishment of elections for the European Parliament by direct vote in 1979 (Lescot, *Institutions européennes*, 18).

After the entrance into force of the Lisbon Treaty this phase of reforms ended for a while at least. The new text, despite its weaknesses, answers to a number of questions remained unanswered starting with the Maastricht Treaty: it inserts a new system of majority voting within the Council, which entered into force in 2014, simpler and better adjusted to subsequent enlargements; it generalizes the appeal for co-decision; merges the three pillars inserted by the Maastricht Treaty (Dollat, *Droit européen*, 21) and offers legal personality to the Union; establishes a new permanent president of the European Council; clarifies to certain extent the limits of competence between the international level and the European one; proposes a start for the theorization of the European regime, dedicating a chapter for democracy (Lescot, *Institutions européennes*, 32-41).

It also marks the limits of integration, because this treaty is born precisely to prevent a failure. With the Lisbon Treaty is also shaped the difficulty in reaching the use of the federal model. Far from the ambitious objectives stated by the constitutional treaty, the Lisbon Treaty confirms the hybrid feature of the Union, placed at the border between the intergovernmental system and the federal one.

Also, the Treaty states the role of the Member States' representatives in this system (Council, European Council) parallel with

the representatives of the European citizens (European Parliament) and the actors of the so-called supranational institutions (Commission, Court of Justice) (Lescot, *Institutions européennes*, 38-39).

The institutional reforms inserted by this treaty reveal the slowing down of the process of federalization (Costa and Brack, *Le function*, 225-226).

CONCLUSION

In the following years, the Union should, once more, prove its utility, both from the inside, as well as from the outside by showing that its existence is indispensable for the welfare of the Member States' citizens.

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SEVERAL EXAMPLES OF FRIENDLY SETTLEMENTS CONCLUDED BY THE ROMANIAN STATE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract: *The European Convention of Human Rights recognizes the Alternative Dispute Resolution principle through its provisions regarding the acknowledgment of friendly settlements, providing, thus, a pattern of good practices in this area.*
Although the frienfly settlement idea is promoted in many European countries, strictly from a national perspective, these agreements concluded in cases regarding human rights are seen as inadmissible. In this context, the following paper aims to examine some cases brought before the European Court of Human Rights, in which the Romanian State signed such settlements.

Key-words: *European Court of Human Rights, friendly settlements, Alternative Dispute Resolution, European Convention of Human Rights*

1. INTRODUCTORY ISSUES RELATED TO FRIENDLY SETTLEMENTS OF CASES PENDING BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

According to Art. 39 of the the European Convention on Human Rights, at any stage of the proceedings, the Court may be available to the parties that are interested in concluding friendly settlements of the case, in observance with the human rights under the Convention and its Protocols. This procedure is confidential. In case the parties reached a friendly settlement, the Court shall strike the case out of its list by a decision which is limited to a summary of the facts and of the adopted solution; then this decision will be transmitted to the Committee of Ministers which supervises the execution of the amicable settlement clauses.

Following the European Court of Human Rights jurisprudence we can note that this friendly settlement involves mutual concessions from the complainant and the respondent State, which justifies the conclusion

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that the mechanism is similar to the transaction agreement[2]. In the Romanian judicial literature was noted that these amicable agreements are "particular means of the plaintiff's waiving the complaint", representing "a particular transaction form made before the Court "[3].

Actually, the advantages for using the mechanism of the friendly settlement shown in the judicial doctrine are persuasive[4] :

- the applicant's prejudice is more quickly covered, by the amount of money received;
- the respondent State is not formally sentenced, so we can say the effects of an admissible complaint are mitigated;
- the Court is decongested from a growing number of complaints filed before it.

2. THE PROCEDURE OF FRIENDLY SETTLEMENTS OF CASES FILED BEFORE THE ECHR

Art. 62 of the European Court Regulation provides some details on the procedure of amicable settlement of the dispute. Thus, once the complaint has been filed before the Court and has been declared admissible, the Registrar will contact the parties to inquire whether they intend to enter into a settlement agreement in the case. Also, the procedural rules quoted impose taking the appropriate measures to facilitate the conclusion of such an agreement and to ensure the confidentiality of negotiations, so that the course of these negotiations does not affect the position of the parties in the litigation proceedings.

If the Court is informed by the Registrar of the case that the parties have reached an agreement, the Court will have the obligation of checking whether the agreement respects the human rights, as these are guaranteed by the Convention and its Protocols. In the event that a friendly settlement of the case is in consistency with the respect for human rights, the Court shall strike the case out of its list by means of a decision.

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[2] C. Nourissat, *La transaction, regard communautaire*, in colective work "Transaction dans tous les dimensions", 176.

[3] R. Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații.* Volumul II, (București: C. H. Beck, 2007), 317-318.

[4] Chiriță, *Convenția europeană a drepturilor omului,* 518.

Regarding the content of such decision[5], it includes a summary of the proceedings and of the facts, the examination of the legal issues being replaced, usually, with the declaration of the respondent State Government, by which it presented the final proposals regarding the amicable settlement of the dispute between the parties and the declaration of the applicant / applicants which expresses manifestation of will in the sense of acceptance of the government proposal. Also, each of the parties declares that the agreement reached is the final settlement of the dispute and agrees not to seek re-opening of the proceedings.

Often, the respondent State explicitly acknowledges the existence of violation of the Convention and expresses the regret in this respect, but this side is not mandatory[6], as there are many situations where the state does not allow, at least not explicitly, that it had been the author of any violation of the applicant's rights. [7] However, it is assessed that the admission is implicit, because otherwise, certainly the state would have not ordered to enter into an agreement with the applicant.

In most cases individual measures are sufficient to amicably settle the case, without the need for adopting general measures. However, where they raise a question that refers to a category of cases, it may be necessary to adopt general measures[8].

3. THE ROMANIAN STATE EXPERIENCE IN CONCLUDING FRIENDLY SETTLEMENT OF CASES SUBJECT TO ECHR JUDGMENT

With reference to the cases in which the Romanian State was examined, with title of examples, we identified, below, some such agreements.

Thus, in *the case Argintex against Romania*[9], the applicants alleged infringement of art. 1 of Protocol no. 1 due to quashing of a

[5] C. Bârsan, *Convenția europeană a drepturilor omului. Vol. II-Procedura în fața Curții. Executarea hotărârii*, (Bucharest: All Beck, 2006), 460.
[6] R Chiriță, *Convenția europeană a drepturilor omului*, 318.
[7] Chiriță, *Convenția europeană a drepturilor omului*,. 318.
[8] *La Convention Européenne des droits de l'homme. Commentaire article par article* (sous la direction de L. E. Pettiti, E. Decaux, P.H. Imbert), (Economica, 1999), 671.
[9] available on the Superior Council of the Magistrates website.

judgment, by extraordinary procedure, which had the effect of not being paid the amounts provided in this decision.

Relying in particular on Article 6 Para. 1 of the Convention, the applicants complained about the unfairness of the proceedings before the Court of Cassation, because of admission of the appeal in cancellation filed by the Attorney General, which infringed the principle of legal relations security. In this case the Romanian Government paid the applicant company the amount of Eur 9,000 in view of a friendly settlement of the case.

The same issues were raised as to the European Court also in the case *Clivet against Romania*[10], in which the applicant complained of violations of the legal relations security and the right to a fair trial due to the retrial of the final judgment ruled in his favor, following the extraordinary appeal for annulment promoted by the Attorney General. The Romanian government has offered to pay Mr. Stephen Clivet, free of charge, the amount of 1,200 euros and to reimburse any amounts collected as a result of compliance with the decision ruled by the Supreme Court. Similar is the case *Meteș against Romania*[11].

Particular is the *case Mocanu against Romania*[12], where the applicant argued that he was the victim of a violation of art. 3 of the Convention, due to the ill-treatment he was subjected to during his preventive detention and of the lack of effective investigation. He complained also of non-compliance with art. 8 of the Convention, especially on the reason of opening his correspondence sent by the Court and the refusal by the administration to provide the necessary stamps for its correspondence, and art. 34, taking into account the prevention of individual exercising the right to appeal.

In this case, the petitioner has accepted the Government's proposal to be awarded, *ex gratia*, the sum of 17,000 euros to cover the pecuniary and non-pecuniary damage, and the related costs and expenses incurred; correlatively, the petitioner waived any claim against Romania, in relation to the facts at the origin of his application.

[10] available on the Superior Council of the Magistrates website.
[11] available on the Superior Council of the Magistrates website.
[12] available on the Superior Council of the Magistrates website.

The case Gergely against Romania[13] ended also with a friendly settlement, the issues complained by the applicant being given by the breach of Articles 3, 6 § 1, 8, 13 and 14 of the Convention, which guarantee, *inter alia*, prohibition of inhuman and degrading treatment, the right of access to a court for fair determination of the civil rights and obligations, the right to respect for the private and family life and for the home, the right to an effective remedy and protection from discrimination in the enjoyment of rights and freedoms of the Convention.

For an amicable settlement of this case, the Government made a declaration expressing the regret of failure of criminal investigations to fully clarify the circumstances which led to the destruction of the applicant's home and property, which determined unfit living conditions, have hampered her ability to file a civil action for damages and to exercise her right to respect for her home, private and family life. The Government also regrets that the remedies for enforcement of the rights in the Convention generally lacked at the time when the applicants were seeking justice in the domestic courts, and that some observations were made by some authorities regarding the origin of the Roma applicants. The Government has explicitly accepted that the case data were constituted in violations of art. 3 (prohibition of torture), art. 6 (the right to a fair trial), art. 8 (the right to respect for private and family life), art. 13 (the right to an effective remedy) and art. 14 (prohibition of discrimination) of the Convention.

Similarly, *the case Iordănescu against Romania*[14] ended in an amicable settlement, under the circumstances the applicant initially complained of failure to enforce a final judgment regarding the return of a nationalized property. Despite repeated approaches to the authorities involved, the applicant had failed to regain possession of the land.

In this case, on May 6, 2008 the Court received the following declaration signed by the applicant:

« I, Aurelia Popescu, found that the Romanian government is willing to pay Mrs. Georgeta Iordănescu free of charge, the amount of 230,000 euro (two hundred thirty thousand euro) for an amicable

[13] available on the Superior Council of the Magistrates website.
[14] available on the Superior Council of the Magistrates website.

settlement of the case based on the above-mentioned request pending before the European Court of Human Rights.

This amount, that will cover any pecuniary and moral damage, as well as the costs and expenses, will be converted into the currency of the respondent State at the rate applicable on the date of payment and shall be exempt from any applicable tax. I accept this proposal and otherwise waive any claim against Romania as regards the facts at the origin of this request, including the execution of the decree of 15 February 1999. I declare the case definitively resolved.»

For the commitment to adopt general measures, relevant is the case *Notar against Romaniai*[15], where the Government undertook to initiate a process of reform of the legislation on stamp duties, so that civil actions for damages awarded to treatment contrary to article 3 of the Convention be exempt from the duty.

Among the committments of the Government, we quote:

"The Government will take the necessary measures in order to inform the police authorities about the proper conduct to be adopted in order to ensure compliance with the presumption of innocence, as defined in paragraph 2 of Article 6 of the Convention.[…]The Government will continue to strive for the protection of children in difficulty, according to the commitments made by the legislation and strategies adopted nationwide."

Similarly, in *the case Moldovan against Romania*[16], the Government committed to adopt the following general measures:

- enhancing the educational programs for preventing and fighting discrimination against Roma within the school curricula in the Hădăreni community, Mures County;

- developing programs for public information and for removing the stereotypes, prejudices and practices towards the Roma community in the Mureş public institutions competent for the Hădăreni community;

- initiating legal education programs in cooperation with the Roma community members;

- supporting positive changes in the public opinion concerning the Roma community of Hădăreni based on tolerance and the principle of social solidarity;

[15] available on the Superior Council of the Magistrates website.
[16] available on the Superior Council of the Magistrates website.

- stimulating Roma participation in the economic, social, educational, cultural and political life of the local community in Mureș County, by promoting mutual assistance and community development programs;

- implementing programs to rehabilitate the housing and the environment in the community;

- identifying, preventing and actively solving conflicts likely to generate family, community or inter-ethnic violence.

« Furthermore, the Government is committed to preventing similar problems arising in the future by carrying out appropriate and effective investigations and by adopting, in the future, of social, economic, educational and political policies to improve the situation of the Roma community, in accordance with the existing strategy of the Government in this respect. In particular, it shall undertake general measures as required by the specific needs of the Hădăreni community in order to facilitate the general settlement of the case, also taking into account the steps which have already been taken with this aim, namely the rebuilding of some of the destroyed houses. »

4. CONCLUSIONS

In conclusion we note the aspects retained by the Romanian legal doctrine: as a general principle, settling amicable a case before the European Court of Human Rights is an advantage both for the parties and for the European Court. If we relate to the litigants, assuming that such a solution is reached, the applicant obtains satisfaction on its claims, including by the receipt of monetary compensation to cover the moral and the material prejudice suffered as a result of violations of the Convention denounced in its request, while the State concerned, although usually recognizes such violations and undertakes to pay such compensation, it will not be condemned internationally. At its turn, the Court will make a much simpler decision, without a full review of the factual and legal questions claimed in that case, and shall take note of the agreement of the parties, in the above-mentioned conditions”[17].

[17] Bârsan, *Convenția europeană a drepturilor omului,* 459.

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THE PRINCIPLE OF PREVENTING POLLUTION AND ECOLOGICAL DAMAGES

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Abstract:

In the ensemble of the principles of environment protection, the principle of the preventive action has a special place and is based on the idea that the prevention involves significantly lower costs than the remedy of the ecological damages. The prevention involves two categories of actions: the ones created to remove the causes of pollution, more often by ecological upgrade of the processes of production and limitation or total elimination of the negative consequences against the environment factors in the context in which the pollution was already generated.

Key words: *pollution, environment protection, prevention.*

INTRODUCTION

G.E.O No 195/2005 on environmental protection states in its Art 3 the principles and strategic elements on which the law is based on, considered as the fundament for the actual legislation in this area, also principles of the environment protection, namely: the principle of integrating environmental requirements in other sectorial policies; the principle of precaution in decision making processes; the principle of prevention; the principle of the retention of pollutants at source; the principle "the polluter must pay"; the principle of preserving biodiversity and ecosystems specific to the natural bio-geographical frame.

The sustainable use of natural resources, public information and participation in the decision making process, access to justice in matters of environment and development of the international collaboration for environment protection are considered as strategic elements in this area.

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1. THE PRINCIPLE OF PREVENTION. PRESENTATION

The principle of prevention is stated by Art 3 Let c) of the G.E.O. No 195/2005 and is based on the idea that the prevention assumes lower costs than the remedy of ecological damages, especially that, in most cases, these are irreversible. Beyond its regulation in the framework-normative act, the principle is also directly or indirectly stated by most national, communitarian and international normative acts whose object is the environment protection.

Given that the legal provisions only mention it without clarifying its content, the literature[3] has shown that the principle of prevention has two categories of actions: the ones removing the causes generating pollution, more often by the ecological upgrade of the production processes and limitation or total elimination of the negative consequences against the environmental factors in the context in which the pollution was already generated.

In practice, the application of this process requires the settlement of obligations for prevention for the natural or legal persons operating dangerous activities for the environment, as well as the initiation of certain activities to avoid the generation of noxious effects against the environmental factors. As an example, we mention the obligation to request and obtain the environmental permit/environmental integrated permit for the performance of existing activities, as well as the initiation of new activities with a possible significant impact over the environment, the measures for the integrated pollution prevention and control and the list of activities subjected to the procedure of receiving an environmental integrated permit, being established by the law.

Directive No 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)[4] states in Art 11 the general principles governing the basic obligations of the operator[5]. The Directive was

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[3] M. Duțu and A. Duțu, *Dreptul Mediului* (Bucharest: C.H. Beck, 2014), 114; D. Marinescu, *Tratat de dreptul mediului* (Bucharest: Universul Juridic, 2010), 65.

[4] OJ L 334/17 December 2010.

[5] According to Art 3 Pct. 15 of the Directive No 2010/75/EU "operator" means any natural or legal person who operates or controls in whole or in part the installation or combustion plant, waste incineration plant or waste co-incineration plant or, where this

transposed in the national legislation by Law No 278/2013 on industrial emissions[6], which has as declared purpose the integrated prevention and control of the pollution resulted from industrial activities (Art 1), establishing the conditions for prevention or, if it is not possible, for the reduction of air, water or soil emissions, as well as for the prevention of wastes, so thus a high level of environmental protection shall be reached. From Art 11 it results that the operator who performs activities in the areas established by the law[7] shall take the necessary measures to provide that installations are operated in accordance with the following principles:

- all the appropriate preventive measures are taken against pollution;
- the best available techniques are applied;
- no significant pollution is caused;
- the generation of waste is prevented;
- where waste is generated, it is prepared for re-use, recycled, recovered or, where that is technically and economically impossible, it is disposed of while avoiding or reducing any impact on the environment;
- energy is used efficiently;
- the necessary measures are taken to prevent accidents and limit their consequences;
- the necessary measures are taken upon definitive cessation of activities to avoid any risk of pollution and return the site of operation to the satisfactory state

An important role in the application of the principle of prevention is played by a series of activities such as: a proper evaluation (process

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is provided for in national law, to whom decisive economic power over the technical functioning of the installation or plant has been delegated.

[6] Published in the Official Gazette, Part I, No 671/1 November 2013.

[7] We are talking about the activities enlisted by Annex 1 of the Law No 278/2013 on industrial emissions, namely: energetic industries, manufacturing and metalworking, mineral industry, chemical industry, waste management, other activities (such as: producing in industrial plants of wood cellulose and of other fibrous materials, paper or cardboard, with a production capacity exceeding 20 tons per day; pretreatment [operations like washing, bleaching, mercerization] or dyeing of textile fibers or textiles, with a treatment capacity exceeding 10 tons per day; tanning of hides and skins, the treatment capacity exceeding 12 tons of finished products per day).

used to identify, describe and establish, depending on the objectives of preservation and in accordance with the current legislation, the direct and indirect, synergic, cumulative, main and secondary effects of any plan or project, which is not directly related with or is not necessary for the management of a protected natural area of communitarian interest, but which might significantly affect the area, individually or in combination with other plans or projects – Art 2 Pct. 30^1 of the G.E.O No 195/2005), the evaluation of the environmental impact (process used to identify, describe and establish, depending on each case and in accordance with the current legislation, the direct and indirect, synergic, cumulative, main and secondary effects of a project over human health and environment – Art 2 Pct. 31 of the G.E.O No 195/2005), but also the activity of risk assessment (study concluded by natural or legal persons who have this right, according to the law, which performs the analysis of the probability and gravity of the main components of environmental impact and establishes the necessity of prevention, intervention and/or remedy – Art 2 Pct. 32 of the G.E.O No 195/2005).

2. MEANS OF IMPLEMENTATION

The legislator enlists in Art 4 of the G.E.O No 195/2005 the means of implementation of the principles of environmental protection, therefore, of the principle of prevention. In accordance with the legal provisions, these means are:

- Integrated prevention and control of pollution by using the best available techniques for the activities with a significant impact on the environment;
- The adoption of development programs, in compliance with the requirements of environmental policies;
- The correlation of territorial management and urbanism with the environmental one.

The rational territorial management and a fair urbanism can be efficient tools in the harmonization of the imperatives of development with the necessary protection and improvement of the environmental conditions. With the opportunity of planning human settlements and urbanism must be considered the need to avoid the possible damages

caused to environment, as well as the obtaining of socio-economic and ecological advantages[8];

- The performance of the environmental assessment prior to the approval of the plans and programs which can have a significant effect over the environment, refers to the idea that each human activity may result in pollution, imposing a permanent attention paid to consequences;
- The evaluation of the possible impact over the environment in the initial phase of the projects with a significant impact over the environment;
- Introduction and use of incentive or coercive ecological leverages and tools; which represents an obligation, but also a right of the state which helped by certain legal regulations influence the attitude of economic agents and citizens;

The economic incentives of co-interest and the tightening of legal sanctions may represent important tools for the compliance with the legal regulations regarding the environment protection.

- Solving, on levels of competence, the issues of environment, depending on their proportions;
- Promoting normative acts harmonized with the European and international regulations in this area;
- Establishing and supervising the achievement of programs for conformity;
- Creating the national system for integrated monitoring of environment's quality;
- Recognizing the products with low impact on the environment, by granting the *Eco label*;
- Maintaining and improving environment quality;
- Rehabilitating the areas affected by pollution;
- Encouraging the implementation of management systems and environment evaluation;
- Promoting the fundamental and applicative research in the area of environment protection;
- Public education and awareness, as well as its participation in the process of decision making and decision application regarding the environment.

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[8] E. Lupan, *Tratat de dreptul protecţiei mediului* (Bucharest: C.H. Beck, 2009), 89.

Public training and education, as well as its participation in the creation and application of decisions emerges as an important mean for the creation and development of an environmental consciousness, indispensable for the successful performance of the obligations regarding the environment protection[9].

- Developing the national network of protected areas for the maintenance of a condition favorable for the preservation of natural habitats, of wild flora and fauna as integrant part of the European ecological network – Nature 2000;
- The application of systems insuring the traceability and labeling of GMOs;
- Removing with priority the pollutants directly and seriously affecting human health.

CONCLUSIONS

The principle of prevention reveals the prophylactic environment protection[10], operating in two phases. In a first stage, the principle is found in all legislative actions in this area, the reason of the legal norms on environment protection consisting precisely in prevention, and in a second stage, a special role is played by the authorities for environment protection managing the procedure of regulation and issuing legal acts in this area, according to the law.

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[9] Lupan, *Tratat de dreptul protecţiei mediului,* 90.
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THE CONTRIBUTION OF THE EUROPEAN UNION'S INSTITUTIONS IN THE PROTECTION, PRESERVATION AND DEVELOPMENT OF THE ENVIRONMENT

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Abstract:

The European Union's policy in the area of environment aims a high level of protection, considering the diversity of situations from different regions of the Union. Among their competences, the Union and its Member States cooperate with third-party states and with competent international organizations in order to achieve the objectives of the environmental policies. Of the Union's institutions, the main attributions and competences in this area are of specialized organisms, such as the Directorate-General for the Environment, the Council for Environment and Committee for Environment, Climate Change and Energy. Attributions in the area of environmental protection are also held by the Committee on the Environment, Public Health and Food Safety of the European Parliament, but also by the European Investment Bank.

Key words*: environmental protection, Union's institutions, Directorate-General for the Environment, Council for Environment, Committee for Environment, Climate Change and Energy*.

INTRODUCTION

Since 1987 when the Single European Act entered into force, which inserted for the first time in the area of communitarian preoccupations the environment issues and until nowadays, the European Union, through its institutions, had as main objective of the environment policy the consolidation of the natural capital, the promotion of an economy efficiently using the resources and the adoption of measures for

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the protection of the population's health. The Maastricht Treaty[3] developed this issues and proposed solutions in order to guarantee a high level of environmental protection.

Thus, the Preamble of the Maastricht Treaty states the decision of the Member States to promote the economic and social progress in tight relation with the "intensification of the environmental protection", then in Art 2 it includes among the objectives of the Community the promotion of a high level of protection and improvement of the environment, Art 3 stating that the action of the Community also aims the "policy in the environment area". The Maastricht Treaty also includes an Annex and a Declaration regarding the impact of the communitarian measures on the environment. New provisions in the area of environmental protection have been inserted by the Amsterdam Treaty[4], namely Art 3C which became Art 6EC according to the new numbering, has established the integration of the environment requirements in the definition and application of communitarian policies and actions, especially for the purpose of sustainable development. The provisions of this Treaty are completed with the decisions of the European Council at Gothenburg (15-16 June 2001) which enhances the action of the European Union in the area of environmental protection and sustainable development – as long term communitarian strategy.

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[3] The Maastricht Treaty was signed in 1992 and entered into force in 1993, being also named the Treaty on the European Union. The most important themes of this Treaty are: the establishment of an economic and monetary union; an enhanced framework for the new common policies; increase the powers of the communitarian courts; the extension of the area of intervention of the European Community. The Treaty represents the birth certificate of the European Union, the new structure having three pillars: the first pillar is represented by the three European Communities: European Economic Community (EEC); European Atomic Energy Community (EAEC or Euratom) and the European Coal and Steel Community (ECSC). Simultaneous with the birth of the European Union, the European Economic Community becomes the European Community, and the EEC Treaty becomes the EC Treaty. See: O. Manolache, *Tratat de drept comunitar* (Bucharest: C.H. Beck, 2006), 500 and next; E.N. Vâlcu, *Drept comunitar instituţional* (Craiova: Sitech, 2013), 25-28.

[4] The Amsterdam Treaty was concluded in 1997 and has entered into force on 1 May 1999. By this Treaty are performed certain reforms aiming among others: the area of freedom, security and justice, the development of the concept of European citizenship, environmental protection, consumers' protection, an effective and coherent policy etc.

1. THE EUROPEAN UNION'S OBJECTIVES IN THE AREA OF ENVIRONMENTAL PROTECTION STATED BY THE TEU[5] AND TFEU[6]

At present, the TEU restates the principles already acknowledged by the other Treaties[7], showing from its Preamble that the Member States aim "to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields", completed by Art 3 Para 3 which states that the "Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment", and by Art 21 Para 2 Let d) includes among the EU policies also: the foster of sustainable economic, social and environmental development of developing countries, as well as the help given by the Union in the development of certain international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

In addition, Art 11 of the TFEU states that the "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development", and by Art 191-193 of the same Treaty, representing a different title, *Title XX Environment*, enlists the objectives aimed by the E.U in the area of environment: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilization of natural resources; promoting measures at international level to deal with regional or

[5] Treaty on the European Union (TEU), OJEU C 326/26 October 2012.
[6] Treaty on the Functioning of the European Union (TFEU), OJEU C 326/26 October 2012.
[7] See: M.A. Apostolache, *Rolul parlamentelor naţionale în elaborarea şi aplicarea dreptului european* (Bucharest: Universul Juridic, 2013), 112.

worldwide environmental problems, and in particular combating climate change.

2. UNION'S INSTITUTIONS WITH ATTRIBUTIONS AND COMPETENCES IN THE AREA OF ENVIRONMENTAL PROTECTION

Among the Union's institutions, the main attributions and competences in this area belong to the European Commission, which performs it by the General Directorate for Environment, established in 1973 with the purpose of preserving, protecting and improving the environment in Europe for present and future generations. The Directorate has competences regarding the proposal of policies and legislation for the protection of natural habitats, air and water purity, insuring the proper elimination of waste, aims to obtain information regarding the toxicity of chemical substances and offers support for European companies by whose activity tends to a sustainable economy.

In the same time, the General Directorate insures the proper application by the Member States of the Union's legislation regarding the environment, which involves the support of their efforts to comply with the legislation, as well as the verification of the complaints submitted by European citizens and NGOs.

DG Environment represents the European Union in its relations established regarding the environment[8] and manages the general program of action in this area, the 7th of this type, adopted by the European Parliament and the Council of the European Union in November 2013 aiming the period until 2020.

With this Environment Action Program (EAP) the Member States have agreed to lay greater efforts in order to protect the natural capital, to stimulate the growth and innovation characterized by an efficient use of resources and by low carbon emissions and to protect the health and welfare of the people, by complying with the natural limits of our planet.

It is a common strategy, created to guide the future actions of the EU institutions and its Member States, which are together responsible for the implementation of the strategy and the achievement of its priority objectives. The program proposes 3 themed objectives to guide the

[8] http://ec.europa.eu/dgs/environment/index_en.htm

environmental policy until 2020. The first one is to protect, preserve and increase the natural capital, which is the base of our economic prosperity and welfare. The second one promotes an orientation towards an economy efficiently using all resources. This aspect implies the complete implementation of the package of measures referring to climate and energy, reaching an agreement regarding the next steps for the policy in the area of climate after 2020, the improvement of the environment performance of the products during their life and the reduction of the impact caused by consume over the environment. The third objective is based on the progresses registered already by the EU in providing certain important benefits of health for its citizens, the intensification of the efforts to combat air pollution, noise pollution and water pollution, improving the management of chemical substances and preparation for the impact of all climate changes[9]. Unlike the previous programs, reaching these objectives shall not depend only of the new major legislative initiatives, but also shall require the correct application of the aspects upon which it has already been agreed. Also, the European Commission aims to insert new measures to encourage a wider involvement of the private sector in the extension of the market of environments goods and services. While the action program is pointed towards the future, the EU also complies with its engagements regarding the biological diversity, assumed in Nagoya, Japan, 2 years ago and continues to play an active international role[10].

Another institution of the EU with attributions in the area of environment protection is the Council for Environment, formed by the ministers of environment of all Member States, reunited 4 times a year.

The Council for Environment[11] is responsible with the EU's environment policy, including the protection of the environment, the careful use of resources and human health protection. As a political decision factor, the Council has competence, beside the European Parliament, in the adoption of a new corresponding legislation on

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[9] Environment Action Program until 2020, in *Environment for Europeans*, *Magazine published by the DG Environment* 49 (2013): 6.

[10] Environment Action Program until 2020, in Environment for Europeans, *Magazine published by the DG Environment* 49 (2013): 2.

[11] http://www.consilium.europa.eu/ro/homepage/?lang=en

environment, but also has responsibilities in the integration of the environmental policy in other EU policies, such as the industry, agriculture, transportations, energy and services. Referring to the international efforts laid by the EU and its Member States to insure that the environmental standards of the EU are reflected in the international agreements concluded in the area of environment and climate changes, the Council is responsible for the preparation of the positions to be adopted by the EU in international conferences.

Within the Committee of the Regions[12], the attributions in the area belong to the Committee for Environment, Climate Change and Energy[13], which by its activity, contributes in the adoption of certain efficient political measures in the area of environment, climate change, energy and space. Waste management, the reduction of air pollution, the diminution or reductions of the negative effects of other extreme meteorological events generated against the population are a few of the issues approached by this committee.

Finally, attributions in the area of environmental protection are also held by the Committee on the Environment, Public Health and Food Safety of the European Parliament, and by the European Investment Bank.

CONCLUSIONS

The EU policy in the area of environment, applied by its institutions, aims the achievement of the highest possible level of protection within the Member States, by stopping the permanent decline of the biodiversity, the reduction of waste production and of air and water pollution, the enhancement of the ecosystems that make life on earth possible, considering the biodiversity of the situations present in different regions of the EU. For the purpose of achieving the objectives of the environmental policy, the EU and its Member States cooperate with third party states and with other international organizations.

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[12] See: Mihai Cristian Apostolache, "The place and role of the Committee of the Regions within the European institutional assembly", *Analele Univ. Titu Maiorescu, Seria Drept* (2014): 24-38.

[13] http://cor.europa.eu/en/activities/commissions/Pages/commissions.aspx

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TENDENCY IN ROMANIAN CIVIL CODE AND SIMILARITIES WITH GERMAN LAW IN MATRIMONIAL REGIMES

Oana GHIŢĂ[1]

Abstract:

This article attempts a summary comparison of matrimonial property regimes in the Romanian Civil Code and BGB. Starting from technical way that it has been written German Civil Code to the French inspiration surse of Romanian Civil Code we have tried to emphasize the Romanian legislator overlap options with those of German law concerning the separation of goods, wich, in fact, includes a participation to acquisition but also as regards of matrimonial communitarian regimes which borrows aspects of the BGB, but keeping obviously the tradition.

Key-words: *matrimonial regimes, bases, Romanian Civil Code, German Civil Code, codification.*

INTRODUCTION

The most significant legislative achievement of the 20th century was the German Civil Code (Bürgerliches Gesentzbuch - BGB), promulgated in 1869 and enforced at the beginning of the new century, on 1 January 1900. This Code was at the center of the entire development of private law in the German-speaking countries.

The German civil code, especially known as the "BGB" – which represents its initials, is one of the most important and most original legislative monuments of the great Romano-Germanic legal system. Its novel elements, the technical language it promotes, particularities in defining certain concepts – all of these make it significantly different than the French Civil Code, which is the source of the new Romanian Civil Code, and confer it a special position within the great Romano-Germanic legal system.

COMPARATIVE ASPECTS OF MATRIMONIAL REGIMES IN THE NCC AND THE BGB

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Phillipe Malaurie considers the BGB is "a code for jurists"[2]. We underline, thus, the characterization of codification through conceptualization efforts, which are implicit in relation with this legislative procedure, and through sobriety, as the code must not be too "verbosely", because "the code is not the formal determination of a multiple number of laws, but it constitutes the spirit of the system and of totality" [3], and this must characterize any juridical work of great amplitude. On the other hand, in front of the crisis of the sources of law, the code responds to the need for legal certainty and accessibility to the legal norm. What is better than "a book which makes you know the law"?[4]

The distinctive element of this structure is the existence of a general part of the Code which enshrines all the principles which stand at the basis of regulating the specific relationships of civil law. The idea of inserting in the Code this kind of a general part, inspired by the method of the renowned pandectist Arnold Heisse, became popular, being used by several civil codes enacted in the 20th century.

These national codes, considered to form the first generation of civil codes (the French Civil Code, the German BGB, the Austrian, Italian or Spanish Civil Codes, as well as the codes inspired by them) had as main objective the unification of civil law on the national territory. The codes' function of unification indicates the significant role they had in the creation of national states[5]. The unity of law stabilizes social conscience, if not generally the citizens, by using juridical instruments. In the vision of jurists, the code becomes "a memorandum, symbol of national unity and independence" [6].

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[2] Ph. Malaurie, *L'utopie et le bicentenaire du Code civil*, Enjeux et valeurs d'un Code Civil Moderne, Les journées Maximilien-Caron, Université de Montréal, Faculté de Droit, (Montreal: Thémis, 1990), 6.

[3] B. Oppetit, *Essai sur la codification*, coll. "Droit, ethique, societe", (Paris: Presses Universitaires de France, 1998), 9.

[4] Le rapport public du Conseil d'État intitulé: *Sécurité juridique et complexité du droit*, Études et documents nr. 57, (Paris, 15 martie 2006).

[5] J. Basedow, *Du Code Napolen a la codification europeenne – 200 ans de codification a la lumiere de ses fonctions*, in Jean Philippe Dunand, Benedict Winiger, Le Code civil francais dans le droit europeen, Acte du colloque sur le bicentenaire du Code civil francais organise a Geneve, (Bruxelles: Bruylant, 2005), 312.

[6] *Ibidem*.

After Romania became a rule of law, through the acknowledgment of democratic principles, the necessity to reform the legal system appeared. Relationships specific to family law are regulated in Book II of the new Civil Code (NCC), which unifies the majority of civil law institutions in the same legislative work, following the monist philosophy and the principles characteristic to the great Romano-Germanic legal system. Within family law, the *autonomy of the will* principle governs the relationships between spouses, but also between spouses and third parties, the „liberalization of family law”[7] being thus promoted.

The possibility for spouses to freely administer the way in which the patrimonial life is organized within the couple is one of the major aspects of the applicability of this principle. The elimination of the compulsory community of property matrimonial regime, which limited the possibility of the spouses to manage their private property, and the regulation of a plurality of matrimonial regimes which spouses are free to chose from, depending on the particular situation of each family, prove that the legislator wished to adhere to the EU law norms, at least in the field we are analyzing.

From another perspective this "freedom" of the spouses is extremely limited at only three models / patterns, namel [8] : legal community regime, conventional community regime and separation of property regime.

For that matter, maintaining the Family Law Codes, after the transformations which took place in Russia and the Eastern European countries in 1990, is stochastic in these societies marked by transition, in which the old realities of the legal provisions are not sustainable anymore.

This short exposé of the factual reality showed that only the change of the political system and of the perception upon private property and the capitalist regime have led to the separation of Family Law and Civil Law; this could be an argument in favor of the enounced thesis, in the sense that it is not justified anymore, after the fall of

[7] L. Griffon, *Droits de famille et communauté de vie*, Coll. Doctorat et notariat, (Paris : LaMouette, 2002), 11.

[8] R. Albăstroiu, *La liberalisation du droit de la famille*, International Conference History, Culture, Citizenship in the European Union, 13-14 May 2013 (Pitesti: University of Pitești), 224-232.

communism, to separate the Family Law Code from the Civil Law Code, in order to completely dissociate family relationships from the idea of private property and capitalist society. The phrase "family law" is not used anymore to determine a distinct branch of law, but a juridical institution, as is the case with other institutions of civil law: the law of obligations, the law of contracts etc.

Regarding the similarities of the analyzed systems, we observe, after the short comparative approach on the matrimonial regimes under the regulation of the two civil codes, the presence of statutory matrimonial regimes and conventional regimes, which indicates that both systems are characterized by the freedom of will of the parties (the spouses) to chose, modify or change the regime which governs the patrimonial relationships between them and also with third parties. We also observed in both legislations the presence of a body of imperative provisions (in the new Civil code they are named "common dispositions" – or they are known in the legal literature as "imperative primary regime", while in the BGB they are known as "effects of marriage") applicable to patrimonial relationships of the spouses, regardless of the chosen matrimonial regime.

Regarding the distinctive elements of the analyzed systems, we recognize in the Romanian civil law the existence of a communitarian-type statutory regime – the community of property, while the German legal system opted for a separatist-type statutory regime – the community of accrued gains regime. The community of accrued gains regime has not been enlisted by the Romanian legislator among the conventional matrimonial regimes, because it was considered to be complicated, without traditional grounds in Romania, and not being capable to become of interest for the current Romanian society; even if, in the version of the civil code project of 2000, this regime was also proposed for regulation[9]. In fact, separation of property regime is transformed into a system of participation in acquisitions from the way it is regulated in art. 360 par. (2) NCC.

Besides the regulation of the statutory matrimonial regime, the legislator opted to regulate in each case a derogatory conventional regime – by concluding a matrimonial convention –, which is completed by the

[9] M. Avram, C. Nicolescu, *Regimuri matrimoniale* (Bucharest: Hamangiu, 2010), 303.

dispositions of the statutory regimes in each of the analyzed systems: the community of property regime in the new Romanian Civil code and the separation of accrued gains in the German civil code. Besides these regimes, we also underline the existence of a separatist conventional regime in Romanian law (the separation of property regime), and of another two communitarian-type regimes in German law: the community of property regime and the continued community of property together with the common descendents of the spouses.

CONCLUSIONS

Spouses can not form their own matrimonial regime by combining the three options provided in the new romanian Civil Code, as it happens, for example, in Belgium.

From this perspective, we may compare the marriage to a company that can take only the forms prescribed by law (SRL, SA, SNC etc.). Besides, the Romanian legislator tendency, and not only, is to incarcerate legal conduct of the subjects of law in predetermined patterns, in other words to limit as in a invisible vise the individual freedom.

Although it talks about „freedom" of spouses to contract, in reality things are not so, the Code giving to husbands only the possibility to choose a default model, of 3, limited of its turn by the primary imperative regime.

Do we believe that the freedom too sudden of spouses to build a matrimonial regime appropriate to their situation would have been too dangerous or too audacious ? Probably not, but it would certainly defeat the whole philosophy of the Romanian Civil Code.

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FROM THE EXCEPTION FOR THE NON-PERFORMANCE OF THE CONTRACT TO THE UNILATERAL ANTICIPATORY TERMINATION

Nora Andreea DAGHIE[1]

***Abstract**:*

The exception of non-performance of the contract may play an important role against the risk of non-performance, leading by itself to minimizing the prejudice and ultimately even to the termination of the contract.

The express recognition of an active role of the exception, and not just a simply passive role of coercion in order to execute the report, is justified by the verifiable reading of the provisions of the Civil Code and practical considerations which have also been taken into account by the foreign legal systems (French law, English law). This new aspect of the exception, means of implementation and obtaining unilateral termination, may find its basis in our legal system.

Nothing oppose to the finding of the active, anticipative exception of non-performance before the judge, by the other contractor. The exception of non-performance representing a defense at the first instance court, the burden of proof of imminent execution or the lack of unreasonable delay shall be incumbent on the co-contractor of the contracting party invoking the exception.

***Key-words**: the exception of non-performance of the contract, the unilateral anticipative termination, the risk of non-performance, an active role, the foreign legal systems.*

If, before the entry into force of the Civil Code of 2009, it seemed a utopia, now, with the express regulation of unilateral repudiation, the exception for the contract non-performance itself[2] can lead to this result. It can play an important role against the risk of failure, even against the failure announced before maturity.

We begin by noting that there are enough arguments of legal, practical and jurisprudential nature in favour of the admission of an exception allowing unilateral repudiation of the contract (which has the

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[2] Nora Andreea Daghie, „Theoretical and practical considerations on the exception of non-performance of contract", *The right* 1 (2013): 99-124.

effect of minimizing possible damage), but, at the same time, the classic obstacles that oppose the recognition of this effect of the exception for non-performance which only strengthens the limits thereof.

The main obstacle is related to the traditional definition of this legal institution that seems truly immutable: most authors consider that the exception of non-performance can only be exercised provisionally for the enforcement of the correlative obligation. This definition, however, is not devoid of vulnerabilities and we must admit that the physiognomy of the exception of non-performance, and, hence, its definition, necessarily evolve with society and its needs[3].

We do not intend by this approach (a re-appreciation of the foundation of exception of contract non-performance), to deny the overall validity of the classical conception, but rather we want to show that it can metamorphose.

The canonical adage *Frangenti fidem* did not allocate to the exception of non-performance exclusively the role of means of coercion for the execution of correlative obligation and neither did the decisions pronounced in practice in order to make known the exception set systematically a purely temporary role.

The temporary nature of the exception of non-performance could be retained, as the control of the ecclesiastical judge was common practice because of the generality of the sanction of non-performance of the synallagmatic contract and because of the progressive development of a theory of judicial termination. It is worth recalling in this context that the exception for non-performance and the termination evolved in parallel, without receiving the same favours from commentators of the old legal system[4].

To say that the exception of non-performance has the single purpose of performing the correlative obligation leads to a limitation of its effects and to providing an idealistic vision of the fulfilment of the

[3] Nora Andreea Daghie, „The mechanism of the exception of the contract non-performance - natural and effective means of active defense of the creditor-debtor in the synallagmatic contract", (paper will be presented at the International Conference Simplification - imperative to modernize and improve the quality of law, organized by the Romanian Academy – The "Acad. Andrei Radulescu " Institute for Legal Research, Bucharest, april 17, 2015).

[4] Catherine Malecki, *L'exception d'inexécution* (Paris: Librairie Générale de Droit et de Jurisprudence, 1999), 105.

obligations. We can imagine three assumptions, commonly found in practice, that might face the holder of the right to invoke the exception of non-performance of the contract: due to accumulated delays, the performance of the obligation can become impossible due to incompetence of the contracting party; also because of the delay in execution, it is possible that the performance of the obligation does not attract the same interest as at the time of the conclusion of the contract or obviously becomes unlikely[5].

We see, therefore, that in these assumptions, on the one hand, the performance of the correlative obligation is either impossible or irrelevant to the contract party which is the victim of the non-performance, and on the other hand, we discuss the specific effects of the non-performance of the reciprocal agreements.

As its initial purpose is to observe the order of performing the contract or the synallagmatic report, which other mechanism, save the exception, could better justify the assumptions of the unilateral termination which represent the immediate sanction for non-compliance with the execution order? It must be a mechanism inherent to the synallagmatic contract.

The practical advantage is justified by the ease of implementation of the mechanism of the exception of non-performance. Nothing can prevent the contract partner of the one invoking the exception, if they consider themselves a victim of an unfounded unilateral resolution, to refer the judge who will not miss the opportunity to exercise their power of sanction enforcement.

To recognise that the exception has the effect of a unilateral exception does not involve, therefore, a serious distortion of the classical notion.

The express recognition of an active role of the exception, and not simply a passive role of coercion in order to execute the report, is justified by the conjunction interpretation of art.1556 and 1270 par. (1) Civil Code and by practical considerations considered by the foreign legal systems.

The French legal literature has shown that, despite the quasi-unanimous reluctance regarding the recognition in favour of the exception of an active role, direct means of a unilateral resolution subject

[5] Malecki, *L'exception d'inexécution,* 106.

to a potential *a posteriori* judicial review, no objection has been raised against the recognition of the unilateral termination as the effect of the exception[6].

We consider that this new aspect of the exception, means of implementation and obtaining the unilateral termination, may find foundation in our legal system, too.

Since the exception sanctions a classic aspect of the contract: non-performance, all legal systems, naturally, treat this issue and propose remedies, in fact very close, but in terms of terminology, sometimes, very different.

We chose, for a superficial comparative look, the English law, also because it does not distinguish, in principle, between the simple refusal of execution and *"termination"*, which encourages us in suggesting the active role that we want to assign to the exception of non-performance of the contract.

The common law system governing the order of performing the obligations using various procedures including, the quite complex one of the „condition". We specify that the term "condition" of the English law can hardly be considered a possible equivalent of the word condition in our legal system[7]. We shall find that the Common Law system presents solutions sometimes more complex but often more practical than our legal system. The complexity is mainly generated by the diversity of so-called "conditions".

Our intention is to show, in a purely comparative approach, that the needs to be answered at present by the contract law have changed and requires a mechanism that can be adapted to the new requirements. We designed this mechanism as having the features of a pre emptive active exception of non-performance.

We might find in our law the place for an anticipated report regarding the debts, before their due date. It should be noted from the beginning that according to art. 1414 the first part of the Civil Code, which is due with a deadline may not be required before reaching
it. This legal provision does not preclude the possibility for the creditor, ahead of schedule, to take action, especially if certain conditions are met, in order to terminate the contractual relationship on their own. It should

[6] Malecki, *L'exception d'inexécution*, 104-111.
[7] Pavel Perju, *The contract* (Bucharest: C.H. Beck, 2010), 79-80.

be noted that there are two different things discussed: to request the execution and terminate the contract.

The idea that old Romanian civil law of contracts was centered, in order to maintain absolutely, under any circumstances, the contractual link or the enforcement, does not fully meet the requirements of today. The judge is certainly the guardian for maintaining the contractual relationship, but the priority recognized for it is not intangible, though.

We can also add that a strict literal interpretation of the provisions of the Civil Code on the termination does not bring any information regarding the temporal aspect, namely it does not say that the termination shall not be required before it reaches the term. On the contrary, according to art.1523 par.(2) lett. c) of the Civil Code., the debtor is in default if "they expressed, without any doubt, to the creditor their intention not to perform their obligation or when, being an obligation of successive performance, they refuse or neglect to perform their obligation repeatedly ". In these circumstances, the debtor's obligations become due before the end of the standstill period and therefore imply no obligation to wait for the engagement failure if the future becomes clearer. If the execution of one of the parties is likely to be improbable (e.g. cases that result in forfeiture of the benefit of the debtor standstill period - art. 1417 Civil Code.), are not we actually talking about non-performance? Could this assumption be a prelude of the anticipated termination[8]?

Based on these considerations, we shall try to define the active, anticipatory exception, not before making a summary, sometimes descriptive, according to the principle-oriented British legal system – *Anticipatory breach*[9]. We shall find that the two legal systems are not as different as it may seem at first sight.

Thus, if, before reaching the time limit for execution, it is undeniable that the party which is due to execute shall not want to perform its obligation when it is time for the execution, the co-contractor will be entitled to consider this attitude as an *Anticipatory breach*, if the condition of seriousness is also met. However, the expression remains a source of confusion and controversy. One has to analyse the effects of a

[8] Ionuț-Florin Popa, „The civil contract" in *Elementary Treaty of Civil Law. Obligations*, ed. Ionuț-Florin Popa et. al. (Bucharest: Universul Juridic, 2012), 298-300.
[9] Malecki, *L'exception d'inexécution*, 122-123.

possible non-performance which allows the party which is to become a victim of the non-performance to terminate a contract if the party which is the victim of a *anticipatory breach* decided to accept such default, qualified, therefore, as *repudiation*. Since the matter is complex we appreciate a schematic presentation of the mechanism to be quite appropriate.

An example will allow us to understand better the interest for using this mechanism. If A and B are in a contract and if A's obligation is dependent on that of B, B must execute before A. In this context, the legal system governed by the *Anticipatory breach* principle, if it is certain that B will not perform the obligation because, for example, they have communicated their intention to A, A will be entitled to terminate the contract and recover damages. It is a form of anticipated unilateral termination. Thus, A is not required to wait for the date B's claim becomes returnable. There is, on the one hand, an autonomy in A's appreciation of the non-performance which is due to come from their contractual partner and, therefore, a risk management deciding whether A decides unfairly to get out ("escape") of the contractual relationship; on the other hand, this saves time.

Ideologists who analysed the principle of the *Anticipatory breach* clearly highlights some of its benefits due to an active management of the temporal aspect; here is an example
of applying the exception which could correspond to this technique. Article 1722 of the Civil Code allows the buyer "who is aware of the existence of a cause of eviction (...) to suspend the payment of the price until the end of the disorder or until the seller provides an appropriate guarantee."[10]. We believe that this is not something else than a "form" of

[10] For example: "The Court found that the appellant-defendant did not fulfill her obligation to pay the price, the non-performance not being guilty, the party rightly citing the incidence of art. 1364 Civil Code. 1864. In the order no. 5126 of 11 September 2001, the Court of Appeal Craiova, Civil Division, revealed that the building in question was claimed, so that the appellant-defendant was entitled to suspend payment of the price. Since the appellant has paid a significant part of the price of the asset in question, the Court held that failure to pay the remaining cost is not significant enough to attract termination of the contract. As a result, the respondent-applicant is entitled only to request, by way of a separate action, that the appellant-defendant should be obliged to execute the contract "– Luminița Cristina Stoica, *The ineffectiveness of civil legal act. Court practice* (Bucharest: Hamangiu Publishing, 2009), 34-35.

what the British law calls *the anticipatory breach*, because the buyer expects a default that is not yet actually noticed. Indeed, when the execution has not yet arrived, the buyer is afraid of a non-performance which may not yet have occurred or which perhaps will not happen at all.

At first glance, the exception of non-performance is incompatible with the case when sanctioning of the failure is just predictable. There could be two obstacles. On the one hand, the exception of non-performance may be invoked only by the holder of a payable debt, so, by definition they must wait the due date: any non-performance prior the maturity date cannot, in principle, be invoked. The contracting party may, in fact, object: "I'm ready when maturity arrives". On the other hand, Art. 1414 the first title of the Civil Code expressly provides that "what is owed in term cannot be expected before it". However, we shall demonstrate that the two obstacles can be overcome. First, the concept of maturity date is a proof, but this is also not untouchable.

According to a French author, who analysed the similarity and also the distinction of the concept of term, the exception of the active anticipatory non-performance does not directly contradict this notion[11]. And yet, how can we explain the consecration, in certain articles of the Civil Code, of such predictable non-performance? We shall see that this condition of maturity date, as I said before, is not intangible and this is demonstrated even in certain provisions of the Civil Code which militates for recognizing specific issues of the *anticipatory breach* principle for the non-performance exception, supported to some extent by certain decisions of judicial practice.

The peculiarity is that the items are considered, at the same time, as expressing the guiding principles of the exception of non-performance and as exceptions justified in terms of chargeability: the validity of these exceptions, aided by a new Anglo-Saxon incursion, gives us the solid foundation of a new general construction for the institution of exception for non-performance, due to the discovery of yet unknown aspect thereof.

These exceptions are found, for example, in the articles devoted to sales contract. The remark is not without interest since the sale, a synallagmatic contract par excellence, is a fertile ground for excluding the non-performance. Article 1694 of the Civil Code authorises, for example, the seller not to surrender in the following cases: "if the

[11] Malecki, *L'exception d'inexécution*, 124.

obligation to pay the price is affected by a term and after the sale, the buyer became insolvent or the warranties for the seller diminished, the seller may withhold performance of the obligation of delivery as long as the buyer does not give enough warranties that they will pay the price on time". We note that this article regulates the means to answer an almost certain non-performance of some service, although it is still not due: this is the purest and most effective illustration of the *Anticipatory breach* principle.

We must however admit that this article only deals with the refusal of delivery, as it does not state expressly the faculty of the unilateral termination of the sale contract. However, the debtor's conduct can support a definitive refusal. Consequently, we are allowed to assume that this refusal may result in a unilateral termination.

We demonstrated that the exception for non-performance can reconcile with the principle of the *Anticipatory breach*. Ultimately, it is possible to recognize in our civil code the elements of an exception for anticipatory non-performance[12], but it is necessary to insert a regulation of the precise conditions in which it can be exercised.

So it is still necessary to consider, from a technical perspective, how is it possible to ascribe generally this active role to the exception for non-performance. It is the necessary solution to compromise.

This mechanism should be able to permit the operation of a unilateral anticipatory termination when the conditions of the Anticipatory breach principle are met, namely the immediacy of non-performance, as illustrated more specifically in art. 1694 and 1722 of the Civil Code.

Nothing precludes the denial of the active anticipatory exception for non-performance in front of the judge by the other contractor. The exception for non-performance representing a defense in first instance, the burden of proof of imminent execution or of the lack of unreasonable delay shall be of the contracting party invoking the exception. Therefore, most of the times, the active anticipatory exception shall be subject to an *a posteriory* judicial review and we get away so easily from a means of purely private justice.

It is the manner in which, without fully implement the *Anticipatory breach* technique in our legal system, we noticed that the

[12] Popa, „The civil contract", 275-276.

latter may, through the unique mechanism of exception for non-performance, integrate and generalize a specific feature: the control and management from the party who can invoke the exception for non-performance, of the situations in which the non-performance is predictable.

We have seen that the principle of *Anticipatory breach* allows only to one party to appreciate the seriousness of the non-performance by their contractual partners and consider it a repudiation. The term repudiation is liable to have several meanings but overall we admit that it designates any breach of the contract that could justify the other party to wish to terminate the contract. The difficulty of implementing the principle of *Anticipatory breach* results from the appreciation of what the English call "*absence of readiness or willingness*" - lack of promptness and willingness to perform, of either party, an assessment which is made by interpreting words or conduct in general ("*words or conduct*"), which may be a source of uncertainty, also in terms of burden of proof[13]. It demonstrates, however, that it is necessary to take into account the contractual partner's behavior and that the exception for non-performance is a perfect way to achieve this goal.

Certainly, it should be noted that repudiation alone can not break the contractual relationship. The victim of the repudiation must choose whether to accept the repudiation or not and only after expressing the option can the contract be terminated. It is also necessary to have the choice communicated. The effect of the acceptance of repudiation determines breaking the contractual relationship but this will work only for the future. As for the refusal to accept, *per a contrario*, it means basically that the contract shall be maintained. It is admited even that the effects of the *Anticipatory breach* principle applies to contracts executed imperfectly and, in this respect, we can say that it is close to the exception for non-performance.

However, one should note the difference between the English and the Romanian legal systems: the former exhibits in a different way the imperfect or partial execution ("partial performance") and the improper performance ("defective performance"), even if the exception for non-performance treats those, in principle, without distinguishing between

[13] Malecki, *L'exception d'inexécution*, 128.

them. And finally, one last essential difference between the two legal systems is that,while the advantage of using the exception for non-performance results especially in terms of burden of proof, the repudiation must be proved by the party who complains about the risk of non-performance. This proof should lead to "words or conduct" or to the impossibility of execution.

In our opinion, to admit the refusal of execution is actually an implicit authorization of the right to terminate the contract, since a refusal of execution can often be assimilated more to the will to terminate the contract than to the will to obtain the execution of a correlative obligation. A simple refusal of execution has no coercive power if it does not, after a while, allow the unequivocal manifestation of the refusal to execute of the contractual partner, a means of coercion with definitive effect.

CONCLUSION

In conclusion, the termination and the exception for non-performance both sanction the non-performance of the synallagmatic contract starting from the same foundation - the principle of interdependence of the mutual obligations. The whole mystery of the origin of the exception for non-performance, as shown by Cassin, results from the fact that it was not used under these terms. Moreover, we know that when a mechanism is not expressly mentioned, its name is doomed to be quickly forgotten, but not its governing principle. And in this case, the power of the exception for non-performance resides precisely in the permanence of its principle.

Finally, taking into account what was showen above, we think it is not without interest to note that the international trade law provides the suspension of one’s obligations in anticipation of non-performance. Article 71 of the Vienna Convention on the International Sale of Goods of 1980 entitles the contract party which foresees the non-execution of the undue obligation of the other party to refuse to execute their mutual obligations, even if it is mature. The text lists the circumstances under which such anticipation can occur, such as: serious deficiencies in the ability to perform the contract and in the solvency test (natural disasters, war, embargo, total default etc.); how the other side is preparing to execute its contractual obligations (not using raw material in compliance with the contractual provisions, not doing their best to obtain the

necessary licenses for manufacturing the products to be delivered etc.)[14]. In addition, as reflected in art. 72 CVIM, it is partially assimilated to the essential lack of execution, the so-called "anticipation of non-performance" (*Anticipatory breach*), and, according to art. 72.1 CVIM, a party may terminate the contract in case it becomes clear that the other party will commit a fundamental breach of contract[15].

A similar regulation exists in art. 7.3.4. of the UNIDROIT Principles which states that: "If a party believes, reasonably, that there will be a fundamental non-performance, it can require adequate guarantees for proper performance of the contract and may, in the meantime, suspend the execution of their duties. If these guarantees are not provided within a reasonable time, the requesting party may terminate the contractual relationship." This provision is intended to protect the interests of a contracting party which has reasonable grounds to believe that the other party will not perform its mature obligations.

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[14] In connection with the exception of anticipated non-performance, see Ionuț-Florin Popa, „Remedies of non-performance of the sale-purchase contract, in terms of the Vienna Convention on the International Sale of Goods (I)", *RRDP* 2 (2008): 240-242.

[15] To define this condition-concept – the fundamental breach of contract – we should consider art. 25 CVIM, according to which a breach of contract committed by one of the parties is essential/fundamental when the other party causes such damage that substantially removes what it was entitled to expect from the contract, unless the part that has not executed its obligation did not foresee, or a reasonable person of the same kind and being in the same circumstances did not foresee, such a result. The concept is built on the two sides of what is called *case* in the continental law systems and *cosideration* in the *common law* systems: the legitimate expectation and the reasonable forecast.

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CONTRACT OF MANDATE IN THE NEW CIVIL CODE

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Abstract:

Representation institution has been and will be an important instrument in terms of ability to substitute and to be present in several places at the same time. The using of the contract was found mainly in commercial matter, in this area being the most useful and here perfecting to the form that we have today in the new Civil Code. In both forms, the mandate can be with representation and without representation, as the mandatory can sign legal documents on behalf and account of his reprezentative or in his own behalf and on account of the principal.

One of the applications of the contract of mandate is found in corporate matter, in which case the company administrator concludes such an agreement with the company by which provides its management.

Key words: *mandate, reprezentation, company, administrator, management, simulation, people interposing.*

I. INTRODUCTORY NOTIONS

The mandate contract is governed by the provisions of art. 2009-2042 Civil Code, in current regulation, and art. 1532-1559 Civil Code 1864 respectively in the old regulation.

The mandate contract is one of the most important legal instruments constructed and adapted to the everyday needs of both professionals and natural persons, imagined for the gratification and fulfillment of the need to be present at the completion of a legal operation, even in the absence of that which effectively committed[2].

The term of mandate, according to the new regulations, is not very different from the previous view of the legistrator, actually appreciating that the mandate is a contract whereby one party named principal commits to conclude one or more legal acts on behalf of the

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[2] For particularizations on the historical evolution of the mandate contract, see Cristina Nistorescu, *Representation and mandate in private law* (Bucharest: Ed. All Beck, 2004), 3 et seq.

other party named mandatory[3]. What differs from the wording of the definition of art. 2009 Civil Code to art. 1532 Civil Code1864 is the fact that the legistrator renounced to the presumption of gratuitousness of the mandate contract, contained even in the contract definition, and chose to maintain this presumption, but contained in one of the classifications of mandate contract. This solution it is explained in the previous regulation because I had the dualistic approach - civil law and commercial law - which actually turned into a monist view on private law.

Naturally, we cannot agree with the opinions expressed in that it would disappear along with the issuance of the new Civil Code, Commercial law, as long as social relationship that determine and explain this branch of law tend to exist. I appreciate that these currents of opinion are unfounded, based on a superficial analysis of the branches of private law system in conjunction with an ignorance of reality and specificity of some branches of law.

In the configuration of the Civil Code, the legislator has considered that it requires a classification of the mandate contract based on the remuneration of the mandatory, being able to be in the presence of a gratuitous mandate, if the mandatory is not paied for his activities, or onerous mandate, if the mandatory receives a remuneration.

In the Article content the legislator shows that the mandate is presumed to be gratuitous if it is concluded between two natural persons, and onerous if it is given to professional activities, the parties being able to derogate expressly from these provisions.

As the principal may or may not be represented, the mandate contract is classified by Art. 2011 Civil Code as being with or without representation.

Representation institution was not provided with an uniform regulation but it was explained only in some of its applications, although its role is fundamental, especially in the matter of relationship between professionals or regarding the enterprise[4].

The utility of the representation cannot be disputed, it allowing a person to be present simultaneously in several places, which facilitates

[3] See for developments Claudia Roşu, *Mandate contract in the internal private law* (Bucharest: C.H. Beck, 2008), 14 et seq.

[4] See also Stanciu D. Cărpenaru, *Treaty of Romanian Commercial Law*, fourth ed. (Bucharest: Universul Juridic, 2014), 535.

the civil circuit expediency and efficiency. Without exhaustively treat all matters relating to the mandate contract, I will point out a few items on which I believe that the attention of the practitioner can stop and which, I appreciate, represent a particular importance.

II. ABOUT MANDATE BY INTERPOSITION OF PERSONS

The mandate contract without representation or, as it is called, *pret-nom* convention is the legal act in which strength the mandatory works on behalf of the principal, but in his own name, not represent the principal; so his quality of mandatory is unknown to the third contracting party with whom concludes the legal document that is the subject of the mandate (in other words, in this case the mandate is hidden both for the public and co-contracting party). The mandatory's position in this legal arrangement made him to be called "lender of name" or *prêt-nom*[5].

In terms of structure, the mandate contract without representation resembles to the interposition of people, both being forms of simulation, but the two legal categories are distinct. The differentiation criterion is the participation of the third contracting party to the simulator agreement: if the simulation existence is known by all three characters, if the third contracting party knows that he concludes the public legal act with an interposed and secretly conclude the real legal act with the real acquirer of the right, then we can talk about interposition of persons. If, however, the third contracting party does not know the quality of "straw man" of the one with whom he concludes, but - contrary - he is confident that this is the true "business owner", then the interagent is a *pret-nom* (lender of name) and he worked under a mandate contract without representation (or contract of *prêt-nom*), which is nothing but the interposition of persons.

In both cases the mechanism is that of the interposition of persons, only that in the assumption of mandate contract without representation the interposition is real - as the interagent acquires in his patrimony the right from the third contracting party and has the obligation, under the mandate contract without reprsentation, to transmit it to his principal, remained occult - when in the case of total connivance

[5] See Flavius A. Baias, *Simulation*. *Doctrine and jurisprudence study* (Bucharest: Rosetti, 2003), 117.

the interposition is fictitious – as the right is transmitted directly from the third contracting party to the beneficiary, without going through the interagent's patrimony.

So, the real mechanism of name lending only works in case of the fictitious interposition (the usually qualified as the interposition of persons) and not in thatof real interposition (traditionally called in the legal French and Romanian literature, *prêt-nom*). This is because the interagent *"does nothing but lend his name: nomen commodat"*.

Particularly relevance represents the manner in which the right gets in the patrimony of the real "business owner": directly - in case of the interposition of persons, because the document (true, occult) is concluded between the third contracting party and the hidden beneficiary; indirectly - when it concludes a contract of *prêt-nom*, through occult mandatory who must submit to his principal what he received from the third contracting party.

In this situation, not having the quality of representative, for the assumption is of the mandate without representation, the mandatory acts in his own name and for his principal, remained hidden, to acquire in his own patrimony the right in question, it is always necessary the conclusion of a new legal document in this respect between mandatory and principal.

Although simulation is the synthesis of the action of two important ideas of the civil law - the principle of freedom of will and the theory of appearance - both of which must succumb to an imperative which governs the conclusion of all legal acts: the observance of the law, public order and morality. To this imperative it gives expression art. 5 and art. 968 of the Civil Code 1864 and art. 11 and art. 1236 Civil Code, and it must be respected no matter whether the legal document concluded has an independent existence or is part of a simulation.

Simulation which aims the violation of law, public order or morality rules is unlawful and can only draw nullity sanction.

When it appeal to the simulation to defraud the law, the purpose of the simulation and thus the mediated cause of simulator agreement, are the creation of an appearance to conceal the violation of the law and to create the illusion of the observance of it: the secret act is contrary to the law, while the public act is perfect legal. As such a cause can only be unlawful, within the meaning of art. 968 Civil Code 1864 and art. 1236 Civil Code, the sanction that it is imposed is the absolute nullity.

A document which, if it would be openly concluded, would have been voidable, can not become valid simply because it was concluded under the guise of an apparent document. Therefore, to be valid, the secret document must meet all the validity requirements requested by law, both for any legal document generally, stipulated by art. 948 Civil Code 1864 and art. 1179 Civil Code, and those special required by law for the type of respective document.

Being, above all, a legal operation, the secret document, by which it agrees on interposition of person, must be the expression of an unvitiated consent, to have a lawful object and a case, under the rules of social life, to be committed by persons with civil capacity of exercise corresponding to the type of respective legal document etc.

The fact that the parties have created an elusory legal situation does not eliminate the application of the substantive rules governing the real legal document.

In short, the interposition of person is not nullifying by itself, but it does not confer any privilege to the parties. Ultimately, the parties are not exonerated, at the conclusion of the secret document, from the fulfillment of the conditions which they should have been complied with if the document would have been committed openly.

The matter to be discussed here would be also the legality of the operation of "name lending", characterstic of the mandate contract by interposition of persons, motivated by the unlawful object of this contract, namely the alienation of an attribute identifying the person – the name.

According to the definitions doctrinal[6] given, the name of the natural person represents a means of her identification, an element that places the person in the universe, representing a string of words designating an individual.

The unanimous opinion is in the sense that this attribute of person's identification is compulsory for living in society, but, even

[6] Gabriel Boroi, *Civil Law. The general part. Persons*, 1st to 4th ed. revised and enlarged (Bucharest: Hamangiu, 2010), 351 et seq.; Vasile Popa, *Civil Law. The general part. Persons*, 2nd ed. (Bucharest: C.H. Beck, 2006), 392 et seq.; Carmen Ungureanu, *Manual of Civil Law. The general part. Persons* (Bucharest: Hamangiu, 2011), 330 et seq.; Eugen Chelaru, *Civil Law. Persons*, 3rd ed. (Bucharest: C.H. Beck, 2012), 79 et seq.; Ovidiu Ungureanu and Călina Jugastru, *Civil Law. Persons*,, 2nd ed., revised (Bucharest: Hamangiu, 2007), 138 et seq.

more, is the human right to be individualized in the family and in society by those words intended to have the identification meaning.

Also, one of the legal character of the name, among others, is that of being inalienable. The name inalienability represents that characteristic of it which means that the natural person may not renounce to the name and cannot alienate it in any way. This means that no matter how much he would like, the person cannot "grant", "sell", "rent" or "lend" the name he bears.

We can compare this name property to its absence in the civil circuit, which determines the impossibility of its transaction in any form.

So, being in the presence of the impossibility of transmission of the natural person's name, in whatever form, it results that absolute nullity of the mandate contract is more than obvious, this one having an unlawful object, which cannot be the object of a transaction and of course which is detrimental to public order.

III. ABOUT THE COMPANY'S ADMINISTRATOR MANDATE GOVERNED BY LAW NO. 31/1990

In the doctrine[7] the issue of legal nature of the relationship between the society and the administrator is presented differently.

The classical view claimed the qualification of these legal relationship of the company with the administrator as emanating from a

[7] Stanciu D. Cărpenaru, *Romanian Commercial Law*, 8th ed. (Bucharest: Universul Juridic, 2008), 238-240 (further quoted *Course VIII)*; Ion L. Georgescu, *Romanian Commercial Law*, vol. II (Bucharest: All Beck Restitutio, 2002), 397-406; Gheorghe Piperea, *Trading companies*, *Capital market*. *Communitary Acquis* (Bucharest: All Beck, 2005), 124-125 (further quoted *Companies);* Nicoleta Dominte, *Organization and operation of companies* (Bucharest: Ed. C.H. Beck, 2008), 241-251; Cristian Gheorghe, *Trade companies. Will of associates and social will* (Bucharest: All Beck), 2003, pp. 94-99 (further quoted *Will*); Gheorghe Piperea, *Obligations and liabilities of companies administrators* (Bucharest: All Beck, 1998), 60-67 (further quoted *Liability*); Gheorghe Piperea, *Commercial Law*, vol. I (Bucharest: All Beck, 2008), 201-204 (further quoted *Course*); Claudia Roşu, "Legal nature of the relationship between administrator and trade company," Commercial Law Review 80 (4/2001); Claudia Roşu, "Civil legal nature of the position of trade companies administrators in French law," Commercial Law Review 162 et seq. (10/2002); Claudia Roşu, *Mandate contracts and their effects in civil and commercial law* (Bucharest: Lumina Lex, 2003), 216 et seq.

mandate contract of common law[8]. This concept was based on the provisions of the Romanian Commercial Code, which expressed in art. 122 and 123[9], that the public company is managed by one or more temporary mandatories and they are responsible for the execution of their mandate.

This classical concept had its origins in the French provisions of the Commercial Code (Art. 31) and the Law of July 24, 1867 (art. 22), which, identically, provided the possibility of public company management by one or more temporary[10] mandatories.

The modern doctrine[11], in one of the opinions expressed, considered that the idea of mandate is absorbed by the broader concept of representation, taking into account that the administrator position is marked by the exigencies of public order. As such, the legal nature of the mandate would be with a legal content, resembling to the tutor[12].

According to another opinion inspired by the organicist current, it considered that the administrator is an organ through which the company carries out its activity, extracting its power from the law and not from the contract with the company or with the associates[13]. To this opinion it opposes the contractualism which regards the position of administrator as a simple mandatory of the company, revocable *ad nutum*[14].

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[8] D.D. Gerota *Course of trade companies* (Bucharest: Fundația Culturală Regele Mihai I, 1928), 85-86.

[9] Art. 122 and 123 C.com were repealed by art. 287 of Law no. 31/1990.

[10] Philippe Merle, *Droit commercial. Sociétés comerciales*, 11 édition (Paris: Ed. Dalloz, 2007), 412-413. Innovations were made in French law by the Law of July 24, 1966 law that gave the possibility to choose between the classic management company (board of directors and a chairman) and the new system, inspired by German law, directorship and board supervision.

[11] Opinions found in Cărpenaru, *Course VIII*, 239 and Georgescu, *Commercial Law*, vol. II, 397.

[12] Georgescu, *Commercial Law*, vol. II, 397.

[13] Sorin David and Flavius A. Baias, "Civil liability of the trade company administrator," *Dreptul* 13 et seq. (8/1992); Emanoil Munteanu, "Some aspects of the legal status of Company Directors (II)," Commercial Law Review 76-82 (4/1997). In this connection manager is not considered as a subject of law distinct from the company, but is an integral part of the company acting under the powers conferred by law.

[14] Georgescu, *Commercial Law*, vol. II, 399; Stanciu D. Cărpenaru, "Companies administration in Law regulation no. 31/1990," Commercial Law Review 33 (2/1993); Octavian Căpăţână, "General characteristics of trade companies," *Dreptul* 14 (9-

Another opinion[15], in the classification of the relationship between the administrator and the company starts from the fact that the administrator performs a permanent and remunerated activity for the company, thus considering that the legal relationship between the administrator and the company is a contract of employment. However, the weight of administrator position is given by the legal acts and not by the material acts as in the case of the employment contract[16].

In the qualification of legal relationships between the administrator and company it must start from the provisions of Law no. 31/1990, which in art. 72 disposes: "*The obligations and liabilities of the administrators shall be governed by the provisions relating to the mandate and those specifically provided in this Law"*.

Interpretation of art. 72 can not be other than the qualification of legal relationships between the administrator and the company as being mandate relationships. Of course it can not be merely about a commercial mandate and not civil[17], as part in the mandate contract is a

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12/1990); Commercial Code Annotated (Craiova: Tribuna Craiova, 1994), 170, note 2; Michel Juglart and Benjamin Ippolito, *Les sociétés commerciales. Cours de droit commercial*, 2e volume, 10th Edition (Paris: Montchrestien, 1999), 167-170. Opponents of the organicist theory claim that the administrator can not be organ of the company since he does not contribute to the creation of corporate intent, but its enforcement. In this regard, see also Gheorghe, *Will*, 95; Georgescu, *Commercial Law*, vol. II, 397, 408-411.

[15] Brânduşa Ştefănescu and Ion T. Ştefănescu, "Correlation between the liability of administrators - employees under Law no. 31/1990 and liability under the Law no. 53/2003 - Labour Code," *Dreptul* 68 (2/2006); Ştefan Beligrădeanu, "New legal status of economic leaders whose capital belongs wholly or majority to the state and to a territorial administrative unit," *Dreptul* 3 (8/2001).

[16] Cărpenaru, *Course VIII*, 239; Stanciu D. Cărpenaru et al., *Companies Law. Comment on articles*, 4th ed. (Bucharest: C.H. Beck, 2009), 234-235 (further quoted LSC4). It is true that the basis of the mandate entrusted to the administrator may have a different base, being able to graft on the quality of associate or starting from an employment contract concluded between the company and administrator, when he has not the quality of associate, in the present situation the employment contract will be suspended pursuant to art. 1371 par. (3) of Law no. 31/1990.

[17] Stanciu D. Cărpenaru, "Companies administration in Law regulating no. 31/1990," Commercial Law Review 33 (2/1993); Căpăţână, "Trade companies," 14. These opinions were related to the legislations previous to the new Civil Code, but the principles can be applied now.

company[18]. In the previous regulation the subject of the commercial mandate was regulated in the Commercial Code, where, according to art. 374 para. (1) C.com., it was provided: *"The commercial mandate has as object the transaction of commercial business on account and behalf of the mandate"*, which means that the administrator will conclude, will make legal proceedings and will perform material operations on account and behalf of the company[19]. The current provisions, namely art. 2009 et seq. Civil Code, does not make a distinction between the civil and commercial mandate contract. However, from the wording of the text of art. 2010 Civil Code is inferred the existence of this classification, considering that the mandate given for acts of exercise a professional activity is presumed to be onerous.

The mandate of the ordinary administrator it is a professional commercial mandate, this one having responsibilities to manage the businesses of the company[20].

CONCLUSIONS

Without exhaust all subjects which the mandate contract can suscitate, I appreciate that the two issues addressed on companies and mandate by interposition of persons represents current and omnipresent subjects in the sphere of legal relationships, which open a new perspective on the future regulation of the new Civil Code, although many principles and rules have been preserved from the old regulation, but also due to the reproduction of some provisions in the matter of

[18] According to the previous regulation, art. 56 C.com.: *"If a document is commercial only for one party, all contractors are subject, as regards this act, to the commercial law, except for the provisions relating to individual, even to the traders and the cases where such law provides otherwise"* . The mandate is also commercial due to the specific tasks of the administrator to manage the company's businesses - Gheorghe Piperea, *Companies*, 125. Naturally we can no longer speak of a civil and commercial mandate, in the current regulation, being able to make referrence to a professional mandate and one unprofessional.

[19] Gheorghe Piperea, *Companies*, 125; Commercial business transactions means the accomplishment of production activities, commercial or services. These are not only legal documents but also legal facts and material operations, as the legislator wanted to conform to the commercial law not only the legal relationships emanating from legal acts but also the legal relationships resulting from legal facts - Stanciu Cărpenaru, *Treaty of Romanian commercial law* (Bucharest: Universul Juridic, 2009), 33-34.

[20] Gheorghe Piperea, *Companies*, 125.

representation which we mainly found in the field of relationships between traders, currently between professionals.

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SHORT CONSIDERATIONS REGARDING THE ROMANIAN LAND REGISTRATION PROCEDURE ENSURING THE INFORMATION FUNCTION OF THE LAND REGISTRATION TROUGH LAND REGISTRATION PROCEDURE

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Abstract:

This paper aims to emphasize the importance of land registration procedure in obtaining the above mentioned objectives and in this respect we understand to analyze the mandatory stages within the land registration procedure and also the authorities involved and their responsibilities. We consider the European evolutions in this matter as having a great importance and that their impact at national level can no longer be neglected.

Currently, the European developments and the globalization mark every aspect of national regulations and the land registration matter makes no exception because we can easily observe an increase demand of cross boarder operations. Thus, this increase in cross-border operations demands an easy access to the information of the national land administrations.

Key words: *land registration, procedure, European standards, cross-boarder operations*

INTRODUCTION

The importance of land registration is determined by the need of knowing the legal status of real estate, ensuring in this way the compliance with the legal certainty principle with regard to the real rights circulation, from their birth to their extinction.

Thus, through land registration are followed several objectives, among which we mention: to ensure the certainty of real estate rights establishment and transmission; to ensure the protection of the persons interested in acquiring real estate rights; to establish a legal, economic

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and technical inventory of all real estates; to establish a clear evidence of the tax liabilities[2].

Romania, as Member State of the European Union, is constantly trying to improve its legislation in the field of land registration and respects the European efforts concerning the harmonisation of Member States' legislations in order to facilitate the free movement of persons, capital and goods and to make the economy of the Union as competitive as possible[3].

I. The Romanian authorities with responsibilities in the land registration procedure

The object of land registration is the registration in the land book of the real estate rights or of other personal rights, acts, deeds or legal relations concerning the real estate.

The purpose of land registration is to allow the creation, transfer, modification or extinction of the tabular rights or, where appropriate, to ensure the enforceability against third parties or only to inform them about the existence of other rights relating to real estates property or to acts, deeds or legal relations in connection with the real estates registered in the land book.

In order to follow the object and the purpose of land registration, the Romanian legislator created the authorities that have as their main responsibilities the land registration.

I.1.The National Agency for Cadastre and Land Registration and its subordinated institutions organization

The National Agency for Cadastre and Land Registration[4] (hereinafter referred to as the Agency), is an institution of central public administration, with legal personality, the unique authority in the field of cadastre, land registration, Geodesy and cartography.

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[2] G. Boroi, M-M Pivniceru, T.V. Radulescu, C.A. Anghelescu, *Drept civil. Drepturile reale principale*, (Bucharest: Hamangiu, 2010), 184.

[3] M. Ionescu, 'Principiile de baza ale publicitatii imobiliare si ale noului sistem de publicitate adoptat prin Legea nr. 7/1996 ' , in *Dreptul*, 6 (1997): 38.

[4] The Agency operates in accordance with the Government Decision no. 1288 regarding the Regulation of organisation and functioning of the National Agency for Cadastre and Land Registration from 18/12/2012, published in the O.M. no. 894/28.12.2012.

The Agency is organized and operates under the coordination of the Government and of the Prime Minister.

Under the Agency operates 42 offices of cadastre and land registration, organized in each district and in Bucharest (hereinafter referred to as the territorial offices), and the National Centre for Cartography, as public institutions with legal personality.

The Agency carries out the following functions[5]: a) strategic planning; b) regulatory and endorsement; c) control; d) representation; e) administration; f) coordination.

Thus, in carrying out its functions the Agency has as main responsibilities the following: develops strategies for its areas of activity; elaborates the preparation and training strategies in its areas of activity; elaborates the national and institutional normative framework for its areas of activity; initiates, develops and endorses, as applicable, normative acts drafts and international agreements in its areas of activity and related to it, in compliance with the legal regulations in force; controls the subordinated institutions; controls the activity of those authorised to carry out specialized works, in accordance with the regulations in its areas of activity; controls the execution of cadastral works, mapping, surveying, geodesy, photogrammetry and remote sensing at the level of the entire country; applies the penalties prescribed by law according to its competence; provides, on behalf of the Romanian Government, representation internally and internationally in its areas of activity; represents the interests of the State in domestic and international professional organizations with similar activity or incident to the Agency's fields of activity, in accordance with the agreements and other arrangements established for this purpose; coordinates and controls the execution of cadastre and ensures the registration of real estate in the cadastral register of land registration throughout the country; ensures, in accordance with the law, the execution, expanding, upgrading and maintaining in use the national geodetic network; organizes and manages the national Geodesy and cartography fund; organizes, manages and

[5] See art. 5 of the Government Decision no. 1288 regarding the Regulation of organisation and functioning of the National Agency for Cadastre and Land Registration from 18/12/2012.

maintains the database of the integrated system of cadastre and land book; constructs, maintains and operates the national electronic register of street nomenclatures; carries out and maintains the electronic register of the boundaries of administrative-territorial units; receives the cadastral works; approves the documentation concerning setting aside the lands of the agricultural circuit; approves, within the limits of the competences in its fields of activity, where appropriate, the work and the technical specifications relating to informational systems specific to the ministries` areas of activity accomplished by other public administration institutions; authorizes natural and legal persons to perform specialized works in the fields of cadastre, geodesy, cartography in Romania; provides professional training and continuous training of its staff through the Professional Training Centre of the National Agency, an institution without legal personality, through the Romanian Notarial Institute or through other authorized entities; ensures the presidency and the secretariat of the National Infrastructure Council for spatial information in Romania, hereinafter referred to as INIS, in accordance with art. 1 paragraph (4) of the Government Ordinance no. 4/2010 concerning the establishment of national infrastructure for spatial information in Romania, approved with amendments and completions by Law no. 190/2010, with subsequent amendments and additions; represents the contact point for the European Commission concerning the Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an infrastructure for spatial information in the European Union (INSPIRE[6]); carries out and maintains the Romanian

[6] INSPIRE (Infrastructure for Spatial Information in the European Community), is a directive of the European Commission which was initiated in order to improve coordination at European level between the authorities of the Member States, to fill the lack of standards related to spatial data and in order to overcome political limitations on the geo-information required for the implementation of European policies in the field of environment. INSPIRE's database will be used in the risk assessment for insurance companies, in the organisation and operation of the activity in the field of communications, agriculture, tourism and the exploitation of natural resources. The INSPIRE directive entered into force in 2007. Romania has delayed its adoption, leading the European Commission to start the infringement proceedings. Romania reached the last stage of the pre-contentious phase, one step from the European Court of Justice. Finally, the Romanian Government adopted at the end of January, 2010 the draft of the normative act on the establishment of a computerised database portal with

geo-portal INSPIRE and ensures its compatibility with the European geo-portal INSPIRE, performs other duties assigned by the Government Ordinance no. 4/2010, approved with amendments and completions by Law no. 190/2010, with subsequent amendments and additions; monitors the implementation and utilization of INIS and ensures permanently the accessible results for the European Commission and the public, in accordance with art. 17 paragraph (3) e) of the Government Ordinance no. 4/2010; provides, upon request, statistical situations in the areas of activity of the public institutions which justify an interest.

As we have mentioned before, the territorial offices provide public services specific to the Agency's activities at counties level.

Under the subordination of territorial offices, at the level of each of the judicial districts exists at least a bureau of cadastre and land registration or, where appropriate, a public relations office, as units without legal personality.

According to article 22 of Law no. 7/1996[7], the land registration activity within the territorial offices is accomplished by land book registrars, appointed by the order of the Agency's general manager. The assistants-registrars perform the land book registrations on the basis of the provisions given by the registrars; release extracts from the land book and the burdens certificates and fulfills other duties laid down in specific regulations.

The number of registrars for each territorial office is established by order of the Agency's general manager.

Within the territorial offices, the land registration activity is under the responsibility of a chief-registrar and within the territorial bureaus, under the responsibility of a coordinating-registrar, appointed by order of the Agency's general- manager, as result of a contest.

The registrar has to fulfill the following cumulative conditions[8]: a) has the Romanian nationality and the civil rights capacity; b) is licensed in Law; c) does not have a criminal record; d) enjoys a good reputation; e) has a good knowledge of the Romanian language ; f) is apt in terms of healthcare; g) has occupied for five years the assistant-registrar position

broad application in the field of environmental protection, with only a few days before the deadline imposed by the European Commission expired.

[7] Law no. 7/1996 was republished in the O.M. no. 83 from 7 February 2013.

[8] See Law no. 7/1996, Article 22, paragraph 4.

or exercised for 3 years the position of public notary, judge, prosecutor, lawyer, legal adviser or other legal function.

Employees of the Agency and of the subordinate units are forbidden to investigate cases where the beneficiaries are themselves or the spouse, family members or relatives up to the third degree inclusive, legal entities within they, or one of the persons mentioned above hold the quality of shareholders, associates, managers or administrators, and also the cases which have as object the documentations drawn up by them before they acquired the quality of employee of the institution, by authorized natural persons, who are their spouse, family members or relatives up to the third degree inclusive, or by the legal authorised entities within they or any of the persons mentioned above hold the quality of shareholders, associates, managers or administrators.

When one of the situations mentioned appears, the employee is obligated to abstain and to notify without delay, in writing, the institution, for allocating the work to another person.

Trough these obligations regulated by the law, we believe that the legislator wished to ensure *the security function of the land book*, because the registrars are bound by the law regulations and in the same time are independent when taking any decision regarding the land book procedure. The Romanian legislator and also the judicial system are currently preoccupied in fighting all acts of corruption that can interfere in ensuring the public authorities independence.

II. The land book registration procedure

II.1. The stages of land book registration procedure

If we analyse various systems of land registration, we could find that these accomplish multiple functions, given the type of each system. The information function is essential and primary, common to any form of land registration, in contrast with other functions that are specific and secondary meaning that some of these functions can coexist in the same system and others can not be cumulated.

The *primary and essential function* of any land registration procedure is *to inform* third parties or more precisely to make it possible for any person interested in knowing what is the material and legal

situation of the real estates so that those persons can decide according to these elements. Fulfilling the land registration procedures constitutes an ulterior and extrinsic element of the legal relationship established between the parties that exists independently of any land registration procedure. Therefore, these formalities are purely informative or declarative.

In the Romanian private law, *the land registration function of enforceability against third parties* ensure the full effectiveness of a specific legal situation. In other words, as long as the land registration procedure is not met, only effects relative and not absolute are produced, limited only between the parties involved. Therefore, only when the land registration procedure has been completed the act, deed or legal situation can produce legal consequences both between the parties and towards third parties.

The stages of land registration procedure are regulated by the republished regulations of the Law no. 7/1996 and also by the Regulation of approval, reception and registration in the cadastre registry and land books, approved by Order no. 700/2014 of the General Director of the National Agency for Cadastre and Land Registration (hereinafter referred to as the Regulation).

First, the registration application in the land book is submitted to the territorial bureaus of the territorial office and will be accompanied by the original document or by its authenticated copy, that certifies the legal act or deed whose registration is requested. To this end, the authenticated copy will be kept in the portfolio of the territorial office.

In case of judicial decision, it shall be presented an authenticated copy, noting that it is final and irrevocable. The registration applications shall immediately be registered in the entry register, specifying the date and the number resulting from the chronological order of their submission.

The registrations in the land book are carried out at the concerned parties' request, except in cases where the law provides the ex-officio registration. Thus, the registration application shall be transmitted to the territorial office that has the competence to exert the registration[9].

[9] See M. Nicolae, *Tratat de publicitate imobiliară*, 2nd vol., (Universul Juridic Publishing House, Bucharest, 2011), 337 and the following.

According to article 29 of Law 7/1996, when the registrar approves an application, he orders the tabulation or the temporary registration, if the document meets the following conditions: a) it is concluded according to the form conditions laid down by law; b) correctly identifies the names of the parties and indicates the social security number, if assigned, the fiscal identification number, the fiscal registration code or unique registration code, as appropriate, assigned to them; c) individualizes the real estates through a number of land book registration and a cadastral or topographic number, as appropriate; d) it is accompanied by a certified translation, if the document is not drawn up in Romanian. In the case of notarial authentic document, it must be signed by a public notary in function in Romania; e) it is accompanied, where appropriate, by a copy of the land book extract for authentication, by the land book extract for information or by the burdens certificate; f) it is accompanied by proof of payment of the land registration tariff, except for the exemptions established by law or the situation in which the proof of payments is made in accordance with the procedures laid down in the protocols provided by the Law 7/1996; g) follows all legal provisions laid down by special laws.

If the registrar considers that the documents submitted in support of the registration application, do not fulfil the form conditions required by law for their validity, the application is rejected by a motivated closure[10].

The registrar shall reject the registration application for the legal act whose absolute nullity is expressly provided by law or for failure to comply with special conditions laid down by the regulations in force.

The registration application rejection is mentioned in the entry register and in the land book.

After this procedure is concluded, the motivated closure shall be communicated to the interested parties, as well as to other persons concerned, according to the mentions of the land book, within 15 days from the pronouncement of the closure, but not later than 30 days from the date of the application's registration[11].

[10] See Article 30 of the Law no. 7/1997.

[11] See Article 55 of the Regulation of approval, reception and registration in the cadastre registry and land books, approved by Order no. 700/2014 of the General Director of the National Agency for Cadastre and Land Registration.

The interested parties or the public notary may draw up a request to be re-examined the closure of acceptance or rejection within 15 days of the communication, which shall be decided within 20 days by the chief-registrar's closure. In order to solve the request for re-examination, the person concerned can complete the file with the required documents, at the request of the chief-registrar.

Against the chief-registrar's closure, the interested parties or the public notary may complain, within 15 days of the notification. The re-examination request and the complaint against the closure shall be submitted to the territorial office and shall be registered ex officio in the land book. The territorial office is obliged to submit the complaint to the Court, accompanied by the closure file and the copy of the land book.

The complaint against the closure can be filed by interested parties or by the public notary directly to the Court. The file which shall be submitted to the Court is made up of: the certified copy of all documents and documentations which formed the basis of the land book closure as well as and the chief- registrar's closure that solved the request of re-examination, the first copy of the complaint, the certified copy of the land book and the proof of the communications. If, subsequently, other complaints concerning the same file are registered, they will be also submitted to the Court, with reference to the original communication number.

In case of admission of the complaint, the final judgement of the Court will produce an effect in the land book from the date of the application registration to the territorial office and will be operated starting with the date on which a copy of the original sentence according to which it was admitted the complaint, noting that it is the final decision, was submitted[12].

If the complaint was admitted, the final judicial decision of the Court will take effect from the date of the application registration to the territorial office and will have the same rank as the initial application.

If through the judicial decision was not decided to undertake certain operations in the land book, the file shall be submitted to the archive by

[12] See Art. 62 of the Regulation of approval, reception and registration in the cadastre registry and land books, approved by Order no. 700/2014 of the General Director of the National Agency for Cadastre and Land Registration.

the initial number, at the same time with the cancellation of the complaint from the land book.

II.2. The first registration in the land book

The first registration shall be carried out upon request, on the basis of:

a) the document that proves the legal act or deed of the acquisition or establishment of the real right;

b) the fiscal certificate issued by the City Hall;

c) the cadastral documentation, trough which was attributed a cadastral number;

d) the proof of the tariffs payment for the reception and registration in the land book, as appropriate.

Also, they are considered first registrations in terms of Law 7/1996, awarding cadastral numbers for real estates registered in the land books opened according to Decree-law no. 115/1938[13] to unify the provisions relating to land books, regardless of the kind and number of cadastral and land book operations made in this respect.

The cadastral documentation for the first registration contains:

a) the tally-sheet;
b) the proof of tariff payment, if necessary;
c) the receipt and registration application;
d) the declaration on honor with respect to the identification of the measured real estate;
e) the identity documents copies of owners-natural persons or copies of the registration certificates, in the case of legal persons;
f) the copy of the extract from the land book or a real copy of the land book, if necessary;
g) the fiscal certificate issued by the City Hall;
h) the original or certified copy of the acts under which the registration is requested;
i) coordinated inventory of station and radiated points;
j) the analytic calculation of the surface;
k) technical memorandum;
l) the real estate file;
m) the emplacement and delimitation plan;

[13] Decree-law no. 115/1938 was repealed when Law no. 7/1996 entered into force.

n) the localization at an appropriate scale plan, so that the real estate can be located.
o) the cpxml file [14].

II.3 The property right's dismemberments registration

The rights of usufruct, use and habitation are tabulated in part III of the land book of the real estate on which they are constituted, making reference to the registration contained in part II of the land the book, where the property right is tabulated.

The right of servitude is tabulated in part III of the land book of the real estate constituting the subservient fund, and the benefit of the right of servitude is noted in the second part of the land book of the real estate that represents the dominant fund.

If the dominant fund or the subservient fund is dismembered, the registrations relating to the servitude are registered in part II and in part III of the land books of the real estate resulted.

If the use, usufruct, servitude, habitation, or superficies cover only part of a real estate, is drawn up the plan of emplacement and demarcation of the real estate that contains the area of land affected by the property right dismemberment.

The usufruct is registered over the entire real estate or over a share of it.

The right of superficies is tabulated in part III of the land book, mentioning the land book in which the property right over the building is registered. In the superficies` land book, in which is registered the property right of the building, it is mentioned the same cadastral number of the real estate (land) - accompanied by the building's code.

The right of superficies is always registered with showing the duration for which it was constituted.

The duration of the right of superficies is that shown in the document under which the tabulation is required, but not more than 99 years.

The cancellation of the property right's dismemberments established for the benefit of a real estate can be done only with the consent of the

[14] See Art. 83 of the Regulation of approval, reception and registration in the cadastre registry and land books, approved by Order no. 700/2014 of the General Director of the National Agency for Cadastre and Land Registration.

person who has registered a right over a real estate. This consent is not necessary if the right is extinguished by the expiry of the registration or by the death or, where appropriate, by the end of the legal existence of the holder, if this is a legal person[15].

II.4. The registration in the records of the cadastre and land book of the real estate located in the evidence of an administrative territory, whose location is in another administrative territory.

In the situations in which a real estate was entered in the land registry on an administrative territory, and its location is on another administrative territory, the aligning of these information is carried out on request or ex officio, on the basis of the identification documentation of the emplacement.

The documentation for the location of the real estate identification is submitted to the territorial office in whose evidence is the real estate, for performing the modifications and the land book transfer, and a copy of the land book shall be attached to the original cadastral documentation. The newly opened land book contains the description of the real estate from the cadastral documentation and the legal situation from the closed land book. The closure is communicated to all persons concerned.

II.5. The real estates` annexations and detachments registrations

The real estate can be modified by annexations and by detachments. The annexation and the detachment represent the technical-material operations of the real estate registered in the land book and can not involve a transfer of ownership. The changes involved by the annexation/detachment operations are carried out on the basis of the cadastral documentation received by the territorial office.

The owners of adjoining real estates, for a better exploitation of the real estates, may require the merger's registration in the land book on the basis of the merger document, of a convention on the establishment of the shares resulting from the real estates merger, drawn in authentic form, and of a cadastral documentation[16].

[15]Article 94 of the Regulation of approval, reception and registration in the cadastre registry and land books, approved by Order no. 700/2014 of the General Director of the National Agency for Cadastre and Land Registration.

[16] Nicolae, *Tratat de publicitate imobiliară*, 338.

The merger of adjacent real estates can be achieved if they are located in the same administrative-territorial unit.

According to Law no.7/1996, republished, with subsequent amendments, in case of real estates with open land book, to the drawing up of an detachment/merger documentation it will be used the surface of the real estate registered in the land book, resulted from the measurements, in accordance with the legal provisions in force at the date of the cadastral number assignment[17].

If the real estates are encumbered by real rights or other burdens belonging to third parties, the annexation/detachment operation can be done only with the consent of the third parties. In the absence of a contrary agreement, the registrations regarding the real rights, together with the burdens and other registrations that encumbers the real estate will be maintained unchanged in the land books of all resulted real estates. The mortgages that encumbers the attached real estates shall be registered in the land book of the real estate resulted from the annexation in the order of the initial ranks.

II.6. The tabulation of the public property right and of its corresponding real rights

The tabulation of the public property right over the public property assets of the State is made at the request of the manager of the central public institution, on the basis of the property documents, and in their absence, on the basis of the extracts from the centralized inventory of those assets, accompanied by a document that confirms the identity between the real estate and the position from the inventory[18].

The tabulation of the public property right over the public property assets of the administrative-territorial units shall be made at the request of the mayor or of the president of the County Council, on the basis of property documents, extracts from the assets inventory attested by Government decision, certifications of conformity, accompanied by a

[17] See art. 39 of the Law no.7/1996

[18] See Article 115 of the Regulation of approval, reception and registration in the cadastre registry and land books, approved by Order no. 700/2014 of the General Director of the National Agency for Cadastre and Land Registration

document that confirms the identity between the real estate and the position from the inventory.

According to article 115 of the Regulation, in the absence of the property documents or of the Government decision of the inventory attestation of public property real estates of the administrative-territorial units which are the subject of registration, the temporary registration issued in compliance with the law by the County Councils, the General Council of Bucharest or by the local councils, will be decided.

The right of administration, the right of concession and the real right of free use are tabulated in part II of the land book.

In the first part of the land book of the building over which the right of concession, administration or use was constituted, is described the construction, and in part II is registered the ownership of the building.

In the land books, in which are registered the rights of the State and of the administrative-territorial units over their public or private domain assets, it will necessarily be indicated the public or private domain appurtenance of the asset.

II.7. The real rights` cancellation from the land book

The cancellation of the tabular real rights is done by requested, except when the law expressly provides the ex officio cancellation. In the latter case, the registrar's obligation to cancel ex officio a tabulation arises only as a result of the registration, at the territorial office, of the document which shows the existence of an ex officio cancellation case, even if there isn't a request for tabulation cancellation.

The cancellation of the tabular real rights is based on the authentic form document by which is acknowledged the consent for cancellation of the registration or on an administrative act which replaces the lack of consent.

In the case of the mortgage right cancellation, the cancellation is done on the basis of the official statement issued by the authority that holds this right, bearing the signature of the head of the institution, the number and the date of registration.

When alienating the real estate, the express consent of the tabular right holder is not required to cancel the real right from the land book, because the consent results from the agreement expressed for the conclusion of the contract.

When, in cases provided by law, the tabulated right is extinguished by the fulfilment of a period described in the register or by the death of the natural person or when the legal entity ceased its existence, the cancellation will be made at the request of the person concerned, except when the law provides the ex officio cancellation.

In all cases in which a tabulated right is cancelled, the registrations relating to rights that encumbers the cancelled right are maintained, except the cases when the law provides their cancellation.

III. The European need for a harmonized land registration procedure

We can observe the European Union's preoccupation for harmonizing the Member States regulations, and the field of land registration makes no exception.

To this end, in 2007, the Directive 2007/2/EC of the European Parliament and of the Council was adopted on 14 march establishing an infrastructure for spatial information in the European Community (INSPIRE)[19].

According to article 1, paragraph 1 of the Directive, its purpose is '*to lay down general rules aimed at the establishment of the Infrastructure for Spatial Information in the European Community (hereinafter referred to as Inspire), for the purposes of Community environmental policies and policies or activities which may have an impact on the environment*".

To follow the purpose established by the Inspire Directive, Member States have to monitor the implementation and use of their infrastructures for spatial information and they have to make the results of this monitoring accessible to the Commission and to the public on a permanent basis.

Romania has delayed to implement the Inspire Directive, and that determined the European Commission to start the infringement proceedings. Thus, Romania reached the last stage of the pre-contentious phase, one step from the European Court of Justice. In January 2010, the Romanian Government adopted the draft of the normative act on the establishment of a computerised database portal with broad application in

[19] Having regard to the Treaty establishing the European Community, and in particular Article 175(1).

the field of environmental protection, with only a few days before the deadline imposed by the European Commission expired.

The INSPIRE directive was transposed into national law through the Government Ordinance no. 4/2010[20] concerning the establishment of national infrastructure for spatial information (INIS) in Romania and the elaboration of the legal framework for operation of INIS, the coordinating structure of this process.

Spatial information is an important issue for both producers and users. They are increasingly used by decision-makers, resource managers, scientists and citizens. Romania has a wide range of spatial information created by the institutions in various fields.

A good collaboration between public authorities is the basis for efficient use of spatial information. Thus, it eliminates the overlap in the production process of spatial information and they become available for both the public and private sectors.

If in the year 2010, in Romania the infrastructure for spatial information was poorly developed, now it has been extended, in particular within the local administration through the achievement of infrastructure on certain specific topics.

Also, at European level there is the European Land Information Service (EULIS) which provides direct access to official land registers in Europe. EULIS is owned by a consortium of member countries with expertise in the area of land registration, most of them government organizations. EULIS is an important initiative developed by the official bodies for land registration in European countries. Several European countries[21] are part of this project and others[22] wish to be part of it.
EULIS' purpose is to be the first choice for European land and property information. It aims to become the most important place for professional customers and European citizens to find out official land registration information, including direct access into the register or other details such as contact information.

[20] The Government Ordinance no. 4/2010 was modified by G.O. no. 32/2013 and republished in the O. M. no. 433/ 13.06.2014.
[21]Austria, Czech Republic, England, Finland, Ireland, Lithuania, Macedonia, Netherlands, Scotland, Spain, Sweden.
[22]Belgium, Estonia, Georgia, Iceland, Kosovo, Latvia, Norway, Slovenia.

EULIS wish to become the first choice for professional customers, because they may use the service as an initial quick and easy check before using traditional methods[23].

Although the project's primary goal does not reach very far, we wish to believe that this is only the first step towards more harmonised land registration systems in Europe.

In Europe, the multilingualism generates a barrier when trying to harmonize the regulation in a certain field, and obviously the land registration makes no exception.

We consider that what EULIS is trying to achieve represents an important step towards European land registration harmonization and that is because they did understand that the language barrier is the number one issue that needs to be surpassed. Also, this aspect has preoccupied the European Commission over the last decade, trying to find common legal concepts and a common terminology for all European land registration system.

Having this as a starting point, EULIS formed a glossary that provides translation from one language to another in the land registration field. To understand the differences between the used terminologies we can analyze the English term *mortgage* that is translated in Scottish as *standard security*, in Dutch as *hypotheek* and we can do this with all land registration terms and the conclusion will be that the multilingualism doesn't simplify at all the land registration procedure. So, next to the expressions in each national languages, the EULIS glossary presents the 'EULIS terms' and the 'EULIS definitions'.

We consider that the EULIS glossary solves just partially the issue of language barrier and of multilingualism within Europe and that is because only a few European countries are members of EULIS. So, we believe that a more extensive action has to be developed at EU level, and to ensure a more efficient harmonization in the field of land registration by harmonizing the terminology in this matter.

Also, we believe that the harmonization of the national land registration procedure can be the next step. In this respect, the harmonization at legal and organizational level challenges the European authorities and represents a process that needs to be developed in time.

[23] For more information see www.eulis.org.

To this end, it strongly has to be considered the fact that within the European Union there are many different land registration systems and also different legal systems. This makes it very hard to establish a single land registration system for all Member States, taking into consideration the important differences between their legal and registration systems and their resistance to change.

However, we consider that a European harmonized system brings also an important advantage for the European citizens that are part in cross-border transactions.

III.1. The need for information and the personal data protection

If we take into consideration developing a complex system like EULIS within the entire European Union we have to take into the account that the participants are from different jurisdictions, and thus different regulations on personal data protection may apply.

The EU Member States are supposed to have implemented the EU data protection directive (95/46/EC), which entered into effect on 25 October 1998. This Directive establishes a regulatory framework to ensure both a high level of protection for the privacy of individuals in all Member States and the free movement of personal data within the European Union (EU).

But the EU Member States have implemented the 1995 rules differently, resulting in divergences in enforcement. So, a single law will eliminate the current fragmentation. So, from 2012, a proposal of Regulation concerning the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) is under debate.

This Regulation proposal is based on Article 16 of the Treaty on the Functioning of the European Union, that allows the adoption of rules relating to the protection of individuals with regard to the processing of personal data by Member States when carrying out activities which fall within the scope of Union law.

So, a Regulation is an appropriate legal instrument to regulate the protection of personal data in the Union because of its direct applicability in accordance with Article 288 TFEU. It will provide greater legal certainty by introducing a harmonised set of rules in all EU Member States because personal data are transferred across national boundaries, both internal and external borders, and the rates are rapidly increasing. In

EU there are practical challenges to harmonizing data protection legislation and a need for co-operation between Member States authorities. These regulations will ensure effectively and consistently the same level of protection for individuals when their personal data are transferred to third countries.

Certainly, when the above mentioned Regulation will enter into force all EU citizens rights to information will be ensured in a harmonized legal context and a harmonized land registration system can become reality.

CONCLUSION

Analyzing the most important aspects of the land registration procedure in Romania, we can certainly say that the Romanian legislator is trying to keep up with the European challenges by ensuring a transparent legal system and also by respecting the citizens' need of legal certainty and also ensuring the most important function of land registration-the information function.

Land registration procedure can not be analyzed without taking into consideration the national authorities with responsibilities in the land registration matter. So, we consider that the Romanian legislator respected the European standards when regulating the competences of the national authorities and of their subordinated institutions.

Currently, we consider that within the European Union there is a continuous preoccupation concerning the Member States legislation harmonization and these efforts are in the benefit of both the EU citizens and the national authorities.

As we have already mentioned, these efforts are also in the direction of harmonizing the terminology used in the land registration field and also in harmonizing the land registration system by creating one system applicable within all Member States.

Certainly, the multilingualism is a real challenge within the European Union, but it has both its advantages and disadvantages. We think that by eliminating the language barrier within different land registration systems the EU citizens` fundamental rights will be protected and also the principle of legal security respected.

Also, by harmonizing the legislation concerning personal data protection, the discussion regarding an unique European land registration system can no longer be difficult because by having a single regulation

will have a great impact on balancing the two very important rights - the right to information and the personal data protection.

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OVERSIZED TRANSPORT – SPECIES OF ROAD TRANSPORT GOODS

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Abstract :

Oversized transport is a special transport, representing a species of road freight transport. Making this type of transport shall be in accordance with OG no. 43/1997 regarding the roads, republished, with subsequent amendments and MTI Order no. 356/2010, as amended. The movement of road vehicles which exceed the maximum permitted weight and / or overall provided by law, with or without load, takes place on public roads only if they are registered, correspond in terms of technical condition and safety requirements and have a road transport special authorization issued by the administrator of the road. Details on this type of transport will be presented in this study.

Key-words: *oversize, special, authorization, notice, road administrator, escort*

INTRODUCTION

Road transport generates the movement of goods or persons from a starting point to a destination point[3]. Depending on the characteristics of the goods moved, shipments can be of different kinds, namely: road transport of general cargo; road transport of perishable goods; road freight and hazardous waste; Road transport of waste; Road transport of live animals; Road transport oversized. What is the subject of this study is the last type of transportation from those listed.

Oversized transport is carried out in accordance with the Order of the Minister of Transport and Infrastructure no. 356/107 of 4 May 2010 approving the Norms regarding the authorization and making road

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[3] Regulated by OG no. 27/2011 regarding the road transports.

transport weights and / or overall dimensions exceeding the maximum set out in O.G. no. 43/1997 concerning the roads[4], as amended by the Minister of Transport and Infrastructure and Minister of Administration and Internal Affaires no. 995/2012[5].

It is a kind of road goods transport and the operation is carried out with vehicles carrying goods indivisible or without cargo, exceeding constructive masses and / or the maximum permissible dimensions. Given that it is a kind of road goods transport, it must meet the general requirements of road transport operator[6] in order to conduct such activity. The road transport operators must be licensed to transport to be granted if the enterprise has an effective and stable in Romania and the conditions of good repute[7], professional competence[8] and financial capacity[9]; road transport operators must be registered in the national electronic register of road transport operators kept by the competent authority (Romanian Road Authority)[10] and have a appointed person in the company to respond to the transport performance in good conditions. The movement of road vehicles exceeding the maximum permissible weight and / or outline provided by law, with or without load, takes place on public roads only if they are registered and correspond in terms of technical condition and safety requirements.

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[4] Published in the Official Gazette no. 337 of 20 May 2010.

[5] Corrected - the Official Gazette no. 579 of August 14, 2012.

[6] Regulation EC 1071/2009.

[7] See the provisions of Directive 09/1071 / EC on access to the occupation of road haulage and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the the right to freedom of establishment in national and international transport operations - Published in the Official Journal of the European Communities 14.11.2009.

[8] See the provisions of Directive 09/1071 / EC on access to the occupation of road haulage and road passenger transport operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the the right to freedom of establishment in national and international transport operations - Published in the Official Journal of the European Communities 14.11.2009.

[9] For details see Amelia Singh, *Dreptul transporturilor* (Craiova: Sitech, 2013), 83.

[10] See art. 4 from the Order of Minister of Transport and Infrastucture no. 980/2011, amended and supplemented, regarding the application of the provisions relating to the organization and performance of road transport and related activities established by O.G. no. 27/2011 on road transport.

In addition to these general conditions, the carrier must also meet specific conditions for the conduct of such activities namely drivers to have certified for transporting oversized. In cases provided by law for performing these transports accompanying by motor vehicles transport, the carrier must have or to appeal to a specialized operator to obtain special authorization road transport. This authorization is granted by the administrator of the road; issued under the rules for the authorization and conduct mass movement of road vehicles and / or transcend masses and / or the maximum permissible dimensions provided in O.G. no. 43/1997, approved by Order of MTI No. 356/107/2010.

For transports which exceed the maximum limits of weight and / or size, can not browse other routes because of technical characteristics of the load paths and roads, the National Road Administration may issue special transport authorizations.

To get an AST (transport special authorization), the applicant must meet certain conditions, namely: to be economic operator specialized in performing escorts[11], to hold vehicles licensed[12] by the Ministry of Transport and Internal Affaires in order to make escorts and drivers specialized of the economic operator's to hold certificate[13][14]. If these conditions are met, the applicant must complete an application, the model of which is shown on the website of CNADNR SA[15].

Approval and / or authorizing traffic of vehicles exceeded the

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[11] The authorization is personalized with permit number, name and identification dates of specialized economic operator, date of issue and validity of 5 years from the date of release, signature and stamp CNADNR and ARR.

[12] Vehicles for escort must be equipped according to Art. 36 of the Regulations approved by Order of MTI no. 356/107/2010. Permits are personalized with the approval number, name and identification dates of specialized economic operator, license number and vehicle identification number accompanying the date of issue and validity of 5 years from the date of release, signature and stamp CNADNR and ARR.

[13] Rated certificate is personalized certificate number, name and identification of authorized personnel, date of issue and validity, signature and stamp CNADNR and ARR.

[14] See Methodology for authorizing operators specialized vehicles and escort certification of specialized personnel for escorting vehicles using the national road network exceeding the maximum limits established by OG no. 43/1997 concerning the roads, republished, with subsequent amendments, drawn up by the Romanian Road Authority and the National Company of Motorways and National Roads in Romania SA 2010.

[15] www.cnadnr.ro.

maximum weight and / or size limits shall be carried out by the administrator of the road on which they travel only for goods that can not be divided. Advence approvals transport prior conduct overruns the maximum permissible limits for weight and / or size limits shall be issued on request by the road network administrator for routes with the lowest cost, taking into account existing traffic restrictions on consignment, within the limits of competence and are charged accordingly. Pricing special transportation authorization and approval and also the estimates are in accordance with Order no. 290 of 17 June 2013 approving the tariffs applied by the National Company of Motorways and National Roads in Romania SA, supplemented and amended by Order no. 398/2013[16].

For situations where more research studies are needed on the ground will be prepared a project transport by a specialized unit agreed by the road administrator. Expenditure of studies, research and project design of transport shall be supported by the applicant. The project transport is drawn up strictly according to the real characteristics of transport. Any work required by the transport project will be supervised during the execution and received by the administrators of respective road, before crossing the trail. Special transport authorizations are issued for limited periods of time, taking into account traffic restrictions temporarily or permanently restricted sectors requiring bypass.

The maximum weight and / or size for that special transport authorization may be issued are: 80.0 tonnes for the total weight of the convoy; 5 m width; 5 m height; 40.0 m length.

Vehicles that exceed the maximum permissible weight and / or size can circulate on public roads on the base of authorization made by the administrator of the public road, in case are fulfilled the conditions provided by law, those contained in the regulations relating to the technical conditions to fulfill for admission the vehicles in traffic on public roads in Romania, as well as those stipulated in any other normative regulations relating to circulation on public roads. Exception from paying special transport authorizations are fire-fighting vehicles, belonging to the General Inspectorate of Military Firefighters Corps, located in the mission, as well as the vehicles which belong to road network administrator, including compliance signaling traffic

[16] Official Gazette no. 484 of August 2, 2013.

restrictions.

If it exceeds the maximum permissible width of the vehicle or cargo or side edges will be flagged prominently, at the back, with ropes with reflective foil strips red - white, with an inclination of 45 °, descending towards the outside of the vehicle or load, on a background the following dimensions: 40 cm wide and 1.20 to 1.50 m height. If the width of the convoy in motion is between the maximum permissible limit and 3.20 m inclusive, this will be mounted additionally necessarily front and rear, one tablet with the inscription warning: "Warning! Oversize! ", And the tractor will use the standing lamps yellow flashing lights.

If the width is between 3.20 m and 4.50 m including the lateral contours of the load side will be installed, additional, signal lights at distances of no more than 1.0 m. Also, the convoy will be preceded by a escort car walking equipped with two lamps yellow flash-lights, in operation mode, and with warning indicator with the inscription: "Warning! Oversize!" monted to be visible to oncoming traffic. It should be noted that this vehicle should be authorized in order to perform the escorts, the driver of that vehicle must also have the certificate to be able to perform such escorts and not least the company owning the vehicle must be authorized to carry out the escorts for transports.

If the convoy width exceeds 4,50 m, in addition to the conditions stated above, it will be followed by a vehicle with two yellow flashing light lamps in operation mode, as well as with warning inscription: "Warning! Oversize!" mounted in the rear. If the convoy width exceeds 4.5 m or length exceeds 30 m or weighs 80 tons, the convoy will be accompanied by two vehicles equipped to carry out of escorting.

For vehicles with over-width greater than 5 m or 40 m length greater than or higher than 5 m, and for vehicles whose total weight exceeds 80 tons, crossing bridges, overpasses or viaducts is carried out compulsorily, by temporarily interruption of traffic, crossing for the singular work through escorting and guiding by the traffic police. The carrier will require, before issuing the special authorization administrator of road transport, the agreement issued by the General Inspectorate of Police for temporary and local interruption of circulation.

Given the complexity of such consignments, their performance is permitted only on weekdays between the hours 22-6.

One of the great challenges of this type of transport is the loading and unloading of cargo to / from the trailer platform, with situations

where cranes or special ramps are required.

CONCLUSIONS

Considering all features oversized transport, it is recommended that you take it in advance to make an individual planning in terms of size, leverage points, axle weight distribution, loading and unloading point. Depending on the characteristics of the goods is to choose the appropriate type of trailer – platform, flatbed or gondola; expanding cargo insurance where its necessary; oversized transport route (case study); also, depending on the size of cargo, is to request special authorizations to ensure support and escort transport vehicles. All this helps to determine the cost of carrying oversized transport in conditions of maximum security.

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WORK THROUGH TEMPORARY EMPLOYMENT AGENCIES

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Abstract:

Work through a temporary employment agency is the work done by a temporary employee who has signed a contract with a temporary employment agency and who is assigned to a user firm with a view to work under this user's supervision and direction.

A user can call on a temporary employment agency only for temporary and precise assignments, excepting the situation in which the user wants to replace an employee of his whose employment contract is suspended due to that worker going on strike. The temporary employment agency assigns a temporary employee, engaged under a temporary, fixed-term employment contract, in the basis of a commercial contract in writing.

Key -words: *temporary, fixed-term employment contract, temporary assignment, temporary employment agency, temporary employee, user firm*

INTRODUCTION

The Labour Code brings under regulation, in art. 83 item h., two possible ways to conclude individual labour contracts for a definite term. The first regards cases strictly regulated by special laws, and the second situation regards the development of projects or programmes of extreme importance. Therefore, we agree that individual labour contracts for a definite term can be concluded if special laws state so. The Labour Code itself includes a particular way of concluding an individual labour contract for a definite term in the form of the temporary labour contract, which is brought under regulation in art. 94 and 95[2] of said law.

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[2]Art. 94. [temporary labour contract (1) A temporary labour contract is an labour contract concluded in writing between the temporary labour agent and the temporary employee, usually covering the length of a assignment.

(2) A temporary labour contract shall contain, besides the elements provided for in Articles 17 and 18 (1), the conditions of the assignment, the length of the assignment, the identity and headquarters of the user undertaking and the way the temporary employee is to be remunerated.

The individual labour contract through a temporary labour agent is regulated in art. 88-102 of the Labour Code. As stated in art. 88, item (1), temporary work "is the work performed by a temporary employee who concluded a temporary labour contract with a temporary labour agent and who is assigned to a user undertaking to work for and under this user's supervision."

Work through a temporary labour agent is work done by a temporary employee who concluded a temporary labour contract with a temporary labour agent and who is made available to a user, to temporarily work for and under this user's supervision.

A temporary employee is a person who concluded a temporary labour contract with a temporary labour agent, with a view to be placed at the disposal of a user to temporarily work for and under this user's supervision.

A temporary labour agent is a company authorized by the Ministry of Labour, who concludes temporary labour contracts with temporary employees, in lawful conditions, to make them available to user undetakings, to work for and under these users' supervision during a period determined by the assignment contract. The conditions of functioning and the authorization procedure of the temporary labour agencies shall be established by Government Decision nr. 938/2004. A temporary employment agent's authorization for functioning has a period of validity of 2 years and it can be extended for another 2 years at its end date.

The Labour Ministry introduced a National Inventory Registry of temporary labour agencies where all authorized agencies are registered. A list of all authorized temporary labour agencies, along with those whose authorizations have ceased is published once every trimester in the

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Art. 95. [temporary labour contract concluded for several assignments] (1) A temporary labour contract may also be concluded for several assignments, subject to the duration provided for in Article 90 (2).
(2) Between two assignments, the temporary employee shall be at the disposal of the temporary labour agent and shall enjoy a wage paid by the agent, which may not be lower than the national minimum gross wage.
(3) For each new assignment, the parties shall conclude an addendum to the temporary labour contract, which shall detail all elements provided for in Article 93 (2).
(4) A temporary labour contract shall cease at the end of the last assignment for which it was concluded.

Official Monitor of Romania and is also available on the ministry's web page.

Every temporary labour agent has to create a financial guarantee by depositing a sum equal to 25 minimum wages, along with all taxes and contributions due by the employee to the social insurance budget, unemployment insurance budget and healthcare insurance budget, into a distinct account, opened at a Romania-based bank. This guarantee can be used only for paying remuneration rights, if the temporary labour agent's funds do not cover these obligations.

The user undertaking is a person or a company for whom and under whose supervision works a temporary employee assigned by a temporary labour agent.

The temporary work assignment is the period of time during which a temporary employee is assigned to a user undertaking to temporarily work for and under this user's supervision, to perform certain precise and temporary tasks.

A user undertaking may resort to temporary labour agents only for the performance of certain precise and temporary tasks, except in the instance when the user wishes to replace in this way one of his/her employees whose labour contract is supended following their going on strike.

To bring temporary employment under regulation, legislators drew inspiration from the laws of other countries, especially France, who, in its turn, found inspiration in English and American law.

With a view to establish a harmonized framework for the protection of temporary employees in the European Union, Directive 2008/104/CE of the European Parliament was adopted.

Of course, consequently, the legislator had to consider these recommendations and they were introduced in Romanian legislation through Law 40/2011. But, in spite of the adjustments made in 2011 there still are incongruities between the two types of provisions. Therefore, the European provisions state that people can, too, perform activities as temporary labour agents on European Union soil, whereas Romanian law clearely states that only companies can be authorized and can perform such activities.

Therefore, according to art. 88 (3) of the Labour Code, a temporary labour agent is a company authorized by the Labour Ministry.

As opposed to that, the European laws cover a wider base, stating that a person can also be a temporary labour agent.

As a result it would have been normal that the national law be adapted accordingly, meaning that a temporary working agent is any person or company who concludes temporary labour contracts or work relationships with temporary workers with a view to assign them to a user undertaking, to temporarily work for and under this user's supervision.

While in art. 88 (2) of the Labour Code uses the term temporary employee, the European law uses the term of temporary worker.

There is a distinction between the two terms, because the term "worker" has a wider range of application than the term "employee" since it includes not only the people who have signed a labour contract, but also those who are implicated in working relationships based on something other than a contract.

According to art. 2 (2) of Government decision 1256/2001 "a temporary labour agent may hire foreign citizens, as well as stateless people residing in Romania, based on their work authorization or their residence permit."

Moreover, there are discrepancies between the way the national and European law define a temporary work assignment. While the Directive states that a temporary work assignment is the period of time during which the temporary worker is assigned to the user undertaking to perform temporary tasks for and under its supervision, the Labour Code[3] regulates that a temporary work assignment is represented by a precise and temporary task which is to be performed by the temporary employee, excepting the replacement of an employee who is on strike.

The duration of a temporary work assignment is brought under regulation by art. 90 of the Labour Code, as it has been modified through Law 40/2011.

This assignment may be established for a period of time that cannot be longer than 24 months. It can be extended for successive periods of time which, added to the initial duration of the assignment, cannot be longer than 36 months. The terms under which the duration of a temporary assignment can be extended are clearly stated in the temporary labour contract or in an addendum to it.

[3] Art. 89 - A user may call on temporary work agents for the performance of a prec ise, temporary task, excepting the situation regulated in art. 93."

Temporary work implies a triangular relationship and the signing of two contracts, different in their legal nature:

a) the temporary labour contract, signed by the temporary employee and the temporary labour agent;
b) the assignment contract, signed by the temporary labour agent and the user undertaking.

According to art. 94 of the Labour Code, the temporary labour contract is an individual labour contract which is concluded for the duration of an assignment. Its subject matter is composed of three types of elements:

- general elements, stated in art. 17 of the Labour Code, which represent the subject matter of any labour contract;
- elements which appear in art. 18 of the same Code regarding work in foreign countries;
- specific elements that customize the temporary labour contract:
  - working conditions for the assignment;
  - duration of the assignment;
  - identity and headquarters of the user undertaking;
  - methods of remuneration of the temporary employee.

The temporary labour contract can be signed for more than one assignment, too, with the condition of it not being longer than the maximum duration of 36 months, as stated in art. 90 (2) of the Labour Code[4].

The employer and employee can also sign an individual labour contract for an indefinite term, in which case during the time between two assignments, the employee is available to the temporary labour agent, and the agent has the obligation to abide by the terms of the contract. A new temporary labour contract shall be signed for every temporary work assignment.

To conclude, it is possible that two different contracts be concluded between the same contractants: a temporary one for every

[4] Art. 90 - (1) The temporary work assignment is established for a duration no longer than 24 months.
(2) The duration of a temporary work assignment may be extended for several periods of time, which, added to the initial duratin cannot amount to more than 36 months.
(3)The terms under which a temporary work assignment may be extended are stipulated in the temporary labour contract or can make de subject of a rider to that contract.

assignment and one for indefinie term, which shows its effects during the time between two assignments.

It is obvious that both contracts are valid, and the temporary labour contract is not an addendum to the individual labour contract for indefinite term. The signing of one such contract can have two reasons.

To begin with, the temporary labour agent is in direct need of the services of that employee during the time between two assignments.

On the other hand, that employee is available to the agent, so that when a request appears, the employee can be easily assigned by signing a temporary labour contract. For the duration of this contract, the work relationship for an indefinite term will be supended (by agreement of the contractants – opportunity offered by art. 95 of the Labour Code). In case the temporary labour agent does not need the employee's services during the time between two assignments, but the latter still has to be available to the agent, then the employee is entitled to an allowence that cannot amount to less than 75% of the employee's salary according to the job title he/she possesses.

The temporary labour contract, from the point of view of its legal nature, is still an individual labour contract for a definite term, but it is special, because the employee performs a task not for the benefit of his employer, but for the benefit of a third party, the user undertaking. The temporary labour agent has a role, too, in the development of this contract because the terms of the assignment contract include the obligation that the user pay the temporary labour agent for the offered service, that of assigning a temporary employee during an assignment.

RIGHTS AND OBLIGATIONS OF THE CONTRACTANTS

Temporary employees shall have access to all the services and facilities provided by the user unde the same terms as the latter's other employees.

The user shall provide the temporary employee with individual protection and work equipment, except when, based on the assignemnt contract, this is the responsibility of the temporary labour agent.

The user shall not be allowed to benefit from the services of a temporary employee if his goal is to thus replace one of his employees whose labour contract is suspended as a result of his going on strike.

The user shall inform all temporary employees by displaying a poster accesible for all employees who perform their duties there with

regard all vacancies available with a view to ensure chances equal to those of the employees with a labour contract for an indefinite term to obtain a permanent job.

Moreover, the user shall ensure the access of the temporary employee to all professional training courses organized for the user's employees.

The user may conclude an individual labour contract with the temporary employee only after the fulfillment of the temporary work assignment. Such contracts can be concluded during the temporary work assignment only with the consent of the temporary labour agent.

During the entire temporary work assignment, the temporary employee benefits from a salary paid by the temporary labour agent. The salary of the temporary employee cannot be inferior to that earned by the user's employee who performs the same or a similar task. If the user has no such employee, the salary of the temporary employee will me established based on the collective labour contract aplicable to the user.

The temporary employment agent is the one responsible with the deduction and transfer of all taxes and contributions due by the temporary employee to state budgets and pays for him/her all contributions due according to the law.

If, within 15 calendar days from the date the obligations concerning the payment of wages and those concerning contributions and taxes have fallen due and exigible,and the temporary labour agent does not execute them, they shall be paid by the user, based on the request of the temporary employee.

The user who has paid the amounts due as stated before is subrogated for the amounts paid in the rights of the temporary employee against the temporary labour agent.

At the end of the mission the temporary employee may conclude with the user an individual labour contract for an indefinite term. If the user employes, after a temporary work assignment, a temporary employee, the duration of the assignment shall be taken into consideration when calculating wages, as well as the other entitlements stipulated by the labour legislation.

Unless special provisions are made to the contrary, the provisions of the law and of the collective labour contracts applicable to employees employed under individual labour contracts for an indefinite term with

the user shall also apply to temporary employees for the duration of their assignment with him.

THE ASSIGNMENT CONTRACT AND THE TEMPORAY LABOUR CONTRACT

The temporary labour agent puts at the disposal of the user a temporary employee, employed with a temporary labour contract, on the basis of an assginment contract concluded in written form.

The temporary labour contract has the next characteristics: it is an individual labour contract for a definite term, which cannot exceed a duration of 24 months, but it can be lenghtened for a maximum total period of 36 months. The employee performs the work for which he was employed at the headquarters of the user undertaking to which he was assigned by the temporary labour agent for a certain predetermined period of time called a temporary work assignment, meaning the temporary period decided by his/her employer and the user undertaking. The temporary labour contract can be signed by the temporary employee and the temporary labour agent for the duration of one or more assignments which can be performed for one or more beneficiaries, but without exceeding the maximum legal period, that of 36 months. This contract, too, is concluded in writing.

Similar to the individual labour contract for an indefinite term, individual labour contracts for a definite term through a temporary labour agent are aplicable to people who concluded a temporary labour contract with a temporary labour agent and are made available to users to temporarily work for and under these users' supervision. According to art. 95 (2) of the Labour Code, the temporary labour agent „ may conclude an individual labour contract for an indefinite term with his employee, in which case, during the time between to temporary work assignments, the temporary employee is at the disposal of the temporary labour agent" and, consiquently, not at th disposal of a third party. This is an enforcement of the provisions of Directive 2008/104/CE of the European Parliament and of the november 19th 2008 Assembly regarding the temporary labour agent which stipulates in its articles 14-23, but especially in art. 2 chapter 2 of General Dispositions: „The object of the presend directive is to ensure protection of ttemporary employees and to make quality of work through a temporary labour agent better, by ensuring the enforcement of the equal treatment principle, as it is

stipulated in art. 5 for temporary workers and by recognising temporary labour agents as employers while considering the necessity to establish an appropriate framework for the use of temporary labour with a view to effectively contribute to the creationg of jobs and evolution of flexible types of work."

The temporary labour contract is a contract which is concluded in written form between the temporary labour agent and the temporary employee, for the duration of a temporary work assignment.

The labour contract stipulates, aside from the elements regulated in art. 17 and 18 (1) of the Labour Code, the conditions in which the temporary work assignment is to be carried out, the identity and headquarters of the user, as well as the wages the temporary employee is entitled to.

The temporary labour contract can be concluded for the duration of more than one temporary work assignment, too, as long as it does not exceed the maximum limit admitted by law. For each new assignment, the parties shall conclude an addendum, which will contain all the elements necessary for the first contract.

For the temporary labour contract, there can be a probation period for the performance of the temporary work assignment, and its duration shall be established depending on the wishes of the user, but it cannot exceed:

- 2 working days, if the temporary labour contract is concluded for a period shorter or equal to a month;
- 5 working days, if the temporary labour contract is concluded for a period longer than a month, but no longer than three;
- 15 working days, if the temporary labour contract is conluded for a period longer than three months, but no longer than six;
- 20 working days, if the temporary labour contract is concluded for a period longer than six months;
- 25 working days, for the employees who occupy executive positions and whose contracts last longer than six months.

Regarding the correct execution of the contract, the Romanian legislator stipulates two possible methods for terminating an individual labour contract for a definite term through a temporary labour agent:

1. through conpletion of the temporary work assignment for which it was concluded

2. if the user relinquishes the services of the temporary employee before the completion of the temporary work assignment.

If the temporary labour agent dismisses the temporary employee before the time limit provided for in the temporary labour contract, for reasons other than disciplinary ones, he shall comply with the provisions of the law on the termination of the individual labour contract which are not related to the employee's own person.

Temporary labour agents have the obligation of keep an inventory of temporary labour contracts and register them, complying to the provisions of the law in effect, in the General Registry of Employee Inventory.

The assignment contract is the legal instrument that gives the user the permission to benefit from the work of the temporary employee which is put as his disposal by the temporary labour agent. This contract, from the point of view of the Romanian legislation, is a civil contract, considering that, according to Romanian law the temporary labour agent is a company. The assignment contract is thoroughly explained in the Guide regading the founding and functioning of the temporary labour agent in Romania, published in 2012 and it states:

The temporary labour agent puts the temporary employee at the disposal of the user, based on an assignment contract, concluded in written form, which has to state the following:

1. Duration of the temporary work assignment;
2. Characteristics specific to the position, especially necessary qualifications, where it is to be performed, and working schedule.
3. Precise working conditions;
4. Individual protection and work equipment which the employee has to use;
5. Any othe services and facilities in favour of the temporary employee;
6. The value of the commision the temporary labour agent benefits from, as well as the remuneration to which the employee is entitled;
7. The terms under which the user can refuse a temporary employee made available by a temporary labour agent.

Any clauses prohibiting the user from employing the temporary employee after the completion of the temporary work assignment are null

and void, because it is considered an impediment to the evolution of the labour market, which is based on the principle of free flow of workforce.

According to Directive 2008/104/CE art. 8 (3) "temporary labour agents may not collect any tax from the temporary workers for the activities they perform so that the temporary employee is recruited by the user or for a labour contract or the establishment of a working relationship with a user undetaking after the completion of the temporary work assignment for that user." In other words, by law, the employer does not have the right to collect any tax from his temporary employee, the sum of money received for making the temporary employee available being his only profit, and this sum is negotiated and contracted when the assignment contract is concluded.

CONCLUSION

The economic crisis which manifested itself in the 2009-2013 period has had effects the are still felt today. It has also made the need to reconsider the principles of labour law arise, to make it possible to identify a new equilibrium between the concept of flexibility and adaptability, which, combined, have given birth to a new concept of flexicurity, which suits the present economic needs better. The concept of flexicurity of labour regards the extensiveness of the economic dependent labour, which is also the labout that is at the border between independent labour and subordinate labour, governed by the individual labour contract for an indefinite term, but which is more and more often represented in atypical contracts such as:

- the individual labour contract for a definite term;
- the part-time labour contract;
- the temporary labour contract;
- the discontinuous labour contract (i.e. when the worker performs his duties only on Saturday and Sunday);
- the zero hours contract (i.e. when the worker is at the disposal of the employer to be called on at a later time).

That is why the employees who perform their duties under this kind of atypical contracts are considered "vulnerable workers", because they activate in successive jobs, for short periods of time, of low quality which in time leads to a disqualification of this people and a weaker social protection.

Considering all of the above, we can conclude that flexicurity reprezents an intergrated strategy of simultaneous consolidation of flexibility which esentially has the purpose to help the employer gain more freedom of movement and social security, and in turn to help the employee gain protection and social security for the entire duration of his life, no matter his position in the society of in the labour market.

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LEGAL PROTECTION OF THE NAME

Oana-Nicoleta RETEA[1]

Abstract:

The social, individual and family interest are all joined by name. Each of these interests are legitimate and an excess of one of them threatens the existence of the others. Humans cannot be outside the legal life at no time. The name is attached to privacy, as demonstrated in the first place by being a means of individualization of a person. Nowadays the name of the person and the problems imposed by its use are covered by specific provisions. Every human being, as bearer of civil subjective rights and civil liabilities should be individualized in the legal relationships in which they participate.The purpose of this article is to provide the first comprehensive legal analysis of the protection offered to the right to a name, taking into consideration it's juridical nature. Another fact generally agreed on is that the right to a name is one of those personality rights which are simultaneously identification attributes of an individual, being however included also intro the notion of "family right". All these prerogatives which belong to every indvidual will determine a certain defense.

Key words: *right to a name, use of the name, identification attribute, protection, legal nature, personality rights.*

INTRODUCTION

The name is a complex notion whose birth, historically speaking, represents primarily the result of a long usage, as any element related to language The name becomes a legal concept, its structure and rules of assigning are the subject of the regulations, and not the name itself[2]. Legal literature has proposed several definitions, of which we retain the one that states that the name is "that attribute of the physical person which consists in the human right to be individualized, within the family and society, by the words set out in the law, in this meaning "[3]. Such a definition presents the failure to not reveal the essential quality of the

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[2] E. Chelaru, *Drept civil. Persoanele-în reglementarea NCC* (Bucharest: C.H. Beck, 2012) 0n-line Library,www.legalis.ro.

[3] Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului* civil (Bucharest: Universul Juridic, 2005) 381.

name that of being a personal non-patrimonial right, from the class of identification attributes.

The name is a subjective civil law from the point of view of its legal nature, since art. 81of the new Civil Code speaks of "the right to a name". The same legal nature of the name results from art. 7 pt. 1 of the Convention on the Rights of the Child, adopted by the Unated Nations General Assembly on 20 November 1989 and ratified by Romania by Law no. 18/1990, published in the Official Gazette no.109 of September 28, 1990, which provides: „the child shall be registered immediately after birth and shall have the right to a name from this point forward". This principle is reinforced by art. 9 of Law no. 272/2004, republished in the Official Gazette no. 159 of March 5, 2014, according to which the child has a right to a name, as part of its right to identity. Being a part of the personality, the name is not a patrimonial value and is therefore a personal non-patrimonial right[4].However, there is controversy over the legal nature of the name, some authors in foreign legal literature as well F.Zenati-Castaing, believes that this is a good that can be acquired by long possession[5].

The name is a consequence of filiation, being the bearer of our identity. If we consider that the descendants have the right to act in defense of their ancestral name, even if they have never worn it and that the inaction of family members not prevent action in defense of family heritage by others, it seems name is a sort of family right.[6]

PROTECTION OF THE RIGHT TO NAME

According to article 82 of the new Civil Code "everyone has the right to name established or acquired under the law", which determines the scope of the legal instruments provided for protection of the right to the name. Therefore, subject to the defense of the right to a name could be: the surname acquired by filiation or adoption effect, the name chosen at the time of marriage, any person's first name,the found child's name,

[4] Gerard Cornu, *Droit civil. Introduction. Les personnes. Les biens.* Ediția a V-a (Paris: Montchrestien, 1991). 276.

[5] A se vedea F. Th. Revet Zenati-Castaing, *Manuel de droit des personnes* (Paris: Presses Universitaires de France, 2006). 57-62.

[6]Ovidiu Ungureanu și Cornelia Munteanu, *Drept civil. Persoanele în reglementarea noului Cod Civil* (Bucharest: Hamangiu, 2015). 242.

the one born from parents unknown,and the first name and last name changed by administrative means.

Legitimate bearer of a name is entitled to defend itself, which is a faculty and not an obligation. The holder of a name is not entitled to challenge its use of whom regularly has the same name, unless unfair competition for those who exploit skillful a homonym[7]. Unlike the legal person, the name of the individual has no exclusivity of its use, as there is no possibility of reserving it. Therefore, the probability of uniqueness of a forename or a surname is very small and it does not take the respect of exclusive rights to the name [8].

Because the name is an element of personality, it cannot be defended only if it prejudices the personality. In addition, as mentioned above, it is a sign of belonging to a family, all family members having the right to defend the family name in court, without the need for demonstrating any prejudice[9].The injury may create a confusing situation on the real author of actions, which may put the true owner of the name into the difficult situation of proving that he is not the author of the charged facts (sometimes in a criminal trial)[10].

The right to a name, in his quality as personal non patrimonial right[11], is protected by art.252 to 257 of the new Civil Code, which is the general rule protecting personal non-patrimonial rights. Therefore, according to art. 253 of the new Civil Code, the individual whose personal non patrimonial right was violated, Court may refer to either get the prohibition of the commitment of the unlawful fact if it is imminent, or cessation of the infringement and the prohibition for the future if it continues, or finding that unlawful nature of the committed fact, if the disorder produced subsists. We see that justice protection may be

[7] G. Cornu, *Droit civil. Introduction. Les personnes. Les biens.* Ediția a V-a (Paris, Montchrestien, 1991), 613.
[8] C. Voicu, în *Noul Cod Civil.Comentarii, doctrină, jurisprudență. Vol.I.* (Bucharest: Hamangiu, 2012), 323.
[9] O. Ungureanu și C. Munteanu, *Drept civil.Persoanele în reglementarea noului Cod Civil* (Bucharest: Hamangiu, 2011), 166.
[10] C. Voicu, în *Noul Cod Civil.Comentarii, doctrină, jurisprudență. Vol.I.* (Bucharest: Hamangiu, 2012), 324.
[11] S. Cercel, I. Dogaru, *Drept civil. Persoanele* (Bucharest: C.H.Beck, 2007) 118;

required even before the wrongful act have occurred if there is a threat to one of the non-patrimonial rights [12].

The legal provision states the Court's posibility to dispose restrictive measures on the victim's demand , against the accused, being specified with illustrative purpose, to oblige the accused one to publish the judgment of conviction , on his expense[13].The victim is entitled to compensation for material damage but also to patrimonial compensation for the damage caused, even if the prejudice was not of patrimonial nature (moral prejudice), if the injury is attributable to the author of the act. Unlike the action whose purpose is to protect the patrimonial personal right, which is imprescriptible, the action requiring repair damages or other asset is prescriptive in common law rules[14].

In addition, the text of the law settles two situations: contesting name [art. 254. alin. (1) and alin.(3) of the new Civil Code] and usurpation, in whole or in part, of the name [art. 254. alin. (2) and alin.(3) of the new Civil Code]. In terms of art. 254 of the new Civil Code, the injured party may request the court to take, by way of presidency order, interim measures which may consist, especially, in the ban of abuse or its interlocutory prohibition or in taking the necessary measures to preserve the evidences.

According to art. 256 of the new Civil Code, the right to a name, like any other non-patrimonial personal rights, is protected after the death of the holder,so the action may be continued or initiated, if necessary, by the surviving spouse of the injured party, by any of the relatives in a straight line deceased, and by any collateral relatives up to the fourth degree, inclusively. The possibility of formulating objections to the requests for changing the name, based on art. 11 para. (1) O.G. no. 41/2003, is a defense of the opponent's name.

Not being an action in tort, it will not need to prove the existence of damage or fault of the defendant, but that the applicant has acquired the name (family name) regularly, that the defendant wears it without right, and this circumstance is likely to cause confusion, in that the defendant

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[12] E. Chelaru, *Drept civil.Persoanele-în reglementarea NCC* (Bucharest: C.H. Beck, 2012) On-line Library,www.legalis.ro.

[13]A. Rădoi, în Fl. Baias (coord.), *Noul Cod civil. Comentariu pe articole* (Bucharest: C.H. Beck, 2012) 249.

[14]E. Chelaru, *Drept civil. Persoanele-în reglementarea NCC* (Bucharest: C.H. Beck, 2012) On-line Library,www.legalis.ro.

could be considered a member of the applicant's family[15]. There may be situations where using the name of another person is innocent: the acquisition by the child's name due to fraud committed by the mother in the birth statement under a false name, recognition of a child by his unnatural father with the purpose to avoid the adoption procedure, etc. All these situations find their solution in actions for filiation recognition or actions related to civil status and not by mechanisms provided by art. 254of the new Civil Code[16].

CONCLUSION

Defending the right to name provided by art. 254 of the new Civil Code constitutes a 'derogation' from the common law on the reparation of the violations to the patrimonial rights of Art.253 settled by the new Civil Code.[17]

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REFLECTING THE RIGHT TO PRIVATE LIFE IN ECHR JURISPRUDENCE RELEVANT FOR ROMANIA

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Abstract:

The European Convention of Human Rights compels the signatory states to provide for the exercise of rights and liberties stipulated thereof. In conformity to art. 8 of Convention, the right to private life has generated a rich jurisprudence to European Court considering useful the analysis of it, from the perspective of Romanian's cases.

Key words*: private life, subjective right, jurisprudence.*

INTRODUCTION

The European Convention for protection of human rights and fundamental liberties[2] has a direct application and represents the natural connection between the rights and liberties asserted and the requirements of a democratic society, compelling the signatory states to provide for the exercise of rights and liberties stipulated thereof.

In the statistics of the judgements passed between 1959-2010, published by Court on 19 September 2011, related to Romania, out of over 26 000 petitions formulated in the interval mentioned, only 791, that is around 3%, were declared admissible, the rest of 97% being declared inadmissible or deregistered from the docket during an incipient stage[3].

NOTION OF PRIVATE LIFE

On international level, the first disposal concerning the right to private life was included in the Universal Declaration of Human Rights 1948, which in art. 12 stipulates that: „no one will be subject to arbitrary immixture in his particular life, in his family, in his domicile or correspondence", followed by the rulings included in art. 17 of the

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[2] Hereinafter referred to as Convention.

[3] Costin Leonard Fălcuță coord., *Collection of jurisprudence ECHR (recent causes against Romania)* – vol. II –, (Bucharest: European Institute of Romania, 2011), III.

International Pact concerning the civil and political rights, according to which „(1) No one may be subject to arbitrary or illegal immixtures in his particular life, family, domicile or correspondence, or illegal impairment of his honour and reputation. (2) Any individual has the right to the protection of law against such immixtures or impairments".

On regional level[4], we state the disposals of art. 11 of the American Convention of human rights and, mainly, those of art. 8 of the European Convention of human rights, according to which „(1) Any individual has the right to private life and family, his domicile and correspondence. (2) It is not accepted the interference of a public authority in exercising such right but to the extent this interference is stipulated by law and if it represents a measure which, in a democratic society, it is necessary for national security, public safety, economic wellbeing of the country, defence of order and prevention of criminal acts, protection of health or moral, or protection of the rights and liberties of others".

In the conception of the European Court of Human Rights, the notion of private life „covers the physical and moral integrity of individual; the guarantee offered by art. 8 of Convention is mainly meant to provide for development, without external interferences, of the personality of every individual, in the relation with the others"[5], however it is not reduced only to the private sphere of individual[6].

Since personal life is associated to social life, the Court decided that there were interferences in the private life by the state authorities when they intercepted the phone calls related to exercising the profession of trader by the plaintiff. It results that, in terms of art. 8 of Convention, the sphere of the notion of private life includes as well the commercial and professional activity, because, the labour place provides to the individuals the possibility to establish relations with the others.

It is significant the extension of protection of the private life of an individual stipulated by art. 8 to the healthy environment, as it results

[4] Corina Florența Popescu, Maria-Irina Grigore-Rădulescu, ″Aspects related to observance of right to private life by mass-media″, *Romanian Pandect* 10 (2014): 18.

[5] Cause Botta against Italy.

[6] François Sudre, *European and international law of human rights*, (Iași: Polirom, 2006), 313.

from the jurisprudence of Court in the cases Lopez-Ostra against Spain and Guera s.a. against Italy.

Thus, in the case Lopez-Ostra against Spain, the Court decided that by installing a sewage treatment plant of residual water with negative effects on private and family life of the plaintiff close to his domicile, the state did not provide for a fair balance between general interests, represented by the need to build such installations and the personal interests, materialised in the right of the plaintiff to benefit of a healthy environment, protected by art. 8 of Convention.

Also, in the case Guera and the others against Italy, the Court showed that there are direct consequences of producing such noxae by the activity of a chemical plant on private and family life of the plaintiffs, and the Italian state did not take positive measures to communicate them essential information which would have allowed them to assess the risks resulted from the activity of such plant and decide thus if they can continue living in the neighbourhood.

Although pursuant to analysing the jurisprudence of Court related to protection of human right to a healthy environment it is difficult to achieve a clear distinction between the right to a private life, the right to family life and the right to domicile[7], registered in the field of ruling of art. 8 of Convention, the interpretation of negative[8] or positive[9] obligations incumbent upon state authorities in the field leads to the conclusion that this concern both the right to private life and the right to family life of the individual and the right to domicile, the observance of which involving, among others providing a healthy environment[10]..

Synthesising, we appreciate that, in the opinion of Court, the notion of private life, stipulated by art. 8 of Convention, includes the right of individual to private intimate, personal life, the right to a social private life and the right of individual to a healthy environment.

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[7] Radu Chiriţă, *European Convention of Human Rights. Commentaries and explanations, vol. II*, (Bucharest: C.H. Beck, 2007), 38.

[8] The negative obligations are materialised by not exercising some interferences in exercising this right.

[9] The positive obligations are materialised by taking some measures meant to entail the observance of the right mentioned

[10] Corneliu Bîrsan, *European Convention of Human Rights. Commentary per articles, vol. I, Rights and liberties*, (Bucharest: All Beck, 2005), 600.

NATURE OF THE OBLIGATIONS IMPOSED TO STATE BY ART. 8 OF CONVENTION

Pursuant to the interpretation of the disposals of art. 8 of Convention and as outlined, constantly, by the European Court, art. 8 imposes the states to meet some negative obligations [11] and positive obligations[12], inherent to providing effective respect of private and family life.

The consecration of right to observance of private and family life has as finality the protection of individual against any arbitrary interference of public power in exercising the prerogatives providing the contents of this right. Consequently, the sphere of negative obligations incumbent upon state authorities includes the interdiction of not doing something meant to impair the exercise of the right by its holders, respectively the natural persons or social entities who may claim it. This does not exclude the possibility of national authorities to adopt legal rules related to the incrimination of certain acts related to private life, intercepting correspondence, post dispatches or phone conversations, institution of some measures of supervision etc., having as scope the protection of national security, public order or prevention of committing some criminal acts.

As shown, the states are also incumbent upon the accomplishment of some positive obligations related to adopting a proper legislative system [13], allowing them just the accomplishment of such positive obligations determined based on art. 8 of Convention.

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[11]Chiriţă, *European Convention of Human Rights. Commentaries and explanations, vol. II*, 74.

[12] ECHR, cause *Phinikaridou against Cyprus*, petition no. 23890/02, judgement dated 20 March 2008, http://www.echr.coe.int ECHR, cause *Dickson against Great Britain*, petition no. 44362/04, judgement dated 4 December 2007, http://www.echr.coe.int; ECHR, case *Kaftailova against Latvia*, petition no. 59643/00, judgement dated 7 December 2007, http://www.echr.coe.int.

[13] Popescu, Grigore-Rădulescu, ″Aspects concerning the observance of right to private life by mass-media″, 20.

CASE CSOMA AGAINST ROMANIA[14]

By judgement dated 15 January 2013 passed in the case Csoma against Romania, the Court determined the breach of art. 8 of Convention by the fact that, on the one hand, the patient was not completely informed on the risks of medical intervention, her written consent was not acquired, one omitted the performance of obligatory pre-operative test, and, on the other hand, on such moment, the state does not provide for a proper legal frame for the plaintiff to obtain an effective remedy for the prejudice caused[15].

The plaintiff, of profession nurse, got pregnant in January 2002, the evolution of pregnancy being supervised by dr. P.C., gynaecologist at Covasna Municipal Hospital, and on the 16th week of pregnancy, the fetus was diagnosed with hydrocephaly, determining the physician to decide for the interruption of pregnancy.

In this respect, the plaintiff was hospitalised at Covasna Municipal Hospital on 13 May 2002, where she was administered by perfusion, and the next day by abdominal injection, a concentrated solution of glucose determining thus the death of fetus.

During the night of 15 May 2002, the plaintiff had fever and shivers, and in the morning of the next day, the fetus was expulsed, afterwards, the patient starting to bleed intensely. Despite the two curettages performed by the physician, the haemorrhage couldn't be stopped, the plaintiff being diagnosed thus with Disseminated Intravascular Coagulation (CID), determining her physician to decide the urgent submission of patient to the County Hospital of Sfântu Gheorghe, situated at around 30 kilometres distance.

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[14]http://www.hotararicedo.ro/index.php/news/2013/02/malpraxis-medical-lipsa-consimtamantului-scris-al-pacientei-omisiunea-medicului-de-a-informa-adecvat-pacienta-asupra-riscurilor-procedurii-medicale-incalcare-art8-conventie-cauza-csoma-c-romaniei.

[15] In the specialised literature, it was shown that the field of application of art. 8 of Convention protects a wide sphere of interests of personal nature, which, although strictly defined by the Convention, presents close connections, the Court having the obligation to determine both the field of enforcement of rights and the conditions under which the process of exercising it may know the restrictions stipulated by Convention. See D.J. Harris, M. O' Boyle, C. Warbrick, *Law of the European Convention on Human Rights*,(London, Dublin, Edinburgh: Butterworths, 1995), 303.

Although the patient was in a critical condition, during the transportation, she was assisted only by a nurse. Once arrived at the County Hospital, the physicians had to perform a complete hysterectomy and bilateral adnexectomy to save her life.

Considering that the physician P.C. committed serious medical errors in the treatment performed, the plaintiff submitted a complaint to the College of Physicians of Covasna, which, on 18 September 2002, reached the following conclusions:

- the interruption of pregnancy was correctly indicated;

- the injection of glucose solution abdominally involved the supervision of it and accurate location of placenta by echography lacking however from the consultation sheet of the patient; such a method imposed a prior information of patient related to the risks and complications and obtaining her written consent which was also absent from the medical record;

- CID does not represent a direct consequence of abdominal injection of the solution although it represents a rare and serious complication resulted from the use of such method;

-considering that CID was discovered in due time, allowing the transfer of patient to another hospital with the consequence of saving her life, no medical neglect could be identified.

However, the report presents certain procedural irregularities, respectively the absence of written consent of the patient, the absence of echography for the localisation of placenta, inexistence of the results of preliminary laboratory tests, as well as the fact that, depending on the facilities and resources of Municipal Hospital, the cases with a potential high risk should be treated in hospital units properly endowed.

Also, during the year 2002, the plaintiff filed criminal complaint against the physician P.C. for committing the offences of serious body injury and, respectively, professional negligence, and on 19 November 2002 she brought a civil action.

On 4 December 2002, on demand of the body of criminal investigation, the Forensic Service Sfântu Gheorghe completed a medical report of expertise concluding the absence of any medical neglect, outlining that the method selected for causing the abortion could have been done in any medical unit with gynaecological profile. Also, it was stated that in the absence of the mentions concerning the results of laboratory tests from the medical record did not exclude the possibility

that the tests had been actually performed without recording however the result thereof.

On 15 January 2003, the plaintiff formulated objections to this expertise report in this respect, considering it incomplete, required to be answered among others the questions if the physician had meet the obligations incumbent upon him during the procedure of causing the abortion, if there were other methods available to interrupt the pregnancy, if the performance of echography could have influence the intervention, as well as if total hysterectomy could have been avoided if she had been hospitalised in a medical unit properly endowed.

On 27 March 2003, the Forensic Institute Târgu-Mureş issued an approval concerning the case of the plaintiff stating among others that the medical documents did not include the form necessary to be filled in and signed by two specialist physicians and by the hospital manager for the procedures of interruption of pregnancies longer than 14 weeks. Also, the absence of the written consent of the patient, necessary in the medical interventions with high risk, as well as the preliminary laboratory results and the data concerning the localisation of placenta by echography.

On 26 January 2004, I.N.M.L. Mina Minovici confirmed the report dated 4 December 2002, considering that there was no medical neglect from the part of the physician however, indeed, the latter omitted to discuss with the patient the risks involved by the medical intervention and obtain her written consent.

On 27 February 2003, therefore prior to the issue of the point of view by I.N.M.L. Mina Minovici, the prosecutor of Prosecution Office attached to Covasna County Court decided the release from criminal prosecution of the physician P.C., solution confirmed by the hierarchical prosecutor, and by Covasna County Court on 29 September 2004.

The plaintiff claimed the breach of the rights stipulated by art. 2, 6 and 13 of Convention by the fact that she was not properly informed related to the risks of intervention and that, due to medical neglect, her life was endangered, being in the impossibility of being ever pregnant.

The Court, showing that it is the sole to qualify in law the issue in fact submitted for judgement and that it may analyse a petition from the perspective of another article than the one claimed by the plaintiff (Guerra and the others against Italy, 19 February 1998), considered opportune the examination of the case from the perspective of art. 8 of Convention.

The plaintiff claimed that she was not informed related to the nature and possible consequences of the medical procedure, stating that the circumstance that she was a nurse did not exonerate the physician from meeting his obligations of informing and obtaining the consent of the patient. Thus, if the procedure of interrupting the pregnancy is not urgent, there is no justification for the lack of preparation of intervention, mainly related to the omission of performing preliminary laboratory tests.

The Government stated that the liability of state cannot be claimed based on art. 8 of Convention considering that, on the one hand, the national authorities did not identify any fault of physician and on the other hand the plaintiff, voluntarily hospitalised, knew the significance of the medical procedures performed to her. The Government acknowledged however that the only negligence of physician may be identified in his omission of acquiring the written consent of the patient, this circumstance couldn't however lead to the conclusion that the patient hadn't been informed related to the nature of the procedure or that her consent was absent.

The court, based on the fact that by the medical intervention performed by the physician P.C., the life of the plaintiff was seriously endangered, with the consequence of her impossibility of ever being pregnant, determined that it was interference to the right of private life of the plaintiff.

In order to determine whether the state met its positive obligations imposed by art. 8 of Convention, the court, without being able to contradict the solutions of the national courts related to the non-employment of criminal liability of the physician P.C., referred both to actual circumstances of performing the medical intervention, reflected in the contents of the expertise reports drafted by the national authorities and to the legal possibility made available to the plaintiff on national level, to obtain an effective remedy for the injury suffered.

Thus, the Court, firstly, took notice of the fact that all expertise reports converge in determining that the physician omitted, prior to the intervention, to obtain the written consent of the patient and to perform preliminary laboratory tests. In this context, a reasonable explanation couldn't be encountered for the omission of physician of asking for the written consent of the patient, the Court rejecting the argument of Government according to which the quality of nurse of the plaintiff

would explain the lack of informing and suggest the existence in fact of her consent.

Thus, the Court noticed an inexplicable manner of management of the situation by the physician who, although there was no emergency in proceeding to the interruption of pregnancy, neglected to perform the obligatory preliminary tests and appreciate objectively whether such hospital was properly endowed to deal with potential complications. From the same perspective of absence of emergency in performing medical interventions, the Court determined that the expertise report performed during the judicial procedures did not answer to the objections formulated by the plaintiff, provided that a detailed answer related to this issue could have revealed the events that led to the loss suffered by the plaintiff.

Considering the legal remedies made available to the plaintiff, the Court, although accepted that the civil action in the criminal trial were enough to provide the plaintiff the actual possibility to obtain the reparation of damage, considered however that the manner how the investigations were performed did not satisfy certain exigencies.

Thus, the reports of expertise mentioned the lack of any medical error of physician despite obvious omissions from his part, mistakes however indicated by reports.

On his turn, the prosecutor ignored the contradictions existent in the expertise reports related to the fault of physician relying his solution only on the report drafted on his demand (that dated 4 December 2002), ignoring however the report of the College of Physicians of Covasna, although the latter seemed complete and better focused on the procedural issues analysed. Last but not least, the court determined that the prosecutor did not know the point of view of INML Mina Minovici, neglecting as well to consider the objections and questions raised by the plaintiff related to the report of expertise drafted on 4 December 2002.

Under the conditions that, upon the events subject to this case, it was not possible a new expertise considering that I.N.M.L. Mina Minovici had issued an official point of view, the Court determined the impossibility of the plaintiff to raise, again, through a procedure, the problem of existence of a medical error. This aspect questions whether the civil action formulated by the plaintiff in contradictory with the physician would have been an effective remedy, mainly considering that

the report of forensic expertise would have been essential evidence in sustaining its civil action.

The Court, although it noticed a development of national jurisprudence in this respect, however it noticed that the national courts did not have a well established practice concerning the liability of hospitals in the cases of medical fault (case Stihi-Boos against Romania, previously quoted, par. 64). This finding corroborated with not considering any medical fault in the expertise reports performed, leads to the conclusion of existence of a minimum chance for the plaintiff to obtain an effective remedy.

Although Law no. 95/2006 concerning the reform in the field of health facilitated the acquirement of compensations by victims even in the absence of determining a fault of the medical staff, the court considered disproportionate to ask the plaintiff to draft a new demand of compensations in front of civil court, considering that the plaintiff, on such moment, was not passive but she notified the College of Physicians and judicial bodies, during the criminal procedures bringing as well a civil action.

Considering the arguments mentioned, the Court determined that the plaintiff was breached the right to private life by not informing her on the risks involved by the medical procedure and by not being involved by the physician in selecting the medical treatment provided, and the state did not meet the positive obligation to provide then an effective legal system by which the plaintiff could have obtained a proper reparation of the breach of right to private life being thus breached art. 8 of Convention.

Consequently, the Court decided that the defendant state pays to the plaintiff, within 3 months as of the date of final judgement, the amount of 6.000 EUR, as moral damages.

CONCLUSIONS

Referring to the wide sphere of values appeared by art. 8 of Convention, we consider that meeting both kinds of obligations must have as objective providing a balance between individual interests and the interests of society being left on the discretion of state, but subject however to the control of court.

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CONDITIONS AND PROCEDURE CRIMINAL LIABILITY OF LEGAL ENTITY

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Abstract:

Criminal liability of legal persons is a topical issue, as the attention of European criminal doctrine among the central themes of scientific and regulatory approaches. Study the historical evolution of this institution is able to support the idea that the criminal liability of legal persons is consistent with the fundamental principles of criminal law, the nature of the legal person is justified by socio-economic needs.

The new Criminal Code[3] *retains much of the precepts underlying the regulation of the Criminal Code above. Thus, despite the arguments against this institution, the criminal liability of legal persons is a reality and, for this reason, must know very well the legal provisions governing the institution.*

The theme chosen is justified by the fact that this institution, always called "recent" raises many problems both theoretical and practical. There are indeed few decisions condemning legal entities, but these cases in which the issue was raised criminal liability of collective entities sometimes ended up with solutions (already) contradictory. There is a real reluctance amongst practitioners to discuss criminal liability of legal persons. Media and legal information sites displayed every day news about the indictment of directors of companies for offenses relating to copyright, tax evasion, smuggling, issuing checks without cover, etc., although it is clear that in these cases should be raised (and) the issue of criminal liability of legal persons concerned.

Key words: *criminal liability; legal entity; criminal trial; execution of punishments*

LEGAL PERSONALITY

One of the general conditions for liability of legal person is that it possess legal capacity. According to art. 219 NCC, licit or illicit acts committed by a legal person commits itself bodies legal entity, but only if they relate to the duties and functions assigned order. Illegal acts entail joint and several liability and those who have committed both to the legal entity and to third parties.

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[3] Law 286/2009 published in the Official Gazette of Romania, Part I, no. 510 of 24 July 2009 - which came into force on 1 February 2014.

Regarding entities under the constitution or who have ceased to exist by dissolution, they are not criminally liable because the entities being set up, until the time of acquiring recognized as those that can not be found in the category legal persons, as they have gained or lost being legal, not criminal legal capacity.

The doctrine was considered with regard to legal persons under liquidation stage, can be held liable for criminal acts committed them during this phase as liquidated businesses retain their legal capacity for transformation of cash assets and pay liabilities. [4]

Associations, foundations and other non-profit legal persons criminally liable even if they were declared of public utility, because by this as they are not public authorities or institutions.

As regards political parties, the legislature has not exempt from criminal liability, but only excluded the application of certain supplementary penalties against them, namely, dissolution and suspension of operations.[5]

Trade unions and employers organizations and religious organizations and national minorities have a similar legal regime applicable to political parties. Legal persons engaged in the press, regardless of the legal, penal responsibility, but may be assigned three additional punishment: dissolving, suspending operations and closure of sites.

LEGAL CAPACITY

The second general condition to be committed criminal liability of legal persons is that it does not fall within the excluded, because not all legal persons criminally liable. Regarding the exclusion from the scope of state legal persons criminally responsible, it is justified by the fact that the state is among the only legal entities can not be abolished, and on the other hand it is the only active subject of reports of criminal responsibility. Therefore, in our system of law, the state is not criminally liable, regardless of facts which would impute.

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[4] A. Jurmala, ”Legal entity - active subject of crime”, *Criminal Law Review* (No. 2, April-June 2010):122.

[5] Gh. Mărgărit, ”Concept of criminal liability of legal persons in the new Criminal Code”, *The Law* (no. 2/2005):103-104.

Important provisions relating to public authorities are contained in the Constitution. Basic Law provides that "public authorities"[6]: Parliament, the President of Romania, the Government, public administration, judicial authority.

According to art. 135 para. (1) of the Criminal Code in force "Public institutions are not criminally responsible for crimes committed in the exercise of an activity not subject to the private domain". In drafting previously existing Criminal Code provision is not criminally responsible public institutions "which conduct can not be subject to the private domain." The legislature took into account the suggestion of the literature on the previous wording, which was considered inadequate.[7]

OFFENSE THE OBJECTIVE OF ACTIVITY OR INTEREST IN THE NAME OF PERSON OR LEGAL

A third general condition for the training of criminal liability of legal persons is that the offenses are committed in achieving the object of activity or interest or on behalf of the legal person. Romanian legislator regulated the criminal liability of legal persons as-clause (liability) general or general liability model, met especially in common law, under which a legal person can be held criminally liable for any offense, no plano exclusion of certain crimes. Of course certain crimes, such as rape, perjury, etc. concept can not be committed, at least as the author, the legal person.

To attract criminal liability of legal persons and must prove guilt for failing prudence and diligence is reflected in the way in which it was ruled that legal person. A person is guilty of an offense against life, limb and health if the way he organizes and coordinates activities:

a) resulted in death or endangering a person's life or injury caused to a person's physical integrity and health;

b) represents a serious breach of care that legal person must have to beneficiaries of its services and those third parties with whom they came into contact.[8]

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[6] The public authorities shall mean the authorities expressly provided for in Title III, as well as art. 140 and 142 of the Romanian Constitution.

[7] F. Streteanu, ”Some considerations on the criminal liability of legal persons according to the draft law amending the Criminal Code”, *RDP* (no. 1/2005): 42.

[8] RI Motica, L. Bercea, V. Pasca, *New Codes of Romania* (Bucharest: Juridical Universe, 2011), 562-563.

The existence of guilt is conditional, inter alia, verification and psychophysical capacity of the person, natural or juridical, to realize the act and its consequences. Imputability there will therefore whenever, on wrongful act can not invoke one of the grounds provided by law that are excusable guilt.[9]

GUILT OF LEGAL PERSONS

The Criminal Code provides that the criminal liability of legal persons, the act must be committed to the shape of guilt by the criminal law. The new Criminal Code no longer repeats this statement, but not because guilt is not a prerequisite for liability of legal person, but because this term is not considered necessary as art. 16 para. (1) of the Criminal Code previously established that "act[10] is an offense only if committed with guilt as required by the criminal law."

As regards the legal person's guilt, it relates to organs and organization, being able to say that establish the guilt of individuals that make up the legal equivalent bodies to establish the guilt of that entity. If the offense is not committed by bodies of the legal person, but representatives or representative, legal person's guilt is determined by reference to the attitude of its organs.

The existence of guilt or form or how it will result in objective aspects of how decisions were adopted by the governing bodies of the legal entity or existing practices known, accepted or tolerated in the work of the legal entity. Although one can say that the individual guilt of the legal person show leadership and its guilt, however, according to some authors, the organs must establish rules and practices within the organization and functioning of the legal person and based on the findings, if bodies that legal person decided they knew or did not prevent, in accordance with the levers are close at hand, committing crimes, following a finding that the criminal liability of legal persons may be employed, provided that it is performed as required guilt by law for the offense in question.

G. Anthoniu, *preliminary explanations of the New Criminal Code*. Volume I, (Bucharest: Juridical Universe, 2010), 564.

[9] G. Anthoniu, *Preliminary explanations of the New Criminal Code. Volume I*, (Bucharest: Juridical Universe, 2010), 564.

[10] Regardless if committed by an individual or a legal entity.

If intentional acts necessary pre-existence of a decision of the legal entity under which the act was committed by the criminal law. For the offenses of negligence, guilt is determined by checking obligations of the legal person. Assuming criminal liability of legal persons for offenses committed by negligence, it is considered possible, whether or not established the guilt of individuals, whereas guilt is related to attitude collective bodies concerned.

With regard to offenses committed by persons other than the bodies of the legal person for the offense to be necessary that they knew or should have known about the criminal activities of individuals. It is therefore excluded criminal liability of legal persons where the offense is committed by a servant suddenly the legal entity or if criminal offense does not fit in a practice tolerated or legal person consents. Moreover, if the legal person created a well organized system of supervision and control, was reasonably able to prevent the commission of offenses, liability of legal persons should be excluded.

The doctrine considers that, as long as the legal person's guilt is a distinct element of individual guilt, as it is analyzed separately, it must be admitted that two people can be guilty of the same or different form or way.[11]

All the same form of guilt can be when both legal persona and physical acts both intentional negligence or both. An example in this case may be the situation where members of the board of a legal person have decided diversion object of activity in order to carry out activities of trafficking, the same attitude towards this activity with subjective and individuals involved the practical implementation of the decision of the Board. Another example might be when causing an accident at work that caused several deaths were culpable attitude both individual who operated the machine that failed and because of which the accident and bodies management of a company, which did not perform training on safety.

Other examples given are those that the doctrine of guilt by acting as a legal entity and the individual may be different. For example, the employee intentionally constant discharging polluting waste and the legal entity for which he works knows about servant or activity, but there is a repeated negligence regarding supervision of employees.

[11] Streteanu F., R. Chirită, p. 403.

In the above cases as examples, the author of material - or the negligent employee dishonesty - will be held criminally liable as a participant, either as sole perpetrator, if necessary, it is possible that a legal person is not criminally liable, after as possible and state the person in leadership legal person can not be prosecuted. Therefore, criminal liability of legal persons may coexist with individual responsibility, who is an organ of the legal person, and the individual who performed the material element of the offense, but the three categories of subjects may find in other positions. For example, the legal person is not criminally liable, but the two individuals responsible. Another case may be that the legal person and the author criminally responsible material without leading individual legal person convicted. It is also possible that only legal person convicted.

On the evidence of guilt, the doctrine states that this is done indirectly by proving guilt bodies legal entity between the two there is a relation of identity.

REPRESENTATION OF LEGAL ENTITY AND ITS PLACE OF CITATION[12]

A legal entity is represented the fulfillment of procedural acts and procedural legal representative.

If for the same offense or for related facts to put the criminal action against the legal representative of the legal person, it shall appoint an attorney to represent it. In this case, if the legal person has not appointed an agent, it is designated, if necessary, by the prosecutor conducting or supervising the prosecution, the judge or the court preliminary chamber, among insolvency practitioners authorized law.

The legal entity shall be summoned to headquarters. If the seat is fictitious or legal person no longer works at said premises and the new headquarters is not known, at the headquarters of the judicial body displays a notification.

If the legal entity is represented by proxy, citing is the home to the headquarters of the trustee or the insolvency practitioner appointed as trustee.

[12] Par. 491 of the New Code of Criminal Procedure.

PREVENTIVE MEASURES LEGAL ENTITIES[13]

Judge rights and freedoms, during prosecution, the prosecutor's proposal, or, where appropriate, the judge or the court may order pre-chamber, where there are reasonable grounds justifying reasonable suspicion that a legal person committing an offense under the criminal law and only to ensure the proper conduct of criminal proceedings, one or more of the following measures:

a) prohibition initiation or, where appropriate, suspension of the procedure of dissolution or liquidation of the legal person;

b) an initiation or, where appropriate, suspension of the merger, division or reduction of capital of the legal entity, began before or during prosecution;

c) prohibition of economic operations likely to involve reduction of the assets or the insolvency of the legal person;

d) prohibition on the conclusion of certain legal acts determined by the judicial body;

e) prohibiting the nature of their activities during which the offense was committed.

To ensure compliance with preventive measures, the legal entity may be required to deposit a security consisting of a sum of money which can not be less than 10,000 lei.

The security shall be returned to the date of the final judgment of conviction, to postpone the punishment, the penalty waiver or termination of criminal proceedings in Case, if the legal entity has complied preventive measure or measures, and where by final judgment was ordered payment of legal entity.

Bail not be refunded in the event of failure by the legal entity of the lien or preventive measures, making state budget revenue to date of the final judgment in the case, and if willing to pay the bail, in the following order monetary compensation awarded for damages caused by the crime, legal costs or fines.

Preventive measures may be placed on a maximum of 60 days and be extended during prosecution and maintenance during the preliminary procedure and the judgment room, if maintained their grounds for the decision, each extension not exceeding 60 days. During prosecution, preventive measures have rights and freedoms judge

[13] Par. 493 of the New Code of Criminal Procedure.

reasoned ruling given in closed session by citing legal entity. The prosecutor's participation is mandatory. Conclusion may be filed against the judge rights and freedoms or, where appropriate, pre-chamber judge or higher court, the legal person and the prosecutor within 24 hours after delivery, for the present, and communication, for lack legal entity.

Preventive measures are revoked by the judge of rights and freedoms at the request of the prosecutor or the legal entity and the pre-chamber judge and the court of its own motion, but it appears that there are no grounds justifying the taking or keeping them.

PROCEDURE FOR INFORMATION[14]

Prosecutor during prosecution, notify the authority that authorized the establishment of the legal person and legal entity body that registered the initiation of criminal proceedings and prosecution of the legal person, on the disposition of these measures, in order to perform appropriate.

For institutions not subject to the condition registration or authorization to acquire legal personality, information is made by the body that established the institution.

Aforementioned bodies are obliged to inform the judicial body within 24 hours of registration, certified copy, any claim they registered on the legal entity.

However, the legal entity shall disclose the judicial body within 24 hours intention merger, division, dissolution, reorganization, liquidation or reduction of capital.

The same rules must be respected and when taking preventive measures against legal entity.

Once a final decision of the sentence, fine, executing court shall send a copy of the judgment organ which authorized the establishment of the legal person, the body that registered legal entity, the body that established the institution not subject to authorization or registration and enforcement of control and surveillance tasks legal entity to carry out appropriate.

[14] Par. 495 of the New Code of Criminal Procedure.

EFFECTS OF THE MERGER, ABSORPTION, DIVISION, CAPITAL REDUCTION, DISSOLUTION OR LIQUIDATION OF LEGAL PERSON CONVICTED[15]

If, after a final decision convicting the legal person and to the enforcement of sentences imposed, comes a case of merger, acquisition, division, dissolution, liquidation or reduction of its share capital, authority or institution that is competent to authorize or record this operation is obliged to notify the executing court about it and inform the legal entity created by the merger, absorption or has acquired the assets of the individual fractions divided. The legal entity resulting from the merger, absorption or has acquired the assets of the individual fractions divided obligations and prohibitions take legal person convicted.

MAIN ISSUES ON THE EXECUTION OF PENALTY LEGAL ENTITIES[16]

Legal person sentenced to fines is required to submit the receipt of full payment of the fine to judge the performance, within 3 months after a final conviction.

When the legal person sentenced is unable to pay the fine in full within the time stated above, the execution judge at the request of the legal person, may order the payment of the fine timing more than 2 years in monthly installments. In case of default of payment of the fine within the time stated in default or rescheduling a suitable rate, the enforcement court shall provide a statement on the part of the application or device that fine timing competent bodies, the procedure for execution of execution levy of tax claims.

ENFORCEMENT OF COMPLEMENTARY PUNISHMENTS

Regarding the additional punishment[17] of dissolution of the legal person, copy the sentence device is communicated to the date of the final, the court hearing the execution of the legal person and the body that authorized the establishment of the legal person or body that registered legal entity, while requesting information on how the enforcement of the

[15] Par. 496 of the New Code of Criminal Procedure.
[16] Par. 497 of the New Code of Criminal Procedure.
[17] Par. 498 of the New Code of Criminal Procedure.

measure. On conviction to the penalty becomes final dissolution, legal person shall enter into liquidation.

Regarding the additional punishment of suspension of activity of the legal entity[18], a copy of the judgment of conviction imposing the penalty of suspension of activity or any activity of the legal person shall, on the date of the final, the body that authorized the establishment of the legal person, the body that registered legal entity, the body that established the institution not subject to authorization or registration and organs with control and supervision of the legal person, to take appropriate action.

Regarding the additional punishment closure of some work of the legal entity[19], a copy of the judgment of conviction imposing the penalty legal person closure of outlets communicated at the time of the final, the body that authorized the establishment of the legal person body that registered legal entity, the body that established the institution not subject to authorization or registration and organs with control and supervision of the legal person, to take appropriate action.

Regarding the additional punishment of banning legal entities to participate in public procurement procedures[20], a copy of the judgment shall be communicated to the date of the final:

a) trade register office in order to arrange advertising in the trade register;

b) Ministry of Justice in order to arrange publicity in the National Register of non-profit legal persons;

c) any authority which keeps track of legal persons in order to arrange publicity;

d) electronic procurement system administrator.

Also, a copy of the judgment of conviction imposing the penalty of denial of legal entities to participate in public procurement procedures shall be communicated to the date of the final, the body that authorized the establishment of the legal person and the body that registered legal entity, to take appropriate action.

As regards, the execution of the complementary penalty of placing under judicial supervision,[21] judicial trustee's duties regarding the

[18] Par. 499 of the New Code of Criminal Procedure.
[19] Par. 500 of the New Code of Criminal Procedure.
[20] Par. 501 of the New Code of Criminal Procedure.

supervision of legal entities are included in the judgment of conviction imposing the penalty placed under supervision. Judicial trustee can not replace the statutory bodies of the legal entity management activities.

Regarding the enforcement of punishment complementary to display or publication of the judgment of conviction, an extract of the sentence that the additional penalty of displaying the sentence shall be served, the date of the final legal person sentenced to display the form, place and time determined by the court. An extract of the sentence that the additional penalty of publication of the sentence shall be served, the date of the final legal person convicted to publish the judgment in the form prescribed by the court, at its own expense, through the press or by written or audiovisual other audiovisual media, designated by the court. The legal entity executing court sentenced submit proof of commencement of the display or, where appropriate, evidence of publication of the sentence execution within 30 days after the judgment, but not later than 10 days after the beginning of the execution or, where appropriate, the execution of the principal penalty. A copy of the judgment of conviction, wholly or extract thereof shall be communicated to the date of the final body that authorized the establishment of the legal person, the body that registered legal entity, the body that established the institution not subject to authorization or registration and enforcement with control and supervision of the legal person, to take appropriate action.

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[21] Par. 501/1 of the New Code of Criminal Procedure.

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THREATS TO THE EU EXTERNAL BORDERS AND EUROPEAN INITIATIVES TO MITIGATE THE RISKS IDENTIFIED

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Abstract:

The EU external borders are transited annually by an enormous number of travelers. The freedom of movement for goods and capitals, sometimes allows the free movement of the criminal phenomenon as well. A European Border Police and a globalized approach towards border security and consequently, the security of the EU citizens might be the solution for the mitigation of the security risks identified. Migration, legal or illegal, seems to be a threat to the EU concepts, if not properly managed.

Key words: *EU Borders, EUROSUR, European Border Police, Fundamental Rights, Law Enforcement Agencies*

INTRODUCTION

Annually, the EU external borders are transited by an impressive number of travelers. In the Annual Risk Analysis, Frontex indicates that more than 700 million passengers are crossing the external border during one year. This massive volume allows sometimes the free movement of the illicitly obtained capitals and the criminal phenomena as well.

Police and judicial cooperation between the member states of the EU became a mandatory approach even from the very beginning of the existance of a single external border. This approach requested that the way this common (external) border was managed is coordinated between the member states. “The driver of this change was not immigration so much as organized crime, which of course has no respect for national boundaries”.

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CURRENT SITUATION

The police cooperation between the 26 member countries of the Schengen Area increased in a steep manner since 1999, under the Treaty of Amsterdam, and was later incorporated in the EU framework Aquis.

The police and judicial cooperation in the Schengen area was managed initially by the External Borders Practitioners Common Unit. In the context of the EU enlargement, in 2004, a new EU agency was established – Frontex, the EU agency for the management of the operational cooperation at the External Borders of the Member States of the European Union.

Since its early operational days up to 2013, Frontex increased from a annual budget of 19 mil euro (in 2006) and 30 staff members to 94 mil euro and 300 staff members in 2013.

According to UN, in 2013, the number of international migrants reached 232 million persons, coming from every corner of the world. In this context, the statistics about this migration flows are easy to collect but they do no mean much for a deep analysis that will enlighten on how the facilitation networks of organized crime groups for illegal migration work and what is to be done by the law enforcement agencies to counter this threats.

With regards to the Frontex activity, the activity of the Agency is planned to be intelligence driven. The source of the intelligence provided is to be the Member States of the EU as the main contributor followed by the intelligence generated at Frontex level. The Risk Analysis Unit of Frontex collects information from several sources: the EU Member States, NGO's, other EU missions and Agencies and definitely the open sources. Antonio Saccone, the head of one sector from the analysis unit of Frontex, says that "*information sharing is crucial*" in order to be able to draft strategic predictions.

Information is gathered in Frontex also via the Frontex Situation Centre (FSC), one of the providers of data for the European Situational Picture (ESP) and the main entry gate for information in Frontex. FSC has also a support role for the activity of the Risk Analysis Unit of Frontex.

According to Frontex's approach, the main threat at the EU external borders is the irregular migration. However, an ICMPD study explains that "as border management is not limited to the domestic context but inevitably touches upon cooperation with other states, it must

also ensure effective cooperation […] to better approach 'common fields of work such as transborder crime, irregular migration, trafficking in human beings, terrorism and smuggling of goods".

Frontex admits the importance of countering transborder/cross border criminality and includes in it's strategic product, ARA (Annual Risk Analysis), a chapter dedicated to cross-border criminality. The Frontex's land borders operations carried out at the EU external BCP's (border crossing points) focus also on the detection of vehicles stolen in the EU.

Yearly, around 1.2 million vehicles worth 6 billion euro on the black market are stolen. Europol indicates that some of the main destinations of the stolen vehicles are Russia, Ukraine, Kazakhstan and Belarus. The final destination of the stolen vehicles is important just to identify the most targeted border sections and increase the awareness on the area.

A European concept that was proposed in order to counter the risks mentioned, is the ***EUROPEAN SYSTEM FOR BORDERGUARDS (ESBG).*** Although not a new idea (initially discussed in the 90's), the Stockholm Programme mentioned it also in 2010, in 2011, following the amendments to the Frontex Regulation, the EU Commision requested a feasibility study. The main aim of the study was to identify models for the border governance and following the consultation with the Member States and the European Parliament, 3 models were identified/proposed:

1. enhancing the current activities in the context of the current legal provisions
2. sharing of responsibilities - the exceptional situations/hot spots are in the responsibility of the European authorities while the daily activities will remain in the competence of the member state
3. complete integration at EU level - there will be no national police officers but just one European structure

The only key problem mentioned by some Member States is the national sovereignty. Having an EU organism responsible for the border security of a border section managed at national level by the local authorities might, from the perspective of some states, take over some national security aspects.

The authors of the study mentioned that it is not mandatory to select one of the models but possibly to start gradually, from the first one

and continuing with the second and third one. There is no immediate need for a decision but to draft a calendar to follow.

Another European Initiative meant to tackle the threats identified at the EU external borders is the ***EUROSUR system***. The awareness of the situation is a must for the efficient activity at the borders. The availability of the information for the Member States of the EU is enhanced by the EUROSUR system.

The aim of the EUROSUR is to:

- reduce the number of illegal immigrants who enter the European Union undetected;
- reduce the number of deaths of illegal immigrants by saving more lives at sea;
- increase the internal security of the EU as a whole by contributing to the prevention of cross-border crime.

What EUROSUR actually does is to provide an on-line platform for the Member States to observe the detections at the entire EU external borders. In such a way they can be aware of the existing threats and, based on risk analysis, tailor their national surveillance systems.

A critical view of the EUROSUR system explains that, although the role of the system is to "reduce the number of deaths of illegal immigrants by saving more lives at sea", "*to date, there is no obligation under the Eurosur legislation to ensure that Member States or Frontex initiate search and rescue operations should their plethora of surveillance tools locate a vessel in distress"*.

The practical aspects of functioning indicate that the system links national surveillance mechanisms of the EU Member States and neighboring countries. The concept of Pre-Frontier Intelligence Picture is a tool meant to enable a forecast of the threats before they are at the EU external border. Another aim also stated for the EUROSUR – to prevent cross-border crime is translated by identifying and reducing the volume of irregular migrants entering the EU, facilitated.

An in-depth study of the Frontex's prognosis indicates that "Globally, over the next 20 years, air passenger numbers are predicted to rise by 4 percent a year. By 2031, an expected 12 billion people will take to the skies, more than double the present number – and 2.8 billion of these future passengers will take off or land at a European airport".

Lately, the main focus at the EU external borders was on maritime and land borders. The volume of passenger traffic and the limited time for border checks are currently vulnerability at the borders. The forecast indicates that this volume is about to rise (especially for the air borders) and therefore, initiatives such as the ***Advanced Passenger Information System (APIS)*** were developed and implemented.

In US, the system is implemented and functioning even from May 2009 and the main aim of the system is to enhance border security by providing officers with pre-arrival and departure manifest data on all passengers and crew members.

In the area of border security but with a specific focus on countering cross-border criminality functions the **SELEC (Southeast European Law Enforcement Center).**

The tasks of SELEC as stipulated by the SELEC Convention are to:

- Coordinate regional operations and support investigations and crime prevention activities of the Member States in trans-border cases;
- Provide the Member States with the opportunity to exchange information and criminal intelligence and offer operational assistance in a quick and timely manner;
- Collect, collate, analyze, process and disseminate information and criminal intelligence;
- Produce strategic analysis and threat assessments related to its objective;
- Establish, operate and maintain a computerized information system, which implies also to ensure the protection of personal data.

The SELEC activity involves some EU Member States, members also of the Schengen area but also non-EU countries. Compared with other EU missions and Agencies, SELEC has also the views of the criminal phenomena before it reaches the border.

In a similar approach, the activity carried out by EUBAM in Moldova and Ukraine, although initially meant to support only the local authorities, comes to complete the overall picture.

A brief analysis of the situation at the EU external borders indicates the cross-border criminality as the main threat. Among this

form of criminality, illegal migration is one of the most important one as it is, in most of the cases, facilitated.

The OCG groups involved in facilitating irregular migration are making huge profits that later on are spent on financing the same criminal activities or related ones. A possibility is that this profit is used for financing drug trafficking and it might be that it also reaches the terrorism area.

CONCLUSIONS

The reaction of the EU organisms to the threats identified at the security of the EU borders, most recently, are focused also on the safety of the EU citizen and it's property. Automatic systems, judicial and police cooperation and the direct operational support provided by EU organisms such as Frontex, are, from our prerspective, European initiatives meant to mitigate the risks identified.

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LAW AND RELIGION IN ANTIC ROME

Andreea RÎPEANU[1]

Abstract:

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between ius, honestum and fas. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.

Key words: *law, religion, legal science, sacral law.*

INTRODUCTION

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between ius, honestum and fas. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.[2]

The justification of punishment and mainly of capital execution is encountered, at least initially, in religion, in providing the victim to the God offended by fact and whose revenge could fall thus over the entire community.[3] Even the notion of *sanctio*, by which the punishment was

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[2] Molcuț E., Oancea D., *Roman Law*, Bucharest: Publishing House, 1993, 60.

[3] Strachan-Davidson J. L., *Problems of the Roman criminal law*, Oxford: Clarendon Press, 1912, 1.

determined for the breach of a law is obviously related to *sanctus*, *sacer* and *sacratio*. [4]

LAW AND RELIGION

For several centuries, the pontiffs have known the pomp days[5] and the solemn formulas that the parties in dispute were compelled to pronounce. The pomp days and formulas were revealed and displayed in forum by Gnaeus Flavius, the freedman of Appius Claudius Caeccus in 301 before Christ.[6] The pontiffs held the monopole of law, being the sole who knew and could provide explanations related to the trial. The first priest of the state was the king, until the foundation of republic.[7] The Romans didn't know later either the distinction existent today between state and church, aspects of religion, of sacred, rites and practices appearing in all aspects of Roman life, including in law and criminal law.

As for religion, Roma did not adopt an expansionist model, but there was rather an absorption of religious elements specific to other Mediterranean civilisations, however we must outline the importance of the cult financed by public resources – *sacra publica*.[8] The religious practices could be encountered in every aspect of daily life. The banquets, the meetings of senate, the parades and the wars were usually preceded by sacrifices. Many of such practices survived as well the period after the adoption of Christianity, as state religion. The sacrifices were forbidden starting with 1 January 439, when it was enforced *Codex Theodosianus*.[9] The religions was present in all aspects of social life, it was not limited to temples and feasts.[10] There was however a clear difference between res sacrae and res publicae. In this respect, it was asserted in recent studies, that both religious practices of Romans, and

[4] Strachan-Davidson J. L., 3.
[5] Days when trials were judged.
[6] Hanga Vl., Bucharest: *Borough of seven cholines*, 1951, 185.
[7] Girard Fr., *Histoire de l'organization judiciare des Romains*, Paris: Arthur Rousseau, 1901, 13.
[8] Rüpke Jörg, (coord.), *A companion to Roman religion*, (Blackwell, 2007) 7.
[9] *Codex Theodosianus*, 16,10,4 decreed: in all places and all towns, the temples must be closed, and pursuant to a general warning, the possibility to sin to belong to bad ones; termination of sacrifices (if someone commits such an act to be victim of revenge); the property of the one executed to be claimed by the town; the governors from province to be punished in the same manner if they neglect the punishment of such acts.
[10] Jörg Rüpke (coord.), *A companion to Roman religion* (Blackwell, 2007), 5.

the juridical ones, wouldn't be so different as previously thought, but much more dynamic, evidence of Roman specific conservationism. Therefore, the feasts with religious character were still organised in the town of Alba Longa, although it hadn't been for long time an important urban centre.[11]

For the lack of faith, it seems that there weren't juridical consequences, according to the former laws. There is however the possibility the state expressly demands a manifestation of faith, on certain occasions. In this respect, after the death of Cesar, when he was turned into a God (endowed with divine power), it was ordered to every citizen, under the death punishment, to celebrate the anniversary of birth of the dictator.[12] There was, mainly during the period of Republic, a religious freedom, but this does not mean that there is no strict supervision of cults.

In order to understand Roman religious one shouldn't ignore the two legends: of foundation of Rome and of first kings. The dam sent by Marte to nurse the two twins prefigure the warrior vocation of Romans. Pursuant to the defeat of Albans, Romulus and Remus decided to found a town on such places, where encountered and raised.[13] Wanting to find out the desire of law in this respect, Romulus selected Palatine and Remus the choline of Aventin. The fatidic signs appeared firstly to Remus, in the form of six eagles. Romulus was shown twice more eagles.[14] However, both Remus and Romulus were acclaimed as kings by its own camp, *this being the reason of much trouble, turning into a bloody fight, in tumble, seriously injured by his brother, Remus fell breathless*.

The second legend, presented by Titus Livius, recounts us the fact that Remus jumped over the new walls built up by Romulus, but without any bad intention. However. Romulus, taking the gesture in serious, killed him saying: *all those who dare to jump over the walls built by me to die like this*.[15]

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[11] Plinius, *Naturalis Historia*, 3,69-70.
[12] Dion, 47,18.
[13] Livius Titus, *Ab urbe condita*, Bucharest: Minerva, 1976, 14.
[14] Livius Titus, vol.I, p.14 and Plutarh, *Romulus*, III-XI.
[15] The foundation of a borough entailed very struct rites: in order to be able to see the will of gods a good omen space is delimited on the sky; the space of borough, on its

The nature of these myths is symbolic for subsequent development of Roman spirituality and moral. Pursuant to such bloody sacrifice, the first offered to divinity of Rome, the people will always keep in mind a memory not rather pleasant. More than 700 de years, pursuant to the foundation of Rome (753), Horaţiu will still consider it an originary sin, the consequences thereof being able to cause the perdition of Borough, determining its sons to murder each other.[16] Similarly, *during every critical moment of its history, Rome will be disquieted, thinking that it feels the pressure of a blast. As on its birth, it didn't taste peace neither with men nor with Gods. This religious anxiety will put a pressure on his destiny. It is easy, too easy to oppose it to an apparent good consciousness of Greek boroughs. However, Athena had known crimes as well: on the origin of the power of Tezeu is the suicide of Egeu*.[17]

It was said that the legends of founding Rome would have on origin indo-European myths, mythological inheritance which, camouflaged in the oldest history of borough, represents by itself a religious creation susceptible to reveal us the structure specific to Roman religion.[18]

Initially, there was in Rome, as in other states of antic world, a confusion between law (*ius*) and religion (*fas*). Consequently, the priests were considered the maintainers and interpreters of divine will. The early legal practice was intensely maintained by pontiffs, from this college being elected as well the superior magistrates. The formula relied on a ritual practice involving accurate reproduction of some words deemed correct. The formulas were reserved to pontiffs, an elitist group of initiated people holding monopole over this knowledge. *Pontifices* were the only one able to draft testaments, contracts and who could provide evidence in trials. Under the direction of *pontifex maximus*, *comittia curiata* determines the sacred law and pontifical college, controlled state religion and ritual training. Starting with 3rd century before Christ, the place of pontiffs is taken by a class of legal advisors providing legal

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turn, was delimited by the ground plot ploughed, symbolicaly, to become inviolable, sacred.

[16] Grimal Pierre, *Roman civilisation*, Bucharest: Minerva, 1973, 16.

[17] Grimal Pierre, 16.

[18] Mircea Eliade, *History of faith and religious ideas*, Bucharest: Scientific, 1992, 106.

consultations in private law, including, both the field of contract, and that of crime.

In a society where guarding sacred goods of borough is deemed public duty and the recognition of sacrificers was an obligation, but which extended as well the application of domestic discipline over free citizen, when state religion was interested in doing this, the accomplishment of religious obligations was primitively rigoursly imposed, as well as sanctioned by criminal law. The one who, without being authorised in this respect, reveals the contents of the book of secret oracles, which may be consulted only based on a state order, risks capital punishment.[19] The guard of public sanctuaries was generally incumbent upon magistrates. When, exceptionally, other individuals were appointed as well, who neglected their duties, a capital crime was committed.[20] There is no technical term to describe the sacrileges committed against Roman religion. The expression of Tertullian, *crimen laesae romanae religionis* is accurate, but it is not used frequently. At the same time, the notion of *sacrilegium* although frequently used, is not accurate, as it designates, at least on origin, the theft from a temple.

Although, the cult of other Gods, than those of Rome or those adopted by state is not deemed a delict, certain forms of foreign religion were morally and politically disapproved. Thus, during the Republic and Empire frequently were taken measures against the Egyptian cult, perceived as being too shocking for occidentals.[21] The repression consists in police measures, such as: it was forbidden public exercise of such practices; the altars and chapels were removed; the foreigners were applied measures of coercion etc.[22] According to Septimiu Sever, the king had, besides the duty to honour the gods of old rite that of disapproving and punishing any alienation from the old rite.[23] Consequently, the legal works consider capital crime the introduction of new divinities and related ritual practices.[24]

The notion of *iniuria* (injustice) of private law was applied more for the state, than for gods. The profanation of a temple or the trouble of

[19] Val. Max., 1,1,13.
[20] Cicero, *Pro Rabirio*, 2,7.
[21] Cicero, *De legibus*, 2,8,19.
[22] Livius Titus, 4,30; 25,1,7,5.
[23] Dion, 25,36.
[24] *Digeste*, 48,19,30.

development of a religious act has as consequence a criminal action ended with a condemnation. It is ignored the possibility of the existence of particular legal disposals in this respect. Anyway, if such disposals existed, they targeted exclusively the offence of state. Roman criminal law did not include any disposals for the offence committed against a divinity by words or writs.

On Romans, as the ideal was represented by the regularity of annual cycle in the ordered development of seasons, any anomaly represented a crisis situation in the relation with gods.[25] Therefore, the accurate signification of miracles must be deciphered by priests. The magic power of divining the future belonged only to magistrates and military heads; it consisted in the interpretation of forecasts.

The domestic cult, remained unchanged for 12 centuries of Roman history, during the entire period of paganism was led by *pater familias*.[26] On its turn, the public cult was under the control of state. During the royalty period, the king held the first rank in sacerdotal hierarchy, being considered *rex sacrorum* (king of sacred).[27] It is known the fact that in the home of King three categories of writs were practiced, dedicated to Jupiter, Iunonei, Ianus, Marte and Ops Consina (goddess of agrarian abundance).

It was rightfully asserted[28], that rituals predominate not only in religious life of Romans, but also in politico-institutional life, marking deeply the entire mental of Roman people.

The cult of Dionis[29] was known in the entire Mediterranean world, including in Rome. Pursuant to the extension of Roman domination in Greece, the esoteric (secret) associations were spread in the entire peninsula, mainly in Campania.[30]

Consequently, in 186 before Christ was adopted a *Senatusconsult of Bacchanalibus* which had as scope the suppression of the cult of

[25] Eliade Mircea, vol.II, 107.
[26] Eliade Mircea, vol. II, 109.
[27] Eliade Mircea, vol. II, 111.
[28] Cizec Eugen, *History of Rome*, Bucharest: Paideia, 2002, 18.
[29] Dionis was in Greek mythology the god of vegetation, of pomiculture, of wine, of ecstasy and of fertility, called on Romans both Bacchus or Liber. In Rome Dionis appeared in the theatre shows and it was called in sacrifices.
[30] Eliade Mircea, vol. II, 226.

Dionis.[31] In this respect, it was foreseen that noone, in the company of more than four individuals, men or women (two men and three women), will participate to sacred rites, but with the approval of praetor and Senate. The manner of investigating the case and of punishment are presented to us by Titus Livius. However, the recounting must be performed under the reserve that, despite its erudition, similar to its ancestors, he does not consider history a science, therefore, he does not feel forced to always consider the historical truth. *Ab urbe condita* contains in fact three kinds of texts (of analysis, rhetoric and literary). The accuracy of text depends however on the source of inspiration; similarly for the transmission of details.[32] The certification of this law[33] is due to the discovery of an inscription in 1640 at Tiriolo. The Consul Spirus Postumius Albinus performed an investigation (*quaestio*) related to conspiracy (*coniuratio*) appeared related to practicing the cult of Dionis.

The supporters of the cult (around 7000) were accused of several crimes, among which: practicing ritual orgies, organisation of crimes for own enriching, forgery of documents etc. The text was analysed by several researchers, who emphasized the similarities with the persecution of Christians later on. There are some debates related to the nature of text and on the reasoning for which the practitioners of cult were punished. Thus, on the one hand, it is stated that, considering that religion was a state monopole, the particulars couldn't be allowed to organise such a cult and also, that it is manifested an opposition towards the influence of Greek culture, and on the other hand, it was asked the question whether in 186 before Christ existed indeed a criminal organisation using a bacchic cult to hide the activity. This cult was frequently associated[34] with orgy, crime and robbery or falsification.

When a conspiracy was discovered, the procedure consists in delegating a magistrate that leads an investigation, followed by the

[31] Eliade Mircea, vol. II, 126, uses the phrase of *nocturne orgy mysteries*.
[32] Walsh P.G., *Livy: His Historical Aims and Methods*, Londra: Cambridge University Press, 1967, 150 and 235.
[33] Pagan Victoria Emma, *Conspiracy Narratives in Roman History*, University of Texas Press, 2004, 51-53.
[34] According to Titus Livius there were bacchic rites not forbidden by state. However, the word *bacchic* represented mostly an insult, referring to immorality or sexual deviation.

execution of leaders. It provides as well the neutrality of the group, as well as the rewarding of informers. The conspirators were judged by extraordinary courts. The foreigners were judges as well, since conspiracy was considered a crime against state. Although there were some doubts related to the accuracy of data provided, it is clear that Aebutius and Hispala were the informers of consul Postumius.[35] The consul took them in custody to protect them and presented the case to Senate. Although some of the supporters of the cult committed suicide, the majority were caught, judged and executed or enchained;[36] the same for the leaders of the cult. On their turn, the altars were destroyed.

CONCLUSIONS

We believe that the asperity of punishments and the manner how this case was settled, must not be related to excessive intolerance of Romans opposite to religious cults, but rather to the prevention of a conspiracy. The severity and ampleness of investigation, carried out within five years prove the political nature of trial. The danger was determined by the existence of a potential complot against state and not by practicing a cult, since, as Ovidiu asserts, *Rome was the most dignified place of meeting of all gods*. The foreign cults were accepted and acknowledged at Rome by formal integration in official cults. Therefore, we must consider the social, political and military context after the second Punic war, when the security of state should be protected against any form of conspiracy.

Taking advantage of this situation, the senate used the legislation to control foreign influence, mainly that of Greek culture, control manifested several times, just to suppress the religious influences. In this respect, in 173 before Christ two epicurean philosophers were exiled; and in 155 before Christ the philosopher Carneades was exiled as well, on initiative of Cato cel Bătrân.

Despite all these, some bacchic practices survived in Rome, being tolerated by state to a certain extent.

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[36] Livius Titus does not recount what happened further on with thouse enchained, however it is easy to understand. To be mentioned that Rome had no prison in the sense that we provide to the notion.

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VALENCES OF LOCAL AUTONOMY

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***Abstract**:*

The local autonomy it is made in the European framework like an element of the „common democratic principles for the member states of the Council of Europe (in which our country is a member since 1 October 2003) which through its legal regulation makes possible power descentralization. The local autonomy represents the right and effective capacity of the administrative-territorial units to fulfill its own interests as they consider, according to the law but without central government intervention. The local autonomy represents the fundamental principle of the administrative-territorial organization of a state. Constitution of the countries of the world gives an important place tothe local autonomy which is at the base of organization and functionof the local public administration.

Key-words: *local autonomy, Constitution, public authority*

1.INTRODUCTION

Any State as a public authority, organized on a delimited and recognized by other states, is intended not only to represent the people of this territory, but also of resolve interests so different from one person to another or from a group of individual to another. To fulfill this role, the state divides its territory and population in certain areas located on this interest, based on various criteria: geographic, religious, cultural, etc. These areas - small or large - that are administrative units throughout history have worn different names: county, county, region, city, community, etc. Today, according to art. 3 para. 3 of the Constitution, "the territory is organized administratively into communes, towns and counties." In all administrative units created State public authorities that represent it and act in order to perform its interests and those of residents. Likewise, the state established authorities and the central level to represent the interests and ensure the achievement of place at this level and occurring as what is common and generally all areas of interest. We know that it really contributes to the development of Romanian legal research, documenting how difficult it is, updating a legislative or doctrinal information, especially in public law, so dynamic in its

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development. Given our tradition in local government, dominated by administrative tutelage, even in the most liberal periods, on the one hand, and current general conceptions of democratic states on departments or regions, on the other hand, the constituent legislator put emphasis on the autonomy of villages and towns, reserving the county authority chosen only a coordinating role. Local authorities shall, according to law, exclusive competences, shared and delegated powers. "Local autonomy gives local authorities the right, within the law, to take initiatives in all areas except those that are specifically data the other public authorities shall be established in each county a county council, as the local government authority for coordinating the activity of commune and town in pursuit of public services of county interest. Local authorities are autonomous but not sovereign. Autonomy is solely at administrative and not legislative or judicial ruling. Local authorities are checked for administrative tutelage exercised by the state administration. Thus, local autonomy can not interpret and apply only in Romanian state character is a complex unitary state. Local autonomy is considering the organization and functioning of local public administration from the "right and effective capacity of local authorities, to resolve and manage his own behalf and under their responsibility, an important part of public affairs for the benefit of the local communities that is "central government authorities, the principle of subsidiarity, intervening if and insofar as the objectives of the action can not be made by local authorities.

2. HIGHLIGHTS CONSTITUTIONAL ON LOCAL AUTONOMY

Romanian Constitution of 1991 regulates elective local authorities and establishes the role of local councils, mayors and county councils, as authorities' territorial decentralization "and the role of the prefect as representative of local government, so that devolved authority. Thus in Article 122 para. (2) shows that the prefect 'lead decentralized public services of ministries and other central bodies of administrative-territorial units ".Legea the 2003 Constitution revision added to the two principles of the 1991 text and the principle of devolution of public services. This principle becomes therefore constitutional dimension and the submission to express, even to revising the Fundamental Law in 2003[2] included the

[2] M Constantinescu et al., *Constituţia României*, (Bucharest: All Beck, 2003), 252 and 262.

principle of decentralization and devolution purposes, now removes any dubiu. is also reviewing art. 122, became after renumbering art. 123, it is clear now that the prefect leads provided local services in the territory of ministries (other central specialized bodies) so state services, which are classified as decentralized and not decentralized services. Local and regional authorities are only those local autonomy, citizens elected authorities, ie local councils, mayors and county councils, as mentioned in art. 121 and 122. The local autonomy, is a principle of implementation prefect institution in the public administration system. In order of historical events it is earlier state. Therefore, decentralization, local autonomy as an essential element, it can not be conceived, at least in unitary states, without the control of the state, called traditionally control trusteeship exercised in some countries (Italy, France) officials or state administration authorities and in others (UK) by judges. Mention that the control system of tutelage from France, like that from us, moreover, leads finally to the administrative court. Local autonomy, especially in a unitary state, can not be conceived only within certain limits. It is not acceptable that in a state of law be disregarded law, the authority of the central executive or the judiciary because the principle of local autonomy. Local autonomy can not be achieved under the rule of law, the principle of local autonomy is one of them. Hence the organic link that must exist between the local autonomy law of local interests (village, town, city, county) and national interests expressed by law. This explains why, in all democratic countries in the territorial-administrative unit of the highest level, was established a representative of the state executive power with the role of ensuring the application of the law by local authorities, organized on the basis of administrative autonomy.[3]

3.LOCAL AUTONOMY IN SOME EU COUNTRIES

Local autonomy is designed in a European context ,,as a component of democratic principles common to all Member States of the Council of Europe (of which our country is from 1 October 2003) that by regulating its legal and practical implementation makes it possible

[3] A. Iorgovan, *Tratat de drept administrativ*, Volume 1,part 4, (Bucharest: All Beck, 2005), 514.

decentralization of power.[4] Local autonomy is recognized right-sectoral territorial administrative units to meet their own interests as it sees fit, with due process, but without central government intervention. Local autonomy is the fundamental principle of administrative-territorial organization of a stat.[5] Constitutions world states granted a primordial principle of local autonomy, which is the organization and functioning of local authorities. Local autonomy involves solving local issues by local administrative authorities. So we can say that between the principle of administrative decentralization and the local territorial autonomy there is no difference of content, decentralization is a trend in the evolution of public administration to achieve local autonomy, decentralization being based on the idea of a certain local autonomy.

In France, it is common basic organization that works BE basis of local autonomy. The basis of the system of administrative organization of the commune, described as a "natural community of people" who are living neighborly relations. State and the Community constitute interim administrative structures. With the exception of Ireland and the United Kingdom, European Union countries, so continental countries, suffered the influence of France in terms of local government. Three essential elements of the local system established since the French Revolution were resumed with different variations in most continental states: a cut territorial theory based on objective criteria; creating a correspondence between the districts and the state administration and local authorities of at least two levels of administration (except Finland, Austria, Luxembourg and Portugal); a representative of the Government, at wholesale level, tasked to monitor the activity of the two levels .[6]Each of these elements has evolved differently from country to country. The local political-administrative system currently understand, whole communities constituted authorities and institutions belonging to the administrative-territorial divisions of the states performing public administration, relations between them and the relationship between them and state authorities. At present, regionalization represents a new way to

[4] E. Popa, *Autonomia locală în România* , (Bucharest:.All Beck, Juridical studies colections, 2009), 38.
[5] D. Apostol- Tofan, *Instituții administrative europene*, (Bucharest: CH Beck, 2006), 123.
[6] C. - L. Popescu, *Autonomie locală și integrare europeană*, (Bucharest: All Beck, 2009), 59.

understand or perceive territorial organization of a state, ie, intermediate level, its functions and purposes. In 1971 Regionalization policy known 1980 a decisive phase in Belgium, Italy and Spain, followed by′decade - France over the next decade. Incidentally, in Belgium there is a specific situation, unique in the world, Belgian federalism is characterized by a superposition, meaning that it consists of Communities and Regions, at the same timp.[7] European countries know either unit system with one level of local government (Luxembourg, Finland and Portugal) or a two-tier system of local government (Greece, Denmark, Ireland, Netherlands, United Kingdom, Sweden) or a three-tier system of local government (France Italy, Spain). Within the EU, regions have evolved to become true partners of the European Commission in the development and implementation of Community policies financed by funds structurale.[8]As a representative of local autonomy administrative structures in the UK are currently found in the municipalities (parishes) districts, urban or rural burgs, counties, burgs, reserving it a special status capitalei[9]. In the UK, successive reforms over the last century have led to the situation that the population should not only be less attached to local structures, perceived rather in the form of public service concentration than as elements of local democracy. In other countries, consecration of local autonomy in the Constitution, especially the people and elect national commitment to basic authorities, guarantee the maintenance of their powers, only their number and territorial scope is left to the imagination legislature.

4. LOCAL ADMINISTRATION PRINCIPLES

Under the provisions of art. 119 of the Constitution ,,administration in territorial administrative units is based on the principle of local autonomy and decentralization of public services "and according to art. Paragraph 2 of Law 286/2006. (1). ,,The public administration in territorial administrative units is organized and operates under the principles of decentralization, local autonomy, devolution of public services, eligibility of local public administration authorities, legality and

[7] F. Delpérée, *Les collectivités territoriales en France*, 3e édition, (Paris: Ed. Dalloz, 2006), 77.
[8] Delpérée, *Les collectivités territoriales en France*, 137.
[9] I. Vida, ”Administrație publică și autonomie locală” , *Dreptul* (no. 10 - 11/ 1994), 174.

consultation of citizens in solving local problems of special interest "and par. (2) ,, local autonomy organization, functioning, powers and duties and resource management which, by law, belong to the village, town, city or region, as appropriate. " Relations between local authorities in communes and towns and public administration at county level is based on the principles of autonomy, legality, responsibility, cooperation and solidarity in solving the county.

4.1 Local autonomy

According to art. 3 of Law no. 215/2001 on municipalities par. (1) ,, Local self-government denotes the right and effective capacity of local authorities to solve and manage, on behalf and in the interest of the local communities that they represent, public affairs, under the law. "This right local councils and mayors exercised and county councils, local public administration authorities elected by universal, equal, direct, secret and freely expressed. Local issues are the jurisdiction of local administrative and financial, is exercised on the basis and within the limits prescribed by law. Local autonomy organization, functioning, powers and duties and resource management which, by law, belong to the village, town or county, as appropriate. Local authorities shall, according to law, exclusive competences, shared and delegated powers. "Local autonomy gives local authorities the right, within the law, to take initiatives in all areas except those that are specifically data in other public authorities. Relations between local authorities in communes, towns and municipalities and public authorities at county level based on the principles of autonomy, legality, responsibility, cooperation and solidarity in solving the county. Central public authorities not may establish or impose any responsibilities to local government in the decentralization of public services or the creation of new public services without ensuring financial means to achieve those responsibilities.

4.2 Decentralization

Decentralization is the transfer of administrative and financial competence of the central public administration at the local government or the private sector; The principles on which decentralization is conducted is governed by Law no. 195/2006 and are the following: a) the principle of subsidiarity, which consists in exercising the powers of local government authority located at the administrative level closest to the citizen and that has the necessary administrative capacity; b) the principle of ensuring appropriate resources transferred competencies; c) the

principle of responsibility local governments in relation to their competence, imposing the obligation to achieve quality standards in the provision of public services and public utilities; d) the principle of decentralization process to ensure a stable, predictable, based on objective criteria and rules that do not constrain the activity of local governments or limit local financial autonomy; e) the principle of equity, which involves ensuring access of all citizens to public services and public utilities; f) the principle of budgetary constraint, which prohibits the use of central public administration authorities special transfers or subsidies to cover deficits final local budgets.

4.3 Deconcentration

According to art. 120 para. (1) of the basic act: "Public administration in territorial-administrative units shall be based on the principles of decentralization, local autonomy and deconcentration of public services" . Also, this principle is found and regulated in art. 2 para. (1) of Law no. 286/2006 amending the law locale1e public administration as one of the fundamental principles upon which public administration is organized and operates locala.Principiul deconcentration, as a fundamental principle of organization and functioning of local government, as we shall see below, concerns centrals and power relations between its different structures distributed in teritoriu.Deconcentrarea is mainly a form of centralization, a concrete way to improve the negative consequences resulting from pure centralization process. The fundamentals deconcentration deficiencies are found in the centralized system and the need to correct a certain extent this is a way of sharing carente.Deconcentrarea competencies into a single legal entity, the state, which occurs from top to bottom, By local standards gross competent representatives assigned devolution of central power in the territory. The beneficiaries of this delegation of powers are officials or bodies that still remain in a hierarchical subordination relation towards the central authority and who are not undergoing a "democratic control of Electors" being called.

4.4 Eligibility

Local autonomy is pointed out and the principle of "eligible local authorities'overall material competently administrative teritoriale.Autorităţile local government units are not subject to the hierarchical power of the central authorities, which are independent because they are not called for at the center, but are elected by the

citizens of administrative territorial units. The principle of eligibility is closely related and involves another right - the vote. The right to vote or to choose expresses the essence and legitimacy of any power since elections a multifunctional character. They allow voters to express their right to participate in the management of local public affairs through elected representatives and to participate directly in socio-political life of local communities.

4.5 Legality

This principle was introduced in administraţieie Law no. 69/1991, as amended by Law no. 24/1996. The legal principle applied to local government means that everything related to it, that is the choice, establishment, exercise and adopt decisions or issue other administrative acts and other activities should be carried out only on the basis and in accordance with legea.Legalitatea also require the administration to act in effective law enforcement purposes, a key feature of the state ruled by law is the principle of legality of administration and aims to guarantee citizens freedom to direct state intervention.

4.6 The principle of consulting the citizenry on local problems

The principle of consulting the citizenry on local problems of special interest or local referendum is a component of local autonomy enjoying constitutional regulation. In matters of local interest that concerns some people can be territorial-administrative unit organized this party, consultations, public hearings and discussions in the law. Local authorities are to retain the right to intervene directly in some cases in the administration, through referendum or other forms provided by law.

5.CONCLUSIONS

Local administration in developed countries based on the principle of local autonomy and consider that in Romania the real energy must be channeled, efficiency and functional local autonomy, administrative and financial. This offers the advantage of applying strategies and tactics tailored to the specific adaptable to local realities. Reality shows that over the years trying to adapt to the changes of administrative, political and legal occurring in developing countries. An analysis of the legal and institutional framework shows that it has failed to optimize found the best tools to reform the administration: decision making, local autonomy being fully assumed by local authorities; failure to identify, clearly, responsibilities and relationships between different

institutions; decentralization is incomplete, failing proximity to the citizen's interest, of responsibilities and decisions

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CONCURRENCE OF OFFENCES IN THE CURRENT REGULATION

Lavinia Mihaela VLĂDILĂ[1]

Abstract:

The new Criminal Code inserts important modifications in the area of the plurality of offences. In this regard, the concurrent offences did not remain outside these changes. Thus, the new Criminal Code modifies the sanctioning of the concurrence, proposing a model which does not leave room for the judge's interpretation or arbitrariness. Hence, the penalty increase is mandatory, and in the application of the penalty are used all three systems of sanctioning (the system of the arithmetic cumulus, the system of the legal cumulus and the system of absorption), as stated by Art 39.

Key- words: *concurrence of offences, plurality of offences, legal cumulating system.*

I. INTRODUCTION

The offence, as a legal institution, comprises between the direct representative elements, such as its legal definition and specific features, a series of institutions tightly linked and inseparably connected to it. One of these institutions is the very plurality of offences[2]. Reality has proven that there are multiple situations in which a person commits a single offence, but can also be cases in which the person commits, simultaneously or in different moments, multiple offences and, in this last case, it is necessary to know how to define these situations and how to sanction them. This is why the plurality of offences is connected to the institution of the criminal liability, by the necessity for the existence of a special sanctioning treatment, unlike the case of the person committing a single offence[3].

According to the new Criminal Code, there are three forms of the plurality of offences, of which two are independent and the third one is the result of combining the first two; these are: the concurrence of offences, relapse and the intermediary plurality.

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[2] Vintilă Dongoroz et al., *Explicaţii teoretice ale Codului penal român*, 1st Volume, 2nd Edition (Bucharest: All Beck, 2003), 228.

[3] Dongoroz et al., *Explicaţii teoretice*, 232.

In this article we shall analyse the concurrence of offences by emphasizing the novelties inserted by the new regulation.

II. CONCURRENCE OF OFFENCES - DEFINITION, FORMS, CONDITIONS, SANCTIONING TREATMENT, MERGING PENALTIES; NOVELTIES INSERTED BY THE CURRENT REGULATION

Definition. The concurrence is a form of the plurality of offences consisting of the commission of two or more offences, susceptible of being submitted to trial, by the same natural or legal person, prior of being sentenced for any of them[4].

The concurrence of offences expresses an increased dangerous condition of the offender, having an objective nature, resulted from the number of the offences he has committed[5]. Probably, this was one of the reasons for which the legislator has chosen in the current regulation his objective sanctioning, giving up a complicated system in which was often found the judge's subjectivity, the latter one being deprived of landmarks in establishing the penalty, the previous regulation emphasizing more the degree of danger of the offender and less the number of offences he has committed.

The new Criminal Code states this form of plurality in Art 38-40 and 45 of Chapter V, Title II, together with two of the most met forms of the unity of offences, named by certain doctrinaires, *apparent forms of the plurality of offences*[6], namely the continued offence and the complex offence, together with the other two forms of the plurality of offences, namely the relapse and the intermediary plurality. Unlike the Romanian regulation, the Spanish doctrine appreciates the continued offence as form of concurrence[7].

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[4] Mihail Udroiu, *Drept penal. Partea generală. Noul Cod penal* (Bucharest: C.H Beck, 2014), 176.

[5] Dongoroz et al., *Explicaţii teoretice*, 232.

[6] Traian Dima, *Drept penal. Partea generală*, 3rd Edition revised and amended (Bucharest: Hamangiu, 2014), 350.

[7] Luis Arroyo Zapatero et al., *Curso de derecho penal. Parte general* (Barcelona: Experiencia, 2004), 394, 398.

THE FORMS OF THE CONCURRENCE OF OFFENCES. CRITERIA FOR CLASSIFICATION.

Our preoccupation for the establishment and definition of the forms of the concurrence of offences resides from the legal provisions of Art 38, which defines two main forms of concurrence: multiple offences and formal concurrence.

According to Art 38 Para 1 of the new Criminal Code, the **multiple offences** are formed by multiple distinct actions or inactions. For instance, "X" today commits a theft (Art 228 C. Code), and after three days he commits an offence of hitting or other forms of violence (Art 193 of the Criminal Code), or "Y" today commits murder (Art 188 C. Code), and until his definitive punishment for this offence he also commits a homicide out of negligence (Art 192 C. Code) etc.

In the absence of an express name given by the law, the previous doctrine used for the multiple offences the name material concurrence[8]. Nowadays, most of the authors use the name stated by the law, that of multiple offences.

For the existence of multiple offences, the law only states the condition that the same person to participate in the commission of two or more offences, performed by distinct actions or inactions. This mean of the multiple offences, which does not impose any other condition regarding the offences committed or their author has been named by the doctrine as **formal concurrence**[9].

This is why we shall be in the presence of a concurrence of offences regardless if one of the persons committing the offences participates as author, accomplice or instigator.

Furthermore, it has no relevance the form of guilt with which the offences are committed, some of them being committed with intent, others out of negligence or with oblique intent (for instance, we may have a simple concurrence of offences between the offence of negligence at the workplace and an offence of hitting and other violence, or between the

[8] Matei Basarab et al., *Codul penal comentat. Partea generală*, 1st Volume (Bucharest : Hamangiu, 2007), 194; Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală* (Bucharest : Universul Juridic, 2012), 103.

[9] Constantin Mitrache and Cristian Mitrache, *Drept penal român. Partea generală* (Bucureşti : Universul Juridic, 2014), 321.

offence of hitting and any other acts of violence causing death and the offence of negligence at the workplace etc.).

Also, the offences forming the concurrence of offences can have the same nature (for instance, multiple thefts) and in this case the concurrence is *unitary*, or may have different natures (it is committed an offence of theft and an offence of perjury), being named *dissimilar* concurrence, namely the offences which may endanger the same special legal object or these may be different, as they can be stated by the same law (all the offences are stated by the Criminal Code) or by different laws (an offence is stated by the Criminal Code, while another one is stated by Law No 39/2003 on preventing and combating organized crime).

There are also material multiple offences when an offence is consumed, and another one has remained as attempt, as there can be a concurrence between a simple offence (murder) and a complex offence (robbery), or between a continued offence (stealing electric power) and a continued offence (also of theft), or between a progressive offence (bodily harm) and an offence as habit (begging)[10] etc.

The offences forming a simple concurrence may be committed in any time and place. Correlated with the factor of time, the law does not state how long must be between the first and the second concurrent offences. Nevertheless, there are two limits. The first one is stated by the law, namely the second offence must be committed until the remaining definitive of the decision for conviction for the first offence, because in this last case we shall be in the presence of relapse. The second limit of time is indirect resulted: the second offence must be committed, and the concurrence must be trialled, until the fulfilment of the term of prescription for the first offence, or else, if the first offence has been prescribed from the perspective of the criminal liability, then it cannot be a component of concurrence, thus its existence shall be uncertain.

Beyond these aspects, though the law does not state any condition, it does not exclude any relation between the offences forming the concurrence. Thus, the material concurrence can be qualified, with connection, or characterized, the relation between facts being one of place (*concurrence with topographic connection*), of time (*concurrence with chronological connection*), in the meaning that the offences have been committed simultaneously or successively, of means-purpose

[10] Dongoroz et al., *Explicaţii teoretice*, 233-35.

(*concurrence with etiological connection*), in the meaning that an offence is committed to ease the commission of another offence, or of cause-effect (*concurrence with consequential connection*), namely an offence is committed to hide a previous offence[11]. By comparison, the Spanish doctrine recognizes only the existence of the material concurrence with etiological connection, named also mediated concurrence (*concurso medial*), between the offences existing a necessary objective connection (as established also by the majority of the Spanish jurisprudence)[12]. This form of concurrence (*concurence with etiological connection*) has a special particularity, namely the offences forming it are always committed with intent[13].

These two last forms of the material concurrence, namely the concurrence with etiological and consequential connection are recognized by the Criminal Code, being stated by Art 38 Para 2 Thesis II.

The **ideal concurrence** is that form of concurrence achieved through a single action or inaction, from which it results the commission of multiple offences. It must be stated that the French legislation does not admit the existence of such form of concurrence, which is named ideal concurrence of qualifications[14], unlike the Spanish, German or Italian legislations[15]. By analysing the situation of the ideal concurrence of offences, ECHR, by Decision No 30 July 1998 *Oliveira v Switzerland*[16] has established that in the absence of a violation of Art 4 of the Protocol 7

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[11] Mitrache and Mitrache, *Drept penal român*, 321; Dima, *Drept penal*, 353-54; Ilie Pascu, Vasile Dobrinoiu et al., *Noul Cod penal comentat. Partea generală*, 2nd Edition revised and amended (Bucharest: Universul Juridic, 2014), 277-279; Ion Oancea, *Tratat de drept penal. Partea generală* (Bucharest: All, 1994), 151-155; Vasile Dobrinoiu et al., *Drept penal – partea generală* (Bucharest: Europa Nova, 1999), 263-264; Matei Basarab, *Drept penal roman – partea generală*, 1st Volume (Iaşi: Publ.-house of the "Chemarea" Foundation, 1992), 6-13.

[12] Luis Arroyo Zapatero et al., *Curso de derecho penal. Parte general* (Barcelona: Experiencia, 2004), 397-398.

[13] Dongoroz et al., *Explicaţii teoretice*, 237.

[14] Harald Renout, *Droit pénal général* (Orléans: Paradigme, 2007), 116-117.

[15] George Antoniu et al., *Explicaţii preliminare ale noului Cod penal*, 1st Volume, Art 1-52 (Bucharest: Universul Juridic, 2010), 400-403.

[16] See the HUDOC Database.
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22docname%22:[%22\%22CASE%20OF%20OLIVEIRA%20v.%20SWITZERLAND\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58210%22]}.

to the Convention the principle *non bis in idem* has been violated. Nevertheless, the decision of the Court has presented a different opinion according to which there is such violation if the action itself is prioritized at the expense of the legal qualification of the actions, the criminal provisions must be clear and predictable, as resulted from the ECHR decision Gradinger *v* Austria of 23 October 1995[17].

The previous doctrine of the new Criminal Code also named this form of concurrence as formal concurrence[18].

In other words, by a single action or inaction are committed two or more offences. For instance:

1. "A", an inattentive driver under the influence of alcohol, makes a wrong maneuver and hits two persons harming them, being necessary for their recovery 18, namely 25 days of medical care, case in which we shall have a concurrence of offences formed by two offences of the same kind (thus unitary) of bodily harm by negligence (Art 196 C. Code);

2. "B" drives a vehicle without license and under the influence of alcohol causing the seriously harming a person, case in which we shall have the ideal concurrence of offences between the offence of driving without license (Art 335 C. Code) and the offence of bodily harm by negligence (Art 196 C. Code);

3. "C" commits the robbery of a civil servant performing exercising the attribution of a state authority, case in which we shall have a formal concurrence of offences between the robbery (Art 233 C. Code) and the offence of outrage (Art 257 C. Code)[19];

4. Smuggling into the country of weapons and ammo, illegally, as well as their illegal holding and transportation, within the Romanian territory, after the smuggling into the country of weapons and ammo, represent the elements of the qualified offence of smuggling stated by Art

[17] See the HUDOC Database.
http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22docname%22:[%22Grading er%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBE R%22],%22itemid%22:[%22001-57958%22]}.

[18] Antoniu et al., *Explicaţii preliminare ale noului Cod penal*, 384; Matei Basarab et al., *Codul penal comentat. Partea generală*, 1st Volume (Bucharest : Hamangiu, 2007), 198 ; Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală* (Bucharest: Universul Juridic, 2012), 104.

[19] Supreme Court, Decision No 1504/1973, in Romanian Law Magazine, No 10/1973, 170.

271 of the Law No 86/2006 on the Customs Code of Romania, as well as the elements of the offence of non-complying with the weapons and ammos regime stated by Art 279 Para 1 of the previous Criminal Code (currently Art 342 Para 1 of the new C.Code)[20];

5. The offence committed by the parent, who repeatedly causes violence against his minor child, which resulted in the partial paralysis of the child, and to reiterate the violence against the child after his partial paralysis, causing the death of the minor victim, meets both the constituents of the offence of first degree murder and particularly serious murder stated by Art 174, Art 175 Para 1 Let c)-d) and Art 176 Para 1 Let a) of the Criminal Code (previous, A/N) (currently Art 199 of the new C. Code – domestic violence), as well as the constituents of the offence of ill treatments applied to minor stated by Art 306 C. Code (previous, A/N) (currently Art 197 new C. Code), found in an ideal concurrence of offences, because by causing repeated violence which resulted in the death of the minor, the parent has seriously endangered the physical, intellectual and moral development of the child[21].

[20] High Court of Cassation and Justice, The Criminal Section, Decision No 952/17 March 2009, in ***, *Buletinul jurisprudenței. Culegere de decizii pe anul 2009* (Bucharest: C.H. Beck, 2010), 651 and next.

[21] High Court of Cassation and Justice, The Criminal Section, Decision No 1646/5 May 2009, in ***, *Buletinul jurisprudenței. Culegere de decizii pe anul 2009* (Bucharest: C.H. Beck, 2010), 654 and next. An identical solution was ruled by the supreme court in an appeal in the interest of the law, in the Joint Chambers, by Decision No 37/22 September 2008, available at www.scj.ro, by which it established that it is an ideal concurrence of offences between the offence of hitting and other violence (Art 180 in the previous regulation, Art 193 in the new C. Code), bodily harm (Art 181 in the previous regulation, Art 193 in the new C. Code), serious bodily harm (Art 182 in the previous regulation, Art 194 in the new C. Code), illegal deprivation of freedom (Art 189 in the previous regulation, Art 205 in the new C. Code) with that of ill treatment applied to minors (Art 306 in the previous regulation, Art 197 in the new C. Code) for the offence committed by the parent or any person entrusted with the minor for raising and education, who abuses of his authority and, contrary with the interests of the minor, commits acts of violence or deprivation of freedom with the intent of harming the child, physical or moral violence, seriously jeopardizing the minor's physical, intellectual or moral development. See also the collection of cases coordinated by Alexandru Boroi (coord.) et al., *Practică judiciară în materie penală. Drept penal. Partea generală* (Bucharest: Universul Juridic, 2013), 151-158.

As in the case of the material concurrence, the offences committed in an ideal concurrence of offences may have the same nature, but, most times, have different natures.

From a subjective perspective, the offences forming the ideal concurrence of offences may be all committed with intent, others with oblique intent, others with intent, and other ones out of negligence, as there can be the situation in which all the offences are committed out of negligence (as the first example above mentioned). In relation to the form of guilt in the concurrence of offences, it is possible that the perpetrator may have realized that his offence may also have other effects than the ones intended, and in this case all offences are committed with intent, some with direct intent, other with possible intent or oblique intent; but if the perpetrator could not really foresee all the effects of his single action, then the offences characterized by these effects are committed out of negligence[22].

Also in the case of the ideal concurrence of offence it is possible that some of the offences to be committed in their consumed form, and others to have remained as attempt[23].

It is thus considered that we are not in the presence of an ideal concurrence of offences, but in the presence of a concurrence of laws, when an offence is susceptible of receiving two legal classifications, of which one from a general law, and the other one from a special law. In this case, the issue is solved by applying the principle *specialia generalibus derogant*[24].

Likewise, there is no ideal concurrence of offences when one of the offences is legally absorbed by the aggravating content of another offence, as the case of the offence of rape which resulted in a bodily harm (Art 218 Para 3 Let e)), or an offence of robbery committed in a dwelling place or an office of a company (Art 234 Para 1 Let f)). Regarding the offence of rape against a close relative, or against a brother or a sister, it must be

[22] Dongoroz et al., *Explicaţii teoretice*, 238.

[23] Ion Oancea, *Tratat de drept penal. Partea generală* (Bucharest: All, 1994), 155-156; Vasile Dobrinoiu et al., *Noul Cod penal comentat. Partea generală*, 2nd Edition revised and amended (Bucharest: Universul Juridic, 2014), 264-265; Matei Basarab, *Drept penal roman – partea generală*, 1st Volume (Iaşi: Publ.-house of the "Chemarea" Foundation, 1992), 13-15.

[24] Lavinia Vlădilă and Olivian Mastacan, *Drept penal. Partea generală* (Bucharest: Universul Juridic, 2012), 61. Dima, *Drept penal,* 357.

stated that until the entrance into force of the new Criminal Code, this offence represented an ideal concurrence, between the rape and incest, as also established by the supreme court in its Decision No II/2005, ruled by the Joint Chambers[25], in an appeal in the interest of the law, but currently, according to Art 218 Para 3 Let b) the offence has become, by the legislator's will, a complex offence with aggravating circumstances, being a qualified form of the offence of rape.

CONDITIONS FOR THE EXISTENCE OF THE CONCURRENCE OF OFFENCES. From the definition of the concurrence of offences it results that for its existence it is necessary the fulfilment of the following conditions[26]:

- The commission of two or more offences. In this case, it does not matter neither the nature of the offences, nor how serious these are. It represents a concurrence also if the first offence is consumed and the second one is just a punishable attempt, just as how, in both cases, the offence can only be a punishable attempt;

- The offences to be committed by the same person. The person may have participated in any form in the commission of the offence: either as accomplice, author/co-author or as instigator;

- The third condition aims the fact that the offences must be committed before the definitive conviction for any of them. It is essential in this case that the perpetrator must not have been definitively convicted. If he was convicted, but the decision is not definitive, then we are also in the presence of a concurrence, and not of relapse. Likewise, if the decision, though definitive was cancelled by an extraordinary means of appeal, also in this case shall be considered the rules of the concurrence of offences;

- The offences committed or at least two of them must be subjected to trial. If the perpetrator has committed two offences, and for at least one of them has occurred a cause removing the criminal feature of the action

[25] High Court of Cassation and Justice, The Joint Chambers, Decision No II/2005, published in the Official Gazette No 867/27 September 2005, available at www.scj.ro

[26] Costică Bulai and Bogdan N. Bulai, *Manual de drept penal – partea generală* (Bucharest: Universul Juridic, 2007), 521-522; Narcis Giurgiu, *Legea penală şi infracţiunea* (Iaşi: Gama), 301-302; Constantin Butiuc, *Instituţii de drept penal*, 2nd Vol. (Bucharest: Lumina Lex, 2003), 130-134; Constantin Mitrache and Cristian Mitrache, *Drept penal român. Partea generală* (Bucureşti: Universul Juridic, 2014), 319-320.

(either a justification cause or a non-attributable cause) or which removes the criminal liability, or any cause for non-punishment, when this condition is not fulfilled.

The sanctioning treatment of the concurrence of offences for the main penalties assumes the knowledge of the means in which the main penalty is established for the concurrence of offences.

It must be stated from the beginning that the new Criminal Code establishes a different system of sanctioning which, by comparison with the previous one, we consider it to be superior. Thus, if according to the previous regulation, the predominant system of sanctioning was the system of the legal cumulus, currently are used all three systems of sanctioning (namely, the system of absorption, the system of the legal cumulus and the system of the arithmetic cumulus). Also, according to the previous Criminal Code, the addition to the penalty was optional, was applied in two stages, being incremented the heaviest penalty up to its special maximum, and then, if this maximum was not enough a maximum of 5 years was possible to be added for imprisonment and ½ for a fine, while according to the actual regulation, when the system of the legal cumulus is applied, the addition is mandatory and fixed, being of 1/3 of the rest of the penalties applied, both for imprisonment and fines. Furthermore, the application of the addition to the penalty by the court according to the previous regulation should have been motivated by the court, while currently we consider this motivation as no longer necessary, as long as its application is mandatory. Moreover, in the case of applying the system of the arithmetic cumulus, the aggregation of certain main penalties is enough to increment the sanction; in this case, the application of the additional 1/3 shall be made only if at least three offences were committed, of which at least two are sanctioned by the same type of main penalty (fine or imprisonment). Another novelty inserted by the current Criminal Code is that according to which is possible to change the nature of the initially applied penalty, if the offences are of a special seriousness so that they get to exceed by 10 years the maximum of the imprisonment period, in this case becoming applicable the life imprisonment.

In detail, according to Art 39 of the new Criminal Code, for natural persons, the system of sanctioning in case of a concurrence of offences is the following one:

1. First it is established the penalty for each offence;

2. Then shall be established the final penalty considering the following rules:

a. When a penalty of life imprisonment and one or more penalties by fine or imprisonment have been established, shall be applied the penalty of life imprisonment – in this case is applicable the **system of absorption**, because life imprisonment, being absolutely determined and without any possible increase, absorbs the rest;

b. If the court established only penalties by imprisonment, then it shall apply the biggest one, which shall be incremented by 1/3 of the sum of the other penalties;

In this case, if by applying the additional 1/3 shall be reached a penalty by imprisonment for 40 years or more **and** if for at least one of the offences committed, the penalty stated by the law is imprisonment for at least 20 years, then the court **may apply** the penalty by life imprisonment – in this case is applicable the **system of the legal cumulus**;

c. If the court applied only penalties by fine, it shall apply the biggest one, to which it shall add 1/3 of the total of the other established penalties – it is applicable the **system of the legal cumulus**;

d. If the court applied a penalty by imprisonment and one by fine, finally it shall apply them both – it is applicable in this case the **system of the arithmetic cumulus**;

e. If the court applied more penalties by imprisonment and more penalties by fine shall be applied both the penalty by imprisonment, calculated according to the rules stated by Let b), as well as the resulted penalty by fine, calculated according to the rules stated by Let c) – it is applicable the system of the legal cumulus, as well as the **system of the arithmetic cumulus**.

In any case, **the application of the penalty for the concurrence of offences** has a single legal limit, stated by Art 2 Para 3 of the new C. Code, namely to not exceed the general limits of the penalty by imprisonment or by fine. The new regulation no longer states as limit the sum of the penalties applied for each of the offence, because by applying the additional 1/3 of the sum of the others the sum of all the penalties shall never be equalled.

Merger of penalties[27]**.** It represents the case in which, after a person has been definitively convicted for a concurrence of offences, it is found that he has committed other offence(s) under the area of the concurrence, but for which he was not trialled. In this case, it shall be ordered by the new court trialling the offence(s) that were unknown the **merger of all penalties**. Also, the merger of all penalties shall be applied also when it is ascertained that the person definitively convicted had received another definitive conviction for the offences falling within the scope of the same concurrence.

This situation is stated by Art 40 of the new C. Code, according to which shall be applied the rules stated for the concurrence of offences, as previously mentioned. For instance, if "X" has been convicted by the Ploiești Courthouse to imprisonment for 1 year and 4 months, for committing a concurrence of offences formed by two offences of hitting and other violence (Art 193 C. Code), for each of them receiving 1 year of imprisonment, and after that it is ascertained that "X" had previously committed another offence of theft (Art 228 C. Code) then the court trialling the theft shall separate the two previous penalties, shall establish for the theft a penalty (let's say 2 years of imprisonment) and, by considering all three offences, shall order X to execute a penalty according to one of the rules stated by Art 39 C. Code [namely, in the end it shall result a penalty by imprisonment applied according to Art 39 Para 1 Let b) C. Code of 2 years and 8 months (2 years for theft + 1/3 of (12+12 months for each offence of hitting)].

If the perpetrator has executed totally or partially the penalty ordered by the previous decision, what has already been executed shall be subtracted from the duration of the penalty applied for the concurrent offences.

The provisions referring to the application of the penalty for a concurrence of offences shall be applied also in the case in which the penalty by life imprisonment has been switched or replaced with a penalty by imprisonment.

Referring to the application of the merger for the concurrence of offences, the legal practice has faced with the issue of the collective or individual pardoning of some of the offences representing the scope of the concurrence. Because the jurisprudence did not prove unity of opinions in

[27] See Art 40 of the Criminal Code.

this case, the High Court of Cassation and Justice stated in an appeal in the interest of the law, by Decision No X/24 October 2005[28] that in the case of a collective pardoning, before moving to the merger of the penalties forming the concurrence, to be ascertained the pardoning of each penalty for which was applicable this act of clemency, and in the end to be merged only the executable penalties, which were not totally or partially pardoned. Unlike this case, for the individual pardoning, according to the nature of this act of clemency and by relation to Art 3 of the Law No 546/2002 regarding pardon and the procedure of pardon, its effects can aim, in the case of the concurrence of offences, only the resulting penalty.

Additionally, regarding the application of the merger by the courts, also the High Court of Cassation and Justice has clarified another dilemma from practice, in the meaning that the application of the merger of an offence with other ones for which the perpetrator has already been convicted, must be performed from the phase of the awarding of a solution on the main issue of the matter on trial for the new offences discovered, because the courts for legal control[29] cannot directly order it in the appeal they hear (as an effect of the principle of *non reformatio in pejus*)[30].

III. CONCLUSIONS.

The new Criminal Code has brought important modification, as we have mentioned, also for the plurality of offences. Of the three forms, the one analysed by this article, the concurrence of offences, has suffered changes especially in the area of its sanctioning treatment, which was simplified and objectivized. Under this aspect we consider the new regulation as being superior to that of the previous Criminal Code.

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[28] See ***, *Jurisprudenţa instanţei supreme în unificarea practicii judiciare* (in criminal matters, A/N) (1968-2008), (Bucharest: Universul Juridic, 2008), 295-297.

[29] The phrase *court for legal control* means the court which trials the case file in the means of appeal (appeal or remedy), because it performs a "control" of legal nature of the decision issued by the first court.

[30] See Decision No LXX (70)/15 October 2007 of the High Court of Cassation and Justice, ruled in an appeal in the interest of the law; on the official website of the institution: www.scj.ro.

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SOME CONSIDERATIONS ABOUT THE CURRENT LAGAL DILATTANTISM

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Abstract:

Dilentntismul is a phenomenon characteristic of our contemporary society, often met, not only in law, but also in art, culture, sport, and in our daily life. Where is placed between genius and mediocre dilettante? The relationship between mediocrity and genius dilettantism issue belongs naturally to this equation. Greatly simplify things, we consider that dilettantism is a median between artist and ignorant. More specifically, between one who creates disciplined talent and power that does not give two shakes the art. In this transitional space, is one who is very interested in what the artist creates and wants to be an artist to turn, but for one reason or another can not, so it comes down to the pleasures of art produced by others. What's with this new phenomenon, with this new word, scandalously superficial as dilettantes and dilettantism few ideas seem extremely useful in a confusion of terms which often operate in Romania last time. We call "amateur" one who does not understand that doing things of poor quality, which does not know or can not. We find it perfectly similar to "amateur". It's funny how in a country like Romania, where the rigors are down and absolute relativism is law, the personal relationship beat any academic institutional relationship, the content obnubilează style, began legal dilettantism in school and worse ends with postdoctoral studies.

Key-words: *dilettantism, Romanian law, European Union law, justice, society, simplification of legislation, smart regulation*

1. INTRODUCTION

What's with this new phenomenon, with this new word, scandalously superficial as dilettantes and dilettantism few ideas seem extremely useful in a confusion of terms which often operate in Romania last time. We call "amateur" one who does not understand that doing things of poor quality. He lives in Romania today they are down and the rigors of absolute relativism is law, the personal relationship beat any academic institutional relationship, the style clouded content. Regarding legal

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dilettantism, he began graduate school and ends worse with postdoctoral studies. How did he? Communist period perverted everything, including and especially the right, the dark side and gave countless long time will have to pass in order to sparkle glimpses of light in every corner contaminated. That period was one of survival. Both the law itself survival and physical survival of the employee in fact legal.

But things were not all like that. Let us explain: a political and legal instrument for determining the masses to follow the program of the Communist Party was right, especially criminal law, by the laws that achieve a severe repression of political opponents of the new programs. According to the late Prof.. Dr. George Antonius, "drawing on the ideas of jurists lucid as Piccard, Francois Geny, which demonstrated the existence not only in their time of change, the evolution of legal institutions over time, and there are elements of continuity at a time Historical and maintaining other institutions, ideas, conceptions of legal phenomenon, a series of studies published in this period and raised the question whether we could identify, in addition to some immediate changes in legislation compatible with the new legal order the established, some elements of continuity with last ordering. The analysis of these issues was the fundamental theme of the study "Foreword", belonging academician Ion Gheorghe Maurer, published in the first issue of the Institute of Legal Research, 1956, "Legal Studies and Research." In its study "argues the deep and documented argument that evolution Romanian law does not register only immediate and complete a pass to the right of a society based on exploitation right but reveals a new society and elements of continuity, due to the existence of regulatory needs, identical to a historical stage to another. In this view, the right is not exhausted by formulating legislative provisions but also takes into account some realities that pre-exists, that predate the norm and serve objectives. The legislator did not invent rules only make them to expression of objective necessity requiring regulatory or another. Science studying law objective laws operating in legal regulation cannot ignore the fact that along with institutions and concepts, right contains both elements changing from one type of society to another and constant elements, reflecting common regulatory needs of different types of society, as, in addition to economic laws specific to the social order, there are general economic laws common to many ordinances".

It was the opinion of a specialist who passed valuable luggage all the new boat victory of communism brought the Judeo-Bolshevik Soviet tanks, as did other personalities - Mihail Sadoveanu - only mention here that having parked in front house two cars "gas" one Canal, the other for the Academy, chose the path of heaven or hell. Those who opted for the Canal, there were tragic ending retrain or communist prisons, others have built communism until 1989, greatly contribute through their creative effort to "the great accomplishments". The new realities arising after the coup of 1989 have confirmed hopes a better standard of living and that will be "bread and roses for everyone". Neither could not be so, the post-revolutionary continued this process of perversion giving it a new dimension, namely the moral abyss. As some young fail to reconcile with the idea that a colleague of theirs, uglier and worse than they earn more by selling her body and get to do the same, as many of those engaged in development and law enforcement have sold their soul for a handful of silver coins. This has altered DNA has corrupted creative fiber. We can not speak Romanian law without his lawyers understand Romanian. Both systems (communist and post-communist) or have depersonalized or gave them a personality monstrous, unnatural. So they got that part right of the people to be engaged in political games hoping to receive a reward as small. And few people who have long desired reward.

Outstanding representatives of Romanian law, but less inspired Cofre lawyers in the profession backstage games wonders wonder how they starve, while illiterate politicians bathes in money. Paradoxically, most of the times not even hesitate for a moment to take place. I have not seen but never assuming by their actions or mere silence situation reached. Today, more than ever, the right is what he likes his boss or and, better yet, what is pleasing to the party. To this day the phrase "the truth will set you free" does not mean much for the vast majority of politicians.

The lawyers - and here I mean all legal professions - without backbone is difficult to say what is going to Romanian law, however, is not difficult to guess. One thing is certain. As common man fulfills his best potential only when they get to work abroad, as well as trained man gets to glimpse the realm of happiness only after escaping from this space toxic. Especially, that a tenant of Cotroceni, who just completed his mission as received, we urge "fatherly" to leave our homeland, "sweet Romania" as Eminescu said softly!

Who are those who intoxicate the right *Mioritic* this space? Simple answer, our material circumscribed title, as dilettantes in this area as sensitive society, that of justice. On her first since her find the study of "factories bachelor" pardon of some law schools that bring 18,000 thousand graduates annually, of which only 1,000 of them are absorbed by the labor market. The longer then master classes and what is worst among us lawyers, notaries and bailiffs corrupt, greedy after huge gains, legal advisers employed in public institutions based on criteria folks than professionalism and prosecutor's offices or courts even where it found and corrupt judges.

Then move in parliament and government, local government and central consequence of final judgment in a number of increasingly high performing free, holidays, health in prisons in Romania, Romanian taxpayers pay. They are part of the broad scope of the dilettante who invaded Romanian society, sick and nearly killed by severe disease of mediocrity and immorality. Finally, it all culminates in our constitutional arbiter where corruption already entered. This institution, for instance can not be called, although undeniable merits of some of the outstanding personalities within it, has become highly politicized and highly dangerous immense powers conferred by so small a number of people who have been appointed on the basis of political affinity, not elected, modify and even cancel state law, without reference to at least some curious decisions "moment or customer tailored"!

2. WHAT ARE DILETTANTES?

Dilettantes are, therefore, a species that permeates society, a somewhat diverted from its major purpose because it closer to their own pleasure, but which is essential for society if there were no dilettantes, for artists who would create would make laws MPs would perform in sport etc. mediocrity? To achieve a better understanding of our approach, we make a brief foray into art since the right is not only a science, and art. His passion for art makes dilettante, finally, indispensable art, for if artists could produce for themselves, it would be painful and if they produce for those uninterested, would be absurd.

We can identify as being very recent phenomenon dilettantism - only the bourgeois lifestyle could make it possible, and about etimogologia word I could find that "Diletta" in Italian there since the eighteenth century, and appeared to differentiate the artists who devoted his life to

the creation and lived in their work, for which the Italians had the word "maestro" of those who devote art of pleasure, and "Diletta". And further, to be more precise look like "dilettante is an art lover who will not only observe and enjoy, but wants to and participate in its execution." The same applies in the law and in our daily life, we see these people everywhere, in almost all fields, saying the blue, "so we can". The condition will participate in creation (fulfilled or not, does not matter), stresses the importance of defining diletanului overwhelming passion. If you are passionate, you're not dilettante. Sure, passion originates in pleasure as the creator of art motives "maestro" are of very different natures.

Evil is much deeper, its roots are found throughout the communist period characterized by its proclaimed atheism as state policy and those descendants continued today in a secularized society, materialistic. Moreover, the Constitutional Court of Romania (called that, but I'm afraid it is not the Romanians) held that God is good to stay out of school, children education fun to draw up and make as other precepts, not after image of God but of the potentates and weather makers because that can be more easily manipulated and lied to. Folks, religion is obligatory as breathing! Why? It's like asking why I breathe!

Until now, students can apply if they did not want to study religion. This year, applications must draw those who want to follow religion classes. Controversy on the time of Religion in schools continues. According to the professor dr. Gheorghe Iancu, former Ombudsman, religion, law, mandatory and not optional. Specifically, the National Education Law no. 1/2011, as amended and supplemented by Articles 18 and 65, states that "the core curriculum required by law belong materials that are compulsorily taught and not voluntary or optional. These materials are known, namely: Romanian language and literature, mathematics, history, geography, physics, chemistry, etc. These include religion. In other words, religion has provided legal regime for other compulsory subjects and should be taught in the same conditions. " More specifically, religion is included in the core curriculum, can not be subject curriculum that includes electives set of school and not by law.

An example is enlightening. Thus, instead of religion can be mathematical model that religion could be taught or not as the student wishes or not, which is absurd. In other words, a compulsory subject and should be taught, otherwise mandatory effect is not achieved, and this

lack of effective legal regulation of compulsory matter in question. At the same time, can not invoke the small number of students who would attend a religion, because the law does not make the organization of the course concerned by the number of students. Consequently, it is difficult to change the text of Article 18 para. (2) of Law No.1 / 2011 that "the student may not attend religion classes" as changing the text would be to ignore the binding nature of religion, which would be illegal, says former Ombudsman. Note that Articles 65 and 18 of Law No. 1/2011 were subject to two exceptions of unconstitutionality, one in 2012 and one in 2014. The solutions of the Constitutional Court are contrary. Thus, by Decision no. 306 of 27 March 2012 the Constitutional Court ruled that art. 18 of Law No. 1/2011, which refers to religion classes are constitutional.

In the 2012 decision, the Court held that Art. 18 of Law no. 1/2011 are consistent with those of the art. 29 and art. 32 para. (7) of the Constitution, with the art. 18 of the Universal Declaration of Human Rights, with the art. 18 para. (1) and art. 13 pt. 3 of the International Covenant on Economic, Social and Cultural Rights, as well as those of art. 9, paragraph l of the European Convention on Human Rights. Thus, the Court held "that is guaranteed parents or guardians to ensure convictions, the education of the minor children whose responsibility devolves on them since, according to the law criticized, at the written request of the student's major or parents or legal guardian established for minor student, the student may not attend religion classes, and in this case the school situation ends without discipline religion. "

Two years later, totally opposite CCR decided by Decision no. 669 of 12 November 2014 and held that religious discipline is binding, as a school subject that is part of the core curriculum. However, the completely unconstitutional, the Court found that religion "can not be opposed to students, since the establishment of aims reaching constitutional requirements" on state obligations. At the same time, and all unconstitutional, the Court held that "the obligation is enforceable against only state religion which is held by the need to organize religious education by providing teaching religion to the 18 recognized religions". But the Constitution must be respected and is binding on all members of a democratic society Romanian Constitution regulates real obligations for them, including public authorities. "As part of the core curriculum, as Parliament decided by Law no.1 / 2011, religion requires mandatory for

students, and the state also has the obligation already examined. Of course, the state's obligation to ensure the teaching of religion must respect "the specific requirements of worship." (Art. 32 par. (7) of the Constitution). Again, religion is like math, both are mandatory and must be attended, according to the specific cult concerned. More than expanding our discussions, we see that the absence of religion, of God in our lives and our children can be born dilettantes contemporary society and, more seriously, to the future. These amateurs, by "works", can alter the legal monuments of our law, codification massive civil and criminal law lately by improper application and interpretation of the creation of true professionals who, despite opposing views remain milestones of Romanian contemporary law codification which we will briefly make some considerations on the lines below.

3. ON THE RIGHT CONTEMPORARY ROMANIAN

The right is a mirror of a social system. The rules contained in responding to specific needs and at the same time, tend to meet the dynamics of social life. Thus, it is a model of interpersonal relationships, providing individual in relationship with himself and other individuals who can lead principles after life, in all its aspects - spiritual, material, biological and especially social. The principles governing relations between people are, in their essence the same.

Therefore, the right offer, par excellence, constant legal principles around which any society is structured, regardless of time and space, not only must follow the regulations contained models, new, modern facilities in other legislation, but to exploit both the elements that constitute the timeless constants of any substantive rules - rules and principles that last time - and, of course, the issues currently required by the imperatives of a dynamic, living realities and changing.

Correlating therefore provisions that spring from sustainable tradition of Romanian law with provisions contained both European and international instruments and the internal current legislative framework, basic rules in the light filtering solutions offered by doctrine and jurisprudence constant over the years, current law should reflect the need to adapt to the requirements of current legislation socio-economic realities. However, profound transformations of Romanian society and the realities of contemporary European values requires the protection of new socio-moral, cultural, economic and scientific-technical,

fundamental rule of civil law must respond equally to requirements arising from commitments made by Romania as a member state of the European Union.

As regards judicial reform and the fight against corruption, Romania needs to continue its efforts to achieve specific objectives and in particular to continue the work of moral and legal rehabilitation, ongoing. This can be done smoothly but only in a unified vision of the whole, which requires consistency and correlation with legislative reform on moral and religious substance of the law. From the perspective of EU legal acts must answer the need for a modern legal framework to represent and articulate a coherent response to the need to reform both the institutions and mechanisms related to substance fundamental socio-economic relations and procedural instruments. The right to be a modern instrument regulating fundamental aspects of individual and social existence, adapted to the new current terminology.

The idea of promoting a monistic conception of regulation of private law relations into a single code - Civil Code - by incorporating the totality of the provisions concerning persons, family relations and trade relations aimed at creating a uniform legal framework that is common law, respecting the legal particularities and the special rules for each category of people, especially those at an increased dynamism determined by the evolution of EU law and other relevant international standards.

And in criminal law development and adoption of a new Criminal Code was a crucial moment in the evolution of Romanian legislative decision to move toward a new Criminal Code was not a simple manifestation of political will, but was equally a corollary of economic and social development, and the doctrine and jurisprudence. The major upheavals in the political, social and economic, which took place in the Romanian society in the nearly four decades that have passed since the adoption of the Criminal Code of 1968, especially in the period after 1989 have left no room for doubt in about the need for a new Criminal Code.

The drafting of a new Criminal Code was based on a number of shortcomings existing in the former regulation, shortcomings highlighted both practice and doctrine. The former penal sanction regime governed by the Criminal Code of 1968, subject to frequent legislative interventions on different institutions, led to inconsistent application and

interpretation, inconsistent, criminal law, with repercussions on the effectiveness and purpose of justice. Development of a new Criminal Code was required and the need for readjustment within normal limits and punitive treatment in response to the requirements of European Union integration with the rules adopted in the criminal law of the European Union for achieving the area of freedom, security and justice. The new Criminal Code to pursue the following objectives:

- Creation of a coherent legislative framework in criminal matters, avoiding unnecessary duplication of existing rules in force in the current Criminal Code and special laws;
- Simplify the rules of substantive law, designed to facilitate the uniform application and expeditiously in activity of judicial bodies;
- Ensuring the satisfaction of the requirements arising from the fundamental principles of criminal law enshrined in the Constitution and the covenants and treaties on fundamental human rights to which Romania is a party;
- Transposition in national criminal law regulations adopted at EU level and harmonization of Romanian criminal law systems other Member States of the European Union as a prerequisite for judicial cooperation in criminal matters based on mutual recognition and trust.

By achieving the objectives set will be connecting to the demands of contemporary national criminal law of the fundamental principles of criminal law. Also, social, substantially simplifying the rules of law, together with the changes made by the new Code of Criminal Procedure, should lead to criminal law to ensure predictability and increased confidence in the overall criminal justice. In developing the project aimed on the one hand, Capitalisation Romanian criminal law, on the other hand the connection to the current regulatory trends of legal systems of reference in European criminal law.

Based on these general imperative embodied in massive recoding the Romanian private law and criminal law, substantive and procedural, object Us subsumându our research stated in the title of the paper, we develop below some considerations on administrative simplification of legislation necessary for the implementation good governance and hence improve the activity of our local and central public administration.

4. SIMPLIFICATION OF LEGISLATION AND ADMINISTRATIVE ACTION. SMART REGULATION

The proliferation of legal norms is a phenomenon that occurs throughout the Western world, but for various reasons, cultural, for example, in France, or the circumstances of the development of legal and social system, such as Romania (the new historical-political and economic data post-1989, and the implications of accession to the European Union), known in some countries impressive. The plan objective, taking any official action involving multiplication general rules, whatever their nature and origin, legislative or regulatory, legal or technical, national or European-union. This "saturation" legislation is characterized by a glut, a lack of legibility of the rules applied and, finally, a weak effectiveness in achieving objectives. Such a situation generates a waste of time, money and ultimately, motivation, both for the administration, often discouraged and helpless in the face of this mass complicated texts that must apply. Some sectors of society, the economic is among the most affected by such legislative situation. Overregulation subject "actors" in a real business' tax papers "stress plus taxes and is expressed by the costs of administrative formalities to be fulfilled, the obligation to provide a great deal of information and documents regarding their work for specialized government. In this context problematic, it is obvious that a more flexible regulatory environment as readable and indispensable stable and favorable economic development and stimulating employment. In contrast, normative and procedural complexity drastically reduces attractiveness to potential investors and cancel their initiative.

Negative effects are recorded on public administration which, under the weight of the large volume of legal regulations in their application clachează correct, timely and appropriate, and effectively abandoning control and often glide slope corruption. Last but not least, contribute to the maintenance and amplification phenomenon inherent process of transposition of EU directives into national law by a tendency to go beyond the requirements of European union, due to inertia in the system and the shortcomings deepening its meaning. Numerous studies conducted in Europe to assess the weight of administrative burdens on businesses, in such a situation, shows an average representing 3% of GDP, which indicates an abnormal situation that requires urgent corrected. From this perspective, simplifying the law in general and legal regulations, in particular, is essential to ensure its accessibility, proper

implementation and efficiency measures furthered. In addition, it is an increasing degree of democracy citizens and legal level of civilization.

5. SIMPLIFICATION AS A REMEDY FOR "GOOD GOVERNANCE (MANAGEMENT)"

5.1. Issues of "good governance (management)"

Promoting a "good governance (administration)" public alike involves streamlining the functioning of the state and the tools used, among which are those of a regulatory nature. And simplifying its various aspects - administrative simplification, legal language or legislative techniques - is most commonly used for this purpose. First used in administrative paperwork idea then invaded all branches of national law, international and European Union-not, however, unfortunately its efficiency to be able to practice.

Even if the concept of simplification is old and the term already has its own history, they still suffer from the absence of a precise legal definition, the concept itself remains ambiguous, as always mentioned in the singular, whereas, in fact, is pluralist in stances of expressions and meanings. This double uncertainty factor affecting so very concept of simplicity: on the one hand, it is characterized by a form of relativity ("simplification should not be confused with simplicity. Policy reject the illusion of absolute simplicity simplification of the law", it does not remove the complexity necessary and inevitable, but only the unnecessary occurs by facilitated the compilation of texts or insufficient maturation of rules), and on the other by a plurality of different shapes (which reflects the "diversity complexities that the legislature intends to remedy "). Therefore, the two essential facets as reducing administrative burdens, respectively, strengthening legal certainty and coherence, which contributes greatly to the accessibility, readability and clarity of the law, the principle of legitimate expectations and promoting achievement of codification. From this perspective, simplifying and improving the quality associated modernization law and are promoted as such in official strategies.

5.2. About the need to simplify Romanian law

The report issued by specialists in the field, in February 2009, Prime Minister of France wearing a meaningful title: "To simplify our laws to cure a bad French." Changing only the last word in the sentence, ie the nationality of evil, he becomes perfectly true of the Romanian law.

Indeed, a simple statistical radiograph reveals an alarming situation. Thus, it shows that are currently in force in our country no less than 65,240 pieces of legislation, including laws 6247, 2336 by government ordinance, 854 government ordinances, 21,480 of government decisions and 34,323 other acts (speaking in this category especially acts of public authorities and local county). As accelerating pace of adoption, the last 25 years are characterized by an unprecedented dynamism: if in 2000 were adopted in 1532 by legislation (laws 231, 290 of the Government Emergency Ordinance 137 government ordinances, 798 Government Decisions and other 66 other acts) in 2005 reached 4.012 acts of which 415 laws, Government Emergency Ordinance 209, 55 government ordinances, government decisions and 2,486 1,847 other documents to reach 4,176 by 2013 the number of legal acts adopted (of which 384 laws, 115 Government Emergency Ordinance 32 government ordinances, government decisions and 2,508 1,137 other acts). The richest year in law after 1989 was 2002, 683 also acts adopted, followed by 2003 (with 609 laws) and 2004 (Act 602).

Beyond the role of indicators of representative democracy and how the political powers of the state (parliament and government) exercises its regulatory powers, such data reveals a plethora of rules generated both cultural and legal tradition of French origin, emphasized statist but also the general historical context of the last two decades and a half. After completion of major legislative reform process for the transition and its transition to a new stage of development, the European Union integration, and the development of democratic Western massive corpus of positive law Romanian regulations in force form needs a process relocation, new principles in a flexible, accessible and efficient, which means, above all, simplicity and accessibility synthesis.

Of course, the extensive process of (re) coding developed in recent years and expressed mainly through the adoption and entry into force of the new codes [civil (Law no. 287/2009) of Civil Procedure (Law no. Law no. 134 / 2010), Criminal Law (Law no. 286/2009) and the Criminal Procedure (Law no. 135/2010)] was an opportunity for some simplification of an important part of Romanian legislation. Indeed, simplification and codification related to natural hair. Simplification is an objective law, involving in particular to improve the accessibility and, in this perspective, is related to coding, which is a technical means of achievement. It is therefore not surprising that often occur

simultaneously simplification and codification. Undoubtedly, the relationship between the two concepts in practice depends on, among other things, the nature of coding: the right encoding constant or innovative, creative. The first is characterized by not only simplify access to law, without touching its content. It is defined as a technique aimed at reassembling and reorganizing existing rules on a specific subject area, in a single text validated by the competent public authorities.

The impact of this coding seems a priori relatively modest. On the contrary, innovative encoding requires, in addition to a rational assembly of materials, a recast development, a change of design and content of what exists in the regulatory field. Its potential major simplification depends on the priorities set in the approach to (re) coding. With a strong interface between the two basic types of coding required legislative and transitional phenomenon, recent recoding Romanian law aimed less simplification, sometimes even contributed to increasing regulatory complexity. However, can not be ignored and some effects in the field, a fortiori products such as simplification resulting from the adoption of monistic conception of private law, which led to the suppression of separate existence of a commercial code. In fact, just perfection legal reform by adopting new codes and the overall situation of the Romanian legislation, marked by unnecessary complexity, inconsistency and therefore adequate accessibility and efficiency implies now begin a process of simplification of it.

5.3. Simplifying the right strategic program of the European Union

Simplification problem right U.E. was made formally for the first time from Birmingham Declaration in 1992, the European Council expresses the wish that "Community legislation to become simpler and clearer." These objectives have to be spent by the Edinburgh European Council of 11 to 12 December 1992 a resolution was adopted on June 8, 1993 relative to editorial quality of Community legislation, in terms of which have been established "guidelines fix assessment criteria "of this quality, the purpose being" to make Community legislation as clear, simple, concise and perceptible as possible. " Following the Treaty of Amsterdam of 2 October 1997, institutional Agreement of 22 December 1998 between the European Parliament, the EU Council and the Commission adopted common guidelines turn these three institutions will also target a 'clarity, simple and precise provisions of Community law ". In their application, the legal services of the three institutions have

adopted, on 16 March 2000, a "Joint Practical Guide", which allows the formulation of documents "in a comprehensible and coherent, and following uniform principles of presentation and the coroner." The first of these guidelines stated that: "EU laws are formulated in clear, simple and precise."

Considering that institutional Agreement on Better Lawmaking of 2003 became inadequate for the current legislative environment created by the Lisbon Treaty after 2011 and related legislation, special attention was paid to design and promote a new vision in the field, focusing on concept of "smart regulation" ("smart regulation"), seen in practice as a continuous, dynamic process designed to lead to better legislation, simplification of EU law and reduce administrative burdens and commitment on the path of good governance, where decision making is based on clear facts, the impact assessments and the ex-post play an essential role.

In December 2012, the European Commission initiated this program for smart regulation and performance (Refit) aimed to identify the whole European union legislation, regulations or administrative constraints inefficient to allow the necessary changes of EU law better. In August 2013, the Commission services published a working paper on the first results of its examination of "mapping and screening" according to each sector of the European Union-law. On 2 October 2013 the European Commission published a Communication "Smart Regulation Program and Performance (Refit): results and future steps," which clarify and specify the strategy pursued by the Commission in this regard, detailing how its simplification approach. Finally, through its Communication of 18 June 2014 on the refit program, the Commission made a new assessment of the results in the field and set new priorities for action.

In turn, the European Parliament adopted on 4 February 2014 Resolution on the adequacy of EU regulations on subsidiarity and proportionality (19th Report on Better Lawmaking 2011) which makes some general comments on the matter. Among these we may mention considerations "normative compensation application" which would require the identification of compensation equivalent value before new legislation that would introduce imposing costs (pt. 39) and the definition of 'gold plating', as the practice of those Member States, in the transposition of EU directives under national law, beyond the minimum requirements.

It showed that after October 2013, the legislature (Parliament and Council) adopted a number of proposals for simplification and reduction of administrative burdens, including legislation on the recognition of professional qualifications, public markets and tahygraful numeric. Moreover, according to official statistics, the Commission took more than 660 initiatives to simplify, or restoring encoding and 5590 laws were repealed.

The objective of smart regulation can only be achieved thanks to a joint action of the European institutions, Member States, economic actors and civil society. It requires to be considered a priority and pursued both in the preparatory phase and during the legislative process itself. As regards the measures to be taken by EU Member States it stems from the fact that according to estimates, up to one third of the administrative burden associated with Union legislation arising from national measures of enforcement. Therefore, Member States have an important responsibility not only to ensure timely implementation of EU law and full, but also to follow as this is done in the least restrictive. From this point of view, the national authorities of the Member States are required to exploit the opportunities for simplification offered by European-union legislation and ensure that the latter should be applied at national, regional and local level in the most effective and efficient as possible. In this respect, the simplification of legislation and administrative action is thus a major objective of the Romanian state development in the coming decades.

6. CONCRETE WAYS TO OVERCOME THE IMPASSE LEGAL DILETTANTISM

We appreciate that overcoming the current impasse in the range shown above could be achieved by reconsidering our profession, the legal, who rely on writing and the oratory, in court, arguing before the judge. Lawyers are professional writers and are paid to perform quality written work, checked seriously and to become good legal writing will take many years, beginning during university through basic training received during the Faculty of Straight.

In this respect, Malcolm Gladwell Outliers in his study presents a developing theory, theory suggests that you need 10,000 hours to develop expertise in a field. If the theory is correct, then certainly applies and legal writing. Thus, if you work 2000 hours per year and in 1000 they

assign writing, then to become an expert in legal drafting will take 10 years. It is very long. But it is not enough to do this for 10,000 hours, you have to work at it - to study, learn, and implement what you have learned. If you do not study the legal profession - you just automatically write - it will take more than 10,000 hours. And if you write less than 1000 hours per year, it will take more than 10 years, can take 15 or 20 years.

We hear sometimes from senior lawyers that law students and young lawyers are writers without result. This bothers me because it is unrealistic to have high expectations of the people who spent more than 10,000 hours practicing legal writing and I appreciate that these complaints often wrong, there are two reasons: first, the dissatisfied are not experts in legal writing and are not in a position to judge. Secondly, the discontent had forgotten how ineffective was their writing when they were at the beginning.

Furthermore, time pressure may be an important barrier against good legal writing and legal professions takes time and are quite demanding. Many lawyers feel compelled or forced to work more than I can take. Workload affects legal writing. Take the example of a text recovery. If your handwriting is not high, it may be because you do not know how to rephrase or text may be because you know how to revise, but you're too lazy. But most of the time is because you have no time, even though you know you revise. Editing is what makes good writing is weak legal and good writing is extraordinary. But in practice often have sacrificed reformulation. There is a book on legal writing and I read books on legal writing, only serious and constant practice law teaches legal writing. There is, however, the culture, especially legal without which one can not conceive legal writing, even if today is quite large number of those who wrote several books Deca read! Why do we call culture?

The answer is simple: the communist period perverted culture and is now normal for a writer to try to be a man total, meaning that anything that surrounds him not to remain indifferent and it's natural, therefore, that a writer to deal with politics, but more important is that the writer is a public observatory. The writer actually has no privacy. Intimacy is a public good writer is one who manages to goal before other individuals feelings, moods, feelings, representations announcing something else, something new in the world order. He is more than a seismograph, is the man who manages to see what will happen. Therefore we think that the

legal literature, as it was done in our country between 1960-1980, is no future, because it was able to provide.

It's not necessarily political or social future, but the future of our own sensibilities. However, we see that the matter is now extraordinarily dense inspiration of great diversity, she commits to a sober life minute by minute, to a great capacity of observation, concentration and distinguishing what is truly significant. By the way they feel, many of our contemporaries are still people of the nineteenth century and into politics if animated by lofty ideals, as Heliade-Radulescu, despite knowing the risks they are exposed, should make a corollary of the political work of writing and personality. There is kind of ridiculous writers who believe tribunes of the nation, otherwise very active but do not differ too much, can only rhetorically, of individuals who pretend to make political dilettantes and Farsi. Politics is a field of pragmatics, compromise, a space of transactions that require diplomatic spirit and rallying to another type of moral, almost always guilty. The writers have failed when they entered politics, but it's good to familiarize writer including this area, because it keeps the world we live in and is a well-defined outer part of his life.

Finally, there are apolitical writer in their own way, probably because we are accustomed to those writers declared apolitical, but are underground political parties in power. The writer is completely isolated from the political context being that our world is no longer possible. This isolation is impossible. Perhaps by 1789, they start social movements that led to the formation paradigm of modernity, perhaps by then was impossible. Today, we see that even the philosophy seems to change the subject. It is no longer a reflection on metaphysical ideas, but very often a reflection on language, on science, an expression of anthropological vision. There is a philosophy of politics and interest in it is growing. But it was, of course, theoretical approaches, no policy in its concreteness. The writer really isolated and is no longer possible because the means of expression of this world marked increasingly permeates the political, where there are no innocent themes and languages, where the body is also a political and politicized value. Here you can not live off the ideas and practices of our time, that can not live - dare I say - than in democracy. Therefore, perhaps there is quite a lot of us writers who have changed their identity after 90, who migrated from literature to political, in the sense that suddenly began to be concerned with the construction of

institutions of civil society, the relationship between civil society and power or power simply giving up but the literature or returning to it only sporadically. The true nature of these writers, however, was not that the writers. As writers were probably attracted by the lure of the beginning of political awareness, they remained in the area of literature, a professional condition as anonymous, without being able to distinguish. And behold, the opportunity arose dreams.

In the legal field, if things are a little different, of those who have migrated all the way in policy analysis there are several outstanding legal writers whose names we avoid them to publish only the theme omits someone. For that Romania needs now, given that globalization is a phenomenon which if we can not be opposed, to make it as painless. A paradigm shift is underway.

7. CONCLUSIONS

Natura non facit Saltus, no doubt, but it does sometimes giant strides. Right modernises, transforms, we can say that transfigures and rapidly absorbed with a scrumptious "neologisms" borrowed from the West - particularly from the European Union. Meanwhile, the "progressive circles" put the matter more earnestly to leave the Roman-Germanic system used in continental Europe for the common law under the influence of the US. This thing will not happen from one day to another. Despite the enthusiasm of the young for "Americanization" of the elderly resistance will be strong enough to prevent any radical measure time by twenty years. Then perhaps oddly, the new law will stealthily sneak in official documents.

But so great a change in law in institutions and mentalities and habits as sudden intrusion of a large number of outstanding legal acts can not be done perfectly. Semidocţii, dilettantes, a whole category of officialdom and ordinary people create unwillingly word-perfect, rough terms, expressions wrong, right funny. Even more than our inflation will add the legislative European or international, as in France where the impact is even greater, as in a suggestive title Deals of Justice. Le marché de l'américain obéissance mondialisée authors raise a number of issues impact on the process of globalization phenomenon îînfăptuire justice.

It is a true paradigm shift in influence, becoming stronger, practices initiated and developed overseas, but gradually penetrate and European legal area. Thus, companies worldwide are facing a unique attitude of the

US authorities after a suspected fraud hanging over them, we propose to choose: to cooperate or to oppose. If the firm agrees to cooperate - and in concrete is the only option possible! - It is committed to conduct a thorough internal investigation, at his expense, and communicate the results to the competent authorities, and to pay a fine negotiated and finally, most often, to accept the appointment of an internal controller (monitor). Thus, corruption, money laundering, tax evasion or international sanctions spectrum are treated as a special deal, without judicial intervention, with its inconveniences and guarantees. It avoids first, lengthy procedures, putting those people, and astronomical penalties may thing seriously damage the reputation of the company. In the face of these threats and perspective to see them banned from the US market, often prefer cooperation, opening a new logic. The company wishes to discontinue the suspect defense of judicial and administrative authorities negotiated peace buys American free market and society.

Novelty and generalize this practice invites not only business but also the bar, public authorities and European institutions to ask and respond to what might appear as a new way of regulating economic globalization by law. Beyond the technical area of design, economic sanctions or financial regulation, such an approach allows a better understanding of "global law" applying to a more pragmatic, more efficient or more insidious dimension of the global model. For the European legal area, a prime example was the major resonance with Siemens. Such legal scenarios have increased in recent years to such an extent that it became possible "modeling" a gender practices. The causes can start in many ways, but recent regulations have strengthened the alert mechanism (whistleblowing, ie a set of provisions for the protection of the donor alert) the recent Dodd-Frank in particular, which gives it a percentage of the amounts covered. Once confirmed the suspicion against a company - whatever its headquarters in the world, since it is listed on a US stock exchange or that has significant commercial interests in the United States, or using means located in the United States - may be offered by the US to cooperate, ie to give to rely on a number of legal safeguards and accept conducting an internal investigation by lawyers, assisted by experts in electronic data processing. These surveys have limits set in front of them (or any object on the course of time and space), the authorities may at any time to expand to new industries, extend or enlarge the number of jurisdictions concerned opened. In addition, most

often their efforts in the associated task forces bringing together several investigative bodies, which are proving particularly effective, accumulating expertise in tax law or stock exchange, accounting or criminal law.

A broad approach and laborious so would not be possible without a legal arsenal that allows, from The foreign Corrupt Practices Act (FCPA), which was preceded and followed by many other texts, such as RICO law adopted to combat organized crime, trebling of damages. Most often, the agreement provides for the appointment of a monitor, vetting application always original text American lawyer subsequently by Siemens because of increasingly frequent and another nationality. Finally, the agreement reached between the company and the authorities have approved, in some cases, a Judgement consent, approval judgment handed down by a federal judge, which has the effect of not only given increased weight, but also to facilitate tracking case of failure.

Mostly transactional, negotiated with character, this procedure has the advantage of speeding pragmatic, minimize losses and image menajării companies involved. It marks while diluting its repression classic, exclusive state with coercive, to the responsibility assumed, admitting guilt and sanctions imposed negotiation aimed not lead to a destructive revenge, but pay particular opportunities Recovery. The new paradigm of "societal justice" subject rather laws of the market economy, rather than legally binding rules announced fundamental changes in the remedy plan "social evil" in favor of repair materials, to the detriment of "revenge" social.

Beyond its unusual in European legal tradition, this "justice without justice" raises a number of questions: it shows unquestionably advantage effectiveness? There looming, do, a global adjustment? No justice reduce to one merchant? What remains function of the state justice? And, concluding, a simple change of paradigm or the nature of justice?

Researching all this movement of ideas where "everything we are allowed, but not everything is and help us," as the Apostle Paul said "the whole man, strong, even if it is allowed, it will not let mastered all what he is permitted ", we see emphasizing the lack of morality in people's lives. Moreover, everything, absolutely everything is just resembling love, not hatred and betrayal!

The same law, there miracles, but occasionally, wonderful stories; There are sometimes privileged moments in people's lives when, in one

generation, God gathers more changes than a few centuries of torpor. This happened to us with the "generation of 1848", the "Great Union generation", a handful of people who were fighting but driven by a boundless faith in the destiny of their country. They tossed out like trash, customs, laws, institutions, even the vocabulary imposed by a foreign power. They drank eagerly from the springs of Western culture; adopted new institutions have renewed the language and the right, have created the entire literature of universal value, began quietly, a democratic process, at a pace nemaicunoscut of any other country in Europe; fixed for generations, with boldness and realism, the major political objectives of the nation and led Europe to take them. They did however. They did more: they forged Romania.

What happens today in Romania and even worldwide, when the current crisis offers a humanity so many bad knees, the opportunity to reflect on its own survival, the sole planet? After "tamed" nature, man is now subject to manipulations of all kinds, those who stand to profit at the helm and especially behind the big corporations. You can not steal without mind control victim. We are talking today about a war in the mind. It is worn by large corporations and neoliberal policies that have created and continue to keep the crisis. Greed high finance has produced the current economic instability, social and legal. Large corporations do not need free minds, but robots, motivated only by conquering a position in the hierarchy and the benefits of a luxurious life, bowed obediently to the precepts "correct policies". Personally, I defy political correctness of all colors. For example, Nestlé controls 70% of bottled water in the world, including Périer, San Pelegrino, Vittel. It is an action that threatens the neoliberal and postcolonial a fundamental human right - the primary access to water. Can be turned into a human right cargo, label and price ?! Apparently so.

In Romania, as in other countries freed from communism, the citizen is ruled by fear. We are afraid because they do not have true faith. When we pray and ask God to "give" miracles confuse faith with magic. Without hard work and sacrifice, you can not take flight dignity skyline. Born bird cage believed to fly is a disease! For this to advantage after '89 so that mentality perpetuated as long as you eat what's good. Belly full freedom lies above! When not stay strong Christian faith is born naked through which a lot of death. And when man becomes "human resource" - an individual handled, manufactured by enslavement of the mind. Mind,

soul and heart become his captive. The state educational system also contributes greatly to shackling the mind and spirit. After being trained as grown adults prejudices, euphemistically called "national programs", students become downright unable to think or act otherwise than that they imposed their trainers. I, in these 25 years, we have seen in Romania only promote malignant incompetence. A period in which the Romanian soul was passed by the sword. Therefore, I think it is an urgent need to restore moral values reprofesionalizarea Romania and flawless, respect for law, in history, our people have given proof works.

And if, in the next two and a half decades, we have another "Great Union or forty-eighter generation" and our government will not be able to buy, own money, 1 million lei, piramidon, vaccines or aspirin domestic production without the approval of the IMF and the European Commission, Romania may disappear from the landscape of European states, leaving a simple indicator geographically and with it our right and Romanian.

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SOME HISTORICAL ASPECTS ON TAX EVASION

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Abstract:

Tax evasion is a phenomenon caused by the human's need for money, underlined in various ways to evade tax obligations, thus the genesis of this phenomenon is inextricably linked to the state and its appearance. The many legal obligations imposed to taxpayers and their burden, determined taxpayers at all times to invent various methods of avoiding tax obligations. Through this study we aim to make a historical incursion on tax evasion as the phenomenon evolved with economic and social development, to identify the main causes of the occurrence of this phenomenon and how to combat the phenomenon

Key -words: *tax evasion, fiscal burden, phenomenon, taxpayers, methods*

INTRODUCTORY REMARKS

The man's need for money was and continues to be a major one. With money you can get and you can do almost anything, just that they do not come by itself, and to have them, one may do some illicit acts, which influence our lives, some for good, others for worse. Among these latter facts enrolls tax evasion, which provides more money for those who administer and less money for those who support it, the genesis of tax evasion being inseparable from the state and its appearance.

TAXATION AND TAX EVASION. HISTORICAL POINT OF VIEW

The many obligations that tax laws impose to taxpayers, as the burden of them, at all times, determined taxpayers ingenuity in inventing various methods to circumvent tax obligations[2]. The forms of tax evasion have evolved with economic and social development. Evading the obligations was a historical concern of those who had to pay[3]. In ancient times, people collected money and hid them, in order to not be found by

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[2] N. Hoanţă, *Tax evasion* (Bucharest: Tribuna Economică, 1997), 214.

[3] V. Berliba, *Legal and criminal aspects of tax evasion enterprises institutions and organizations* (Chişinău : Lumina Lex, 2002), 7.

the Huns, Tartars, Turks and other so-called civilized; nowadays, together with those remaining from the former invaders, we accumulate and hide the money, among other things, from the greedy eye of our new state, which is about to become as democratic as the State it replaced[4]. "In fact, at that time when violence and disorder reigned, was appropriate that people have cash reserves, as if they would be driven out of their places, thay could bring them to a secure place, recognized valuables. The same violence that led to the accumulation of treasures, leads to hide them. A proof of the habit to hoard precious objects and to hide them is the vast amount of treasures whose owners are not known. Treasures found were considered as an important source of income for the sovereign. Today, however, all the treasures found in the country, could barely represent a greater proportion of income for some noble man[5]". The existence of taxes is known in antiquity and is considered to occurr the development of the human society, in the first state formations, being determined by the need of material maintenance of those exercising the authoritarian functions in state. Biblical material sources testify the existence of certain taxes until the coming of Jesus on earth. Thus, the question asked by the Pharisees of Jesus (Gospel of Mark, Matthew and Luke) Is it lawful to pay taxes to Caesar or not ? The Man of God, called first, a penny for tribute and, learning that the portrait and inscription of the dinar belonged to Caesar, convincingly answered: "Give therefore to Caesar what is Caesar's and to God what is God's." This saying represents the idea that tax is not charged in the absence of the taxable object, but for something that exists[6]. Since their inception until the present, the taxes were designed and applied differently, depending on the socio-economic and public expenditure in each state. Thus, in ancient times, at public expense were added the necessary expenses to ensure the functioning of state governing bodies, to ensure the maintenance of the army, to build roads, to temples and religious festivals etc. During the

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[5] V. Berliba, "General tax evasion" Paper presented at the conference entitled "*Tax evasion: causes, consequences and measures to combat" the Republic of Moldova*, (27th to 28th of September 2001): 27.

[6] V. Berliba, "General tax evasion" Paper presented at the conference entitled "*Tax evasion: causes, consequences and measures to combat " the Republic of Moldova*, (27th to 28th of September 2001):27.

development of history, along with the diversification of income, was imposed the need to increase the number of taxes levied. In certain periods of development of society, people associated not paying taxes to their personal freedom. Free was considered only the person who was not listed as contributor. With the advent of taxes and their development was becoming increasingly necessary the determination of a special tax technique. Some considered taxation as " a skill to pluck the feathers of the drake in such a way to get the maximum amount of feathers with less noise." According to the Roman historian Sveton testimony, when provincial tax collectors have proposed Emperor Tiberius to impose new taxes in the province, the latter replied that "a good shepherd shearers, but not flay". This would be an old axiom for the new tax system structure, showing that the excessive nature of the tax would be a cause of their failure to be paid on time[7]. In the Romanian country, the emergence and evolution of taxes is characterized as a complex and lengthy process. The first historical data dating back VII century BC, when the Greek colonies in Dobrogea had special colleges formed by treasurer, cashier and dispensor who administered public finances[8]. In the late sixth and fifth centuries BC, in the Greek states, the most important source of income for the counties was made up of different customs and trade taxes, constantly imposed. Thus, in Athens were obtained higher revenues from taxation or customs clearance for transit trade operations such as a duty of 2% for trade in goods import or export. In Egypt, in the third century BC, during the Ptolemaic dynasty, there was a bog brutal fiscal system[9]. Significant revenues of the state were gathered by both direct and indirect taxation. Direct tax system was represented by permanent or sedentary taxes and was a common system for the whole population or its narrower categories[10]. It should be mentioned that custom duties levied in Pehesion, North Alexandria and Elephantine,

[7] V. Berliba, "General tax evasion" Paper presented at the conference entitled "*Tax evasion: causes, consequences and measures to combat" the Republic of Moldova*, (27th to 28th of September 2001):27.
[8] Gh. Clocotici, *Undue influence, fraud and tax evasion* (Bucharest: Lumina Lex, 1996), 34.
[9] Gh. Clocotici, *Undue influence, fraud and tax evasion* (Bucharest: Lumina Lex, 1996), 35-38.
[10] Gh. Clocotici, *Undue influence, fraud and tax evasion* (Bucharest: Lumina Lex, 1996), 88.

were very high. Also in this period, domestic customs fees are charged through the emergence of surveillance detachments of traffic of goods. Indirect taxation is particularly significant during Selencizilor kingdom. Back then, there were charges for exchange transactions, for crossing borders state, state taxes, taxes on desert roads etc. In the second century BC in the Roman Empire, in the slave economy appears a taxation system. Levying taxes was conducted by specialized officials of the state and was also introduced the concession system of collecting fees. Provincial Finance Administration was coordinated by the financial procurator of Dacia Superior, then Dacia Apulensis based Sarmizegetuza. He was appointed from the ranks of the equestrian order and was under the imperial legate. To determine taxes, censuses were held every five years by specialized magistrates: *duumiri quinquenales*. Direct taxes were designated by the term "tribute" payable on land ownership and buildings. The land tax was recognized by the state supreme provincial property because of Dacia lands were under dual ownership - the ultimate property called "ager publicus" and subject property, exercised by the provinces[11]. It is also perceived a tax person named "tributum capittis" which was paid by both the citizen and the pilgrims; financial tax - "tributum messengers"; giving commercial enterprises - "conductor commerciorum"; mendations for rent habitations and mines - "conductores et salinarum fish". Indirect taxes called "vectigalia" is paying inheritance - "vicesima Libertatum"; the liberation of slaves - "vicesima"; on sales of goods and slaves; the movement of goods and people[12]. For the collection of customs duties in Dacia were established certain offices, called "stationes", both within the borders of the province as well as customs were fixed points at Drobeta, Lucidava, Poro-missum, Ampelum. Perceived duty of 2% was set and her collection was made at the fixed state[13]. It should be mentioned that duties began to be collected just before the appearence of the state. This means, they were charged at the border crossing of any goods, means of transport crossing the towns etc. Since the seventh century, worlwide are documented the first attempts to encourage and protect business activities. Thus, due to the development of trade relations shall be recorded the appearance of

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[12] T. Olcescu, *Financial and fiscal treaty* (Iaşi: Cantes, 2000), 33-34.
[13] D.D. Şaguna, *Financial and fiscal treaty* (Bucharest: All Beck, 2001), 70.

money and commercial center consolidation, which implies increasing fiscal duties. Interesting facts about taxes in the feudal period represents the Republic of Florence, in Italy, in sec. XII-XV. Thus, during this period in the said territory there was a tax on rich citizens' income, to be collected based on a progressive scale; there were taxes on inheritance and salt, customs duties on goods entering the country. Old tax income was replaced with the estimo tax, applied to all goods that citizens were registered with in the *Registro del estimo* written baes on statements of the taxpayer, which if found to be inaccurate were punishable by dishonorable erase of that person from the voters list for Public bodies[14] elections. Thus, we can conclude that a form of evading the payment of taxes or tax evasion at that time could manifest as unclear data entry in the *registro del estimo*, that allowed the taxpayer to pay less tax. Moreover, by this example, it is once more highlighted the undeniable connection between the establishment of taxes and the tax evasion. In 1558, the Queen of England, Elisabeth the 1st, says that "to establish tax and receive love is not given to anyone", emphasizing further that "she began to rule with the love of her subjects[15]". Due to the large number of excessive diversification of taxes, the Constituent Assembly, convened after the French Revolution of 1789, decided the form of taxes by replacing privileges of the nobles and clergy, removal of taxes on sales of consumer goods and other reform measures before all, enshrining the right of citizens to freely consent to the establishment of taxes. All modern tax system appears democraticly namely from Article 13 of the Declaration of Human Rights and of the Citizen of 1789, which provides that "*for the maintenance of public force and for administration a common contribution is indispensable. It must be equally reported between all citizens as far as possible*[16]". There were at that time more traditional ways of avoiding taxes, including: tax law - which provides tax evasion itself through the tax system favors (flat-rate regimes of taxable valuation); refraining taxpayer to operate, operation or taxable act. This method was found in case of excessive taxation (super tax

[14] V. Berliba, "General tax evasion" Paper presented at the conference entitled "*Tax evasion: causes, consequences and measures to combat " the Republic of Moldova*, (27th to 28th of September 2001): 27, 135.

[15] D.D. Şaguna, *Financial and fiscal treaty* (Bucharest: All Beck, 2001), 70.

[16] "LUCRARE-LICENTA" http://ru.scribd.com/doc/76951294/LUCRARE-LICENTA.

burden) because marginal tax rate became very high and the taxpayer prefers to refrain from providing additional unit of work; evasion is produced in this case by substituting leisure relieved taxed labor and gaps using the tax system. The existence of numerous taxes prompted the Consul of England in the Principalities, during the years 1814-1821, to conclude: "... there are people in the world who are more depressed and overwhelmed by the despotism of taxes, the peasant in Moldova... [17]". In 1883, by adopting the Organic Regulations, were abolished all taxes that existed until then, introducing a new tax called capitation, direct taxes and per capita, to which were forced peasants and workers, mazili, cities and fairs, and patenta - direct taxes and fixed - do not depend on the amount of income, determined by the grades they were subjected to merchants and craftsmen. Subsequently, as a result of the unification of the Romanian Principalities and thus the formation of the modern Romanian state, we illustrate that the following categories of taxes: land tax, established during the reign of Al. I. Cuza, abolished by the reforms of 1921, 1923 payroll tax, introduced in 1877, then in 1891, disbanded and returned eight years later, taxes on spirits, founded in 1867, industrial tax, introduced in 1921, other taxes, such as professional tax, inheritance (1921), automobiles (1939), on luxury and turnover (1921) on the property, etc.

Tax evasion grew in the early part of the last decade of the last century, but we must not forget that there are references to this phenomenon since 1918. The first law in Romania intended to regulate fighting it was promulgated in 1929 as the "Law on tax evasion crackdown on direct contributions". In 1921 and 1923 by the issuance of the tax reform law was made the transition to the modern system of taxes, income tax being introduced. Constant income is under the law of 1923, that income that the taxpayer declares evidence based. After December 1989, the phenomenon of tax evasion in Romania has grown because the tax base of the state recorded a downward rate but also because of permissiveness of the legislation and fiscal policy of the Romanian state fiscal policy characterized by excessive pressure on the taxpayer, the a cumbersome legislation in the field and the misapplication of it. 87 In 1994 the law was criminalized tax evasion legislation as

[17] Wilkison, *Tableau de la Moldavie. Treaty of finance* (Bucharest: Tipografia Unitară Română, 1925), 13-17.

amended in 2005. Law 87/1994 on 15 July 2005 was replaced by the Law no. 241/2005 on preventing and combating tax evasion. Evolution of tax evasion is therefore in close connection with the development of regulations on taxes as a result of the fact that tax evasion is rooted in the existence of taxes between tax evasion and tax there is a cause-effect relationship. As shown escapist phenomenon has evolved due to the concerted action of factors such as economic growth, the fiscal, legal and institutional size, other internal and external factors. Therefore escapist phenomenon is complex, with negative implications on multiple levels, it must be followed at all times to be combated effectively. International tax practice attests that a modern tax system must contain components that enable education and promptly informing taxpayers about their obligations relating to the preparation of tax returns correctly, the keeping of accurate records of income and expenditure for penalties and sanctions that are applied to the offending[18].

PREVENTION AND CONTROL OF TAX EVASION

Preventing and combating tax evasion is very difficult because it involves the formation of a costly system and a large camera surveillance tax collection. We mention that for preventing and combating tax evasion must first be known causes that led to this phenomenon, but the need to prevent and combat tax evasion is undeniable. We consider that prevention is the best form to combat any phenomenon, namely tax evasion. Tax avoidance measures must be implemented to prevent being forced to fight a phenomenon already rooted, this rule is known and applicable in any field. But prevention of tax evasion is not an easy task at all, prevention of tax evasion must include measures allowing annihilation complex phenomenon. Developing measures to prevent and combat tax evasion phenomenon within the competence of state bodies. It is known that the existence of tax evasion is interdependent on the degree of taxation, the tax burden, the state through its tax on the taxpayer exercised, namely the number of taxes that are to the subject. The number of taxes will be bigger and tax evasion will increase because an excessive fiscal requirements of the economy inevitably attract a tendency to evade tax obligations. No matter what measures will fight

[18] Gh. Voinea, G. Ştefura, A. Boariu, M. Sorococeanu, *Taxes, fees and contributions* (Iaşi: Junimea, 2002), 68.

state tax evasion, it is undeniable that such measures primarily to change the perception and mindset taxpayer. Tax evasion as shown above should be viewed as a complex phenomenon which requires in turn thoughtful countermeasures. First we think any taxpayer must understand that it has a fundamental obligation to state tax, an obligation derived from the supreme law of the state. Tax evasion is one of the complex socio-economic phenomena of the utmost importance for the state, a phenomenon that states face any stage of development and the consequences of which seeks to limit as much as an eradication of the phenomenon being practically impossible. The state has the task therefore of effectively limiting and combating tax evasion. Just to prevent the commission of the acts and omissions of tax evasion, the legislation contains provisions on obligations of taxpayers, namely, to have official authorization for taxable income generating activities, to register with the tax authorities, tax authorities competent to declare honestly, both revenue and taxable goods as your data headquarters, subsidiaries, representatives, to prepare records and other documents required, to enable and facilitate fiscal control, to pay taxes on the terms provided for by law[19].

CONCLUSION

The evolution of tax evasion is therefore in close connection with the development of regulations on taxes as a result of the fact that tax evasion is rooted in the existence of taxes, between tax evasion and tax there is a cause-effect relationship. As shown, the tax evasion phenomenon has evolved due to the concerted action of factors such as economic growth, the fiscal, legal and institutional size, other internal and external factors. Therefore the tax evasion phenomenon is complex, with negative implications on multiple levels, it must be followed at all times to be effectively combated. International tax practice attests that a modern tax system must contain components that enable education and promptly informing taxpayers about their obligations relating to the preparation of tax returns correctly, the keeping of accurate records of

[19] I. Gliga, *Financial Law* (Bucharest : Humanitas, 1998), 196.

income and expenditure on perfect for penalties and sanctions that are applied to the offending[20].

We believe that it is impossible to completely eradicate tax evasion, but it is very necessary to seek measures that would decrease tax evasion to a minimum. In this sense we say there are a lot of solutions requiring only states will reduce the phenomenon. It is wrong to believe that tax evasion will disappear once with increasing control and eradication of small tax evasion, because the real problem is, without neglecting the small evasion in evasion million, an area to which we believe should be directed attention national tax system.

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THEORETICAL ISSUES REGARDING THE NATIONAL COMITTEEE FOR FINANCIAL STABILITY

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Abstract:

The National Committee for Financial Stability was created by the Cooperation Agreement in the field of financial stability and management of financial crises, concluded on 31 July 2007.

The National Committee for Financial Stability acts, pursuant to point 20 from the agreement, as a central body and is charged with cooperation and exchange of information between the parties signing the Agreement, as well as with the management of potentially negative impact problems on the national financial system.

The Agreement provides in point 19 that the main objective of the Committee is to ensure the stability of the financial system and to assess, prevent and manage, if any, the financial crisis situations at the level of individual financial institutions, financial groups or financial market on the whole.

In the near future, they envisage that the responsibilities of the National Committee for Financial Stability will be performed by the National Committee for Macroprudential Supervision.

The National Committee for Macroprudential Supervision is to be an inter-institutional cooperation structure, without legal status, whose mission will be to ensure the coordination in the field of macroprudential supervision of the national financial system, by establishing a macroprudential policy and the corresponding instruments for its implementation.

Key- words: *National Committee for Financial Stability, National Committee for Macroprudential Supervision, European Systemic Risk Board, financial crisis, national financial system.*

INTRODUCTION

The National Committee for Financial Stability was created by the Cooperation Agreement in the field of financial stability and

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management of financial crises[3], concluded on 31 July 2007 between the Ministry of Economy and Finance (at present called Ministry of Public Finance), The National Securities Commission, the Insurance Supervisory Commission and the Supervisory Commission of Private Pension System (whose responsibilities were taken over by the Financial Supervision Authority[4])[5]. In November 2011, as a member institution of the Committee, the Guarantee Fund of Deposit in the Banking System[6].

Pursuant to point 2 from the Agreement, the cooperation of these institutions within the Committee "shall be accomplished without jeopardizing the competences and responsibilities of the authorities arising from the legal provisions based on which they perform their activity".

The Members of the National Committee for Financial Stability are the Minister of Public Finance, the Governor of the Romanian National Bank, the Chairman of the National Securities Commission, the Chairman of the Insurance Supervisory Commission, the Chairman of the Supervisory Commission of Private Pension System and the Executive Manager of the Guarantee Fund of Deposit in the Banking System (point 22 from Agreement, as modified by Addendum no. 3 to Agreement).

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[3] http://www.fgdb.ro/uploads/publications/Acord_CNSF.pdf, accessed on 29.04.2015, time 16.50. The provisions of the Agreement are to be complemented with those of the Cooperation Agreement between the financial supervisory authorities, the central banks and the Ministries of Finance from the European Union regarding cross-border financial stability, that entered into force on 1 June 2008 and was signed by the Ministry of Economy and Finance, on behalf of Romania, the Romanian National Bank, the National Securities Commission, the Insurance Supervisory Commission and the Supervisory Commission of Private Pension System.

[4] Created by OUG no.93/2012 regarding the establishment, organisation and operation of the Financial Supervision Authority, published in the Official Journal no. 874 of 21 December 2012.

[5] Originally, the document was concluded under the name of Agreement between the Ministry of Economy and Finance, the National Security Commission, the Insurance Supervisory Commission and the Supervisory Commission of Private Pension System for cooperation in the field of financial stability and management of financial crises. The title was modified by Addendum no. 3 to Agreement, concluded on 19.01. 2012. See text at http://www.fgdb.ro/uploads/publications/Act_aditional_nr.3.pdf, accessed on 29.04.2015, time 17.40.

[6] Art.3 form addendum no.3 to Agreement, quoted on note 3.

Within the Committee, by Addendum no. 1[7] to Agreement, they created five specialised technical committees:

- one regarding financial stability;
- one regarding financial supervision;
- one regarding financial regulation;
- one regarding payment and deduction system;
- one regarding financial statistics.

The National Committee for Financial Stability acts, pursuant to point 20 from the agreement, as a central body and is charged with cooperation and exchange of information between the parties signing the Agreement, as well as with the management of potentially negative impact problems on the national financial system.

The Agreement provides in point 19 that the main objective of the Committee is to ensure the stability of the financial system and to assess, prevent and manage, if any, the financial crisis situations at the level of individual financial institutions, financial groups or financial market on the whole. Under special circumstances, such as when a financial institution or a financial market faces a significant risk for financial stability, the main objective of the parties of the Committee should be, pursuant to point 30 form Agreement, "to reduce the contamination risk of the other financial institutions or markets or even of the financial system on the whole". To reach this objective, the same text provides that "the parties will try to minimize both the moral risk in the private sector and the financial risk for taxpayers, arising from any financial support measure".

The activity of the Committee is governed by four main principles, specified in point 3 of Agreement. These are:

- clear delimitation of responsibilities;
- transparency;
- efficiency;
- exchange of information.

Among the Committee's responsibilities, provided at point 20 of Agreement, we remember:

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[7] http://www.fgdb.ro/uploads/publications/Act_aditional_nr.1.pdf, accessed on 29.04.2015, time 17.30.

- promote the systemic exchange of information and opinions in the field of financial stability and management of eventual financial crises;

- examine the projects of legal acts presenting interest for the signing parties of the Agreement, from the point of view of financial stability and management of financial crises;

- assess the periodical analyses on the stability of the financial system and on the risks to whom the financial institutions and markets are exposed to;

- elaborate plans for unforeseen situations, including responsibilities of all supervisory authorities of the different sectors of the financial system, also of the Ministry of Public Finance, and of the Guarantee Fund of Deposit in the Banking System;

- coordinate the management of financial crises.

By Addendum no.4 to Agreement, of 23.12.2013, they introduced a new responsibility, that of adopting recommendations and consultative opinions, respectively, pursuant to Government Emergency Ordinance no. 113/2013 regarding some budgetary measures, and of modifying and complementing the Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital aggregation, for a temporary period, until the operationalization of the inter-institutional coordination structure in the field of macroprudential supervision of the national financial system[8].

In the near future, they envisage that the responsibilities of the National Committee for Financial Stability will be performed by the National Committee for Macroprudential Supervision. The creation of this new institution is based on the Recommendation of System Risk European Board of 22 December 2011, regarding the macroprudential mandate of national authorities, according to which the Member States should designate, establish perquisites and ensure the necessary legal framework for the organisation and operation of a national authority to which they entrust the responsibilities in the field of macroprudential policy. This issue is emphasized by the introduction of the project of

[8] Published in The Oficial Monitor no.830 from 23.12.2013.

Government of Emergency Ordinance regarding the macroprudential supervision of the national financial system[9].

The National Committee for Macroprudential Supervision is to be a inter-institutional cooperation structure, without legal status, whose mission will be to ensure the coordination in the field of macroprudential supervision of the national financial system, by establishing a macroprudential policy and the corresponding instruments for its implementation (as resulting from art. 1 para. (2) from the project of the above-mentioned Ordinance).

From the organisational point of view, the Committee is made up, pursuant to art. 5 para. (1) of the emergency ordinance project, of:

- General Council;
- Technical Committee regarding systemic risk;
- Technical Committee regarding management of financial crises;
- Secretarial activity.

The General Council will be made up, pursuant to art.7 para.(1), of:

- governor, prime vice governor, the two vice-governors and the chief economist of the Romanian National Bank;
- president and vice-president of the Financial Supervisory Authority;
- two representatives of the Government appointed by the prime-minister.

The president of the Committee shall be the governor of the Romanian National Bank (art.6 para.(1)).

Pursuant to art.2 para.(1) from the above-mentioned ordinance project, the main objective of the newly-established Committee will be its contribution to "safeguarding the financial stability, including by consolidation of the capacity of the financial system to resist shocks and by diminishing the accumulation of systemic risks, thus ensuring a sustainable contribution of the financial sector to the economic growth".

Among the Committee's main responsibilities, as provided in art. 3 para. (1) from the ordinance project, we remember:

[9] The text of the project can be find on the site of the Ministey of Public Finances, http://www.mfinante.ro/acasa.html, accesed on 29.04.2015, time 19.00.

- identification, collection and analysis of information necessary to accomplish the main objective;
- identification, monitorization and assessment of systemic risks;
- elaboration of the strategy regarding the macroprudential policy to accomplish the main objective;
- issuance of warnings and recommendations to prevent or diminish systemic risks of the stability of the national financial system.

The committee shall also be responsible fort he coordination of management of financial crises.The activity of the Committee is supervised by the Systemic Risk European Board, which should be informed regarding the actions performed in order to prevent and diminish systemic risks at national level.

Pursuant to the grounding note of the project of legal act under discussion, the social and economic impact will be a positive one, thus ensuring an efficient macroprudential policy, maintenance of financial stability and also a sustainable contribution of the financial sector to the economic growth.

CONCLUSION

The National Committee for Financial Stability, and its potential successor, the National Committee for Macroprudential Supervision, are advisory bodies established for a positive purpose. Their activity is not efficient though, exactly due to their advisory role. These bodies, as they were designed by the lawmaker, are not genuine actors on the political and financial stage, lacking any means of constraint in their activity that should contribute to accomplish the objectives assigned. The irresponsibility of the politicians from the decision-making and execution bodies is the reason why such bodies should be constituted as having a more important role than an advisory one, if we want their activity to be a truly efficient one.

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DISCUSSIONS ABOUT THE POSSIBILITY OF THE COURT CHARGED WITH THE RESOLUTION OF A COMPLAINT AGAINST THE DISCIPLINARY TERMINATION OF THE LABOR CONTRACT TO REPLACE THIS PENALTY WITH A LIGHTER PUNISHMENT STIPULATED BY THE LABOR CODE

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Abstract:

By Decision 11/2013, the High Court of Justice upheld the appeal on points of law and determined that the court competent to resolve the appeal against the disciplinary sanction applied to the employee by the employer, finding that it is incorrectly individualized, can substitute it with another punishment. Therefore may appear the risk for a deed considered serious and punishable by disciplinary termination of employment contract by the internal rules prepared by the employer pursuant to Art. 242 point f of the Labor Code, to be singled out by different courts and sanctioned more lenient by replacing the sanction issued by the employer. The question is whether, considered as such by the court, the deed may be provided by internal rules as punishable by disciplinary termination of employment contract.

Invested with an annulment request of a decision of disciplinary termination, the court cannot establish that there is a disproportion between the facts established by internal rules and the possibly pre-established sanctions by the employer, but will analyze, in terms of the solidity of the contested decision, if the applied sanction respects the proportionality between the deed committed and the consequences, given of course the other matters expressly stipulated by art. 250 of the Labor Code.

***Key words**: replacement of disciplinary punishment; misbehavior provided by internal rules; proportionality between the offense committed and the consequences.*

By Decision no. 11/2013[3], the High Court of Justice upheld the appeal on points of law and determined that the interpretation and application of provisions of Art. 252 paragraph 2 in relation to art. 250 of the Labor Code, "the competent Court to resolve the appeal against the

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[3] Published in the Monitorul Oficial, Part I, no. 460 of 25 July 2013.

disciplinary sanction applied to the employee by the employer, finding that it is incorrectly individualized, can substitute it with another punishment."

Such a possibility existed previously for the courts that dealt with complaints against decisions of disciplinary dismissal, on the grounds "that being triggered the judicial review of the act of disciplinary sanctions, control which is devolutive in terms of sanction individualization, the contested decision is illegal by applying sanctions too severe"[4] only that because there is no uniform[5] practice, some courts hesitate to pronounce such a solution on the grounds that the application of the disciplinary sanction is not the attribute of the court that can exercise only control of legality and rationality of the disciplinary sanctions act, as a disciplinary sanction application is the exclusive[6] prerogative of the employer because he has the disciplinary prerogative, being competent to individualize the applicable disciplinary sanction in relation to the seriousness of the disciplinary offence, taking into account the circumstances in which the offence was done, the degree of guilt, consequences of the disciplinary offense, general behavior of the employee and possible penalties incurred by him.

Since this decision is, according to art. 517 paragraph 4 of the Civil Procedure Code, mandatory for the courts from its publication, it means that "being invested with the judgment of appeals against the sanctioning decision issued by the employer, the court has to verify the legality and validity of the measure taken, exerting devolutive control of jurisdictional nature. In order to assess the severity of the disciplinary offense and the manner of individualization of the sanction against the criteria precisely established by the legislature, the court has not only the possibility of appreciating the evidence during the preliminary disciplinary research carried out under the provisions of art. 251 of the

[4] Brasov Court of Appeal, civil decision no. 1369R/2009, în Lucia Uţă and Florentina Rotaru, Simona Cristescu, *Dreptul muncii. Răspunderea disciplinară (2)* (Bucharest: Hamangiu, 2013) 262-68.

[5] Şerban Beligrădeanu, "Inadmisibilitatea obstacolării dreptului instanţei judecătoreşti de înlocuire a sancţiunii disciplinare, aplicată de angajator salariatului cu o alta mai uşoară prin dispoziţii scrise în regulamentul intern al unităţii", *Dreptul* no. 4 (2007), 115-26.

[6] Bucharest Court of Appeal, civil decicion 2509/R/2011, Lucia Uţă, Florentina and Rotaru, Simona Cristescu, *Dreptul muncii. Răspunderea disciplinară (2)*, 257-61.

Labor Code, but also the possibility of directly managing supplementary evidence...if it deems that the punishment is unjustified in relation to the seriousness of the disciplinary offence, the court will accept the appeal, partial annulment of the contested decision and replacing sanctions of the employer by other punitive measures".

Of course at first glance one might say that asking annulment of the disciplinary dismissal, by replacing it with other disciplinary punishment provided by art.248 paragraph 1 of the Labor Code, namely: written warning; demotion, by granting the corresponding salary for the position where the demotion was disposed, for a period not longer than 60 days, the reduction of the base salary for a period of 1-3 months with 5-10%; reduction in base salary and/or, where appropriate, of the management allowance for a period of 1-3 months with 5-10%, would violate the principle of availability, as would rule on something that has not been requested.

The analyzed decision shows that "proceeding to replace the sanction, the court does not give something else or more than was asked, but restores the balance between culpable conduct of the employee and the disproportionate sanction inflicted by the employer".

Although the mentioned decision does not expressly provide it, we are talking about replacing it with a lighter punishment because in its considerations it is shown that "proceeding to replace the sanction, the court shall make the application of the principle of *non reformatio in pejus* enshrined in the provisions of art. 481, respectively art. 502 of the civil Procedure Code."

Starting from this situation there is a risk that a deed considered serious and punishable by disciplinary termination of employment contract by the internal rules prepared by the employer pursuant to Art. 242 point f of the Labor Code, to be singled out by different courts and sanctioned more lenient by replacing the sanction issued by the employer. The question is whether, considered as such by the court, the deed may be provided by internal rules as punishable by disciplinary termination of employment contract.

It has been said that "the legislature recognizes the exclusive competence of the employer to qualify internal those actions which constitute serious offenses which attract disciplinary measures, including disciplinary termination of the labor contract, so that the court cannot give another qualification to the offense (already qualified by the

employer), and cannot replace disciplinary sanction (already established by the employer)."[7]

Not the acts committed by the employee are incriminated by the employer in the internal regulation - which it is not even possible – but the "framing of the same facts in the patterns stated as misconducts, by applying legal norms...the court, noting the violation of the law or its wrongful application, in terms of proportionality of the sanction in relation to the disciplinary offense committed, cancels the decision, the employer will issue a new decision, according to the court judgment.

This way, the wrongful act of the employee does not remain unpunished and employer interests are protected, by observing labor discipline and his disciplinary prerogative. Also, there cannot be said that a second punishment is applied for the same crime, for the first disciplinary action was canceled by the court after review of legality carried out in the way of appeal, and the employer's decision did not enter the civil circuit"[8].

In legal literature was also formulated the opinion that "to the extent in which the employer defined, in the internal regulation, which are the deviations and applicable sanctions, the judge cannot change the sanction applied by the employer, the judge analyzing only if the act was committed"[9], point of view not shared in doctrine.

Thus, it has been stressed that "the employer cannot predetermine what sanctions will apply to a particular act, the rule being that only disciplinary research may establish, dose the sanction...as result, finding the nullity of the norm in the internal rules, the court may apply a lighter disciplinary punishment"[10]. It was also said that "the court charged with the resolution of the appeal against disciplinary sanctions has no

[7] Costel Gâlcă, *Codul muncii comentat şi adnotat,* (Bucharest, Rosetti International, 2013) 576.

[8] Disciplinary sanction. Appeal of the employee. Replacement of the wrongfully individualized sanction with another disciplinary sanction, *with critical comment by Nela Petrisor*, Revista Română de jurisprudenţă, 4 (2013), 113-25.

[9] Ada Postolache, *Regulamentul intern şi limita judecatorului în calificarea abaterii disciplinare*, Revista română de dreptul muncii 4 (2006) 106.

[10] Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii* (Bucharest: Universul Juridic, 2012), 756.

interdiction imposed by the internal rules regarding the possibility of replacing a disciplinary sanction with another lighter punishment"[11].

It was mentioned that "if the internal rules may include disciplinary offenses whose committing creates conditions for triggering disciplinary liability of employees, in limited or exhaustive manner, instead it cannot specify what is the punishment for the respective disciplinary offence. Such a manner of preparation of internal regulations should be illegal because it would defeat conventional and legal criteria that the employer is required and/or may take into account in determining the severity of the illegal act, engaging in such a hypothesis the futility or deprivation of legal effects of the prior disciplinary research."[12]

Indeed, according to Art. 250 of the Labor Code "the employer establishes disciplinary sanctions applicable according to the gravity of the disciplinary offense committed by the employee, taking into account the following: circumstances in which the offense was committed, the degree of guilt of the employee; the consequences of the disciplinary offense; general behavior in service of the employee; any previous disciplinary sanctions suffered by him." Basically, the employer judges the fact, thinks and analyzes all factors in relation to whether or not the act of the employer constitutes misbehavior, and in case of positive answer sets the applicable penalties.

In legal literature was also shown that "the judge has no right to censor the level of work discipline of each employer, so that it cannot decide on the pertinence of some articles unless he was expressly invested, by special request, either through a complaint regarding the cancellation of certain provisions of the internal regulation"[13].

From the point of view of the future existence of enumeration of the facts considered by the employer as serious misconducts as well as the provision that they will be punished with disciplinary termination of the individual labor contract, we believe that a court ruling partly admitting the request and replacing the disciplinary sanction of termination of the employment contract with another, cannot have any effect on the internal regulation, in the sense that the provisions regarding

[11] Alexandru Țiclea, *Tratat de dreptul muncii*, edition VI, revised and completed, (Bucharest: Universul Juridic, 2012), 826.
[12] Daniela Moţiu, *Dreptul individual al muncii* (Bucharest: C.H. Beck, 2011), 453.
[13] Costel Gâlcă, *Codul muncii comentat*, 576.

the qualification of the facts as serious misconducts and the applicable penalties will not be considered void, without an express request in this sense.

In other words, another employee to be punished for a similar deed in the future, cannot invoke as precedent the favorable decision for another employee, because the offense is committed in similar circumstances, but not identical, circumstances which will be considered by the employer in the individualization of the applied penalty, as well as by the court which will exercise the devolutive control of the applied measure.

Of course, nothing prevents the employee to use, as a means of defense, the previously pronounced decision.

As stated in the doctrine "the enumeration - exhaustive or not of the disciplinary offences in the internal regulation is possible, but the specification, in particular, for each offense or group of disciplinary sanctions which would be applied by the employer, is not legally possible"[14], and also that "a list of disciplinary offenses and a guidance of the possibly applicable disciplinary sanctions - and thus observing the need of the disciplinary research - is legal"[15].

Invested with an annulment request of a decision of disciplinary termination, the court cannot establish that there is a disproportion between the facts established by internal rules and the sanctions possibly pre-established by the employer, but will analyze, in terms of the solidity of the contested decision, if the applied sanction respects the proportionality between the offence committed and the consequences produced, given the other aspects expressly stipulated by art. 250 of the Labor Code.

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[15] Ion Traian Stefanescu, *Tratat teoretic*, 750.

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THE ACTION (EFEFECT) OF LEGAL NORM IN TIME – PRINCIPLES OF PUBLICITY

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Abstract:

The most important measures of the state in the economic, social, cultural and human rights protection field are transcribed into laws. Respecting the law expresses the people's attitude, of the state authorities and of all the other organizations towards normative acts in force, towards legal norms.

Having a compulsory character, the legal norm is invested with a mandatory legal force that, by correlation it's compulsory for all the recipients. The manifestation in time of the legal norms reclaims the need to specify the beginning and the ending of law's action or of other normative acts in which it is integrated.

Key-words: *norm, democracy, norm's action, law, compliance.*

In a society governed by the rule of law, legal compliance is an essential requirement for keeping the stability of the legal order and the harmonious development of the social life. In ancient times the rhythm of the legal changes and innovations was quite slow due to the slow pace of socio-economic transformations. In the modern society, grace to the industrial revolution, the elaboration of legal norms was more dynamic and complex.

In the contemporary state, the legal norm constitutes a general measure that applies in all the cases that fall under its action, for an undetermined period of time or for the time prescribed in its content, in a certain space (territory) and for subject that participate in the legal circuit in this space, characterizing its fundamental coordinates.

The period during which a legal norm is in force represents also the time period in which it can produce legal effects. The manifestation in time of the legal norms reclaims the need to specify the beginning and

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the ending of law's action or of other normative acts in which it is integrated.

The time period of the legal norm is governed by three main principles[2]

- The entry into force of the norm, the principle of publicity;

- The existence and the effectiveness of the legal norm, the principle of activity;

- Out of force, the principle of lacking juridical effects.

These legal principles are interrelated and form an historical spiral representative for the legal evolution of the society as well as for law's progress[3]. The most important measures of the state in the economic, social, cultural and human rights protection field are transcribed into laws. Respecting the law expresses the people's attitude, of the state authorities and of all the other organizations towards normative acts in force, towards legal norms [4].

Referring to the way of entry into force of the normative act there cannot be established a general rule, sometimes even until the entry into force of the act, because it requires time to assure the preparedness for introducing new regulations. The same thing happens in the Republic of Moldova.

The entry into force of the legal norm is determined by the day of its the publication in the "Monitorul Oficial" of the Republic of Moldova and enters into force or at the date when it is published or on another date, stipulated in its content. Not publishing the legal norm is equal to its nonexistence.

Jus publicum expresses the best the essence of legal norms and taking into consideration the fact that they are destined to serve the public interest the society must be informed about their content. Making the normative acts public is a mandatory procedure that assures that those who must respect them (citizens, public authorities and other social organisms) have the possibility to know the legal dispositions.

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[2] Nicolae Popa, *Teoria generală a dreptului. Sinteze pentru seminar* (Bucureşti: All Beck, 2005), 122.

[3] Popa, *Teoria generală a dreptului*. *Sinteze pentru seminar*,122.

[4] Costică Voicu, „Securitatea juridică şi complexitatea dreptului", in: *Culegere de studii juridice* (Craiova: Sitech, 2010), 375.

This procedure starts at the phase of examining the proposals, of documentation and deciding on the elaboration of the normative act. The drafts of the normative acts are a subject of public consultations in accordance with the Law no. 239-XVI of 13 November 2008 on transparency in decision making and with the procedures established by the Government[5].

After the adoption and promulgation of the laws, the normative acts are made public by the only official publication of the state, a public structure of national interest, which in our country is called "Monitorul Oficial" of the Republic of Moldova (the Official Gazette) within the State News Agency "Moldpres". The order of publication and of entry into force of the official documents it's reglemented in the Law no.173 of 6 July 1994 on publication and enforcement of official documents[6].

The categories of legal norms such as the Decrees of the President of the Republic of Moldova, stipulated in the art.86, para. (2), art. 87, para. (2), (3) and (4) are countersigned by the Prime Minister; the acts of the Govern, in accordance with art. 102, para. (4) of the Constitution „... are signed by the Prime Minister and countersigned by the Ministers who are bound to their execution ..."[7].

The publication of *„the Decisions regarding the ratification of international treaties, as well as the Decisions on approving the law drafts law on ratification, acceptance, approval or accession to international treaties are subject to a special procedure of initiation, elaboration, adoption, entry into force and termination*" in accordance with the Law on international treaties of the Republic of Moldova[8].

In other words, the date of publication in the „Monitorul Oficial" (Official Gazette) is the date when the law becomes enforceable.

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[5] Law no. 239-XVI/ 13 november 2008 concerning the transparency in the decision taking process in the respect of the procedures established by the Governement. Pulished: 05.12.2008 in the Official Gazette No. 215-217, art.798.

[6] Law no. 173 /22.07.2005 concerning the main regulations of the special statute of the localities on the left side of the Nistru (Transnistria). Published: 29.07.2005 in the Official Gazette No. 101-103, art.478.

[7] The Republic of Moldavia Constitution from 29 July 1994. In: Official Gazette of the Republic of Moldavia no.1 from 2.08.1994

[8] Law no. 595 concerning the international treaties of the Republic of Moldavia ale Republicii Moldova from 24.09.1999. Published: 02.03.2000 in the Official Gazette No. 24-26, art .137.

We recognize the fact that the information is vital for man and for the entire society. In our state is proclaimed the right to information, the principle „nemo censetur ignorare legem“ as well as the presumption of legal knowledge. We have the „Official Gazette” and other public or private sources of information (media, the Internet), but some of them are inaccessible for the ordinary citizen due to their costs. Under these conditions, the most common and accessible way of information and knowledge of the law is the „rumor” and the perpetuation of this process pushes society toward disorder"[9].

Such an understanding of this principle is appreciated, from a legal point of view, as inadequate. Thus, it no longer represents the presumption of legal knowledge in all circumstances but only that the law has a mandatory force for each and everyone, even to those who ignore it or to those who didn't had sufficient interest in knowing the correct content or meaning of the normative act. In this regard, the principle is not an obstacle for invoking error of law but an obstacle to circumventing the law on the grounds of ignoring them[10] .

Thereby, the principle is not an obstacle for invoking the error of law, but just an impediment in the way of avoiding the law by ignoring it.

To consider the principle *„nemo censetur ignore legem”* as being an irrefutable presumption of law knowledge for realizing the general interest, social stability, law efficacy and the harmony between the state of fact and the state of law, anarchy prevention would have the opposite effect, by ignoring the human element, the value of the law being in strict dependence of the circumstances specific to each individual. That's why it is considered that, particularly in the civil law, the adage *„nemo censetur ignore legem”* has no absolute power. It is therefore possible to cancel a contract not only for mistrial but for an error of law[11].

From a contrary point of view, making the legal regulations public has, as a legal – philosophical fundament, the idea that the ignorance of the law is harmful – *ignoratia iuris nocet*[12] From the moment of law's publication becomes effective the legal absolute

[9]Guţan S.. Prezumţia cunoaşterii legii - de la teoria la teoria de realitate. http://www.armyac ademy. ro/biblioteca/anuare/2007/a28.pdf.

[10] Ovidiu Ungureanu, *Drept civil. Introducere* (Bucureşti: Rosetti, 2005), 141.

[11] Ungureanu, Drept civil. Introducere, 39.

[12] Popa, *Teoria generală a dreptului. Sinteze pentru seminar*, 123.

presumption, „*nemo censetur ignorare legem*" – it means that no one may invoke in his defense the reason of not knowing the law. Here's why the legal norms enter into force from the date of their publication (or the date they were actually made known) [13].

However, in the legal theory, are admitted two exceptions from the thesis of the absolute character of legal knowledge presumption[14].

- When a part of the state territory becomes isolated by force majeure, situation in which law incognizance is determined by objective reasons. This exception can be analyzed quite well by "'the creation of an autonomous territorial unit with a special legal status – Transnistria. (art. 3 - para. (1)). Transnistria, in the person of its legislative and executive powers and of the local public authorities, respects on its territory the Constitution, other laws and regulations of the Republic of Moldova ..."(art. 7) [15].

- In what concerns the conventions (in the civil or commercial right), when a person concludes a contract not knowing its possible consequences. In this case, the Party may request the cancelation of the agreement invoking the error of law. Essential for this kind of juridical rapports is to assure that the will of the contracting parties is not vitiated [16] (for example, art.227 „The nullity of the juridical act affected by error", or the art. 228 "The nullity of the juridical act concluded by doll" – the Civil Code of the Republic of Moldova) [17].

From its entry into force the legal norm starts to fully govern the social relations and from this moment no one can avoid the legal norm's command justifying himself for not knowing it. This rule can be easily explained by the fact that the authority and the mandatory character of the legal norm could be doubted if the excuse of incognizance may be

[13] Popa, *Teoria generală a dreptului, Sinteze pentru seminar,* 111.
[14] Popa, *Teoria generală a dreptului, Sinteze pentru seminar,* 123.
[15] Law no. 173/06.07.1994 concerning the publication procedure and entering into force of the official acts from 6 July 1994. Published: 12.08.1994 in the Official Gazette No. 1.
[16] Nicolae Popa, *Teoria generală a dreptului* (Bucureşti: Actami, 1992), 111-112.
[17] Code No. 1107/06.06.2002 The Civil Code of the Republic of Moldavia. Published: 22.06.2002 in the Official Gazette No. 82-86 art Nr: 661.

admitted. „The legislative act produces effects only as long as is in force and cannot be retroactive or ultra active" (art. 46)[18].

The difficulty that may appear after text's publication in the Official Gazette consists in some inexactitudes that may be found in its content, which the practice established in this field can resolve trough rectifications meant to correct the error or the omission that affects the text. For example – art. 70 of the Law no. 317/2003[19] . This practice raises questions about the value of such adjustments as may be observed different types of situations.

The rectifications may limit to correcting a clerical error, evident from simply reading the text, situation in which the correction made is taken into account. In other cases, the error is not that obvious and the errata intend to modify the meaning of the published text. It seems that in this situation, the jurisprudence subordinates the efficiency of the rectifications to its conformity with the original text of the law – text voted by the Parliament.

In conclusion, we must mention that the time of the legal norm defines its duration and resistance, each norm having a life period of its own. The principle of publicity expresses the best the essence of legal norms and, due to the fact that they must serve, before anything, the public interest, the society has the right to know and understand them. We cannot claim a certain behavior/conduct if the legal norm isn't made public.

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SHORT CONSIDERATIONS ON THE MOST IMPORTANT PARTICULAR CONDITIONS NECESSARY FOR THE VALID CONCLUSION OF AN INDIVIDUAL LABOUR AGREEMENT

Carmen-Constantina NENU[1]
Adriana- Ioana PÎRVU[2]

Abstract:

The legal and valid conclusion of an individual labour agreement supposes the meeting of a number of conditions. Some of them are common to a valid conclusion of any agreement (capacity, object, consent and cause), and others are particular for the individual labour agreement. In this regard, we specify conditions, such as: existence of position, professional training, work seniority and specialty, checking of professional skills and knowledge, medical exam, particular conditions for certain categories of employees.

The specificity of the labour legal report and its particular importance in the framework of social relationships determine a strict regulation of the validity particular conditions of the individual labour agreement, and an impact analysis of such legal provisions on the labour market.

Key words: *work, employment, validity, contract, checking skills, medical examination*

INTRODUCTION

The capacity of a subject in a labour legal report within which the natural person binds himself/herself to perform a certain activity in the benefit of the employer, involves the existence of the legal capacity of such person, and also his/her ability to work from a biological point of view, i.e. it supposes the working physical and mental ability of the person performing the activity, as well as a series of professional and personal skills, for which the lawmaker shall regulate concrete ways of checking.

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Out of the validity particular conditions of the individual labour agreement, the most important are the medical examination and the professional and personal skill checking of the person requesting to be employed. That is why our study mainly deals with these two conditions, whose objective is the identification of the problems raised by their way of regulation, with special implications in the social labour relationships.

EMPLOYMENT MEDICAL EXAMINATION

Natural persons can only be employed based on a medical certificate certifying that their state of health allows them to perform the work assigned. Law no. 319/2006 regarding labour security and health[3] constitutes the employer's obligation to employ only persons who, following the medical examination and the checking of mental-professional skills, correspond to the labour task to be executed.

By Government Decision no. 355/2007[4], regarding the supervision of the workers' health, it was decided the procedure of the medical examination of workers, both at employment and during the performance of the individual labour agreement. The employment medical examination, as provided by art. 8 of the decision, is among the prophylactic medical services assuring the supervision of the workers' safety, together with: adjustment medical examination, periodical medical examination, medical examination upon recommencing the activity, special supervision and health promotion at the workplace.

The work ability is defined by art. 9 para. (1) of the decision, as being the worker's medical capacity to perform the activity at the workplace in the profession/position for which the medical examination is requested.

The Government Decision also defines other terms aiming at the work capacity, such as:

- ability to work conditionally – it is the case when the occupational physician makes medical recommendations, the ability being conditioned by their compliance (art.10);
- temporary inability to work – designating that medical inability of a worker to perform the activity at the workplace in the profession/position for which the medical examination is requested regarding the work

[3] Published in „Romanian Official Journal", part I, no. 646 of 26 July 2006.
[4] Published in „Romanian Official Journal", part I, no. 322 of 17 May 2007.

ability, until the reassessment of the state of health by the occupational physician (art. 11 para. (1));
- permanent inability to work – designating the permanent medical inability of a worker to perform the activity at the workplace in the profession/position for which the medical examination is requested regarding the work ability (art. 12).

The employment medical examination is performed for:
- workers who are to be employed with an individual labour agreement for a definite or indefinite period;
- workers who change their work place or are detached to other work places or activities;
- workers who change their job or profession.

The employment medical examination is made upon the employer's request and it mainly establishes the following:
- the applicant's work ability for the profession and place where the employment is made;
- compatibility between the diseases presented at the moment of examination and the future work place;
- the applicant should not have any diseases that could endanger the health and security of the other employees' and of the unit, and/or the quality of the products achieved or the services rendered, or be a risk for the health of the population served.

Following the medical examination, they can make proposals to adjust the job to the anatomic, physiological and health possibilities of such person, they can guide the persons to be employees towards other work places, or there can take place an introduction in the information and operational system from the sanitary system of such persons needing particular medical supervision, as provided by art. 14 of the government decision.

The conclusions of specialised medical examinations, different according to the specificity of each occupation, are found in the professional skill sheet drawn up by the occupational physician.

In practice, this legal provision allowing that only the occupational specialist physician should have competence to draw up the professional skill sheet, may create disfunctionalities, making the final examination be a mere formality. The small number of occupational specialist physicians in the entire country, compared to the number of employees, cannot solve the particular problems of medical examinations

upon employment and during the performance of individual labour agreement. That is why it would be recommended that the two responsible ministries, the ministry of labour and that of health, should re-analyse the competence of occupational physicians and of enterprise physicians, because otherwise the medical examination only remains a legal provision without judicial efficiency and does not reach the purpose intended by the lawmaker.

The Labour Code provides in art. 27 para. (2) that the conclusion of an individual labour agreement without a medical examination shall be sanctioned with the absolute nullity of such agreement. Also, the Labour Code expressly provides the impossibility to validate the agreement with the presentation by the employee of a medical certificate issued subsequently to the individual labour agreement.

Transposing the European rules regarding equal treatment and non discrimination, the Labour Code forbids the request of pregnancy tests upon employment. Subsequently to employment, pregnant women also benefit from particular protection measures regarding maternity risk[5].

CHECKING OF PERSONAL SKILLS AND PROFESSIONAL TRAINING OF THE NATURAL PERSON REQUESTING TO BE EMPLOYED

The Labour Code provides the condition of checking the professional and personal skills of the person requesting to be employed, before the conclusion of the individual labour agreement (art. 29); this condition imposed by law for the valid conclusion of an agreement is specific to labour law.

The ways by which this checking is to be achieved are not expressly established by the framework law on work relationships, this law only making reference to the regulations of the applicable collective labour agreement, to the statute of personnel and to the interior regulation at the level of each employer. For checking, they can establish any ways

[5] The Government Emergency Ordinance no. 96/2003 regarding maternity protection at work place, published in the „Romanian Official Journal", part I, no. 750 of 27 October 2003, approved with further amendments by law no. 25/2004, as amended and complemented by Government Emergency Ordinance no. 158/ 2005 regarding health social security leave and indemnities, published in the „Romanian Official Journal", part I, no. 1074 of 29 November 2005

considered by the employer and by the social partners as appropriate for the activity performed at the level of the employing entity. These ways can be: contest, examination, interview, practical examination.

In case of employers from public and budgetary sector, an exception is regulated, the employment being made only by contest or examination. This regulation had its critics on behalf of some union representatives who saw in it an open gate to abuses and corruption in the public sector. Employment of contracting personnel in the budgetary sector is established by law. The provision in the Labour Code would not even be necessary, as long as there is a special law regulating the occupation by means of a contest or examination of vacancies in public institutions. It is true that some conditions must be met to be entered in a contest or examination, but the interest protected by the legal rule is a public one and is justified by the additional requirements imposed by law, compared to the ones in the public sector.

For the personnel of some categories of budgetary units, the employment conditions are provided by special legal rules. When employment of personnel is necessary, the vacancies from the organizational chart are announced for contest, they are made public and communicated to employment agencies, giving details of the specific conditions for organisation and participation to the contest. In case there are not many candidates registered for a vacancy, the checking of the professional and personal skills of the candidate shall be made by an examination.[6]

For autonomous administrations, trade companies or any other legal persons, others than the budgetary ones, employment is made under the conditions established by constitutive documents, interior regulations or the applicable collective labour agreement, if the law does not provide otherwise.

By regulating only at the level of example the ways of checking the professional and personal skills of the person requesting to be employed, the organisation perquisite of the employer is consolidated as

[6] See in this regard Government Decision no. 286/2011 for the approval of Framework Regulation regarding the establishment of the general principles of occupation of a vacancy or temporary vacancy job corresponding to the contracting positions and to the promotion criteria according to the immediately superior professional stages or levels, of the contracting personnel from the budgetary sector, paid from public funds, published in the Romanian Official Journal, Part I, no. 221 of 31.03.2011, further amendments and completions.

a legally recognised right. Having the right to establish the way of organisation and operation of the entity, as an exclusive right, the employer is directly recognised the right of selection of the personnel[7].

CONCLUSION

Analysing all the legal provisions in matter of medical examination of the person requesting to be employed, both before the conclusion of the individual labour agreement and during its performance, we hereby ascertain that the lawmaker, expressing the principle of protection of the person performing the work, imposed a series of obligations in the employer's charge, establishing severe sanctions for their breach.

Also, by reason of the same principle of protection of the employee's rights, and as expression of the employer's right to organize the activity of the entity, the national lawmaker imposed rules for checking the employees' professional and personal skills, adapted to the specificity of the public sector, and of the private one, respectively.

From the short analysis made, we can see a correct regulation of the two specific conditions of validity of the individual labour agreement, adapted to market requirements and to social partners.

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[7] Magda Volonciu, *Comentariu* (to art. 29) in *Codul muncii, comentariu pe articole., vol I, art. 1-107,* by Alexandru Athanasiu, Magda Volonciu, Luminiţa Dima, Oana Cazan, (Bucureşti, C.H.Beck, 2011), 151

BRIEF CONSIDERATIONS ON LEGAL FEATURES OF THE INDIVIDUAL EMPLOYMENT CONTRACT. INTERNAL AND INTERNATIONAL REGULATIONS

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Abstract:

Characteristics of the individual employment contract are those features that define and customize it in relation to other civil or commercial contracts also involving the provision of work. The identification of these features was mainly a result of doctrine, but also of specific legal practice. Although not specifically outlined by the legislature, these characteristics have been the basis for legal regulation of individual employment contract.

Key words*: work, employment, contract, labor relations.*

INTRODUCTION

The individual employment contract is further distinguished as important within the sources of the legal work relationship. It maintains the role of main designer of this legal relationship. General rules governing the legal relationship of employment are impersonal and insufficient to determine the specific rights and obligations of the parties. They are key elements that can only be established by free will of the parties, reflected by the conclusion of an individual contract of employment. By its consensual nature, concluding an individual employment contract is a legal expression of freedom of labor principle.

Parties of an individual employment contract are separated. Only the conclusion of this legal act creates the legal framework necessary to achieve their goals and interests, essentially divergent. The individual employment contract is the legal instrument by which they will cross their legal will to exercise rights and to meet obligations in order to

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obtain benefits. The legal rights and obligations of the legal relationship parties, stipulated by legislation or by regulations and statutes, are applicable only to an established legal relationship. This relationship is concrete, established between the employee and employer only as effect of the individual employment contract. Elements such as the type of work, salary, duration of employment relationship can be established only by contract, which becomes the law of the parties. Rights and obligations of employer and employee are respected only by executing the individual employment contract.

The individual employment contract is presented as a legal instrument which reflects the rights and obligations of two legal parties, employer and employee. It is intended to stimulate the parties in the continuous achievement of the terms established. Experience confirms that if the contracting parties have unequivocal knowledge of the mutual rights and obligations, they are likely to avoid subsequent complaints or disputes, with all the range of effects that they produce[3].

The individual employment contract remains the main source of individual legal labor relations[4]. It is a result of the fact that labor market dynamics should be reflected in the new meanings of rights and obligations of the parties, which can not be covered by legal acts, with their general and impersonal character. The purpose of the legal work relationship is a special one, connected to the personality of human beings, and, as people are different, we need individual legal acts which materialize working conditions in which each of the employees provides work.

1. NATIONAL REGULATIONS ON INDIVIDUAL EMPLOYMENT CONTRACT`S CHARACTERISTICS

Characteristics of the individual employment contract are those features that define and customize it in relation to other civil or commercial contracts also involving the provision of work.

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[3] See: S. Ghimpu and G. Mohanu, *Condiţiile încheierii contractului individual de muncă* (Bucharest: Ştiinţifică şi Enciclopedică, 1988), 133-34.

[4] See: I.T. Ştefănescu, *Tratat de dreptul muncii* (Bucharest: Wolters Kluwers, 2007), 191; Al. Ţiclea, *Tratat de dreptul muncii* (Bucharest: Rosetti, 2006), 303; Al. Athanasiu and L. Dima, *Dreptul muncii* (Bucharest: All Beck, 2005), 24.

The national doctrine[5] has characterized the individual employment contract mainly by the subordination relationship, mostly legal, but also with an economic component, that arises between the employee and the employer during the course of employment, highlighting other distinguishing features as follows: it is a legal document that is bilateral, commutative, for consideration, concluded *intuitu personae*, involving the main obligation of the parties to conclude a contract unaffected by its ways, on a continuing basis, whose content has a legal and a conventional part. Also, the employment contract is characterized by the fact that it is governed by the employee protective legislation, designed to alleviate the unequal strength relationship of its parts.

All these characteristic features, whose list is not exhaustive, results from work-itself, which is not a commodity and must have specific regulations in relation to those applicable to common law contracts.

2. INTERNATIONAL REGULATIONS ON INDIVIDUAL EMPLOYMENT CONTRACT`S CHARACTERISTICS

The International Labor Organization has given priority to the individual employment contract concluded for an indefinite period and full-time, as the legal instrument that responds best to the principle of protecting the employee in the relationship of subordination created in the contract. The ILO vision on the duration of the work is found for the first time in the Recommendation 166/1982, Member States being invited to establish adequate safeguards against the use of fixed-term employment contracts. Given this recommendation, but also the fact that the overwhelming majority of ILO member States circumscribe their legislation to this principle, the rule on employment contracts is employment contracts of indefinite duration. In the context of

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[5] See: S. Ghimpu et all, *Tratat de dreptul muncii* , vol 1 (Bucharest: Ştiinţifică şi Enciclopedică, 1978); Al. Athanasiu, C.A Moarcăş, *Muncitorul şi legea. Dreptul muncii* (Bucharest: Oscar Print, 1999); T. Ştefănescu, *Tratat de dreptul muncii*, (Bucharest: Wolters Kluwers, 2007); A Popescu, *Dreptul international al muncii* (Bucharest: C.H. Beck, 2006); Al. Ţiclea, *Tratat de dreptul muncii* (Bucharest: Universul Juridic, 2007); M. Volonciu, *Comentariu(la art. 10) în Codul muncii, comentariu pe articole, Vol. I, art. 1-101* (Bucharest: C.H. Beck, 2007).

globalization and pressure of unprecedented economic development, materialized in increased competition between operators, flexible labor relations through the use of fixed-term employment contracts, part-time temporary employment agency or labor at home, appears to be a necessity. Although aware of all these transformations, the ILO continued to address in its work, mostly, the issue of individual employment contract of indefinite duration[6].

At the ILO Conference in 1998 it was tried for the first time to regulate the employment relationship of those who perform an activity or provide a service under a civil or commercial contract, but what was only obtained was keeping this problem in the attention of the organization. Thus, in 2003, the ILO Conference recommended Member States to adopt policies that prohibit the practice of concealing the employment relationship, practices that have as effect the absence or reduction of social protection for workers, which is only provided by employment law.

Within the ILO Conference in 2006 Recommendation 198 was adopted, regarding work relationships, which requires Member States to formulate and implement, after consultation with social partners, national policies that would allow the determination of the specific employment relationship, would formulate criteria to distinguish between employees and self-employed workers, namely to establish measures to combat disguised employment relationships and to adopt rules applicable to all forms of contractual arrangements[7].

Starting from the consideration that, in some cases, difficulties in establishing an employment relationship occur, either because rights and obligations of the parties are not clearly defined, because there are attempts to disguise the employment relationship, or because the law, its interpretation or application is insufficient or limited, all these making workers vulnerable, the Recommendation states that it is necessary to adopt a national policy to protect workers within employment relationships. In the second part, the Recommendation 198/2006 of ILO

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[6] For details of ILO action in this direction see: A. Popescu, *Dreptul internaţional al muncii* (Bucharest: C.H. Beck, 2006), 227-234.
[7] See: Popescu, *Dreptul internaţional al muncii*, 231-32.

states the determination of the existence of an employment relationship by conditions and by specific indicators.[8]

This is the first time an international document officially defines the characteristics of the individual legal work contract and the legal relationship arising under the individual employment contract, and this paper aims to explore these very traits. Is important to indicate what the ILO recommends to Member States concerning the characterization of the employment relationship.

Thus, under section 12 Member States are advised to consider clarifying the conditions that determine the existence of an employment relationship, for example, subordination or dependence. By the provisions of sections 13, Member States are recommended to consider the possibility of defining in their laws, or by other means, specific indicators of the existence of an employment relationship, indicators that could include[9] the following:

A. *On one hand*, the *specificity of the work*, meaning the fact that the work:

- Is done according to the instructions and under the control of another person;
- Involves the integration of worker in organizing the enterprise;
- Is done only or primarily for the benefit of another person;
- Must be provided personally by the worker;
- Is carried out according to a schedule determined or at the specified workplace or work accepted by the applicant;
- Has a specified duration and a certain continuity;
- Involves the provision of tools, materials or machinery by the employer.

B. On *the other hand, other features of the employment relationship*

- The worker's regular pay; remuneration is the only or main source of income;

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[8] See: Popescu, *Dreptul internaţional al muncii*, 233.

[9] Translated text of Part II of the Recommendation 198/2006 is taken from A. Popescu, *Dreptul international al muncii* (Bucharest: CH Beck, 2006), 232-233.

- Payment in kind is made in the form of food, housing, transport etc.;
- Recognition of certain labor rights as weekly rest and annual leave;
- Financing professional employee travel by the person requesting the provision of work
- No financial risks for the worker

Likewise, the characteristics of the individual employment contract are highlighted by the198/2006 ILO Recommendation on the employment relationship.

In this respect, the following principles contained in the ILO Recommendation[10] have a special importance :

- Member States should, within their national policies, consider the possibility of establishing a legal presumption of existence of an employment relationship if one or more relevant indicators exist;

- Protection of employees must not conflict with civil or commercial real relations, thus ensuring that people engaged in a true working relationship benefit from the protection to which they are legally entitled.

Regarding the legal framework of the European Union, there is so far no Community act to crystallize, as does the ILO Recommendation 198/2006, the characteristics of individual employment relationship.

Although the ILO Recommendation defines in a great way the characteristics of the individual employment relationship, however, such features are to be found, scattered in a number of EU regulations and directives. Moreover, the European Commission frequently called on Member States to take account of Recommendation 198/2006 of the ILO on the employment relationship. In its Communication the Commission has made to the Council, the European Parliament, the Economic and Social Committee and the Regions Committee, Communication entitled "The result of public consultation on the Commission Green Paper" - Modernizing Labor Law to meet the challenges of the 21st century"[11] "

[10] See: Ion -Traian Ştefănescu, "Impactul globalizării asupra dreptului muncii şi a dreptului securităţii sociale – perspectivă europeană", *Dreptul* (4, 2008): 76; Popescu, *Dreptul internaţional al muncii* , 234.

[11] Commission document COM (1007) 627, final

emphasizes the following "The European Parliament called for an initiative to the convergence of national definitions of the status of workers in order to ensure more consistent implementation and effective application of the acquis communautaire. He urged Member States to promote implementation of the 2006 ILO Recommendation concerning the employment relationship. Some Member States have also suggested that the recommendation should serve as a basis for discussions between Member States and social partners on how to best approach at European level the phenomenon of disguised employment relationships".

In conclusion, the ILO recommendation opened a perspective for a new vision of labor relations, while maintaining the foundation on which the employment contract[12] is based, by highlighting characteristic features of this type of legal relationship.

CONCLUSIONS

As noted, the198/2006 ILO Recommendation on the employment relationship, highlights the characteristics of the individual employment contract, actualizing them and focusing on current legal and economic subordination of the employee, as a distinguishing feature that customizes it to other civil or commercial contracts with a similar object. Obviously, all these guidelines are not legally binding, but they have their own power, stemming from the international character of the organization, for guiding the ILO Member States labor laws and not only. Undoubtedly, these guidelines concern and enactment of legal work in Romania.

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[12] See Popescu, *Dreptul international al muncii*, 234.

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ESTABLISHING THE LIABILITIES OF THE DEBTOR UNDERGOING INSOLVENCY PROCEEDINGS. VERIFICATION OF THE RECEIVABLES AND PREPARATION OF THE PRELIMINARY TABLE

Florin LUDUŞAN[1]

Abstract:

Establishing the liabilities represents a logical and complex approach, which includes a set of actions and operations carried out under the law by the designated person, aiming at the quantitative determination of the debts of the debtor and of the entities to which the debtor has these debts. The legal administrator or liquidator has the competence to determine the liabilities. The steps to establish the liabilities of the debtor undergoing insolvency proceedings are: the notification of the creditors, request for the enrollment in the list of liabilities, verification of receivables, preliminary table, challenge of the receivables, final table and the final updated table This study aims to analyze two of these steps, namely, verification of receivables and preparation of the preliminary table.

Key- words: *insolvency, receivables, preliminary table, debtor's liabilities;*

INTRODUCTION

Establishing the assets in the insolvency proceedings has been revealed in the need to establish the entire assets immediately after the opening of the insolvency proceedings. The action for annulment of some documents signed by the debtor and the actions for rendering liable the management members of the debtor are ways that make it possible the reunification of the entire assets. Identifying the main steps in the process of setting the liabilities, we mention that this procedure is of great importance, since only after the setting of the liabilities and comparing them with the assets, one may choose reorganization or liquidation.

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1. RECEIVABLES SUBJECT TO THE VERIFICATION PROCEDURE. RECEIVABLES EXCEPTED FROM THIS PROCEDURE

Article 105, paragraph (1), thesis I of Law no. 85/2014 establishes the rule according to which all receivables will be subject to the verification procedure. Verification is a task of the legal administrator, as shown in article 58, paragraph (1) letter k) of the Law, text according to which one of the legal administrator's task is to verify the receivables and where appropriate, to make objections, to notify the creditor in case of failure to record or in case of partial record of the receivables, as well as the preparation of the receivable tables. [2]

Article 105 of Law no. 85/2014 provides for two exceptions, respectively, receivables that will not be subject to the verification procedure: i) receivables established by enforceable judgments or enforceable arbitration decisions; ii) receivables to the budget, resulting from an unchallenged enforceable title within the period prescribed by special laws.

The final part of the operative part of a judgment will show if the judgment is enforceable, if it is subject to appeal or final, and the date of delivery and the mention that it has been given in public hearing.[3] The finalizing action of the arbitration proceedings is the arbitration decision, the requirement of drawing up the document in writing and the content of this judgment being expressly regulated by article 603 of the New Civil Procedure Code. Of the analysis of article 603 of the New Civil Procedure Code, the following conclusions may be drawn [4]: i) the arbitration award shall be made in writing and it must include the mentions set out in article 603, paragraph (1), letters a) - g); ii) if there is a distinct opinion, it is mandatory to draft and sign it showing the reasons on which it is based; iii) article 603, paragraph (3) of the New Civil Procedure Code must be correlated with article 548, paragraph (2) of the same legislative instrument. The receivables to the budget are receivables

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[2]Oliviu Puie, *Dreptul comerţului internaţional,* (Bucharest: Universul Juridic, 2015), 261. Mihaela Sărăcuţ, *Participanţii la procedura insolvenţei,* (Bucharest: Universul Juridic, 2015), 68.

[3] Gabriel Florin Ivănescu, *Hotărârea judecătorească civilă,* (Bucharest: Hamangiu, 2014), 100.

[4] Radu Bogdan Bobei, *Arbitrajul intern şi internaţional. Texte. Comentarii. Mentalităţi,* (Bucharest: C.H.Beck, 2013), 166.

consisting of taxes, duties, contributions, fines and other budget incomes and their accessories (article 5, point 14 of Law no. 85/2014).

In line with the previous regulation, respectively Law no. 85/2006, all receivables would be subject to the verification procedure, one exception being set up, respectively not all receivables found through enforceable titles, such as judgments, securities, bills of exchange, checks, promissory notes made enforceable, authentic contracts, credit agreements were subject to the verification procedure.

Assuming the amendment of an enforceable judgment in the remedies at law, the legal administrator will recover the receivables table, recording the amount resulting from the judgment in the remedy at law, i.e. the sum of the final judgment. In the event that judicial review court cancels or withdraws the decision without solving the issue in the first instance, the judgment in the court of common law is suspended and the legal administrator or liquidator will start to examine the said receivable, notifying the creditor in case of total or partial failure to record the receivable, according to the provisions of article 110, paragraph (4), also indicating the reasons.[5]

The receivables arising from contracts of lease, terminated prior to the opening of the proceedings shall be recorded according to article 105, paragraph (3) of Law no. 85/2014, respectively: i) if the ownership of the asset has been transferred to the debtor, the sponsor acquires a legal mortgage on those assets and the receivable shall be recorded under article 159, paragraph (1), point 3; ii) if the assets are recovered, the receivable shall be recorded according to the priority laid down in article 161, point 8, except the situation when there are no other assets which confer to the holder of the receivable a preference case consisting of the difference between the value of the entire receivable and the market value of the assets, as determined by an independent evaluator; (iii)) if one or several recovered assets have been used, the price received will be deducted from the total of the receivable to register.

[5] Nicoleta Ţăndăreanu, *Codul insolvenţei adnotat* (Bucharest: Universul Juridic, 2014), 189.

2. THE PROCEDURE FOR THE VERIFICATION OF THE RECEIVABLES

The purpose of verifying the receivables is to validate the accurate receivables, to claim the incorrect or invalid receivables and to proceed to the registration of the receivables in the preliminary table.

In order to draw up the preliminary table of receivables, the legal administrator will verify each application and the documents submitted and will conduct a thorough research in order to establish the legitimacy, the exact value and priority of each receivable. To establish the legitimacy of the receivable means the finding by the practitioner undergoing insolvency proceedings of the justification of the creditor's receivable, by determining its basis, as a result of the examination of the creditor's request and of the documents submitted by him. The legitimacy of the receivable concerns the rightfulness of the creditor to participate in the list of liabilities, justified by his receivable against the debtor's property, on the basis of the evidence presented, thus establishing the validity of such documents.[6]

Accurate determination of the amount of the receivable by the legal administrator concerns the fix amount of the receivable, respectively the entire amount owed by the debtor, made up of the main debt and penalties or interest. The priority of the receivable shall mean the existence of a preference cause which accompanies the receivable or not, in order to establish the rank of preference and, implicitly, the order of the amount distribution, pursuant to article 159 and article 161.

An innovative aspect is represented by the text of paragraph (2) of article 106 of Law no. 85/2014, text that refers to the limitation: "Where by way of derogation from the provisions of article 2512 and the followings of the Civil Code, the legal administrator/liquidator finds that there has been judicial limitation of the receivable, he will notify the creditor, without doing the background verifications of the alleged receivable".

Common law regarding judicial limitation was represented by Decree no. 167/1958 on judicial limitation until 1 October 2011. According to article 18 of Decree no. 167/1958, the court and arbitration

[6] Radu Bufan and Andreea Deli-Diaconescu and Florin Moţiu, *Tratat practic de insolvenţă,* (Bucharest: Hamangiu, 2014), 473.

body have the obligation, by default, to investigate whether the right of action or enforcement is prescribed.

The New Civil Code, article 2512 establishes a new rule, meaning that the prescription of the right of action for civil receivable shall not be invoked by default, but only upon the request of either party. Thus, according to article 2512 of the New Civil Code, "the limitation period may be applied only by the person in whose benefit it is made, personally or by proxy, and without being bound to create a contrary title or to have been in good faith. The competent jurisdiction entity may not apply the limitation ex officio." So, once the limitation has been regulated in the New Civil Code, one renounced the absolute nature of limitation and implicitly of the persons who may invoke it. It is expressly provided that the competent jurisdiction entity is prohibited to invoke ex officio the exception of limitation period even if it would be in the interest of the state or administrative - territorial units.[7]

Notwithstanding such provision of the Civil Code, the Insolvency Law no. 85/2014, article 106 determines that the legal administrator will invoke by default the expiry of the limitation period and will not include that receivable in the table. [8]

3. PREPARATION AND REGISTRATION OF THE PRELIMINARY TABLE

As a result of the verifications made, the legal administrator/ liquidator shall prepare and record the preliminary table with the court, including all receivables against the debtor's property. The preliminary table for receivables will cover all debts due or not yet due, under condition or litigation, arising before the opening of the proceedings, accepted by the legal administrator after verification. The table will provide both the amount claimed by the creditor, the amount accepted and the priority level, and in the situation of the creditor undergoing insolvency proceedings, the legal administrator / liquidator appointed shall be mentioned. In the case of simplified procedure, the receivables

[7] Alexandru Suciu, *Excepţiile procesuale în noul Cod de procedură civilă* (Bucharest: Universul Juridic, 2014), 226.

[8] *Ion Turcu, Codul insolvenţei. Legea nr. 85/2014. Comentariu pe articole* (Bucharest: C.H.Beck, 2015), 292-293.

arising after the opening of the proceedings until the time of bankruptcy shall also be recorded in this table.

The preliminary receivables table will be published in BPI; after its publication, the creditors enrolled in the preliminary receivables table may participate in the meetings of the creditors. Once with the publication of the preliminary receivables table in BPI, the legal administrator/ liquidator shall immediately send notice to the creditors whose receivables or preemptive rights were recorded partly in the preliminary table of claims or removed, while stating the reasons.

The debtor, creditors and any other interested party may lodge appeals against the preliminary receivables table, drawn up by the legal administrator / liquidator after considering the applications for the admission of the receivables, which shall be filed with the local court within 7 days after the publication of the preliminary table in the Bulletin of Insolvency Proceedings, both the general procedure and the simplified procedure. A response may be made against the appeal and it will be submitted with the local court within 10 days from the date on which the author of the response received the complaint and the accompanying documents. The bankruptcy judge resolves all disputes simultaneously, in a single decision, since the procedure is a collective one and the amount to be distributed shall be determined simultaneously for all creditors.

CONCLUSION

From this study we may draw the following conclusions:

- All creditor's receivables will be subject to the verification procedure, except those established by enforceable court decisions and enforceable arbitration awards.
- The receivables from lease contracts, terminated before the date of opening of insolvency proceedings has a special registration procedure.
- The legal administrator, checking the applications for the admission of receivables, conduct a thorough research to determine the legitimacy, the exact value and priority of each receivable.
- The preliminary table will be set the amount claimed by the creditor, the amount accepted and the priority level of the receivable.

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THE LEGAL STATUS OF INVALIDITY IN LABOUR LAWAND CASES OF INVALIDITY OF DISMISSAL DECISIONS

Laurenţiu - Răzvan LUNGU [1]

Abstract:

The legal status of invalidity of an individual labour contract generally fits within the common law pattern of the legal status of the invalidity of legal documents. The invalidity of an individual labour contract is determined by a cause which is prior or simultaneous to the conclusion thereof, unlike the cessation of the same contract, which is determined by subsequent conditions, occurring during the performance of such contract. "Any contract made with the infringement of legal requirements for its valid execution shall be deemed invalid (...)" (art. 1246(1) Civil Code).

The distinction in the common law (art. 1246(2) Civil Code) between the status of absolute invalidity and relative invalidity does not have the same relevance for labour law.

According to art. 57(2) of the Labour Code, invalidity is not retroactive, while, in common law, according to art. 1254(3) Civil Code, "Even when the contract provides for successive execution, each party should return to the other, in kind or in equivalent, the received deliveries (...)".

A dismissal decision should meet several requirements of format and content. The legal regulation of the format and content requirements of such act aims at preventing possible abuse, as well as providing elements for checking the legality and the justification of such measure.

Key -words: *legal status of invalidity, individual labour contract, Labour Code.*

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1. THE LEGAL STATUS OF INVALIDITY IN LABOUR LAW

Invalidity is a sanction that renders a legal act unenforceable in case the legal guidelines in force for its valid execution have not been observed[2]. In case any of the requirements provided by the law for the validity of an individual labour contract has not been observed upon the execution thereof, the contract shall be deemed invalid.

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[2] Al. Athanasiu et al., *Codul muncii, Comentariu pe articole, Vol. I, Articolele 1-107* (Bucharest: C.H. Beck, 2007), 312.

The legal status of invalidity of an individual labour contract generally fits within the common law pattern of the legal status of the invalidity of legal documents[3].

The invalidity of an individual labour contract - first regulated as a legal institution in labour law through the Labour Code in force, art. 57 - expresses, in a concentrated manner, the accumulations of legal doctrine and legal practice in this field[4].

Initially, the issues raised by the invalidity of an individual labour contract were solved by applying rules on invalidity in the civil law[5].

Subsequently, until March 1, 2003 - when the Labour Code came into force - invalidity became established in labour law on an indirect basis, through art. 68(b) of Law no. 168/1999 on the settlement of labour conflicts - currently repealed. However, common law was still applied.

The text makes no distinction between absolute invalidity and relative invalidity. Thus, depending on the nature of the interest protected by the legal guideline that was infringed when executing an individual labour contract, the latter will be subject to absolute or relative invalidity[6].

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[3] Al. Athanasiu et al, *Codul muncii…*, 312.

[4] Ion- Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii, ediţia a III-a revizuită şi adăugită* (Bucharest: Universul Juridic, 2014), 310; D. Gherasim, "Teoria nulităţilor în materia contractelor de muncă", in *Justiţia Nouă* nr. 2 (1965); S. Ghimpu, "Aspecte teoretice şi practice privind nulitatea contractului de muncă", in *Revista Română de Drept* nr. 5(1968): 33-34; Sanda Ghimpu et al., *Dreptul Muncii - Tratat, Vol. I,* Bucureşti: Ştiinţifică şi Enciclopedică), 269-280; Sanda Ghimpu, *Dreptul muncii* (Bucharest: Didactică şi Pedagogică, 1985), 121-123; Alexandru Athanasiu and Claudia Ana Moarcaş, *Dreptul muncii. Relaţiile individuale de muncă*, Vol. I (Bucharest: Oscar Print, 1999), 211-219; Ion -Traian Ştefănescu, *Tratat de dreptul muncii, Vol. I* (Bucharest: Lumina Lex), 384-388; Sanda Ghimpu and Alexandru Ţiclea, *Dreptul muncii, ediţia a II-a*, (Bucharest: All Beck, 2001), 403-410; I. T. Ştefănescu and Ş. Beligrădeanu, "Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii", in *Dreptul* nr. 4(2003): 44-46.

[5] Ion -Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii, ediţia a III-a revizuită şi adăugită* (Bucharest: Universul Juridic, 2014), 310; Liviu Pop, *Tratat de drept civil. Obligaţiile*. Vol. II, Contractul (Bucharest: Universul Juridic, 2009), 441-442.

[6] Alexandru Athanasiu et al.**,** *Codul muncii, Comentariu pe articole, Vol. I, Articolele 1-107* (Bucharest: C.H. Beck, 2007), 312.

The invalidity of an individual labour contract is determined by a cause which is prior or simultaneous to the conclusion thereof, unlike the cessation of the same contract, which is determined by subsequent conditions, occurring during the performance of such contract. "Any contract made with the infringement of legal requirements for its valid execution shall be deemed invalid (...)" (art. 1246(1) Civil Code)[7].

The distinction in the common law (art. 1246(2) Civil Code) between the status of absolute invalidity and relative invalidity does not have the same relevance for labour law.

According to art. 57(2) of the Labour Code, invalidity is not retroactive, while, in common law, according to art. 1254(3) Civil Code, "Even when the contract provides for successive execution, each party should return to the other, in kind or in equivalent, the received deliveries (...)".

The text (art. 57(1) Labour Code) only refers to absolute invalidity, not relative invalidity, which seems an obvious drawback or an incomplete remark of the lawmaker. For this reason, it should also be applicable to relative invalidity[8].

The Constitutional Court (Decision no. 378/2004, published in the Official Gazette of Romania, Part I, issue 936 of October 13, 2004) stated that "it is irrelevant whether invalidity is absolute or relative, since the deliveries executed by the parties (performance of work, payment of wages, other rights and obligations) during the existence of the individual labour contract cannot be cancelled." In fact, art. 57(1) provides that the invalidity of an individual labour contract is determined by the "failure to observe any of the legal requirements imposed for its valid execution".

"Thus, the reference to the requirements included in the legal regulations in force as of the date of execution of the individual labour contract is obvious, since other requirements established by subsequent normative documents cannot be imposed to previously executed contracts."

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[7] Ion-Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii* (Bucharest: Universul Juridic, 2014), 310.

[8] Alexandru Ţiclea, *Tratat de dreptul muncii - Legislaţie. Doctrină. Jurisprudenţă*, (Bucharest: Universul Juridic, 2014), 719; Luminiţa Dima, "Regimul juridic al raporturilor de muncă în reglementarea noului Cod al muncii", in *Pandectele Române* nr. 6(2003): 112-113; Ştefănescu, *Tratat teoretic şi practice,* 330-331.

Invalidity is a sanction that renders a legal act unenforceable in case the legal guidelines in force for its valid execution have not been observed. In essence, it occurs when the validity requirements are not observed upon the execution of such document[9].

The invalidity of the contract is generally regulated by art. 1246-1265 of the Civil Code. It has a triple role: preventing the execution of contracts with the infringement of legal provisions; removing any effects of the legal document that may be contrary to the law; guaranteeing the implementation of the principle of legality[10].

The absolute or relative invalidity of an individual labour contract is a result of the law, not the will of the parties. It should be established through a document of the body also competent to decide upon the execution of the contract[11].

However, whenever the parties fail to agree on invalidity, the jurisdiction body should issue a decision[12].

Legal literature has also proposed the establishment of a right of the labour inspection and the prosecutor (not only of the parties), of notifying the competent court in order to establish the invalidity of an individual labour contract which is not made in writing[13].

Moreover, according to art. 1247(2) of the Civil Code, absolute invalidity may be invoked by any interested individual, by way of action or exception.

According to art. 1261 of the Civil Code, a contract affected by an invalidity cause is validated when invalidity is covered. Invalidity may be covered by confirmation or other methods provided by the law.

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[9] Ţiclea, *Tratat de dreptul muncii,* 720; Gheorghe Beleiu, *Drept civil român*, (Bucharest: Universul Juridic, 2005), 220.

[10] Ţiclea, *Tratat de dreptul muncii,* 720; T. Bodoaşcă et. al, *Drept civil, Partea generală* (Bucharest: Universul Juridic, 2012), 184.

[11] Ţiclea, *Tratat de dreptul muncii,* 720; Supreme Court, Civil Section, Decision no. 316/1979 in "*Culegere de decizii pe anul 1979*", 176.

[12] Ţiclea, *Tratat de dreptul muncii,* 720; Supreme Court, Civil Section, Decision no. 869/1966 in "*Culegere de decizii pe anul 1966*", p. 209; S. Ghimpu and M. Florescu and Ş. V. Stănoiu, "Examen teoretic al practicii judiciare în dreptul muncii", in *Studii şi cercetări juridice* nr. 3(1967).

[13] Ţiclea, *Tratat de dreptul muncii,* 720; Ş. Beligrădeanu, "Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Legii nr. 53/2003 – Codul muncii", in *Dreptul* 7(2011): 34.

Such “other methods provided by the law” can be found in the Labour Code. Thus, the analysis of labour law provisions and, additionally, common law provisions shows that the invalidity of a labour contract may be covered in two different ways:

- through the subsequent fulfilment of legal requirements;
- through confirmation.

Regarding the first way of coverage, this is applicable in all cases of invalidity of labour contracts (absence of a medical examination, absence of a written form, etc.), since art. 57(3) of the Labour Code indistinctly (unclearly, imprecisely) provides that the invalidity of an individual labour contract may be covered through the subsequent fulfilment of legal requirements.

On the contrary, confirmation, as a unilateral act of the contracting party whose interest has been affected (e.g. the party whose consent was affected) cannot cover the invalidity generated by the failure to observe a legal provision. Indeed, a contract affected by absolute invalidity is only susceptible of confirmation in the cases provided by the law [art. 1247(4) Civil Code), so that an explicit derogation would have been required in the Labour Code, for such an exception to be applicable. Moreover, confirmation implies that the requirements for the validity of the confirmed contract are met [art. 1263(1) Civil Code].

The utility of a distinction between absolute and relative invalidity regarding the individual labour contract appears again. In the absence of any special provisions, common law guidelines shall be applied. According to art. 1248(3) Civil Code: “a contract that may be cancelled is susceptible of confirmation”. On the contrary, a contract affected by absolute invalidity is only susceptible of confirmation in the cases provided by the law.

The two types of invalidity can be distinguished according to the traditional criterion of common law, i.e. protected interest. For instance, any invalidity entailed by the failure to observe legal provisions on the professional training requirements for a job is absolute, since its purpose is to protect a public general interest.

On the contrary, the invalidity of a contract executed by a person who does not meet the study requirements imposed by the employer upon the execution of a labour contract, additionally to legal requirements, is relative, since its purpose is to protect a personal interest. The consequence of such distinction is included in common law:

relative invalidity can be covered by confirmation, while absolute invalidity cannot.

The validation of a contract should not be mistaken with a remake thereof.

The remake of an invalid contract is a new concept introduced in the current Civil Code, whose art. 1259 states that: “an invalid contract may be remade, in whole or in part, provided that all legal requirements as of its remake are met.

In all cases, a remade contract shall only produce effects for the future, not for the past”. The application of this regulation can also be envisaged regarding the individual labour contract, for instance in the hypothesis of an absolutely invalid contract pursuant to the failure to meet the format requirements imposed by the law upon its execution, which is remade by the parties, this time in writing, after a mutually or legally-based establishment of invalidity.

Irrespective of the absence of a regulation on relative invalidity and the derogatory configuration of absolute invalidity, one of the most significant derogations from common law in this matter refers to the effects of invalidity.

Invalidity is not retroactive in labour law, as art. 57(2) states: “the establishment of the invalidity of an individual labour contract creates effects for the future”. The consequence of this rule is the cessation of the contract pursuant to the establishment of invalidity, according to art. 56(d). Therefore, only an existing contract, which had been deemed valid - until the invalidity was established - can cease.

The fact that the invalidity of an individual labour contract is not retroactive also results in the recognition of professional experience for the worked period.

The rule that the invalidity of an individual labour contract is not retroactive derogates from the rule of the new Civil Code, established under art. 1254(3): “when the contract is dissolved, each party should return to the other, in kind or in equivalent, the received deliveries (...), even when they have been performed on a successive or continuous basis.”

This rule is new in common law, since the old Civil Code provides that, in principle, the invalidity of contracts with successive execution does not produce retroactive effects.

Most legal systems recognise, some way or another, the worker's entitlement to a certain compensation, often using as a justification the consequent illegitimate enrichment of the employer.

The Romanian Labour Code, art. 57(5) provides that the person who has performed work based on an invalid individual labour contract is entitled to compensation for such work, in accordance with the performance of work attributions.

A first issues regards the non-retroactive nature of invalidity. Thus, if the labour contract is invalid, it shall cease based on art. 56(d), but it shall be deemed valid until cessation.

Provided that the labour contract is deemed valid, the clause on wages shall also be in force, i.e. the worker would be entitled to compensation not in accordance with the performance of work attributions, but in accordance with contractual provisions. For instance, if invalidity is determined by a failure to observe provisions regarding the medical examination, the contract shall be deemed valid until invalidity is established, i.e. the worker will be entitled to the wages provided for in the subsequently cancelled contract.

Based on such an interpretation, art. 57(2) and (5) may be considered contradictory. In fact, if invalidity is not retroactive, the issue is not whether the worker is entitled to compensation, but whether s/he is entitled to wages, according to contractual provisions. The contract is valid until invalidity is established and thereafter. The only effect of invalidity shall be the cessation of the contract, according to art. 56(d).

The individual will, thus, be compensated not in accordance with the performance of work attributions, but according to contractual provisions (automatically replaced by legal provisions or the provisions of the applicable collective labour contract, if they are found under the minimal level established thereby).

On the contrary, art. 57(5) would have meaning if invalidity were retroactive, as in the (current) common law and, by way of exception, the individual would still be entitled to compensation. Since no contract would exist for such compensation to be based on, only then the issue to estimate the value of work would arise.

An individual's right to the compensation of performed work is not an effect of invalidity, but, on the contrary, either an effect of the validity of the contract until the establishment of invalidity, or a effect of the principle of illegitimate enrichment.

The second issue refers to the relation between compensation and the fulfilment of work attributions, implying that the performer of the work will be compensated as if the contract had not been valid, except for the case when the employer may prove that the work was not performed according to such contract, so that work attributions could not be fulfilled.

From the point of view of the fulfilment of attributions, legal literature distinguishes between the hypothesis when invalidity is entailed by the failure to meet the legal requirements of studies or experience for the occupation of such position.

However, the Labour Code also includes an exceptional regulation, i.e. regarding the compensation of the labour performed by persons illegally staying in Romania, who were received to work by an employer who is aware that they are victims of human trafficking [art. 265(2)] or when more than 5 persons were received to work without labour contracts [art. 264(3)]. Art. 265(5) of the Labour Code is applicable in such cases, stating that the employer shall pay - *inter alia* - any outstanding compensation due to illegally employed individuals. The amount of compensation is presumed to be equal to the national average gross salary, unless the employer or the employee may prove otherwise.

Therefore, regarding the compensation of work performed based on an invalid contract, art. 57(5) is the rule, and art. 265(5) is the exception.

The assumption established by art. 57(5) can only be reversed by the employer, proving an improper fulfilment of work attributions. An employee cannot reverse such assumption, proving an excessive fulfilment of attributions, so as to receive a higher salary than the one corresponding to the position s/he would have occupied if the contract had been correctly performed.

On the contrary, the assumption established by art. 265(5) can be reversed by either party. Indeed, the worker can even prove that s/he would have been entitled to a salary higher than the national average (such a proof is not excluded, irrespecctive of the employee's position of qualifications).

Therefore, through the amendment of the Labour Code (2011), but especially through the enforcement of the new Civil Code (October 1, 2011), the relationship between general laws and special laws has

acquired new valences regarding the invalidity of individual labour contracts.

The applicability of civil law provisions will always depend on their incompatibility to the specificities of work relations.

2. CASES OF INVALIDITY OF DISMISSAL DECISIONS

In order to avoid any abuse from employers and with a view to ensuring the professional stability of employees and observing their right to defence, the Labour Code includes several rules that must be observed upon dismissal[14].

Any failure to observe any rules that should be met in case of dismissal may entail the invalidity of such measure, regarding the employer's status.

Such rules may refer to: interdictions on dismissal, as regulated by the Labour Code (art. 59 and art. 60(1) of the Labour Code); prior research (art. 63 of the Labour Code); the prior assessment of the employee (art. 63(2) of the Labour Code); the proposal of other vacancies (art. 64 of the Labour Code); prior notice (art. 75 of the Labour Code); the deadlines explicitly provided by the Labour Code (art. 252(1) and art. 62(1) of the Labour Code).

Dismissal cannot be decided when the individual labour contract is suspended by action of law or at the employee's initiative. However, if it occurs, it shall be deemed invalid.

In practice, the most frequent situations are found regarding the interdiction on dismissal "during temporary work incapacity"[15].

Any failure to perform research results in the absolute invalidity of dismissal (art. 251(1))[16], except, of course, when the individual in cause is guilty for not having been listened to[17].

Legal practice has shown that "the observance of compulsory legal provisions regarding the procedure of prior disciplinary research is

[14] Ţiclea, *Tratat de dreptul muncii*, 720.
[15] Ţiclea, *Tratat de dreptul muncii*, 762.
[16] Ţiclea, *Tratat de dreptul muncii*, 766; Court of Appeal Timişoara, Section of labor and social insurance disputes, Decision 251/2011 (www.portal.just.ro).
[17] Ţiclea, *Tratat de dreptul muncii*, 766; Court of Appeal Timişoara, Section of labor and social insurance disputes, Decision no. 1872/R/2011, in *Revista română de dreptul muncii*, 4(2011): 92-93.

an inherent essential obligation for disciplinary sanctions, as a guarantee of the observance of the employee's right to defence prior to the application of the disciplinary sanction, and its infringement is a cause of explicit absolute invalidity of the measure in comparison to the provisions of art. 251(1)-(4) of the Labour Code, sanctioning under absolute invalidity the application of the disciplinary sanction in the absence of prior disciplinary research on the very same day of research, which is not limited to calling the employee for the performance of prior disciplinary research and taking an "explanatory note" of pre-established questions (showing that the employer does not want and is not interested to know the employee's defences, but only the answer to some questions of the employer), but regards the observance of the entire procedure provided by the law and all the guarantees provided to the employee so that his/her right to defence is observed before s/he is sanctioned"[18].

Any dismissal decided without the performance of a professional assessment (as per art. 63(2) of the Labour Code) is absolutely invalid (based on art. 78 of the Labour Code), even though, essentially, the measure would be reasonable, i.e. the concerned individual is not fit for his/her position[19].

[In the situation provided by art. 61(c) and (d) and art. 56(e) of the Labour Code], the employer shall propose other vacancies to the employee, which are compatible to his/her professional training or to the work capacity established by the professional physician of the unit.

Art. 64 of the Labour Code does not provide for the dismissal for reasons not related to the employee's person (dissolution of the position - irrespectie of whether the dismissal is individual or collective).

Even though the former collective labour contract applicable at a national level [art. 80(1)] stated that art. 64 also was applicable in individual dismissal for reasons not related to an employee's person, the High Court of Cassation and Justice decided (judging the recourse to the interest of law) that, in case the workplace is dissolved according to art. 65 of the Labour Code, the employer does not have the obligation to provide the employee with another position (Decision no. 6/2011,

[18] Ţiclea, *Tratat de dreptul muncii*, 767; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 1529/R/2011, in *Revista română de dreptul muncii* 4 (2011): 102-103.
[19] Ţiclea, *Tratat de dreptul muncii*, 769.

published in the Official Gazette of Romania, Part I, issue 444 of June 24, 2011).

According to this, "the provisions of art. 64 of the Labour Code only refer to the situations when dismissal is founded on the reasons provided under art. 61(c) and (d) and art. 56(f) of the Labour Code (...). Art. 64(1) of the Labour Code deals with exceptions and strict interpretations, so that any extension of the scope of the situations envisaged by art. 64 of the Labour Code where the provisions of art. 74(1)(d) should be applied is illegal".

At the same time, any dismissal decided without prior notice (as per art. 75 of the Labour Code for individuals dismissed for physical or psychological incapacity, professional unfitness - art. 61(c) and (d) - and for reasons not related to their person - art. 65 and 66 - and which cannot be lower than 20 working days) is absolutely invalid[20].

The current Labour Code did not take over the provision of the previous Labour Code [art. 131(2)], i.e. that any failure to provide the prior notice provided by the law did not entail the invalidity of the dissolution of the individual labour contract, but only the employer's obligation to pay the employee "a compensation equal to the statutory wages for half a month".

Therefore, in all the situations dealt with by art. 75(1) of the Labour Code, the employer shall effectively provide a prior notice period (as per the contract), and any failure to do so shall entail the absolute invalidity of dismissal (art. 78 of the Labour Code), even though, in essence - from all other points of view - such measure would have been completely reasonable and legal[21].

Moreover, a dismissal decision should meet several requirements of format and content.

To this purpose, it should be remembered that a dismissal decision is "a unilateral act of an employer, by which the latter decides to cease an individual labour contract"[22].

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[20] Ţiclea, *Tratat de dreptul muncii*, 771; Court of Appeal Suceava, Decision no. 880/R/2005, (www.portal.just.ro).

[21] Ţiclea, *Tratat de dreptul muncii*, 773; Şerban Beligrădeanu, "Probleme generate de actualele reglementări referitoare la dreptul de preaviz al salariatului în cazul concedierii pentru anumite temeiuri legale", in *Dreptul* 12(2005): 73.

[22] Ţiclea, *Tratat de dreptul muncii*, 775; Al. Ţiclea, "Decizia de concediere", in *Revista română de dreptul muncii* 3(2003): 12-17; Şerban Beligrădeanu, "Aspecte esenţiale

The legal regulation of the format and content requirements of such act aims at preventing possible abuse, as well as providing elements for checking the legality and the justification of such measure[23].

The Labour Code regulates on the content of dismissal decisions in several texts, located in different sections, even different chapters and titles (art. 63(3); art. 76(1); art. 252(2)[1]).

Corroborating the above mentioned texts, we shall present the (framework) elements composing a dismissal decision[24]:

a) A first element is, of course, the name of the employer, the head office of the legal entity, as the case may be, the head office of the natural person, the name, surname and position of the representative of the legal entity entitled to decide on such dismissal.

Moreover, the following information on the envisaged employee is compulsory: name and surname, position, workplace.

b) Motivation of the decision. Art. 62(3) provides that, under sanction of absolute invalidity, the dismissal decision should be motivated in fact and in law and art. 76(a) provides that this must contain the reasons for such dismissal.

Therefore, the decision must include an actual motivation, i.e. what factors determine dismissal, such as the reorganisation of the employer's activity: what it consists of, which considerations lied at the basis of the reorganisation and dissolution of the workplace. The simple assertion that a reorganisation of the activity would have occurred cannot be considered as meeting the requirement provided by art. 74(a) of the Labour Code, acting as a non-motivated statement[25].

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referitoare la forma, conţinutul şi nulitatea deciziei de concediere în lumina Codului muncii", in *Dreptul* 6(2004): 32-46; Alexandru Athanasiu and Luminiţa Dima, „Regimul juridic al raporturilor de muncă în reglementarea noului Cod al muncii – Partea a IV –a", in *Pandectele Române* 6(2003): 155-158.

[23] Ţiclea, *Tratat de dreptul muncii,* 775; Court of Appeal Galaţi, Section of labor and social insurance disputes, Decision no. 386/2007, Jurindex.

[24] Ţiclea, *Tratat de dreptul muncii,*777.

[25] Ţiclea, *Tratat de dreptul muncii,* 778; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 2550/R/2010, in *Revista română de dreptul muncii* 8 (2010) 86.

A decision that includes no motivation, but mentions that dismissal took place based on art. 65(1) of the Labour Code is invalid[26].

At the same time, it has been shown that the mention on "a circumstance that the position has been dissolved" does not represent a presentation of the reasons resulting in dismissal, since the necessity of this measure is not shown, the document resulting in the decision to dissolve the position is not indicated, the existence of reasonable cause for the dissolution of the position is not proven, i.e. it is not clear for which reason the appellant's position was dissolved[27].

On balance, a dismissal decision must include the reasons resulting in such measure. Any reference to internal notes, etc. of the employer does not replace the elements that had to be included in its content.

Even though the invoked documents preceded the moment when the decision was issued, being notified to the employee, it cannot be considered that the legal conditions resulting in dismissal, along with other legal elements are met[28].

The presentation of the concerned facts to the court, when the appeal is solved, does not replace the employer's omission, since, dealing with absolute invalidity, for the failure to comply with ad validitatem format requirements, it cannot be covered by confirmation[29].

The legality of a dismissal decision shall be verified by relating it to the situation at the moment of its issue and subsequent circumstances[30].

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[26] Țiclea, *Tratat de dreptul muncii*, 778; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 2589/R/2011, Jurindex.

[27] Țiclea, *Tratat de dreptul muncii*, 778; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 3428/R/2012 in *Revista română de dreptul muncii* 5(2012): 128-129.

[28] Țiclea, *Tratat de dreptul muncii*, 778; Court of Appeal Galați, Section of labor and social insurance disputes, Decision no. 683/R/2008, Jurindex.

[29] Țiclea, *Tratat de dreptul muncii*, 778; Court of Appeal Galați, Section of labor and social insurance disputes, Decision no. 454/R/2007, Jurindex.

[30] Țiclea, *Tratat de dreptul muncii*, 778; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 2526/R/2011, Jurindex.

The lawful motivation regards the legal basis of the dismissal. Thus, the incident text of the Labour Code (art. 61(a)-(d), art. 65, 66, 68, art. 252, etc.) of the applicable collective labour contract or the internal rules shall be mentioned, etc.

According to the law, any failure to indicate the legal basis in the content of the dismissal decision entails the absolute invalidity thereof. However, legal literature[31] shows that a wrong indication of such legal basis does not automatically entail such invalidity. The court has the obligation to rectify the legal status of the cessation of the contract, when deciding on the cause.

Several arguments can be brought to support this idea, such as: the good faith lying at the basis of work relations (art. 8(1) of the Labour Code), loyalty and honesty in legal documents.

c) The duration of the prior notice is compulsorily mentioned in the dismissal decision under art. 76(b), though this duration is established in the collective or individual labour contract. It would be more recommended to include the date when such duration began and the date of its expiry. However, the concerned text should be rationally interpreted to this purpose[32].

The doctrine and case law have decided that any failure to indicate the duration of the prior notice in the dismissal decision, provided that the employer proves that the prior notice has been granted, does not infringe the law[33].

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[31] Ţiclea, *Tratat de dreptul muncii*, 779; Ştefan Beligrădeanu, "Aspecte esenţiale referitoare la forma, conţinutul şi nulitatea deciziei de concediere în lumina Codului muncii", in *Dreptul* 6 (2004): 38-39.

[32] Ţiclea, *Tratat de dreptul muncii*, 779.

[33] Ţiclea, *Tratat de dreptul muncii*, 779; Ştefan Beligrădeanu, "Probleme generate de actualele reglementări referitoare la dreptul de preaviz ai salariatului în cazul concedierii pentru anumite temeiuri legale", in *Dreptul* 12 (2005): 74; Al. Athanasiu and L. Dima, „Regimul juridic al raporturilor de muncă în reglementarea noului Cod al muncii, Partea a IV-a", in *Pandectele Române* 6(2003): 237; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 347/R/2008, Jurindex; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 6846/2011, in L. Uţă and Fl. Rotaru and S. Cristescu, *Încetarea contractului individual de muncă. Practică Judiciară* (Bucharest: Hamangiu, 2009), 121.

In its Decision no. 8/2014, the High Court of Cassation and Justice admitted the recourse filed by the general prosecutor of the Prosecution Office attached to the High Court of Cassation and Justice and the managing board of the Constanta Court of Appeal, stating that:

"In the interpretation and application of the provisions of art. 75(1) of the same Code, any failure to provide the prior notice with the minimum duration provided by art. 75(1) of the Labour Code, republished, respectively with the duration included in collective or individual labour contracts, if more favourable to the employer, entails the absolute invalidity of the dismissal measure and decision.

In the interpretation and application of the provisions of art. 76(b) of the Labour Code, in relation to art. 78 of the same Code, the absence from the content of the dismissal decision of the mentions on the duration of the prior notice granted to the employee shall not be sanctioned by invalidity of the dismissal decision and measure, when the employer proves that the employee has received the prior notice with the minimum duration provided by art. 75(1) of the Labour Code or with the duration included in the collective or individual labour contracts, if this is more favourable to the employer".

d) The criteria for the establishment of the order of priority in case of collective dismissal are not provided by the Labour Code, but by collective labour contracts or some special normative documents (such a normative document is, for instance, Law no. 329/2009 on the reorganisation of public authorities and institutions).

The elements regarding the list of vacancies available in the unit and the deadline by which the employees should opt for a vacancy according to art. 64 (Decision no. 6/2011 of the High Court of Cassation and Justice, published in the Official Gazette of Romania Part I, issue 444 of June 24, 2011) regard dismissal for reasons related to the employee's person [art. 61(c) and (d) and art. 56(f)], as well as those considering the reasons for which the employee's defence presented during the prior disciplinary research were discarded or the reasons for which a research was not performed [art. 252(2)(c)] are only required in the hypotheses included in such legal texts.

e) The deadline by which the dismissal decision may be appealed. Irrespective of the reason for such dismissal, the deadline

should be included in the decision, and the entitled individual should be notified on his/her right to appeal[34].

According to the Labour Code (art. 77, art. 252(5) and art. 268(1)(a) and (b), the employer's decision is enforceable and, as the case may be, it may be appealed within 30 days from the date of notice to the employee. According to the Law on social dialogue no. 62/2011, the 45 days deadline is calculated as of the date when the concerned individual has become aware of such measure.

f) The court entitled to solve the appeal represents another mention that should be included in the dismissal decision.

According to art. 269(1) of the Labour Code, labour conflicts should be judged by legal courts. Such a competence also is established by art. 208 of the Law on social dialogue no. 62/2011. In essence, the competence lies with the court.

According to art. 2(1)(c), of this latter Code, the court judges "labour conflicts, except for those falling under the competence of other courts, according to the law", as a first court.

The same decision was made by the Supreme Court of Justice - United Sections - in its Decision no. II of March 31, 2003, published in the Official Gazette of Romania, Part I, issue 455 of June 26, 2003[35].

Therefore, the sanctioning decision should include a mention on this court. To this purpose, it has been decided that "the simple reference that the decision may be appealed with the court, according to the contract, does not observe the legal requirement, and the law provides for a sanction with absolute invalidity for the absence of such mentions"[36].

The employer has no excuse for not including one of the two mentions or both in the decision; on the contrary, s/he shows negligence, indifference, even bad faith or contempt to his/her employee and this guilty conduct should be sanctioned[37].

Moreover, it has been shown that the employee has a delicate status; having undergone a disciplinary dismissal, s/he should take

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[34] Ţiclea, *Tratat de dreptul muncii*, 780.
[35] Ţiclea, *Tratat de dreptul muncii*, 781.
[36] Ţiclea, *Tratat de dreptul muncii*, 781; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 4535/R/2013, in *Revista română de dreptul muncii* 11 (2013) 31.
[37] Ţiclea, *Tratat de dreptul muncii*, 782.

measures to determine the competent court, perhaps by seeing a specialist, which contradicts the principle of good faith in labour relations, as shown by art. 8(1) of the Labour Code.

The same thing is valid for the Constitutional Court, which decided that the absence of actual and legal motivation elements and mentions on the deadline by which a decision may appealed and on the comeptent court entails the absolute invalidity thereof.

"The defence against an illegal or unfounded abusive measure, resulting in a limitation of the right to work is a fundamental constitutional right of employees. This right can only be exercised in full awareness, i.e. if the employee is properly informed on the actual and legal reasons lying at the basis of the employer's decision and the procedures for appealing such measure.

The inclusion of mentions on the deadline for the appeal and the court competent to solve the conflict in the dismissal decision helps solve the cause by a reasonable deadline"[38].

The same solution is also shared in legal practice.

g) A dismissal decision should also include: the date of issue, the registration number with the employer's general registration office, the signature of the concerned individual and the employer's seal, as the case may be. It has been considered that the decision to dissolve an individual labour contract, under sanction of absolute invalidity, should be signed by the legal representative of the employer, considering the public order nature of the guidelines regulating the representation right of the unit - natural person[39].

h) The notification of the dismissal decision. According to art. 76 of the Labour Code, dismissal decisions should be notified to employees in writing. Verbal communications are irrelevant; they are equivalent to failure to notify[40].

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[38] Țiclea, *Tratat de dreptul muncii*, 782; Constitutional Court – Decision no. 506/2005, published in the M. Of. al României, Partea I, nr. 982, of 4 november 2005.

[39] Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 3390/R/2011, in D. G. Enache and M. Ceaușescu, *Litigii de muncă. Jurisprudența relevantă a Curții de Apel București pe semestrul I*, (Bucharest: Hamangiu, 2011), 103-104.

[40] Țiclea, *Tratat de dreptul muncii*, 782; Court of Appeal Brașov, Section of labor and social insurance disputes, Decision no. 788/M/2008, Jurindex.

The act of communication is highly important and has obvious legal consequences, since the employer's measure is enforceable as of the date of notification (art. 77) or, according to Law no. 62/2011, "as of the date when the decided measure was notified" (art. 211). "This means that work is terminated not on the date that may have been mentioned by the employer in the decision, but, by force and on basis of law, on the date when the dismissal decision is notified"[41].

As for the deadline and method of notice, the provisions of art. 252(3) and (4) of the same Labour Code (regarding dismissal decisions) should be observed.

Thus, "the decision of sanctioning shall be notified to the employee within at most 5 calendar days since the date of issuing thereof and produces effects starting with the date of notification." [par. (3)]. Of course, since deadline is not compulsory, but recommended. Therefore, any failure to notify the decision by this deadline does not result in the measure being invalid, but it is deemed that it has not been taken. Thus, the sanction for failure to notice is the unenforceability of such decision. In case notification takes place in front of the competent court, the work relation is terminated on that date. Until that date, the concerned individual still is an employee[42].

The decision "shall be delivered personally to the employee, with signature of reception, or, in case of refusal of the reception, by registered letter, to the domicile or residence communicated by the latter." [par. (4)].

Notification also is deemed effective if the employer's decision bears the employee's mention "I have been informed today, ..., ", followed by his/her signature, even though the concerned individual asserts that s/he has not received a copy[43].

It has been considered that decisions notified with a notice bearing no registration number or decisions signed by the employee, but

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[41] Țiclea, *Tratat de dreptul muncii*, 783; Court of Appeal Bucharest, Seventh Civil Section, for cases regarding labor disputes and social insurance, Decision no. 5707/R/2011, Jurindex.

[42] Țiclea, *Tratat de dreptul muncii*, 783; Court of Appeal Brașov, Section of labor and social insurance disputes, Decision no. 788/M/2008, Jurindex.

[43] Țiclea, *Tratat de dreptul muncii*, 783; Court of Appeal Pitești, Civil Section, for cases regarding labor disputes and social insurance for cases involving minors and family, Decision no. 197/R-CM/2007, Jurindex.

with no date mentioned, cannot be classified as notified, according to the law[44].

In case the dismissal decision is not notified, but the employer enforces it, the provisions of art. 78 of the Labour Code shall apply, and this decision shall be absolutely invalid[45].

The Constitutional Court rejected the exception of non-constitutionality of the provisions of the prior Labour Code regarding the notification of the decision and stated[46] that all those procedural acts are required for the application of the provisions of the Constitution regarding the right to work and social protection of work. Employees whose labour contracts are dissolved must be properly aware of the decision, of the reasons and legal bases thereof, so that they may appeal a decision they deem to be illegal or unfounded.

In conclusion, the absolute invalidity of dismissal is provided by art. 78 of the Labour Code, as a direct effect of the failure to observe with the procedure imposed by the legal provisions on dismissal.

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[45] Ţiclea, *Tratat de dreptul muncii,* 784; Court of Appeal Suceava, Commercial Section, Decision no. 244/2008, in P. Bejan, G.G. Schmutzer, *Dreptul muncii, Jurisprudenţă*, 2008-2009, p. 201.

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THE EMERGENCE AND DEVELOPMENT OF PARLIAMENTARY IMMUNITY IN THE ROMANIAN CONSTITUTIONAL SYSTEM (1866 - 1989)

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Abstract:

In our study, we have shown the evolution of the institution of parliamentary immunity in Romania. Our undertaking started with the first constitutional acts of Romania and stopped in this first part at the regulations before the 1989. The Romanian constituent in the period 1866-1948 has been preoccupied to offer the elect a parliamentary protection as wide as possible. After 1948, together with the modification to the structure of the Parliament, the parliamentary immunity war restrained. The immunity did not cover votes and opinions expressed during the mandate any more, but contained only the component of penal inviolability. In the period 1989-1991, parliamentary immunity was ruled by the provisions of the Constitution of 1965, in what penal immunity is concerned, and the lack of responsibility for the votes and opinions expressed during the mandate has been covered later, after several regulations have been adopted, regulations that proved themselves as interim and insufficient.

Key - words: *Constitution, Parliament, parliamentary protection, parliamentary immunity, mandate*

1. INTRODUCTION

By analyzing Romania's constitutional history, we can see that the members of the first parliamentary assemblies, who were elected on different grounds, did not have protection during their mandate. Even though mhe members of the *"parliamentary"* assemblies, which emerged from the Organic Laws, were *"elected"*, they did not however enjoy parliamentary immunity protection, as it was known at that time.

After the Revolution of 1848, due to the fact that the Organic Laws were rejected, several documents of reformative nature were drafted, some of

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them as typical draft constitutions. Thus, although its early manifestations were timid, the revolutionary movement in Moldova evolved from the least revolutionary political and intellectual environment to the only project capable of generating a genuine draft Constitution in 1848 – 1849, thanks to Mihail Kogalniceanu's capacity and legal culture. Kogalniceanu, who was influenced by the French Constitution of 1791 and the Belgian Constitution of 1831, proposed *the implicit separation of powers between the "branches" of the government* [3]. He also proposed the principle of national sovereignty, as a mechanism to delegate the power to a body of *"representanţi"* (that is *"representatives"*), which indicates the final assimilation of the specific terms and procedures used by the classical constitutional law within the legal instruments of the time. In his proposal, the legislative power was going to be reserved to a *"community public gathering"*, whose name seemingly reminds us of the established order. Though, the mechanism of appointing its members was different from the one that had been used before, and even from the Constitution of 1866, as it was trying to outline the effort to reconcile the different *"states"* and social statutes, as the equality of the *"driturilor ţivile şi politice"* (that is *"political and civil rights"*) was guaranteed.

The legislative power, so envisaged, evokes the modern parliamentarism by the concern to ensure a space of expression, suitable for the will of the *"national representatives"*. It was drafted for the first time the kind of guarantees of which the members of the representative assembly enjoy in their relationship with the executive power. [4] Although a wording containing an archaism *„mădularele adunării"* (that is *"the members of the assembly"*) is used to designate the representatives, the way how, by means of this project, they tried to *"acclimate"* the classical constitutional law principles concerning the parliamentary immunity and inviolability, complies with it. The lexeme *"inviolable"* attached to *"representatives"* marks the distance that Kogalniceanu's project took in comparison to the statutory meetings. [5] In this regard, the nation will speakers needed to enjoy at least minimal protection against criminal abusive prosecution and political chicanery. The transformation that led to the constitutional projects of the Focsani Central

[3] Ioan Stanomir, *Naşterea Constituţiei. Limbaj şi drept în Principate până la 1866*, (Bucharest: Nemira, 2004), 241.
[4] Stanomir, *Naşterea Constituţiei*, 246.
[5] Stanomir, *Naşterea Constituţiei*, 246.

Committee and the State Council can be identified in the document of 1848, which used in a very precise manner constitutional neologisms. [6]

Thus, Kogalniceanu's project was situated at the end of an essential decade for the forming of the constitutional vocabulary in the Romanian Principates, when almost all concepts, which the ruling elite used in the work to drafting the fundamental document of 1866, were received. Hence what might have looked as a work of improvisation was actually a continuing effort to implant modern constitutional elements. However, before the adoption of the Constitution of 1866, the idea of ensuring protection to deputies had been considered in the period before the unification of the Romanian Principates in 1859, when the Annex to the Paris Convention concerning the election provisions on 19 August 1858 was enacted. This document provided a criminal *"immunity"* for every member of the Assembly *"who, while in the parliamentary session, cannot be arrested or prosecuted under criminal matters without the Assembly's authorization, apart from in flagrante delicto cases"*. [7] Since it was only about criminal immunity, this provision covered only a part of the full immunity, because the lack of liability in relation to the votes and political views was not provided.

Given the organizational model of the Romanian Principates following the Paris Convention, at Focsani, a Central Committee was established. The Committee was tasked with preparing all laws of general interest, common to both Principates. [8] Under those powers, the Focsani Central Committee approved, in the meeting on 9/21 October 1859, a draft constitution for the United Principates - Moldavia and Wallachia. Then the draft constitution was submitted for approval to Alexandru Ioan Cuza and included in Article 57, Chapter II "About the General Assembly" provisions which were meant to create protection for deputies, who were to have representation mandates. Thus, it was stated that: *"No member of the Assembly may, at any time, be persecuted, prosecuted or arrested for votes or opinions he expressed in the exercise of his mandate"*. In the meeting on 18 September 1859, while this project was under discussion, Mihai Kogalniceanu requested the removal of

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[6] Article 17 - "*Moldova's representatives shall be inviolable; they can never be denounced, arrested or prosecuted for the opinions they would have revealed within the Assembly.*"
Article 18 - "*Also they cannot be denounced and arrested in criminal cases, unless obvious guilt, without the Assembly's permission.*"

[7] Cristian Ionescu, *Dezvoltarea constituţională a României. Acte şi documente 1741-1991*(Bucharest: Regia Autonomă Monitorul Oficial Publishing House, 1998), 259.

[8] Article 27 - 37 of Paris Convention.

the word *"persecuted"* from the text, due to its uselessness, its meaning was covered by the word *"prosecuted"* [9], but the other members of committee opposed, as they wanted to keep this form[10].

These provisions brought once for all, in the Romanian system, the modernity to the writing technique, which was to be accompanied by the representatives' operating space, sheltered from the executive's interference. Therefore, a parliamentarism, even embryonic, could only be imagined in the presence of the set of immunities which any European constitution, adopted after year 1830, naturally entailed. The correlate of this provision, which was meant to protect the independence of the parliamentarians' views against the executive's interference, was the regulation that would guarantee the removal of the arbitrariness in case of the eventual detention of the representatives. The inviolability, which, however, all European constitutions stipulated, was a recurrent aim in all the other Romanian constitution drafts.

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[9] Protocols of Central Committee, meeting on 18 September 1859, 10.

[10] Article 58 provided that: *"Every deputy is inviolable throughout the parliamentary session. Therefore, during the session, no Member may, under any circumstance, be prosecuted or arrested by any authority, without the formal approval by two-thirds of the Assembly. The prosecution or the arrest of a member of the General Assembly during the session and throughout it is postponed if the Assembly so requires."*

Article 59 provided that: "During the sessions, in case of guilt, the member who made the offense can be arrested; but then, within 24 hours, the authority is obliged to bring the case to the President of the Assembly, and he will immediately convene the Assembly to decide.

To approve the maintaining of the arrest, the Assembly decision is needed, given with the two-thirds majority of its members.

The deputy who, during a session of the Assembly, was arrested under suspicion of guilt, the very day of the meeting of the Assembly, will be given under guard to the President of the Assembly, together with all documents of his arrest and prosecution.

Within three days, the Assembly will vote with two-thirds majority, whether the arrest and prosecution are legal and must be maintained. In a contrary case, the deputy will soon be released and exempt from any prosecution."

In Article 60 the punishment to be imposed to those who violate the immunity of a member of the parliament was provided: *"Those, who violate the inviolability of a deputy, are thought and punished as they violated the national representation Itself"*. For details, see Ionescu, *Romania's Constitutional Development*, page 288. It is noted that, through this article, they wanted to establish the first component of parliamentary immunity - the lack of legal liability for votes and political opinions expressed in the exercise of the parliamentary mandate, which stretched over all actions by a parliamentarian. It should be noted that this proposal intended to cover all aspects of the exercise of the parliamentary mandate, not only those related to activities undertaken within the Assembly.

The Paris Convention of 1858 was amended once again, after the unification of the Principates, because the double election on 5 and 24 January 1859, and then the dissolution of the Focsani Central Committee, in 1862, made that several important articles thereof to be inapplicable. This project was never adopted, mainly because on 30 July / 11 August 1863, Prince Alexandru Ioan Cuza proposed a new draft constitution, which came to complete the Paris Peace Convention and introduce new institutions, including the Senate.

By means of this project, that was to permanently acclimate an institution into the Romanian system, namely the Upper Chamber (the Senate), they wanted to implement the tasks of the Central Committee, which worked as a moderating body, very much alike to a Senate *sui-generis*, that maintained an institutional balance whose survival depended on the establishment of a Superior Chamber, that would takeover its tasks. The designation and operation of the second body gave birth to a dispute between the Prince and the Conservative Party. So, the alternative was focused on the faith in the usefulness of a second Chamber, an elected one, but in accordance with a higher census than the other assemblies. Prince Cuza's option, from which the draft Constitution and the Developer Statute would be born, changed the semantic of the Senate, transforming it from an elected Chamber into an appointed body[11], inspired by the French Constitution of year VIII. This body was due to take over many tasks, including legislative tasks, leaving the Elective Assembly, within this project, deeply limited in its powers. Concerning its members, Article 23 provided that *"a senator shall neither be arrested nor prosecuted in criminal matters, except for red-handed, unless the Senate had authorized otherwise, namely his arrest or prosecution"* [12].

The draft amendment of the *"constitution"* generated both numerous debates, and the opposition of the Ottoman Empire. However it materialized through the adoption of the Addendum to the Convention on 19 August 1858, annexed to the Constantinople Protocol on 16/28 June 1864, which provided that the Parliament of the Principates would be composed of the Senate and of

[11] Stanomir, *Naşterea Constituţiei*, 379.

[12] As it can be seen, the immunity of the members of both chambers of the parliament was to be formed only of the criminal inviolability, without taking into account the freedom of expression in the exercise of their mandate.

the Elective Assembly. Here, the only mention concerning the parliamentary immunity had in view only the inviolability[13].

Under these circumstances, it was approved the Developing Statute of the Paris Convention on 2 July 1864, which provided, in Article 7, that *"the members of the* ponderatrice *assembly enjoy the same inviolability which is ensured to the deputies by Article 36 of the electoral law, here attached"*. This law provided in Article 36, its last article, that *"a member of the Elective Assembly, throughout the parliamentary session, shall not be arrested or prosecuted in criminal matters, except for red-handed* [14]*, only after the Senate would have authorized the prosecution*"[15].

2. PARLIAMENTARY IMMUNITY IN ROMANIA'S FIRST CONSTITUTIONS (1866 - 1938)

After a period of great turbulence - Alexandru Ioan Cuza's abdication, on 11 February 1866, the reign refusal by Philip of Flanders, the reign acceptance by Charles I of Hohenzollern, the acceptance of the Prince by the people and then, on 23 October / 4 November 866, by the Sultan of the Sublime Porte as well – the necessity of adopting a new constitution occurred. Therefore, the State Council drafted in 1866, a draft constitution which included, for the first time in the constitutional history of the country, provisions on parliamentary immunity, with both its forms: lack of legal liability for votes and opinions issued under the exercise of their duties and criminal inviolability [16].

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[13] Article 7, last paragraph of the Addendum to the Convention of 19 August 1858, annexed to the Constantinople Protocol of 16/28 June 1864.

[14] Flagrante delicto.

[15] It can be noticed again that the immunity granted to the members of the two assemblies is still the criminal immunity, as it was taken from the provisions of the previous documents.

[16] These provisions were included in Articles 72, 73 and 74 of the project and they stipulated that: "No Member may, under any circumstance, be prosecuted or arrested for the votes or options he expressed in the exercise of his mandate". Moreover, they stated that: "Throughout the parliamentary session, no member of the assembly will be prosecuted or arrested, without the prior approval of the Assembly, issued with a two-thirds majority of the Assembly. The pursuit, arrest, or coercing of a member of the assembly shall be postponed during the parliamentary session and throughout it, if the Assembly so requires." The Assembly members could be arrested: "only in case of flagrante delicto, but then, within 24 hours, the authority is obliged to notify the case to the President of the Assembly, who shall immediately convene the Assembly to decide. In order to approve the maintenance of the arrest, the decision by the Assembly issued with two-thirds majority is needed."

The Constitution that was adopted on 1 July 1866 [17] provided, in Articles 51 and 52 of Chapter I "About the National Representation", that *"a member of one or the other Assembly can be neither prosecuted nor persecuted for the opinions and votes he expressed during his mandate"* and that he can be, during the parliamentary session *"neither prosecuted, nor arrested, unless the Assembly whose member he is authorizes otherwise, and for red-handed. The detention or prosecution of a member of one or the other Assembly is suspended throughout the session, if the Assembly so requires."* For the first time, a fundamental law made provisions on parliamentary immunity in both its forms, the parlamentarians being thus protected, like other parliamentarians from the other European countries, of any interference in the activity they would carry on. [18] Although the Constitution was amended twice, in 1879 and 1884, the constitutional provisions on immunity remained unchanged. After the War of Independence, Romania's declaring as kingdom, the World War I and the Great Unification of 1918, the need for a new Constitution ocurred - a constitution to meet the requirements of the great Romania, that was completed with its historic provinces. Thus, in 1923, a new Constitution was adopted. This constitution, which amended and supplemented the Constitution of 1866 (as amended in 1879, 1884 and 1917), and was built after the model of the Kingdom of Belgium's Constitution of 25 February 1885, and included, in Articles 54 and 55, provisions on

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According to another provision: "The deputy who, during a session of the Assembly, was arrested under suspicion of guilt, the very day of the meeting of the Assembly, will be given under guard to the President of the Assembly, together with all documents of his arrest and prosecution. Within three days, the Assembly will vote with two-thirds majority, whether the arrest and prosecution are legal and must be maintained. In a contrary case, the deputy will soon be released and exempt from any prosecution."

[17] It was enacted and published in the Official Gazette on 1 July 1866.

[18] In the literature of the time it was considered that: "These parliamentary immunities were admitted so that the deputy and senator can perform its duty which must ensure the cult of the general interest, under his conscience. If the representative of the nation could be legally responsible for the words he pronounces in the Assembly, the freedom of action would be restricted. He would hesitate every time whether to talk or not on a certain issue in Parliament. Fearing not to not be misinterpreted before the courts, he would not freely tell what he believes in his intimate conscience. So if a Deputy or Senator was arrested and prosecuted like any other citizen, he would be distracted from fulfilling his tasks. The executive power would have a very easy way to remove the opposition members who cause troubles." Constantin Dissescu, *Drept constituţional*, 3rd edition, (Bucharest, Librăria SOCEC & Co., Ltd. Co., 1915), 701. See also Paul Negulescu and George Alexianu, *Curs de drept constituţional*, Tome I, (Bucharest, Casa Şcoalelor, 1942), 537 - 539.

parliamentary immunity. These provisions were mainly taken from the previous Constitution; including the faulty drafting of the text was taken. Thus, in the wordinge "a member of one or the other Assembly can be neither prosecuted nor persecuted", the word *"persecuted"* is used [19] thus repeating unnecessarily the idea already expressed by the word "prosecuted". [20] A tautology was generated by an incorrect translation of the Belgian Constitution of 1831, which, in Article 44, provided „*aucun membre de l'une ou de l'autre chambre ne peut être poursuivi ou recherché à l'occasion des opinions et votes émis par lui dans l'exercice de ses fonctions*".

As provided by Article 54 of the Constitution of 1923, the parliamentary irresponsibility was the deputies and senators' right not to be prosecuted by courts for the votes they expressed in the exercise of their mandate. *It was fully justified and no one refuted it, and it did not lead to any difficulties in practice.* [21]

Though, by this regulation, the irresponsibility for the views which a member of parliament expressed in the exercise of his mandate, had some difficulties of interpretation, particularly due to the large area it covered, and its existence was heavily criticized. However, there were a variety of cases where members of parliament were prosecuted for certain views they expressed from the parliament's rostrum. [22]

But these criticisms were told that the lack of liability for the votes and views they expressed in the exercise of their mandate was not established for the exclusive use of the parliamentarians, but for the benefit of the parliament, which could not fulfill its mission if its members were subject to various

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[19] "The expression of our Constituent is not happy. The prohibition to be prosecuted is well understood, but there is no point or, at least, it appears today the prohibition to be persecuted. What is this prohibition? And how to implement it? It is only due to a mistranslation from the Belgian Constitution." See George Alexianu, *Curs de drept constituţional*, Tome III, (Bucharest, Casa Şcoalelor, 1934), 213, note 1.

[20] Constantin Angelescu, "Iresponsabilitatea membrilor adunărilor legiuitoare", *Public Law Magazine*, Year X, no. 1 - 4 (1935), 106.

[21] Constantin Angelescu, "Iresponsabilitatea membrilor adunărilor legiuitoare", *Public Law Magazine*, Year X, no. 1 - 4 (1935), page 107.

[22] Article 54 provisions generated many discussions at that time, as they were seen as having a quite broad meaning, creating an *outrageous* privilege by putting under its umbrella of any opinions expressed by a parliamentarian in the exercise of his duties, even if they would have been obvious crimes, which if they had been issued by another person this person would have been sent to courts. Whatever the crimes committed in this way, the representative of the nation enjoys complete impunity, as he can neither be convicted nor even prosecuted.

"vexations" and were deprived of independence. There was also a mechanism that opposed the deputies and senators' excesses, even if they disobeyed criminal law. The internal regulations of the Chambers stipulated disciplinary actions, even though they were too mild and ineffective. It should be mentioned that the lack of liability for the views the parliamentarians expressed in the exercise of their mandate expanded not only on what it was said from the parliament's rostrum, but also on what it was expressed in writing [23] (if, of course, it was about an act that was part of the exercise of their mandate) and on the gestures that they would have made during parliamentary debates. The parliamentarians enjoyed immunity not only for the views they expressed in the public meetings of the House and Senate, but also for the views they expressed in sections, in standing or special committees, as well as in investigation committees, even if all these were working in a different place from the assembly.

The immunity mandated by Article 54 opposed to criminal proceedings against the members of parliament for eventual crimes, committed by uttering opinions in the above mentioned situations, and, in case such an action was brought, the deputy or senator was acquitted and even relieved from paying civil penalties. Moreover, the parliamentarian could not give it up, and the courts had to consider it, even if it was not claimed, and had to judge under Article 54 of the Constitution, so as to acquit the defendant and dismiss the action.

The parliamentary irresponsibility was not limited in time, it existed after the mandate termination, and the parliamentarians were not responsible for the opinions uttered in the Chamber in which they were included throughout their mandate. Though parliamentary immunity did not cover the following: the views which a member of the Parliament expressed in the articles published in newspapers, since working as a journalist was not part of the exercise of their mandate, the speeches a member of the Parliament made in public meetings with voters, the manifestos addressed to voters, or publishing brochures with the speeches in Parliament, because all these were not documents or publications related to the exercise of the parliamentary mandate.

The criticisms on the extended immunity took into consideration *"some abuses that resulted in... results extremely harmful for the democratic regime.*

[23] It is about parliamentary reports, statements of reasons of the draft laws, made from the parliamentarians' initiative.

Protected by parliamentary irresponsibility, a deputy could gain small revenge without risking serious trouble. From the rostrum of the Parliament, he can utter the most heinous slander, under the certainty of impunity".[24] Furthermore, suppression was even asked in relation to parliamentary immunity provided that some precautions were taken to prevent problems which such a solution might cause, especially because the law protects all citizens alike against the excesses of those temporarily holding the state leadership. [25] Being considered a safeguard against legal actions, even though they were justified, rather than a weapon for defense of members of Parliament against the dangers to which they would have been exposed by the Executive, it was requested to restrict the scope of the irresponsibility by granting the right to sue a member of the parliament, with approval of the Chamber of which he was part.

Since the adoption of a new Constitution in 1938 [26], following the pressure by King Carol II, the provisions on parliamentary immunity, with small changes of expression, were maintained. [27] These provisions had a very short life, as they were suspended, together with the Constitution in 1940. By 1944, as the Romanian political life went through a turbulent time, the Parliament did not function anymore, and it was dissolved by the king.

After 23 August 1944, when King Michael I decreed that Romania withdrew from the alliance with Germany and joined the Allies, the 1923

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[24] Angelescu, " Iresponsabilitatea membrilor adunărilor legiuitoare ", 122.

[25] Angelescu, " Iresponsabilitatea membrilor adunărilor legiuitoare ", 124 - 25.

[26] By High Royal Decree no. 900 on 20 February 1938, published in the Official Gazette, Part I, no. 42 on 20 February 1938, King Charles II decreed the new Constitution of the Kingdom of Romania, deciding to send it to the Romanian people "to properly know and accept it". In the same edition of the Official Gazette, they published the Proclamation of King Charles II to Romania, on 20 February 1938 by which he briefly presents the contents of the new Constitution and the High Royal Decree no. 901 on 20 February 1938, through which the Romanian people was called on 24 February 1938 to decide by referendum both on the Constitution decreed by the King, and Royal High Decree no. 902 on 20 February 1938, by means of which five members of the Commission to count the result of the referendum were appointed.

[27] Thus, Article 56 of the Constituţie stipulated that: "A member of one or the other Assembly cannot be prosecuted for the opinions and votes he expressed during his mandate", and article 57 stipulated that: A member of one or the other Assembly cannot, during the parliamentary session, "either be prosecuted or arrested for criminal guilt, unless the Assembly whose member he is authorizes otherwise, and for red-handed. The detention or prosecution of a member of one or the other Assembly is suspended throughout the session, if the Assembly so requires."

Constitution was partially put back in force. It was subsequently amended, and remained in force until 1948, when a new constitution was adopted. It also adopted Decree no. 2218/15 July 1946 [28] on the exercise of the legislative power, which stipulated that the legislative power should be exercised jointly by the King and the National Representation, organized into a single body - the Assembly of Deputies. By this decree, the constitutional provisions of 1923, providing an extensive parliamentary immunity, were compressed into a single article and resumed. [29]

3. REGULATION OF DEPUTIES' IMMUNITY IN THE CONSTITUTIONS OF COMMUNIST ORIGIN

The Constitution of 1948 was adopted after the abdication of King Michael I, on 30 December 1947, and it proclaimed the republican form of government, which the Council of Ministers adopted in its meeting on 30 December 1947, [30] when the Provisional Presidium of the People's Republic of Romania was established. By law no. 32/1948, the Assembly of Deputies was dissolved and regulations were introduced on convening the National Grand Assembly and the shift of the legislative power to the Government. [31]. By this law, the National Grand Assembly was convened on 28 March 1948, and it adopted the 1948 Constitution.

In the Constitution, the parliamentary immunity was mandated by art. 59 but, as we can see from the text, it did not extend to the votes and opinions expressed during the mandate, but it only has the component of criminal inviolability. [32] According to this regulation, it was considered that the members of the parliament were sufficiently protected against any interferences, without the need to use the powers given by lack of liability for votes and political opinions within the parliamentary activities. Thus, it was

[28] Published in the Official Gazette, Part I, no. 161, on 15 July 1946.
[29] Article 14 of Decree no. 2218/15 July 1946 on the exercise of the legislative power.
[30] Ionescu, *Dezvoltarea constituţională a României. Acte şi documente 1741-1991*, 757 – 761.
[31] Published in the Official Gazette, Part I, no. 46, on 25 February 1948.
[32] Thus, this article stated that "No deputy may be detained, arrested or prosecuted without the National Grand Assembly of the People's Republic of Romania, during parliamentary sessions or the Presidium of the National Grand Assembly of the People's Republic of Romania, between sessions for all criminal offenses, except for the cases of flagrante delicto, when the approval of the National Grand Assembly of the People's Republic of Romania or of the Presidium of the National Grand Assembly of the People's Republic of Romania will be immediately asked."

resumed an old thesis, which argued that it would not be necessary to establish such rights for parliamentarians, who were protected against arrests and judge by the courts because of the need to obtain a prior authorization from the National Grand Assembly or its Presidium.

The period that followed in Romania's history was marked by radical changes in the Romanian society, which led to the adoption of a new Constitution in 1952. Article 34 of the 1952 Constitution included provisions on the immunity of the members of the National Grand Assembly, which had been narrowed even more than in previous legislation. [33] We can see that there was no mention on red-handed crimes, the way to tackle these cases being left at the mercy of the authorities. Also, no distinction between criminal, civil and other cases was made. This situation was dealt by the adoption of the 1965 Constitution [34] when, in Article 61, the old regulation was taken over partially, but clear statements were made about the criminal nature of the detention, arrest and prosecution and about red-handed crimes.[35] Here it is noted that, in case of flagrant offenses, a deputy could be arrested, even without informing the National Grand Assembly. Then the National Grand Assembly had only to give its consent on the arrest and prosecution. The 1965 Constitution included these provisions in Article 61, at the same

[33] Thus, "No deputy of the National Grand Assembly can be prosecuted or arrested without the consent of the Grand National Assembly during the parliamentary sessions, and between sessions – of the Presidium of the National Grand Assembly".

[34] The Constitution was adopted by the National Grand Assembly in its meeting on 21 August 1965, after taking into consideration the draft project published on 29 June 1965 by the Committee for Drafting the Constitution, by the unanimous vote of the 446 deputies which were participating in the meeting, and this situation was certified by the President of the National Great Assembly, Stefan Voitec. It was promulgated on 21 August 1965 under the signature by the President of the State Council, Chivu Stoica, and then published in the Official Gazette of the Socialis Republic of Romania, no. 1 on 21 August 1965. The Constitution came into force upon adoption, i.e. on 21 August 1965, and it expressly repealed, at the same date, the Constitution of 1952. In its initial version, it was made up of 114 articles included into 9 titles, but it was amended on numerous occasions, which led to its republication in the Official Gazette of 22/20 February 1968, 34/16 March 1969, 44/4 May 1972, 56/8 April 1974, 167/27 December 1974, 65/29 October 1986. At its last republishing, the Constitution had 121 articles grouped within 9 titles. The Constitution was repealed totally and expressly on 8 December 1991 through Constitution of 1991.

[35] Thus: " No deputy of the National Grand Assembly can be detained, prosecuted or sued to criminal courts without prior approval bythe National Grand Assembly during the session, and between the sessions of the State Council. Only in case of red-headed, the deputy may be detained without this approval."

time it maintained, under the communist tradition, the protection of the deputies only against measures taken too "fast" by the state authorities. According to them, the bodies had to ask permission to National Grand Assembly during the parliamentary session and the State Council – outside the parliamentary session. The deputies could be detained without the consent of those bodies only in case of flagrant offense. To maintain the arrest and then the prosecution, the required consent had to be obtained.

CONCLUSIONS

The Parliament, as the people's representative body, emerged at the same time with the first forms of protection for the parliamentary mandate. The necessity of establishing protection instruments for parliamentary mandate was due to the role that Parliament plays in society. These means of protection (even if they were initially called privileges) only allowed the parliamentarians to fulfill the mission for which they were elected by the citizens, to dedicate themselves to their mandates, and to work in the interest of those who designated them.

The parliamentary immunity is a tradition in the Romanian parliamentarism. The protection of the parliamentary mandate was a permanent concern for the Constitution maker. The protection of the parliamentary mandate had different meanings according to each historical moment. While, during the inter-war period, this instrument of parliamentary protection allowed the Representatives of the Nation to exercise their mandates both without fear for outside pressure, and also in accordance with the interests of the people, in socialism, its content was restricted, and unfortunately, the protection no longer had in view the political opinions and political votes of elected officials.

After the events in 1989, the parliamentary immunity regained all the capacities of a concept whose history began with the Magna Charta Libertatum.

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*** The 1866 Constitution of Romania

*** The 1923 Constitution of Romania

*** The 1938 Constitution of Romania

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*** The 1952 Constitution of Romania

*** The 1965 Constitution of Romania

NORMATIVE CONTENTS OF CONSTITUTION

Marius ANDREESCU*

Abstract

The modification of the fundamental law of a state represents a very special political and juridical act with major significances and implications in the political social system as in the state's one, but also at each individual level. That's why such an approach needs to be well justified, to answer to some juridical and political social needs well defined, but mainly to correspond to the principles and rules specific to a constitutional and state's democratic system providing to the state the stability and functionality it needs.

In this study we analyze the necessity of such a constitutional reform in Romania, and also some provisions from the report of the Presidential Commission for the analysis of the political and constitutional regime in our country. We formulate our opinions in relation to the justifying some constitutional regulations. In this context, we consider that there are arguments for the maintaining of the bicameral parliamentary system and an eventual revising of the fundamental law needs to consider the measures needed to guarantee the political and constitutional institutions specific to the lawful state.

Keywords: *Revising of the Constitution / limits of the constitutional revising / bicameral system/ power excess/ guaranteeing of the fundamental liberties /constitutional norms*

I. Stability and constitutional innovation

One of the most controversial and important juridical problems is represented by the relationship between the stability and innovation in law. The stability of the juridical norms is undoubtedly a necessity for the predictability of the conduct of the law topics, for the security and good functioning of the economical and juridical relationships and also to give substance to the principles of supremacy of law and constitution.

On the other hand it is necessary to adapt the juridical norm and in general the law to the social and economical phenomenon that succeed with such rapidity. Also the internal juridical norm must answer to the standards imposed by the international juridical norms in a world in which the 'globalization" and "integration" become more conspicuous and with consequences far more important in the juridical plan also. It is

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necessary that permanently the law maker be concerned to eliminate in everything that it is "obsolete in law", all that do not correspond to the realities.

The report between stability and innovation in law constitutes a complex and difficult problem that needs to be approached with full attention having into consideration a wide range of factors that can determine a position favorable or unfavourable to legislative modification[1] .

One of the criterions that help in solving this problem is the principle of proportionality. Between the juridical norm, the work of interpretation and its applying, and on the other hand the social reality in all its phenomenal complexity must be realized with an adequate report, in other words the law must be a factor of stability and dynamism of the state and society, to correspond to the scope to satisfy in the best way the requirements of the public interest but also to allow and guarantee to the individual the possibility of a free and predictable character, to accomplish oneself within the social context. Therefore, the law included in its normative dimension in order to be sustainable and to represent a factor of stability, but also of progress, must be adequate to the social realities and also to the scopes for which a juridical norm is adapted, or according to the case to be interpreted and applied. This is not a new observation. Many centuries ago Solon being asked to elaborate a constitution he asked the leaders of his city the question:" Tell me for how long and for which people" then later, the same wise philosopher asserted that he didn't give to the city a constitution perfect but rather one that was adequate to the time and place.

The relationship between stability and innovation has a special importance when the question is to keep or to modify a constitution because the constitution is the political and juridical foundation of a state[2] based on which is being structured the state and society's entire structure.

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[1] Victor Duculescu and Georgeta Duculescu, *Revizuirea Constituţiei*, (Bucharest: Lumina Lex, 2002), 12.

[2] Ion Deleanu, *Drept constituțional și instituții politice*, (Bucharest: Europa Nova, 1996, vol. I), 260.

On the essence of a constitution depends its stability in time because only thus will be ensured in a great extent the stability of the entire normative system of a state, the certitude and predictability of the law topics' conduct, but also for ensuring the juridical, political stability of the social system, on the whole. [3]

The stability is a prerequisite for the guaranteeing of the principle for the supremacy of constitution and its implications. On this meaning, professor Ioan Muraru asserts that the supremacy of constitution represents not only a strictly juridical category but a *political-juridical* one revealing that the fundamental law is the result of the economical, political, social and juridical realities. "It marks (defines, outlines) a historical stage in the life of a country, it sanctions the victories and gives expression and political-juridical stability to the realities and perspectives of the historical stages in which it has been adopted" [4].

In order to provide the stability of the constitution, varied technical modalities for guaranteeing a certain degree of rigidity of the fundamental law, have been used, out of which we enumerate: a) the establishing of some special conditions for exercising of an initiative to revise the constitution, such as the limiting of the topics that may have such an initiative, the constitutionality control ex officio upon the initiative for the constitution's revising; b) the interdiction of contitution's revising by the usual legislative assemblies or otherwise said by the recognition of the competence for the constitution's revising only in favour of a Constituent assembly c) the establishing of a special procedure for debating and adopting of the revising initiative; d) the necessity to solve the revising by referendum; e) the establishing of some material limits for the revising, specially by establishing of some constitutional regulations that cannot be subjected to the revising [5].

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[3] Elena-Simina Tănăsescu, *Constituția României. Comentariu pe articole*, coordinators I. Muraru and E.S. Tănăsescu, (Bucharest: All Back, 2008), 1467-1469.

[4] Ioan Muraru and Simina- Elena Tănăsescu, *Drept constituțional și instituții politice,* XI th edition, (Bucharest: All Back, 2003), 80.

[5] For the development see: Muraru and Tănăsescu, *Drept constituțional și instituții politice,* 80; Tudor Drăganu, *Drept constituțional și instituții politice. Tratat elementar, Vol I* (Bucharest: Lumina Lex,1998), 45-47; Marius Andreescu and Florina Mitrofan, *Drept constituțional. Teoria generală*, (Pitești:Publishing House of Pitești University,

On the other hand a constitution is not and cannot be eternal or immutable. Yet from the very appearance of the constitutional phenomenon, the fundamental laws were conceived as subjected to the changes imposed inevitably with the passing of time and dynamics of state, economical, political and social realities. This idea was consecrated by the French Constitution on 1971 according to which "A people has always the right to review, to reform and modify its Constitution, and in the contemporary period included the "International Pact with regard to the economical, social and cultural rights" as well as the one regarding the civil and political rights adopted by U.N.O. in 1966 - item 1 - is stipulating:"All nations have the right to dispose of themselves. By virtue of that right they freely determine their legal status.

The renowned professor Constantin G. Rarincescu stated on this meaning:" A constitution yet is meant to regulate in future for a longer or a shorter time period, the political life of a nation, is not destined to be immobile, or perpetuum eternal, but on the other hand a constitution in the passing of time can show its imperfections, and no human work is being perfect, imperfections to whose some modifications are being imposed, on the other side a constitution needs to be in trend with the social necessities and with the new political concepts, that can change more frequently within a state or a society". [6] Underlying the same idea the professor Tudor Drăganu stated: "The constitution cannot be conceived as a perennial monument destined to outstand to the viccisitudes of the centuries, not even to the ones of the decades. Like all other juridical regulations, the constitution reflects the economical, social and political conditions existing in a society at a certain time of history and aims for creating the organizational structures and forms the most adequate to its later development. The human society is in a continuous changing. What it is valid today tomorrow can become superannuated. On the other side, one of the characteristics of the juridical regulations consists in the fact that they prefigure certain routes meant for chanelling the society's development in one or another direction. These directions as well as the modalities to accomplish the targeted scopes may prove to be,

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2006), 43-44; Duculescu and Duculescu, *Revizuirea Constituţiei*, (Bucharest: Lumina Lex, 2002), 28-47; Deleanu, *Drept constituțional și instituții politice*, 275-78.

[6] Constantin G. Rarincescu, *Curs de drept constituțional* (Bucharest, 1940), 203.

in their confronting with the realities, inadequate. Exactly for this very reason, the constitutions as all other regulations, cannot remain immutable but must adapt to the social dynamics"[7].

In the light of those considerents we appreciate that relationship between the stability and the constitutional revising needs to be interpreted and solved by the requirements of principle of proportionality[8]. The fundamental law is viable as long as it is adequated to the realities of the state and to a certain society at a determined historical time. Much more – states professor Ioan Muraru – "a constitution is viable and efficient if it achieves the balance between the citizens (society) and the public authorities (state) on one side, then between the public authorities and certainly between the citizens. Important is also that the constitutional regulations realize that the public authorities are in the service of citizens, ensuring the individual's protection against the state's arbitrary attacks contrary to one's liberties"[9].In situations in which such a report of proportionality no longer exists, due to the imperfections of the constitution or due to the inadequacy of the constitutional regulations to the new state and social realities, it appears the juridical and political necessity for constitutional revising.

Nevertheless in the relationships between the stability and constitutional revising, unlike the general relationship stability – innovation in law the two terms have the same logical and juridical value. It is about a contrariety relationship (and not a contradiction one) in which the constitution's stability is the dominant term. This situation is justified by the fact that the stability is a requirement essential for the guaranteeing of the principle of constitution supremacy with all its consequences. Only through the primacy of the stability against the constitution's revising initiative one can exercise its role to provide the stability, equilibrium and dynamics of the social system's components, of the stronger and stronger assertion of the principles of the lawful state. The supremacy of the constitution bestowed by its stability represents a

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[7] Drăganu, *Drept constituțional și instituții politice,* 45-47.

[8] For development see Marius Andreescu, *Principiul proporționalității în dreptul constituțional*, (Bucharest: CH Beck,2007).

[9] Ioan Muraru, *Protecția constituțională a libertății de opinie*, (Bucharest:Lumina Lex, 1999), 17.

guarantee against the arbitrary and discretionary power of the state's authorities, by the pre-established and predictable constitutional rules that regulate the organization, functioning and tasks of the state authorities. That's why before putting the problem of constitution's revising, important is that the state's authorities achieve the interpretation and correct applying of the constitutional normative dispositions in their letter and spirit. The work of interpretation of the constitutional texts done by the constitutional courts of law but also by the other authorities of the state with the respecting of the competences granted by the law, is likely to reveal the meanings and significances of the principles for regulating the Constitution and thus to contribute to the process for the suitability of these norms to the social, political and state reality whose dynamics need not be neglected. The justification of the interpretation is to be found in the necessity to apply a general constitutional text to a situation in fact which in factum is a concrete one"[10].

The decision to trigger the procedure for revising a country's Constitution is undoubtedly a political one, but at the same time it needs to be juridically fundamented and to correspond to a historical need, of the social system stately organized from the perspective of its later evolution. Therefore, the act for revising the fundamental law needs not be subordinated to the political interests of the moment, no matter how nice they will be presented, but in the social general interest, well defined and possible to be juridically expressed. Professor Antonie Iorgovan specifies on full grounds:" in the matter of Constitution's revising, we dare say that where there is a normal political life, proof is given of restraining prudence, the imperfections of the texts when confronting with life, with later realities, are corrected by the interpretations of the Constitutional Courts, respectively throughout the parliamentary usance and customs, for which reason in the Western literature one does not speak only about the Constitution, but about the block of constitutionality" [11].

The answer to the question if in this historical moment is justified the triggering of the political and juridical procedures for the modifying

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[10] Ioan Muraru et. All, *Interpretarea Constituției*, (Bucharest: Lumina Lex, 2002), 14.
[11] Antonie Iorgovan, "Revizuirea Constituției și Bicameralism", *Public Law Journal* (no. 1/2001), 23.

of the fundamental law of Romania can be stressed out in respect with the reasons and purpose targeted. The revising of Constitution cannot have as finality the satisfying of the political interests of the persons holding the power for a moment, in the direction of reinforcing of the discretionary power of the Executive, with the inacceptable consequence of harming certain democratical constitutional values and principles, mainly of the political and institutional pluralism, of the principle of separation of powers in the state, of the principle of legislative supremacy of the Parliament.

On the other hand, such as the two decades lasting history of democratical life in Romania has shown, by the decisions taken for many times, were distorted the constitutional principles and rules by the interpretations contrary to the democratical spirit of the fundamental law, or worse, they didn't observe the constitutional dispositions because of the political purposes and their support in some conjunctural interests. The consequences were and are obvious: the restraining or violation of some fundamental rights and liberties, generating some political tensions, the nonobservance of the constitutional role of the state's institution, in a single word, due to political actions, some dressed in juridical clothes, contrary to the constitutionalism that needs to characterize the lawfull state in Romania. In such conditions, an eventual approach of the revising of the fundamental law should be centered on the need to strengthen and enhance the constitutional guarantees for respecting the requirements and values of the lawfull state, in order to avoid the power excess specific to the politician subordinated exclusively to a group interests, many time conjunctural and contrary to the Romanian people, which in accordance to Constituion item 2 paragraph (1) of the one who is the holder of the national sovereignity.

In our opinion, the preoccupation of the political class and state's authorities in the current period, in relation to the actual contents of the fundamental law, should be oriented not so for the modification of the Constitution, but especially into the direction of interpreting and correct applying and towards the respecting of the democratical finality of the constitutional institutions. In order to strengthen the lawfull state in Romania, it is necessary that the political formations, mostly those that hold the power, all authorities of the state to act or to exercise its duties within the limits of a *loyal constitutional behavior* that involve the

respecting of the meaning and demoratical significances of the Constitution.

Currently, the political and juridical reality in Romania is confronting with an extensive political approach for the revising of the fundamental Law, substantied throughout the results of the referendum organized on 2009 having as objective the reducing of the number of parliamentarians and with the passing to a unicameral parliamentary system, in the "Report of the Presidential Commission for the Analysis of the Political and Constitutional regime in Romania" [12] that was published on April 28th 2010, the initiative of the President of Romania for revising the fundamental law at the Government proposal and the decision no. 799/17.06.2011 of the Constitutional Court targeting the law draft for Romania's Constitution revising[13].

This is up to now the only political initiative that has been materialized in a legislative draft for revising the fundamental law that was submitted to the Parliament. In the present social and political context other proposals, ideas for the modifying of the Constitution are being expoxed by the governing ones yet without being materialized in a new legislative initiative.

Our scientific approach has into consideration, from a critical perspective, mostly the political initiative for the Constitution revising that has already the form of a legislative project, though it is not on the Parliament 's roll for debating. We wish at the same time to underline few important themes which in our opinion need a more serious consideration, included in regard to the normative contents of the Constitution. In this epoch of political class' intense preoccupations for the modifying of the fundamental law it is important to reflect in the light of the political exigencies of the constitutional law, upon the normative content of the Constitution. The establishing based on some scientific criterions to what exactely needs to contain the fundamental law of a state, is essential to avoid that throughout political enthusiasm be ignored the basic aspects regarding the specific of the normative contents of the Constitution that explains thus last one's supremacy.

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[12] Published by C.H. Beck Publishing House, Bucharest, 2009.
[13] M.Of. no. 440/23.06.2011.

The proposals for the Constitution's revising have as an obvious finality the passing of Romania's constitution system from bicameral to unicameral and the strengthening of the executive power, mostly of the presidential institution.

The doctrine in specialty underlines the fact that in the unitary states, such as Romania, both the unicameral system, as the bicameral system have advantages and disadvantages [14]. There is no ideal constitutional solution on this meaning. Important is the fact that the Parliament's structure which the Constitution consecrates be adequate to the social, political and economical realities of a country, be functional and to integrate harmoniously within the system of authorities of the state with the observance of the principle of constitutional democracy principles and of the lawfull state. Nevertheless, prestigious authors such as professor Herbert Schambeck remark the importance of the parliamentary system: "From the second chamber of this type, it is expected to emanate *auctoritas*, which in a specific way grants personal fame, in plus to *potestas* or the political power. The second Chamber or the superior chamber has always existed in the area of tensions between the tradition inherited and the present political reality. It represents a part of the basic constitutional organization and a political reality of the state"[15].

Coming back to the essence of the problem, besides other authors[16] , we appreciate that in Romania, the bicameralism is adequate to the state and social system at this historical moment, corresponding better to the necessity to achieve not only the efficiency of the parliamentary legislative procedures but also the "norming ponderation" and quality of the legislative act. The bicameralism is a necessity for Romania because the Parliament represents a valid counterpondering

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[14] For development see Ioan Muraru and Mihai Constantinescu, *Drept parlamentar românesc*, (Bucharest: All Beck, 2005), 72-79.

[15] Herbert Schambeck, „Reflections on the Importance of the Bicameral Parliamentary System", *Public Law Review* (no. 1/2010), 3.

[16] Ioan Muraru and Mihai Constantinescu, *Drept parlamentar*, 2-37; Iorgovan, "Revizuirea Constituției, 3-7; Florian Vasilescu, „Questions about Bicameralism", *Romanian Public Law Review* (no. 3/2010), 28-51; Ioan Alexandru, ,"Reflections regarding the bicameralism and asymmetry of the distribution of competences", *Public Law Review* (no.. 3/2010), 51-60.

against the Executive, in the context of the exigencies and balance of the powers in a democratic state. With good reason the regretted professor Antonie Iorgovan underlined: " It would have been a very high political risk, in that post revolutionary tension, that in Romania to have designed a unicameral Parliament and such a risk exists still at present, considering that one cannot speak about a political life settled on natural pathes of the democratical doctrines accepted in Occident (the social-democratic doctrine, the democratic-Christian doctrine, liberal doctrines and ecologist doctrines)"[17]. The unicameralism in a semi-presidential constitutional system such as the one of Romania, in which the powers of the head of the state and in general those of the Executive are significant, having into consideration the excesive politicianism of the moment, would have as a consequence the severe deterioration of the institutional balance between the Legislative and Executive, with consequence the increase of the discretionary power of the Executive and the minimizing of the role of Parliament as a supreme representative organism of the Romanian people, as a unique law maker authority of the country, such as the provisions of item 61 paragraph (1) of the Constitution foresee.

The transition to a unicameral Parliament needs not be treated simplistic such as unfortunately comes out from the contents of the Law draft regarding the revising of Constitution elaborated by the Government, it rather needs a general modification of the Romanian constitutional system, a reconfiguring of the role and duties of the state authorities so that the balance between the Legislative and Executive be maintained and not create the possibility of an evolution towards an exaggerated preponderance of the institution of the head of the state in respect to the Parliament.

We underline the fact that all states with a unitary structure of Europe that have a unicameral Parliament have at the same time a constitutional system of parliamentary type in which the duties of the head of the state regarding the governing are being reduced. We do not wish to do a thorough analysis of this constitutional problem, we stress only the conclusion that the unicameralism may have be political and constitutionally justified in Romania and adequate to the democracy values in a lawfull state only if the legitimacy and the role of Romania's

[17] Iorgovan, Revizuirea Constituției, 18-19.

President as a constitutional institution, will be fundamentally be changed. The election of the President needs to be by the Parliament. At the same time in case of a unicameral structure of the Parliament it is necessary to reduce significantly the responsibilities of the President in respect to the Executive and the governing ones. In such a reconfiguring of the institutions of the state needs to be increased the role and duties of the Constitutional Court and those of the Justice, these ones being guarantees of the supremacy of the law and Constitution and for avoiding the power excess coming from the other authorities of the state. In one word, in our opinion the unicameralism cannot be associated in Romania other than with the existence of a constitutional system of parliamentary type.

The legislative proposal for the Constitution revising is of a nature to create a disproportion between the Parliament and Executive by the fact that the unicameral structure of the Parliament does not represent a guarantee sufficient to make an efficient counterponderance in respect to the Executive, mainly as the responsabilities of the President are obviously enhanced. The dispute between unicameralism and bicameralism with applying to the conditions of Romania is well characterized by the regretted professor Antonie Iorgovan: „...any bicameral or unicameral parliamentary system can lead into severe disfunctionalities such as professor Tudor Drăganu states, no matter how successful may be the constitutional solutions, if in the parliamentary practice evidence is given of politicianism, demagogy and lack of responsibility”[18].

Does the present Parliamentary system of Romania correspond to the exigencies of the democratic traditions of bicameralism and is it really adequate to the fulfilling of the role and functions of the Parliament? Professor Tudor Drăganu, in a flawless argumenting logic, in an extensive study answered to this question:”The revised Constitution establishes a system that claims to be bicameral but it functions currently like a unicameral system, condemned being to violate by certain of its aspect the most elementary principles of the parliamentary regime and which contains in itself the danger of producing in future of severe

[18] Iorgovan, ”Revizuirea Constituției, 16.

disfunctionalities in accomplishing the legislative activity"[19].The illustrious professor had into consideration that the law for the Constitution's revising does not contain references with regard to the number of deputies and senators it sets the matter of legitimacy of substance of the two chambers, because their members are appointed by the same election body and by the same type of system and election ballot; the responsibilities of the chambers in legislative matter are not sufficiently well differentiated; the exercising of the right to the legislative initiative of the senators and deputies, such as regulated, generates constitutional contradictions.

Together with other authors[20], we state that in the perspective of a future constitutional revising, to regulate the differentiation between the two chambers also by special types of representation. The law compared offers sufficient examples of this kind (Spain, Italy, France) and even the election law of Romania on March 27th 1926 offers a landmark on this meaning. The Senate may represent the interests of the local collectivities. Thus, the senators may be elected from an electoral college made of the local councils' chosen members. Interesting to underline is the fact that in the Constitution draft on 1991 the Senate was designed as a representant of the local collectivities, grouped on the country's counties and Bucharest municipality.

It is reasonable the critic of Professor Tudor Drăganu according to which the current constitutional regulation does not achieve a functional differentiation between the two chambers. This aspect was also noticed by the Constitutional Court that, referring to the parliamentary legislative procedure introduced in the draft for the Constitution revising, stressed: "The examining in cascade of the law drafts, in a chamber in the first lecture, and in the other one in the second lecture transforms the bicameral Parliament in a unicameral one"[21]. Therefore a new initiative for the modification of the fundamental law should have into consideration this aspect also and should achieve a real functional differentiation of the two chambers.

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[19] Tudor Drăganu, "Few critical remarks about the bicameral system established by the Law for Constitution's revising adopted by the Deputies Chamber and in the Senate", *Public Law Review* (no. 4/2003), 55-66.
[20] Dan Claudiu. Dănişor, quotted works, 23-24.
[21] Decision no. 148/16.04.2003 (M.Of. no. 317/12.05.2003).

II. Brief Considerations regarding the normative contents of the Constitution

The Constitution is a law, but in the same time through it juridical force and its contents it distinguishes itself from any other laws. At the same time, the supremacy of the fundamental law grants to this one the quality of a main formal spring for all other law branches. Consequently, there are specific features of the normative contents of the Constitution in respect to the other normative acts, included compared to the existing codes. The normative specific of the Constitution makes an important criterion for explaining scientifically this one's supremacy and the structurant role of the fundamental law, not only by the system of law but also for the entire social, political and economical system of a state. Thus such as it is mentioned in the literature in specialty, the supremacy of the Constitution is a quality of the last one expressed throughout the supreme juridical force but also through its normative contents. As a first observation we specify that the norms forming the content of a constitution have the features of the constitutional law which I analyzed above. This observation is not enough to determine the normative content of the fundamental law because the sphere of the constitutional law norms is wider, including other formal sources specific to this branch of law.

The constitutional contemporary reality that is stressing also the diversity of the normative content removes the idea of general uniform standards valid for the contemporary constitutions. In this regard it is enough to remember that there are some states and constitutions whose provisions are inspired by the religious precepts. The diversity in the normative content is a consequence of the fact that the fundamental law of a state is determined in view of the aspect of the content of the social, political and economical realities, by the characters and attributes of the respective state historically expressed and in the same time by the will of the constituent law maker, in essence the political will, at a certain historical moment.

Besides other authors, we consider that the scientifical definition of the constitution is the main criterion for the identifying of the normative content. Such a criterion provides the generality necessary to give a scientific character to the scientific elaborations in the matter and at the same time it explains the existence of the differences between the fundamental laws of the contemporary states. The space allocated to this

study, does not allow an extensive analysis of the definitions proposed in the literature in speciality. For the purpose of this scientific approach we bear in mind the essence of any attempt to define the fundamental law, namely "The constitution is the political and juridical fundamental foundation of any state"[22].

In juridical acceptation, the fundamental law is the act through which it is determined the statute of the power and at the same time all the juridical rules, having as regulating objective the establishment of exercising and maintaining of the power, as well as the regulation of the basis of the power, of the bases for power organizing. The juridical concept on the constitution can be expressed in two different meanings, respectively in the material meaning and in the formal one.

In the "material" acceptation, the constitution contains all the law rules, no matter of their nature and form, having as regulating objective the organizing and functioning of state power, the relations between the state's organs and society. Therefore they are part of the constitution body not only the so called constitutional regulations but also the norms contained in the ordinary laws and normative acts of the executive powers if through these are being regulated the social relations specific to state power. In such a conception has preeminence the regulating objective of the constitutional norm and not its form of expression. The theory above stated was accepted by the Constitutional Council of France which elaborated the concept of "the constitutionality block".

In the formal acceptation, the constitution is all the law rules, no matter of their regulating objective, elaborated in a form different from other normative acts, by a state authority namely established (the constituent assembly) following a specific procedure, derogatory from the usual legislative procedure. This way of defining the constitution starts from the correct idea that a certain "procedure" defines a juridical form or a normative category. Consequemtly the categories of normative acts can be differentiated by the adopting procedures.

Analyzed separately, the formal acceptation and respectively the material one cannot be a criterion enough to identify the normative content of the fundamental law. The accepting of the formal criterion has as a consequence the fact that the law fundamental may regulate any kind

[22] Deleanu, *Drept constituțional și instituții politice*, 88.

of social relations, no matter of their importance or regulating objective. [23] The material criterion is also unilateral because it excludes the procedural elements, necessary for a scientific characterization of the fundamental law.

The scientific approach regarding the identifying of the normative content of the constitution needs to have into consideration cumulated both the formal acceptation as the material one to which adds the political dimension to which we referred to above. Therefore, we consider that three critera can be identified in view to establish the normative contents of a constitution:

A. The establishing of the normative content of the constitution is fulfilled depending on the specific, importance and value of the regulated social relations. We concur to the opinion stated by the literature in speciality according to which, unlike other normative act categories, the norms contained in the constitution must regulate the fundamental social relations that are essential for the establishment, maintaining and exercising of the power, but also those referring to the bases of the power, respectively the power organizing bases. There are three such categories of social relations, that can form the regulating objective of the norms contained in the constitution that allow their identification such as follows:

-The constitutional norms, some having values of principle, having a determining role in the establishing and functioning of the governing organs and in the establishing of the form of the state, respectively of its characters and attributes;

- the norms for the consecration and guaranteeing of the fundamental righs and liberties and those that regulate the citizens' fundamental duties;

- constitutional dispositions that have no direct connection with the governing process and regulate the bases for power organizing (sovereignity, territory, population) and the bases of the power (economy, social and cultural aspects etc)

B. The form for adopting the constitution or of the constitutional laws have a solemn character and are achieved according to a procedure

[23] For example the Switzerland Constitution , by item. 25 bis establishes rules for cattle cutting.

derogatory from the usual legislative procedure and by a state authority specially established or by the Parliament, that acts as a constituent power and not as a usual legislative power;

C. The significance of the constitution as a fundamental poitical document determines the concrete content of some constitutional regulations, expressing the will of the legislator constituted at the historical time for adopting or as the case may be, for the revising of the fundamental law. The political dimension of the constitution evokes the complex and multiple characters of its exterior determinations, respectively the historical particularities of the society organized at state level, the development degree and corresponding to the political will of the constituent legislator.

It is important to underline the constitutional dynamism. The fundamental law is a dynamic and opened act, in a continuous crystallization process. The constitutionality status is achieved in a continuous and complex process for interpreting and applying by state's authorities of the texts contained in the body of the constitution. A special role in this wide process of interpretation and concrete fulfilling of the constitutional provisions is in the charge of the constitutional authorities. The activity for interpreting the fundamental law texts is justified because in the normative content of the constitution there are categories and concepts whose sphere cannot be defined by the constituent law maker. Thus, the constitutional norms cannot and must not offer definitions. For example in Romania's constitution there are such concepts that are defining by interpretation way and have formed the objective of analysis of the Constitutional Court: " spirit of tolerance and mutual respect" (item 29, paragraph 3); "identity" (item 30, paragraph 3); "private life" (item 30, paragraph 6), " the principles of the lawfull state" (item 48 paragraph 2); "public utility" (item 44, paragraph 3); "public and moral proportionality" (item 116, paragraph 4).

The interpreting and applying of the constitutional norms involve what in the literature in speciality is called the "loyal constitutional behavior", namely the authorities of the state have the obligation in the work of interpreting of the constitutional text to respect the spirit and mainly the finality of the juridical norm. That's why the work for interpreting and applying of the fundamental law is not legitimate if by such an activity the finality aimed consists in fulfilling the supporting interests of political nature. The juristprudential interpreting of the

constitutional text can reveal new constitutional norms. For example, the jurisprudential interpretation of the Constitutional Court underlined a new fundamental law that has no express formulation in the Constitution, respectively "the right to one's image".The normative contents of the constitution must be understood and determined with having into consideration the teleological criterion emphasized in the above stated definition. Namely the fundamental law's structuring role for the entire social, political and state system, guarantor of the fundamental rights and liberties.Noticing a political and juridical reality yet present, G. Bourdeau stated:" The written constitution is the work of the theoreticiens preoccupied more by the elegance and juridical balance of the mechanism they construct, than by its political efficiency [24]" Such a finding, we consider valid also for the Constitution, respectively the contemporary Romanian constitutionalism.

The fair determination of the normative contents of a constitution is expressed by its political and juridical efficiency. The fundamental law must achieve the social dynamic balance but also the stability and institutional harmony, the efficient guaranteeing of the fundamental rights, in essence the requirements of a real constitutional democracy based on the values of the state, of the institutional and social balance and of the proportionality[25]. Ion Deleanu noticed very well that: "the success of the constitution and constitutionalism is always a political one as far as it is the result of a transaction, of a relationship between what the constitution offers in a formalizing and objectiving term of the political matters and what the political actors ask or search for at a certain time in order to fulfill their own objectives. [26]

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THE REFERENCE FOR A PRELIMINARY RULING BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION – PROCEDURE AND EFFECTS

Iulia BOGHIRNEA[1]

Abstract:

In this article we aim to continue the study of an instrument for a uniform interpretation and application of the European Union law, namely the procedure of references for a preliminary ruling submitted before the Court of Justice of the European Union. This procedure has as purpose the issuance of a preliminary ruling for the clarification of a matter of law at the notification of a court of a Member State, the interpretation being mandatory for all courts of all Member States

Key- words: *reference for a preliminary ruling, unitary interpretation of the EU's law, unitary application of the EU's law, Court of Justice of the European Union, national courts*

INTRODUCTION

This preliminary procedure, synthetically, has three stages:

a) The national judge, ascertaining that an European norm is incident in a litigation subjected to his judgment notifies the CJEU with a reference for a preliminary ruling on a matter of principle of the Union's law;

b) The CJEU shall decide upon the prejudicial matter by a ruling;

c) The national court shall reinitiate the trial being compelled to apply the preliminary ruling of the CJEU.

This mechanism has the role to prevent a divergent jurisprudence within the Union, using the "procedure of the reference for a preliminary ruling" by the Court of Justice of the European Union[2], knowing the fact that all Member States' national courts must comply with a preliminary ruling of the CJEU.

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[2] The procedure being the European model for the mechanism of the preliminary ruling for solving a matter of law by the High Court of Cassation and Justice, the mechanism has the role to insure a unitary legal practice and also an internal legal order.

1. The referring courts

The CJEU cannot, ex officio, assume the task of interpreting the European law[3].

Art 4 Para 3 of the TEU states that: "*Based on the principle of loyal cooperation, the Union and its Member States respect and help each other in fulfilling the missions stated by the Treaties. Member States shall adopt any general and special mission to insure the fulfilment of the obligations resulting from the Treaties or from the acts of the Union's institutions*", corroborated with Art 19 Para 1 2nd thesis, stating that "*Member States shall establish the means of appeal necessary to insure an effective jurisdictional protection in the areas stated by the Union's law*", from whose interpretation it results the obligation of the national courts of Member States to apply the communitarian law based on the general obligation for loyal cooperation.

From the official translation of the TFEU, art 267 uses the collocations "*courts of a Member State*", "*national courts*" or "*tribunals of Member States*" regarding the referring courts for the notification of the CJEU for a preliminary ruling. But, all these have received an extensive interpretation from the CJEU, confirmed by its jurisprudence, with a wider connotation, namely that as "jurisdictional organs", considering different criteria[4]: that organ must be recognized by the law, must be permanent, its competence be mandatory, the procedure must have a contradictory nature, to apply rules of law and be independent, the latter criterion being essential[5].

Thus, the referring court may be a jurisdictional organ of an EU's Member State[6].

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[3] R. Schütze, *Dreptul constituţional al Uniunii Europene* (Bucharest: Editura Universitară, 2013), 287.

[4]Case file C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH c. Bundesbaugesellschaft Berlin mbH* [1997] ECR I-4961; Case files C-9 and C-118/97 *Jokela and Pitkaranta* [1998] ECR I-6267; Case file C-407/98 *Abrahamsson and Andrerson v. Fogelqvist* [2000] ECR I- 5539; Case file C-195/1/98 *Österreicher Gewerkschaftsbund, Gewerkschaft Offentlilicher Dienst v. Austria* [2000] ECR I-1097; Case file C-53/03 *Syfait v. GlaxoSmithKline plc* [2005] ECR I-4609; Case file 246/80 *C. Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR I-2311. See also Paul Craig and Grainne de Burca, *Dreptul Uniunii Europene*, 4th Ed., (Bucharest: Hamangiu, 2009), 581.

[5] Case file C-210/06, *Cartesio Oktato es Szolgaltato bt*, Rep. [2008], ECR I-9641.

[6] According to the CJEU, the arbitral courts are not national courts, not being entitled to notify it with a prejudicial matter. Cauza 102/81 *Nordsee Deutsche Hochseefischerei*

Art 267 Para 2 of the TFEU states that *any court of a Member State, from any level of the national legal hierarchy and in any phase of his procedure, may address* the Court of Justice of the European Union a request for a preliminary ruling regarding the interpretation of the European law, in cases subjected within his competence[7], cases in which is incident the application of the communitarian law. But Art 267 of the TFEU differentiates between these courts which have the possibility to submit to the Court requests for preliminary rulings (in the cases above mentioned) and courts which "are compelled" to submit the Court requests for preliminary rulings (Art 267 Para 3 TFEU). In this latter case, the text states an obligation "if such matter is invoked in a pending case in front of a national court *whose decisions are not subjected to any means of appeal in the national law*, this court *has the obligation to notify the Court*".

Thus, only the judge[8] from a Member State, in a pending case in which he must apply European norms[9], shall be able to consider, in relation to the circumstance of the litigation subjected to judgment, the need to submit a request for interpretation of its provisions for the issuance of a preliminary ruling by the CJEU, the clarification of the European norms by the Court being useful in solving the pending case.

2. Suspending the litigation in front of the national court

The solution of suspending the litigation in front of the national court is not expressly stated by Art 267 TFEU but, it can be implied from

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GmbH c. Reederei Mond Hochseefischerei Nordstern AG and Co. KG [1982], ECR 1095. For more decisions see S. Deleanu *et al., Curtea de Justiție Europeană. Hotărâri commentate* (Bucharest: Wolters Kluwer, 2007), 158 and next.

[7] Case file 106/77 *Amministrazione delle Finanze dello Stato/Simmenthal*, ECR [1978] "A national court summoned within the limits of its competence, to apply provisions of the communitarian law (A/N: European), is compelled to apply those provisions […]

[8] The parties of the national litigation are not entitled to address the CJEU because, on the contrary, this would have as effect the limitation of the national court's independence, and on the other hand, Art 267 TFEU would remain without content. See also, T. Ştefan and B. Andreşan-Grigoriu, *Drept comunitar* (Bucharest: C.H. Beck, 2007), 266.

[9] Almost the majority of the European norms are directly and with priority applicable. G. Fabian, *Drept instituțional al Uniunii Europene* (Bucharest: Hamangiu, 2012), 405.

the text because the national court cannot solve the litigation in the absence of the CJEU's preliminary ruling[10].

Art 23 of the Statute of the Court of Justice of the European Union[11] states that "for the cases stated by Art 267 TFEU, the decision *of the national court, who suspends its procedures* and notifies the Court of Justice, is submitted to the Court by the referring national court […]".

Also the new Code of Civil Procedure offers provisions in this regard. According to Art 412 Para 1 Pct. 7 of the Romanian Code of Civil Procedure, the trial of the case files shall be suspended de jure if […] the court submits a request for a preliminary ruling to the Court of Justice of the European Union, according to the provisions of the treaties founding the European Union.

Regarding the suspending decision, for the suspension of the litigation, the court shall issue a hearing report which can be appealed, separately, at the court hierarchically superior. When the suspension was ordered by the High Court of Cassation and Justice, the decision is permanent. The appeal can be submitted for as long as the suspension lasts, both against the hearing report which order it, as well as against the hearing report which ordered the denial of the request for putting back on docket of the litigation (Art 414 Para 1-2 of the Romanian Code of Civil Procedure).

The literature shows that this procedure, by formulating and submitting a preliminary request to the CJEU does not transfer the litigation to the latter one, the national court preserving its competence to adopt any means of procedure, including the possibility of withdrawing the preliminary request "even without a reasoning in this regard"[12].

Art 415 of the Romanian Code of Civil Procedure states that the trial of the pending case is resumed after the issuance of the preliminary ruling by the Court of Justice of the European Union.

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[10] Ion Deleanu, "Dialogul judecătorilor – forme şi implicaţii ale dialogului judecătorilor", *Romanian Jurisprudence Magazine* 1 (2012): 40.
[11] Consolidated version.
[12] Deleanu, *Dialogul judecătorilor...*, 40.

3. The content of the request for a preliminary ruling

Art 94 of the Rules of Procedure of the Court of Justice emphasizes the fact that "beside the text of the questions submitted to the Court with a preliminary feature, the preliminary decision must include:

a) a summary exposure of the litigation's object, as well as of the pertinent facts, as they have been ascertained by the referring court, or at least an exposure of the factual circumstances on which the questions are based on;

b) the content of the national provisions which could be applied in this case and, if necessary, the pertinent national jurisprudence;

c) the exposure of the reasons which have determined the referring court to have doubts regarding the interpretation or validity of certain European law provisions, as well as the connection established by the referring court between these provisions and the national litigation applicable for the main litigation".

4. The procedure in front of the CJEU

The procedure of preliminary rulings[13] is stated by Art 105-114 of the Rules of Procedure of the CJEU, being divided onto two parts: a written and an oral one.

After the Court's Registrar shall register the case file, the Court's President shall appoint a judge to act as rapporteur regarding that case.

4.1. The written procedure

The decision of the national court is submitted to the Court of Justice by that national court, according to Art 23 Para 1-4 from the Statute of the CJEU. After that, the decision is sent by the Court's Registrar: to the parties in the litigation, to Member States and the European Commission as well as to the institution, the organ, office or agency of the Union which has adopted the act whose validity or interpretation is contested.

Within 2 months from the date of the latest notification, the parties, the Member States, the European Commission and, if necessary, the institution, organ, office or agency of the Union which adopted the

[13] CJEU has created a guidebook for the national courts in which are briefly described and the issues related to this procedure. See the information note regarding the references for a preliminary ruling submitted by the national courts, No 2011/C 160/1 (OJEU C 160/28 May 2011).

act whose interpretation or validity is contested, have the right to file to the Court statements in intervention or written observations.

For the cases mentioned by Art 267 TFEU, the national court's decision, by the care of the Court's Registrar, shall be notified to the States parties to the Agreement on the European Economic Area, other than the Member States, as well as to the European Free Trade Association (EFTA)[14] mentioned by the Agreement, which, in the case in which one of the areas of the agreement is aimed, *may submit to the Court statements in intervention or written observations*, within 2 months from receiving the notification.

4.2. The oral procedure

After concluding the written procedure, the judge-rapporteur shall make a report containing: the factual and de jure situation, the previous jurisprudence, proposals for the administration of certain evidences, proposals for the trial of the case file in plenum or in chamber, matters which shall be established in an administrative hearing. During the same hearing, the president of the CJEU shall establish also the first term for hearing, term at which the judge-rapporteur shall deliver his report for the hearing concluded based on all information he received[15].

One copy of this report for the hearing shall be sent to all participants, for them to be able to express their opinions regarding the solving of the litigation by the CJEU.

The oral procedure reproduces the opinions of all participants and is concluded with the *final request* or the *final conclusions* delivered by the Advocate-General, by which he proposes a solution for solving the prejudicial matter.

The CJEU shall decide with the vote of its majority, in a public hearing.

5. The effects of the CJEU's preliminary ruling

Art 91 of the Rules of Procedure of the CJEU states that "the decision is mandatory from the date of its issuance", being common with the text interpreted as long as the Court shall not modify its interpretation.

[14] EFTA – European Free Trade Association.

[15] Gyula Fabian, *Drept instituțional al Uniunii Europene* (Bucharest: Hamangiu, 2012), 425.

In the Official Journal of the EU shall be published a notice stating the date and the operative part of the judgment (Art 92 of the Rules of Procedure of the CJEU), the judgment *in extenso* and the Advocate-General's conclusions shall be published in the annual report of the CJEU.

The decision of the Court of Justice, having the force of res interpretata, is mandatory for the court who submitted the request for a preliminary ruling (even if it was not in the situation of being forced to notify the CJEU according to Art 267 Para 3 TFEU), the latter one resuming the suspended litigation after the issuance of the CJEU's ruling.

Also, the decision is binding for the courts called to decide in the same cause, if the parties follow the legal means of appeal. The non-compliance with the CJEU's ruling shall be sanctioned in accordance with the Treaties.

Furthermore, the decision of the Court shall be imposed for all Member State's courts which shall be compelled to apply it in the litigations for which is incident the text interpreted by the Court[16].

CONCLUSION

As a conclusion, the preliminary ruling of the CJEU is first of all mandatory for the referring court, compelling it to consider it in solving the main litigation. Subsequently, this decision shall have the "*force of res interpretata*"[17] or even of "*res judicata*"[18], all courts of Member States who have to solve a similar litigation, in which are found the same matters of law solved by a preliminary ruling by the Court of Justice, being compelled to consider it.

The role of this procedure is to insure a unitary interpretation of the communitarian law and filling in the gaps, the Court having an exclusive competence to deliver an authentic interpretation of the Treaties' provisions and of the acts derived from them.

Some principles and basic concepts of it have been created by the jurisprudence of the Court, which also has a quasi-normative function[19].

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[16] Mircea Duţu and Andrei Duţu, *Dreptul contenciosului European* (Bucharest: Universul Juridic, 2012), 156.

[17] Case file 28-20/62, CJCE, Da Costa [1963], Rec.59.

[18] Case file 69/85, CJCE, Wunsche, [1968], Rec. 947.

[19] Lavinia-Mihaela Vladilă, Constanta Matusescu and Steluta Ionescu, *Jurisdicţii Internaţionale si Europene* (Bucharest: ProUniveristaria, 2014), 258- 307.

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CULTURAL ASPECTS RELATED TO ROMANIAN PUBLIC ADMINISTRATION REFORM IN THE CONTEXT OF INTEGREATION IN EUROPEAN UNION

Liviu RADU[1]

Abstract:

After the integration in European Union it was expected that the performances of Romanian public administration will increase getting closer to those of older members of European Union. After seven years the reality proves to be different. Romanian administration is lacking efficiency and effectiveness, the quality of public services is poor. Also the infrastructure is in a very bad shape. Corruption is also at a very high level. I consider that the causes are mainly cultural. We were accepted in a political union in which public administration is based on professionalism, political neutrality and the rule of law. This is the result of centuries of evolution of the Western administrative systems. Unfortunately our history shaped a different pattern. Our public administration is lacking professionalism, the political influence in policy processes is extremely high and informal rules and relations prevail. After the revolution Romania lost ten years without adopting important reform measures. The pace of reform accelerated after the starting of the negotiation for accession in EU but slow down almost immediately after. This proves the fact that the commitment of the Romanian political class and public administration toward reforms is low. As a solution I propose further involvement of European Commission in stimulating the reform process in Romania.

Key- words: *state-making, bureaucracy, legislation, public administration, European integration, public administration reform.*

INTRODUCTION

Even if not favored by historians public administration was one of the most important elements for the development of human societies. Every important state that existed throughout history had a complex and well organized public administration. This was the case of ancient Egypt, Mesopotamia or China. But the modern administrations have very few connections with the ancient ones. Modern administrative system developed in geographical area of Western Europe, being in the same time the most important tool in state-making process. Western European

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countries crossed a long process of evolution from the feudal kingdoms to the modern states and this process was parallel with the development of a legislative and administrative system.

Due to its history Romania didn't have the chance to build consolidated legislation and public administration. This led to a gap between Romanian administration and the administration from the other members of the European Union. Evidences show that Romanian political class and public administration are not capable to reduce this gap. Very few reforms were adopted before the starting of the negotiation with European Union and very few reforms were adopted after accession. The problem I consider to be of cultural nature: a difference between the Western formalistic culture and the culture based on informal relations that exist in Romania.

Arnold J.Toynbee is describing in his "Study of History" the "ordeal" that human groups had to undertake about 6000 B.C. due to severe climate change. The movement of the "rain belt" to north created severe living conditions in once friendly environments. Some of the human groups affected by this climate change decided to move in the valleys of some large rivers (Nile, Tigris, Euphrates or the Yellow River). There they met harsh environments which they transformed creating comfortable living conditions[2]. But Toynbee is only mentioning some "creative personalities" that are considered "pioneers" by the other members of the group and accepted as leaders. Or it is obvious that such massive projects (irrigation systems and barrages could not have been created without a complex, professional bureaucracy. In case of Egypt, historical evidences are proving the existence of an elaborated administrative system from the very beginning of the statehood: "It is therefore, not surprising that administration seems to appear in Egypt at the same time with writing and the territorial state[3]. At the beginning of the Fourth Dynasty (2613 BC – 2494 BC – Wikipedia) Egyptian administration resembled much of the characteristics of a modern

[2] Arnold J. Toynbee, *A Study of History (*Oxford: University Press, 1987): 48-49; L. Radu, *Relatiile politico-administrative (*Cluj-Napoca: Accent, 2011) 182-183.

[3] Eva-Maria, *The Organization of a Nascent State: Egipt until the Beggining of the Fourth Dinasty,* in Garcia, Carlos Moreno (editor), *Ancient Egyptial Administrationm* (Leiden: Kroninklijke Brill NV, 2013) 19.

administrative system: "...the reconstructed branches of authority are: the royal palace, the temples and the huge central administration that was divided into different agencies: the executive and judicial branch, the branch of works and expeditions, the archives, the treasury, the granary and the provincial administration" (idem.). Farazmand is supporting the same idea related to the Persian administration: "Bureaucracy of the Persian Empire was a formidable institution of administration and government, and it was both efficient and effective". The institutions developed by the ancient Persians influenced the Roman administration and were also the model for all the empires that functioned on the territories once controlled by the Achaemenid Persian Empire, including the Ottoman Empire[4].

In Rome, the reforms of Octavius Augustus started to create a sound administrative system. The administrations of the city of Rome, of Italy and of the provinces were placed to a large extent under the control of the emperor. The Senate, representing the people resembled a certain degree of power, especially in provinces (provinces were divided in imperial and senatorial ones)[5]. But the Roman political life was extremely agitated. Skilled political leaders were followed by weak or even mentally disabled Emperors. As a consequence, the Roman Empire was not able to develop a long lasting functional administrative system.

The evolution of modern European Administrative Systems

Although the administrations of the ancient empires may represent a source of knowledge, the connection with the modern, Weberian type of administration is weak. We may agree with Farazmand that the Achaemenid Persian model of administration was a very advanced one but the reality is that none of the empires that were inspired by it lasted for long periods of time. One good example is the Ottoman Empire that successfully fought against the European states until the seventeenth century but was ultimately defeated due to the gap between the performances of European and Turkish administrations. I will present

[4] Ali Farazmand, *Learning from Ancient Persia. Administration of the Persian Achaemenid World-State Empire,* in Farazmand, Ali (editor), *Handbook of Comparative and Development Public Administration*, Marcel Dekker, 2001, 33-44.
[5] William C. Morey, *Outlines of Roman History (*Chicago: American Book Company, 1901) 36-38.

below a brief summary of the evolution of the Western European administrative systems that are the core model for any modern public administration.

In 476 the Western Roman Empire officially disappeared from the political map of the world. According to Guizot, two social structures survived: the cities extremely feeble at that moment ("...the municipalities were one heritage that was left by the Roman civilization to modern Europe, very weakened, very rudimentary, but real..."p.49); the second one was the church. Being well organized the church took over a part of the tasks formerly belonging to state and probably saved the Western world from dissolution absorbing also the barbarians who gradually advanced on the former territories of the Roman empire.

But the barbarians brought in Europe other two social structures: the royalty and the nobility. Between these four social actor and centers of power a fight for primacy in some cases or survival in other started. The church wanted to preserve the power achieved after the falling of the Roman Empire. On the other hand, the new monarchs claimed the power for themselves. The nobility wanted also power, or to preserve their freedom. In this sense we may state that the feudal contracts are at the origin of democratic regimes. These contracts provide duties for the subjects, but also limitation for the actions that lords (kings) may undertake against them. In these sense, *Magna Carta Libertatum*, the document king John without Country was forced to sign in 1215 was a feudal contract signed between the king and the ensemble of its noble subjects. Many other documents of this type were issued in that period as a reflection of "the right to resistance to abuses of the monarchs" claimed by the nobles[6]. *S*ometimes nobility tried to take control over cities or villages or to reduce their rights. Cities wanted autonomy or even independence or sometimes cities needed protection. In these cases cities may appealed to kings. Anyway as many historical sources are proving, it was a chaotic and violent society very close to Hobbsian "natural condition of mankind". The task of introducing order in these societies was slowly taken over by monarchy. It was a process that lasted several centuries and was the basis for the modern states. The first feudal kingdoms were not, according to Strayer states conform to our modern

[6] M. Bloch, *Societatea feudală. Clasele şi cârmuirea oamenilor. The feudal society. The classes and the government of people* (Cluj-Napoca: Dacia, 1998) 186-187.

understanding: "...were ephemeral in time and space ... the loyalty of the subjects addressed to person of the king...and the king mission was to solve emergency situation such as leading his people to war" (Srtayer, 1982, p.13). Slowly the kingdoms became more stable in terms of geographical borders and leadership and started to develop a system of rules backed by an administrative system that gradually transform them in the ancestors of the modern states. "Royalty became in the eye of the people, obtaining their support, the owner and protector of the public order, of general justice and common interest, as a general magistrate and a center and connecting point of the society.... This is the contribution of the regality to the great achievement of the modern European societies: the reduction of the four social actors mentioned above to two: the government and the country (the people)[7].

The process of creation of a unique center of power, represented by the monarchy was supported by a category of population that can be labeled as middle class. This social categories composed by the church, small nobles, the population of the cities and a part of the peasantry preferred stability and peace to the turmoil of the feudal system and were at the origin of its elimination. "Between 1100 and 1500 the European system of states crossed a period of transformations that, taken all together are the equivalent of a slow revolution....New ideas became mature in the minds of medieval people....in the XIIth century the social forces in favor of stability became sufficiently strong to block the disruptive ones...A good government meant, in medieval times, a strong monarchy pursuing the public good. Although it may seem strange, these social categories accepted authoritarian regimes in the form of hereditary monarchies" (Davis, 39-42).

From ideological point of view, probably the most important representative of these ideas was Niccollo Machiavelli. His famous book, *The Prince*, was a manual and a manifesto addressed to de Medici family asking and teaching them to realize the unification of Italy[8]. At that time Italy was suffering from the numerous conflicts that resulted either

[7] Guizot, Francois, *Istoria civilizatiei in Europa. The History of Civilization in Europe* (Bucharest: Humanitas, 2000) 168.

[8] N. Machiavelli, *The Prince*, (Indianapolis: Hackett Publishing Companny, 2008) 373-383.

between Italian states or by intervention of foreign troops. The creation of a unified state was seen by Machiavelli as a mean to ensure the peace inside the country and to resist to foreign invaders. His model was France which at that moment was a unified country in which an absolute monarch was able to impose its authority and ensure the peace and safety of the people. The transformation of the feudal kingdoms in absolute monarchies produced a number of important changes: "Authority was vested in the monarch; resources were secured for support the monarchy; the monarchy promoted mercantilism as state policy for controlling social and economic activity; governmental administration was expanded and centralized"[9].

The process of construction of unified monarchies in Western Europe is also described by Max Weber, the author of the famous *Ideal Bureaucratic Model,* the first articulated theory of bureaucracy. He called this process: *The Rutinization of Charisma* or in other terms the translation from charismatic to legal-rational authority. I will try to present briefly the theory of Max Weber. He identified three forms of authority or forms of domination. Authority is for Weber *the accepted power.* In other words, in the case of the first form, *the traditional authority,* we voluntarily obey rules (traditions) or rulers because so did our ancestors. The second form of authority is the *charismatic* one. In this case we are loyal to leaders with exceptional qualities (Jesus Christ and Mohamed were the examples offered by Weber to sustain the idea that this type of authority was the most significant in human history). And the third form, characteristic to modern societies is *the legal-rational*: we are obeying the laws because rationally we are aware about the advantages that result from their existence. According to Weber, traditional societies (tribes) evolved in charismatic ones as leaders with exceptional skills were able to conquer new territories and populations. At the beginning these leaders were ruling the new states based on their personal decisions. But as the size of the country increased this was no longer feasible. Another problem was the continuity of the new regime. The solution was the development of a legislative system that will replace the personal decisions of the monarchs with written rules. For the

[9] F. Heady, *Public Administration . A comparative Perspective* (Boca Raton, CRC Press, Taylor&Francis Group, 2001) 177.

implementation of these rules a body of professional clerks was needed. If we are looking at the history of many of the Western European countries we may observe this process of slow development of a legislative framework and in parallel the development of an administrative system which is now known as Weberian bureaucracy. This is characterized by written rules, professional clerks, hierarchy, written documents and the separation between public and private sphere. According to Weber this type of bureaucracy was the most important tool in modernizing Western European states, as important as the machines were in the process of economic development. Wherever were implemented they ensured efficiency, effectiveness and predictability for the political leadership[10]. By 1800 such systems existed in Hapsburg Empire, in France, Prussia and some of the Nordic Countries, but the system that inspired Weber was the German (Prussian) one. The Weberian model is considered very useful for study purposes, but is also criticized for a number of reasons. This subject extends the topic of this paper.

The creation of the state was different for each Western European country and it was not always accompanied with the development of a centralized administrative system. In the early stages of evolution (1200 – 1500) specialists identified two different state-making patterns. First, the single-state pattern characterized by the early unification of the state (Raadschelders, 204). It is the case of England, after the Normand conquest, France during the XV century and Spain after the completion of *Reconquista (*the liberation of the country from the Arab domination that was completed in 1492). Differentiation should be also made between these three countries. England is considered a unitary state without centrifugal tendencies inside. The central government was not facing "segregation movements" and for this reason did not develop administrative structures similar with the French ones, to control the country. On the other hands France is labeled as a mosaic state (Strayer apud Raadschelders, p. 204). Some of the kingdoms large provinces (like Burgundy) enjoyed large autonomy and tried to obtain independence or

[10] Weber, Max, *Economy and Society* (San Francisco: University of California Press, 1978); Weber, Max (text selected by S.N. Eisenstadt), *On charisma and institution building, (*Chicago: The University of Chicago Press, 1968).

even to take over the rest of the country. The French monarchy was forced to develop an administrative system, among other reasons, to take control over these provinces. It was not until late XV century when we can speak about a unified French state[11]. Spain had a different specificity its administration being dominated by the Catholic Church.

The second pattern is the German one "characterized by splintering of a regnum (the territory governed by a king) into many states, like happened in Germany and Italy[12]. The development of administrative systems started separately in each of the component states and the unification of the entire state was accomplished only in late XIX century.

Different administrative pattern may be also found in the second stage (1500 – 1780). England kept its "centralized-decentralized) model in which local authorities were enjoying a great level of autonomy related to their own affairs but a strong loyalty towards the central government (the monarchy). This was possible partly due to their specific geographical position which not required important military efforts for its defense. For centuries England pursued a policy of "European equilibrium", trying to avoid that one of the continental European countries will become too strong in relation with the others. A real hierarchical administrative system was not developed until the second part of XIX century after the Northcote-Trevelyan report. But even after this report which recommended a number of reforms in the British administrative system that will lead to a higher level of bureaucratization this will never be comparable with Germany or France.

On the other hand, continental states like France or Hapsburg Empire were in competition in what Hall and Ikenberry named the "European multipolar state system"(pp. 71-74). Almost continuous conflicts required intensive military efforts and an administrative system to support these efforts. While the two great powers compete for hegemony in Europe, a small country raise almost unnoticed to became one of the greatest powers in the world. Due to the wise leadership of King Friedrich Wilhelm the first (nicknamed "the King Sargent" Prussia

[11] Nicholas David, *The Evolution of Medieval World. Society, Government and Thought 312-1500* (New York: Routledge, 2014), 459.
[12] Jos C.N. Raadschelders, *Handbook of Administrative History (*New Brunswick: Transaction Publishers, 1998), 204.

became one of the leading European countries, the heart of the future Germany. What is important to point out is that, unlike England which kept its loose form of administrative organization, continental European countries developed, during XVII and XVIII centuries, fairly sophisticated hierarchical administrative systems. Such structures could be observed in France, Hapsburg Empire, Prussia or Sweden.

The French Revolution and the Napoleonic wars placed a supplementary pressure on development of European administrations. Important administrative reforms were adopted in France (1800 – 1808) with the creation of the prefecture system. After the defeat in the war with France, Prussia also changed its General Administrative Code. Also a defeat in the war with Russia, in 1810, determined Sweden to adopt important changes in its administrative settings. Details about these evolutions are extending the topic of the present paper and will be included in a future paper.

In conclusion, in the evolution of the Western European administrative systems after 1500 two major patterns can be identified. England kept its decentralized administration with an emphasis on self-government. On the other hand, continental countries developed hierarchical, centralized administrations, with two major tasks: administer and control large territories and provide resources for almost continuous European wars. One more observation should be made. The French administration was exclusively a creation of the monarchy. After 1800 it was the will of Napoleon which shaped the administrative system of France and this royal/imperial flavor is present to this days. Although legislation is important in French administration the role of president as leader of French administration is noticible. In case of Prussia and German space in general an important contribution came from the administrative system itself (Radu, 2014, 91-92).

The case of United States

The American administration has deep roots in the English administrative traditions[13]. Notably, the American revolutionary did not intend at the beginning of their protest to separate from their home

[13] John Carrol, *Root to Branches. Tracing the Foundations of American Public Administration in Medieval England,* in Farazmand, Ali (editor), *Handbook of Comparative and Development Public Administration* (Marcel Dekker, 2001), 103-116.

country. Only the escalations of the events lead to this outcome. Anyway, being former English colonies, at the formation of the American federation the administrative structure of the new created country resembled to a large extent the administration of the former fatherland. One important debate in the period of the creation of US was related to the type of the administration the new country should adopt. A part of the *Founding Fathers* represented by Alexander Hamilton expressed the opinion that the future Federation should adopt a strong, hierarchical type of administration (The Federalist, 199-203). But the new republic was a result of a revolt against the central authority of the king of England. As a result, the entire American history was dominated by the fear of a strong government. During the drafting of the Constitution this concern was expressed, among others, by James Madison. He sustained that the power of the state should be restricted and the administrative matters should be left as much as possible in the hands of ordinary citizens or of the local communities (The Federalist, 317-324). Madison's opinion prevailed and for almost a century the American public administration was extremely loosely organized. Also it was lacking of professionalism because the conception was that every political leader should have loyal clerks as collaborators so every political change was followed by changes in the administrative ranks. This type of public administration was suitable as long as the American society was not very well developed, with small and isolated cities that had only minor administrative problems to be solved. But after the civil war United States entered in a period of rapid development. The primitive administration inherited from the *Founding Fathers* could no longer cope with ever increasing social demands. A reform was needed and in 1883 the Pendleton Act established a Weberian type of administration at federal level. In the next years the so called *merit system* (recruitment and promotion by merit was extended at state and local level. But as in the case of the British administration, the American one never reached the level of bureaucratization of Germany or France.

The case of Eastern Europe

The history of Eastern and some Central European states was significantly different from the western ones. Some of them, like Hungary or Poland reached at a high level of development at a certain moment of their history but at some point (Hungary, 1541 and Poland

1795) disappeared from the political map of Europe. Hungary was defeated by the Ottoman Empire and Poland was divided between Hapsburg Empire, Russian Empire and Prussia. We will discuss below the situation of the Romanian states. One motive for this evil fate was the absence of the hereditary monarchy. For this reason the two countries suffered many wars for succession and very often kings of foreign origin manage to get to the throne. In other cases the countries were divided between more sovereigns. These conflicts weakened the two countries and led to their conquest by other states. Their statehood was reestablished only in 1918. By the contrary the principal of heredity ensured in Western monarchies smooth successions in the vast majority of the cases. Even the protestant Henri IV was accepted in catholic Paris after he accepted the catholic faith (Davies, 383 – 391).

Romanian public administration

In the feudal period the actual territory of Romania was divided in three different parts. Transylvania was under the domination of the Hungarian kingdom until 1541 when, after the disappearance of Hungary became independent. After the Karlowitz peace treaty it became a separate entity in the Hapsburg Empire, the Emperor being also Prince of Transylvania. In 1867 it was incorporated in Hungary. Until the Austrian conquest Transylvania did not develop a hierarchical type of public administration. Administrative tasks were carried out by the nobility, by the leadership of certain cities or by some communities, like the German or Sekel ones. The Hapsburg Empire introduced its centralized administration immediately after the conquest. A governor was appointed by the imperial chancellery and he was responsible with the appointment of the heads of local public administration. The second part of the XVIII century was characterized by a series of reforms promoted by the imperial chancellery under the leadership of two important reformers: Friedrich Wilhelm von Haugwitz and Wenzel Anton von Kaunitz (Radu , 2014, p.8). The result of these reforms was that the administration of Hapsburg Empire became a Weberian type of public administration being imposed in the entire empire including Transylvania.

The two states from outside the Carpathian Mountains were independent until 1711 when their status did not change officially but the princes (domnitori) were appointed in Istanbul by the Turkish leadership. This practice lasted for more than a century and it is known in Romanian

history as the Phanariote regime. In Romanian common knowledge and to some extent in our historiography this regime has a very negative image being considered by most of the Romanians as the origin of our widespread corruption. Indeed, the Phanariotes, who were persons of Greek origin living in a neighborhood of Istanbul, were spending a lot of money to bribe Ottoman officials in order to be appointed as Princes in one of the Romanian states: Valachia or Moldavia. After appointment their first concern was to recover the investment they made. And they did this by selling offices and spoiling the population[14]. The result was an extremely high level of corruption which led to an increased poverty. In addition, the two countries were often war theaters in conflicts between Ottoman and Russian Empire.

Though, some of Romanian historians starting with Nicolae Iorga are pointing at some positive aspects of the Phanariote regime. Some of these Princes tried to introduce reforms and to modernize the two countries. Constantin Mavrocordat fried the serves in both countries: in 1746 in Valachia and in 1749 in Moldavia[15]. Also other attempts for important reforms took place in this period: "Indeed, the Phanariote century (1711-1821) may be labeled as the 'century of reforms', because during over one hundred years all the fields of the social life – fiscality, agriculture, administration, justice, religion and culture were subject of a huge restructuration that ultimately aimed at the establishment of public order and modernization...The reform policies were focusing especially on administration and justice. To strengthen the control of the state and to eliminate the private jurisdictions, Constantin Mavrocordat appointed at the head of each administrative unit two clerks directly subordinated to him. They had administrative, fiscal and judicial competences. To protect the tax payers from abuses he introduced the payment of the clerks encharged with tax collection"[16]. The failure of these reforms was due to the very short reign of their promoter.

The Phanariote regime ended in 1821, the Greek Princes being

[14] N. Djuvara, *O scurta istorie a romanilor povestita celor tineri* (Bucharest: Humanitas, 2006) 161.
[15] N. Djuvara, *O scurta istorie a romanilor povestita celor tineri* (Bucharest: Humanitas, 2006) 161.
[16] Fl. Constantiniu, *O istorie sinceră a poporului român* (Bucharest: Univers Enciclopedic, 1998) 181-185.

replaced by ones of Romanian origin. For a short period of time, between 1828 and 1834 the two states were under Russian occupation. Ironically, the representative of an autocratic regime, general Pavel Kiseleff implemented in both countries in 1831 and 1832 a kind of constitutions that were named Organic Statute. It was not the most modern type of constitution but for the first time the principle of separation of power in an imperfect form was implemented on the territory of our country.

The defeat of Russia in Crimean war created the condition for the unification of the two states under the name of United Principalities of Valachia and Moldavia in 1859. The first prince of the newly created state was a Romanian officer Alexandru Ioan Cuza. A period of intensive reforms started. The public administration was organized having the French administration as a model.

Being accused of dictatorial tendencies, Cuza was replaced with a German prince who will rule under the name Charles I, initially as a prince and from 1881 as a king. The reforms continued under his rule[17]. After WW I Romania had to face the difficult problem of integrating the new territories that were gained after the war. A law for administrative unification of the country was issued in 1925. Two years before, in 1923, was implemented the first Romanian Civil Service Statute. But the political life was, like in every other European country agitated, unstable. As an example, the Law for public administration was changed almost every year. In 1938 the democratic regime was abolished and replaced with a royal dictatorship. It was the beginning of a long period of dictatorial regimes that will last until the 1989 Revolution.

The length of the democratic regime in Romania was too short to ensure the consolidation of the democratic institutions, including the administrative ones. The civil service was still lacking professionalism and it was to a large extent under political control. And the feeble Romanian administration was even more damaged by the communist regime. The administrative and party ranks were overlapping, local autonomy was virtual non-existing and the main criteria for the selection of the human resource for administrative institutions was political.

Thus, Romanian administration was in 1990 in a very poor condition. The period between 1859 and 1938 was too short to build a

[17] N. Djuvara, *O scurta istorie a romanilor povestita celor tineri* (Bucharest: Humanitas, 2006) 195-218.

solid administrative tradition. The negative characteristics inherited from the Phanariote regime were worsened during the communism and in 1990 Romanian administration was characterized by excessive centralization and politicization, lack of professionalism and domination of informal rules[18]. These aspects create a cultural problem in relation with European Union were administration is characterized by opposite features: professional and politically neutral civil service, decentralization and the rule of law. The period between 1990 and 2007 was too short to eliminate or to reduce the gap that separates us from the administrations of the Western countries. Unfortunately, the first ten year were almost lost, very few reforms being implemented. The starting of the negotiation for accession in European Union accelerated significantly the pace of reforms. Important laws were adopted in areas like local public administration, civil service statute, local public finance or decentralization. The decision-making process at the level of the central government was improved through a number of regulations. All these were possible due to the pressures exercised by the European Commission and other foreign partners. But after 2007 the pace of reform slow down and in many cases reforms were reversed. The economic crisis is one explanation, but the most important cause is the lack of political will to continue the reforms. The institutional construction that took place between 1998 and 2007 was seen by the majority of the Romanian politicians as a burden. The political class is not able to understand the values that govern the functioning of modern administrations, the mechanisms and the procedures and their utility[19].

One possible solution would be the further involvement of the European Commission in supervising the process of reforms in order to reduce the gap which I consider to be mainly cultural between Romanian and Western administrations.

CONCLUSION

The Western European countries traveled a long journey in the

[18]B. Cobarzan, *Special Advisors to the Ministersin Romania: Carriers of Political and Administrative Roles,* in Connaughton, Bernadette, Sootla, Georg, Peters, Guy B., *Politico-administrative Relations at the Centre. Actors, Structures and Processes Supporting The Core Executive.* (Bratislava: NISPAcee, 2008) 298-299.
[19] L. Radu, *Relatiile politico-administrative.* (Cluj-Napoca: Accent, 2014) 185-189.

state-making process, from early feudal kingdoms to the modern state. Probably the most important elements in this evolution were the development of a legislative framework and an administrative system to implement this legislation. The legislative and administrative systems are not uniform among the Western countries. Germany and France have very complex and detailed legislative systems whereas other countries like the Nordic ones or US have a more general type of legislation. The same is valid for the degree of bureaucratization.

Romania didn't have the chance to develop a strong state and administrative tradition. Thus, the integration in European Union creates a difficult task for the political class and for the administrative system: to reduce the gap that separates us in terms of efficiency, effectiveness and the quality of public services from the old member states of European Union. Evidences show that the Romanian political class is lacking the will to undertake the necessary reforms. Very few reforms were adopted before the start of the negotiation for integration in EU and very few reforms were adopted after the integration.

One possible solution would be the further involvement of the European Commission in supervising the process of reform in order to reduce of the gap which I consider to be mainly cultural between Romanian and Western administrations.

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THE RIGHT TO WITHDRAW FROM THE OFF-PREMISES CONTRACTS AND FROM THE DISTANCE CONTRACTS

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Abstract:

On 13 June 2014, the Government Emergency Ordinance no. 34/4 June 2014 on consumers rights in contracts with professionals as well as for amending and supplementing certain acts, came into force. This ordinance transposes into national law the Directive 2011/83 / EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Directive 93/13 / EEC the Council and the Directive 1999/44 / EC the European Parliament and of the Council and repealing Directive 85/577 / EEC of the Council and the Directive 97/7 / EC of the European Parliament and the Council.

According to the explanatory memorandum, the aim of adopting the ordinance was to create a unified framework based on clearly defined legal concepts regulating certain aspects of the relationship between traders and consumers in the Union.

The scope of the ordinance shall comprise, with the exceptions stipulated by the law, any type of contract between a professional and a consumer, including contracts for the provision of publicly available electronic communications services or services of access and connection to public electronic communications networks and delivery of terminal equipment related to service provision.

Key words*: the exceptions, the contract, distance contract, the consumer, the protection of consumers.*

1. INTRODUCTORY CONSIDERATIONS

It shall also apply to contracts for the supply of water, gas, electricity or heat, including those supplied by public providers, in so far as these commodities are provided on a contractual basis.[2]

[1] Judge, Dambovita Tribunal, Lecturer Ph.D, Valahia University, Romania.

[2] Contracts stipulated by article 3 paragraph 3 on social services, health services, gambling, financial services, transfer of immovable property or rights over them, substantial transformation of building / buildings , marketing of package travel, contracts regulated by GEO no. 14/2011 regarding entitlement to regular use of accommodation, premises for the food supply, transport services, those concluded through vending machines, off-premises contracts of value below 10 euros are excluded from the scope of the ordinance.

Specifically, ordinance regulates the mandatory information to be provided to consumers for contracts other than the distance or off-premises contracts, the contracts concluded away from business premises and distance contracts, the formal requirements of the contract and the right of withdrawal together with the model of standard printed form used in the European Union.

It also cover issues related to the delivery, charges for the use of means of payment, transfer of risk, communication by telephone, additional payments and unsolicited sale.

Legal powers, notification and control on violations of the ordinance and breaches considered contraventions, including penalties, have also taken into consideration in the area of regulation subject to the ordinance.

As the text of the ordinance shows, the legislator was concerned especially in highlighting the information which the professional is required to provide to the consumer both in pre-contractual and in the contract stage and the detailed regulation of the right of withdrawal from an off-premises contract or a distance contract, which are real and effective ways to ensure a high level of consumer protection.[3]

2. DISTANCE CONTRACT

According to art. 2 para. 1 point 7, distance contract means any contract concluded between the professional and the consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the professional and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

It follows from this provision that the legislature had taken into consideration the application of legal protection regime introduced by the ordinance, only for those contracts concluded between a professional and

[3] Consumer information is an essential and indispensable way to achieve real protection and attain target set by Art.169 para. (1) and art. 169 para. 2 letter (A) of the Treaty on the Functioning of the European Union (TFEU) and a high level of consumer protection, respectively. In academic writings, the obligation to inform in the professional-consumer relationships is a part of explicit legal obligations, Liviu Pop, Ionut-Florin Popa, Stelian Ioan Vidu, *Elementary Treaty of civil law, Obligations under the new Civil Code* (Bucharest: Universul Juridic Publishing House, 2012) 138 -139.

a consumer (as they are defined in the ordinance, art. 2 para. 1 point 1 and 2), being excluded the contracts concluded between professionals.[4]

The essence of a distance contract is the exclusive use, up to and including the moment of its conclusion, of one or more means of distance communication, such as order by phone, fax, internet, mail.

Unlike the previous regulation of the contract, made by G.O. no. 130/2000 on the protection of consumers in the conclusion and performance of distance contracts, which defined and comprised an annex list of distance communication techniques, the new regulation has given up this option, leaving to the parties the possibility to use any means that can be used for the conclusion a contract which does not require the simultaneous physical presence of both parties. Constant development of the means of distance communication does not allow an exhaustive list to be compiled, but enables the determination of valid principles even for those which are not yet widely used.[5]

There is no specified term of sales system or organized distance service provision, but we believe that in this concept should be included sales systems of third parties, for example, online platforms, which are used by a professional.

The definition does not provide additional elements to identify all situations that may be considered as part of distance contracts, but the phrase "up to and including the time the contract is concluded," must be interpreted as meaning that it is also applied to those situations where while the consumer visits the business premises in order to get information about the products and services provided by professional, though he concludes the contract by means of distance communication.

The form of the contract differ from the classical one to conclude a contract, because of the exclusive use of means of distance communication, which require adaptation of the form of the contract to

[4] Consumer - any person or group of natural persons organized in associations acting for purposes outside his trade, industrial production, craft or profession (art. 2, paragraph 1 pt. 2 of Ordinance no. 21/1992 on the protection of consumers). Professional - any natural or legal person, public or private, acting in his commercial, industrial production, craft or profession in relation to contracts falling within this ordinance, and any person acting for the same purpose acting in the name and on behalf of it (Article 2 para. 1 pt. 2 of the Government Emergency Ordinance no. 34/2014).

[5] ECJ Decision C-49/1 / 05.07.2012.

the operation of the means of communication and the typical "technical constraints" [6].

According to art. 8 of the Ordinance, the professional shall transmit the information referred to in art. 6 or make them available to the consumer in a way appropriate to the means of distance communication used and, necessarily, in plain, clear and understandable language, and if the information is contained on a durable medium[7], it must be legible.

3. OFF-PREMISES CONTRACT [8]

Off-premises sales has benefits especially when the customer is away from shopping centers allowing him to purchase the products or services he needs. The method presents some inconvenience, since the consumer is not allowed to make immediate comparisons between products and sometimes, the professional may be tempted to take advantage of the inexperience of some customers who may be taken by surprise, make them to buy products they do not need or which are of inferior quality. In the published literature it has been written rightly that "where the circumstances show that these people are not able to appreciate the influence commitments or to detect deception or contrivance used to persuade them to subscribe or give the appearance of having been forced", the legislator has to intervene.[9]

According to art. 2 para. 1 letter d) of the Ordinance, off-premises contract means any contract between a professional and a consumer concluded in one of the following circumstances:

a) concluded in the simultaneous physical presence of the professional and the consumer, in a place which is not the business premises of the professional;

b) as a result of an offer from the consumer under the same circumstances as those referred to in letter a);

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[6] Directive 2011/83/EU of the European Parliament and of the Council.

[7] Tools that allow storing information, whether by the consumer or the professional, (art. 2 para. 1 pt. 10), such as: paper, emails, DVDs, memory sticks, CD - ROMs, hard disks, USBes are included in the category of the durable mediums.

[8] Directive 2011/83 / EU uses the term negotiation, which not always has the meaning of the conclusion of the contract and it is possible that negotiations may not be followed by carrying out of the wilful agreement and the settlement of the contract.

[9] Yves Reinhard, *Droit commercial,* Litec, Paris.

c)concluded on the business premises of the professional or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the professional in the simultaneous physical presence of the professional and the consumer;

d) concluded during an excursion organized by the professional with the aim or effect of promoting and selling goods or services to the consumer.

The same clarification as in the case of a distance contract is required: the protectionist rules typical of this type of contract are limited to relationships between consumers and professionals, excluding those of the professionals among them or those in which the person who wants to be protected is the professional himself. In the case-law of the ECJ it was stated that a trader who makes arrangements to conclude a contract on the sale of advertising or trade fund cannot be regarded as a consumer protected by Directive 85/577 on protection of the consumer in respect of contracts negotiated away from commercial establishments. [10]

However, as mentioned in Directive 2011/83 / EU, the situation of dual-purpose contract, concluded for purposes partly within and partly outside the trade and in which the trade purpose is not predominant in the general context of the contract, in which case that person must be also considered consumer, should not be ignored.

The essence of the contract is that it is concluded away from business premises, i.e. outside the immovable retail unit (location), in which the professional operates continuously or outside the movable retail premises in which usually operates. The contract may be concluded between the present or absent parties, only if the simultaneous presence of the consumer and the professional in places different from business premises of the professional occurred and on the occasions specified in the definition of the contract. Conversely, it is not the case of a contract concluded away from business premises if the contract was negotiated within the premises of the professional and finalized through means of distance communication or the professional went to the workplace of the consumer to provide him an estimate of works to be done, on which the consumer has had sufficient time for reflection, after which he concluded the contract within the business premises of the professional.

[10] Judgment of the ECJ C-361/89 / March 14, 1991.

4. THE RIGHT OF WITHDRAWAL FROM THE CONTRACT

Validly concluded contract has the force of law between the contracting parties. Binding force of contract principle enshrined in art. 1270 par. 1 of the Civil Procedure Code, suggests that the parties are required to execute exactly and in good faith the obligations they have entered into. The consequence of binding force of the contract determines the rule laid down in para. 2 according to which the contract be amended or terminated only by mutual consent or in cases authorized by law.[11] By virtue of this rule, the unilateral denunciation of the contract can only be made following the agreement of the parties or where it is legally authorized.

In common law, the unilateral denunciation of the contract is possible in conformity with the rules laid down by art. 1276 of the Civil Code. If the right of denunciation of the contract is recognized to one of the parties, it may be exercised as long as the performance of the contract has not begun. In the case of the contracts with long-term execution or involving continuous performance of a contract, this right can be exercised subject to a reasonable period of notice, even after the commencement of the execution of the contract, but denunciation does not become effective in respect of the service provision or which are currently in progress. If it was stipulated a service provision in return for the denunciation of the contract, it takes effect only when the performance is executed. Failing an agreement to the contrary, the provisions of this art. shall apply.

Where the contract is concluded for an indefinite period of time, either party may request unilateral denunciation with a reasonable period of notice. Any clause to the contrary or stipulation of a performance in return for the denunciation of the contract shall be deemed unwritten.

For off-premises contracts and distance contracts, the legislator authorized the right to withdraw from the contract which consists of the possibility for the consumer to revert back retroactively to the consent given at the time of the conclusion of the contract, resulting in termination of the obligation to perform the contract. We could say that the right of withdrawal is a legal limitation on the principle of binding

[11] For detailed overview, see Liviu Pop, Ionut-Florin Popa and Stelian-Ioan Vidu, *Elementary Treaty of civil law, obligations under the new Civil Code* (Bucharest: Universul Juridic Publishing House, 2012), 145 - 46.

force of contract, allowing the consumer to withdraw what has been agreed. Exercise of this right is made without the consent of the professional, on the contrary, the latter is obliged to take all measures prescribed by law for the exercise of the right of the consumer to be done freely, despite the fact that their own interests are affected.[12]

Previously, under the old regulation of both types of contracts, and G. O. 130/2000 concerning distance contracts and O.U.G. nr. 106/1999 concerning contracts concluded away from business premises, regulations that have been repealed and replaced by a unitary regulation by this Ordinance, the possibility of withdrawal was called by the phrase "the unilateral denunciation of the contract".

If we consider that in common law unilateral denunciation of the contract is permissible only in matters of contracts with long-term execution concluded for an indefinite period, as is the case of the tenancy agreements or if the parties have expressly agreed upon this and has an effect on the duration of the contract, i.e. causing termination, without affecting the situation of performances already provided, naturally, the legislator dropped the old phrase to indicate the right of withdrawal, whose aim and purpose are different from those produced by the unilateral denunciation of the contract.[13]

Thus, being regulated to the only benefit of the consumer, involving the reverting back to the consent, the right of withdrawal extends the effect up to the time of conclusion of the contract, producing retroactive effect, while unilateral denunciation has an effect only if the performances have not been provided. At the same time, in case of the right of withdrawal, the performances provided are subject to return, whereas unilateral denunciation has no effect on performances provided which remains won by the party in whose favor they have been provided.

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[12] Referring to its legal nature, the right of withdrawal is part of the category of potestative rights. See, to that effect, Valeriu Stoica, Alexandru Bleoancă, *Enumeration in the list of the annex to the G.O. no. 130/2000 on the legal regime of the distance contracts is restrictive or illustrative?*, Journal of commercial law no. 11(2002): 30. Such rights are defined as "the power conferred on the holders to act on preexisting legal situations by changing, extinguishing or recreating them through their own unilateral activities".

[13] Liviu Stănciulescu, *Lecture Notes On Civil Law. Contracts* (Bucharest: Hamangiu House Publishing, 2014), 308 -309;

The right of withdrawal may be exercised at consumer's discretion, because, according to the art. 9 para. 1, he is not forced to justify the decision of withdrawal. Because of this, the consumer is not liable for abusive exercise of the right or penalty payments.

However the exercise of the right is not exempt from any costs that are determined by the return of the product, or the fact that until the moment of the actual return, it is possible that the value of the asset to have diminished by handling.

Right of withdrawal finds justification in the fact that in the case of the distance selling, the consumer is not able, in all instances, to see goods he understands to purchase them until the moment of contract conclusion with the result that after the taking possession of them and knowledge of their characteristics and the way in which they operate, without any reason, should be able to withdraw from the contract without the fulfillment of obligations undertaken. As set out in Directive 83/2011/EU in contracts concluded away from business premises, consumers should be able to withdraw because of "the surprise element and/or potential psychological pressure".

Not all distance contracts and those concluded away from business premises may be withdrawn by the consumer. The legislator exempts those the prices of which can fluctuate on financial market during the period of withdrawal, those made according to the consumer's specifications or customized, which can expire quickly, and those of maintenance or emergency repair requested by the consumer, the supply of newspapers, magazines, contracts concluded as a result of auctions. The complete list of these contracts is provided in art. 16 of the G.E.O. no. 2011/83/EU.

5. THE CONDITIONS FOR EXERCISING THE RIGHT OF WITHDRAWAL

The conditions for exercising the right of withdrawal shall carry over the withdrawal deadline, information concerning the right of withdrawal and the form of expression of withdrawal from the contract.

5.1. art. 9 of Ordinance introduces a unique period of withdrawal of the consumer from the distance contract or from contracts away from business premises, within 14 days, which he can exercise without having to justify the need for withdrawal and without incurring costs other than

those referred to in art. 13 para. 3 and art. 14[14]. The withdrawal term is subject to mandatory time limit and is calculated in calendar days.

The moment in which the withdrawal period of 14 days starts to run within which the withdrawal must be made is established differently, depending on the subject of the contract which can consist of either the provision of services or delivery of goods or the provision of utilities-water, gas, electricity, heat.

According to the art. 9 para. 2 of the Ordinance, the period of withdrawal shall expire 14 days after:

a) the date of conclusion of the contract, in the case of contracts for the provision of services;

b) the day on which the consumer or a third party indicated by him other than the carrier takes physical possession of the products, in the case of contracts of sale, or:

- (i) in the case of multiple products ordered by the consumer in one order and delivered separately, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last product;
- (ii) in the case of delivery of a product consisting of multiple lots or pieces, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the last lot or piece;
- (iii) in the case of contracts for regular delivery of products during defined period of time, the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the first product;

c) in the case of contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of heat energy or of digital content which is not supplied on a tangible medium, the day of the conclusion of the contract.

[14] This term replaces the term of 7 working days stipulated by G.O. 106/1999 for denouncing unilateral contract concluded away from business premises and the term of 10 working days, which was provided by G.O. no. 130/2000 for unilateral denunciation of the distance contract

The rule of expiration of the period of withdrawal according to the times set out in art. 9 para. 2 of the Ordinance[15] shall apply only on condition that the professional should have observed the pre-contractual obligation to inform the consumer that he has the right of withdrawal and to communicate him a model withdrawal form. Otherwise, according to the art. 10, when the professional failed to realize the information incumbent on him by virtue of the law, the withdrawal period shall expire 12 months, calculated from the end of the initial period of withdrawal within 14 days. For example, if the sales contract that covers a product at the end of which the professional has not informed the consumer that he is entitled to withdraw, the period in which it can exercise the right of withdrawal shall be of 12 months and 14 days from the time the consumer acquires physical possession of the product. This period may be shortened if within the period of 12 months, the professional provides information to the consumer in relation with the opportunity to withdraw from the contract and in this case, the period shall expire 14 days after the date on which the consumer receives the information. According to Directive 83/2011/EU, 12-month period is a time limit, aiming at ensuring legal certainty as regards the duration of the period of withdrawal.

5.2. The consumer's decision to withdraw from the contract must be brought to the attention of the professional. For the unification of the procedure to be followed, in the conditions under which consumer reports have cross-border character, the European Union has introduced a standard form, taken to the point B of the annex to G.E.O. no. 34/2014.The professional is bound to attach the form to the contract concluded with the consumer.

Before the expiry of the period of withdrawal, the consumer is required to communicate to the professional his decision to withdraw from the contract, either by using a standard form or by means of an unambiguous statement of withdrawal from the contract, irrespective of how the declaration is materialized. The professional may allow the consumer to transmit on his website the withdrawal form or any other kind of statement, but is obliged to confirm on durable medium the receipt of the standard form of withdrawal. In application of art. 11. 5 of paragraph 1 of Directive 97/7/EC on the protection of consumers in

[15] The ECJ judgment C-49/11/5.07.2012.

distance contracts ECJ concluded that "a commercial practice which consists in making available the information referred to in that provision only through a hyperlink on the website of the enterprise in question does not comply with the requirements of the provision referred to, because such information is neither "provided" by this company nor "received" by the consumer and a website such as the one in question cannot be deemed to be a "durable medium".

To produce the desired effect - withdrawal of the contract, notification related to the exercise of the right of withdrawal must be communicated to the consumer by the professional before expiry of the period of withdrawal, calculated in accordance with the distinctions provided in art. 1. 9 para. 2 and 10, the time to receive communication by the professional being of no importance.

The burden of proof concerning the exercise of the right of withdrawal is borne by the consumer, since the right is regulated to his benefit and he becomes the only one who is interested in proving that he has acted on such possibility. That is why it is recommended for the consumer to have the notification of withdrawal from the contract materialized on a durable medium (email, letter, fax) in order to use it as evidence if necessary[16].

6. THE EFFECTS OF WITHDRAWAL

As a result of the withdrawal, the consumer shall be absolved of the obligation to execute the contract which he has concluded or to conclude a contract for the order which he had launched it. Withdrawal from the contracts concluded away from the business premises or from the distance contract shall also take effect on loan agreements, which shall cease to apply automatically, at no cost to the consumer, with the exceptions provided for by the law. The taking of such effects gives rise to obligations owed by both the professional and the consumer.

6.1. The main responsibility of the professional is the obligation to reimburse all the amounts he has received from the consumer, whether it is the price or it is the cost of delivery. The cost of delivery which the

[16] Moreover, in the event of a dispute, the consumer is the one who argues he has exercised the right of withdrawal, and he is responsible for proving what he states. In accordance with art. 249 of the Civil Procedure Code, the one who makes an argument during the lawsuit, needs to prove it, except in cases provided by law.

professional has to reimburse is the common standard one, even though the consumer preferred a more costly way for the delivery of the product. In the latter case, the differences in cost shall remain payable by the purchaser.

The repayment must be made no later than 14 days after the date on which the professional is informed of the consumer's decision to withdraw from the contract. In connection with repayment term, the law shall also establish a measure of protection for the consumer who has not been offered to recover the products sold, for the benefit of whom the law has provided for the possibility of postponing the reimbursement to the consumer after receiving the products which are the subject of the sale, or he has received a proof that the products have been sent to professional, taking into account the earliest date.

Given that the art. 13 of G.E.O. no. 34/2014 establishes only the portion of amounts due by the professional after the withdrawal of the consumer, in the event of delay in the execution of the obligation after its due term, the consumer is entitled to damages in the amount of the compensation provided for by the parties or as required by law, in accordance with art. 1535 of the Civil Code.[17]

6.2. The main obligation of the consumer is to return the products either directly to the professional, or to a person authorized by him to receive them. According to the art.. 14, the operation of returning the products shall be carried out without undue delay and no later than 14 days from the date of communication by the consumer of his decision to withdraw from the contract. The legislator used the words "without undue delay", *per a contrario*, the consumer may delay the return of products for good reasons but no later than the expiry of the period of 14 days of the notification of withdrawal of the professional, considering that the deadline is met if the products are sent back before the expiry of this period. Therefore the maturity of the obligation to send the products back is not later than the 14th day after the notification of withdrawal by the professional.

This obligation has one exception, in the event that the professional himself offered to recover the product.

[17] This is about the penalty interest provided by G.O. no. 13/2011 on the remunerative and default legal interest for financial obligations, as well as for regulation of the financial-fiscal measures in the banking sector.

As a rule, the costs of returning the product shall be borne by the consumer. However, in the event that the professional offered to bear the costs of returning the product, or if he omitted to inform the consumer that such costs should be borne by him, the costs will be borne by the professional. The professional is the one who takes over the products at his own expense when they were delivered to the domicile of the consumer at the time of conclusion of the contract and which, by their very nature, cannot be returned through mail.

It is possible that until the moment of exercising the right of withdrawal, the consumer should have been used the purchased products[18], so that, at the time of their return they no longer have the features they had at the delivery. Therefore, the legislator has provided for him to be liable for the decline in the value of the good concerned caused only by a manipulation differently from what is required for the determination of the nature, characteristics and operation of the products. It is quite natural that, after purchasing the product, the consumer tries to understand how the product operates, in order to learn its properties, to determine its nature, but if this way of "handling" and "inspection" is not carried out with "due care", "how he would have been allowed to do it in a shop"[19], he must respond, otherwise, it would encourage the misuse based on the idea that, anyway, the professional is obliged to receive it back.

It is interesting to note is that the legislator has expressly provided in art. 14 para. 3, that the decline in the value of products should not have a deterrent effect for the consumer to exercise his right of withdrawal

As in other cases, the consumer is not responsible for decline of the value of the product, if the professional failed to inform him about the right to withdraw from the contract. There is nothing but bearing by the professional of the damages arising from the failure to fulfil his own obligations to inform the consumer, no one being able to invoke his own fault in the execution of the contract.

Evidence of a reduction in the value of the products resulting from manipulation differently from what is required for the determination

[18] For example, he used a tablet PC whose display was scratched or he wore an item of clothing, rode a bike whose tires were worn out, after which he informed the seller that he withdrew from the contract.
[19] Directive no. 2011/83/EU.

of the nature, characteristics and operation of the product is the professional's responsibility.

A special situation with regard to the consumer's payment obligation is encountered in contracts which have as their object the provision of services or the supply of water, gas, electricity, when they are not put up for sale in a limited volume or fixed amount, or heat. The consumer may wish the service to be provided or utilities to be delivered within the period of withdrawal of 14 days, while the supplier must have the assurance he receives their equivalent value. He pays for the quantity consumed an amount proportional to what he received until the moment in which he informed the provider/supplier with regard to the exercise of the right of withdrawal. The calculation of the amount due is made pursuant to the clause of the price which has been agreed upon in the contract. The consumer can demonstrate that this price is excessive or disproportionate by reference to the market price; in that case the obligation to pay is not related to the price established in the contract, but it is comparable to the market value.

The same procedure shall apply to the distant contracts when the consumer places an "order which implies an obligation of payment", followed by withdrawal from the contract.

6.3. Referring to the costs incurred by the consumer, the situations in which costs are not borne by him are presented in art. 14.6. Although it follows from an interpretation *per a contrario* of the provisions of the entire Ordinance, the legislator has expressly regulated them.

As a general remark, the justification for exemption from incurring expenditures is found in the breach of the duty of information incumbent upon the professional or as a result of failure to perform or improper performance of his obligations during the withdrawal period.

The consumer shall bear no cost for:

a) the performance of services or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or heat, in full or in part, during the withdrawal period, where:

- (i) the professional has failed to provide information in accordance with art. 6, para. (1) letter h) or i) of art. 6;
- (ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with art. 7 para. (3) and art. 8 para. (8);

b) the supply, in full or in part, of digital content which is not supplied on a tangible medium where:

- (i) the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period referred to in art. 9;
- (ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent;
- (iii) the professional has failed to provide confirmation in accordance with art. 7 para. (2) or art. 8 para. (7).

CONCLUSIONS

The regulation of the consumer right of withdrawal from distance and off-premises contracts allows the consumer, who is the weak party of the legal relation concluded with a professional, to withdraw, under the law, the decision to be a part of such relation, in which he entered without clear representation, based on a prior analysis of the need to purchase a good or service, or based on direct perception of the properties and characteristics of the product and service contracted, even more so of the effects of the contract concluded in such conditions.

This is the remedy offered by the European Union and national legislator to provide a high level of consumer protection in an area where the consumer is vulnerable, precisely through contracting arrangements used by an experienced professional.

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THE CITIZENSHIP, THE RIGHT TO VOTE AND INTERNET

Marius VACARELU[1]

Abstract:

The XXI century is technologic and humanity is able to use a lot of devices in many ways. All of them function and create a special social space, where people can consider themselves as a part of a global society, but also they remain nationals. In this case, they still have the specific rights of national citizenship, and to exercise them they use now internet more than other times. The right to vote is one of the most important which is affected by this technologic development. The citizenship can be more present than ever and for this internet can be a legal weapon for citizens and democracy.

Key words: *Citizenship, internet, right to vote, democracy, technology.*

INTRODUCTION

During the last 20 years all our life was changed by the power of technology, which is expressed by two special devices: mobile phone and internet. Both of them creates a specific access to what we want: is not necessary now to expect a phone on a room – we can talk even on football tribune; is so simple to read today the latest news on the top of mountains and so on. But this reality changes also some part of society and mainly our perspective for vote and participation to political life.

Today is possible that much more people to be active on politics, like no other time of history of mankind. Because of this, we should analyze briefly the relation between state and society, between state, law and internet and the right to vote. Is important to note also that the debate on those subjects is more political then rational in some countries today. However, it is impossible to elude the discussion about law and internet. Because of this, we chose just a part of it: the political right to vote and internet.

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1. What is internet today?

A good answer to this question must underline just one dimension: internet is just an instrument for a better life. Unfortunately, some people think that is a part for a second life, and from this attitude there will more transformation on national and international legal system.

Never before in history have there been so many opportunities to access, comment upon and challenge governing authorities. But never before, at least in democratic history, has the public felt so frustrated and disappointed about its lack of ability to make any difference to the policies and decisions of government. In surveys, focus groups and interviews, citizens repeatedly complain of feeling left out, unheard and disrespected; mere spectators upon a political process that is rapidly losing their trust[1].

Of course, this feeling of lack of trust is a consequence of "what is known today – and it was hidden yesterday". Today's European states society is developed after minimum 125 years of state education, where legality was one the main ideas of teaching. For sure, the education inside family (and on religious institutions) must be on the same direction. On this paradigm, there is not pleasant for citizens to compare the daily facts with whole their education to morality and rule of law on society.

2. To compare facts means, firstly, to know them. The best instrument to know is internet; and the access to internet become almost a right recognized by national legislations today. Is not still accepted, but the tendencies are straight to this direction.

It might be strange for some people, because on the 20th century it was not a right to have a phone (the closest instrument by the internet), but we must compare the results of this new technology with all other inventions of mankind. Even the wheel couldn't produce such a deep result on daily life and plane was not able to do this too, because of the costs.

Internet today represent the cheapest instrument for work and entertainment, like no other before. Having this huge cost advantage, with also a perfect result for money economization of its procedures, internet almost replaced other instruments used before on business law,

[1] Stephen Coleman and Jay G. Blumer, *The internet and democratic citizenship*, (Cambridge: Cambridge University Press, 2009), 14.

as telephone and fax. Soon, the internet will be on the same time video and printed documents and almost all commercial legislation (but also the civil law one) will be adapted to internet, and not vice-verse.

In many countries today the access to internet is easier that the access for current water and many other things who create a more comfortable life. It means that information and entertainment are stronger than parts of Maslow pyramid. This is the result of economy: to introduce pipelines with water (or any other goods) cost a lot, because water is something physical, and the water distribution on Earth is different from state to state (just compare water problem in France and Israel of in Niger and Canada).

Internet is just some cables, their costs is small and everyone can afford it. On this economic equation, we can consider that the right for internet is stronger that other rights just because of costs. For sure, every state want to assure water and some other goods at a very cheap price to its inhabitants, but the cost is bigger. But implementing internet, it means that state helps people to critic its achievement.

3. The right to internet is somehow a political and civil right. We remember the two pacts signed on United Nations Organization, and we cannot consider that internet is part of economic, social and cultural rights, despite its huge importance for economy and culture. We can consider that the right for internet is a part of economy (by its costs and economic results), but we must appreciate much more its consequences on implementing transparency, rule of law and democracy.

At a most basic level of definition, democracy can be regarded as having five essential characteristics[1]:

a) Regular, free and fair elections, involving competition between more than one party;
b) The rule of law, under which all citizens are subject to a common jurisdiction, with no discrimination;
c) Freedom to speak, assemble and publish, and for opposition to the government of the day to organise without fear of intimidation.
d) Government accountability to the public and responsiveness to public concerns

[1] Coleman and Blumer, *Internet*, 16.

e) The existence of a civil society sector which is free from control by either the state or the market.

Looking to these characteristics, we'll observe that internet is a main actor in a), c) and e) and it helps a lot government to implement the d) position.

4. Internet is also a space for young people, because of the developed skills of pushing some buttons. New forms of mass communication traditionally have had great appeal for younger people. Not only are the younger generation less likely to have established long-standing habits of media use, but they also are more willing to experiment with new technologies and formats. Younger citizens may claim new communications technologies as their own, developing particular expertise and novel applications. They view new technologies as a means of gaining advantage in the educational arena, in the workforce and in the political realm. Despite the conclusions of much research that young citizens fail to engage in traditional forms of participation, there are indications that the Internet may be facilitating, if not invigorating, youth civic engagement[1].

The technology makes huge steps to help older persons to have an easier access to internet. In the same time, every day new young people get the right to vote and older people dies. This balance is favorable to internet, in 10 years in all developed states internet penetration rate will be higher than 80%, from the person who benefits by the right to vote. This will transform political campaigns, making them more personal than group ones.

5. All these ideas are connected with the demographic dimensions of states. According to Wikipedia[2] and to many other sources, it will be a huge growth of population in the 21st century:

"According to current projections of population growth, the world population of humans will continue to grow until at least 2050, with the estimated population, based on current growth trends, to reach 9 billion in 2040, and some predictions putting the population in 2050 as high as

[1] Sarah Oates, Diana Owen and Rachel K. Gibson, *The internet and politics*, (London: Routledge, 2006), 4.

[2] http://en.wikipedia.org/wiki/Projections_of_population_growth, Accessed on 27.04.2015.

11 billion. World population passed the 7 billion mark on October 31, 2011.

According to the United Nations' World Population Prospects report, the world population is currently growing by approximately 74 million people per year. Current United Nations predictions estimate that the world population will reach 9.0 billion around 2050, assuming a decrease in average fertility rate from 2.5 down to 2.0.

Almost all growth will take place in the less developed regions, where today's 98.3 million population of underdeveloped countries is expected to increase to 7.8 billion in 2050. By contrast, the population of the more developed regions will remain mostly unchanged, at 1.2 billion. An exception is the United States population, which is expected to increase 31% from 305 million in 2008 to 400 million in 2050 due to projected net international migration.[7] In 2000–2005, the average world fertility was 2.65 children per woman, about half the level in 1950–1955 (5 children per woman). In the medium variant, global fertility is projected to decline further to 2.05 children per woman.

By 2050 (Medium variant), India will have 1.6 billion people, China 1.4 bil., United States 439 mil., Pakistan 309 mil., Indonesia 280 mil., Nigeria 259 mil., Bangladesh 258 mil., Brazil 245 mil., Democratic Republic of the Congo 189 mil., Ethiopia 185 mil., Philippines 141 mil., Mexico 132 mil., Egypt 125 mil., Vietnam 120 mil., Russia 109 mil., Japan 103 mil., Iran 100 mil., Turkey 99 mil., Uganda 93 mil., Tanzania 85 mil., Kenya 85 mil., Germany 83 mil. and United Kingdom 80 million."

If we consider that 74 million people are born every year, it means that in 18 years from now more than 1 billion people will get the right to vote. Since 1987, we were 5 billion people, since 2000 – 6 billion and since 2013 we are 7 billion people on Earth. Today our number is 7,31 billion persons. In 1950, the Earth population was just 2,52 billion people. As we can see, more than 2,3 billion people are less than 27 years old, and a good part of them use internet daily; almost 5 billion people is less than 65. Even now people from 18 to 27 years old are hundreds of million. On this number, the right to vote become very important, because more than 5 billion people have a voting age and can have access to internet (more than less).

6. The right to vote is something very personal and it must remain personal. On this paradigm, it is compulsory to assure the secret of vote

and, mainly, the possibility of voting. If the first condition is easy to satisfied, the second one creates a lot of problems today and tomorrow.

We can remember that on the Octavianus Augustus time, the emperor of Rome, it was a special counting of people, when everyone was forced to go to the city or village where was born. In many cases, the electoral legislation try to implement the same principle: a person must vote where stable housing. Much more, if there is a difference between his house form the official papers and his real life, priority belongs to official documents.

But this contradiction become more complicate today because of mobility of persons and the capacity of money transfer. Today there are a lot of countries who live because of remittances of their citizens who lived abroad. In this case, is normal to offer to them a possibility to influence much more the politics of their state, because they remain citizens of their state too.

It cannot be accepted the idea of "living abroad, so – no right to vote on your country, because they left it". This kind of argument is stupid, because citizenship is a legal and also political connection between a person and a state. The political connection is understood as "*lato sensu*": here "political" means also historical, familial, economic and cultural. A state cannot benefit by the money of its citizens who live abroad and to not offer them the right to vote.

Today internet helps this money transfer speed, in just few seconds state borders are passed by money. On this case, we consider illegal and not-democratic at all the condition of preliminary registration of persons to vote.

In fact, this kind of condition must be prohibited everywhere, without any consideration. A stronger argument to this prohibition is the fact that human wish must be express freely every time. Internet helps people to know a lot of things in one second, to sign petitions, to join for public protests and to many other activities. Their wish is free on internet and influence the reality too, just the speed connection creates problems. If we want to change something in electoral legislation, is the creation of educational standards for candidates, and this must be mandatory.

Because mankind become more "internautic", states must accept this reality and to start to change their legislation. This change should be on every field of activity, not only in business law or communications. In fact, a modern proverb said that a memory-stick saved more trees than

anything else. The change of legislation should be total, and it must respond to this "shorting distances" made by internet. This is another example when law must follow the development of technology and not vice-verse.

Thus, for election and strength the citizenship institution, states must follow the internet development and for this, it should adopt a special kind of elections: electronic one. For sure, electronic elections should not replace traditional way of elections, but in 20 years, we predict that electronic way of election will be the most usual, and the traditional one, just an exception. There are a lot of possibilities to secure electronic vote. There is false debate the security of vote – in fact, every day of internet using teach everyone much more about viruses and other possibilities to loose passwords and accounts. This is future: internet wins its competition with printed papers.

CONCLUSION

The last 10 years change a good part of mankind and for the next 10 years will transform it. Internet is the main agent on this transformation. It is a special creation of clever people, able to defeat almost all other inventions of former times. In this case, its dimension is settled also to legal system.

States should act having internet as partner, and this partnership must be extended to electoral dimension. On this direction, states should extend the role of electronic vote, because is inevitable, on the next years and decades.

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THE SPECIFIC OF THE OBJECT AND CHARACTERISTICS OF THE PUBLIC INTERNATIONAL LAW

Daniel-Ştefan PARASCHIV[1]

Abstract:

The public international law embodies an independent existence, with a distinct regulating object and characteristic features, which is different from any other law branches. Its legal norms regulate the relations between states or other subjects regarding the public international law. These are, mainly created by the consent of the states and are not fulfilled by any international authority, but by the will of the states, except the jus cogens norms, which, by their nature, are compelling laws.

Key- words: *public international law, specific object, characteristic features, characteristic traits, international relations.*

INTRODUCTION

The term „international law" first appeared in the modern era, being used for the first time by the English philosopher and jurist Jeremy Bentham in one of his works published in 1789[2].

The public international law contains the totality of the legal norms, created by the state on the basis of the agreement will expressed in specific juridical forms, as to regulate the relations between them, related to peace, security and international cooperation The application of these norms is achieved by the wilfully observance, and in case of necessity, by means of the individual or collective sanctions imposed by the states[3].

The process of constituting and applying the norms of the public international law within the international community contributes to the substantiating and consolidation of the *international legal order*.

It is based on the fundamental norms for the international community in its totality (from which the states cannot derogate based on their agreement, under the sanction of nullity), as well as the

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[2] Dumitra Popescu, *Drept internaţional public* (Bucharest: Printing house of the University Titu Maiorescu, 2005), 11.

[3]Pierre-Marie Dupuy, *Droit international public*, 7[e]édition (Paris: Dalloz, 2004), 1.

international regulations established in the customary or conventional manner.

As any right represents a reflexion of the necessity for organisation within the society that formed it, so does the public international law constitute that totality of legal norms which govern the functionality of the international society[4].

The legal norms of the public international law are contained in treaties and in other sources of law, created by the states (and by the other subjects of international law) based on the will agreement , in view of regulating the relations between them.

THE OBJECT OF THE PUBLIC INTERNATIONAL LAW

The expression „ public international law" signifies the fact that the object of the regulation is constituted from the international relations (inter-state and/or between other subjects of international law), unlike the relations from within a state (between the natural and/or juridical persons), that form the object of the internal law[5].

The public international law is the law applicable to the international society[6].

The totality of the states, as well as the other participating entities to the reports that are formed on the international plan (inter-governmental international organisations) , the movements of the people who fight for liberation, (the Vatican, etc.), form the *society* or the *international community*.

The contemporary international society is the result of a process of progressive integration and of uninterrupted broadening of the political frameworks, factors which offer a dynamic and Copernican unity[7].

The very wide range of the relations between states, as the carriers of sovereignty, reflects numerous contacts in the domains: political, economic, cultural, etc.

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[4]Raluca Miga-Beşteliu, *Drept internaţional public. Introducere în dreptul internaţional public,* Third edition (Bucharest: All Beck Printing House, 2003), 2.

[5]Dumitra Popescu and Felicia Maxim, *Drept internaţional public* (Bucharest: Renaissance Printing House, 2010), 13.

[6]Nguyen QuocDinh, Alain Pellet, Patrick Dailier, *Droit international public,* 3[e]édition (Paris: Librairie générale de droit et de jurisprudence, 1987), 490.

[7]Leontin-Jean Constantinescu, *Tratat de drept comparat. Introducere în dreptul comparat,* vol. I (Bucharest: All Printing House, 1997), 34.

The international relations also contain, however, numerous relationships between natural and legal persons who belong to different states, between the institutions and the organisations of the states, as well as between the international, inter-governmental or non-governmental organisation, which are regulated by norms of public international law.

Moreover, no category of social relations can exist outside a system of norms which will govern the relations between the participating entities.

The object of the international law is different from the domestic law, which regulated the social relations from the framework of the respective states, since it is formed from the international relations, within which the relationships between the states represents the most comprehensive domain.

Thus, the regulating object of the international law is represented by those international legal relations in the framework of which the states act as carriers of sovereignty, being equal subjects from a legal point of view.

In the recent practice of the international economic relations, contractual legal reports are sometimes engaged between a state, on the one hand, and a subject of domestic law, on the other hand[8]. They intervene between a particular state and big transnational societies, in their capacity of legal persons of domestic law, regularly inscribed in other states, as to regulate the exploitation conditions of certain natural resources or of the supply of large sectors of services.

The aspects related to the legal nature and the right applicable to these legal acts constituted the object of numerous doctrinal debates and international litigations.

Their placement either in the sphere of the public international law, or of certain branches of domestic laws, led to the elaboration of theses related to the existence, in our present times, of a branch of law, that consists of a "hybrid" nature : *the transnational law* [9].

[8]In the legal literature, these reports are denominated „*state-contracts*".

[9]Raluca Miga-Beşteliu, *Drept internaţional public*, vol. I (Bucharest: All Beck Printing House, 2005) 2-3.

THE CHARACTERISTIC FEATURES OF THE PUBLIC INTERNATIONAL LAW

Due to the modalities of formation, application and control of the execution – generated by the specific positions of the subjects from the international legal order – the public international law presents certain *particularities* that fundamentally differentiate it from any other branch of the law domain.

a) The public international law is a *coordination law*, its norms embodying a legal form by the consensus of the states, as well as by means of other subjects of international law that participate to their being adopted.

In the international society there is no legislative or superstate body, competent to elaborate and adopt international regulations, as it is the case of the domestic law of the states, which is considered a subordination law, since its norms adopted by the legislative authority are compulsory for the entire territory of the state, for all the legal and natural persons.

The states are the ones which create the majority of the international legal norms, by their will agreement, freely expressed in the content of the treaties or by establishing the customs, and they are also the recipients of those regulations, since they accept to adapt their behaviour within the external relations, to the imperatives contained in the norms of the public international law.

Frequently, the processes of elaborating the norms of international law are achieved by the states, within the framework of international conferences and organisations, convoked in this purpose. However, the normative activity of such international forums cannot be assimilated to the exertion of the legislative function by the national parliaments.

Within the public international law, the activities to elaborate and adopt the legal norms take place on the horizontal, which involves the self-censorship and the reciprocal censorship of the states[10], in the process of the application and the control of their observance.

b) The norms of the public international law are not accomplished by a superior international authority, but rather, by the states who

[10]Adrian Năstase and Bogdan Aurescu, *Drept internaţional public. Sinteze*, 7th edition (Bucharest: CH Beck Printing House, 2012) 31.

willingly act, and in case of non-observance, by means of certain measures taken by the individual or collective states (priory consented upon based on other treaties), or by measures applied by international organisations, in accordance with their object of activity and the empowerments given by the states with the occasion of establishing the competences.

Mainly, in the international society, there are no specialised bodies meant to ensure the application of the public international law within the relations of the states or other international entities, and thus, these attributions being in the care of the respective states.

c) In the public international law, there are certain legal organs, but, mainly, the exertion of its jurisdiction *is not compulsory*, since the explicit consent of the states or of the other subjects of international law is necessary so that a dispute be submitted to the judgement of an international court.

In the international community, there are no judicial bodies with a compelling competence, which should intervene of their own motion by establishing sanctions, when the legal regulations are not observed, except the penal courts which are to act in case of the violation of the norms of *jus cogens,* which embody an imperative character, being mandatory for all states.

In principle, however, the international bodies with jurisdictional function have a competence established by the explicit consent of the states in cause. For example, for a state to be considered a party before the International Court of Justice, it proves necessary to have its consent, except the case in which the respective state had recognised the compulsory jurisdiction of the ICJ (The International Court of Justice), in conformity with the art. 36(2) from the UNO Chart, as it also stipulates the disputes that should be solved by the court.

The sanctioning system is also different in the international law, which consists of a wide range of individual or collective sanctions, without using force (measures of constraint of an economic, commercial order, etc.) or, exceptionally, with the usage of armed forced[11].

[11]Dumitra Popescu, *Drept internaţional public,* 15.

CONCLUSIONS

In the present conditions, namely of broadening the globalisation, the public international law, by its object of activity, has an increasingly important role in maintaining the international peace and security, in the development of the political, economic cooperation, or of any other nature, as well as in the actions of orientation and modelling of the external policies of the states.

The public international law influences and directs the *external policy* of the states by the action of its norms and principles, which must be observed and applied, in conformity with the characteristic traits of this branch of law[12].

The external policy relate to the instruments of the international law *inter alia* (treaties, organisations, international courts etc.), as to achieve its objectives and is reflected in the treaties concluded by the states, in the negotiations and proposals from within the international organisations, in the positions regarding the management and solving of the international conflicts, in the actions performed to maintain the international peace and security etc.

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[12]Elena Paraschiv, *Importanţa principiilor generale în cadrul izvoarelor dreptului internaţional,* în „Law, Culture and Society" (Bucharest: Cartea Universitară Printing House, 2007), 45 and foll.

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THE APPEAL PROCEDURE IN DISPUTES WHICH CONCERN CRIMINAL COMPLAINTS. THE NECESSITY OF HARMONIZING CERTAIN PROVISIONS OF G.O. 2/2001 ON THE LEGAL REGIME OF THE CONTRAVENTIONS OF THE CODE OF CIVIL PROCEDURE

Elena ILIE[1]

Abstract:

The present study was generated from a desire to bring to the attention of the legislature the need to harmonise certain provisions of the procedure for settling the administrative complaints, regulated by Government Ordinance, no. 2/2001 on the legal regime of offences, what is common law in contravention with the provisions of the Civil Procedure Code, approved by law No. 134/2000, as amended and completed by law No. 138/2014 and of law No. 2/2013 concerning measures for relieving the courts of law, as well as in preparing for the implementation of law No. 134/2010 on the code of civil procedure.

According to the article 31 of the G.O. 2/2001 on the legal regime of contraventions against the minutes in respect of the contravention and the penalty, the offender has to grasp the appeal of complaint, while the injured party may issue a complaint only with regard to compensations, and the third party to which the goods belong seized can attack only the protocol against further penalty of confiscation.[2]

Regarding the procedure to be followed by the offender in settling the complaint, since the adoption of the Ordinance and so far, the legal regulation had changes in default, as well as in the formal explicit modification that has not done anything other than put in a legal form what was recognized by default and has been applied without reservation in judicial practice in the matter.

Key-Words: *Contravention, procedure*

In its original form, article 32 of the Ordinance provided that the complaint, accompanied by a copy of the protocol of the contravention,

[1] Judge Dâmboviţa Tribunal, PhD, Lecturer Valahia University of Targovişte, Associates Professor.

[2] The complaint represents the specific path of administrative remedy, and is considered an ordinary remedy „capable of being used against all administrative penalties, regardless of the reasons," Alexandru Ţiclea, *Reglementarea contravenţiilor, Ed. III, revised and added* (Bucureşti: Lumina Lex, 2003), 83-84.

to be submitted to the governing body of the agent, this being obliged to receive and communicate to the depositor a proof in this regard (paragraph 1), the agent being that who submitted it to the Court without delay in whose constituency was committed that offence to the competent resolution (paragraph 2). By the decision of the Constitutional Court No. 953/on 19 December 2006, the provisions of article 32, paragraph 1 (1) of the Government Ordinance 2/2001 concerning the legal regime of offences, have been declared unconstitutional because it infringes on the free access to justice and, consequently, the right to a fair trial, as well as the provisions of article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the article 10 of the Universal Declaration of Human Rights, as long as it does not require as alternative and possibility that a complaint may also be filed in the Court[3].

Through the amendment Government Ordinance No. 2/2001, in article 41, paragraph 4 of law no. 76/2013 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, article 32 paragraph 1 was made in agreement with the decision of the Constitutional Court and with the entire judicial practice that followed.

According to article 32 paragraph 1 (1), the complaint is submitted to the District Court in the territory where that offence was committed. This provision is established through a material and to exclusive territorial jurisdiction in favour of the Court of the place of offence. Assigning the territorial court favouring the court in which the offence was committed is the rule, but like any rule, therefore certain exceptions apply in all cases where the law does not provide otherwise, if not, the rule applies.[4]

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[3] According to article 147 of the Constitution of Romania, the laws found as unconstitutional cease their legal effect within 45 days of the publication of the decision to the Constitutional Court if, during this period, the legislative bodies, does not make them agree with the provisions of the Constitution. During this period, the provisions recorded as unconstitutional laws are suspended. Therefore, since 10 March 2007, para. 1 of art. 32, has ceased to be applied, making an implicit change in procedural terms, in this case complaints were made directly to the Court.

[4] For example, article 101 of G.O. 15/2002 on the application of the fee and the fee of tolls on the national roads network in Romania, introduced by art. III of law No. 2/2013, provides that derogating from the provisions of Ordinance No. 2/2001, the complaint, accompanied by a copy of the minutes of the contravention, are inserted at the District Court in whose constituency is domiciled or has its registered office the infringer. This

Law no. 76/2012 article 32 brings another substantial change, permanently eliminating any interference of the jurisdictional authorities or other bodies with such activity in control over the application and enforcement of criminal sanctions, specifically stating, in paragraph (2) that is the exclusive competence of the Court referred to in paragraph (1) monitoring the application and the enforcement of main and complementary sanctions. Thus, it is recognized the full spectrum of competence of the first instance court of on monitoring the application and the enforcement of main and contravention sanctions.[5]

In relation to the content of regulation, if the invocation of the exception of competence by the parties and verifying the competence ex officio by the Court, the obligation is imposed by article 131 in the Civil Procedure Code, the judge does not have to verify but the material and the territorial competence not the general one which comes to the judicial power solely with the phrase "monitoring the application and enforcement of criminal and complementary sanctions is the exclusive competence of the Court."

Regarding the presence of a general, material and territorial authority, exclusively by public order, filing a complaint to an incompetent court may be invoked by the parties or by the judge at the first term of the Court to which the parties are legally brought in front of first instance, pursuant to article 130 paragraph 2 C.C.P. To the extent that neither the judge nor the party have invoked incompetency to settle

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time, the criterion for determining the competence of solving of complaint is no longer the place of violation, but the offender's person's domicile or headquarters of the offender is a legal person. The application of this provision, after the entry into force of law No. 2/2013, sparked numerous unregulated jurisdiction, settled by the High Court of Cassation and Justice, the courts that were in place when the act was committed, invested after that point for complaints made against the prosecution of proceedings entered into prior to that date by carrying their declension in favor of the courts in whose constituency the offender's residence is located, without regard to its rules regarding the application in time of the application of the law, in other words, by making retroactive application of the new law to situations under the old law, about the competent organs to settle the complaint.

[5] This provision is regulated and corroborates in article 94 paragraph 1 (4) of the code of civil procedure: the Courts assess the ... 4 any other data requests by law in their jurisdiction. In relation to the competence of the Court of first instance, see Gabriel Boroi s,a., *Noul Cod de procedură civilă, Comentarii pe articole, vol. I, art. 1-526* (Bucureşti: Ed Hamangiu, 2013), 272-279;

the administrative complaint within the procedure, a further discussion of competence of the exception is inadmissible.

This makes the provision inserted in the article 130 paragraph 1 of C.C.P. contain a rule of procedure with special arrangements for invocation, limited to the first term with legal procedure carried out and only in front of the first instance.

The interpretation is reinforced by article. 480 paragraph 4 of C.C.P., stating expressly that the appellate court will annul the contested decision and will send the cause to trial to the effective court or another competent body with judicial activity, if it finds that the Court of first instance was ineffective and the ineffectiveness has been invoked under the law. *Per a contrario*, if ineffectiveness has been invoked as a ground of appeal, but the Court will find that the first instance ineffectiveness was not invoked in accordance with the law, that is, the first term of court at which the parties are legally brought to court, the solution will not be annulling the sentence and referring to the competent court for retrial, but will reject the application as inadmissible.[6]

We should note that, unlike the ineffectiveness of the private order in the case of public order does not matter who invokes it (the offender, the respondent, the judge ex officio), nor the manner in which it is invoked (by courtesy, through written or oral), it only counts to be invoked in the first term, the purpose of the legislator is to avoid delaying the process and speeding judgment.

As it is well known, according to article 34 paragraph 2 of G.O. 2/2001 on the legal regime of contraventions, the legislative text has been altered by the same article 41 section 5 of Law no. 76/2012 for implementing Law no. 134/2010 on the code of civil procedure, the decision by which the complaint has been resolved can be attacked only with appeals. The appeal is solved by the administrative and financial contentious Court of first instance. Is not required the motivation for the appeal. The grounds of the appeal may be also sustained orally before the Court. The Appeal suspends the execution of the judgment.

[6] About the character of territorial incompetency and invocation regime see G.Boroi, *Noul Cod de procedură civilă, Comentarii pe articole*, vol. I, art. 1-526 (Bucureşti: Hamangiu, 2013), 130; M Tăbârcă, *Drept procesual civil conform noului Cod de procedură civilă, vol. I, Teoria general (*Bucureşti: Universul Juridic, 2013), 685.

The text of law rendered above contains an exception to the rule of compulsory motivating the appeal along with the motivation of the request for appeal, a rule imposed, under the penalty of revocation of the right appellant to motivate this appeal through article 470 paragraph (1) letter c) in conjunction with article 470 paragraph 3 second sentence of the code of civil procedure.

Regarding the other procedural provisions, G.O. 2/2001 contains one exception, namely enforceability in court proceedings both before the Court and the Appellate Court; the provisions of article 242 and article 411 of C.C.P., the amendment introduced by article 41 section 5 of law no. 76/2012 article 34 paragraph 1 of G.O. no. 2/2001. In other words, unlike other disputes, with the object of the complaint against the protocol of finding and sanctioning of violation, the judge cannot suspend the trial, even if the applicant did not meet the obligations imposed in the course of the trial, as he cannot suspend the proceedings through parties agreement or through the absence of the parties at the trial.[7]

In addition to the above situations, G.O. 2/2001 does not contain any exception, on the contrary, through article 47 it states expressly that the provisions of this Ordinance shall be supplemented by the provisions of the Criminal Code and the Code of Civil Procedure, where applicable, which means that the procedure before the Court of first instance is applicable also in the appeal in respect of contraventions, with minor adjustments.

Pursuant to the provisions of article 34 of the G.O. 2/2001, in practice, various cases arise requiring the agreement of the atypical situation created by the right and obligations of the appellant parties to

[7] Article 242 C.C.P., the suspension of judgment of the case features: (1) When found that the normal process is blocked by the fault of the applicant, through failure to comply with the obligations laid down in the course of the judgment, according to the law, the judge can suspend the judgment, showing that certain obligations in closing were not respected. The provisions of article 189 shall apply. (2) At the request of the party, the judgment will be resumed if the obligations referred to in paragraph (1) have been met and, according to the law, it can continue. Art. 411 of C.C.P., voluntary suspension: (1) the judge shall suspend judgment: 1. when both parties require; 2. when neither party, legally cited, fail to appear at the second case. However, due to controversy if the complainant or respondent requested a written judgment in default. (2) the application for judgment in default shall take effect only from the Court before which it was formulated.

motivate the appeal orally, with the provisions relating to the rights and obligations of the parties to the appeal and the powers of the Court of judicial review.

In consideration to the provisions of article 34 paragraph 2 of G.O. 2/2001, cited above, the appellant can motivate the appeal or not.

In the event that he chose motivating the appeal, the appellant may lodge appeals with the reasons with the request for appeal, complying with the provisions of article 470 paragraph 1 letter c) in the code of civil procedure or submit them through a separate memorandum, but within the period of the appeal motivation. A variant found more often in practice is that the grounds of appeal lodged over the term of motivating the appeal, or the first term of the Court, or the appellant proceeds to the oral motivation of the appeal at the first term of court.[8]

It goes without saying that an offender whom the ascertaining agent has applied a substantial fine, he confiscated the goods used for committing the contravention or the amount of money attached to them, proved to be suspended, was suspended the right to drive the vehicle on public roads, the operating permit has been cancelled or his building demolition without authorization has been ordered, just to give only a few examples of sanctions that he is obliged to execute if it rejects the complaint, to delay as much as possible, the procedure for taking advantage of the possibilities provided by law for this purpose.

Symmetrical to possibilities recognized to the appellant, it is necessary to analyse the situation of the appellate in the exercise of his right of defence by filing in the request for appeal through which to propose evidence and invoke exceptions.

Article 208 paragraph 1 in the Civil Procedure Code, describe that meeting for a claim is compulsory excepting the cases in which the

[8] The term is that provided by art. 468 of C.C.P., in 30 days from notification of the judgment. If the appealll was declared before the Court has notified the judgment of first instance, the motivation of the appeall should be made, where the caller has chosen the first option, within 30 days after the appeal communication. Apparently, in the administrative complaint matters, are excluded the provisions of art. 470 para. 5 C. C.P., because art. 34 para. 2 of the G. O. No. 2/2001 provides that the term of appeal is from the communication and not the pronouncement. However, we consider, in relation to the facility which the legislature attaches to the caller that the appeal was declared before the communication of the decision, the reasoning of the appeal may be submitted within 30 days of the notification of the decision and not the statement of appeal).

law expressly provides otherwise. Not sanctioning the handing of the meeting an appeal within the period prescribed by law, resulting from paragraph 2 is the defendant's acquiescence in the case of the appellate to the right to propose evidence and to invoke exemptions, other than those of public order, if the law does not stipulate otherwise.

At the same time, in accordance with article 205 in the Civil Procedure Code, the meeting is the act of procedure whereby the defendant defends himself in fact and in law from the application of bringing him to court.

According to the article XIV of the Law no. 2/2013 concerning measures for relieving the courts of law, as well as in preparing for the implementation of law no. 134/2010 on the Code of Civil Procedure, the appeal and, where appropriate, the grounds of appeal shall be lodged with the Court whose decision is attacked, and according to the article. XV paragraph 2 of the Law, the Court of judicial review, to which it has been assigned the case at random, proceed to the regularization of the application to fill in gaps and changing it if consider that it does not meet the conditions laid down by law.

The judicial review court may request to the appellant, within 10 days of the notification of the address, to fill out an application for any of the requirements referred to in point a), b), d) and (e) of paragraph 1) article 470, paragraph 1 of the Civil Procedure Code, such names of the parties, place of residence, social security number, registration code or, where appropriate, an indication of the appealed judgment, the alleged evidence in support of the appeal, the court fee, signature stamp. In connection with absence of proof of payment of the stamp fee, we note two situations to avoid prolonging the adjustment phase. Thus, if the demand for appeal records other missing acts rather than proof of payment of stamp duty/fee, if the settlement is going to mention the obligation to submit the proof of payment of stamp duty on the record, before proceeding to the application of appeal communication. If the payment of stamp duty is the only omission, then no longer imposes a 10-day period for filing of the appeal request, since the obligation to stamp duty/fee, according to article 23 no 80/2013 of O.U.G., regarding the judicial stamp tax, will be required by the appellant with the summons for the first term of the legal term, according to the article 470

paragraph 3 C.C.P., we can ascertain the nullity of the appeal for lack of proof of payment the stamp duty.[9]

Unquestionably, in the category of the appeal request lacks that can be covered in the settlement phase of the application of appeal, may not take part imposing the offender to deposit the grounds of fact and law on which it is based, the requirement laid down in the article 470 paragraph (1) letter c) C.C.P. since, given the special law – G.U.O. no. 2/2001, what is common law in matters of violations - provided an exception to his advantage, cannot be required to state their reasons for appeal under other conditions other than those laid down in the special law.

Therefore, regardless of whether the request of appeal contains the motivation in fact and in law of appeal, a motivation which would be beneficial in relation to the provisions of article 470 the Civil Procedure Code will become available the communication of the offender's application, the text of article XV paragraph 3 of Law no. 2/2013 containing a specific provision to that effect, which will be set to meet a claim no later than 15 days from the date of communication.

The problem which arises in practice is that, the offender only having received the request of appeal, without the reasons to it, is set to meet a claim on the basis of the acts from the court's file, or, as is increasingly more often in practice, make a request in turn by stating that although the meeting is mandatory according to the provisions of the article 208 paragraph 1 in the Code of Civil Procedure, read in conjunction with article XV paragraph 3 and 4 of Law no. 2/2013, yet being unable to meet the claim in the absence of reasons of appeal.

In our opinion, given the character of the appeal of a right to pass from a person to another person, we believe that nothing shall prevent the appellant to formulate defence in relation to the contents of the file, in particular where the appellant invokes new evidence and he does not bring new entries next to the others and does not make the request for appeal.

[9] Unlike the procedure before the Court of the first instance, when not stamping the complaint of a minor offence may be found by closing time in the boardroom, in accordance with article 200 para. 3 reported in article 197 of C.C.P., conclusion subject to review pursuant to article 200, paragraph 4-6 of C.C.P. It should be recalled that article 482 C.C.P., referred only to the rules of procedure concerning a trial.

If the appellant submits the reasons for appeal, in the first term of judgment or communicates them orally, for the need of respecting the provisions of article XV paragraph 3, in conjunction with those of article 14 paragraph 2 of the Civil Procedure Code, concerning discrepancy, according to which the parties must make themselves known to each other and in a timely manner, either directly or through the Court, where appropriate, the reasons of fact and law on which they based the claims and defence as well as the means of proof which they understand to use, so that each of them are able to arrange for their defence, the grounds of appeal submitted in writing to the file, or copy of the end of the session in which they were recorded, must be communicated to the appellant.

The process part of the appellant may be different in the sense that, if he is present, may declare that it supports the defence without having to apply for a term of meetings the claims, or, to the contrary, to ask for a term for the meeting at which it is entitled and even obliged in accordance with the provisions of article 205 in conjunction with article 208 paragraph 1 of the Code of Civil Procedure and article XV paragraph 3 of Law no. 2/2013.

But, unlike the common law where the entire procedure described above takes place at the stage of the appeal, before fixing the date of judgment, in the processes involving the administrative complaints, this adjustment is carried out, where appropriate, ahead of schedule, when the caller has filed the grounds of appeal within the time limit or the motivation of appeal, or after fixing the term of trial since oral motivation cannot be recorded but through a procedural act, or by a discharge in terms of orality and contradiction, according to the article 14 and 15, of the Civil Procedure Code.

Unlike the first case in which the judgment of the appeal is made, to the extent that no new evidence is given in a short term, in the other situation, caused by the subsequent motivation of the appeal, in writing or orally, the appeal judgment is prolonged with the time necessary for the communication of the administrative procedure act, the legal forms to achieve not less than 15 days (article XV paragraph 3 of Law no. 2/2013), communicating and meeting the response, within 10 days from its communication (article XV paragraph 4 of Law no. 2/2013).

Regarding the reference norm inserted in article 482 of the Civil Procedure Code, according to which the provisions of procedure

concerning the judgment in first instance shall also apply to the Court of Appeal, in so far as they are not hostile to those contained in this chapter, we draw the logical conclusion that all matters pertaining to procedural documents, of the exercise of the right to self-defence, as they result from article 13 paragraph 3, second sentence, take place in public session, considering the provision in article 240 paragraph 2 of the Code of Civil Procedure – in appeal the trial research, if necessary, will be made in open court, which extends the advertising period of the process.

Starting from the possibilities exemplified above, we find ourselves in the situation that some cases should be prosecuted in a relatively short period, and some should be extended automatically with time limits that otherwise would take place in the Council by resolution.

There is how, due to the fact that the administrative appeal may be orally motivated, shall elusion the provision provided for in article 35 of the Government Ordinance no. 2/2001 according to which complaints against reports of finding and sanctioning of offences are mainly solved. It is no less true that in almost identical appeals, the estimation of the duration of judgment made pursuant to article 238 paragraph 1 of the Civil Procedure Code, will be different, as the appeal was motivated with the filing of the appeal claim, (much smaller estimation of the duration) or the appeal was motivated orally (higher estimation), and the application of paragraph 1 sentence 1 of article 241 regarding the assurance of celerity is much dimmed.

In our opinion, given the characterization of the jurisprudential contravention (taken by Romanian jurisprudence without reservation, after the European Court of Human Rights in the case of Romania vs. Anghel), of accusation in criminal matters, of obligation as the civil process whose object consists in checking the legality and solidity of the protocol of finding and sanctioning the contravention, followed by taking the decision on the penalty, compensation settled, as well as on the confiscation measure, to be carried out not only in accordance with all the guarantees provided for in article 6 paragraph 2 of the ECHR, but also, of all the principles and guarantees of a well-directed procedural point of view, both in the settlement phase and the phase of trial.

Here comes the aspect related to procedural balance of maintaining a position of parties in terms of the procedural rights and obligations and their correlation with the celerity principle of the civil trial.

The consideration of the offence as charged accusation in criminal matters and the court procedure in the civil trial, force the Court to respect for all procedural guarantees required before an independent and impartial tribunal, is not admissible in any deviation from the rules of procedure examined above.

Given the current regulations of the appeal for offences, which allows the appearance of all the situations that we have displayed, we consider that it is necessary the *lege ferenda* to change provisions of article 34 paragraph 2 of the G. O. no. 2/2001 on the legal regime of the offences, by suppressing the provision relating to the appeal reasoning, in this way by applying the rules laid down in article 468-470 C.C.P.

Thus we believe that the rule stated in article 34 paragraph 2 of G.O. no. 2/2001 on the rules of juridical offences have the content of "(2) *If the law does not provide otherwise, the decision by which the complaint has been resolved can be attacked only with appeals. The appeal resolves to the Administrative and Tax Court of first instance. It is not required to motivate the appeal. The appeal suspends the execution of the judgment*."

Our suggestion takes into account the difference between appeal and recourse, as well as remedies, with the reasoning that the appeal, having a character which makes a right to pass from a person to another, referred to in article 476 of C.C.P., causing a new trial on the grounds, the Court of judicial review judging out both in fact and in law over the legality of the hearing and judgment appealed on the basis of documents, works and samples taken from the judgment of the contravention complaint, if the appellant has chosen not to motivate the appeal, all the more so as its motivation is not mandatory.[10]

On the contrary, if the appellant understood to motivate the appeal within the time limit laid down by law (not subsequently in writing or orally, as it allows the current regulations in article 34

[10] Art. 476 C.C.P. the effect of the appeal (1) Appeal exercised within term causes a new trial upon the merits, the Court of appeal acting both in fact and in law. (2) if the appeal does not motivate or the motivation of the appeal or the response times do not include reasons, the means of Defense or new evidence, the Court of Appeal will pronounce on the grounds, in fact, solely on the basis of those put forward at first instance. (3) by appeal you might not require the judgment or review, but setting aside the ruling of the first instance and dismiss the application for annulment of bringing to court as a result of an exception or consented to sending the file to the competent court.

paragraph 2 of G.O. no. 2/2001), the Court of Justice will re-judge the grounds within the limits set by the parties through the grounds of appeal, the incidents provisions being available regarding the limits of a right to pass from a person to another, attracted to what was appealed in accordance with the principle of *tantum devolutum quantum apellatum*, according to the article 477 C.C.P.[11]

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[11] See comments and jurisprudence regarding the devolution effect and its limits, Viorel Mihai Ciobanu , Marian Nicolae. *Noul Cod de procedură civilă, comentat şi adnotat, Vol. I art. 1-526* (Bucureşti: Universul Juridic, 2013), 1076-88.

STATELESNESS AND DUAL CITIZENSHIP IN CONSTITUTIONAL LAW

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Abstract:
Negative conflict of citizenship leads to statelessness situation namely to the loss of citizenship. Statelessness represents such a situation in which a person who has no citizenship, can not be classified in the field of action of various laws belonging to states and thereby become stateless. Two citiyenship or multi citiyenship, in its turn, is a positive conflict of citizenship which occurs when a person has two or more citizenships.

Key- words: *statelessness; dual citizenship; „jus sanguinis"; „jus soli"; diplomatic protection; State legislation*

I. GENERAL CONSIDERATIONS

1.1. Concept of population

The population is, along with the territory and government authority, one of the constituent necessary for the very existence of the state. One can not talk about the existence a state if it does not have population.[2]

The population of a state includes the totality of its persons - foreigners or stateless persons with dual citizenship, refugees or displaced persons - who live on its territory and subject to its jurisdiction. The status of different categories of persons is determined by the legal regulations of each state. From the state population are also persons who have the citizenship of that state, but are permanently or temporarilyon the territory of other states.[3]

In the exercise of its sovereign power, each state establishes the legal status of its population, regulating throughlegislative acts the legal status, rights and obligations of all categories of people that make up the

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[2] Vasile Creţu, *Public International Law.* (Bucharest: Foundacion România de Mâine, 2006), 95.
[3] http://idd.euro.ubbcluj.ro/interactiv/cursuri/MarcelaRad/cap4.html.

population. The exception from this rule are people with diplomatic status enjoying by certain immunities, the state jurisdiction over them being limited.

The states may exercise diplomatic protection and sometimes on foreigners whether at the request of another State accepts such assignment. Such situations may arise if a State broke off diplomatic relations with another state and in case of war, when a third State assumes the task of representing the interests of belligerent State.[4]

Problems regarding population status, rights and obligations of persons, whatever hypostasis may be (citizen or foreigner with permanent or temporary status) can not be solved entirely by the law of a state, some aspects claiming the cooperation of an international framework created by bilateral or multilateral treaties, given the complexity of the issues regarding the population and the impact these issues have on the relations between states.

International regulations and cooperation between states in solving problems of population cover areas and legal institutions such as dual citizenship, statelessness, refugees and displaced persons, the legal status of foreigners, asylum, extradition, diplomatic protection, human rights, etc.[5]

1.2. Legal nature of citizenship

"Everyone has the right to a nationality. No one may be arbitrarily deprived of his nationality nor denied the right to change his nationality." With those succinct statements, Article 15 of the Universal Declaration of Human Rights of 1948 confers to all individuals, wherever they are in the world, the right to have a legal connection with a State.

The concept of citizenship has arisen in connection with the inhabitants of ancient cities access to certain rights (eg Greek or Roman cities). The people of Athens were divided into three categories: people, metecs and slaves. Slaves are not recognized as human persons. Metecs who were of foreign origin, but whose family was long ago installed, sometimes for generations, were not considered citizens, but were submitted to the same military and financial tasks as citizens. They were deprived of political rights, the right of access to land ownership and the

[4] Creţu, *Public International Law* , 96.
[5] Creţu, *Public International Law* , 96.

right to appear in court.[6]

In Rome, citizenship - *civis Romanus* - was originally reserved for natives and they are provided with a number of rights, including the right to vote. Along with historical evolution, "Roman citizenship increasingly tended more to mean an affiliation of the individual to the state"[7].

During the feudal period, a form of connection of the people with the state was representing by the "obedience". The concept of citizenship has reappeared, to be universally established, on the occasion of revolutionary movements from the XVIII-th century, and with the advent of the Declaration of Human Rights and citizens.

It is considered that the citizenship is an affiliation of a person to a state. This statement takes into account first, that a community of people is considered as an integral part of the state in its broad sense (respectively the territory, population, nation and political power).[8] From this point of view, it is captured a political relationship.

Belonging to a state also implies a legal bond (*vinculum juris*) between individuals living in a given territory and political power. There is a close connection between political and legal aspects of citizenship.[9]

Citizenship is a complex and permanent legal relationship between a state and an individual. This report contains specific rights and obligations of constitutional law, provided by Constitution and laws.[10]

In a broad sense, as one of the topics is the state, citizenship is a *permanent legal - political connection* between the individual and the state.

The legal nature of citizenship has generated numerous discussions. According to some opinions, it would be a link between the state and persons, as well as between the state and assets. After other theories, such

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[6] Simona Livia Theodora Mihăilescu, *Constitutional Law and Political Institutions*. (Bucharest: Universul Juridic, 2012), 81.

[7] Pierre Garrone, *Citoyennete et nationalaite*. (Centre europeen de la culture, 1996), 14.

[8] Garrone showed that: „the existence of the State can not be conceived without the rights of citizenship. This field of law is in relation with three basis elements of the State: territory, population and organized public power."

[9] I. Muraru stated that: „although for the science of constitutional law is interested first its legal sense, the analyze of citizenship must be done starting from the indissoluble relation which exists between the political and legal aspects." *Constitutional Law and Political Institutions.* (Bucureşti: Actami,, 1998), 147.

[10] Mihăilescu, *Constitutional Law and Political Institutions*, 81.

as the contractual one, citizenship would be a contract between the state and the individuals within it. This theory tends to make analogies forced with the contracts from civil law; it may be a metaphor that reminds us of natural law theory.

Other points of view classifies citizenship within a sociological perspective, as a kind of "status" of the person, classification in a category of sex, social status, marital status. Although from this point of view may be some similarities, it starts from the premise that can not be put on the same plane. Regarding citizenship qualification as a "legal situation" we share the points of view that claim is not sufficiently determined.

Some authors consider citizenship as a part of their legal capacity. Prof. I. Muraru stated: "we reckon that citizenship is an element of legal capacity required to subjects of the constitutional law relationships." This author explains that since the laws have limited legal capacity in certain categories of ratios, as well as for foreigners and stateless persons, means that citizenship appears as the second element of legal capacity. From the perspective of the undersigned, as author of this article, such view is acceptable only if it comes from the perspective of the citizen as a subject of law; if the second subject of law is the state, it is endowed with sovereignty.

Each state has the obligation and right to protect its citizens wherever they are. The relationship between citizen and state extends wherever they find in another state, or in an area over which the sovereignty of a state is not exercised. This relationship between state and citizen can be established *by law* or *by choice of the individual*.

When referring to citizenship acquired as a result of law (automatically) due to natural causes, regardless of the person's will in the world there are two main principles: *jus sangvinis* (right of blood) and *jus soli* (right of the earth) and the quality of citizen gives to individuals access to all fundamental rights and imposes all its duties according to constitutional law.

II. CONFLICTS OF CITIZENSHIP

Conflicts of citizenship are *negative* when no state recognizes the quality of citizen to the person whose nationality is being under a fdiscussion, so a statelessness, or when each state considers that person to be citizen of the other state, condition that the courts try to remove it by

their own legislation or by international conventions; and *positive* conflict when two or more states grants or both requires the citizenship of another person, citizenship called into question.[11]

In the positive conflicts are distinguished: the ones in which the national authorities (legislative, judicial, etc.) has to determine whether a person (fo Legislative authority: a group of people) has or not the citizenship of a country; the ones in which that authority has to establish the citizenship of a person (of a class of persons) among several foreign citizenships or between foreign citizenship and a stateless situation and (also in this category) those in which an international authority, competent by the consent of sovereign states concerned has to determine a person's citizenship or of a category of persons.

Within the conflicts where are being discussed the citizenship prevail *lex fori* principle, thus: in the negative conflicts, the rejection of the citizenship; in the positive conflicts, its admission, solutions inherent to the sovereignty of that State, to its public order, to the fact that the citizens constitutes its elements (or one of them), that in their determination a state can not allow the interference of any other state, the legislature having the attitude in some positive conflict hypothesis, to give preference to foreign citizenship or to the way in which the foreign law resolves the conflict, to allow easier conditions or formalities from the Government aiming to renunciation of citizenship of the country; or just to make bearable the dual citizenship, for example by relieving the one who has it by a number of peacetime military obligations, etc.

Obviously, the conflict resolution will not be equal in the two countries, that their resolution will be diametrically opposed, that basically will be primordial a citizenship or another depending on the domicile had by the double citizen ot depending by the place of the asset in question, that basically the dual citizenship could not be discussed but only where the domicile woudl be established on the terithory of a third State.[12]

In the conflicts that concern only the citizens foreign to jurisdiction that has to rule on them, if there are no agreement for the resolution of the conflict nationality between foreign countries whose citizenship are proposed for the same person, and no agreement between

[11] Barbu B. Berceanu, *Citizenship. Legal monograph*, (Bucharest: All Beck , 1999), 63.
[12] Berceanu, *Citizenship. Legal monograph*, 65.

these States and the State whose jurisdiction is going to resolve the conflict, the authors consider two cases: the one in which a political interest of the State is at stake, whose jurisdiction is to decide and the one in which there is no such an interest.

Sometimes may occur more complicated situations. Is the case where a person is seeking citizenship in two or more states and those states approve to grant their citizenship. What is the nationality of that person? Of course, if the citizenships were required at the same time and conferred all, rarely the case, at the same date, the solution would be made through the choice of the person in question. If the citizenship were required at the same time, but were given on different dates, the person will have the nationality of the first State which granted citizenship. If the citizenships were required on different dates but were granted on the same day can not be taken into account neither the first nor the last citizenship, so in this situation will be required the intention of the applicant and his option.

Generally, the manifestation of will can be established either by the declaration of the person whose nationality is called into question or depending by the principal and usual residency and - a true *jus dimicillii* - or after the State of whose the respective person, as applicable, appears to be in fact the most attached.

It is possible to prevent and resolve the conflicts of citizenship by way of public international law with effects *erga omnes* resolution, by way of international conventions (conventions that can not only solve the existing situations of dual citizenship, but also to prevent them) sometimes having only limited objectives (eg military obligations of the dual citizens).[13]

III. STATELESNESS AND DUAL CITIZENSHIP

3.1. Conceptual delimitations

3.1.1.Statemesness concept

Negative conflict of nationality leads to statelessness situation, ie the loss of citizenship. In a resolution adopted in 1936, the Institute of International Law, defines a stateless person as "an individual who is not considered as having a state nationality".

[13] G. Meitani., *Public Internation Law Course*. (Bucharest, 1930), 248-254.

Ths, statelessness is the situation of a person who has no nationality, which can not be classified in the field of action of various laws belonging to states and thereby become stateless. It can exist in situations such as the child is born to parents without citizenship in a state which apply the the "right of blood" *(jus sanguinis)*; a person loses a citizenship of a state, but without acquiring another citizenship.

As dual citizenship, statelessness is a consequence of the mismatch between the laws of different countries in the field of citizenship, whose effect consists in non acquiring of a citizenship by the child born on the terithory of the respective state or the loss of citizenship of a State, without having acquired the citizenship of another state. Also, the children of stateless parents may be stateless if they are born on the terithory of a state where is exclusively applied the principle of "*jus sanguinis*".

Statelessness, first recognized as a global problem during the first half of the twentieth century, may be the result of the disputes between states regarding the legal identity of persons, state succession, extended marginalization of specific groups in society or deprivation of the persons or groups of persons by their nationality.

Statelessness is normally associated with periods of profound change in international relations. Redrawing of international borders, the manipulation of political systems by national leaders to achieve disputed political goals and/or denial or deprivation of nationality with the intent to exclude and marginalize racial, religious or ethnic minorities led to the appearance of stateless people in all regions of the world.

In the the last twenty years, a growing number of persons were deprived of their nationality or they could not get an effective citizenship. If this situation is allowed to continue, a sentiment increasingly deeper lack of belonging to a nationality among affected populations can lead to alienation and deprivation by such persons by all rights and obligations conferred by a state of its citizens, as well as their proper protection.

Stateless, lacking of any connection to a particular state are subject to the jurisdiction of the state where they are, where they have the quality of foreigners. But, unlike foreigners who enjoy by the diplomatic

protection of the state to which they belong, stateless persons are not entitled to such protection.[14]

There are fundamental human rights that apply to all persons, regardless of their status or the type of stay in a given territory.

Romania of the regulated through its Constitution, that foreign nationals and stateless persons living in Romania shall enjoy general protection of persons and property, guaranteed by the Constitution and other laws. The right to asylum is granted and withdrawn under the law, observing the Treaties and the international conventions to which Romania is a party (Art. 18). Based on the constitutional provisions GEO 194/2002 regarding the foreigners regime establishes inclusivelly the stateless and dual citizens rights and obligations; through Law no. 361/2005, respectivelly Law no. 362/2005 Romania acceded to the two international conventions regarding the status of stateless persons, respectivelly reffering to the reduction of statelessness and the rest domestic legal framework sets also other situation applicable to foreigners, such as the right to asylum (Law no. 122/2006) or rules applicable to the acquisition of ownership of land by foreign nationals (Law 312/2005).

3.1.2. Dual citizenship concept

Dual citizenship is a positive conflict of nationality which occurs when a person has two or more nationalities. It is also called multi citizenship. Dual citizenship as a result of the conflict of nationality, does not necessary lead to the loss of citizenship, but to the acquisition in addition of another citizenship.

The cases that lead to dual citizenship may be: the child born from parents citizens of a state which applies the law blood ("*jus sanguinis*") in respect of the acquisition of citizenship in a state where is applied the principle of land law ("*jus soli*"). In this case, the child acquires the citizenship of both countries; the marriage of a woman with a stranger can also lead to a dual citizenship, if the woman aquire also the citizenship of the husband when the legislation of that country grants her the husband's citizenship through marriage; accomplishing the military

[14] Corina-Florența Popescu, Maria-Irina Grigore Rădulescu, *Public International Law. Introductory Concepts*, (Bucharest: Universul Juridic, 2015).

service in a foreign country; adoption by a foreigner, when the state of whose citizen is the adopted child does not consent to the renunciation of citizenship and the state of the person who adopts grants to the child its citizenship; acquisition of the citizenship of a state by a person, upon request, without this latter to renounce to his prior citizenship.

Generally, the dual citizenship can not be considered a handicap but in some cases, it can lead to a number of complications for the person concerned and to certain conflicts of interest in the relationship between the two countries, whose citizenship is held by the dual citizen.[15]

When the person with dual citizenship is in one of the two states, the influence of the other state citizenship is usually reduced.

Complications may occur when the person with dual citizenship goes on the territory of the other country whose citizenship holds. If the person with dual citizenship is a male he may be obliged, eg to accomplish the military service, even though he had fulfilled this obligation towards the other state.

Such conflict situations may arise in connection with the exercise of diplomatic protection by one of the two states whose citizenship is held by the person with dual citizenship against the other state. In such cases, international practice showed a general tendency to establish and encourage, between the two citizenship under conflict, the real and effective one or so-called dominant citizenship.[16]

3.2. International regulations on statelessness field and the legal status of stateless persons

Stateless have a precarious legal status, thus they enjoy by fewer rights than citizens of that state. Unlike foreigners - citizens of other countries - they do not enjoy by diplomatic protection of a state and can thus be certain victims of discrimination, unfair expulsions, etc.

Also, stateless persons are obliged to respect the laws of the state where they are located. They do not however enjoy by a series of political rights such as the right to vote and the right to be elected.

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[15] Nicolae Ecobescu, Victor Duculescu, *International Public Law*,(Bucharest: Hyperion, 1993), 52.

[16] Georg Schwarzenberger, *Internaţional Law as applied by Internaţional Courts and Tribunals*. (London, 1957), 364 – 365;

For the reduction or elimination of statelessness cases and thus to limit the negative consequences of this situation were developed multiple international conventions. As impostance were noted the two Conventions signed in New York in 1954 and 1961 under the auspices of the United Nations Organization.[17]

These conventions recognize the right of everyone to a citizenship. States have pledged not to withdraw to any person citizenship if this would create stateless situation and to grant citizenship to children born on their territory from stateless parents.

Both the Convention on the Reduction of Statelessness and the Convention on the elimination of statelessness (1961) established a set of rules including: the loss of citizenship shall operate only when is acquired a new citizenship; the child born from unknown parents if it is not known the place of birth, will receive the citizenship of the state in which he was found. When it shall be known the citizenship of one of the parents the child may acquire this citizenship; the child born from stateless parents will receive the nationality of the state in whose territory he was born.

Convention on the Status of Stateless Persons (1954) defines a stateless person as that person "who is not considered a citizen of any State under its laws" (Article 1). This is a purely legal definition. It does not refer to the quality of nationality, the manner in which nationality is granted, or access to a nationality. The definition refers to an action of law through which the legislation of the state regarding the nationality defines *ex law* who has citizenship. Given this definition, to be called "stateless", a person must show a denial, namely that has no legal connection with the any of the countries involved in the case.

The Convention seeks more accurate to mention the procedure applied to stateless persons in the country of their domicile, in relation to the arrangements applied to nationals and foreigners and stateless main obligations. Among the provisions of this Convention we mention: every stateless has duties to the country in which he is, conforming to its laws and regulations, and to measures aiming to maintain the public order; application of the Convention to all stateless persons without discrimination regarding race, religion or country of origin; treatment

[17] Convention regarding the regime of stateless from 28 of Sept. 1954 and Convention regarding for reduction of the stateless from 4 Dec. 196l.

applied to stateless persons to be at least as favorable as that accorded to nationals regarding the freedom to practice their religion and religious education of their children; granting to stateless the treatment generally applied to foreign citizens.

There are also other provisions concerning the legal status of stateless persons, provisions relating to movable and immovable property, freedom of association, access to the courts, exercise professional activities and work in various fields. International treaties concluded during transfers of territory must provide guarantees regarding the citizenship of the inhabitants of these territories.

In trying to establish the proof of statelessness, states should analyze the legislation in the field of nationality from the states to which the individual had previous ties (eg, by birth, through previous residence, state/states where the children are citizens or wife/husband, state/states where the parents/grandparents are citizens), to consult with those states and to request evidence, if necessary. States must request the person's cooperation in providing all evidence and information.

Documents from a responsible authority of a State, certifying that the person is not a citizen thereof, is usually a credible form of proof statelessness. However, such evidence may not always be available.

The competent authorities of the country of origin or previous country of residence may refuse to issue official document attesting that the person is not a national of that State or simply do not respond to requests. Authorities of states may consider that it is not their duty to report the persons who have no legal link with the country. The authorities of certain states may consider that it is not their duty to report the persons who have no legal link with the country. However, it can be considered that if a state refuses to confirm that a person is its national, the refusal, in itself, is an evidence, whereas normally would grant diplomatic protection states citizens.

Although the 1954 Convention defines a stateless person, it does not develop a procedure for identifying stateless. It is therefore in the interests of states and people who may fall under the Convention that states adopt legislative framework that provides guidelines on how to identify a stateless. Such legislation should designate the decision maker and establish the consequences of identifying a person as stateless.

Some states have passed laws that establish specific agencies within governments - offices who have specific business object asylum,

refugees and stateless or, for example, the Internal Ministry - which analyzes and makes decisions regarding the cases in which a person claim to be stateless. Other states that have no specific legislation for laying down the procedure for recognition of statelessness, established a legal or administrative authority whose jurisdiction is to determine whether a person is stateless or not. However many more states do not have a specific procedure.

In many cases, the problem of statelessness occurs during the course of procedures for determining the refugee status. In these cases, stateless requests can be "processed" in such proceedings, which include humanitarian or subsidiary protection. In fact, stateless persons may be obliged to apply for asylum just because the state does not have available any other procedure. Some states do not have specific procedures for recognition of stateless, but this problem can rise when a person requests a residence permit or a travel document, or where an application for asylum is rejected and that person calls to remain in a country of asylum for other reasons.

Romania, for example acceded to the Convention relating to the Status of Stateless Persons by Law no. 362/2005, but subject to the "right to grant public aid only stateless persons who are refugees within the meaning of the Convention of 28 July 1951 relating to the Status of Refugees and the Protocol of 31 January 1967 relating to the Status of Refugees or, where applicable, under national law."

The first document that contains a provision on the phenomenon of statelessness was the Universal Declaration of Human Rights proclaimed by the UN General Assembly on December 10, 1948, which in Article 15 states: "Everyone has the right to a nationality"; ,, no one shall be arbitrarily deprived of his nationality nor denied the right to change nationality."[18]

According to the Convention on the Reduction of Statelessness adopted in 1961, it is recognized to the stateless the same treatment as to nationals in respect of access to the courts, including legal assistance and exemption from bail *judicatum solvi*. Stateless persons shall enjoy the protection extended to nationality: in the residency country in terms of protection of industrial property, in particular to inventions, designs,

[18] Creţu, *Public International Law*, 102.

models, trademarks, trade names and protection of literary, artistic and scientific property.

Social advantages are also similar to those of nationals in respect of: primary education; assistance; public aid; labor legislation and social security (remuneration, family allowances, working hours, paid leave, the age of admission to employment, apprenticeship and training, women's work and adolescents; provisions on occupational accidents, occupational diseases, maternity, in sickness, invalidity, old age and death, etc.).

The treatment assimilated to foreigners enjoyed also by the stateless persons occurs in cases of: acquiring movable and immovable property and other rights reported it, the lease, etc.; right of association in non-political and non-profit associations and in professional unions; regarding the categories of education other than primary education.

The freedom of movement, too is identical to the one given to foreigners in terms of choice of place of residence and to move freely.

According to Article 31, of the same Convention: "The Contracting States shall not expel a stateless person who is habitually in their territory except for reasons of national security or public order".

3.3. International regulations on in the field of dual citizenship and the legal status of the persons with dual citizens

After World War I, took place in The Hague in 1930, the first conference codifying international law, in which it sought to be reached a dual citizenship removal system.

The same conference provides in its protocol, a set of rules that refer to dual citizenship situation. These are: a person with dual citizenship located on the territory of a one of the states whose nationality holds can not invoke diplomatic protection of the other state; the person with dual citizenship shall perform military service in the state on which territory lives more; the person with dual citizenship may be relieved of fulfilling military service if, under the law of that state, shall renounce to his citizenship when it becomes an adult.

Before the Treaty of The Hague was attemped a settlement on citizenship conflict through a series of other treaties, among which we mention the treaties between the US and several European countries in 1868: Bancraft treaties, 1879 Franco-Swiss Treaty; 1891 Franco-Belgian and the Treaty of Rio de Janeiro in 1906.

In 1954, the International Law Commission discussed two draft conventions on limitation and exclusion of dual citizenship in the future, but the work was abandoned at this stage.[19]

Although dual citizenship creates a number of difficulties, there are countries that still maintain legislation favoring dual citizenship by demographic and economic reasons (for example, countries in South America or Israel).

The practice of Romania and of other countries show that adequate national legislation and bilateral agreements remain effective ways to remove the dual citizenship and general dificulties generated by this in relations between states.

Knowing the right of everyone to a single citizenship, Romanian legislation provides rules according to acquiring of Romanian citizenship by birth based on jus sanguinis principle, or in other cases, exclude a second additional citizenship, the foreign law being irrelevant in this respect and acquiring of another citizenship, according to Romanian law, must be accompanied by loss of Romanian citizenship. Thus, Law 21/1991 of Romanian citizenship, the foreign law is without effect to Romanian law, if a Romanian citizen is considered when by law of a foreign state as having also another nationality; acquiring the Romanian citizenship upon request or through repatriation, it is conditioned by the loss of foreign citizenship of the applicant; the Romanian citizenship is lost through retirement, by the person who acquired, through effect of foreign law, the foreign citizenship.

Romania also concluded bilateral agreements with other European countries, such agreements existing between other European countries, too. For example, the Convention between Romania and Germany on the settlement and prevention of dual citizenship of 20 April 1979 provides, inter alia: the right to choose of the adult person with dual citizenship (of the two states and with the domisil in one of them) for the citizenship of one of the contracting state; in the absence of a written declaration of option, that person retains only the nationality of the state party in whose territory is resident; for minor children, citizens of both contacting countries, it is poriviosed either the jointly option right of the parents (if they have different nationalities) or the rule according to it is folloed the that parents citizenship if they are or become citizens of one

[19] Florian Coman, *Drept Internaţional Public vol. I-II*, (Bucureşti : Sylvi, 2001), 101.

of the states parties; in the absence of an option declaration, minor children retain only the citizenship of the country where have the domicile. Granting citizenship by some person having the nationality of the other party is codiţionată after the entry into force of the Convention, the loss of citizenship that person.

In case of multiple nationality, tax obligation are usually resolve through bilateral agreements between the states concerned to eliminate thedouble taxation. As for the obligation to primarily military obligations, they have formed the subject, within the Counsel of Europe, of a Convention with two protocols to which Romania participated and were improved by the European Convention on citizenship. It starts from the principle that every person having the nationality of two or more States Parties to the Convention "shall not be obliged to fulfill military obligations other than the one of those States Parties".

IV. CONCLUSIONS

Despite having a field in constitutional law and international law regarding the acquisition, loss or denial of citizenship, in the world there are millions of persons who have no nationality. They are stateless. There are a variety of causes that may lead to the status of stateless persons, including contradictory legislation, the transfer of territory, marriage laws, administrative practices, discrimination, lack of birth registration, deprivation of nationality (when a State withdraws an individual's nationality), and renunciation (when an individual refuses the protection of the state).

Many stateless people worldwide are victims of forced displacement. People who have been displaced from their domicile are considered particularly vulnerable, could become stateless, especially when their displacement is accompanied or followed by a redrawing of territorial borders. Stateless persons and the persons without nationality are often forced to leave their usual place of residence. According to recent estimates, there are about eleven million stateless people worldwide.

In recent years the international community has become more aware that respect for human rights helps to prevent mass exodus and forced displacements. Similarly, increased the awareness, based on the principles contained in international treaties relating to the obligation of states to solve stateless.

Governments must acknowledge, formally and in practice, that does not have the right to withdraw or withhold the benefits of citizenship to persons who can demonstrate a genuine and effective link with the country. The best way that parliamentarians can demonstrate their determination to reduce or eliminate the incidence of statelessness is to adopt national legislation into conformity with international law, which provides that persons can not be arbitrarily deprived of citizenship, that people receive citizenship under circumstances that would otherwise be stateless, and that adequate protection is provided to persons who remain or become stateless.

On the other hand, regarding statelessness, it is considered in principle, a legal situation favorable to the person with dual citizenship, but in some cases may lead to complications in the legal status of the person with dual citizenship and to some conflicts of interest between the states whose nationality has. Such complications can arise, for example, when the citizen in question changes his residence from one state to another, both in terms of the rights and obligations of, or when it comes to exercise diplomatic protection by the states whose citizen is.

To avoid such situations, international multilateral conventions have been concluded, but without significant results. Were signed, however, numerous bilateral conventions for the avoidance of double citizenship, which establish certain option criteria for the person with dual citizenship. At the same time, in the international practice is increasingly emerging the trend that, between two citizenship, to be encouraged that real and effective one.

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THEORETICAL ISSUES RELATING TO THE RIGHT OF PUBLIC PROPERTY

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Abstract:

The Constitution of Romania establishes in a summa divisio classification the existence of two forms of property in Art. 136 para. (1), which provides that "property is public or private", and para. (2) of the same Art. assigns the holders' right of public property, providing that public property belongs to the State or territorial-administrative units".

The fundamental criteria that underlie the classification of property in public and private are the nature of the goods that make up the subject, as well as the different legal status of the two forms of property.

Key words: *the public property, the state, the territorial-administrative units , the public interest, the land fund.*

The emergence and the evolution of public property and its legal regulation developed in parallel with the emergence and strengthening of the state, as a historical, legal, political and economic institution of the society organization. The existence of the public property cannot be conceived without a statal organization, as the existence of an organized state cannot be designed without the existence of an economic and legal base to support it, respectively without public property.

Therefore, the historical existence of the public property right is strictly linked to the beginning of the state[2].

The right of public property is the right of property over the public domain, belonging to the state and administrative-territorial units exercising possession, use, and availability in public law regime, by self power and in the public interest, within the limits laid down by the law[3].

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[2] I. Adam, *Proprietatea publică şi proprietatea privată asupra imobilelor în România*, (Bucharest: All Beck, 2001), 69.

[3] D.C.Florescu, *Dreptul de proprietate*, (Bucharest :Titu Maiorescu Independant University, 2002), 84.

The Constitution of Romania establishes in a classification *summa divisio* the existence of the two forms of property in Art. 136 para.(1), which stipulates that "property is public or private", and para. (2) of the same Art. lays down the holders of the public property right, by providing that "public property belongs to the state or its territorial-administrative units".

The public property and its legal regime are governed by Law No.213/1998[4], which, in Art. 1 lays down that „the right of public property belongs to the state or its territorial-administrative units over the goods which, in accordance with the law or by their nature, are of use, or in the public interest", and Art. 2 lays down the principle of carrying out the attributes of public property over the goods that make up public domain, within the limits and under the conditions of law, forbidding implicitly an illegal or abusive exercise of this right.

The public property goods constitutes the public domain, which may be of national interest, in which case the property under the public law regime belongs to the state, or of local interest, in which case the property, also under public law regime, belongs to communes, towns, municipalities or counties.

Relevant dispositions about public property are also included in the Civil Code (Art. 475 para. (2); Art. 476-478; Art. 499; Art. 1310; Art. 1844) and the Law No. 215/ 2001 of the local public administration [5] (articles 121-126), the Law No. 18/1991 of the land fund [6] (Art. 4-5; Art. 29; Art. 83; Art. 95-97 and Art. 119), the Law No 33/1994 on expropriation for a public utility reason [7], the Law No. 219/1998 on the concessions regime. [8] Special regulations regarding the right of public property have been adopted by many normative acts.

In conclusion, the constitutional and legal provisions show that the holders of public property right are the state, regarding the public domain of

[4] Published in The Official Gazette of Romania, Part I, no.448, 23rd of April 2001.
[5] Published in The Official Gazette of Romania, Part I, no.204 from the 23rd of April 2001.
[6] Published in The Official Gazette of Romania, Part I, no. 37 from the 20th of February 1991, republished in The Official Gazette of Romania, Part I, no.1 from the 5th of January 1998.
[7] Published in The Official Gazette of Romania, Part I, no.139 from the 2th of June 1994.
[8] Published in The Official Gazette of Romania, no.459 from the 30th of November 1998.

national interest, and the territorial-administrative units, regarding the property in the public domain of local interest [9].

In accordance with Art. 122 para.(1) of the Law No.215/2001 of the local public administration "goods which belong to the public domain of local or county interest, in accordance with the law or by their nature, are of use or in the public interest and they are not declared by law of use or in the public national interest". The right of public property is a real right, therefore an absolute right, opposable erga omnes. It is also an inviolable right. Even though the inviolability of the public property is not expressed as such by the Constitution it results both from its exclusive character, in the sense that the goods which form its object cannot be under the provision of another property regime, and as well as from its inaliebility as a consequence of this exclusivity[10].

The legal persons governed by public law who are the expression of the power structures of a national or local community, respectively the state and territorial-administrative units, must have in the patrimony a right of public property. It is not excluded to have a right of private property on some goods by such legal persons, so that, in their patrimony, the right of public property and the right of private property can coexist[11].

In order to determine the object of the public property right on the one hand, and of the private property right of the state and its territorial-administrative units on the other hand, the legislator uses the concept of "domain" with the sense of totality of the goods, object of the public property and, respectively, of the private one of the state and its territorial-administrative units; goods in each area have all the same legal regime, as opposed to the legal regime of the other domain[12].

Although the Constitution does not use the concept of "domain", this is used by the Law no. 18/1991 regarding land fund which provides in Art. 4 that "land may fall within the scope of the private property right, or other real rights, having as holders natural or legal persons, or they may belong to public domain or private domain".

We notice here that the legal provisions referred to have constituted the first regulation in post-revolutionary legislation concerning the problem of public and private domain, and respectively that of the state and its territorial-

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[9] Florescu *Dreptul de proprietate*, 85.

[10] M. Constantinescu, I. Deleanu, A. Iorgovan, I. Muraru, F. Vasilescu, I. Vida, *Constituţia României-comentată şi adnotată,* (Bucharest: R.A. Official Gazette, 1992), 296.

[11] V. Stoica, „Dreptul de proprietate publică", *Judicial Courier Journal* 7-8 (2004), 130.

[12] D.C.Florescu, *Dreptul de proprietate*, 86.

administrative units. No more and no less it has been made within the framework of a law which settled a particular domain, namely that of land fund.

Neither the Constitution nor the other normative acts contain unitary regulations to provide clear criteria to delimit public and private property of the state and territorial-administrative units from private property of other persons[13].

"Insufficient regulations in the legal literature has led to some interpretations in the sense that in the public domain, in a broad sense, are included all the goods which by their nature or on the basis of a specific provision of the law must be kept for and transmitted to future generations, representing values for public use or their use in the public interest"[14].

Other authors[15] have considered that "property may be public and private. Public property may include public or private domain".

The provisions of Art. 136 para.(1) of the Constitution do not take into account the criterion of the holder regarding the right of property, but the separate legal treatment of the two forms of property.

Public domain is made up of goods referred to in Art. 136 para.(3) of the Constitution, from those laid down in the Annex to the Law No. 213/1998 and of any other goods, which in accordance with the law or by their nature, are of use or in the public interest and are acquired by the state or territorial-administrative units by modes provided by the law.

Between the concepts of public property and public domain there is an identity, the ordinary laws being unable to use the terms public and private with another meaning than the one given by constituant legislator[16].

The current regulation forces us to identify the range of goods belonging to public property with the range of goods belonging to public domain, as there are implicitly involved notions with the same meaning[17].

The fundamental criteria which form the basis for the classification of the property right in public property and private property are the nature of the goods that make up their object, as well as the different legal regime of the two

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[13] I.Romoşan, „Regimul juridic al bunurilor aparţinând domeniului public şi privat al unităţilor administrativ-teritoriale", *Drept Public* 1(1995), 87.

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[17] D. Apostol Tofan, „Corelaţia proprietate publică-domeniu public potrivit Constituţiei şi legislaţiei în vigoare", *Juridica* 1(2001), 5.

forms of property[18]. Thus, if the goods by their nature are affected by utility or public interest they will make up the object of public property for which by law is established a legal regime different from that of the right of private property.

By goods of public utility or public interest someone shall understand those goods which by their nature are intended to be used by all the members of society[19].

Some regulations regarding the right of public property are also included in the Civil Code. The texts of the Civil Code regarding the enumeration of goods which are the object of public property right have been the subject of entitled criticism, being considered as lacking clarity and inaccuracy, since they are included among those goods and some which can make up an object of private property right[20].

By adjusting the afiliation criterion to the public domain of all goods that by their nature are intended for use or public interest, the law of the land fund creates the possibility, that by changing its intended purpose, a good that forms the object of the public property, may be made object of private property[21].

The right of public property is that right of property over the goods in the public domain of national interest and in the public domain of local interest belonging to the state and its territorial-administrative units, which shall be exercised under the public law regime, being inalienable, imprescriptible and intangible[22].

Unlike the right of private property to which is to apply the legal regime of common law provided in the Civil Code and other normative acts, the right of public property is characterized by a special regime, derogatory, due to its own specific legal character. These characters are expressly provided by the law or result from the analysis of legal texts, the right of public property being emphasized by its characters, being inalienable, imprescriptible and intangible. All three characters have been analyzed in the field literature[23].

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[18] I. P. Filipescu, *Drept civil,* 84.

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[20] L. Pop, *Drept civil. Drepturile reale principale*, (Cluj-Napoca: Cordial Lex, 1995), 17.

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[22] L.Pop, *Drept civil. Drepturile reale principale*, 56

[23] E.Safta Romano, *Dreptul de proprietate publică şi privată în România*,(Iaşi : Graphix Publishing House, 1993), 95-96; L.Pop, *Drept civil. Drepturile reale principale*, 42-43; A.Iorgovan, *Tratat de drept administrativ*, vol.II, (Bucharest : All Beck, 2001), 85-89; A.Trăilescu, „Competenţa decizională cu privire la bunurile din

The phrase "public domain" has two meanings: One broad and another restricted or proper.

By public domain, lato sensu, we understand all the goods which are objects of public property, as well as the private property goods which by their nature or by virtue of a specific provision of the law must be kept for and submitted to future generations, representing values intended for public use or their use in the public interest [24].

Stricto-sensu, by public domain we understand only goods which make up the object of public property right of the state and its territorial-administrative units. To these goods are also added public services[25].

Although the fundamental law does not use "*expressis verbis*" the phrase public domain or public area it does not mean that this cannot be also found in the fundamental law. It can be deducted implicitly from some constitutional provisions, which support the thesis of the inexistance of a relation of sinonimy between the public domain and public property [26].

Another point of view states that [27], public property represents the property right of the state or territorial - administrative units - communes, towns and counties - on goods which, in accordance with the law or by their nature or their destination, are of use or in the public interest.

In the new *Civil Code* [28] , public property is defined as the property that belongs to the state or its territorial-administrative units over the goods which, by their nature or by the law, are of use or in the public interest, provided that it is acquired by one of the forms provided by the law.

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patrimoniul unităţilor administrativ-teritoriale", *Dreptul* 9(1992), 65; L.Franţescu, „Noţiunile de domeniu public şi domeniu privat al statului. Conţinut şi regim juridic", *Law* 10-11(1993), 45-47; I.P.Filipescu, „Domeniul public şi privat al statului şi al unităţilor administrativ-teritoriale", *Dreptul* 5-6(1994), 79-80; I. Adam, „Noţiunea şi natura domeniului public, domeniului privat şi proprietăţii private", *Dreptul* 8(1994), 30-31; L.Giurgiu, „Consideraţii în legătură cu domeniul public", *Dreptul* 8(1995), 40-42.

[24] A.Iorgovan, *Tratat de drept administrativ*, 53.

[25] L.Pop,. *Drept civil. Drepturile reale principale*, 60.

[26]V.Vedinaş, „Consideraţii asupra Legii nr.213/1998 privind proprietatea publică şi regimul juridic al acesteia", *Annals Bucharest University, Supplement*, the year XLVIII - 48 (1999), 123.

[27] M.Nicolae, „Consideraţii asupra Legii nr.213/1998 prind proprietatea publică şi regimul juridic al acesteia", *Dreptul* 6 (1999), 3.

[28]Law No 287/2009, published in the Official Gazette of Romania, Part I, no. 511 of 24th June 2009, has been amended by Law No 71/2011 and republised in the Official Gazette of Romania, Part I, no. 427 of 17th June 2011, Official Gazette of Romania, Part I, no. 489 of 8th July 2011 and Official Gazette of Romania, Part I, no. 246 of 29th April 2013.

In accordance with the provisions of Art. 136 para. (2) of the Constitution, as well as of Art. 858 of the Civil Code, only the state or the territorial-administrative units may be holders of public property right.

From those stated above we can conclude that no other law subject, whether a natural or legal person (governed by public or private law) may not be of an entitlement to public property.

The fact that goods in the public domain may be administered by legal persons of public right or may be leased, rented or given to use for free to natural or legal persons, does not turn these law subjects to an entitlement to public property, but only in holders of a right of administration, lease, rent or use free of charge.

CONCLUSIONS:

From the above we can conclude that, no other law matter, whether natural or legal person (governed by public or private law) may not be of an entitlement to public property.

The fact that goods in the public domain may be administered by legal persons governed by public or may be leased, rented or given to use for free to legal persons, not to turn these matters of law of an entitlement to public property, but only in the holder of a right of management, concession, lease, or putting into service free of charge.

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25. Law nr.33/1994, published in The Official Gazette of Romania, Part I, no.139 from the 2th of June 1994;

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27. Law no213/1998 , published in The Official Gazette of Romania, Part I, no.448, 23rd of April 2001;
28. Law no215/2001, published in The Official Gazette of Romania, Part I, no.204 from the 23rd of April 2001;
29. Law No 287/2009, published in the Official Gazette of Romania, Part I, no. 511 of 24th June 2009, has been amended by Law No 71/2011 and republised in the Official Gazette of Romania, Part I, no. 427 of 17th June 2011, Official Gazette of Romania, Part I, no. 489 of 8th July 2011 and Official Gazette of Romania, Part I, no. 246 of 29th April 2013.

PATRIMONIAL-ADMINISTRATIVE LIABILITY

Florina MITROFAN [1]

Abstract:

Legal liability is analyzed as a fundamental institution of law and takes different forms, depending on the scope of regulation.

The Constitution of Romania includes numerous provisions which constitute the legal basis of the patrimonial-administrative institution, in the form of legal liability, which may be driven only in the cases where it has produced a material or moral tort by acts or public activities, in their capacity as legal persons governed by public law.

Key words: *the patrimonial-administrative liability, the person aggrieved, damages, judicial errors.*

Starting with the importance of legal liability, there have been and still there are many debates on issues concerning this institution, both from the point of view of general theory of right, as well as from the point of view of branch sciences of law.

In the contemporary law there are brought into regulation a series of administrative sanctions, even though the notion of administrative liability is not recognized by the doctrine everywhere[2].

The concept of legal liability can be defined as the consequence of incompatibility between the conduct of a law subject and the provision of the legal norm [3].

The Constitution of Romania includes numerous provisions which constitute the legal basis of the institution which is to be analyzed in this article.

We state in this respect the provisions of Article 21 on the free access to justice, according to which: " (1) Every person is entitled to

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[2] A.Iorgovan, *Tratat de drept administrativ*, vol.II, Edition III,(Bucharest: All Beck, 2002), 333.

[3]I. Nedelcu, *Drept administrativ şi ştiinţa administraţiei*, (Bucharest: Universul Juridic, 2009), 429.

address the justice to defense their rights, liberties and legitimate interests. (2) No law shall restrict the exercise of this right. (3) The parties shall have the right to a fair trial and to solving the cases involved within a reasonable period of time. (4) Special administrative courts are optional and free" and the provisions of Article 52, according to which: " (1) Any person aggrieved in their right or in a legitimate interest, by a public authority, by an administrative act or by unsolving an application within the legal term, is entitled to the acknowledgment of his right or legitimate interest, annulment of the act and to remedies. (2) The conditions and limits on the exercise of this right shall be regulated by an organic law. (3) The state also bears patrimonial liability for damages caused by judicial errors. State responsibility is established in accordance with the provisions of the law and does not remove the responsibility of magistrates who have pursued acting in bad faith or gross negligence."

Para. (3) in Article 52 provides that: "the state bears patrimonial liability for tort caused by judicial errors. Its responsibility is established in accordance with the provisions of the law and does not set aside the responsibility of the magistrates who have acted in their function in bad faith or gross negligence[4]."

Significantly to remember under the scientific undertaking aspect is the fact that the patrimonial liability for reals of the state was extended at the time of the revision of Constitution in the year 2003, starting with the judicial errors in penal processes and ending with judicial errors in any processes, regardless of their nature: civil, criminal, administrative, labor right, etc.

As regards the initial version of this constitutional provision they have considered that the institution of such obligations for the state constitutes a contribution to the idea of the rule of the law state, compensating legally persons who have been victims of judicial errors, for damages/injuries which have been caused[5].

[4] Previous the reviewing of Constitution, patrimonial liability of the state was covered by Article 48 para.(3), so: "the state bears patrimonial liability, according to the law, for damages caused by judicial errors in criminal cases".

[5] V. Duculescu, C. Călinoiu and G.Duculescu, *Constituţia României comentată şi adnotată*, (Bucharest: Lumina Lex, 1997), 162.

Moreover, Article 52 is the constitutional basis of liability of public authorities for damages on citizens by breaking or disobeing the rights, freedoms and, after the Constitution was revised in 2003, carried out in this case to correlate with Article 21 and the legitimate interests of them[6].

The state liability is established in accordance with the provisions of the law, specification which may have the meaning of a special law, but may also have the common law significance, the Constitution permitting/allowing both possibilities[7].

By symmetry with legal solution possible at any time in the case of civil servants, it shall be given the opportunity to the state that in the case of magistrates to rule action in regress to be able to recover any damages caused by the government's assuming patrimonial liability for judicial errors[8].

The provision of Article 52 para.(3) concerning the liability of magistrates was criticized in doctrine, due to the fact that it does not open to an aggrieved person an alternative action - against the state or the magistrate -, the first being, in fact, more beneficial, but after the engagement of state liability, this has appealed action against the magistrate[9].

Also in regard with the patrimonial-administrative liability, the provisions of Article 538 in the new Code of Penal Procedure [10] stipulate that " (1) The person who has been convicted definitively, regardless of whether the punishment or the educational measure involving deprivation of liberty has been put into effect or not, shall be entitled to compensation by the state of the damage suffered in the case in which, as a result of retrial of the cause, after cancelling or abolishing the court

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[6] M. Constantinescu, A,Iorgovan, I. Muraru and E.S. Tănăsescu, *Constituţia României revizuită- comentarii şi explicaţii*, (Bucharest : All Beck, 2004), 106.

[7] D. Apostol Tofan, *Constituţia României – Comentariu pe articole*, coordinators I. Muraru and E. S. Tănăsescu, (Bucharest: C. H. Beck, 2008), 522.

[8] Constantinescu, Iorgovan, Muraru and Tănăsescu, *Constituţia României revizuită- comentarii şi explicaţii*, 108.

[9] I. Deleanu, *Instituţii şi proceduri constituţionale în dreptul român şi în dreptul comparat*, (Bucharest: C. H. Beck, 2006), 530.

[10] Law No 135/2010, published in the Official Gazette of Romania, Part I, no. 486 of 15th July 2010, in force since 1st February 2014.

sentence for a new fact or recently discovered which proves that there has been a miscarriage of justice, it has been a final judgment of acquittal. (2) The provisions of paragraph (1) shall also apply in the case of retrial with regard to the convict who was put on trial in absentia, if, after retrial was decided a final judgment of acquittal. (3) The person referred to in paragraph 1. (1) and the person referred to in paragraph (2) will not be entitled to ask for repair by the state of the damage suffered if, by false statement or in any other way, they have determined his sentence/conviction, except in cases in which they were obliged to do so. (4) It is not entitled to remedies the convicted person to whom is attributable to in whole or in part as regards undiscovering in due time of the unknown fact or recently discovered.

To these provisions may be added those of Article 1 of the Law no.554/2004 of Administrative contentious [11], according to which: "Any person who considers himself aggrieved in a right or in a legitimate interest, by a public authority, by an administrative act or by failure to solve in a legal term an application, it may address the administrative contentious court competent for annulment of the act, and the acknowledgment of his right or legitimate interest and remedies for his injuries. Legitimate interest can be both private and public – which gives the right to repair not only of material injury but also of the moral one caused by administrative acts.

A first conclusion to be drawn from the above concerns objects within this form of legal liability.

These may be: the state, the public authorities, the civil servants, of course when they are subjects in a legal rapport/relation of administrative law[12].

The state has an exclusive patrimonial liability in regards with the damages/injuries caused by judicial errors in lawsuits.

What characterizes legal liability of the state is the fact that it is not a responsibility based on guilt, and in order to determine the patrimonial liability of the state it should not be noted beforehand, someone's guilt.

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[11] Published in the Official Gazette of Romania, Part I, no. 1154 of 7th December 2004.

[12] M.Preda, *Tratat elementar de drept administrativ, Edition II* (Bucharest: Lumina Lex, 1999), 253.

In order to involve the state responsibility, two conditions must be met cumulatively:

-to exist a final sentence/conviction delivered in a process,

-the judgment has to be the result of a judicial error.

In the situation in which the conditions referred to above are met, the court, if it has been endowed with an action for liability against the state, must assess the plaintiff's claims.

Patrimonial-administrative liability of the public authorities occurs for the damages caused by administrative acts or by unsolving in a statutory term an application.

In such a case it is necessary to establish the guilt of public authority.

Therefore, the court in such a situation, should verify before evaluating the claims, cumulative meeting of the following conditions:

-the administrative act is illegal,

- the act has produced a material or moral tort,

- guilt of the one who has issued the act

The natural or legal person who was damaged has the possibility to file an action either against authority - (which may formulate action in regress against the civil servant who was gilty of damage)- or against the civil servant.

As regards the administrative-patrimonial liability of the civil servant, this may act either directly, when the action of the damaged person is directed against him or his part, as a defendant, or indirect, as called in security by the defendant authority.

In the case of civil servant it is also required to be met cumulatively some conditions as in the case of public authority in order to be able to bear administrative patrimonial liability.

If the public authorities wish to recover potential damages resulting from civil servants, they will be able to do such a thing by legal procedures concerning labour relations[13].

An important aspect to be borne in mind is that Article 52 of the Constitution of Romania does not indicate which is the public authority that must settle the applications, and this "silence" shall be interpreted in the sense that solving these claims comes to the competent body

[13] M. Constantinescu, I. Muraru, I. Deleanu, F. Vasilescu, A. Iorgovan and I. Vida, ,*Constituţia României- comentată şi adnotată*, (Bucharest: R. A. Official Gazette, 1992), 116.

according to the law, by applying the provisions of Article 21 on the free access to justice.

In accordance with article 95 from the new Code of Civil Procedures[14] "Courts judge, in the first instance, all the applications that are not given by law to other courts.

It appears that in the current regulation, the tribunal is the instance/court of common law responsible for trial in the first instance.

Therefore, in general, the tribunal will judge in the first instance, in any matter and regardless of the quality of the parties or the patrimonial or non-patrimonial character of the demand, whenever by law does not expressly stipulates the material competence of another court[15].

In the contentiuos administrative and fiscal court, the Tribunal is the common law court as regards the judgment in the first instance.

The technique adopted by Law No 76/2012[16] brings out a rule of common law (the integrality of competence of the Tribunal), but the enumeration of powers assigned to Tribunal in certain contents/subjects of such a nature as to ensure certainty in the law and to eliminate some difficulties of interpretation[17].

In fact, in the cases expressly provided by the law, the exclusive jurisdiction belongs to the tribunal, and in the case of the approached theme, Article 541 para. (3) The new Code of Penal Procedure provides that: "In order to receive compensation for damage, the person entitled may address the Tribunal in whose constituency he resides, calling in civil court the state, which is quoted by the Ministry of Public Finance".

With respect to compensation for the damage brought on by judicial errors caused in the other processes than the criminal ones, it is to be noted that there is no express statutory provision to settle the competent court to resolve such disputes in the first instance, and for this

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[14] Law No 134/2010, published in the Official Gazette of Romania, Part I, no. 485 of 15th July 2010, republished in the Official Gazette of Romania, Part I, no. 545 on 3rd August 2012.

[15] G. Boroi and M.Stancu, *Drept procesual civil*, (Bucharest: Hamangiu, 2015), 204.

[16] Published in the Official Gazette of Romania, Part I, no. 356 of 30th May 2012.

[17] Gh.-L. Zidaru, *Noul Cod de procedură civilă - comentat și adnotat*, vol.I- para.1-526, coordinators V. M. Ciobanu and M. Nicolae (Bucharest: Universul Juridic, 2013), 278.

reason we think that in such a situation, the ability shall be determined on the basis of the criterion value, in relation to Article 95 item 1 The new Code of Civil Procedure in conjunction with the Article 94 item 1. letter (J) The new Code of Civil Right Procedure.

In connection with the path of attack that can be exercised against the decision of first instance delivered in the application in respect with its object requests compensation for the damage caused by judicial errors, by reading over Article 483 (2) of the current Code of Civil Procedure[18] shows that under the assumption mentioned above, the path of attack is the appeal.

Another problem that should be clarified in the case of shares in claims derived from judicial errors committed in processes is that if such action is subject to be stampped or not.

The answer to this question is given by the provisions of Article 29 para.(1) letter (i) of O. U. G. . (Emergency Goverment Ordinance) No 80/2013 on judicial stamp taxes[19], according to which are exempted from the payment of the tax stamp the judicial actions and claims, including those to exercise instances of attack, regular and special, relating to criminal cases, including civil damages for material and moral injuries arising out of them.

In the same direction are also the provisions of Article 541 (4) The new Code of Penal Procedure which stipulate relief from payment of the tax stamp.

As from the above it can be drawn the conclusion that the exemption from payment of the judicial tax stamp only operates in the situation referred to in the texts of the law cited above, respectively in the

[18] According to the Law No 2/2003, Article XVIII, " (1) The provisions of Article 483 para.(2) of Law No 134/2010 relating to the Code of Civil Procedure, republished, apply processes started from 1st January 2016. (2) In the processes started with effect from the date of entry into force of this law and up to 31st December 2015 are not subject to appeal judgements given in the applications referred to in Article 94 Point 1 (B). (A) - (i) of the Law no. 134/2010 Relating to the Code of Civil Procedure, republished in the civil navigation and activity in ports, labor conflicts and social security, in terms of expropriation, in applications relating to compensation for the damage caused by judicial errors, as well as in other applications evaluabile cash up to 1,000,000 lei including. Also, in these processes there are not subject to appeal the judgments given by the courts of appeal in the cases where the law provides that decisions of first instance are subject to one call".

[19] Published in the Official Gazette of Romania, Part I, no. 392 of 29th June 2013.

situation of judicial errors committed in criminal cases, it appears that the claims arising out of judicial errors committed in the other catgories of processes will be subject to be stampped, in accordance with Article 3 (1) of O. U. G. (Emergency Goverment Ordinance) No 83/2013.

In other words, the legislator stipulated expressly and restictedly the situations in which certain classes of shares shall be exempt from payment of the judicial stamp tax, the exemptions from the payment of the the stamp tax shall not be extended by analogy to other unforeseen circumstances (*ubi lex non distinguit, nec nos distinguere debemus*).

Article 52 of the Constitution of Romania stipulates the patrimonial liability of the state laid down in accordance with the provisions of the law, for damages caused by judicial errors, but also provides the possibility of the state to formulate an action in regress against magistrates who have pursued acting in bad faith or gross negligence.

Article 96 and the following of Law No 303/2004 on the Status of judges and prosecutors[20], republished, specifies the conditions of engaging the liability of the magistrate. This, in the situation in which the state has formulated an action in regression may be required from the state within the limits of the claims paid to the damaged person by judicial errors[21].

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[20] Published in the Official Gazette of Romania, Part I, no.576 of 29th June 2004 and has been modified by means of Emergency Ordinance of the Government no.124/2004, published in the Official Gazette of Romania, Part I, no. 1,168 of 9th December 2004, approved with amendments and additions by the Law no. 71/2005, published in the Official Gazette of Romania, Part I, no. 300 of 11th April 2005, as amended by O. U. G. No 83/2014, published in the Official Gazette of Romania, Part I, no. 925 / 18th December 2014.

[21] Article 96 of Law No 303/2004 has the following content: " (1) The state bears patrimonial liability for damages caused by judicial errors. (2) The responsibility is determined in accordance with the provisions of the law and did not remove judges and prosecutors responsibility who have pursued acting in bad faith or gross negligence. (3) Cases in which the injured person party shall be entitled to compensation for the damage caused by judicial errors committed in criminal proceedings shall be laid down by the Code of Penal Procedure. (4) Right of an injured person when repairing material loose caused by judicial errors committed in other processes than the criminal will not be able to exercise only in the case in which it is established, in advance, by a final judgment, criminal liability or disciplinary action, as the case may be, the judge or prosecutor for a deed judgment committed in the course process and if this crime is of

As regards the lawsuit frame concerning the admissibility of the action in claims, the person aggrieved addresses with action against the state, and after deducting the injury, based on a final judgment, the state can file against the magistrate who, in bad faith or gross negligence has committed the judicial error.

Concepts of "bad faith and "gross negligence" are defined by Article 99 Ind.1 of Law No 303/2004, as follows: " (1) There is no bad faith when the judge or the prosecutor is in breach intentionally with the norms of material or procedural law watching or accepting the injury of a person. (2) There is no gross negligence when the judge or prosecutor intentionally, seriously and without any doubt disregards the norms of material or procedural law.

According to the Decision of the Constitutional Court no. 633/2005[22] Article 52 item (3) in the Constitution has enshrined the principle " objective responsibility of the state" under the aspect of remedies which the society has huge debts to grant them to the one who has suffered on the injust errors committed in the judicial system.

The regulation according to which the injured party can address with action only against the state, and not against the magistrate who has committed the judicial error, offers wider possibilities in making use of any right to compensation. So, conditioning the recognition of entitlement to compensation exclusively by committing judicial error result this lightening of the burden of probation, the hypothesis which, besides judicial error should be proven bad-faith or gross negligence of the magistrate, constitutional requirements for assumption of responsibility of the latter. What's more, bringing the quality of the debtor of the obligation of repayment exclusively for the member is of such a

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such a nature as to cause a miscarriage. (5) It is not entitled to remedy the person who, during the process, has contributed in any way to judicial error committed by the court or prosecutor. (6) For compensation the damage suffered, the person aggrieved party can be corrected with action only against the state, represented by the Ministry of Public Finance. (7) After injury was covered by the state under irrevocable judgment data in compliance with the provisions of para.(6), the Member can be corrected with an action for damages against judge or prosecutor who, in bad faith or gross negligence, has committed judicial error causing injury. (8) The period of limitation of the right of action in all the cases referred to in this Article shall be of one year.

[22] Published in the Official Gazette of Romania, Part I, no. 1138 of 15th December 2005.

nature as to eliminate any risk of the creditor and could not put debt instruments, being the principle that the state is always solvable.

CONCLUSIONS:

The rules according to which the injured party can be corrected with action only against the state, and not against the magistrate who has committed judicial error, offer wider possibilities in making use of any right to compensation. So, wrapping of recognition of entitlement to compensation exclusively by committing judicial error result this lightening of the burden presentation of evidence, the hypothesis which, besides judicial error should be proven truthlessness or gross negligence of magistrate constitutional requirements for assumption of responsibility of the latter. Moreover, bringing the debtor quality of the obligation remedy exclusively for the member, is of such a nature as to eliminate any risk of creditor and could not put debt instruments, being the principle that the state is always creditworthy.

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THE INFLUENCE OF A PUBLIC AUTHORITY ESTABLISHMENT ON ITS PROPER FUNCTIONING

Ioana PANAGOREŢ[1]
Ivan-Vasile IVANOFF[2]

Abstract:

The modality of establishing a local authority may even have influence on its proper functioning, fact which was demonstrated by the county council president election distinct from the rest of the members of the county council, on the occasion of local elections. The present study demonstrates this observation, focusing on the aforementioned anomaly and presenting solutions for rectifying this poor functioning.

Key words: *Local elections, county council president, county deliberative public authority, unconstitutionality, legal norms.*

By analyzing Decision no. 55/ 5 February 2014, of the Constitutional Court regarding the unconstitutionality of the provisions of the Law approving the Government Emergency Ordinance no. 77/ 2013 for establishing certain measures on ensuring the functionality of the public local administration, the number of posts and reducing costs at public institutions and authorities subordinated, under the authority of or in the coordination of the Government or of the ministries, one found therein regulations of principle which shed a new light on GEO no. 66/ 2008 and on Law no. 50/ 2009 on the approval of GEO no. 66/ 2008 [amending and supplementing the Law on the public local administration no. 215/ 2001, Law no. 334/ 2006 on the financing of the political parties activities and election campaigns, as well as amending Law no. 35/ 2008 for electing the Chamber of Deputies and the Senate and for the amendment and supplementing of Law no. 67/ 2004 on electing the authorities of the local public administration, of the Law of the public local administration no. 215/ 2001 and of Law no. 393/ 2004 on the statute of the local elected officials].

To this respect, "*according to the Constitutional Court jurisprudence, the Government ordinances passed by Parliament by law,*

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in accordance with the provisions of Article 115 paragraph (7) of the Constitution, cease to be independent and become, as a result of approval by the legislative authority, regulatory actions by law, even if, for reasons of legislative technique, along with the data of the approving law, preserve and the identification elements assigned to them at their adoption by the government"[3].

In the same context, "*the Constitutional Court has consistently ruled in its jurisprudence that the vice of unconstitutionality of a simple ordinance or of an emergency ordinance issued by the Government cannot be covered by the approval by Parliament of the ordinance in question. The law approving a unconstitutional emergency ordinance is itself unconstitutional*".[4]

The core element of the analysis is represented by the provisions of the article 115 paragraph (6) of the Constitution, which stipulates: "Emergency ordinances cannot be adopted in the field of constitutional laws, or affect the status of fundamental institutions of the state, the rights, freedoms and duties stipulated by the Constitution, the electoral rights, and cannot target measures of forcible transition of certain goods into public property".

In the jurisprudence of the Constitutional Court it was decreed that: "*those are fundamental state institutions which are explicitly regulated by Constitution, in detail or even in terms of their existence, explicitly or only generic (institutions contained in Title III of the Constitution, as well as public authorities under other titles of the Fundamental Law*)".[5]

[3] See, in this regard, Decision no. 95 of 8 February 2006, published in the Official Gazette of Romania, Part I, no. 177 of 23 February 2006, and Decision no. 1039 of 9 July 2009, published in the Official Gazette of Romania, Part I, no. 582 of 21 August 2009 and the decision no.55 / 2014, published in the Official Gazette no.136 / 25 February 2014.

[4] See, in this regard, by way of example, Decision no. 421 of 9 May 2007, Decision no. 584 of 13 June 2007, Decision no. 1008 of 7 July 2009, published in the Official Gazette of Romania, Part I, no. 507 of 23 July 2009, or Decision no. 738 of 19 September 2012, published in the Official Gazette of Romania, Part I, no. 690 of 8 October 2012 and the Decision no.55 / 2014, published in the Official Gazette no.136 / 25 February 2014.

[5] See, in this regard, Decision no. 1257 of 7 October 2009.

According to the Constitutional Court, "*the fundamental institutions of the State" are considered as having "constitutional status*".[6]

In this context are considered, among others, as being fundamental institutions of the State, local councils, mayors and county councils.[7][the county council president is lacking from the enumeration]

According to the opinion of the Constitutional Court, expressed on Decision no.55/ 2014, the meaning of the phrase "*affecting the status of fundamental institutions of the State"* envisages "*all the components which define their legal status- organizational structure, functioning, competencies, material and financial resources, number and status of personnel, payroll, category of legal acts they adopt, etc*.".[8]

All this debate, based, of principle, on the jurisprudence of the Constitutional Court, represents our arguments in substantiating the unconstitutionality of GEO no.66/ 2008 and, consequently, the unconstitutionality of both legislative acts amended and supplemented by it and its law of approval, fact which leads to a malfunctioning of the county deliberative public authority.

Thereby, in the former Law no.215/ 2001 [prior to GEO no.66/2008] the county councils competency included, according to article 101 and the election, from among its members, of the president and vice- presidents of the county councils.

With the advent of GEO no.66 / 2008, change both Law no.215 / 2001 and Law no.67 / 2004 on local public authorities election [although the county council president is not considered authority according to the Constitution!].

Thus, in Chapter 5 Section 2 of the Constitution are defined the local public authorities, these being the local councils and the mayors, and the county council is defined as: "*the public administration authority coordinating the activity of commune and town councils, in order to*

[6] Decision no. 104 of 20 January 2009, published in the Official Gazette of Romania, Part I, no. 73 of 6 February 2009.

[7] Decision no. 1105 of 21 September 2010, published in the Official Gazette of Romania, Part I, no. 684 of 8 October 2010.

[8] See Decision no. 1257 of 7 October 2009, Decision no. 230 of 9 May 2013, Decision no. 1105 of 21 September 2010.

achieve the public services of county interest." [the county council president is absent from the constitution]

What may one observe in the study of constitutional articles? One clearly discerns what the Fundamental Law understands by public local authorities, resorting to a limited list of them. To the constitutional utterance, unequivocally, one cannot add or remove public authorities which the fundamental act deemed not qualify them as such.

Amending certain organic and constitutional laws by GEO no.66/2008, introduces, along with local councils, mayors and county councils, the county council presidents as being distinct public authorities, others than the ones stipulated in the Constitution!

Thus, as stated at the beginning of our analysis, the ordinance appears in the field of constitutional laws, it affects the status of a fundamental institution of the State (i.e. the county council), flagrantly infringing articles 120, 121 and 122 from the Constitution!

Even if, by the Decision no. 1248/ 18 November 2008, the Constitutional Court pronounces on the constitutionality of GEO no.66/ 2008, considering it as being constitutional, in reference therein does not target Law 215/ 2001, but it focuses on issues related to election procedures, for which, in this study made under the light of the new decision of the Constitutional Court, it is relevant and radically changes the Court' s position on the issue of the cleavage of electing a public authority in two different manners!

Which are the consequences of these constitutional breaches in the light of the new jurisprudence of the constitutional Court?

The President, from 2008 to the present moment is elected by direct vote by the citizens in the same manner as the mayor, who, in the constitutional terminology is a public authority [namely executive] and the president remains on, in legal terms, as the president of another public authority [namely the county council] who is elected separately from this!

The constitutional anomaly is deepened by the article 88(2) from the Law no.215/ 2001 [amended by GEO no.66/ 2008 became Law no.50/ 2009] which stipulates: "*The county council, elected in accordance with the law is supplemented by the county council president, who has the right to vote and leads the council's meetings.*"

The legal but unconstitutional "conceptualisation" of the quoted text enables a public authority to consist of two different "pieces", on the

one hand the deliberative public authority [the county council as the sole authority recognized by the constitution!] elected separately and the county council president [elected separately from the rest of the county council] who "supplements" the county council. This belongs to a "whole" nominated county council, but it is chosen in a different manner than the whole to which it belongs! What other public authority of this state is constituted in two different ways after which it emerges in order to form a whole?

The President of the Chamber of Deputies or the Senate are elected separately from the respective chambers and then merge in order to form the respective chamber of Parliament or are elected the deputies and senators, who then form the two chambers and from them are appointed the management structures of the chambers?

Imagine a separate election, during the general elections of presidents of the two chambers then they lead the respective structures, elected separately?

The violation of the Constitution creates constitutional chimeras and "authorities" which, in fact, do not even exist! The president remains the president of the county council, which is the sole deliberative authority of the county. Instead, the mayor of the territorial administrative unit is elected distinctly from the local council, is and remains executive authority, distinct from the local council which is a deliberative authority, separate from the mayor's! It is logical and constitutional to be so, it is illogical and unconstitutional that the county council president receives a "halo" of special authority as compared to the county council because he/she is and remains the county council president, he/she does not become the president of the county as a distinct authority from this deliberative authority. The democratic infusion received by the direct election separate from the rest of the county counsellors who form the county council, creates a unconstitutional trend which is unfair towards the rest of the council leading to confusion and sometimes even to a malfunction of the county council.

Therefore, from the experience of the mandate 2008- 2002 and the current mandate 2012- 2016, at national level one concluded that there were cases in which the president [elected separately from the rest of county counsellors] had a political colour and most county counsellors, who, in fact, were forming the "voting machine" of that deliberative

public authority were of another political colour, thus the deliberative public authority or did not function or it functioned poorly, failing to adopt decisions on time, or it did not exercise its legal powers and competences [i.e. at the Dâmboviţa county council, during the mandate 2008- 2012, the vice- presidents were elected only in February 2009, 8 months after the constitution of the county council, this seriously disturbing the activity of this authority because there was not a stable political majority to coincide with the political interests and colour of the county council president!].

If the Constitution had been respected and the GEO no.66/ 2008, which became Law no.50/ 2009, hadn't appeared, such anomalies and malfunctioning would not have been reached because the county council would have elected, after its establishment, both the president and the vice- presidents of this structure, having from the very beginning a solid functional political majority for the entire mandate period of the county council, not existing anymore political divergences between the council president and the rest of the county council. Prior to 2008, this was the constitutional and legal situation, not existing malfunctioning and disturbances induced artificially by legal regulations which flagrantly violate the Constitution.

Starting from this constitutional anomaly, this is how the entire existential itinerary of the mandates of the mayor, respectively of the county council president are treated in a different manner.

The newly elected mayor, as executive authority of the territorial administrative unit, is validated by the court in whose jurisdiction is that territorial administrative unit, but he takes the oath in front of the local council, as a deliberative authority [see article 58 and 60 of Law No.215 / 2001].

The county council president, elected separately from the rest of county counsellors, who form the public deliberative authority, is validated by the county court and takes the oath in front of it![see art.89 of Law no.215/ 2001] the county counsellors, equal in their vote to the county council president, and who all form, in fact, the public deliberative authority [the only authority recognised by the Constitution], take their oath in front of the county council president [see art.90 of Law no.215/ 2001], who convenes the council in the establishment session. In the case of county councils establishment the convocation is made by the prefect, and the constitutive session is lead by

the oldest counsellor assisted by two young ones, situation which is similar to the one in the Parliament. In this context, a member of the county council has, from the start, ascending to the other members of the deliberative structure!

The constitutional anomaly persists even in the field of each function duties! Thus, in the case of the mayor, given the fact that it represents an authority distinct to the one of the local council, the mayor can appoint, penalize, order suspension, modification and termination of service or, as appropriate, labour relations, in accordance with the law, for the specialized body, "as well as for the leaders of the public institutions and services of local interest" [art.63 par.5, letter e of Law no.215/ 2001], alternatively, in the case of the leaders of public institutions and services of county interest, these competencies are attributed to the county council, due to the fact that this is recognised as an authority having such attributions, nowise to the county council president [see article 92 paragraph 2 letter e of Law no.215/ 2001].

In what concerns the operation of the local and county councils, there exist fundamental differences resulting from the different qualification given to the two public authorities by the legislator.

Thus, in the case of the local council, its sessions are led by a president of the local council, chosen from the local counsellors, on a limited period of time, so as, during the entire period of the mandate, the leading of the council is held, by rotation, by each local counsellor, who votes and signs the local council decisions in this quality [see article 35 and 41 of law no.215/ 2001].

In the case of the county council, its president, elected separately from the rest of the council, who is not an executive authority, distinct from the county council, leads, votes and signs its decision on a permanent basis ["the executive" runs "the deliberative"].

It would have been abnormal that the mayor, as an executive authority, lead, vote and sign the executive authorities decisions! This comparison reinforces the idea that the mayor is a constitutional authority distinct of the local council and the president is not distinct from the authority of the county council, "merging" in its structure.

The most obvious anomaly of not respecting the Constitution is represented by the situation of dissolving the local council, respectively the county council.

One will refer neither to aspects related to cases in which this situation is used nor to the legal procedure to follow, but one will analyze the situation in which, after the dissolution of such deliberative authorities, what happens with the legal status of the mayor, respectively of the county council president.

In the case of the mayor, the dissolution of the local council does not affect in any way its legal status because the mayor is an executive authority, separate from the deliberative authority of the local council.

In the case of the county council dissolution, the "constitutional anomaly" arises. Thus, the county council is dissolved, but the county council president survives this situation as he is elected apart! Which is the legal logic of the Law no.215 / 2001 as amended by Ordinance 66/2008 became Law no.50 / 2009?

A conspicuous contradiction rises between the provisions of Article 89 and Article 99 of Law no.215/ 2001.

Article 89 stipulates that the president joins the county council forming together a unique authority named the county council, adding his vote or to the other votes, and, in the case of the whole county council dissolution this one still survives through its president who remains "un-dissolved" and in possession of his vote.

How is that possible? "The largest share" [called county council] disappears by dissolution but remains part of the county council un-dissolved [i.e. the county council president]!

The inventions and intentions of unconstitutional laws to regulate such an aspect are absurd in a state of law, and this abnormal situation can only be corrected by connecting the legal texts with the constitutional ones and by removing legal fantasies which exceed the Constitution, the elementary logic and the rule of law!

The attempt of GEO no. 66/2008 to introduce, through the back door of the Constitution, yet another local public authority, generated an unequal treatment between the functioning of local councils and the functioning of county councils, starting from the election of these authorities and persons, passing by the different regime of establishing local public authorities, respectively county authorities to the different functioning of these public authorities which, in a state of law, governed by a democratic Constitution, is unacceptable!

CONCLUSION

In conclusion, it urgently requires the correction of such constitutional anomalies, it is imposed a complaint to the Constitutional Court regarding GEO no.66/ 2008, establishing its unconstitutionality as well as the unconstitutionality of the legal acts "amended" by it, respectively the Law on local public administration no.215/ 2001 and Law no. 334/ 2006 on the financing of the political parties activities and election campaigns, as well as amending Law no. 35/2008 for electing the Chamber of Deputies and the Senate and for the amendment and supplementing of Law no. 67/2004 on electing the authorities of the local public administration, and of Law no.393/ 2004 on the statute of local elected officials, and Law. No. 50/ 2009 approving GEO no. 66/ 2008.

As a consequence, it must urgently return to the constitutional order, seriously damaged, and re- entry into force of the above mentioned regulations, severely affected by the interference of the analyzed ordinance [which became Law no.50/2009].

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2. Decision no. 421 of 9 May 2007, Decision no. 584 of 13 June 2007, Decision no. 1008 of 7 July 2009, published in the Official Gazette of Romania, Part I, no. 507 of 23 July 2009, or Decision no. 738 of 19 September 2012, published in the Official Gazette of Romania, Part I, no. 690 of 8 October 2012 and the Decision no.55 / 2014, published in the Official Gazette no.136 / 25 February 2014 ;
3. Decision no. 1257 of 7 October 2009;
4. Decision no. 104 of 20 January 2009, published in the Official Gazette of Romania, Part I, no. 73 of 6 February 2009;
5. Decision no. 1105 of 21 September 2010, published in the Official Gazette of Romania, Part I, no. 684 of 8 October 2010;
6. Decision no. 1257 of 7 October 2009, Decision no. 230 of 9 May 2013, Decision no. 1105 of 21 September 2010.

THE INTERNATIONAL RESIDUAL MECHANISM OF THE INTERNATIONAL CRIMINAL TRIBUNALS (2012-PRESENT)

Denisa BARBU[1]

Abstract:

This body was established on 22 December 2010 by the UN Security Council to conduct a series of essential functions of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia after the end of their mandates[2].

It is a small and temporary group, a key step of the completion strategies of the two Tribunals, charged with continuing the "jurisdiction, rights and obligations, as well as major functions" (Resolution of the UN Security Council, 1966 in TPIFI and TPIR), but also maintaining the legacy of both institutions.

Key-words*: cooperation, international jurisdictions, cases, residual mechanism, crime*.

INTRODUCTION

The residual mechanism of International Criminal Tribunals has two branches: one branch covers the functions inherited from TPIR and is located in Arusha, Tanzania, starting to work on 1 July 2012, and the second branch was established in the Hague and take over the functions derived from TPIFI from 1 July 2013.[3]

In the initial period, there will be a temporal overlap with TPIFI and TPIR. In 1966 by a Resolution of the Security Council of the United Nations it is shown that "the mechanism will work in time with a small number of employees commensurate with its functions", the Security Council setting out that the mechanism will continue to operate until it decides otherwise, provided that its work should be reviewed in 2016 and every 2 years[4].

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[2]See Appendix 1, p. 5.

[3]http://umict.org/president.html.

[4] Denisa Barbu, *Răspunderea persoanei fizice în dreptul internațional penal,* (Iași: Lumen, 2015), 64-69; see Denisa Barbu, *Răspunderea persoanei fizice în dreptul internațional penal,* (Iași: Lumen, 2015), 305-306.

The mechanism will perform a number of functions currently made essential by the TPIFI and TPIR, arrest, transfer and prosecution of the nine fugitives[5], yet desired TPIR, will be top priorities for it.

In July 2012, nine indictees of TPIR for participating in the 1994 Rwanda genocide are released.

Thus, in accordance with the article 6, paragraph 3 of its Statute, the Mechanism will keep jurisdiction over such persons considered guilty of crimes.

The directors of the Mechanism are the President, the Prosecutor and the Registrar. Their appointment is common to both branches of the mechanism, the President being Theodor Meron, (USA) appointed on 1 March 2012 for a period of 4 years, Prosecutor - Hassan Bubacar Jallow-(Gambia), named on March 1, 2012 for a period of 4 years, Registrar-John Hocking (Australia) was appointed on January 18, 2012.[6]

In the article no.1 of the Statute, a number of terms are defined:

- Accused: a person under indictment by the TPIFI, TPIR or the mechanism;

- To arrest: the Act of taking a suspect or accused in custody, pursuant to a warrant or in accordance with the provisions of article 37.

The working languages of the mechanism are English and French, the accused can use their own language and the expenses for an interpreter being paid by the mechanism, if they do not have sufficient knowledge in order to use any of the working languages.

The UN Security Council recalls the obligation of States to cooperate with the tribunals and, in particular, to meet without delay, the requests for legal assistance, arrest, surrender or transfer of accused persons, so that all states should take the necessary measures in accordance with their national law to implement the provisions of the Council resolution of United Nations and the Statute of the Mechanism.

UN Security Council calls for the President of the mechanism to submit an annual report to the General Assembly and the UN Security Council, and to the President and the Prosecutor to submit six-monthly reports to the Mechanism of the Security Council.

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[5]Alexei Barbăneagră, *Offences against the peace and security of mankind* (Chişinău: Law Centre of Advocates, 2005), 323-340.

[6]http://umict.org/registrar.html.

1. MECHANISM JURISDICTION

The mechanism and the national jurisdiction will continue materially, temporally, territorially and personally the jurisdiction of TPIR, TPIFI, in accordance with the articles 1 to 8 of the Statute of TPIFI, with articles 1 to 7 of TPIR's status and also will have the rights and obligations of the TPIR and TPIFI and will be able to prosecute individuals accused by TPIR and TPIFI.[7]

The mechanism, however, does not have the power to issue new indictments, other than those provided for in this Statute.

Art. 2 of the Statute shows that this Mechanism will continue TPIFI and TPIR functions, as provided for in the Statute ("residual functions").

The mechanism consists of the following organs[8]:

1 - The Chambers, which include a preliminary Chamber for each branch of the Mechanism and a common room for both branches;

2 - The Prosecutor who is common to the two Chambers;

3 - The Register which is common to the two chambers, which will provide administrative services for the mechanism, including the Chambers and the Prosecutor.

2. THE CONCURRENT JURISDICTION (ARTICLE 5)

The Mechanisms and the national courts have concurrent jurisdiction to prosecute the persons who are the subject of article 1 of the Statute.

The Mechanism takes precedence over the national courts in accordance with this Statute, at any stage of the proceedings involving a person falling within the article 1, paragraph 2 of the Statute, the Mechanism may also formally request to national courts to defer to their jurisdiction in accordance with this Statute and the Rules of procedure of the Mechanism.

However, according to the article 6 of the Statute, the mechanism will be able to send cases involving persons under article 1, paragraph 3 of the Statute, the national authorities, as with cases involving persons falling within article 1, paragraph 4 of the Statute. However, in order to

[7]See articles 1-8 TPIFI Statute (S/RES/827-1993) and the annex to S/25704 and Add. 17658 (1993) and articles 1-7 TPIR Status-Annex on the S/RES/955 (1994). S/RES/1966 (2010).

[8]See art. 4 of the Statute of the Mechanism.

determine whether a case that involves sending a person falling within paragraph 3 of article 2, the Test Chamber must, in accordance with the Security Council Resolution 1534 (2004), consider the seriousness of the offence charged and the level of responsibility of the accused.

3. *NON BIS IN IDEM* (ARTICLE 7)

If a person has been judged by TPIR or TPIFI, he/she can no longer be judged by a national court, for acts constituting serious violations of international humanitarian law.

However, a person punished under the article 1 of the Statute of the Court, by the national courts can be later judged[9] by the international criminal tribunals, only if: the deed for which she was judged was murder, and the national court proceedings were not impartial or independent, but were designed to shield the accused from international criminal responsibility.

-The mechanism should have a list of twenty-five independent judges, of whom not more than 2 may be nationals of the same State, the judges being elected for a four year term which may be renewed by the Secretary-General in consultation with the chairpersons of the Security Council and the General Assembly.

-The Prosecutor is responsible for investigating and prosecuting persons mentioned in article 1 of this Statute, acts independently as a separate organ of the mechanism, not soliciting or not receiving instructions from any Government or from any other source. The Office of the Prosecutor shall be composed of a Prosecutor; an officer designated by the District Attorney and qualified staff.[10]

The registry will be responsible for the management and the maintenance of the Mechanism.

The Register is formed from a Registrar; a headquarters' officer of each of the branches of the mechanism designated by the Registrar, and qualified personnel.

The Registrar is appointed by the Secretary-General for a four year term, which may be renewed.

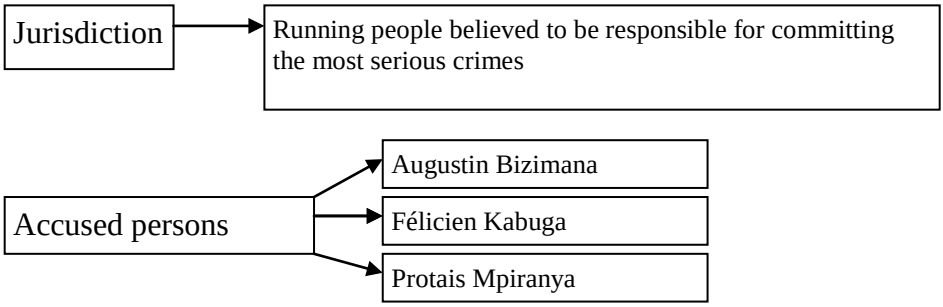
[9] A. Sida, *Introducere în teoria generală a dreptului* (Cluj-Napoca: Cluj 1977), 30-32.
[10] See art. 14 of the Statute; (see Denisa Barbu, *Răspunderea persoanei fizice în dreptul internațional penal,* (Iași: Lumen, 2015),annex 6, 304-305).

Article 19 refers to the rights of the accused, all persons being equal in front of the mechanism, article 20 brings into question the protection of victims and witnesses, and article 22 speaks of punishments; thus, the penalty applied to subjects in paragraph 2 and 3 of the article 1 of the Statute confines itself to life in prison, while the penalty applied to persons referred to in article 4 paragraph 1 will be a maximum of seven years imprisonment or a fine.

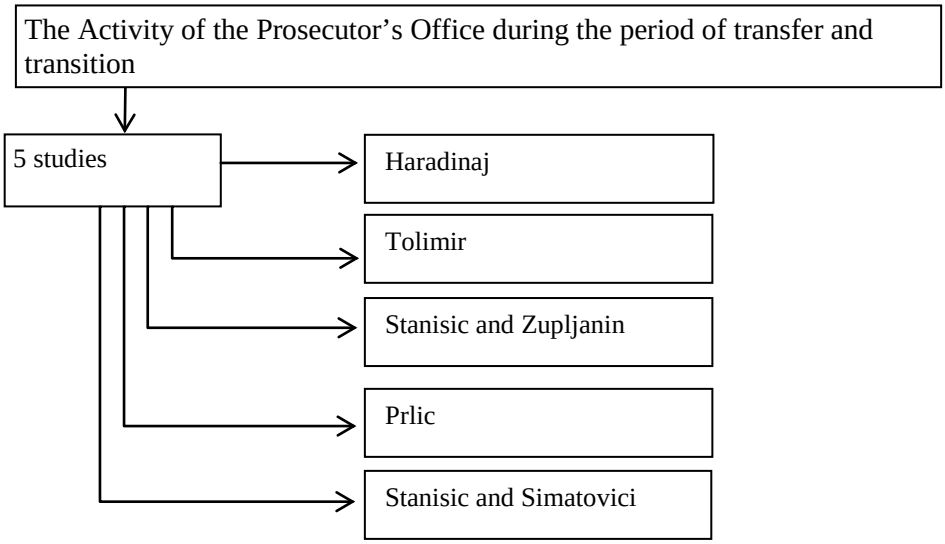
CONCLUSIONS

Without prejudice to any prior conditions laid down by the information providers, the TPIFI, the TPIR and the mechanism archives will remain the property of the United Nations.

ANNEX 1
THE INTERNATIONAL RESIDUAL MECHANISM OF THE INTERNATIONAL CRIMINAL TRIBUNALS



Preliminary Chamber	
Ratko Maheshwari	-The decision will be rendered in July 2016
Stanisic and Simatovici	- The Judgment was handed down on May 30, 2013
Haradinaj and collaborators	-The judgment was given on November 29, 2012
Tolimir	-The Judgment was handed down on December 12, 2013
Stanisic and Zupljanin	-The judgment was given on March 27, 2013
Karadzic	-The Judgment in July 2015



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THE SOCIAL DANGER - ESSENTIAL CONDITION FOR APPLYING THE PREVENTIVE ARREST MEASURE. CASE STUDY

Ion FLAMANZEANU[1]
Denisa BARBU[2]

Abstract:

The choice of a preventive measure is to be made by taking into account its purposes, the seriousness of the facts, the modality and circumstances in which an offence has been committed, but also the person to which the preventive measure is being applied. Based on the analysis of Art. 202 para. 1-3 and Art. 223, the preventive arrest measure can be applied when the general conditions are being cumulatively fulfilled and when alternatively, one of the cases provided for at Art. 223 is incident and complied with.

The preventive arrest is the most problematic of the preventive measures, being an exceptional measure and being grounded on concrete evidence and not simple indications, which are insufficient for that purpose. Moreover, the specificity of the preventive arrest needs to be emphasized and as well the necessity of enforcing such a measure, since there is another preventive measure – namely the house arrest – that can be decided by the judge of rights and freedoms, by the judge in the preliminary chamber or by the competent court for the same reasons as the preventive arrest.

Keywords: *preventive arrest, social danger, strong evidence, reasonable suspicion, proportionality.*

INTRODUCTION

In order to have the preventive measures applied, a series of general conditions need to be complied with cumulatively[3] (the existence of sound evidence or indications on which a reasonable suspicion that a person has committed an offence shall be based, the preventive measure to be necessary for the purpose of ensuring that the criminal trial is being carried out in good conditions, for the purpose of preventing the of the

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[3] Ion Neagu and Mircea Damaschin, *Tratat de procedură penală. Partea generală. În lumina noului Cod de procedură penală* (Bucharest: Universul Juridic, 2014), 628-9.

suspect or indicted from eluding the criminal proceedings or for the purpose of preventing another offence from being committed, the preventive measure needs to be proportional with the severity of the accuse brought against the person to which it is being applied and for the scope looked into by applying such measure[4]) and besides that, at least one of the situations provided for at art. 223 of the Criminal Procedure Code needs to be alternatively complied with[5].

THE NECESSITY AND PROPORTIONALITY OF APPLYING THE PREVENTIVE MEASURES

In the present case study we will be discussing the necessity and proportionality of applying the preventive measures for the felony of theft, for which the law even prescribes the possibility of reconciliation of the parties. The discussions pertain to the applicability of the preventive arrest as long as for this offence the Criminal Code[6] provides for such reconciliation of the parties.

We deem that the adoption of the preventive arrest measure on grounds of social danger is subjectively interpreted by the competent judicial organs, as for the same cases – provided for even in the decision by which the preventive arrest is being implemented (Art. 223 (a), (b), (c), (d) of the Criminal Procedure Code) - the domicile arrest[7] may be applied, especially now, when the extension of the preventive arrest is being proposed, for instance when the offender does not have criminal antecedents.

Thus, we consider that the danger for the public order does not exist, especially for the reason that the offender does not have criminal antecedents, has not attempted to obstruct the normal flow of the criminal trial, had an honest attitude within the course of criminal indictment, has not tried to obstruct the outcome of those by influencing the witnesses or

[4] Neagu and Damaschin, *Tratat de procedură penală*, 630.

[5]As per Art. 202 para 1-3 and art. 223 Criminal Procedure Code. "the measure of preventive ares [needs] to be necessary for the purpose of ensuring the good carriage of the criminal trial, for overcoming the offender fleeing the criminal indictment or the judgment, for the purpose of preventing the carriage of another felony.... the deprivation of freedom is necessary for the removal of a state of danger for the public order ..."

[6] See Art. 231 alin. 2 Criminal Code corob. with Art. 228, Art. 229 para.1 ,2 (b) and (c)

[7] Nicolae Volonciu et al., *Noul Cod de procedură penală* (Bucharest: Hamangiu, 2014), 421-23.

the victim, there is no clear evidence that his release would constitute a danger, overall only presumptions and suppositions existing on the matter.

As correctly stated by the Supreme Court, the danger that the release of an offender would constitute for the society is not to be generically assumed, but needs to be proven and needs to have evidentiary support.

As such, such an evidentiary supported danger cannot be emphasized; for establishing such a social danger there should be envisaged the data linked to the person and the behaviors of the offender, this data – as mentioned above – existing and being able to ground the rejection of the proposal for extension of the preventive arrest.

Taking into account that the purposes of reeducation and the social rehabilitation are being looked into, the purpose of the criminal trial – as stated at Art. 202 Criminal Procedures Code, can be reached even without the preventive arrest measure being taken; moreover, the necessity of extending the preventive arrest is not justified.

One needs to take into account as well the proportionality of adopting the preventive arrest measure in relation to the danger for the public order. There are a series of opinions in the judicial practice regarding the "danger for the public order"[8]. As such, this concept designates a state and not a fact that might endanger in the future the normal flow of the social relationships. The context and the modality of the criminal activity being carried out, the seriousness of the facts and the limits of the punishments provided by law cannot constitute the only grounds of appreciation the social danger has for the public order.

We need to bear in mind as well the necessity and proportionality of the preventive measure[9], since for the same case provided for at art. 223 (a), (b), (c) and (d) Criminal Procedures Code, both the preventive measure of house arrest and the preventive arrest can be applied.

According to the ECHR jurisprudence, legality is one of the fundamental principles the whole criminal trial is to be based on[10].

[8] Constantin Mitrache and Cristian Mitrache, *Drept penal. General Part* (Bucharest: Universul Juridic, 2014), 141-71.
[9] Nicolae Volonciu et al., *Noul Cod de procedură penală*, 501.
[10] Nicolae Volonciu et al., *Noul Cod de procedură penală,* 501-2.

Art. 5 para. 1 (c) of the European Convention on Human Rights provide that a person can be deprived from their liberty only when there are serious reasons to believe that releasing such person would constitute a danger for the society[11] by committing an offence or fleeing after having done so.

The non-fulfillment of the cumulative criteria provided for in the national and the European norms cannot be replaced with any other considerations by the judge. We deem that the danger for the public order needs to be demonstrated and not only grounded on suppositions and presumptions. In support of this statement we can highlight the provisions of Art. 5 of the ECHR, based on which the preventive arrest of a person cannot be undertaken in the detriment of the principles of legal security and protection against discretionary practices, the judge being then in need to be vigilant and not to endorse the extension of such a measure when the factual data has been changed throughout the trial and does not dully justify the deprivation of liberty.

In the given case, the necessity of extending the preventive arrest has been diminished not only due to lapse of time, but also due to the evidence administrated till date, therefore it is imperiously necessary to maintain the balance in between the general interest and the rights of the offender, and moreover the prosecutor did not mention the relevant grounds that determine the necessity of extension of the preventive measure.

We consider then that the proposal for extension of the preventive arrest does not observe the necessity and proportionality of the measure in regards to the seriousness of the facts, being thus a breach of art. 6 of ECHR and of Recommendation (80)11 of the Committee of Ministers of the Council of Europe, since there are no serious reasons to believe that the offender represents social danger by fleeing the criminal indictment by obstructing the judicial processes or by committing other felonies. In this sense we can mention the ECHR jurisprudence; (thus, in *Scundeanu v. România of February 16 2010,* ECHR has sanctioned the excessive usage of the concept of danger for the public order in abstract situations. The Court has ruled that, in the case, there were sufficient reasons to consider that the offender has committed a felony, however this fact is

[11] ECHR, Case Fox, Campbell and Hartley v. United Kingdom, Decision on August 30 1990.

not sufficient for permitting the arrest. The Court has reminded that the referral to the danger for the public order cannot be made in an abstract manner by the authorities, but the latter need to rely on evidence and not on presumptions and suppositions. The Court has stated that, as decided in *Letellierv. France,* considering the danger for the public order can be done only in exceptional circumstances, where there is evidence indicating the magnitude of the real danger that releasing the offender would pose. The Court stated also that, in *Calmanovici*, it has ruled that the judicial authorities did not furnish pertinent and sufficient reasons for justifying the necessity of keeping the offender under provisional detention, as they did not present concrete facts based on which the risk of releasing the offender would have been grounded and did not explain the impossibility of applying measures alternative to detention.)

In order to justify the release of the offender and the replacement of the deprivation of liberty with a limitation of the same liberty, we rely on the jurisprudence of the international courts, which is mandatory as per Art. 11 and 20 of the Romanian Constitution.

As such, the ECHR in Strasbourg has stated that art. 5 para. 3 ECHR stipulates for the authorities called to apply the measure of provisional detention to take into consideration alternative measures as permitted by law without deprivation of liberty[12].Also, in other two recent cases regarding Romania, the Court has reminded that the judicial authorities need to furnish sufficient and pertinent reasons in order to justify the provisional deprivation of liberty of the offender, by presenting concrete facts based on which the risk of having the offender released would possess and to explain the impossibility of applying measures alternative to deprivation[13].

The same Court has shown that this danger diminishes with the lapse of time and the authorities need to ground in a concrete manner the necessity of maintain the arrest[14]. The continuation of deprivation can be thus justified if, from certain concrete elements, priority needs to be

[12]Case *Jabłoński vs. Poland*, Decision in 2000 and *Patsouria vs Georgia,* Decision in 2007.

[13] Case *Calmanovici vs Romania,* Decision in 2008 and Case *Scundeanu vs. Romania*, Decision in 2010.

[14] Case *I.A. vs. France*, Decision in 1998.

granted to the public order, the individual liberty being then only subsidiary[15].

It is then true that the evidence regarding committing a felony on the part of the offender exists, those being administrated during the criminal proceedings, followed by their evaluation in the course of the trial. Taking into consideration these aspects, and also the fact that the offender is at the first incident of this type, we deem that by releasing the latter one, no negative impact would entail in the society and this wouldn't contravene to the normal flow of the trial.

CONCLUSIONS

Also, the context and modality of the criminal activity being carried out, the seriousness of the facts and the sanction limitations imposed by law cannot constitute the only grounds of appreciation of the social danger for the public order.

The exceptional character of the preventive arrest is grounded not only in the procedural norms, but also in the constitutional norms[16], in the conventional regulation that impose a series of guarantees regarding the observance of the liberty and safety of the person. In the latest years, the ECHR jurisprudence, as well as the provisions of the European Convention had a very important stance regarding the solutions given by the Romanian magistrates on the preventive arrest.

Since by applying preventive measures the individual freedom is being hindered, the European and national legislation have established a series of legal guarantees in order to prevent the abuse and discretion in applying and maintaining such measures[17].

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[15] Case *Smirnova vs. Russia*, Decision in 2003.
[16] See Art. 23 para. 1-10 of the Constitution.
[17] N. Volonciu, et al.*, Noul Cod de procedură penală*, 420.

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CONCEPTS AND HISTORICAL REFERENCES REGARDING THE CRIMINAL GUILT IN ANCIENT TIMES

Viorica URSU[1]

Abstract:

The contemporary reality cannot be separated from the past and the future. It is just a certain stage of development. This article contains the multilateral tendencies, often contradictory, of the past, which lead to a qualitative new situation. The guilt must be considered under the historical aspect and the concepts regarding the guilt, characteristic for a particular system of law and legal family in different eras, should be systematized in order to understand the essence of guilt as a legal phenomenon and to elucidate the actual contents of this category.

Key- words: *unlawful deed, the guilt, the subjective side, criminal responsibility, fault, ill will, intention, negligence*

To get to the form of legal liability, and particularly to the criminal one, which we perceive today, legal liability has come a long way and its development is closely linked to the history of mankind in general, with the peculiarities of an era to another and from one nation to another, dictated by the necessities of social life and the achieved level of civilization. The advancement of social life and especially the economic progress have exerted on the evolution of the theory of legal liability categorical influences much more visible than in any other area of law. It must be said that originally the responsibility had solely criminal character and characteristically impregnated with religiosity. Criminal liability was systematized step by step: from the norms that did not make any distinction, in the primitive society, to the norms without rules and without regard to legal institutions established in the Modern Era codings[2]. Regarding the guilt as a condition of legal liability, it is clear

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that we are witnessing a constant evolution, an evolution which is not always understandable or easy to be explained, but certainly entered into a clear and pressing social logic, and therefore rationally justified. The establishment of the legal liability on the guilt of the perpetrator is a basis of the legal liability and in generally it is accepted that the application of liability without the fault element would annihilate one of the functions recognized as being part of the legal liability, the educational function.

The negative deed gradually turned into an unlawful act throughout history. And this time the unlawful act was not only identified and explained, but it also applies to a penalty. In the primitive world the liability was associated with the idea of repression as a necessity dictated by the need to punish antisocial actions to satisfy the divine will, to remove evil in general, which led to the conclusion that at that time the repression was an act of submission in relation to divinity and its representatives in the material world, a way of redemption through suffering.

In ancient times all civilizations believed that the rules, the regulations directing them in all aspects of their life were directly dictated by the gods. Only in time the right has become a "people business" which, as we shall see, did not mean the exclusion of the religious factor from the legal sphere, but rather a clarification of the distinction between them. Therefore, the customary rules were required by mere collective belief that they have a sacred origin. All these rules that were directing the social life had a repressive nature. Gradually the criminal liability releases from the supernatural forces, also the liability of the social group is removed and the criminal liability is restricted to that which, directly, caused the result. Even though in ancient times people could not talk about the guilt(in the actual meaning of this notion), the philosophers and the lawyers of this historic segment tried to find out a subjective basis of the criminal liability and to underlie it scientifically[3].

Probably Aristotle is the first who paid a special attention to the psychological aspect as a subject apart, which attempts to show the correlation between the body and the soul. He also considers that man unlike other living beings has intellect, and this in turn is the fact that

[3]Ion Mircea, *Vinovăţia în dreptul penal român*, (Bucureşti: Lumina Lex, 1998), (1), 7.

determines his actions[4]. Plato believes that the individual soul is just a continuation of the human soul (eternal), noting in this regard that it is constituted and it implies the following three origins: the intellectual (conscious), affective (impulsive) and volitional (volitional, will.) [5].

Egypt. In the conception of the ancient Egyptians, the idea of human justice requires a steady state, an equality which must be respected, and a social report[6]. "The balance of this country lies in the practice of justice"[7]. For this reason it is stated the idea that anyone breaking the order must[8] be punished: "Punish the one who deserves to be punished and no one will vilify justice".

The first ,,appearances,, of criminal guilt were discovered in Egyptian laws such as those of Menes (3100 B.C.), Ramses II (1304-1237 B.C.) [9] or by Sasychis and Bocoris (Sec. VIII B.C.), the latter had made a huge legislative work in the VIII century B.C., consisting of books (40 papyrus scrolls). Due to these findings were outlined the ideas that at that time the most serious attacks were considered crimes against the state and social order (treason conspiracies, plots, etc.) and some religious works such as; killing sacred animals: cats, owls etc. But yet, the guilty responded together with his family for those socially dangerous acts. [10]. Therefore even in that period the death penalty could be replaced with slavery, which sought to remove the murder, giving to the guilty persons the opportunity to use the labor force in the possession rule[11].

Mesopotamia. The Babylonian and Assyrian societies were based on an organic system of laws. S. Moscati stresses that "to the people of Mesopotamia, the right was a typical basic category of thought, naturally tending to transform the customs into rules; so another aspect of that cult

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[4]Аристотель, *«О душе»*, Собрание в 4 томах, Москва, 1976, Т.1, с. 399.

[5]Платон, «*Государство*» в 3-х томах, Москва, 1971, Т. 3, с. 232-241.

[6]C. Stroe şi N. Culic, *Momente din istoria filosofiei dreptului*, (Bucureşti: Ministerului de Interne, 1994), 16.

[7]Stroe and Culic, *Momente din istoria filosofiei dreptului*,16

[8]Horia. C. Matei, *Lumea antică, Mic dicţionar bibliografic*, (Chişinău: Universitas, 1993), 168; Е. Аннерс. «*История европейского права*», Изд. «Наука», Москва 1999, с. 23.

[9] Matei, *Lumea antică, Mic dicţionar bibliografic*, p. 168;Е. Аннерс. «*История европейского права*», Изд. «Наука», Москва 1999, с. 23.

[10]К.И. Батырова, «*Всеобщая история государство и право*», Изд. «Юристь», Москва 1998, с. 26.

[11]Батырова, «*Всеобщая история государство и право*»,, с. 26.

which coincides with the existence of social order "[12]. The Sumero-Babylonians considered the right as having a divine nature[13]. In Mesopotamia's laws, according to some Russian authors[14], the first subjective requirements have already appeared for some socially dangerous acts. For example, the sin that violate God's will is considered to be committed either intentionally or with an unpremeditated intention. But despite of this, in the Babylonian conception the meaning of sin was possible without any guilt; so that the sinner even could "not know" that he had committed a sin, for example, breach of "clean" during the ritual. This fact is appreciated as one of the most formal because it could be considered repaired simply by the offender's repentance.

Some historical monuments related to the criminal culpability in Mesopotamia can be found in the Code of Hammurabi. Being published 2000 years B.C., the Code of Hammurabi contains purely legal, moral and religious rules. In the principle considerations, the Babylon legislator states that the law should bring good to people; it must stop the strong man from doing harm to the weak one. After Hammurabi, the man must affirm himself only living in a society, and that the coexistence is possible only by respecting justice. The one, who breaks the law, rejects man offending both him and the God[15]. As he is the "king of righteousness", he aims "to do justice to prevail in the country, to uproot evil and wickedness, the strong man not to push the weak one"[16]. The defendant must have committed crime or offense deliberately in order to be punished.

The offences committed by negligence were punished easier when it was proved that the act was not committed intentionally: "If in a fight, one hits another one and he does an injury, if he swears:" I have not intentionally hit, to pay only the doctor" (art. 206); "If the wounded died because of his hits, he would swear (it was not intentionally) and if (the

[12]Sabatino Moscati, *Vechi civilizaţii semite.* (Bucureşti: Meridiane, 1975), 74 (quated by Stroe and Culic, *Momente din istoria filosofiei dreptului*, 10.

[13]Ovidiu Drimba, *Istoria culturii şi civilizaţie*, vol. I, (Bucureşti: SAECULUM I.O. and VESTALA, 1998), 96.

[14]О. А. Жидкова, Н. А. Крашинникова, «*История государства и права зарубежных стран»*, Изд. Инфра-Норма-М», Москва 1999, с. 81

[15]Stroe and Culic, *Momente din istoria filosofiei dreptului,* 16.

[16]*Codul lui Hammurabi,* p. 305. *(*quated by Bădescu Mihai, *Concepte fundamentale în teoria şi filosofia dreptului*, (Bucureşti: Lumina Lex, 2002), 3.

dead) were a free man, he would pay a silver mine" (art. 207) [17]. It was also appreciated[18] that this code had and other assumptions by the acts committed by negligence (carelessness) such as the situation referred to (art. 207) according to which: "If the husband was in captivity, and his wife did not have what to eat, she went to another man's house, in this case, she had no guilt (art. 208) "[19]. We find from (art. 218) another similar example telling about the presence and the regulation of the subjective aspect of the socially dangerous facts even at that time, which stated that: "If a doctor had made someone a difficult operation with a bronze knife, but the man died, or he opened someone's eye socket with a bronze knife, and he broke the eye (the patient's eye), his hand had to be cut, too"[20]. In this sense, it should be noted that although Mesopotamia's legal thought has not reached the level of development through which the concept of criminal culpability would become steady in its laws, with all its slave structure and despite some archaic residues; the Code of Hammurabi included "modern" ideas regarding it.

India. In India the notion of law was confused with the notion of worship. A religious rule became the norm that legally regulated the social relations. The set of customs and traditions were brought into close contact with regulations, dogmas and religious rituals. In India, the law appears as a complex and strange mixture of caste rules, royal provisions and rural habits[21]. These religious, moral, civil, legal norms were gathered in collections - each collection being edited by a school or a Brahmin sect that enjoyed a real authority over their respective followers. The best known of these collections is Manu's Code or Laws. In Manu's Laws[22], which was fundamentally legal at the time, the existence of some advanced ideas on the meaning of criminal guilt are revealed, which already occurs in some provisions on the criminal guilt forms, namely, the intention and the imprudence, as well as other subjective elements of the offense, such as its reason (ex. The

[17]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului*, 3

[18]Andrei Guşciuc, Liliana Chirtoacă, Veronica Roşca, *Istoria universală a statului şi dreptului (perioada antică),* Vol.-1, Ed. "Elena" 2001, (1), 98.

[19]Guşciuc, Chirtoacă and Roşca, *Istoria universală a statului şi dreptului (perioada antică),* Vol.-1, Ed. "Elena" 2001, (1), 98.

[20]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului*, 4.

[21]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului*, 4.

[22]*Legile lui Manu*, translated by Ioan Mahalcescu, (Bucureşti: Lumina Lex, 1993), 123.

premeditated murder involved the death penalty, or the guilty of adultery were punished with death[23], or the murder during the defense of the gifts brought as a sacrifice for Brahmans or for women (was considered self-defense) was not considered a sin[24])[25].

We note in this regard that the punishment was applied only if committing socially dangerous acts, the offender involved any guilt and also in case the presence of the person's responsibility state. It had to be ascertained even in the case of an accident (except religious matters), i.e. the unconscious and the foolish, as well as in self-defense cases or in extreme necessity guilt was absolved[26]. The punishment of false witnesses was also known, where it was considered that the guilty (the false witness), was killing a hundred close people and relatives for this, but in the case of false evidence in the act of murder of any person it was equal with killing 1000 people on this occasion.

Ancient China. Since ancient times, Chinese legal regime was characterized by an extremely severe repression. The punishments were barbarian - as in all Asian countries. And all socially dangerous acts and penalties were gathered in a given period Penal Code. In it there were over three thousand socially dangerous acts (crimes), where the need to prove the guilt for the majority of them was recognized (ex. Theft is considered the intentional damage which was punished with death[27], or if the person was found in the act, but he refuses to admit his guilt, or changes his testimony during the investigations ... ", it was allowed the use of torture ...)[28]. The punishment was even worse as the culprit was a closer relative to the victim. For example, the death penalty was prescribed if the guilty caused the death by strangulation, even accidentally, unwittingly, of his father, mother, grandfather or his grandmother. The judge who intentionally acquitted a guilty or condemned an innocent is applied the due punishment according to the offender law. The judge who with bad-faith ruled wrongfully a judgment

[23]*Legile lui Manu*, Mahalcescu, 123.
[24]*Legile lui Manu*, Mahalcescu, 123.
[25]Bădescu, *Concepte fundamentale în teoria şi filosofia dreptului,* 6.
[26]A. Smochină, *Istoria universală a statului şi dreptului (epoca antică şi medievală)*, (Chişinău: F. E. R Tipografia Centrală, 2002), 43.
[27]Гравский, "*Всеобщая история права и государства*", 104.
[28]М.Черниловский, *Хрестоматия по всеобщей истории государства и права*, (Москва: Изд. «Гардарика», 1998), 32.

to capital punishment, he was executed, too. Or the one who committed a crime, but appeared before the judge before the offense has been known, was automatically absolved. It was provided that the anonymous denunciations to be punished with death, even though they contained the truth. The judge who took into account such denunciations was sentenced to 100 cane lashes, while the accused was removed from the case even if he was guilty.

Some knowledge referring to the intention degrees began to be synthesized during this period, so that the socially dangerous acts were further divided into some premeditated and others simply intentional, as those committed by mistake.

These **features of legal liability**, denoting archaic primitive reminiscences are explained by the very backward social status in Chinese society that persisted for millennia. However, the Chinese code is a remarkable effort of legal thinking.

Ancient Greece. The criminal laws of ancient Greece are based on the simple idea of responsibility for the outcome of mechanical causation, whether the act was voluntary or not. This results convincingly and in some passages of the Iliad (if a person caused the death of another person, he was automatically obliged to pay compensation).

We can also observe the delimitation between the wrongful acts and some non-wrongful acts in the Spartan laws[29].

Beginning with the V century B.C. the first signs in legal thinking of the time have appeared, the consideration of the psychological factor: the texts of laws (the laws of Lycurgus, Solon, Dragon), although incomplete and controversial, that reveal the beginning of the distinction between intentional and unintentional murder, premeditated murder and self-defense murder (Ex. If the singers' choir director gave them to drink a liquid to stimulate their voice and therefore a chorister died, he must answer for premeditated murder or negligence.). In another case (a spear thrower kills a young man who came in the trajectory) it was discussed whether the spearman had committed manslaughter or he is not guilty at all (it would be only the fault of the victim); ascertaining that the victim was called to gather the spears (so it was not his initiative) and that the spear was thrown without sufficient attention on persons being on the

[29]Smochină, *Istoria universală a statului şi dreptului (epoca antică şi medievală)*, 56.

ground, it was made a correct conclusion, that spearman had committed manslaughter.) [30].

Ancient Rome. The history of Roman law was open to a time when the issue of liability and, even less, the idea of guilt had not appeared. The historical period when the state did not get involved in conflicts occurring between individuals, and each had to make his own right, for a time it was the force that governed the relations between individuals, so that the injured or hurt in his attempt to revenge was not interested to distinguish between an injustice caused willfully and involuntary[31] ("That the damage could be committed by a human being or by an animal, a wound could have been made intentionally or of inadvertence, he was not interested, passion is blind. Under the empire of pain or anger the victim thinks only to avenge the injury suffered, whoever was the author and whatever was the cause "[32]).

In the first Roman law, the law of those XII Tables, the revenge was replaced, even though only partially, by the right to compensation that the victim gets. Thus the damage was estimated by the parties by agreement (voluntary composition) and only where there were differences they used their right to revenge[33].

Later, as the state was strengthened and felt able to impose its authority it began to interfere in the relations between individuals, fixing the price of the right to revenge in the form of a fine, the punishment.

The importance of this development is revealed by another point: the state begins to be concerned not only with illegal acts that harm the public order, but also with those affecting individuals and, in this way endorses the right to punish the authors of crimes committed[34].
Consequently, the crimes become public and henceforth not the victim will be the one who will punish the perpetrator - by his right to revenge or by redeeming it - but the state, the injured person having only the opportunity to request some compensation.

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[30]I.Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,* (Chişinău: Poligrafică „Tipografia Centrală", 2005),10.
[31]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*10.
[32]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*10.
[33]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*11.
[34]Mariţ, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală,*11.

It is now outlined the distinction that we meet in the Justinian age between the criminal actions tending to a penalty, civil action persecutors which tend to obtain a compensation and the joint actions that tend to both of them.

The causes of lack of guilt in the first period of Roman law must be sought not only in the deficiency or the absence of legal provisions but implicitly, the precarious state of the culture of that time, because what else is right but the expression of political and cultural social life of the society line.

The explanation of the link between the degree of culture and the notion of guilt lies in the fact that only a person with certain intellectual formation was able to notice the difference between intentional and unintentional acts because otherwise the reaction against an injustice was violent because the victim was not pleased only with simple injury coverage, but he also requested a personal satisfaction, a punishment without taking into account, of course, the degree of culpability of the author.

After this first stage, dominated as it was otherwise normal, by brutality and weaknesses, it will accede to a flourishing era of Roman law.

Now, due to the influence of Greek philosophy, the Roman jurists of the late republic, managed to formulate the notion of Aquila's fault. The Aquila's Law has established for the first time the subjective conception of liability, according to which the liability could not succeed when going against unreasonable beings, such as children and fools. Later, it appeared the idea that the children and the fools can't distinguish right from wrong, so they can't be at fault.

This regulation was a breakthrough through the attention paid to the conscious guilt of the perpetrator. Despite this interpretation, it wasn't established a general principle on the subjective side of the illegal act and it has never been made a clear distinction between the materiality of injury and psychological attitude of the offender to act and its consequences[35].

So anyway, according to the Law of Aquila, the act had to be the one committed by negligence or by the willful misconduct of the offender. If

[35]L.-B. Boilă, „Vinovăţia, fundament al răspunderii civile, în ambele sale forme, în textele noului Cod civil, ca şi în ale celui precedent", *Dreptul* 1(2012), 151.

the damage was caused by accident, the Law of Aquila could not be applied[36]. Also according to the law mentioned in the Roman law, the distinction criterion between ill will and guilt was made, as mentioned, in terms of intentional aspect. If the case of ill will the guilt takes the form of intention, while at the fault it was appreciated the absence of the intentional element. So that, even unintentionally causing material damage, the person was also sanctioned[37].

Thus, according to the law of Aquila, the legal foundation of the contractual liability was the Law of Aquila that had enshrined the idea of guilt. Then the concept of quasi offenses was created, representing the infringements committed unintentionally, differing from crimes - committed intentionally; and finally, we can see that: "in the Roman law the notion of fault remained, however, a significant extent, not enough specified, but its requirement has never managed to become a general principle, the liability without fault persisted in a number of cases ".

Thus the quasi offenses of the judge were also considered some form of guilt committed under a negligent or intentional guilt, which brought some damage to one of the parties[38].

The Aquila law constituted the first attempt to regulate the theory of responsibility, under its incidence being those crimes that were neither injuries nor theft, but were penalized only isolated in the law of those XII tables or in the subsequent laws.

In terms of the forms of guilt, the Roman jurists very well delimited the intentional offences from the misconduct offenses.

The Roman law begins for first time to outline the concept of stages of criminal activity. Thus in the case of intentional offenses, the emergence of the idea of committing the offense was called the intention formation and plotting a crime was also named the so-called "pure intention." All the Romans are those who first formulated the unanimous principle accepted by the science of criminal law "*cogitationis poenam nemo patitur*" (the thoughts are not penalized)[39]. Thus, the murder

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[36]Emil Molcuț and Dan Oancea, *Drept roman*, (Casa de editură și presă "Șansa", S.R.L., Universul, 1994), 326.

[37] Э. Аннерс, *История европейского права*, (Москва: Издательство «Наука», 1999), с. 12.

[38] Аннерс, *История европейского права*, 34.

[39]Mariț, *Evoluţia conceptelor şi a reglementărilor cu privire la vinovăţia penală*, 12.

committed by negligence as a result of a fire entailed a lower penalty than the acts committed in ill will[40]. In another example, it is estimated that: "There can be no theft if the object was not taken or was not moved during the theft. Likewise, if a person enters someone's house with the purpose to steal, but has not touched any object nor took them, that act is still not regarded as theft, and this because although he had intended to steal, he did not manifest his intention by taking any particular object [41]".

So, from the above mentions, we can state that the Romans already had quite modern or advanced concepts on the meaning of the subjective concept of the deed, even at that stage of evolution. And this we can argue through the fact that besides knowing the forms of the guilt and other issues or concepts that exclude such forms or any subjective position of the perpetrator from committing any dangerous social facts, such as the situation of the unforeseeable circumstance, other psychological dimensions of crime were already known, such as the purpose of committing it.

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[40]Батырова, *Всеобщая история государство и право*, 113.
[41]Titu G. Maghieru, *Furtul în dreptul roman şi penal român*,(Bucureşti: Pedagogică and Ştiinţifică, 1987), 8.

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THE FOUNDATION OF LIABILITY OF STATES FOR WRONGFUL ACTS

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Abstract:

State liability must be defined by reference to two interdependent elements, one that is objective, which is the violation of an international obligation of the state through a conduct attributed to it, and one that is subjective, resulted in an act or omission, which is attributed to the state under international law.

***Key words**: state responsibility, international liability, international obligation, wrongful acts, codification.*

INTRODUCTION

The institution of international liability has been a constant concern of doctrine and jurisprudence, starting from the premise that sovereignty and international personality of States cannot constitute a reason for the violation of the principles and norms of international law and the interests of other States. In international law, as in any system of law, the subjects must be responsible for their wrongful conduct or for their activities which, although not wrongful, may cause injury to States or their citizens[2].

The institution of liability in contemporary international law encompasses a large content based on a concept different from that existing in classical international law, which was based on civil law liability.

The codification of the principles governing the international liability of States was included on the agenda of the International Law Commission since 1949, but the Commission's work in this area began in 1961, and since 1973, there have seen notable results, through the discussion of a draft Convention relating to international liability. These

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[2] I. Anghel and V. V. Anghel, *Liability in International Law* (Bucharest: Lumina Lex Publishing House, 1998), 36-39.

debates reflect the trend of giving new dimensions to the international liability of States.

In this context, it has also been outlined and determined international liability for damages which may be caused by activities that are not prohibited (*civil liability of states*) [3], but which, by their nature, involve risks (activities in outer space or the activities regarding the use of Atomic Energy for peaceful purposes).

States shall undertake liability in case of breach of any international obligation, not only for some of them and has complex content, both in terms of acts that generates, its topics, as well as of the consequences.

It ensues, therefore, that in international law there are two situations that can trigger the responsibility, as follows:

- liability for unlawful actions or acts in terms of international law-violation of the principles and norms of international, conventional or customary law;

- liability for injurious consequences arising out of activities that are not prohibited by international law-licit activities per se, but with a high degree of risk.

In the work of codification of the responsibility of States for illicit actions (*wrongful acts*), the International Law Commission proceeded, on one hand, to a structuring of the matter, dealing with issues concerning the determination of the origin of international responsibility of States; the contents, forms and degree of responsibility; the implementation of international responsibility and dispute settlement, and on the other hand, has operated a series of boundaries with particular practical relevance.

The Commission has made a distinction between the international obligations whose violation has a special significance for the international community as a whole which cause serious consequences in terms of responsibility, referred to as international crimes including attacks upon maintaining international peace and security, such as slavery, genocide, the war of aggression and other obligations which violation does not have such a meaning, referred to as misdemeanour.

Characteristic of national law, the general principle according to which the breach of an obligation arising out of the legal norm triggers the responsibility and obligation of the perpetrator to repair the damage

[3] Anghel and Anghel, *Liability in International Law*, 36-39.

caused and, also finds its applicability in international law, which enshrines the general principle of liability for unlawful Acts or Facts as a result of an action (*delicta commissiva*) or abstention (*delicta ommissiva*)[4].

The prevailing theories, stated in doctrine and in supported case-law, regrading the establishment of the foundation of international liability have vacillated between civilistă conception of national law according to which the basis of liability must be the fault and strict liability theory (*objective liability*), which supports the trigger of international responsibility by the mere fact of finding the occurance of an international wrongful act.

The theory of objective liability, included in the draft of codification of the Commission of International Law, argues that the wrongful act or fact generates new international relations that may be a consequence of a breach of an international obligation, and if the wrongful act affects the fundamental principles of international law or *erga omnes*[5] obligations, the liability can be invoked by any of the members of the international community[6] because, in relation to these each State has a legal interest.

According to the draft of codification of the Commission, enacted in 2001, such a broad definition has been abandoned in favor of one more concise one, expressed in article. 1, according to which "*any illicit*

[4] Dumitra Popescu and Adrian Năstase, *Public International Law* (Bucharest, 1997), 308; I. Anghel and V. Anghel, *Liability in International Law*, 8; P.M. Dupuy, *Droit international public, 5e edition*, (Paris: Dalloz, 2000), 433; M. Shaw, *Public International Law*, 4th edition (Cambridge: University Press, 1997), 542-543.

[5] The specialized literature has shown that although the concept of *erga omnes* obligations is part of the international law, the scope and its significance are undetermined in the states and judicial practice, which allows any member of the international community to become "defender" in the name of the international community in a legal action or "gendarme" for the compliance with the international law when it is a common interest [O. Schachter, *International law in Theory and Practice*, (Martinus Nijhof Publishers, 1991), 211-12]. From the same reasons, the arbitrary interpretation of the concept could generate abuses from some states to justify the right of intervention or to accommodate their political interests.

[6] Popescu and Năstase, *Public International Law*, 308.

international act of a State entails the responsibility of that State"[7] (article. 1).

In that same sense of conditioning the liability of a state by the violation of an international obligation the International Court of Justice has issued a judgement in the Chorzow Factory matter in which it is shown that: "*there is a principle of international law that states that the breach of an engagement involves an obligation to make repairs in an appropriate form"* [8].

The case-law has consistently affiremed the rule that liability of states is the consequence of failure to comply with an assumed the international obligation by the state and, implicitly, a penalty imposed by this fact, whereas any obligation of a State is the corollary of the right of another State to demand fulfilment of this obligation[9]. Therefore, any breach of an obligation injures the rights of other States, which requires that the institution of liability to have the role of ensuring the correction or restoration of such situations and to deter the tendencies and attempts of destabilization of relations between States.

Because the condition of international responsibility is that the damage or injury is the result of a breach of international norms by a State, in terms of establishing liability issues, it is necessary to identify the State which breached an international obligation.

Considering the difficulty of the analysis, we deem necessary a series of conceptual and terminological details and clarifications.

First, whereas the conduct, in the material sense, belongs exclusively to natural or legal persons[10], and in this situation the conduct

[7] Draft articles on Responsibility of States for internationally wrogful acts in Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10). Chapter IV.E.1, November 2001, 43.

[8] *The Chorzow Factory Case* (Indemnity; Jurisdiction) (Germ. v Pol.), 1927 PCIJ, Ser. A, No. 9 (Judgement of 26 July 1927), 21.

[9] We note in this regard Judge Huber's opinion, in the case of the Spanish areas in Morocco, who stated: "*Liability is the corollary of a right. All the rights with international character entails the international responsibility. The liability stem from the obligation to do the repair, if that obligation is not fulfilled*"(United Nations Reports of International Arbitral Awards, 1923, 641).

[10] As a legal entity, the State should manifest itself through the conduct of the persons acting on its individual or collective behalf, either as members of an entity.

of individuals should be legally attributed[11] to States[12], we should identify the members of a unit who by their conduct represent the State.

The doctrine opinions were joined by the case law opinions, notable in this respect being the Advisory opinion of the Permanent Court of International Justice in the matter of the *German Settlers in Poland*, according to which *the State can act only through its representatives and agents*.

We believe that it should be made clear which individuals may be assigned to the scope of the State bodies or agents from the perspective of international responsibility.

An answer in this regard is provided by international customs, which assigns the conduct of individuals or collectives, designated as agents or organs in accordance with the rules of national law, to the conduct of the State which they represent. In support of such a solution, the doctrine has emphasized that the attribution of the conduct of State organs or agents cannot be challenged under international law, when the State confirms that his representative is invested with delegated authority and acts on its behalf[13], a sit is stated in the draft articles regarding the State liability developed by CDI: "*the conduct of any State body having that status under the national law will be considered an act of the State under international law, in the context in which this body has acted in that capacity in a given case*"[14] .

In international law, the State is perceived as a unified, monolithic structure and not as an entity divided in several bodies[15], so that the responsibility for the external conduct of persons invested with authority is attributed entirely to the State, as shown in art. 5 of the CDI

[11] In our opinion, the term *attribute*, otherwise also used in the coding debates of the International Law Commission, is not confused with the term *impute*, whose meaning is well defined in the domestic law.

[12] Ago, *2nd Report*, 189; Amerasinghe, *Imputability in the Law of State Responsibility for Injuries to Aliens*, in Revue igyptienne de droit international (Cairo), vol. 22, 1966, 91.

[13] Amerasinghe, *Imputability in the Law of State Responsibility for Injuries to Aliens*, 102; Sohn and Baxter, 247-257; ILC, Summary records of the of the 56th Session (A/56/10) (Comments).

[14] ILC Report (A/56/10), Cpt. II, art. 4.

[15] "*It should be noted that a plaintiff State files a suit not against the criminal agent, but against the state that he represents. The State organization and division of authority is not a matter of concern for the nations law*"(Ago, *3rd Report*).

draft, and "*the facts and omissions of collective or individual members that make up the State machinery should be treated the same as acts or omissions of the State at the international level, that attract its liability*"[16].

In terms of case-law, the majority of cases in which international responsibility was attributed to the State for the acts of its representatives or officials concerns the exercise of executive or administrative authority , respectivly acts of the police[17], armed forces[18], consular officials[19], heads of state[20] and, in general, the other categories of administrative officials, but it should be noted that it can be attributed for positive acts contrary to international law, violation of international standards of judicial proceedings or inability to pass laws necessary to fulfill assumed international obligations[21] and the conduct of individuals who meet judicial functions within or on behalf of the state[22].

Within the meaning of article 4 of the draft code of responsibility according to which: "*the conduct of a State body shall be considered an act of the State under international law, whether that organ belongs to the legislature, the executive, judicial or otherwise, if its functions have*

[16] Ago, *3rd Report*, 253. Ago states that: *"Of course, some organs, by the nature of the functions they perform are more exposed in their practice to the infringement of international norms, compared to other organs; the existence of a variety of international obligations makes it difficult in practice to differentiate or distinguish between bodies that theoretically may or may not commit international crimes"*.

[17] Mallen Case (1927) (Mex. V. US.), 4 R Int'l. Arb. Awards 173; Filartiga v. Pena-Irala, 577 F. Supp.860 (ED NY 1984).

[18] Caire Case (1929) (Fr. V. Mex.), 5 R Int'l. Arb. Awards 516; Earnshaw and Others: The Zafiro Case (1925) (UK. V. US), 6 R. Int'l. Arb Awards 160.

[19] Hemming Case (1920) (UK. V. US), 6 R Int'l. Arb. Awards 51.

[20] Agular-Amory & Royal Bank of Canada Claims (1923) (UK. V. Costa Rica), I R. Int'l. Arb. Awards 369.

[21] Ago, *3rd Report*, 246; Cristenson, "The Doctrine of Attribution in State Responsibility", in Injuries to Alliens, (Ed. Lillich) 321; Brownlie, *International Law and Use of Force by States*, 142-143; Hoijer, *La Responsabilite internationale des etats en matiere d'actes legislatifs*, 4 RGDIP (1929), 577.

[22] Ago, 246; Amerasinghe, *State Responsibility for Injury to Aliens*, 53; Brownlie, *International Law and Use of Force by States*, (1963), 142-143; Eustathiades, *La responsabilite internationale de l'etat pour les actes des organes judiciares et le probleme du deni de justice en droit international* (1936).

national or international character and if you occupy a position superior to or subordinate to the organizational structure of the State"[23].

However, the analysis of individuals and groups whose conduct entails international liability of the State should be extended to certain categories of individuals who are not appointed to represent the State in accordance with national rules, thus international law demonstrates the autonomy, without, however, prejudice in any way to the principle of unitary structure of the State in relation to the international community.

Also, the Annex Status to the Agreement dated 8 august 1945 for the punishment of war criminals of the European Axis to contain references to individual responsibility for war crimes and for acts regarded as crimes against humanity and crimes against peace (war of aggression)[24].

The International Tribunal at Nuremberg, set up under the Statute, in its judgment of 30 September 1946, has decided in connection with the personal liability by showing that crimes against international law are committed by people, not by abstract entities, and the only way for the application of the rules of international law is the punishment of individuals who committed such crimes[25] .

It is widely accepted in international law doctrine that states are the main subjects and beneficiaries of international rules, which may lead to the conclusion that their conduct might violate the rules intended. In this regard in the arbitration panel ruling on the nature of international responsibility in the case *Dickson Car Wheel Co. Case (1931) (US v Mexico)* stipulated that *" for the responsibility to rest with a State under international law it is necessary for an international wrongful act to be attributed, i.e. there must be a breach of the obligation imposed by an international legal standard"*[26].

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[23] ILC Report to the UNGA (A/56/10), 44, art. 4. The term "state body" includes all the individual or collective entities constituting the state organization and acting on its behalf. This includes a body of any territorial governmental entity within the State, on the same basis as the central governmental bodies of that State.

[24] The status refers to individual responsibility for crimes against peace, war crimes and crimes against humanity. For the text of the Statute, see Gh. Moca, M. Drăghici, *Collection of Public International Law documents*, (1972), 423-430.

[25] Transcript of Proceedings, p 16, 878; AJ, 41 (1947); Woetzel, *The Nuremberg Trials in International Law* (2nd ed, 1962); J. Brownlie, *International Law and Use of Force by States*, 167-213.

[26] Guerrero, *Report to the Council of the League of Nations on the Questions which appear ripe for international regulations: Responsibility of States for Damage Done in*

State liability must be defined by reference to two interdependent elements, one that is objective, which is the violation of an international obligation of the state through a conduct attributed to it, and one that is subjective, resulted in an act or omission, which is attributed to the state under international law[27].

In other words, liability occurs when the conduct expressed as an act or omission is attributable to a State under international law and that conduct constitutes a breach of an international obligation assumed[28].

Part of the doctrine and old jurisprudence retained, in addition to the two elements mentioned three conditions for determining an illegal act, namely: fault, injury / damage and causation[29].

Currently, strict liability has replaced fault liability considered crucial element in classical international law doctrine and accepted today especially in the context of applying the rules which establish legal or illegal conduct, the content of the obligations in a specific area of

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Their Territories to the Person or Property of Foreigners, League of Nations: 1927), Doc. C. 196 M.70.

[27] Popescu and Năstase, *Public International Law*, 309; Raluca Miga - Beşteliu, *International Law, Introduction to Public International Law*, (Bucharest: ALL Education Publishing House, 1997), 359; Ago, *2nd Report on State Responsibility*, Yb Int'l L. Comm'n 177, UN Doc. A/CN4/233 (1970), 187; Amerasinghe, *State Responsibility for Injury to Aliens* (1967), 37; Jimenez de Arechaga, *International responsibility*, in Manual of Public International Law, (Sorensen), ed. 1968, 534; Sohn and Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, eds. 1974; J. Crawford, *The ILC Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, in *AJIL*, 4 (2002), 874 – 890.

[28] An example of reference for determining the State liability resulting from both actions and omissions is the international dispute on Corfu Strait, between Albania and the United Kingdom, settled by the International Court of Justice (ICJ) in 1949. On October 22, 1946, British military ships passing through the Albanian territorial waters of the Corfu Strait have hit an anti-ship minefield located in the strait. This resulted in property damage and deaths among the crew. ICJ held responsible Albania for the failure to notify that a minefield was placed in its territorial waters, as well as the fact that it allowed its territory to be used in a manner contrary to the legitimate interests of other states (the right to innocent passage). To reach this conclusion, the ICJ went on the assumption that the sovereign state should know and be responsible for all the acts or omissions that occur on its territory. However, the Court acknowledged the liability of the United Kingdom for attempting to carry out demining activities in Albanian territorial waters without the Albanian authorities permission (B. Tchikaya, *Memento de la jurisprudence du droit international public*, (Hachette, 2000), 54-56).

[29] B. Tchikaya, *Memento de la jurisprudence du droit international public*, 56.

relations between states, and in connection with determining liability, the extent and forms of compensation for damage.

Damage was always a condition for the existence of wrongful acts and connection occurs implicitly, to the extent that the damage is admitted as a condition of the infringement.

International responsibility may be invoked for natural or economic damage, but also for the political or moral damages[30], so that any violation of a commitment to a State and any of its subjective rights violation may be considered a material or moral damage caused to that State[31]. Appraisal as wrongful in character of an act generating liability entails taking into account the specific circumstances that led to its occurance, as it is difficult to achieve an inventory of facts and of acts generating liability, considering the diversity of situations which can generate violation of s the norms of international law and considering that a fact considered lawful in accordance with the rules of national law cannot be regarded as having the same character in international law, if it violates the rights and interests of other subjects participating in a international legal report.

Based on these considerations, a basic principle of international law enshrined in article. 27 of the Convention on the law of treaties, applicable to all State divisions and institutions[32] proclaims that a State may not invoke the provisions of its internal law to justify a failure to comply with its international obligations, so the action or omission of a State in the context of a breach of an international obligation entails its responsibility, regardless of the qualifications or motivation this behaviour according to national law.

If, under national law, the States enjoy, in certain cases, the immunity of jurisdiction in relation to national courts, in international law, the State is liable for the breach of international commitments[33],

[30] I'm Alone Case (1935) (Can. V. US), 3 International Arbitration Awards 1939, 1618; Gr. Geamanu, *Contemporary international law* (Bucharest: Didactica si Pedagogica,1965), 219-221; Gr. Geamanu, *Public international law treaty*, volume I, (Bucharest: Didactica si Pedagogica, 1981), 344.

[31] Anzilotti stated that "the international responsibility derives mainly from a violation of a state right and any infringement of a right represents a damage" [Anzilotti, *Teoria generale de la responsabilita della stato nel diretto internazionale*, (1902), 195].

[32] ILC Report to the UNGA (A 56/10), 2001, 44 (Cpt. I – General Principles, art. 3).

[33] ILC Report to the UNGA (A 56/10), 2001, 44 (Cpt. I – General Principles, art. 4).

such liability being a consequence of the privileged position they have as main subjects of international law. Thus, the violation of international obligations constitutes an international crime, such as to give rise to international liability of the State and certain legal consequences both for the State in question-obligation of reparation, as well as for third parties-their right to seek means of reparation, to take countermeasures, and even the obligation, under certain circumstances, to respond to acts contrary to international norms[34].

Specific forms of reparation or other legal consequences of failure to comply with international obligations may be provided for in the treaties in the form of clauses relating to the consequences of the breach of the obligations arising from these treaties and dispute settlement related to them[35]. Depending on the circumstances, two or more Member States are jointly responsible for a crime they committed, such as for occupation of enemy territory[36].

A distinction retained in the legal doctrine is that of the initial or primary liability, and the indirect or secondary liability of States[37].

The initial liability appears in the moment of committal by a State of facts which are directly attributed to it, resulting from the exercise of governance, or from acts of its agents or officials or representatives carried out at the request of or under direct authorization of the State.

Delegated responsibility occurs as a result of carrying out of acts that cause international damage by private persons (own nationals or foreigners that are in the territory of the incriminated state) or by unauthorized officials.

Thus, if the former occurs through direct charging of non-compliance with or breach of an obligation by the State and gives rise to a more complex legal issue, the latter is based on the obligation of the State to remove or eliminate the source of producing damages, in which case the liability of the State entails the adoption of preventive measures,

[34] ILC Report to the UNGA (A 56/10), 2001, 44 (Cpt. I – General Principles, art. 22).
[35] Draft Articles on State Responsibility, part II, Art 2: YBLC (1983), 42-43.
[36] ILC Report to the UNGA (A/56/10), 2001, p. 46, art.11; J. Brownlie, *System of the Law of Nations: State Responsibility*, part 1, (1983), 189 – 192.
[37] The distinction between the initial responsibility of the state and the second one was made for the first time in 1905 by the German jurist Borchard, being subsequently rejected by Strupp, Das völkerrechtliche delikt (1920), 32-35.

submission of remedial or compensatory guarantees from the part of the guilty person and if the situation dictates, even its punishment.
But prevention and reparation obligations owed by the State in the case of indirect obligations are actually obligations for injurious acts for which the State is directly liable.

A striking aspect we consider to be that applicable principles of liability target both to participation or the action of a State, as well as preventive conduct, so that the regime of liability may be invoked and applied, including in case of violation of the so-called obligations of prevention[38].
A fact considered lawful in accordance with the rules of national law cannot be regarded as having the same character in international law, if it has violated the rights and interests of other subjects participating in a international legal report.

Conditioning State liability depends on the breach of an international obligation. The absence of a hierarchy in art. 38 on sources accurately reflects the structure of the international legal order confirming that customary law and treaties are autonomous sources: conditions regarding the formation, existence and termination of the validity of each source does not depend on formation of other sources. This range of sources demonstrate that customary law and treaties are equivalent, and any relationship between the two is based on the criterion of each case.

We believe that any obligation of a State is the corollary right of another state to demand fulfilment of this obligation. When an obligation is violated, are injured, at least theoretically, the rights of other countries.

[38] For example, State A delivers to State B a technology, knowing the hazards of the technology and the associated risk of damage to third States, but also the beneficiary's capacity to prevent and act in case of an environment accident. State A neglect to give to State B all the using instructions of the technology and to present the complexity of the technology or its design deficiencies. State A's failure to present upon delivery of the technology all this details to State B, may limit State B's ability to act effectively in case of an accident and to diminish possible consequences

CONCLUSIONS

The institution of liability must ensure the restoration or correction of a situation and discourage tendencies of destabilization of relations between States[39].

Liability arises only when an international obligation has been violated. The essence of a crime as a source of liability is constituted by the contrast of conduct between the de facto conduct of the state and the conduct which it should have according to international law"[40].

We believe that it must be determined whether by the conduct of a state it is violated a rule or the conduct itself is a breach of an international obligation.

The conduct a subject of international law may be permitted, prohibited or required by international law. Act or omission in the context of breach of an international obligation generates responsibility, regardless of qualification or motivation of such conduct under national law. The principle that a State may not invoke its constitutional provisions or failures as motivation for international infringement of its obligations is a basic principle of international law[41].

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[39] In the case concerning the Spanish areas in Morocco, Judge Huber emphasized that the responsibility is the corollary of a right, so all the rights with international character entails international responsibility. However, the liability stem from the obligation to do the repair, if that obligation is not fulfilled.

[40] ILC Report to the UNGA (A 56/10), 2001, 43-63.

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THE FIGHT AGAINST DOMESTIC VIOLENCE: LEGAL MECHANISMS IN DIFFERENT JURIDICAL SYSTEMS

Roxana Gabriela ALBĂSTROIU[1]

Abstract:

The social reality that goes beyond the juridical one determined the legislator to regulate the protection order an ways to combat the domestic violence, known in different forms, starting with the physical one to the social, economical and spiritual violence.

The area of the victim and the aggressor is pre-established, being determined by the legislator under the terms: "family member", without a limited configuration of the Protection Order towards the family members, as it was established by the general civil law, but a wider field of action, which includes the persons which are living together, even if between them it is not a legal relation of kinship or affinity.

Besides, by the way wich this protection mechanism is designed it interferes with the principles and rules relating to the protection of human rights, the privacy and family life, the principles enshrined in the Basic Law, rules of civil law, criminal law or procedural law.

The study aims to answer the following question: Which are the measures that can be taken in such case of violence? How can be applied such a measure in our Romanian contemporary society? Are we protected and outside the borders of the State?

Key words: *domestic violence, state of danger, family member, the protection order, the restraining order*

INTRODUCTION

The protection order is regulated by Law 25/2012[2] amending and adding to Law 217/2003[3] about preventing and combatting violence. These provisions come in response to the numerous statistics[4] which show an alarming number of domestic violence cases. Noticing that in practice Law 217/2003 does not provide effective protection to victims of

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[2] Official Gazette of Romania 365 from 30 May 2012.

[3] Official Gazette of Romania, Part I. 367 from 29 May 2003

[4] Open Society Foundation, *Studiu la nivel naţional cu privire la implementarea ordinului de protecţie – Legea 25 din 2012,* (Bucharest : Filia, 2013).

domestic violence, lawmakers have considered it necessary to create a tool to try to combat this type of violence from the moment it becomes an imminent and irremovable danger. The very purpose for issuing the protection order is to eliminate the state of danger represented by "any deliberate action or inaction, except in self-defense or defense, manifested physically or verbally committed by a family member against another family member which causes or may cause physical, mental, sexual, emotional or psychological damage, including threats with such acts, coercion or arbitrary deprivation of liberty" [2 paragraph (1) of Law 25/2012].

The normative elements with an element of novelty found in domestic legislation are based on, besides the need felt on a social level, and European and international[5] legislative developments over time – i.e. the protection of victims of domestic violence – numerous normative acts, the last and most important being EU Directive 2011/99[6].

Therefore, the amendments to Law 217/2003 reconfigure the notion of "domestic violence" by re-assessing the actions that justify issuing an order. The scope of the concept of "family member" is expanded, with protection being afforded to any person cohabiting without necessarily establishing a line of kinship. The governing principles in the protection and promotion of interests of domestic violence victims are determined. The "protection order" is introduced as a mechanism for the protection of domestic violence victims[7]. The abilities of competent bodies are reconfigured to allow the enforcing of the court's decision represented by the protection order.

THE PROTECTION ORDER VS. THE RESTREINING ORDER

Regulating the protection order in Romanian law was modelled on the existing similar institutions in other legal systems, as well as discussions on the European protection order.

[5] Ramona Duminică and Aandreea Tabacu, "The influence of European Union law and of international law on the development of national legislation, Journal of Legal Studies", *Supplimentary Issue 4*, 1-2 (2012) 37-49.

[6] Directive 2011/99/UE of the European Parliament and of the European Council from 13 December 2011 concerning the European protection order, the Official Journal of the European Union, L.338/21.12.2011

[7] F. Văduva, *Familia ca sursă de agresivitate şi violenţa*, PhD Thesis, University of Bucharest, 2012, p. 36.

Therefore, we find that the *protection order* is governed in all 50 American states[8] and in Colombia, obviously with some features known from one legislation to another. By order of protection[9] :

- Perpetrators of violence shall be prohibited to attack, strike, contact or disturb the victim;
- Perpetrators of violence are obliged to leave the house they shared with the victim;
- Perpetrators of violence are forced to keep at least 100 yards from the victim and the victim's home or workplace;
- Orders the perpetrator of violence to attend counselling;
- Prohibits the perpetrator from carrying firearms.

The protection order may also include a provision for the protection of children or persons living in the victim's house.

Regarding *the restraining order*[10], it is known as an "ex parte" judicial order whereby the perpetrators of violence cohabiting with the victim are forced to leave home temporarily. The restraining order is most often a temporary injunction issued at the request of the abuses cohabitant. In most states, the notion of "cohabitant" refers to the person is in a sexual relationship with the perpetrators of violence against them and who has lived with them at least 90 days in the year preceding their application for the restraining order[11]. The victim is exposed to imminent danger or has already been abused by the abuser (and/or already has a protection order against him) and has no other legal way to defend themselves than to requesting the issue of a restraining order. In most states, applying for an order may be done only by an attorney[12].

The protection order is regulated on a European level, with some countries having provisions similar to those of the United States, while others fuse the two institutions, having covered only the protection order that mixes characteristics from both of them. Thus, under the national

[8] http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/StalkingHarassment_CPO_Chart_8_2007.authcheckdam.pdf

[9] www.findlaw.com, FindLaw a Thomson Reuters business, 2013.

[10] Webster's *New World Law Dictionary*, Inc., Hoboken (New Jersey: Wiley, 2010).

[11] M. Htun and L. Weldon, *Sex Equality in Family Law: Historical Legacies, Feminist Activism and Religious Power in 70 Countries*, World Development Report (Indiana: Purdue University, 2011), 14.

[12] K.K. Player, *Recent Development: Expanding Protective Order Coverage*, St. Mary's Law Journal no. 43/2012, (San Antonio, 2012), 589.

legislation in Europe, the term "protection order" has become somewhat synonymous with the restraining order and is used depending on the focus either on the victim or the aggressor.

In France, articles 515-9 of the French Civil Code regulate the protection order, an instrument to protect victims of domestic violence, introduced to French law by the Law from the 9 July 2010[13]. According to surveys[14] conducted in France in 2000, one in ten women is a victim of acts of physical, mental, verbal or sexual violence from their partner and three women are killed every two weeks by a current or a former partner. Also, 20% of medical emergencies are cases of domestic violence. Of these victims, only 6% reported the incident.

Austria and Germany[15] have regulated an extension of police powers in order to very rapidly and effectively intervene to remove the victim from under the influence of the aggressor. In serious cases of violence, the police have been given the power to enter the family home, call the victim and evacuate the aggressor. Also, competent police authorities prohibit the perpetrator to return home to the family or to approach the victim's home or workplace. Such interventions can take place even if the victim has not applied to the court for protection.

At present, in our country article 31 paragraph (3) from Law 25/2012 provides that to enforce a protection order the police may enter the family home and all its attachments, with the consent of the protected person or, in the absence of that, the consent of another family member. This can be achieved but only under a protection order.

We observe that the protection order as regulated in our legal system has a number of specific elements. These are more interesting when they highlight a number of exceptions or limitations of rights already provided for in our legislation. And in order to state some of them, we need to start right from the example consisting in the power conferred to the police to enter the victim's domicile, at their request, to

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[13] M. Jaspart, E. Brown, S. Condon, *Les violences envers les femmes*, (Paris : La Documentation française, 2013), 121.

[14] N. Zebrinska, *La guerre secrète, vaincre la violence conjugale Paris*, (Paris : L'Harmattan, 2003), 51.

[15] B. Haller, *The Austrian Legislation against Domestic Violence,* Coordination Action against Human Rights Violations (Viena, 2005).
http://www.ikf.ac.at/english/austrian_legislation_against_domestic_violence.pdf

protect them from the danger posed by the presence of the perpetrator there.

In most cases, the victim's domicile is not their personal property, but is the family home, placed in joint ownership of the spouses, or moreover, is the personal property of the abusive spouse. In this last particular case, we notice the specificity that the legislature intends to infuse into the protection order legislation.

Therefore, entering into *the domain of criminal law*, we consider that article 224 paragraph (1) from the New Code of Procedure describes breaking the protection order and entering the victim's domicile as "entering without the right, by any way possible, in a house, room, outbuilding or enclosed space pertaining to them, without the consent of the person using them...". Can we discuss trespassing in the case of the police executing a protection order? Obviously not. On one hand, because the policeman acting on the basis of a court ruling to be enforced and, on the other, the police have received the consent of a person living in that dwelling. Moreover, when legislating the protection order, the lawmaker had in mind principles like respect for human dignity, equality of opportunity and treatment, protection and visibility of domestic violence victims. These points were considered primordial, the actions that may affect the home are noticed only when the police's intervention is done abusively and without respect for rules laid down in the regulation of the protection order.

Also, in the same situation of executing the protection order by the competent body, we discuss the specifics of this rule, based on *rules of civile law*, i.e., regulation of private property rights and prerogatives it gives to the right holder. Prerogatives are violated by regulating private property right protection order? No. We believe that the legislature is considering only a limited exercise of the rights of ownership, with the limitation made to ensure the safety of the person in a space that is extremely hard to access, the family space breached by police personal and in which the victim is particularly exposed the more it relates to a person and a space which should normally provide extra security and tranquility.

In light of *rules of civil procedure law*, we believe that the protection order is a type of presidential ordinance[16] which needs to fulfill the same expediency and emergency conditions as in the ordinance, as we may observe from the analysis of admissibility conditions for the issue of a protection order.

CONCLUSIONS

The regulation of the European protection order is clearly one of the most important steps in the fight against domestic violence. Ensuring the protection and security of the person manifested in its complex forms, beyond the state borders it may represent only the joint effort of EU countries to eradicate this type of violence.

Regarding the protection order regulated at a national level, it cannot be the only answer to the numerous legislative realities felt in society.

The importance of this regulating tool is really consented to by the presence in the role of the Court of requests from victims of domestic violence. These applications may not mean, in fact, anything other than becoming aware of the seriousness that long silence has protected and encouraged aggressors and, on the other hand, the determination of the victims of such violence to end the suffering they have endured.

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SOME CONSIDERATIONS ON LEGAL COERCION

Oleg TĂNASE[1]

Abstract:

The scientific analysis of the legal coercion subject is always performed in conjunction with state authorities - as public power. The study of this legal mechanism has as result the understanding of incompatibilities established toward the individual, the development of relationship between state and individual-as holder of rights and obligations, the deepening of the interaction between the state and the individual, etc. These reciprocal relations, in particular, highlight how the state honors its obligation to respect human dignity, human rights and freedoms.

For perception of this relation of reciprocity, its development over time, the emergence of this connection, is necessary to identify how the state treats people who came into conflict with the law, the state's attitude towards this person in general, the stat's concern for ensuring the respect of human dignity. These would be minimal diligences that would ensure a proper functionality between the state and the individual.

Key words: *State of national law, state power, legal coercion, legal responsibility, state authority, etc.*

INTRODUCTION

The study of the *coercion* concept has its origin even from the formation of social communities, as well as a social form of existence, and as a political form. The formation of social power, but especially its organization, led to the establishment of rules, the failing of which attracts the responsibility of the individual.

The social relationships formed between individuals led to the formation of the "Power", which is the ability of a subject, viewed individually or jointly organized (*group or collective*) to have the will and the behavior of another subject, which has the same organization (*collective, community*) or differs (*individual subject*), on its own interest or in the interest of other subjects.

To the ”Power” are characteristic some defining elements that could be identified[2]:

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[2]http://mioritix.tripod.com/civica/statul1, as well as N.I. Matuzov, A.V. Malico, *Theory of State and Law*, (Moscow 2014), 29.

- Is a social phenomenon–proper to human society, is dependent and in connection with relations between certain subjects from the society;
- Was present throughout all stages of human development, but at the same time was different at each stage of human development. Since the organization of society is by its nature a complex social system, it involves on the one hand a continuous monitoring and management, and on the other hand involves a regulatory process aimed to keep the system in a state of functionality.

Namely the need of functionality generates the presence in society of the "power" phenomenon, but not vice versa, when is considered that the normal functioning of human society began when power and its bearers appeared in the society.

- is dualism - is an intellectual and will process, assuming power emanating from the subject who has power, before determining the behavior and will of the person who is subject to power, of which fact the last must be aware. This rule does make some exceptions for subjects with certain deformations of consciousness or will.

Lato sensu, the social relations based on "power" imply a bilateral relationship between two subjects with consciousnesses and will - one who has, and other who is subject to. But in the specific context of power relations, the individual who is subject to becomes an object of actions of the subject who has the power.

- The distinguishing feature of power is that it always relies on force. Namely the presence of force positioned it on a subject as performer of power. The force of power can have different origins: physical force, military force, intellectual force, force of conviction or of authority, etc. In this context power should not be confused with violence. The *violence* involves the influencing of the subject against his will through physical or psychic coercion or under the threat of another coercive force. The maintenance of relationships in which the will of the person who is subject to is subordinated to the will of the person who subjects can be achieved by two methods: *coercion and persuasion*.

The coercion process is accompanied by awareness of the subjected person of the fact that under the influence of power he acts contrary to his/her own interests and his/her own system of values and aspirations. While in case of persuasion, the subjected person perceives that the behavior

proposed by the subject who is exercising power, corresponds to the interests of both parties and fall in the system of values of the subject.

The method of persuasion is based on the democratic practices of the state and presents a complex of stimulating and educational measures taken by the State for purpose of development toward its citizens of a legal and rational behavior, giving up illegal activities and adherence to legal standards.

From this perspective is emphasized the coercion of law, which occurs only when we are in the presence of the State power[3] and is the result of binding nature of the legal norm, which contains provisions that are not left to the free will of the subject, but are imposed through a variety of ways.[4]

Without this generally binding, imperative, essential character for legal norm, it would lose the directly meaning of its existence as a distinct social norm in the variety and multiplicity of social norms.[5]

In a close sense to coercion in law is the legal coercion which reflects the active role of law toward state authorities, which exercise directly the coercive influence.

The exercising of legal coercion is achieved through a complex relation, a relation between state and individual, as a holder of rights and obligations. The existence of these relationships has on the basis material norms and procedural rules, which place in the duty of participants to relation of legal coercion the obligations and reciprocal rights. These reciprocal relations, in particular, highlight how the state honors its obligation to respect *a priori* the human dignity, rights and freedoms.

In this context, the coercion in law field implies the idea of *legal responsibility* of the individual toward the state (for non-compliance with rules established by the state) and of the state towards the individual (on the establishment of some rules and laws by state authorities, and non-compliance of these by the state itself: eg. State liability for judicial errors).

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[3]To State power is recognized the publicity character, being carried out by a professional state apparatus, separated from society; State power is universal –it is extended throughout society territory (community), on all subjects (Taken individual and in group), regardless of status, social category.

[4]Corina Buzdugan, "Juridical report of coercion, liability and sanctions", *Fiat Iustitia*, 1 (2012), 44.

[5] Buzdugan, "Juridical report of coercion"m, 44.

Legal liability has an essential feature, through possibility of applying, if necessary, of state coercion.[6]

In the French doctrine the issue of legal liability is viewed through the prism of private law, which contains more extensive analyses and researches. Thus is defined the "civil liability is an obligation of a person to repair the damage caused to another by his/her deed or by the people or things that depend on this person"[7].

Legal liability is a sanction (a penalty). Admissibility and merits of understanding of legal liability as a sanction which provides a measure of repression, a penalty imposed by the state on the offender usually relate to the fact that sanctions are a compulsory element of the institution of legal liability.[8]

Most authors link the notion of legal liability with state coercion, based on the legal assessment of the behavior of the subject of abuse and that is expressed by setting some negative consequences for the subject of unlawfulness, consequences under the form of limitations with subjective, personal or patrimonial character. Only the tandem of these three elements composes the legal responsibility.[9]

These reciprocal relationships are unique only to the State of law, or, the fundamental obligation of the State is to provide its citizens with clear and efficient mechanisms to dispose of the recognized rights and make use of the assured warranties. This thing is valid also to the application of coercion, whereas it doesn't have to have as effect the limiting of human rights and freedoms, only if this is required by the liability's base and goal.

Through liability it is intended to restore the normative order and the training, adopting of a negative reaction of social authorities over the author of respective fact through application of a sanction.

Liability intervenes directly and immediately through social coercion, but does not identify itself with it. Liability has as purposefulness, both the social system regulation and condemnation,

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[6]Constantin Stătescu and Corneliu Bîrsan, *Civil Law, General Theory of obligations, (*Bucharest, 1997), 403.

[7]Rene Savatier, *Traite de la responsabilité civile en droit français, (*Paris, 1939), 1.

[8]Dumitru Baltag, "Current problems in knowing the essence and content of legal liability*"*, *Journal of Legal University Studies,* (no.3-4/2009).

[9] Baltag, "Current problems", 3-4 (2009).

disapproval of the act by the application of a penalty, being established the coercive character[10].

In a state of law, to the disapproval of the illegal act and application of legal coercion, the state has the obligation to ensure the protections of human rights and fundamental freedoms. Since only at this stage of procedure, through legal coercion, will be ensured the values and freedoms of the individual, so that to exclude the possibility of unlawful exercising of coercion and to avoid state's excesses and abuses over its citizens.

The admission of excesses and abuses, will bind the state responsibility toward the individual, but already for state's own deed and guilt, whether it stems from intention or negligence, action or omission.

In these competitive conditions of the deed and fault, on the one hand or, in the absence of fault will not be engaged any legal liability; legal coercion is the main form of interaction between the state and the individual, especially in the moment and toward the person who entered into conflict with the law[11].

These indices are to be concluded on the attitude of the state towards the individual in general, the concern to ensure the respect of human dignity, such as to the application of legal coercion was admitted the violation of some rights and freedoms of the person, only a sanction for these deviations is likely to credibly demonstrate the State's concern

[10]Dumitru Baltag, *The theory of liability and legal responsibility, (*Chişinău, 2007), 118.

[11]According to CEDO jurisprudence in cases against the Republic of Moldova on the violation of article 3 of the European Convention on Human Rights and Fundamental Freedoms, the European Court pointed the bad conditions of detention in the prisons of Moldova, and accordingly ordered the state to repair the damage caused to the person (Case Pisaroglu vs. the Republic of Moldova, in which the applicant, who is a citizen of the Republic of Moldova, born in 1987, who lives in Chisinau. In the period July 2010 - March 2011 she was arrested and detained in prison no .13 in Chisinau, being accused of human trafficking. Before the Court the applicant complained under Article 3 of the Convention on inhuman and degrading conditions of detention, and namely her detention in a cold and overcrowded cell with no ventilation, without bedding, with limited sunlight, no possibility to wash clothes, opportunity to shower only once a week, and also inedible food and limited access to drinking water).http://justice.gov.md/.

to respect and defend human rights and freedoms, thus being a final guarantee of protection of the person.

CONCLUSION

Proceeding from the above, we express our convictions that the level of guarantee of human rights within a state depends largely on guarantees offered by State to the individual within the report for the implementation of legal coercion.

For these reasons and based on the accurate and real situation in this area, it is possible to evaluate and appreciate the democratic character and the character of law of any state, at each stage of development.

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IDENTIFYING PEOPLE, OBJECTS AND LIFTING OBJECTS AND DOCUMENTS

Ivan ANANE[1]

Abstract:

Identification of people is a way of identifying tactics in order to contribute to the truth, as a psychological process easier for updating previously collected information does not require a great effort. Identification of complementary evidence is a process and results in obtaining evidence necessary to establish the truth. Objects which are assumed to contribute to finding the truth about a crime is presented for identifying, after identifying the person making them described previously. If these items can not be made to be presented, the person can be conducted to identify the location of objects. Where there is reasonable suspicion about the preparation or commission of an offense and shall be grounds for believing that an object or a document can serve as evidence in the case, the prosecuting authority or the court may order individual or legal possession of the to present and teach them, upon proof. Judicial body is bound to be limited to raising only objects and documents related to the offense committed; objects or documents whose circulation or possession is prohibited always rises.

Keywords*: identification, objects, people, lift, rules, minutes, proof.*

Identification of persons or objects may be ordered if necessary in order to clarify the circumstances of the case.

Identification of persons or objects may be ordered by the prosecutor or criminal investigation bodies, during the prosecution or the court during the trial.

After disposing measure before the identification is carried out, the person must be heard on identifying the person or object to identify it.

The hearing is to describe all the characteristics of the object or person and the circumstances in which they were seen. The person making the identification is asked whether he previously participated in another process for identifying the same person or object, or if the person or object identified or have been indicated above.

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IDENTIFYING PEOPLE

The person to be identified is presented together with other 4-6 people unfamiliar with features similar to those described by the person making the identification.

The above provisions shall apply accordingly to the situation of identifying persons after photos.

The identification is carried out so as to be identified people not to see that it identifies. Identifying people is a way of identifying tactics in order to contribute to truth, is a psychological process easier for updating previously collected information does not require a great effort.

Identifying people may be more or less accurate because it is the result of psychological mechanisms: observation, memory, playback and reproduction must be taken to prevent occurrence of false identifications, the impossibility location in time and space of facts and circumstances, the person who has some similar features and appear as familiar person called to identify those elements of suggestion can influence the statements that people easily.

Identification of complementary evidence is a process and results in obtaining evidence necessary to establish the truth, often the starting point in identifying suspects / defendants.

Knowledge semnalmentelor and characteristics of individuals by the prosecuting authority has dealt with the case and their pursuit at the hearing person called to identify persons are required to organize this activity.

Studying the case file must lead to the establishment with which people will be identifying persons concerned their quality: the parties or injured persons, witnesses, suspects/defendants opportunities that they have to charge, store and play elements on which is to be made to identify individuals.

Identifying people are usually carried out at the premises of the criminal investigation, the quite exceptional, the work can be carried out elsewhere in this must be set at least two witnesses who will assist in carrying out this work and the lawyer then when the situation requires.

The person to be identified must be presented in a group of at least 4-6 people like her to ensure objectivity outcome. In choosing the persons in the group to consider some rules such as:

- persons forming the group should not be called upon to make known the identification,

- be foreign concerned

- to be as similar (sex, age, height, cues, characteristics of clothing)that must be found.

If the person to be identified was disguised means must be found and used to use wigs, beards, glasses, mustaches.

When identifying persons is by static cues, furnished room for such activities will be invited: people who are to be the group (from which will make identification), assistant witnesses and counsel when the situation requires.

It explains bystander work to be done and its purpose, without rule name the person whose identity must be established, the attention of people to be quiet and do not sign, do not talk to each other them to do just that are required, and if they have something to say, to do the final and only through the criminal investigation.

The following person is brought into the room to be presented for identification, drawing his attention to the behavior that you must have, then given the invitation to occupy the place you want between people in the group, inviting persons to make identification and asked to state whether, in the group is presented, and to identify any person index.

If the person who addressed the question states that identifies any person from the group is presented, shooting the whole group presented, then the identified separately; this activity can be recorded audiovideo.

Photos will be attached to the minutes, to fit likeness of the people in the group and presented for identification.

Shooting people group are running at the time the person who is called to identify persons, seized the group.

The person who made the identification is asked after what has identified that indicated: cues, particular signs. His statement is recorded in the minutes concluded.

After identification, the person identified is legitimized to determine who is your marital status read all present, after which you will be asked what he said about the identificrea his statement was recorded in the minutes concluded.

The person to be identified can not be presented for identification, while several persons.

When identifying persons should be careful observation of both the person called upon to make identification, as well as the to be identified.

For the protection of witnesses and persons who are to be identifying people this activity can be carried out in special rooms in the first chamber being the person to be identified and the group of people in which each person with an identification number and the second room is the person to make the identification, personal identification is performed through a glass mirror for its protection.

Activity to identify persons and identifying the person who is making the statements are recorded in the minutes.

The report must include:

- the order or conclusion ordering people carrying identification,
- where it was concluded,
- date, time of start and finish time of the activity, indicating any moment of interruption,
- name, surname present and the capacity in which they participate,
- name of the person making the identification,
- name and address of the persons who were placed in group identification or whose photographs were presented person making the identification,
- name of the person identified
- how did the identification,
- mention of the photos taken, audiovisual recordings,
- mention of the existence or absence of observations of people participating and assisting witnesses,
- signatures of the criminal investigation and other persons who participated in the identification, including lawyer, in a situation where he participated in identification.

During prosecution, where the prosecuting authority considers necessary identification is recorded audiovisual work. Registration minutes identification is attached as an integral part thereof and may be used as evidence.

IDENTIFYING OBJECTS

Objects which are assumed to contribute to finding the truth about a crime is presented for identifying, after identifying the person making them described previously. If these items can not be made to be presented, the person can be conducted to identify the location of objects.

Object identification activity and identifying the person making the statements are recorded in the minutes which shall include particulars of:

- the order or conclusion ordering the measure,
- where it was concluded,
- date, time of start and finish time of the activity, indicating any moment of interruption,
- name, surname present and the capacity in which they participate,
- name of the person making the identification,
- detailed description of the objects identified,
- how did the identification,
- mention of the photos taken, audiovisual recordings,
- mention of the existence or absence of observations of people participating and assisting witnesses,
- signatures of the criminal investigation and other persons who participated in the identification, including lawyer, in a situation where he participated in identification.

During prosecution, if the prosecution body deems it necessary, the work of identifying the person making the declaration recorded audiovisual identification.

Registration minutes identification is attached as an integral part thereof and may be used as evidence.

Identification of voices, sounds and other items subject to sensory perception ordering and shall be subject to legal proceedings.

If more people are called upon to identify the same person or object, taken by judicial bodies to be avoided communication between those who did and those who will identify perform.

If the same person to participate in several procedures to identify persons or objects, judicial bodies shall ensure that the person subject to identification is situated between persons other than those who participated in previous proceedings, that the object of identification to be placed among different objects from those used previously.

Lifting of objects and documents. The criminal prosecution body or the court is obliged to seize objects and documents that may serve as evidence in criminal proceedings.

Where there is reasonable suspicion about the preparation or commission of an offense and shall be grounds for believing that an

object or a document can serve as evidence in the case, the prosecuting authority or the court may order individual or legal possession of the to present and teach them, upon proof.

The criminal prosecution body or the court may order:

a) any person or entity of Romania to communicate certain information data in its possession or under its control, which are stored in a computer system or on a data storage medium;

b) any provider of public electronic communications network or electronic communications service providers to publicly report certain data relating to subscribers, users and services rendered in the possession or under his control.

Natural or legal persons, including providers of public electronic communications networks or providers of publicly available electronic communications services, they can provide data required under the law signing using an electronic signature based on a qualified certificate issued by a service provider accredited certification.

Any person authorized to submit the data required under the law, has the opportunity to sign data transmitted using an electronic signature based on a qualified certificate issued by an accredited certification service provider and allow unambiguous identification of the person authorized, it thus taking responsibility for the integrity of transmitted data.

Any person authorized to receive data required under law, is able to verify the integrity of data received certification and data integrity by signing using an electronic signature based on a qualified certificate issued by an accredited certification service provider and identifying the unambiguous authorized person.

Every person who certifies your electronic signature law responsible for the integrity and security of such data.

Order of the criminal investigation or the court decision must include: the name and signature of the person who ordered the surrender, the name of which is bound to hand over the object, document or computer data, description of the object, document or computer data to be delivered and the date and the place to be taught.

If the prosecuting authority or the court considers that a copy of a document or computer data can serve as evidence, retain only copy.

If the object, document or data information is secret or confidential submission or surrender is made under conditions that ensure secrecy or confidentiality.

Any natural or legal person in possession of the object or document that can serve as evidence is required to present and to hand in making proof of the criminal prosecution body or the court, on request. If the prosecuting authority considers that a copy of the document may serve as evidence retain only copy.

If the object or document is secret or confidential submission or surrender is made under conditions that ensure secrecy or confidentiality.

If the object or document is not surrendered voluntarily requested, the prosecuting authority, by ordinance, or court, by concluding, has forced lifting. During the trial forced Hoists objects or documents communicated to the prosecutor, who take action for completion by the criminal investigation body.

Against measure ordered by law or the way of fulfilling its complaint can be filed by any interested person.

Procedural Act of lifting objects or documents is an activity that differs from search so that it requires knowledge of the documents, objects related to the criminal case and the place where they are.

Can be lifted following categories of objects and documents:

- who used or were intended to be used to commit the offense;
- which is the proceeds of crime;
- bearing after the offense committed;
- which may serve to truth and solve the case.

Lifting of objects and documents can be made between 06.00-20.00 hours, and in other hours only if caught in the act, or when performing a local open to the public at that time.

This work is done in the presence of the person from which rises objects and documents, and in his absence the presence of a representative of a family member or a neighbor, having legal capacity; and in the presence of witnesses. When the person that stands objects or documents is arrested or detained shall be brought to this activity. If it can not be brought, seizure of objects and documents is made with a representative or a family member, and in their absence, a neighbor, having capacity.

Judicial body is bound to be limited to raising only objects and documents related to the offense committed; objects or documents whose circulation or possession is prohibited always rises.

Objects or documents to the person from which the lifted and the assisting in order to be recognized and to be significant by unnecessary to change them, then labeled and sealed.

Objects that are not significant or which may not apply labels and seals are packed or close, possibly together after applying seals. Objects that can not be lifted seize and leave it be that at which the storage is either a custodian.

The criminal investigation may order that the objects or documents constituting evidence raised to be, as appropriate, attached to the file or preserved otherwise.

Objects and records high, which is attached to the file may be photographed or filmed. In this case the photos, videos and attach it aims file. Objects and documents unrelated to high shall be returned to the person to whom it belongs. Confiscated objects not returned.

In order seizure of objects and documents the criminal prosecution body, moving at the residence of the individual or legal entity that owns the premises by doing the following:

- is legitimized in front of the person or legal representative of the person from which will rise objects and documents;
- legitimizes individuals, to convince that are known to hold objects and documents that may serve as evidence in criminal proceedings;
- show purpose in coming and notify the holder of objects and documents has obligations under the law, asking him to hand over objects and documents and shall raise them;
- draw up the act of lifting can be proof of receipt or delivery protocol lifting of objects and documents.

Proof of delivery receipt objects and documents be drawn up in two copies, one of which leave the person from which amounted goods and documents and shall include the following:

- date and place where it is made;
- name and position of the person who ends;
- name and position of the person who teaches good;
- place, time and conditions under which the documents and objects were discovered and raised their detailed listing and description,

highlighting the characteristics of individuation, such as name, serial number, year of manufacture, date of issue, the number of copies number of pages, whether they are original or copy.

The minutes of lifting objects and documents at ends of objects and seizure procedures and must include the following documents:

- date and place where it is concluded;
- name and position of the person who ends it;
- name, occupation and address of the witness assistants;
- name and unit they belong to other participants (specialists, interpreter, lawyer);
- legal basis for the seizure of objects and documents;
- the address of the objects and documents sought;
- identification of the person who owns the objects and documents sought in the present which is operating;
- mention of legitimizing the criminal investigation and appearing purpose;
- mention of legitimation people found the place where it rises objects and documents;
- to provide explicitly that the person who owns the objects and documents sought was asked to teach and answer it;
- place, time and conditions under which the documents and objects were discovered and raised their detailed listing and description in order to be recognized, highlighting the characteristics of individuation, such as name, serial number, year of manufacture, date of issue, number of copies, number of pages, whether they are original or copy etc ..
- objects which have not been raised, and those that were left in storage;
- specification documents or objects and values found were shown to the person who owns the objects and documents sought and assistant witnesses were marked them unchanged, packaged, labeled and sealed;
- expressly stated that outside goods, documents or values discovered and described in the report was not anything higher.
- judicial photos taken with camera brand indication, the film used and its sensitivity, the scale of the crime scene sketch was drawn and the brand of the camera (if used);
- start time and the time of completion of the work of lifting objects and documents, and the lighting conditions in which to operate;

- whether or not the objections of the person who owns the objects and documents sought or comments of others participating both on the way was made seizure of objects and documents, as well as on those recorded in the minutes;

- number of copies of the minutes and ended their destination;

- signatures of the criminal investigation, witness assistants, of the person from which amounted objects and documents sought the counsel and other participants - on each page and at the end.

This activity required to participate in forensic specialist.

Minutes of fixing the results seizure of objects and documents shall be written clearly, to render faithfully activity and results.

The minutes of lifting objects and documents are attached photographic plate which must include all judicial photos made during this activity and explanatory claims made in each photo. Exhibit photograph signed on each page by forensic specialist.

Copy of the minutes leave the person undergoing seizure of objects and documents or representative, or a family member, and the lack of living or a neighbor and, where appropriate, the custodian.

Lifting of objects and documents have probative value only to the extent that is corroborated by other evidence and evidence in the case.

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THE SYSTEM OF SEARCHES

Ivan ANANE[1]

***Abstract**:*

The search can be domiciliary, corporal, information or of a vehicle. House search may be ordered if there is reasonable suspicion of committing a crime by a person or at possession of objects or documents that relate to a crime and is supposed that the search may lead to the discovery and gathering of evidence about the this crime at preserving the traces of the crime or catching the suspect or defendant. The corporal search involves the examining of foreign body, mouth, nose, ears, hair, clothing, objects which a person has on himself or under his control at the time of the search. The search in the computer system is the process of research, discovery, identification and gathering evidence stored in a computer system or computer data storage medium, achieved through technical resources and appropriate procedures, capable of ensuring the integrity of the information contained therein. A search of a vehicle includes examining the exterior or interior of a vehicle or other way of transport or their components.

Keywords: *search, residence, corporal, computer system, vehicle, mandate, protocol.*

When the person who was asked to give any subject or writting, accepts their existance or owning, as whenever exists seif clues that making a search is necessary for finding an collecting proves, it may be orderer its execution.

The search can be domiciliary, corporal, information or of a vehicle.

The search is made with respect of dignity, without making disproportional interference in private life.

DOMICILIARY SEARCH

Domiciliary search or of object placed in house can be disposed if exists a doubt about commiting a crime by a person ori about owning some objects or writting which connects with a crime and i tis supposed that the search can lead to descover and collecting proves about this crime, about conservation the trases commiting the crime or about finding the suspect or defendant.

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By residence it understands a house or any place fenced in any way which belongs or is used by a individual or legal person.

Domiciliary search can be disposed during the criminal investigation, at the prosecutor's request, by the judge of rights and freedoms from instance which has the competence to judge the cause in first instance or from appropriate instance in degree wherein constituency is prosecution's heartquarters from the prosecuters is included which make or supervises the prossecution. During the judgement, the searching is made automatic or at judge's request, by the instance invested with judging the cause.

The request formulated by the judge must contain:

a) description of place where the search is taking place, and if are any doubts about the existance or the possibility of transfering the proves, dates or searched people in nearby places, description of those places.

b) the indication of proves or of dates of which results the suspicion about commiting a crime or about owning objects or writings which connects with a crime.

c) the indication of crime, of proves or dates of which results that in the place where is requested the search, where is the suspect or defendant or can be descovered proves about commiting a crime or clues of commiting that crime.

d) name, surname, and if it's necessary, description of the suspect or defendant about it is suspected that he is in the place where the searching is placed, as indication of clues about commiting a crime or any objects about is supposed that exists in the place which is about to be searched.

In case of, during the search, i tis observed that clues or dates were transfered, or the searched persons were hiding in nearby places, the search mandate is given by the prosecutor.

The prosecutor gives the request with the file of cause of the rights and freedoms judge.

The request by is requind the permission making the domiciliary search i tis solved in 24 hours, in council chamber, without quoting the parts. The participations of prosecutor is necessary.

The judge benefits, by ending, request's admission, when it is founded and the consent making the search and emits imediately the search mandate.

Ending the instance and the search mandate must contain:

a) title of the instance

b) date, hour and the place of emission
c) first name, surname and the quality of the person who emited the search mandate
d) the period for that the mandate has emited, and can not overcome 15 days
e) the purpose for that has emited
f) the description of the place where the first step is making the search or the places nearby
g) the name of the person who own the place, home or residence which is about to search, if it is known
h) the name of the suspect, defendant or offender, i fit is known
i) the name of the suspect, defendant or offender about there are suspicious that he might be at the search place, indication of evidence commiting the crime or any objects where of there is a supposition that exists in the search place
j) the mention that the search mandate can be used only once
k) the judge's signature or the instance's stamp.

The ending where the judge of right and freedoms rule on the permission request of making domiciliary search i tis not a subject of attack.

In the case where the judge of right and freedoms observe that the law terms are not performed, he emits by ending, the rejection of domiciliary search request.

A new effectuation request of a domiciliary search in the same place can be formulated if has appeared or has discovered new facts or circumstances, unknown by the judge in the moment of solving of previsions request.

During the judgement, the judge instance can dispose making a search in order to execute the warrant for arrest of the defendant, and if there are suspicious that it is required to perform a search where there are indications that the offense had crime related.

The search mandate it communicates to the prosecute, who acts for its executation.

The search is made by prosecutor or the criminal investigation body.

The domiciliary search can not be started before 06:00 a.m. or after 20:00 p.m., except the flagrant crime or when the search is made in a public place.

In the case when in necessar, judicial bodies can restrict the presence of other persons in the place and during the search.

Before the search start, the judicial body legitimiez himself and handed a copy of the warrant issues by judge person they will perform a search or a family member or any other person with legal capacity to meet the person who will perform the search.

In case of the search performed at headquater of a judicial person, the search mandate is given to his/her representative or to any other person with legal capacity which is in the heartquater or is an employee of that judicial person.

In case of search performing is extended to nearby houses in law conditions, persons who lives there will be announced.

Persons required by law are required before starting the search, willingly surrender of persons or objects sought. The search no longer be executed if persons or objects specified in the warrant are taught.

Persons required by law are informed that they have the right to bring a lawyer at the search. If requested the presence of a lawyer is delayed until the beginning of the search his arrival, but not more than two hours from the time at which this right is communicated taking place conservation measures to be searched. In exceptional cases imposing the emergency or the search fell lawyer can not be reached, the search can begin before the expiration of two hours.

Also searched person will be allowed to be assisted or represented by a trusted person.

When the persons who own the place which is about to be searched is detained or arrested, the person will be brought to the search. If they can not be brought, lifting objects and documents and house searches are done in the presence of a representative or witnesses.

Judicial body that performs the search has the right to open, by force, premises, furniture and other items that might find objects, writings, traces of the crime or wanted person, if their owner is not present or not wants to open them voluntarily. At initiation, judicial bodies which perform the search should avoid undue damage. Judicial body is bound to be limited to raising only objects and records that relate to the crime. Objects or documents whose circulation or possession is prohibited or for which there is a suspicion that may be related to committing a crime for which prosecution is initiated by default always picked up.

Exceptionally,the search can begin without giving a copy of the search mandate,without prior request of giving persons or objects, as prior informing about the possibility of a lawyer request or any other trustful person, in next cases:

a) when it is obvious the fact that are making preparations for cover the traces or destoy the evidences or of important elements for the cause;
b) if exists the suspicion that in the searched place is a person whose life or integrity can be in danger;
c) if exists the suspicion that the searched person cane scape from the procedure.

If in the space where the search is about to be performed is found no person, the search is performed in the presence of an assistant witness.

In the provided by law cases, the search mandate copy is given as soon as possible.

Judicial bodies who perform the search can use force, properly and proportioned, to enter in the residence:

a) if exists reasons for anticipating armed resistance or any other types of violence or exists a danger on destruction of evidences;
b) in the case of a denial or if was not received any answer for judicial bodie's requests to enter the residence.

It is forbidden the execution in the same time with the search of any procedural documents in the same cause, which by their nature stop the person from which the search is done to participate to its performing, with the exception when in the same time are performed many searches.

The search place, the persons or objects found during the search can be photographed or audio-video recorded.

The audio-video recording or photos made are attached to the search protocol are part from it.

After identification,the objects or documents are introduced to the person from whom are given, to be recognized and marked by him/her to unchange, after that are labeled and sealed.

The objects which not be marked or can not be applied labels and seals, are packed or closed,as much as possible together, after that seals are applied.

The objects which can not be picked up are given to its owner or to a custodian. The one that has the objects(owner or custodian) has the

obligation to keep and preserve the objects, and to provide them to the prosecution bodies, at their request.

The proves are analyzed and taken at least twice and are sealed. One of the prove is taken to its owner and the other to a person required by law.

The protocol of domiciliary search must contain:

a) firstname, surname and the quality of the one who close it;
b) the number and date of the search mandate
c) the place where it is closed
d) date and hour when began and the hour when the search ended,with the mention of every interrupting
e) firstname,surname,occupation and adress of the persons who were present at the search,with mention of their quality
f) the informing of the person whose residence is searched about his/her right to fiind a lawyer to be present at the search
g) the description of the place and conditions where were held the documents,objects and traces has been discovered and gave, its description, to be recognized, mentions about the place and conditions where th suspect was caught
h) objections and explanations of the persons who were at the search,and the mentions about audio-video recording or pictures
i) mentions about the objects which were not taken, but were left in storrage
j) mentions provided by law for special cases.

The protocol is signed on each page and on the last page by the one who close it, the searched person,by his/her lawyer, if the lawyer was present, and by the persons provided by law. If one of these persons can not or do not want to sign, this fac tis mentioned and the reason too.

A copy of the protocol remains at the search residence owner or remains at a provided by law person who was present aat the search.

The objects or documents taken which provides ways of proves are attached to the file and kept in other way the traces of commiting the crime are taken and preserved.

The objects, documents and taken traces which are not attached to the file, can be photographed. The photographs are approved by the prosecution body and are attached to the file.

Resources sample materials are kept by the prosecuting authority or court to which the case is, until the final settlement of the case.

Objects that are not related to the case shall be returned to the person to whom they belong, except those which are subject to confiscation under the law.

Objects serving as evidence, unless they are subject to confiscation under the law, may be restored even before the final settlement of the process, to their owner, unless when through this return might impede finding the truth. The criminal prosecution body or the court put to the person whom were returned items that is required to hold to the final case.

The objects that serve as evidence if they are not returned, are preserved or shall be recovered according to the law.

The search at a public authority, public institution or other legal persons of public law according to the provisions of this section shall be made as follows:

a) judicial body legitimizes and provides with a copy of the search warrant of the authority, institution or legal person under public law;
b) search is performed in the presence authority representative, institution or public legal person or of another person with full legal capacity;
c) a copy of the protocol of search is left to the authority representative, institution or legal person under public law.

Domiciliary search has probative value only to the extent that it is corroborated by other evidence and means of proof in the case.

THE CORPORAL SEARCH

The search involves examining the body of a person external body, the mouth, the nose, hair, clothing, objects that the person is carrying at the time of the search.

If there is a reasonable suspicion that a search by body will be discovered traces of the crime, material evidence or other items that are important to finding the truth in the case, the court or other authority with responsibilities in ensuring public order and security proceed to carried out.

The search is performed by searching the body or clothing and body of a person in order to discover:

- traces offense committed
- objects, records or values that could serve as evidence

- injuries caused by clenching the victim
- objects owned contrary legal provisions
- other revealing signs of crime committed.

Judicial body must take action that search is carried out with respect for human dignity. The search is performed by a person of the same sex as the person searched.

Before beginning the search, searched person is asked to voluntarily surrender searched items. If the objects sought are taught, no longer performs the search, except when it is considered useful to do this, search for other objects or traces.

Corporal search may be made to: the person caught in the act of crime committed during finding the person trapped after a follow-up done on it in order detention or arrest, the person who is conducting a house searches, the person to be placed in arrest.

According to the law, the corporal search can be disposed by the judge.

If the search is performed both control clothing and underwear of the body are searched.

It is recommended that consideration of clothing to follow a certain order: objects that covers the head, his clothes, shoes, accessories objects, the underwear searched. On the body of the person searched can be found wrapped objects.

Objects or documents presents the person from whom are high and those who attend to be recognized by them and mark them unchanged, then labeled and sealed. Objects that can not be meaningful or may not apply to increases labels and seals are close packed or, if possible together, then apply the seal. Objects that can not be lifted also seized be allowed in the storage that is either a custodian.

Objects, documents or photographing the values found where they were found, and after being shown the person searched and witness assistants are signed them unchanged, or as the case packed and sealed. Pictures taken on this occasion must play both objects, documents or values found, and their place of concealment, especially if it ese places that allow hiding.

Raised objects or documents constituting the sample means are attached to the file or otherwise preserved, and the traces of the offense rises and are preserved. Objects, documents and Raised traces that are not

attached to the file may be photographed. Photos are targeting the criminal prosecution body and attached to the file.

Resources evidence materials are kept by the criminal prosecution body or the court to which the file is found, until the final settlement of the case. Objects that not related to shall be returned to the person who owns, except those which are subject to confiscation under the law.

The objects that serve as evidence unless they are subject to confiscation under the law, may be restored even before the final settlement of the process, who made them, unless when through this restitution might hinder finding the truth . The criminal investigation body or the court to the person who put him were returned items that is required to keep up to the final settlement of the case.

The objects that serve as evidence if they are not returned, preserve or exploit the law.

Being a procedural act with special implications, the search body should be recorded in a protocol to reflect in detail the entire activity of criminal prosecution bodies and their results.

The protocol of search must include:

- name of the searched person
- full name and position of the person who conducted the search
- list of objects found during the search
- the place where is concluded the protocol
- date and time of the start and finish time of the searches at, mentioning any interruptions occurred
- detailed description of the place and the conditions under which the documents, objects or traces of the crime were discovered and raised their detailed enumeration and description in order to be recognized; mentions of the place and conditions in where the accused was found
- name, occupation and address of the witness assistants
- full name and unit of other participants belong to(specialists, performer, lawyer)
- legal basic of the search
- the address where the searched person is found
- mentions about prosecution body
- saying the purpose and present the authorization

- the mention that the searched person was requested to give the objects,writings or values whichare important for the cause or the ones possessed against the law and the searched person request
- mention that discovered objects, writings or values were shown to the searched person and to assistant witnesses,were marked to unchanged,packed,labeled and sealed
- the mention that,except the objects,writings or values discovered and described in the protocol,nothing else has been taken
- the judicial photographs made with the indication of camera's brand, of used film and the deed place sketch
- if there are or are not any other objections of the searched persons or observations of the other persons about the search and the protocol
- the number of protocol's copies and its destination.

The protocol must be sign on each page and on the last page,bu the one who close it and by the searched person. If the searched person can not sign it,this fact is mentionedand the reasons are mentioned too.

A copy of the protocol is given to the searched person.

At this activity a criminologist must necessarily participate.

The protocol of search result must be clearly redacted about the activity and the results.

At the protocol is attached the photographic sketch which must contain all the judicial photographs and the explaining mentions. The photographic sketch must be signed on each pe by the criminologist.

A copy of the protocol is given to the searched person or to his representant or to a family member or to a person who lives with the searched person or to a neighbour.

The corporal search is a valuable prove only to the extent that it coordinates with the other evidences in the case.

THE SEARCH COMPUTER

In search of a computer,system or computer data storage support means research process, discovery, identification and gathering of evidences stored in a computer data or a computer system,storage achieved through technical means and appropriate procedures likely to ensure the integrity of the information contained therein.

During the prosecution, the rights and freedoms judge, the court that would return jurisdiction to hear the case in the first instance or the

instance corresponding to its rank in whose jurisdiction the headquarters of which the prosecution prosecutor who performs or supervises the prosecution may order a search information at prosecutor's request, when the discovery and collection of evidence is required to a computer system or a data storage medium.

Prosecutor submits the application requesting consent to perform the search case file information with the rights and freedoms judge.

The demand is solved in closed session without summoning the parties. The prosecutor is required.

Judge orders by closing the grant when it is grounded, information and consent to perform the search immediately issue the search warrant.

The court shall include:

a). the name of the instance

b) date,hour and place of issue

c) the firstname, surname and personal qualities which issued the warrant

d) the period for which issued the warrant and ordered the work to be performed

e) the purpose for which it was issued

f) computer system or computer data storage media that are to be searched, and the name of the suspect or defendant, if it is known

g) the judge’s signature and instance’s stamp.

The concluding that the rights and freedoms judge ruling on the application for a declaration of computer perform the search, is not subject to appeal.

In the case when performing a search of a computer system or a data storage medium, it is found that the computer data sought are contained in another computer system or computer data storage medium and are accessible from the initial system, once the prosecutor has conservation, copying computer data identified and will require urgent completion of the mandate.

In order to execute a search arranged to ensure the integrity of computer data objects stored on high, the prosecutor shall make copies.

After lifting objects containing computer data as required by law would seriously affect the conduct of business persons holding these objects, the prosecutor may order copies, which serve as evidence.

Copies are made as technical means and appropriate procedures designed to ensure the integrity of the information contained therein.

The search of a computer system or computer data storage system is performed in the presence of the suspect or the accused.

The search of a computer system or computer data storage system is performed by a specialist who works within or outside their judicial bodies in the presence of the prosecutor or criminal investigation body.

a) name of the person who was raised from the computer system or data storage media or system whose name is searched.
b) name of the person who conducted the search
c) names of persons present during the search
d) description and listing information systems or data storage media to ordering the search
e) description and listing of activities carried out
f) description and listing of computer data found during the search exhibition
g) signature or stamp of the person who conducted the search
h) signature of persons present during the search.

Prosecution authorities must take action as the search information is made without facts and circumstances of personal life that at which the search is performed to become unduly public.

Computer data is kept secret identified under the law.

During the trial, the search computer is ordered by the court of its own motion or at the request of the prosecutor, the parties or injured persons in cases provided by law.

THE SEARCH OF A VEHICLE

The search of a vehicle means the examination of its inside or outside of a vehicle or any other public transportation.

In the case of a suspicion that by making a search will be discovered traces of the crime, or objects which are important for find the truth, the judicial bodies or any other authority with attribution in ensuring order and public security proceeds on their effectuation.

The search of a vehicle is made with the purpose of discovering:

- traces of commited deed
- objects,writings or values which can serve as probe way
- objects possessed against the law
- ther signs of the deed.

Before starting the search, serched person is requested to willingly give the searched objects. If the objects are given, the search is no longer available, excepting the case when it is necessary to be done for discovering of new traces or objects.

According to the law, the search of a vehicle can be disposed by a judge.

The objects and writings are introduced to the persons from are tken to be recognized and marked by them to unchanged, after that are labeled and sealed. The objects which can not be marked are packed or closed,as much as possible together, after that seals are applied.Objects which can not be taken are seizured and are let at its owner.

The objects, writings and values which are discovered are photographed at the place where were found and after were shown to its owner and to assistant witnesses, are marked to unchanged, or after case, packed and seizured. The photographs must contain objects, writings or value that were found and the place where were found, especially if there are special places.

The objects or writings which are taken and are proves are attached to the file or held in other way, and the crime traces are taken and preserved.

The taken objects, writings and traces,which are not attached to the file, can be photographed. The photographs are accepted by prosecution body and attached to the file.

The proves are in the prosecution body possession or in judge instance's where the file is, until the cause's solving.

The objects which serve as proves, if are not confiscated, in law's conditions can be restored,even before of proces's endingto it's owner, excepting that trough that restore can be obstructed knowing the truth. The prosecution body or judge instance tells to the object's owner that he has to keep it until the end of case.

The object's which serve as proues,if are not restored, are conserved are value, accoding to low.

The vehicle search must be written in a protovol which must show the whole activity of prosecution bodies and their results.

The protocol of vehicle search must contain:

- First name and number name of vehicle's owner
- Name and position of the person who conducted the search;
- enumeration of objects found during the search;

- Where is concluded;
- Date and time of the start and finish time of the search warrant, indicating any interruption occurred;
- Detailed description of the place and the conditions under which the documents, objects or traces of the crime were discovered and raised their detailed listing and description in order to be recognized; terms and conditions of the place where the vehicle was found.
- Name, occupation and address of the witness assistants;
- Name and unit they belong to other participants (specialists, performer, defender);
- The legal basis of the search (authorization of the judge);
- Address where is the place searched;
- Mention of the legitimation of legal prosecution body;
- Appearing purpose and submission of the bill;
- To provide explicitly that the person searched was asked to surrender the goods, documents or values that cause or interest on those held contrary to the laws and the answer given by one whose vehicle was searched;
- Specification documents or objects and values found were shown to the person whose vehicle was searched and assistant witnesses were marked them unchanged, packaged, labeled and sealed;
- Expressly stated that outside goods, documents or values discovered and described in the report was not anything higher.
- Judicial photos taken with camera brand indication, the film used and its sensitivity, the scale of the crime scene sketch was drawn and the brand of the camera (if used);
- Whether or not of searchd person objections or observations of others participating both on how the search was conducted and on those recorded in the minutes;
- Number of copies of the minutes and ended destination.

The report shall be signed on each page and at the end he concludes and the person whose vehicle was searched. If the person whose vehicle was searched unable or refuses to sign, mention is made of it, and the reasons of inability or refusal to sign.

A copy of the minutes shall give the person whose vehicle was searched. This activity required to participate in forensic specialist.

The protocol of fixing the results of the search must be written clearly, to render faithfully activity and results.

The protocol of searching the photographic plate is attached which must include all judicial photos made during this activity and explanatory claims made in each photo. Exhibit photograph signed on each page by specialist forensic.

Copy of the protocol is allowed the person whose vehicle was searched or representative, or a family member, and the lack of living or a neighbor and, where appropriate custodian.

A search of the vehicle has probative value only to the extent that is corroborated by other evidence and evidence in the case.

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CRIMINAL LIABILITY OF MINORS IN THE NEW CRIMINAL CODE

Cătălin BUCUR[1]

Abstract:

The criminal liability of minors is conditioned by the psychophysical status in different stages of their minority. Of course, we are talking about the normal bio-psychophysical status corresponding to each of the stages, and not about the cases of anomalies or diseases which may negatively influence the normal condition. Only when the normal bio-psychophysical capacity of the minor has reached this degree of development one can raise the issue of his criminal liability, because this is the moment in which the minor is aware of the criminal effects of his action or inaction. Up to the age of 14, a natural person cannot be the general active subject of the offence entailing criminal liability, because the person has not yet reached that level of physical and psychical development allowing him to fully understand the dangerous effect of his action (inaction), thus he does not have criminal discernment, the presumption of the absence of discernment is absolute, because no circumstance shall be able to prove the contrary, namely its existence.

Keywords*: criminal liability of minors, minors, discernment*

1. INTRODUCTION

The criminal liability of minors is conditioned by the psychophysical status in different stages of their minority. Of course, we are talking about the normal bio-psychophysical status corresponding to each of the stages, and not about the cases of anomalies or diseases which may negatively influence the normal condition. Only when the normal bio-psychophysical capacity of the minor has reached this degree of development one can raise the issue of his criminal liability, because this is the moment in which the minor is aware of the criminal effects of his action or inaction.

Up to the age of 14, a natural person cannot be the general active subject of the offence entailing criminal liability, because the person has not yet reached that level of physical and psychical development

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allowing him to fully understand the dangerous effect of his action (inaction), thus he does not have criminal discernment, the presumption of the absence of discernment is absolute, because no circumstance shall be able to prove the contrary, namely its existence.

Considering all of the above, in the regulation of the criminal liability of minors it is necessary to differentiate between minors who have criminal capacity and may be held responsible for the actions they have committed and minors without criminal capacity who cannot be held responsible for the offences stated by the criminal law that they have committed.

In daily life, the offences stated by the criminal law are not committed only by persons responsible, with discernment, but also by irresponsible persons. From the perspective of the criminal liability not every wrongdoer becomes an active subject of law, namely a perpetrator. To be held criminally liable, beside the so-called commission or material participation in the commission of an offence, it also required the guilt, or the guilt exists where there is discernment.

For the criminal law to act by repressive measures, two conditions must be fulfilled: liability and guilt.

In the doctrine there is no agreement regarding the meaning of the notion of discernment.

Vintilă Dongoroz states that, in the case in which some authors relate this concept to the attitude of understanding, others to the capacity of differentiating between good and wrong, others to the possibility of knowing what is licit and what is illicit, these are all useless, because for as long as the discernment is a cause attracting criminal capacity, where there is the presumption that this capacity is missing (for minors between 14-16 years old) the discernment can only be explained by starting from the notion of criminal liability.

Due to the relative feature of discernment, its existence shall be established from case to case, in relation to the offence committed by the minor.

From another perspective, by criminal liability is understood the ensemble of the physical particularities of an individual making him capable of understanding freedom and the necessity of his actions in a dialectical unity with the objective laws for the development of the society and to anticipate the consequences of his action when he is acting contrary to this unity.

In the main, it can be said that an offence was committed with discernment when, in the moment of its commission, the minor was able, due to the degree of development of his psychical faculties, of the education received, of the influences exercised by the social environment, to be aware of the antisocial and harming nature of the offence, of the risk to be punished for committing it.

Our Criminal Code states the division of minors, from the perspective of the criminal liability, into two categories: the minors with criminal liability who are held criminally responsible, and the minors without criminal liability, who are not held criminally responsible.

Thus, according to Art 113 of the Criminal Code a minor under the age of 14 shall not be criminally responsible.

A minor aged from 14 to 16 shall be criminally responsible, only if it is proven that he/she committed the act in discernment.

A minor over the age of 16 shall be criminally responsible, according to the law.

In the category of minors who are criminally responsible we can differentiate two subcategories, namely:

a) A first category of the minors whose criminal capacity is relative;
b) A second category of the minors who are considered, absolutely, as having criminal capacity.

a) The first category of minors considered as having criminal capacity includes minors aged from 14 to 16, in respect of whom the relative presumption of criminal incapacity has been removed.

This removal of the presumption of incapacity takes place when it is proven that the minor perpetrator aged from 14 to 16 has committed the offence with discernment, by a legal psychiatric expertise.

The existence of discernment must be proven in relation with the moment in which the offence was committed. Thus, for the offences of long standing shall be criminally relevant only the acts which prove to have been committed with discernment, and in the case of a concurrence of offences, even in the hypothesis of committing them within a limited data area, the proof of the existence of discernment must be made for each offence separately, because the existence of discernment must be verified also in relation with the nature of the offence committed and of its circumstances.

From here it results the necessity to determine the moment of the commission of the offence, for the different forms of offences and to examine the consequences of the situations which the moment of the consumption of the completion of the offence does not coincide with the one in which the offence was committed (constituent inaction).

When a part of the constituent action or inaction of the continuous or of habit offence, or some of the actions or inactions that would be part of the legal unity of the continued offence were committed before the age of 14 and others between the ages of 14 and 16, one of the following solutions must be applied:

- The minor who, after coming to the age of 14, has committed without discernment the rest of his activity, he shall not be criminally responsible;
- If the minor has committed with discernment the actions or inactions subsequent after coming to the age of 14, he shall be criminally responsible, but the minor perpetrator shall be held criminal responsible only for the actions/inactions committed with discernment after coming to the age of 14, and for the continued or of habit offences, only for that part of the illicit activity subsequent to the age of 14, if it is enough to represent the content of the offence.

When a part of the constituent action/inaction of the continuous or of habit offence or some of the actions/inactions that could form the continuous offence was/were committed between the ages of 14 to 16, and the others between the ages of 16 to 18, the following situations are present:

- for the minor without discernment when he committed the actions/inactions between the ages of 14 to 16, these shall not be part of a continuous, continued or of habit offence, together with other actions/inactions committed after the age of 16. These shall form a continuous, continued or of habit offence, if are enough to represent its content;
- If during the period between the age of 14 to 16, the minor has acted with discernment and after that he continued his criminal activity based on the same resolution, all the acts, action/inactions shall represent a single continued, continuous or of habit offence;
- When a part of the action/inaction constituting the continuous or of habit offence or the acts of the continued offence were committed before the age of 18, and others after the majority, a single continued,

continuous of habit offence shall be ascertained. The perpetrator shall receive, for his entire criminal activity, the criminal legal treatment stated by the law for adult perpetrators.

After the occurrence of a certain dangerous result in the development of the causality, the amplification of this result or the occurrence of another one takes place in time, thus the offence receives a more serious legal qualification.

When the minor under the age of 14 has committed the offence, but its consequences amplified or other ones have occurred after his majority, he shall receive the legal treatment of minor perpetrators.

The establishment of the criminal responsibility of the person who has committed an offence of hitting and other violence during his minority shall be made according to the legal regulations regarding the minority, even when the victim has died due to the injuries caused even after he become an adult, thus the offence committed characterized by this serious result, is the offence of hitting and other violence causing death.

The criminal law states certain facts in relation to which the existence of discernment is easier to prove because the minors learn about the immoral feature of these actions (for instance: theft, rape, hitting), but there are also facts whose antisocial feature involves a more thorough knowledge of life, social order, moral norms and law (for instance: espionage, concealment).

b) From the subcategory of the minors who are considered as having criminal responsibility, are part those minors already aged 16.

The minor aged 16 shall be criminally responsible, according to Art 113 Para 3 of the Criminal Code. The minor aged from 16 to 18 is presumed, in all cases, to have the possibility to understand the social value of his actions and to consciously coordinate his will.

The absolute feature of the criminal responsibility of the minor to whom we refer to does not exclude for him, or for the adult perpetrators, the possibility to prove their irresponsibility, in the meaning of Art 28 of the Criminal Code and this is why, probably, the action committed on this ground does not represent an offence.

2. THE REGIME OF THE CRIMINAL RESPONSIBILITY OF THE MINOR

A) The sanctioning system according to the new Criminal Code

Art 114 of the Criminal Code states the principles standing at the base of the criminal treatment of minors.

Thus, according to its text, for the minor who, at the date when the offence is committed, was aged between 14 and 18, shall be taken an educatory measure without deprivation of freedom.

Against him shall be taken a measure depriving of freedom in the following cases:

a) If he has committed another offence, for which he was punished by an educatory measure which was served or whose serving began before the commission of the offence for which he is trialed;

b) When the penalty stated by the law for the offence is imprisonment for 7 years or more or even life imprisonment.

Analyzing these legal provisions, we notice that the actual Criminal Code no longer states penalties for minors, the sanctioning system being totally based on educatory measures without deprivation of freedom or privative of freedom.

The educatory measures without deprivation of freedom are:

a) Civic training course;
b) Supervised freedom;
c) Confinement for the weekends;
d) Daily assistance.

The educatory measures privative of freedom are:

a) Admission into a re-education center;
b) Admission into a detention center.

The establishment of the educatory measure to be taken against a minor shall be made, according to Art 114 C. Code, according to the general criteria for individualization of the penalty stated by Art 74 C. Code.

For the performance of an evaluation of a minor, according to the criteria stated by Art 74, the court shall request from the probation service a report stating motivated proposals regarding the nature and duration of the programs for social reintegration that the minor is compelled to attend, as well as other obligations which may be imposed to him by the court.

B) The regime of the educatory measures without deprivation of freedom

a) Civic training course

The educatory measure of the civic training course consists in the obligation of the minor to attend a program for maximum 4 months, to help him understand the legal and social consequences to which he is exposed for the commission of offences and to make him accountable regarding his future behavior.

The organization, insurance of participation and supervision of the minor, during the course, shall be made under the coordination of the probation service, without affecting his school or professional program.

b) Supervised freedom

The educatory measure of supervised freedom consists of the control and guidance of the minor during his daily program, for a period between 2 and 6 months, under the coordination of the probation service, to insure his participation in school classes or in professional training courses and to prevent his from performing certain activities or contacting certain persons who might affect the process of his straightening.

c) Confinement for the weekends

The educatory measure of confinement for the weekends consists in the obligation of the minor to not leave his residence for Saturdays and Sundays for 4 to 12 weeks, outside the case in which, during this period, he is compelled to attend certain programs or to unfold certain activities ordered by the court.

The supervision shall be coordinated by the probation service.

d) Daily assistance

The educatory measure of daily assistance consists in the obligation of the minor to follow a program established by the probation service, which contains the timetable and conditions for unfolding certain activities, as well as the interdictions ordered for the minor.

The educatory measure of daily assistance shall be ordered for a period from 3 to 6 months, and the supervision shall be coordinated by the probation service.

During the educatory measures without deprivation of freedom, the court may order for the minor one or more of these obligations:

- To attend a school program or a professional training;
- To not exceed, without the agreement of the probation service, the territorial limit established by the court;
- To not be present in certain places or to certain sports or cultural events, or to other public gatherings, established by the court;
- To not come close or to communicate with the victim or members of his/her family, with other participants in the commission of the offence or with other persons nominated by the court;
- To be present at the probation service at the dates established by it;
- To be subjected to control, treatment or medical care measures.

The supervision of the performance of the obligations ordered by the court shall be coordinated by the probation service.

During the execution of the educatory measures without deprivation of freedom, the probation service has the obligation to notify the court if:

a) There are reasons justifying the modification of the obligations ordered by the court, either the cessation for certain ones;

b) The supervised person does not comply with the conditions for execution of the educatory measure or does not execute, under the established conditions, his obligations.

If during the supervision, there are reasons justifying either the establishment of new measures, or the increase or decrease of the conditions for executing the existing ones, the court shall order the appropriate *modification of the obligations*, to insure for the supervised person more chances for redemption.

The court shall order the *cessation of some of the obligations* ordered when it considers that their maintenance is no longer necessary.

If the minor, with bad faith, does not comply with the conditions for executing the educatory measures or the obligations ordered, *the court shall order*:

a) The prolongation of the educatory measure, without exceeding the maximum limits stated by the law for it;

b) The replacement of the ordered educatory measure without deprivation of freedom with another one more severe.

c) The replacement of the measure ordered with the admission into a re-education center, if, initially, was ordered the most severe educatory measure without deprivation of freedom, for its maximum duration.

For the prolongation of the educatory measure or in case of its replacement with a more severe educatory measure without deprivation of freedom, if any of this time the conditions for the execution of the measure or the obligations ordered are complied with, the court shall replace the educatory measure without deprivation of freedom with the admission into a re-education center.

If the minor already serving an educatory measure without deprivation of freedom *commits a new offence or is trialed for a concurrent offence previously committed*, the court shall order:

a) The prolongation of the initially ordered educatory measure, without exceeding the maximum stated by the law;

b) The replacement of the initially ordered educatory measure with a more severe one;

c) The replacement of the initially ordered measure with an educatory measure privative of freedom.

C) The regime of the educatory measures privative of freedom

a) Admission into a re-education center

The educatory measure of admission into a re-education center consists of the admission of the minor into an institution specialized in the recovery of minors, where he shall comply with an educational and professional training program according to his aptitudes, as well as other programs for social reintegration, according to Art 124 Para 1 C. Code.

As already stated by the literature, we consider the measure of admission into a re-education center, though privative of freedom, is an educatory measure, during which the educational program and training prevails, having as purpose the social reintegration of the minor.

The admission shall be ordered from 1 to 3 years.

If during the admission the minor commits a new offence or is trialed for a concurrent offence previously committed, the court may maintain the measure of admission into a re-education center, prolonging its duration, without exceeding the legal maximum, or may replace it with the admission into a detention center.

If during the admission the minor has proven constant interest for the appropriation of educational and professional knowledge and has made obvious progresses for his social reintegration, after serving at least half of the duration of the admission, the court may order:

a) The replacement of the measure of the admission with the measure of the daily assistance for a period equal with the duration of the admission not served, but for no more than 6 months, if the person admitted is aged fewer than 18;

b) The liberation from the re-education center if the person admitted there has aged 18.

If the minor does not comply with bad faith the conditions for the execution of the measure of daily assistance or of the obligations ordered to him, the court shall reconsider the replacement or liberation and shall order the execution of the rest of the penalty remained unserved from the duration of the measure of admission into a re-education center.

For the commission, until the completion of the admission, of a new offence by a person under the age of 18 and against who was ordered the replacement of the measure of admission into a re-education center with the one of daily assistance, the court shall reconsider the replacement and order:

a) The execution of the rest of the duration of the initial admission, with the possibility of prolonging this duration up to the maximum stated by the law;

b) The admission into a detention center.

b) Admission into a detention center

The educatory measure of admission into a detention center, as Art 125 Para 1 of the C. Code states, consists into the admission of the minor into a facility specialized in the recovery of minors, with a security and surveillance regime, where he shall attend to intensive programs for social reintegration, as well as educational and professional programs according to his aptitudes.

Considering previous mentioned provisions and the ones referring to the educatory measure of the admission into a re-education center we can easily note a differentiation, namely the fact that into the detention center the process for recovery of minors is unfolded under security and surveillance, the programs for social reintegration shall be intensive,

while into the re-education center the program shall not be unfolded under security and surveillance.

Regardless of the duration and exigencies referring to the admission into a detention center, this sanction represents an educatory measure, and not a penalty, this is why it has a predominant educative and preventive feature, and not repressive, as the penalty.

The admission shall be ordered for a period from 2 to 5 years, outside the case in which the penalty stated by the law for the offence committed is imprisonment for 20 years or more or even life imprisonment, when the admission shall be ordered for a period from 5 to 15 years.

If during the admission the minor commits a new offence or is trialed for a concurrent offence previously committed, the court shall extend the measure of admission without exceeding the maximum stated (of 5 or 15 years) determined in relation with the most serious penalty of the ones stated by the law for the offences committed. From the duration of the educatory measure shall be subtracted the period served until the moment of the decision.

If during the duration of the admission, the minor has proven constant interest for the appropriation of the educational and professional knowledge and has made serious progresses for his social reintegration, after serving at least half of the penalty with admission, the court may order:

a) The replacement of the admission with the educatory measure of daily assistance for a duration equal with the duration of the admission not served, but not for more than 6 months, if the admitted person has not aged 18;

b) The liberation from the detention center, if the admitted person has aged 18.

If the minor does not comply, with bad faith, with the conditions of the daily assistance or with the obligations imposed, the court shall reconsider the replacement or the liberation and shall order the performance of the rest remained unserved from the duration of the admission into a detention center.

In case of the commission, until the complete serving of the measure of admission, of a new offence by a person under the age of 18 and against who was ordered the replacement of the measure of

admission into a detention center with the measure of daily assistance, the court shall reconsider the replacement and shall order:

a) The serving of the rest remained from the duration of the admission into a detention center;

b) The prolongation of the duration of this admission;

c) The modification of the regime of serving the penalty.

If during the serving of a measure privative of freedom the person confined, who has aged 18, has a behavior negatively influencing or encumbers the process of recovery and reintegration of the other confined persons, the court may order him to continue to serve the educatory measure into a penitentiary.

3. CONCLUSIONS

The new regulations in this area are in accordance with the international provisions and conventions ratified by Romania.

Are also modified the provisions regarding the criminal responsibility of the minors, from where it arises the idea of the prioritized application of the educatory measures without deprivation of freedom, and the ones privative of freedom become exceptions and shall be applied only for serious or multiple offences.

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STATE'S LEGAL LIABILITY IN THE FIELD OF HEALTHCARE

Mariana GULIAN[1]

Abstract:

The activities government undertakes in the field of healthcare need to be fulfilled in a reasonable, efficient and legal manner with the aim to obtain results free of any legal sanctions for the damage caused to the population. The author of this survey addresses the state's legal liability in the field of healthcare by studying the issue from different perspectives, the basis, conditions of such liability. The author also reveals the necessity to increase the state's liability in the given field so as to prevent the occurrence of legal liability.

Key words**:** *legal liability, state, public authority, public servant, healthcare, sanction, legal framework.*

INTRODUCTION

Society is familiar with the ongoing process of the state's diversification and strengthening action in the field of healthcare, requiring permanent improvements in the healthcare structure. The state contributed in the field of population's healthcare in time by addressing social needs consisting in protecting population from diseases, inability to work or premature death, because human illnesses and suffering has always been a major disadvantage for the society and a disability for the individual, even if different systems of values sometimes inhibited the social echo of the disease.

The government's organized and concerted effort in the field of healthcare is reflected as a reaction to the increased population morbidity, the progress of medicine, social and political trends, and not least – society imputing the government's irresponsibility for the errors committed in protecting population's health. Ensuring healthcare is a national priority of the state, and is a feature of a strong society.

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As healthcare depends on the progress in all the fields of the state, it is logical and desirable that the results registered in any other public fields did not undermine the importance or affect the public or individual healthcare, and the government complied with its legal responsibility for the illegalities in the healthcare system.

Since we've mentioned the terms state and legal liability, it is appropriate to give their definitions, so as to identify their correlation while addressing the field of population's healthcare.

Government is the main political institution of the society, representing a social and historical type of social organisation aimed at promoting joint interests of social groups and concentrating the expression of the entire society [14, p.58].

Judging by the approaches regarding the notion of state, we may conclude that the state has two meanings: *society*, as a form of human community coexistence and *power* – a type of organisation having a coercive authority. Both meanings may be accepted simultaneously, since they are complementary: state as a power, aimed at, and the state as the society needed. One of the state's essential characteristics is the public authority, also called state authority or coercive power [1, p.152].

The analysis of the legal liability in the light of the common law theory, the philosophy of law and sociology of law, and going beyond the boundaries of the approach within related legal disciplines, leads to further research [15, p.356].

Legal liability is a conceptual synthesis resulting from the philosophy of law, which is considered since the XIXth century a category of law. According to some authors, legal liability is a special legal relation comprising mandatory punishment provided for by the law as a result of an action punished by law [2, p.130].

The idea of legal liability is based on the principle stating that everyone is equal in front of the public duties, which means that the state is bound to repair any damage caused by its actions, including in respect of healthcare.

While performing activities related to the healthcare field, the government might cause damages to the individuals. This is why this it is important to know the theory of government liability. In depth comparisons reveal that the past becomes the present, judging by the approach of government and public clerks' liability. Currently, this issue is particularly important as compared to the past, which is because the

number of those damaged by the government and public clerks' activity increase as the latters' activity enhances. Thus, government liability is rather risk-related, therefore an objective liability, while the official's liability is related to the error itself – therefore a subjective liability.

As the state is a legal person, it is a political entity, different from individuals comprising it. The state has certain rights to be observed by the individuals, imposed by forcing people to observe its laws that should be deemed as an essential rule in their lives. The state also has obligations, which are defining its existence. Thus, government has to protect the weak, provide all its citizens with culture, justice, and ensure them a quiet life, protecting their health and ensuring them possibility to exercise their civil and political rights. These are the state's rights and obligations, each of them justifying the other ones.

As the state has an individual character and a separate life [13, p.36], it might cause damage to the individuals even in the field of healthcare, by exercising its multiple activities related to public health, as well as by its public clerks working in the public healthcare institutions. This is why both the state and the individual are bound to compensate those whose right to healthcare they trenched, the state's liability being related to the principle of administrative or civil law.

In a modern society, the individual perceives very clearly the state's activities and their consequences. Such activity of the state, which becomes more complex and increasingly important and wide-ranging, causes more and more of its actions needing to be sanctioned due to individuals' health damaging.

Every day, the theory of public liability in the field of healthcare becomes as major a concern for the society. This shouldn't be surprising, since the damages caused to the individuals' health might arise not only from the relation it has with the medical and sanitary institution or the medical staff, but also from their relation with the public authorities, or rather the state. In absence of legislative acts meant to fully regulate every detail of state's legal liability in the field of healthcare, administrative courts promote the principle of equity by the jurisprudence they operate with.

Therefore, jurisprudence and the doctrine try to extend superficially and in depth the field of the public authority's liability, seeking to re-establish, by allocating damages, the economic balance the public authority broke to the detriment of the individual.

As a rule, the legal liability occurs upon the infringement of a legal norm, which actually presumes fulfilling an obligation provided for by the law. Since the constitution provides that the state is bound to take steps so as every citizen had a decent standard of living ensuring their health [4], doctrinaires and legal practitioners often address in their discussions the state's legal liability in the event it fails to execute its obligation to ensure the individual healthcare by the relevant steps it has to take. Thus, a state where the concept of legal liability is not applied is damned to anarchy and perish, since its guaranty and observance of rights is purely formal [3].

Promoting and developing the field of healthcare requires satisfying the objective needs of the society related to healthcare, which is achievable by introducing the concept of public authority's responsibility, as well as its transformation in a concrete liability, which can be imposed by applying legal regulations. The role of the state and of the public administration in particular is to satisfy objective social needs under the principles of public services and social solidarity. This is why public services within a correct administrative system should function so as not to cause damage to any individual, and in the event of any damage caused by the public service, the state should compensate it, because, according to the principle of social solidarity, this is an irrevocable responsibility of the state.

The research on the state's legal liability in the field of healthcare revealed the fact that the state protecting public health and the health of individuals by means of legal norms is a constant feature common to all the states, regardless of their form of government. This phenomenon could be explained by the fact the danger of transmissible diseases, against which steps were undertaken, is the same for all the social classes, as it is common knowledge that diseases do not choose their victims depending on their status.

Today, in the event the state or its public clerks violate an individual's right to healthcare, the latter can appeal to court and seek compensation for the damage caused. This is why the liability of the state and its public clerks is as important a branch of the administrative law and tends to occupy a leading position in this field.

Our courts of law are called to react accordingly when an individual's right to healthcare was violated and to declare the state liable if it deems the damage was caused by the abusive actions of the state or

its public clerks or by its failure to take the necessary steps to ensure the individual a healthy life.

THE BASIS FOR THE STATE'S LEGAL LIABILITY IN THE FIELD OF HEALTHCARE

Researching the basis for the state's legal liability in the field of healthcare is a complex phenomenon consisting of four categories: legal basis, legal liability, the state and the field of healthcare. Therefore, to determine the essence of the legal liability of the state in the field of healthcare is possible only on condition that all these notions are clearly defined, as each of them is addressed in the relevant doctrine unequivocally.

In every civilized country, the government/state undertakes to guarantee a sound healthcare system aimed to support vulnerable people based on the law. The healthcare activity has a positive influence on the overall development of the state, influencing all the areas. Healthcare ensures the satisfaction of the individual's primary need – to be healthy, and of the society – to have a healthy population. Thus, healthcare comprises a complex of measures the state undertakes to prevent diseases, strengthen and repair the health condition, prolong people's life and ability to work.

Addressing the notion of basis of the legal liability, we reveal the fact that it is determined by the violation of a legal norm. In this respect, the legal norm is a standard, a behavioural model, a program [14, p.117]. The legal norm contains provisions an entity needs to observe – what is lawful or recommended, or what the norm encourages (the power of law consists in ordering, forbidding, admitting and punishing).

The general theory of law requires basis *de facto* and *de iure* for the occurrence of the legal liability or the application of the concept of legal liability. Therefore, in the field of healthcare, the basis *de iure* for the legal liability of the state is represented as a legal norm stipulating the possibility to apply liability measures in the event of an illegal act, as well as the legal act defining the legal norm, the form of liability and the extent of liability under which such illegal act is addressed (court judgment etc.). The *de facto* basis for the state's legal liability in the field of healthcare is represented by the element of crime generating the legal relations of liability. The specific of such legal relation is first of all determined by the characteristics of the state as an entity of the legal

relation. Consequently, the state shall play within such legal relations the role of a passive subject, therefore, first of all it needs to have the status of entity of law. The status of entity of legal relations derives from civil legal capacity of the state and its delictual capacity. The legal capacity of the state, as is the case of other entities of law, comprises its capacity to have civil rights and obligations. The delictual capacity of the state represents its capacity to be liable for committing illegal civil acts. Its sovereignty is another argument confirming the state's civil legal capacity. Therefore, the delictual capacity depends on two factors: first – the *de iure* and *de facto* basis for the delictual liability and, second - a regulated mechanism of achieving such legal liability.

In the light of the above mentioned, we may state that identifying the legal liability of the state in the filed of healthcare is determined by the way the state contributed to the healthcare system, as well as the civil society exercising stronger pressure to efficiently apply the right to healthcare of humans.

The state is the guarantor of the citizens' right to healthcare, this is why it must ensure efficient and legal functioning of all the public institutions and public clerks whose activity is related to the field of healthcare. In the event of infringing people's right to healthcare and related interests by the actions or inactions of the state institutions, such actions shall become legal basis for state liability.

The state's administrative steps affecting citizens' right to healthcare shall have a sound regulatory basis. Thus, every deed of the government, namely every act infringing any individual's right to healthcare shall obviously have a sound legal basis.

An individual affected by a deed of the government may resort to courts of law, and if the legal basis of such deed cannot be proved, the court will invalidate the deed that the individual may simply ignore [16, p.942].

The state exercises its obligations in the field of healthcare towards the citizen as provided for in the normative acts by its public authorities and public clerks.

Public structures involved in public healthcare are fully liable towards the population, as they have the competence to mainstream and strengthen systems monitoring the population's health and identify the health problems and provide relevant, correct and timely information with a view to take steps in addressing public health issues.

The responsibility to regulate, coordinate and control the functioning of the healthcare system lies on the Ministry of Health and its structures organized by competence and responsibilities at the national and territorial level. Studying the basis of the state's liability in the field of healthcare also involves studying the relevant regulations in force. Currently, the legal norms regulating the state's liability in the field of healthcare are systematized and found in several normative acts, the fundamental one being obviously the Constitution.

As legal liability involves negative amendments related to the legal or organizational situation of the liable entity, the bases of its occurrence shall be regulated clearly and briefly. Otherwise, there shall appear favourable conditions for the ill-intended use of the own rights, for abuses, and, in the end, contempt of the rule of law and of legality in general.

Moldova's legal framework in the field of healthcare is incomplete. There are limited capacities at the national and local level to develop, apply the regulatory framework and monitor the implementation in the field of healthcare. The collaboration between the competent authorities is insufficient, each of them working according to their own monitoring and evaluation plan.

Besides the basis of the legal liability addressed in the relevant literature, some authors believe the state's liability may result from the objectives, functions and social contribution of public institutions. They consider that legal liability is based on the necessity to protect social relation, as well as the necessity to create favourable conditions for a healthy living. Some forms of human behaviour are not accepted, therefore forbidden by the legal norms by virtue of their inconsistency.

Authors believe the social basis of the legal liability consists in the contribution of the concept of legal liability to protecting antisocial behaviour and educating a responsible attitude towards legal norms [18, p.200].

The basis of the state's liability can be also identified in the field of healthcare in the necessity to protect social relations related to promoting the values of health.

CONDITIONS OF THE STATE'S LEGAL LIABILITY IN THE FIELD OF HEALTHCARE

Speaking about the conditions of legal liability, we should identify several opinions related to their content, to be able to connect some conditions to the state's legal liability in the field of healthcare.

Some authors believe that to incur the legal liability, the following conditions need to be met: unlawful conduct, a socially harmful outcome, the causal connection between the unlawful conduct and the socially harmful outcome, the guilt of the crime doer and the legal capacity of the illegal action-doer [12, p.225].

If it is to refer to other opinions, we can mention that, according to certain scientists, a condition of legal liability would be the existence of certain circumstances or causes that, in fact, eliminate the legal liability [9, p.287].

In the context of the mentioned above, we can identify a basic condition for legal liability – namely, the presence of subject of the legal liability, which would be also valid for the state's legal liability in the field of healthcare.

The legislation of the Republic of Moldova provides for remediation in the issue related to identifying the subject of state's legal liability. Therefore, the importance of their correct identification increases by virtue of the diversity of state authorities and public clerks acting on behalf of the state within several kinds of legal relations, including the legal relations in the field of healthcare. Consequently, the legislation indicates the following subjects of the state's legal liability: the state, state authorities and public clerks.

Thus, Article 53 par. (1) of the Constitution of the Republic of Moldova stipulates "any person, whose rights have been trespassed upon in any way by public authority through an administrative ruling or lack of timely legal reply to an application, is entitled to obtain acknowledgment of those rights, the cancellation of the ruling and payment of damages."

The result of an illegal action caused by a state authority or a public clerk is the damage, which, together with the subject, is another condition of the state's legal liability. The category of damage/prejudice has been largely addresses in the studies of civil law. Thus, the most common definition is that of "evaluation", which consists in calculating the loss based on the pecuniary value of the damage caused. The damage

caused by the failure to perform a certain obligation represents o breach of a patrimonial interest expressed in pecuniary form. According to the Article 14 of the Civil Code of the Republic of Moldova [5] "damages are considered to be the expenses the person whose rights were violated has paid or will have to pay in order to restore the violated rights, the loss or deterioration of goods (real damage), as well as the profit (the non-reimbursed income) the mentioned person would have gained under a normal trading circulation, if his rights had not been violated."

One of the main condition to bring to justice the state, including in respect of healthcare, is to establish the causal relation between the action/inactions of the state authority or of the public clerk. Such causal relation is aimed to determine and evaluate the prejudice and seek damages for losses. The specific of the legal liability of the state/ public clerks in the field of healthcare is influenced by the serious danger of the illegal action, its seriousness arising from the fact that the doer of the offence acts on behalf of the state and has competences of authority. This is why the illegal actions of the state and pubic clerks have a most negative impact on the rule of law and the legal regime. This is how the legislation of the Republic of Moldova guarantees its citizens remediation for the damages caused by the state authorities.

According to the Article 1404 of the Civil Code of the Republic of Moldova "Damage caused by an illegal administrative act or by non-solving of a request within the legal term by the public authority or an official from that authority shall be compensated for in whole by the public authority. The official shall be jointly and severally liable in case of wilful conduct or gross negligence. Natural persons are entitled to demand compensation for moral damage caused by actions shown at para. (1)."

According to certain authors, the state is an association empowered with authority towards its own citizens and is entitled to adopt legal norms addressing them, to be their leader and to judge them based on the same legal norms. This is why the relations between the citizen and the state are public in their essence, where the state is the authority and the citizen is the subject obeying the former [17, p.128].

The bodies of the public authority and its public clerks act on behalf of the state within legal relations. This is why, by prejudicing to private individuals, the entity having caused this shall be deemed the state as a whole. The legal provision on the damage being repaired by

the state aims first of all at insuring the victim's patrimonial rights, as the specific official might not be financially capable to compensate such damages.

The public authority's guilt by its actions/inactions that have caused damages to the individual's health is tightly connected to their illegal nature.

A. Kuznetsov mentions that in the judicial practice, acknowledging the illegal nature of the deed and the causal relation between such deed and the damage caused totally excludes any hint to the guilt of state authorities or its public clerks [10, p.26-27].

The judicial practice shows that obtaining compensation for the damage caused by the state as a result of illegal acts of the public authority or public clerks working in the field of healthcare is quite challenging, but is achievable on condition that society demonstrates enough activism and the plaintiff submits evidence/legal basis. This is the main objective of the state's normative basis, enabling all the entities to obtain compensation for the damages caused. In this respect, the seeking damages is one of the most efficient modalities to protect the right to health that was infringed by the state.

Thus, taking into account the above mentioned, we may conclude the state should be held liable for all the cases where it does not honour its obligations undertaken by the Constitution or by the pacts and treaties it is part of, if its actions damaged the health of an individual or of the population in general. To achieve the legal liability of the entities of law as efficiently and timely as possible, it is essential to have clear and brief regulations on the basis, procedure, sanctions and the specific entity liable for committing the illegal actions.

FORMS OF THE STATE'S LEGAL LIABILITY IN THE FIELD OF HEALTHCARE

The notion of liability in its wider meaning comprises the obligation of every individual to bear the consequences of their failure to observe some behavioural norms – an obligation binding the doer of an action against such norms and which is generally disapproved by the society for such behaviour. Social disapproval inevitably and undoubtedly comprises legal disapproval, as it is a major component of the latter [8, p.19].

In the field of healthcare, the state's legal liability is a complex phenomenon, originating from both public and private law. As the state holds the public authority, it is not on equal positions with its citizens or other entities of the private law. The public authority, its application and organisation is the essence of the state. In this respect, the state materialises in the practical meaning by its authorities and public clerks. The procedure/limits of repairing the damage the state authorities and/or public clerks caused to the private individual is governed by the norms of the private law and involves elements of enactment terms. Within legal relations of private law, the state loses its capacity of authority and becomes entity of law equal to others. The capacity of entity of the civil legal relations derives from the legal capacity of the state and from its delictual capacity. The state's legal capacity, as that of other entities of law, comprises its capacity to have civil rights and obligations. The state's delictual capacity represents its eligibility to be held liable for committing illegal civil acts. The fact that it is sovereign is an argument for state's legal and civil capacity.

Therefore, the state as an entity of legal liability in the field of healthcare comprises two entities of public law: the public authorities and public clerks.

As far as the limits of this paper, we shall focus the objective of our research on the analysis of distinctive features and correlation between two forms of the state's liability in the field of healthcare, namely:

-the state's legal liability towards private individuals;

-the liability of public clerks and state authorities towards the state.

By identifying the correlation between these two forms of liability, we should mention that the state's legal liability in the field of healthcare, as well as in other fields of public authority, differs from the liability of public clerks and that of state bodies. The first criterion of differentiation is based on subjects. In the first form of the state's legal liability, the natural or legal person of private law is the active subject that has been prejudiced by the illegal action/inaction or by the legal act of the state authority or of the public clerks, or, in other circumstances regulated by the law. The second form of legal liability differs by the fact that public authorities and public officials are held liable in front of the state.

In the context of examining the circumstances invoked by those whose right to healthcare was affected, it must be clearly noticed that public authorities and public officials are liable for any offences in front of the state, not in front of the people or the population, as it is namely the state that represents the legal personification of the nation – the subject that, according to the law, has the authority to qualify deeds with legal significance and to take limiting steps [11, p.47].

In the capacity of subject representing the people, to whom it owes the authority it has, the state has the competence to bring to law state authorities and public servants guilty of committing illegal acts that have damaged private individuals. The liability specifics of public authorities and public officials, unlike other forms of public liability, provides for that one mandatory party within such legal relation shall be a representative of the public authority. Such liability occurs in the event of committing illegal antisocial acts harmful for the public health.

The two forms of liability mentioned above differ by the specific sanctions and the different legal branches. Thus, the legal liability of public clerks or of the public authorities occurs on the general bases of legal, administrative, disciplinary and patrimonial liability.

Neither the criminal, nor the administrative law provides for the criminal or administrative liability of the state or of the public authorities. In the light of the above mentioned, we may clearly state that healthcare public authorities shall not be held criminally or administratively liable for their actions/inactions that have caused prejudices to the public health. To support the prior statements, we shall reveal the provisions of the Article 21 par. (3), (4) of the Criminal Code of the Republic of Moldova [6] stipulating that public authorities are not subject to criminal liability and, article 17 par.(1) of the Contraventional Code of the Republic of Moldova [7] provides the legal regulation exonerating from contraventional liability public authorities and public institutions. Depending on the nature and specifics of the healthcare relations within which the state causes damage to other subjects, it may be incurred both public and private law liability.

The state's liability in the capacity of subject of illegality is clearly stipulated. The private law provides for that the state is a special subject having specific rights and obligations, while the private law using the method of legal regulation based on the legal quality of the parties, provides for that the state is equal to other entities of law.

The application of the private law norms in the authority-subject relation must be clearly stipulated in the text of the relevant legal norm. Thus, there are no regulations in the legislation related to healthcare clearly providing the state's legal liability, but the practice identifies legal relations arising after submitting the state a request seeking damages caused by the state authority or its officials while fulfilling their duties related to protecting population health. In the context of the above mentioned, we could conclude that civil legislation in force contains multiple provisions to be taken into account and protecting public interests in the field of healthcare. The state has always represented the power, which gives it a special status within civil legal relations.

As a socially oriented state, the Republic of Moldova has the constitutional obligation to take steps to ensure every citizen's healthcare for a decent living, and has the direct responsibility to carry out certain national programs in the field of healthcare. In this respect, we shall deem the state's liability as public, which is characteristic for many states, and the norms regulating legal relations where one of the participants is the state shall be public legal relations.

The state's legal liability is regulated by the sanctions provided by the public and private legal norms. Therefore, the state is a subject of public liability as well as private law liability. These two varieties of liability in a democratic country governed by the rule of law represent the legal will of the people and a true guarantee against concentration and abuse of power. The state interacts continuously with the subjects of its own legal system. All the parties of this system may cause damages to each other. We should mention the fact that the state is an entity with equal rights as other entities of law within this national system, and exercises its rights and obligations regulated by the positive law.

CONCLUSION

The sum up the mentioned above, we may conclude that the healthcare system created by the state may function only based on the concept of legal liability in the event of causing damages to the population's interests and right to health. By failing to identify and address health issues due to inefficient management of the health system, the public authority may be charged with causing damages to this field, as it ignores the requirement provided in normative administrative acts to mainstream and strengthen public health insurance systems, with the aim

to identify solutions for the health problems and provide relevant, true and timely information needed to make decisions and take steps in this respect.

To describe the state as subject of legal liability in the field of healthcare, it is necessary to analyse every time, for every separate case the legal relations within which the state occurs as an entity ignoring the legal provisions. The description of the legal relations determines the specific of the state in the capacity of subject of legal liability. Thus, in the field of healthcare, the Republic of Moldova may be held liable both as a state, and by its public authorities, local public authorities and public clerks.

The healthcare system comprises intersectorial activities of several authorities and public institutions, having the duty to work out and harmonise the legislation in the field, to ensure the processes in this field are safe, to inspect, monitor and apply the legislation in force regulating healthcare. Calling for legal liability in the addressed field is often due to shortages in the intersectorial mechanisms and the need to clearly define the responsibilities in the field of healthcare and other fields to implement essential healthcare actions.

This way, the state's legal liability in the field of healthcare can be characterised stressing the following issues consisting in applying the sanctions of the legal norm regulating the obligation to repair damages caused to the population's health, to restore the rights of the victims of unlawful acts committed by the state and/or public clerks, as a reaction to the causing of a prejudice resulted from an illegal action of the state, local public authorities and/or public official, being at the same time directed towards ensuring and re-establishing the right to health, and having certain negative consequences (of patrimonial or non-patrimonial nature) the state will have to bear. We can also notice that the state's legal liability is performed by the public law relations, having as subjects the state and its victims that were prejudiced. The state repairing the prejudice does not exempt public officials from liability. In many situations provided by the law, state is held legally liable, regardless of the guilt of some bodies or specific individuals. Liability is examined from the procedural and civil law perspective, as regulated by the law. In the light of the above said, we shall formulate a definition of the state's legal liability on the field of healthcare, namely exercising the state's obligation to liquidate the consequences caused to the health of the

individual or population by the actions/illegal deeds of the state authorities and public officials.

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ACCOUNTING FOR MORAL SUPERIORITY OF ELITES. POLITICAL ELITES CAUGHT BETWEEN NORMATIVE AND DESCRIPTIVE APPROACHES

Roxana MARIN[1]

Abstract:

*The present paper constitutes itself in an attempt to critically examine the chronologically and allegedly evolutionary perspective on the definition of "political elites" through moral, ethical lances. Employing comparatively the traditional Aristotelian, Italian "elitistic" and contemporary considerations (primarily the "democratic elitism" direction), the main argument put forward by the paper is that the present debate on the moral facet of the definition of "political elite" is, in effect, the reconciliation between two, long disputed manners of thinking about and identifying political elites: the classical normative and the descriptive approaches. Currently, it appears that the century-long opposition has dissolved in the midst of committed, seriously and extensively conducted empirical research, which managed to surpass both the norms and the standards imposed by Aristotle in distinguishing the "powerful few" and the observative, merciless descriptions of "political elites" by the Italian "elitists" and by American C. Wright Mills. The paper is structured on the basis of chronological and comparative standpoints, briefly tackling: (1) the preliminaries of Aristotelian normative approach on elites; (2) the presentation of the basic coordinates of the descriptive approach, marking the definitive shift in defining and dealing with elites at the beginning of the 20th century, and (3) the critical evaluation of the "reconciliatory" achievements of the contemporary debate centered on "democratic elitism" and on vast, comprehensive empirical – particularly quantitative – efforts. Making recourse to the philosophical and sociological contributions that pioneered the study of political elites, this essay discusses the evolution of the moral view on elites, from the hints provided by Aristotle, when inquiring into the virtues and vices of the patricians in the agora, and by Machiavelli, when postulating the "*virtu*" of the leading princes in dealing with the affairs of the state, to the Italian "classics", with their profoundly sociological observations on the contemporary leadership, and the Schumpeterian procedural, instrumental and minimalistic conception of "democratic elitism" and its recent exegetes.*

Key-words: *moral superiority, elites, descriptive approaches, normative approaches, fivefold classification, ideal model, virtue.*

"*[E]lites don't believe in morality. They pretend to be interested in the public and ethical views and engage in deceptive patterns of behaviour in*

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appealing for public support. Hence, they assume a passive public, and they are not really accountable, responsive, nor egalitarian."[2]

INTRODUCTION

When engaging in an argumentation, rarely does an issue present itself which cannot be best illustrated by one of Aesop's fables. Abiding by this principle, the contemporary understanding of the concept of elites, as rendered in the writings of many scholars, receives a fair portrayal within such a tale where reason and guile are left to have their moment. The fable entitled "The Fox and the Lion" proceeds with its moral as follows:

"When first the Fox saw the Lion he was terribly frightened, and ran away and hid himself in the wood. Next time however he came near the King of Beasts, he stopped at a safe distance and watched him pass by. The third time they came near one another, the Fox went straight up to the Lion and passed the time of day with him, asking him how his family were, and when he should have the pleasure of seeing him again; then turning his tail, he parted from the Lion without much ceremony"[3].

Expressed in fuller form, this fable offers a brief account of the first instance from which the concept of elites departed as well of its last and present condition. Owing to its close ties to other concepts beset in

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[2] Samuel J. Eldersveld, *Political Elites in Modern Societies. Empirical Research and Democratic Theory*, Ann Arbor (Michigan: University of Michigan Press, 1989), xv-xvi. Zeger Van Der Wal, Professor at the Department of Governance Studies at VU University in Amsterdam, provides a 21st century touch to the question of defining political elites though a conceptual framework pertaining to the sphere of ethics and morals: "The leaders of our most paramount institutions are scrutinized more than ever before: 'the elite' is under fire. […] [T]he general public is outraged by the havoc their leaders have caused and trust in the elite seems to have reached a new low; a development that started at the end of the 20th century and has resulted in a rise of populist movements across the political landscape of the Western world." Firstly, one cannot but observe that the many powerless, the "*populous*", the "*demos*", the masses registered a new transformation in the form of "general public", which might imply a rather static *hypostasis*, as simple spectators to a show of displaying power and influence. Secondly – and most importantly, it seems conspicuous the almost complete neglect of moral stances within the groups of political elite, which triggers inevitably a sense of destruct towards them. *See* Zeger Van Der WAL, *Elite Ethos. Values and Motives of Politicians and Public Managers in Western Democracies*, paper presented at the PMRC Conference, Syracuse (USA), June 2-4 (2011) 1-26 (2).

[3] AESOP, *Fables*.

the field of political science, the concept of elite rose and counted its gains once with political science, remaining largely true to itself. As such, it is advisable to set about this short journey which oversees the implications that the concept of elites bore across time, with a general definition provided by one of the elitists and summarized here by S.J. Eldersveld:

"In all regularly constituted societies.. the ruling class or rather those who hold and exercise the public power, will be always a minority and below them we find a numerous class of persons who do never, in any real sense, participate in government but merely submit to it. These may be called the ruled class"[4]

As phrased above, all early elite theorists consent that it is particular to each and every at least moderately complex societies that power and privilege are set aside for those few ones addressed as elites. It is they who accrue the greater part of that which has been laid for grabs. This fact stems from the early days of humanity, when the wretched ways of a yet debased social and political order distinguished between master and slave. In order to salvage his life, the weaker opponent of those days of yore, admitted to his limits revealed to him by his thereafter master. He then wept and begged for his life, bowed and began praising his master, as accustomed to all subjects in front of the triumphant, the powerful and the grand heirs. Rejoicing in their victory, those distinguished by birth and riches thrived upon those of infinite lesser breeding and earthly possessions. In the words of Sidney Hook, "all political rule is a process […] by which a minority gratifies its own interests […] the masses who have fought, bled, and starved are made the goat"[5].

In this initial landscape, Ancient philosophers made the first attempts in accounting for the immanent division of power, influence, privilege and morals. Books III and VI of the *Nicomachean Ethics* contain the Aristotelian perspective in regard to the normative approach on the political elite. Aristotle constructs here the cornerstone of the normative direction in the definition of the "political elite", in which this group of powerful, influential "few" represents the ones possessing a

[4] Eldersveld, *Political Elites*, xv.
[5] Sidney Hook, "The Fetishism of Power", in *The Nation*, Vol. 148, 20 (May 13, 1939), 562-63.

series of special, distinguished qualities. Among these qualities, "*arete*" of the *dianoia* [thought] becomes of paramount importance for the ones in leadership, for the potentates in the *agora*. Indeed, these patricians, these potentates are (or should be) the bearers of "*arete*", of mere virtue, of some form of intellectual excellence. Aristotelian "virtue" tends of overlap with the Platonian "virtue", in the sense that "*arete*" would always constitute a faculty, a capability of the soul, not of the mind. Paradoxically, "*arete*" is the halfway, the median between virtue and vice, the "*aurea mediocritas*"; therefore, the leading ones, in Aristotelian *imaginarium*, should have the capability of finding a middle ground between virtue and vice, hence excelling in moderation, in *equilibrium*. The measure in which the elite is able to reach "*eudaimonia*" ["happiness"] is an aspect not discussed by the Greek philosopher, though one might hypothesize that, since "*eudaimonia*" is defined as the "activity of soul in accordance with *arete*, or […] in accordance with the best and most complete *arete*"[6], the leading few might be prone to acquire *eudaimonia*. In a nutshell, it appears sure for Aristotle that the political elite is to possess moral and intellectual prominence, is to consist of men of distinguishable virtue.

However, precisely because the slave alone has performed for ages the real work, thus renouncing his immediate delight, it grew in him the ability to open the world[7]. The skills which he acquired meanwhile his master indulged in the outcomes of foreign labour and abandoned himself to the working hands of others, paved the road of the subject`s emancipation from the stale authority of unjustified rule. Removed of that "certain material, intellectual, or even moral superiority"[8] over those they govern, as the latter grew in intellect and skill, the ruler ceased to be so, and the ruled knew of a different destiny. As a consequence of the Enlightenment, this concept of leadership was deprived of part of its content, namely blind faith in the ruler`s arbitrary decisions. Among many, Napoleon was one to remark upon the new political reality and the opportunities it offered: "the idea of equality, from which I could expect

[6] Aristotle, Robert C. Bartlett (ed., transl.) and Susan D. Collins (ed., transl.), *Nicomachean Ethics*, Book I, Ch. 7, 1098a, 10-15 (University of Chicago Press, Chicago & London, 2011).
[7] Peter Sloterdijk, *Dispretuirea maselor* (Cluj-Napoca: Idea Design and Print, 2002) 41.
[8] Gaetano Mosca, *The Ruling Class* (New York: McGraw-Hill, 1939), 35.

nothing other than rise, had for me something seductive"[9]. From heretofore, it is precisely this equal ground from which men of greater ambitions and higher expectations rose above, and that rising distance is the measure of their power and the sign of them being an elite.

This newly found equality is the reason why men began preoccupying themselves with their status among the rest and voicing indignation at the superiority of others. The elitists wrote of the conscious, cohesive and conspiring groups, Mosca's "political class" and Michels' "oligarchs", with deference and compliance. Mosca stressed the advantage of numbers in out-organizing and out-witting the larger masses, Pareto rooted the unrestricted social mobility as the prerequisite for the rise of those most adept at using force and persuasion, and gifted with inherited wealth and family connections. Michels postulated that through and through and without omission, elites will surface all large organizations, as a necessity of the inner workings of any functioning body of people. Together they grounded the thought that elites are incessantly placing themselves above the majority and that "democracies are divided into the wielders of power and those who are subject to it and have little power of their own"[10]. Within this framework, the concept of elite was tantamount to a detractor of democracy, and consequently of the better virtues of others. In agreement with the elitists, Weber supports the view that even in a democracy the *demos* itself never governs. Nevertheless, Weber and Mosca ascribe certain merits to democracy for counterbalancing the leverage of the bureaucracy, a second peril to the autonomy of the *demos*. However, the fact remains that, according to the elitists,

"*political rule involves organization and all organization no matter how democratic its mythology, sooner or later comes under the effective control of a minority elite; the history of societies, despite the succession of different political forms, is in substance nothing but the succession of different political elites; democracy is a political form that conceals both the conflicts of interest between the governing elite and the*

[9] Friedrich F. Von Falkenhausen, *Im Schatten Napoleons. Aus den Erinnerungen der Frau von Remuzat* (Leipzig: Koehler and Amelang, 1941),104.
[10] Eva Etzioni-Halevy, *Classes and Elites in Democracy and Democratization*, Garland Publishing, New York and London, 1997, p.44.

governed and the fact that these conflicts are always undemocratically resolved in favour of the former."[11]

Skepticism about the contingencies of ethics among the political elite imbued even the Weberian readings that conceive politics founded on the "principle of small numbers" and imagined, in turn, the "leader democracy"[12]. Pareto, few years before him, did not imagine: he rather described a "demagogic plutocracy" (as opposed to "military plutocracy"), as a dangerous compromise between elites and democratic ideals, in which the former retain prevalence over the later through "deception, demagogy and bribing" (thus, everything but moral stances !), giving only the appearance of democracy to the masses[13]. In effect, political elites are "persons at or near the top of the 'pyramid of power'"[14], "persons with the 'organized capacity to make *real and continuing political trouble*'"[15].

Defenders of democracy took offence at the slight odds which this most lauded regime was offered. Liberty and equality were brought to the fore, as universal suffrage was deemed the foundation of all sound government for it ensured that the general will shall be expressed and popular sovereignty will be entrusted to its chosen representatives. However, the rationale that elites, thus dignified under the name of representatives, are decided by the will of the people is somewhat inexact. In this respect the argument is forced into the direction of representation and the accompanying "mandate-independence controversy", which has become an ordinary and familiar subject of discussion. The controversy resides in deciding whether the representative is to do what his constituents urge him to do or what he thinks best.

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[11] Sidney Hook, *The Hero in History*, Cosimo Classics, New York, 2008, p. 240.

[12] Guenther Roth and Claus Wittich (eds.), *Max Weber: Economy and Society*, University of California Press, Berkeley, 1978 (initially published in 1920), pp. 41-71, 1111-1155, 1414, 1459-1460.

[13] Samuel E. Finer (ed.), Derek Mirfin (transl.), *Vilfredo Pareto: Sociological Writings*, (New York: Praeger Publishers, 1966), 142- initially published in 1902.

[14] Robert D. Putnam, *The Comparative Study of Political Elites*, (New Jersey: Prentice Hall, Englewood Cliffs, 1976) 14.

[15] John Higley and Michael Burton, *Elite Foundations of Liberal Democracy*, Colorado: Rowman & Littlefield, Boulder, 2006), 7 [italics added].

Suffice it to say that the beginning and the first half of the 20th century advanced the shift, not only towards an "over-consciousness" of the power gap between elites and the masses, but, paradoxically enough, the acknowledgement of the fact that political elites were, as an intrinsic rule, deprived of any moral prominence over the led masses, they actually eluded any moral stance of excellence and prevalence[16]. Therefore, probably, the veritable transmutation within the *academia* in respect to the moral overview on the political elites and the fashion of defining this group through the lances of ethic excellence and intellectual preeminence is to be found at the beginning of the last century, with the triptych of Italian "elitists" Vilfredo Pareto, Gaetano Mosca and Robert Michels. Paradoxically, though the newly-emerging perspective on the moral dimension of the constitution of the elite is – especially to the latter two – descriptive *par excellence*, daringly honest in the field of sociological research – though quite feeble in the sphere of empirical inquiry –, the exegetes, the observers, the critics hurried to express innumerable rejoinders, labeling – more or less justifiably – the descriptive approach to elites as inseparably intertwined with the prematurely and dangerously rising fascist-corporatist movement in politically infant Italy. Yet, the three prominent sociologists were observers *tout court*. In descriptive vein, political elites go to the extent of fully organizing themselves in order to secure a popular mandate which they obtain in violation of popular sovereignty. Michels was among the first to argue openly that any "system of leadership is incompatible with the most essential postulates of democracy"[17]. The inconsistency of leadership with democratic values is owed to the idea and the content of leadership itself. When closely examined, the skills, talents and other qualities embodied by our leaders discriminate against the average citizen, less gifted with those attributes and who is refused the opportunity of being the governor and not the governed. The realities within the group of power- and influence-holders had irrefutably changed

[16] It might be argued that the premises for this grim, coldhearted perspective on political elites are to be found on the Italian soil once more, with the Machiavellian depiction of the *Prince*, the philosophical cornerstone of modern politics. *See* Niccolo Machiavelli, Quentin Skinner (ed.) and Russell Price (ed.), *Cambridge Texts in the History of Political Thought: The Prince* (Cambridge & New York: Cambridge University Press, 1998) - initially published in 1505.

[17] Roberto Michels, *Political Parties* (New York: Free Press, 1962), 364.

since Aristotle and, in addition, the realities of the polity *per se* and its expectations from the leading ones suffered transformable mutations. These modifications in the people's, citizens' expectations had to be voiced out in the very fashion in which the relationship between the political elite and morality was to be constructed. The descriptive line of thinking about elites has been courageously and vigorously continued and embraced in the 1950s, with the publication of C. Wright Mills's *Power Elite* (1956), a painful radiography of the American potentates at the middle of the century: what Mills describes is – by now famous – inseparable and inextricable interconnectedness between the political, the economic and the military elites, making for a very coherent, homogeneous group of individuals, establishing strong, unbreakable connections with other elite groups. The political elite (the "political directorate") is tightly linked to the economical magnates (the "corporate chief tenets") and military elites (the "war lords"). The connections, Wright-Mills further contends, go back to the childhood period of the members of these elites; the members of these three groups had shared the same family and educational backgrounds; established links since high-school or college and, since then, they have preserved the same personal relations: they meet regularly in rather informal than formal fashion, there are even psychological similarities between them (*e.g.* their behavior is the same in contexts of crisis)[18]. Definitely and evidently enough, what conspicuously lacks from these descriptions is the moral dimension of the political leadership, which became diluted under the weight of sociological considerations regarding the corruptible nature and the mundane qualities of the political elite.

Fair enough, attempts to rejuvenate elitism as moral and intellectual prominence have been unceasable from Machiavelli onwards, particularly in the 19th century[19]. Thusly, the political elites retreat within the Parliament under the panache of more qualitative representation, and govern from this enclosed, higher ground, in an Enlightened fashion,

[18] C. Wright Mills, *The Power Elite* (Paris: Maspero, 1969).

[19] *See*, for instance, the famous address of Edmund BURKE to the electors of Bristol (1774), in Stephen Howard Browne, *Edmund Burke and the Discourse of Virtue* (Tuscaloosa (Alabama): University of Alabama Press, 1993) 67-82. The mandate of the representative, of the political leader, is thus relieved of a strict accountability to the grievances and demands of his constituents, pointing out the superior qualities of the leading few once more.

those whom they can barely distinguish from the distance. If democracy is to rely upon the responsiveness of the elected to their electors, given the previous scenario, the decisions of the government may tend to reflect the wants of the governors, more so than those of the governed and popular sovereignty may be abandoned by the wayside, only to be picked up again upon securing a subsequent mandate.

As the normative-descriptive debate lingered on, the concept of elite was again revisited, once with Schumpeter`s minimal, procedural, instrumentalist concept of democracy[20]. Democracy was defined as a limited political regime in which power is achieved through competitive elections. To his mind, due to the development of mass democracy, popular sovereignty as depicted in all classical works became inadequate. "A new understanding of democracy was needed, putting the emphasis on the aggregation of preferences, taking place through political parties for which people would have the capacity to vote at regular intervals"[21]. Schumpeter impresses upon his readers the banished thought of the elitists; modern times disavow notions like "common good" and "general will" which they replace with pluralism of interests because only self-interest is held to move and stir any individual who is engrossed only with his own pursuits. Drawing on the elitists' appraisal, individuals are not motivated to act by the moral belief that they should pursue the interest of the whole and consent to the general will, but by more narrow preferences and interests. These preferences are to be voiced and heeded by political parties in their struggle for gaining the votes. Schumpeter manages to rebalance the gains in favor of the descriptive, "a-moral" (one might be inclined to label it) perspective, by eloquently pleading for an elite that seems rather selfish in nature, manipulative towards its voters, displaying no moral, superior stance in reference to the masses.

Therefore, the concept of political elite has arrived at the admission that within representative democracy, each elite is to be confirmed by popular vote (a consensus generally coined as "democratic elitism"). However, the conditions under which the vote of the people is expressed, pose some objections to democracy itself. Firstly, as stated

[20] Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Row, 1942).
[21] Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism* (Vienna: Institute for Advanced Studies, 2000), 1.

above, "there can be no guarantee that these decisions as well as the discretionary powers they entail will be carried out in the same spirit as that in which they were authorized"[22]. This is mainly the case of the Burkean elite who think of themselves as being unbound to the views of their constituents and who take pride in following only their conscience and principles. Therefore, what the representative thinks and the manner in which he conducts his conscious are of paramount importance. However, the followers of the mandate theory are not to be exempt of weariness towards their devotion. Secondly, "we can never be sure that consent is freely given, that is not in bondage to ignorance, rhetoric, or passion"[23]. Democracy frequently receives such blows, as the speech of a gifted demagogue can override the better judgment of people. Similarly, passions may cloud their mind, just as indecision and disregard may mislead their vote. Lastly, and in close connection to the previous two factors, the vote of the people is usually guided by the political parties' selection of candidates. The electorate is limited in expressing its preference by the initial, prevailing preference of the party. Thus, it may be concluded that popular legitimization appears to be less of a democratic safeguard when facing the pervasive influence of elites. In order to safeguard the many led, a revitalization of the Aristotelian virtue should have taken place in contemporaneity.

Hence, on the background of increasing accusations regarding a rampant crisis of ethics and morality (deontologically understood) affecting the political leadership, the recent, largely empirically scholarly, emerged in order to reconcile somehow the dispute between those voicing the downfall of morals among politicians (that is, professionalized political elite) and thusly asking for moral and intellectual prominence and virtuous qualities, and those boldly pointing out that, with the virtually unrestricted access of individuals in politics, the moral and intellectual quality of elites became inherently decadent. Based on vast and almost exhaustive quantitative research on political elites (conducted especially in Western, highly developed, democracies), this "neo-descriptive" direction is set up to measure the impact of values – either moral, political, social, etc. – on shaping the existing *tableau* of the "leading few". Moreover, this approach tends to consider aspects that

[22] Hook, *The Hero in History* (New York: Cosimo Classics, 2008), 242.
[23] Hook, *The Hero in History* (New York: Cosimo Classics, 2008), 242.

were previously neglected (*e.g.* commenting on the influence that political parties as "selectorates" or "gate-keepers" possess within the process of recruiting, selecting and legitimizing political elites, considering the importance of preference aggregation in shaping the form of the elites[24]). The empirical approach admits that, as such, the overbearing presence of parties and their intricate system of selection and appointments expand to the very outskirts of the political society in which they dwell. Political elites are daily recruited and groomed so to occupy their higher political standing once with the coming of elections. Very little is left to odds, much is thought ahead. The tightly woven system of nominations is solid proof of the capacity of the leading minority to organize itself better than the heavy and robust masses. Political elites spare no effort or wit in achieving incumbency. Popular sovereignty is professed as both political parties and elites are clothed in skins of humility and reserve towards the word of the people. "The vast machinery of party politics convey to most citizens the belief that minorities finally chosen to govern have been selected by procedures which permit an acceptable measure of popular control"[25]. Upon sober reflection, everyone will be made sensible to their inconsequence within the process of determining the candidates whom they will later entrust with the right to present the person of them all. Democracy is given the backseat in politics because men regularly consent to authorize all the

[24] Needless to say that if each voter were to vote for the candidate whom he saw fit to be his governor from, say, a moral point of view, then we would most likely be faced with a wide scattering of votes. Therefore, it was found necessary to coordinate and organize the votes of the people because, if left untutored, they would never come to an agreement on a given candidate. It might be the case that, in this process of aggregation and selection, some would-be politicians of impeccable moral or intellectual stance would remain outside the political arena, hence decreasing the "moral capital" of the resulting political elite. This might be a pity, indeed, but also an indication of the actual importance of ethics in politics nowadays and of the actual "qualities" a candidate to the "table of the powerful few" should possess. No doubt, a candidacy endorsement is not without previous reflection and deliberation. In order for a political party to nominate a candidate for an upcoming election, *the soundness* of the candidate is brought to bear. There are various aspects attached to candidate selection and many issues to consider before putting forth a nomination. The process of selection can therefore be top-bottom, and just as easily bottom-top.

[25] Kenneth Prewitt, *The Recruitment of Political Leaders: A Study of Citizen-Politicians* (Indianapolis & New York: Bobbs-Merrill, 1970), 110.

actions and judgments of one man or an assembly of men (irrespective of his/ their moral outlook) at the biased advice of political parties.

After comprehensive scrutinizing the ones in power, the recent scholarly generally agreed on five models[26] that might account for specific "qualities" in defining and identifying elites. The assemblage of these models pledges to the fact that a normative-descriptive reconciliation was intended, although in an overwhelmingly descriptive fashion[27]. The "ethical model" of political elite refers to such qualities as: correctness, honesty, fairness, altruism, modesty, high moral standards, verticality and seriousness, courage and bravery, punctuality. The "technocratic model" of political elite takes into consideration such attributes as: political experience, political will, expertise and training, intelligence, patience/ rapid reaction, enthusiasm and imagination. The "pragmatic model" of political elite is respective to such features as: dedication to the constituency's (state's) improvement plans, devotion and respect for the community/ country, desire to change, the capacity to identify development opportunities for the community/ country, vision, perspective, initiative, persuasion skills, capacity to compromise and negotiate, dialog-oriented, intuition, social sensitivity, care for the citizen, economic independence, leadership skills. The "political model" subscribes to the following qualities: oratorical skills, rhetoric, political loyalty, incorruptibility, interest detachment (objectivity), collegiality and team spirit. The "gender model" refers to the gender quality[28]. Though a

[26] The fivefold model of values of the political elite was firstly used by Kenneth Prewitt, in his *The Recruitment of Political Leaders: A Study of Citizen-Politicians*, but it has been employed ever since (and subsequently modified and altered) in numerous empirical studies of the 70s-90s.

[27] This is particularly the reason why this paper coins the recent (*i.e.* post-Wright-Mills) empirical drive in studying and defining political elites as "neo-descriptive), since it admits the necessity of introducing the "ethical model", in spite of the fact that the inquiries are in themselves largely descriptive, exploratory.

[28] The fivefold model was applied for a study on local political elites in East-Central Europe, on two towns in Romania and the Czech Republic, and Poland, and, surprisingly enough, it has been concluded that these elites rely heavily on the "ethical model" in perceiving their position within the community and their subsequent responsibilities. (The study "*A Comprehensive Inquiry into the Local Elites of East-Central Europe. A Comparative Approach of the Municipal Councils in Tecuci (Romania) and Česká Lípa (the Czech Republic)*", defended as an MA disertation by the author of the present paper in June 2013.)

distinct ethical model exists in the scheme above, a series of other attributes to be exposed by the political leadership can be considered as belonging to some moral coordinates (*e.g.* incorruptibility, social sensitivity, collegiality, etc.). This is the reason why, the present paper perceives the five-fold model as a reconciliation between normative and descriptive standpoints. Finally, it had been concluded by the large majority of the researchers who ventured in the field of political elites, that:

"*Legislators are far from being an average assortment of ordinary men. Almost everywhere legislators are better educated, possess higher-status occupations and have more privileged backgrounds than the people they represent.*"[29]

Hence, aspirants to political leadership find their chances have improved considerably if they are possessed with private wealth, sufficiently large to fund their electoral campaigns in entrepreneurial political systems, or simply to secure them a higher education. This rationale applies to candidates from whatever part of the ideological *spectrum*, either conservatives or socialists. The reason is rarely snobbery because these people "are more likely to speak and write well, they are more likely to look healthy and well dressed" and "to work in occupations with flexible hours"[30] leaving them sufficient time for leadership duties. As a rule, when this above-average socioeconomic and educational status is attributed to a member of the male sex, this man will embody the general definition of an eligible candidate. Therefore, "lawmaking remains essentially a man's game"[31]. The nature of the profession that the candidate is practicing is of equal importance, lawyers and people with verbal jobs, alongside businessmen being the most frequent incumbents of all legislatures. These elites are more apt for legislative roles owing to the skills which they acquired in their instruction and experience, not quite to their moral outlook. Also, these professions may be thought to encourage an interest in political activity. Equally valuable is having occupied the same position for which one is

[29] Gerhord Loewenberg, Samuel C. Patterson and Malcom E. Jewell, *Handbook of Legislative Research* (Cambridge Massachusetts: Harvard University Press, 1985), 18.
[30] David Butler, Howard R. Penniman and Austin Ranney, 102.
[31] Gerhord Loewenberg, Samuel C. Patterson and Malcom E. Jewell (Cambridge Massachusetts: Harvard University Press, 1985), 21.

running once more: incumbents are preferred to non-incumbents because of their experience. These political elites are familiar to the electorate, to the party, to the campaign funders and "they already wear the mantle of the elected public official"[32]. Being guided by the lights of experience and having the weight of precedence to justify its measures, the leadership of an incumbent is favoured. Similarly, another attribute of political elites is their local connections, which make them known and trusted throughout their constituency. It is worth mentioning that affiliations either to an interest group, say labour union, religious laymen`s league, farmer organization, or to a certain faction of the party to which the political elite is member, emphasize his status and make him a true commodity for his party, but it might cast a shadow of morality in the front of the electorate, as well.

Together, all assets listed above render the candidate for political leadership more commendable than his peers who may lack them, but may cherish ethical positions instead. With these differences in mind, if one is to conclude if moral principles and ethics – as commonly defined as incontestable human attributes – are at work in present-day societies, inductive reasoning seems to have fallen down to a certain extent. Indeed one may reason that "elites don`t believe in morality. They pretend to be interested in the public and ethical views and engage in deceptive patterns of behaviour in appealing for public support. Hence, they assume a passive public, and they are not really accountable, responsive, nor egalitarian."[33]

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[32] David Butler, Howard R. Penniman, Austin Ranney, 98.

[33] Samuel J. Eldersveld, *Political Elites in Modern Societies,* pp. xv-xvi. Zeger Van Der Wal, Professor at the Department of Governance Studies at VU University in Amsterdam, provides a 21st century touch to the question of defining political elites though a conceptual framework pertaining to the sphere of ethics and morals: "The leaders of our most paramount institutions are scrutinized more than ever before: 'the elite' is under fire. […] [T]he general public is outraged by the havoc their leaders have caused and trust in the elite seems to have reached a new low; a development that started at the end of the 20th century and has resulted in a rise of populist movements across the political landscape of the Western world." Firstly, one cannot but observe that the many powerless, the "*populous*", the "*demos*", the masses registered a new transformation in the form of "general public", which might imply a rather static *hypostasis*, as simple spectators to a show of displaying power and influence. Secondly – and most importantly, it seems conspicuous the almost complete neglect of moral stances within the groups of political elite, which triggers inevitably a sense of destruct

Eventually, although traditionally it has been distinguished between normative and descriptive perspectives on the definition and the problematic interpretation of the group of political elites – with the former retaining a significant emphasis on the moral dimension of the "leading few", while the later vigorously refuting it – the recent empirical efforts showed a certain degree of reconciliation between the two main trajectories, juxtaposing and combining the ethical model of political elites, with additional, supplementary model of thinking about elites (technocratic, political, pragmatic, gender). This unerring, infallible test of all arguments of the "neo-descriptive" approach will shed further light upon the broad issue of political elites confronting moral values and dilemmas and upon the implications it entails.

A PROPOSED CLASSIFICATION ON THE MORAL DIMENSION OF POLITICAL ELITES

For the author of this essay, the actual level of "arete" or what may be properly coined as "elite distinctiveness" might be comprehensibly conceptualized as the distance between the rulers and the ruled, between those that govern and the governed, the elite and the *populous*. For the purpose of argumentation and based on the considerations of the two major traditions (*i.e.* the normative and the descriptive ones), this paper puts forward a three-fold classification of ideal types that may account for the differences among different elite orientations and profiles for the special case of East-Central Europe, for the experiences of those transitional elites in the former Sovietized Europe. While setting forth in searching tentative explanations in such sources as the level of territorial and administrative decentralization and the "legacy" of the defunct regime, the paper discusses three profiles[34].

towards them. *See* Zeger Van Der Wal, *Elite Ethos. Values and Motives of Politicians and Public Managers in Western Democracies*, paper presented at the PMRC Conference, Syracuse, June 2-4 (2011), 1-26 (2).

[34] For instance, the differences in legal framework leading to various degrees of decentralization and arrangements in the distribution of attributions and prerogatives among the central, regional and local levels, is hypothesized to constitute one of the two principal indicators, main variables in explaining the level of "power" the local councilors in different settings claim to possess in managing policy issues, or in accounting for a range of values these leaders embrace and cherish (such as the social

Hence, the proposed classification of elite profile and "elite distinctiveness" makes recourse to two main lines of argumentation, one rather culturalist and nation-specific – *i.e.* the different heritage of the *ancien régime*, the so-called "Leninist legacy"[35], and the "elite political culture" and the outlook of "elite group consciousness" –, the other eminently structuralist – *i.e.* the level of administrative and political decentralization, yielding various formats of power sharing and distribution of prerogatives and attributions:
(1) "predominantly elitistic", those elites characterized by a significant degree of "elite distinctiveness", *i.e.* perceiving themselves, as a group or individually, as separate from the bulk of the town's population, as part of a special, superior caste of notables and local potentates, hence prone to favor the clear gap between the rulers and the ruled; enjoying considerable levels of prestige and reputation, this type of local elites display however a sense of reluctance in effectively dealing with the community's main problems, on the basis that power at the local level is insufficient to allow the leadership here to implement change. Therefore, it might be concluded that the "predominately elitist" local leadership corresponds to those communities presenting low degrees of decentralization and local autonomy. Additionally, the "predominantly elitistic" local elites are tightly linked to a "political" model, for their recruitment is almost exclusively intramural, all those comprising the local leadership being party members and benefiting from the otherwise indispensable support of the party, whose local branches are highly dependent of the central one. Interestingly, the "predominantly elitistic" groups are those that most closely approximate the Aristotelian *desideratum* in their construction, conception and self-perception: they tend to adhere to an "ethical" model of the ideal local councilor, at least declaratively cherishing moral attributes that would provide them with some sort of moral superiority as prime marks of distinctiveness in respect to their constituency, to the population of their community.

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sensitivity, economic equality, political participation, moral norms, the role granted to professionalism and expertise, etc.).
[35] *See*, for the usage of the collocation, Kenneth JOWITT, "The Leninist Legacy", in Vladimir TISMĂNEANU (ed.), *The Revolutions of 1989*, Routledge & New York, (1999): 207-223.

(2) “democratic elitist”, those elites whose traits and profiles point to some form of *aurea mediocritas* between a sense of distinctiveness and the prestige they enjoy within the community, on the one hand, and the effective and meaningful dedication to their community’s developmental plans, on the other hand; as such, though they form a “caste” of notables within the town and are hardly representative to the population of the establishments they lead, in socio-demographical terms, they can act decisively for the benefit of their town due to a considerable degree of local autonomy and decentralized prerogatives, responsibilities and attributions. The local councilors of the “democratic elitist” sort remain still largely dependent on the support of the political parties, but the local parties appear independent in respect to their central branch; occasionally, “democratic elitist” type corresponds to intramural recruitment of locally-established parties, splinters or other quite localized political movements and organizations, responding to extremely specific needs and demands or describing relatively strong political localism and allowing for factionalism and decentralized, territorialized “back-bencher”-ism. In addition, the “democratic elitist” groups overlaps on a rather “pragmatic” or “technocratic” model of the local councilor, as the most cherished attributes of the leadership come to be the professionalism of the local leadership, its capacity in decision-making, policy designing and problem-solving.
(3) “predominantly democratic”, those elites featuring a sense of identification with the masses, with the ordinary citizens of the community they happen to represent temporarily, a dominating “social sensitivity” that would determine their propensity towards social security and welfare strategies in local leadership; this type of local elites are juxtaposed to a tradition of decentralization and devolution mechanisms that permit them to identify and to implement policies responding to the needs of the town. The “predominantly democratic” type of local elites is probably the closest to the population it represents in terms of passive representation, for it may include persons of lower education, or people previously involved in directly advocating for the interests of some segments in the community (pupils, women, unemployed, workers, etc.). These local leaders are usually quite familiar to the problems their town confronts with, being especially concerned with social issues (*e.g.* unemployment, social benefits, housing, etc.). The methods of recruiting elites in this context are highly inclusive, but the actual specificity of

these elites is the extramural fashion in which they are selected, as their political affiliation is futile if existent; the role of the party in the recruitment process, either local or central branches, is virtually insignificant. Consequently, the "predominantly democratic" local elites correspond to rather "pragmatic" and "moral" profiles, while the "political" model is virtually absent in their case.

For a complete and exhaustive discussion on political elites, an entire course of analysis and inquiries is necessary. Countless contributions – of which the most important are, of course, those of Pareto, Michels, Mosca and, most recently, C. Wright-Mills and S. Eldersveld – have already established the paths to be followed in the study of elites. Nevertheless, due to its dynamic nature and its types, due to its empirical research it presupposes, the topic of "political elites" can never be a thoroughly treated one.

CONCLUDING REMARKS

Generally, in the field of political elite studies, two intellectual and research directions are customarily distinguished: (1) the normative theories on elites, and (2) the descriptive elite approach. Chronologically, the normative approaches precede the descriptive ones, for they are inclined to identify elites on the basis of their excellence (or "*arete*"), furthermore, on their moral stance or virtue. Pareto, the pioneering name in the descriptive tradition in studying elites, is actually in between the two approaches: the elite was formed either by those who are the best in their field of activity – namely, politics –, who excel in the realm in which they work or by those who are more or less circumstantially, but always temporarily, ephemerally in top decision-making positions in the hierarchy of power, those being in possession of "residues" of "combinations" or "persistence of aggregates"[36]. His "lions" and "foxes" are by no means common individuals in position of power, since they bear either the monopoly of violence – being some sort of Nietzschean "superhumans" – or the monopoly of deceit; their deontologically-defined "moral superiority" lacks, however. The descriptive manner was, starting from Pareto and the Italian "elitists" Mosca and Michels at the beginning of the 20th century, happily and exhaustively embraced by the

[36] Vilfredo Pareto, *Sociological Writings* (New York: F. A. Praeger, 1966) (first published in 1916).

contemporary scholarly, but most prolific *oeuvres* written in this fashion appeared in the context of a new "elitist" wave of studies, overwhelmingly empirical ones, at the end of the century: Higley's numerous books (most important, those co-authored with Dogan (1998)[37], Pakulski and Wesolowski (1998)[38] and Lengyel (2000)[39]), Mattei Dogan's *Elite Configurations at the Apex of Power* (2003)[40], Etzioni-Halevy's *Classes and Elites in Democracy and Democratization* (1997)[41], Hoffman-Lange's compelling study of elites in Germany (1987)[42], Scott's *The Sociology of Elites* (1990)[43] and the countless studies conducted by Eyal, Szelényi and Townsley, separately or in co-authorship (*Making Capitalism Without Capitalists: The New Ruling Elites in Eastern Europe*, 1998[44])[45]. In this climate, C. Wright-Mills's *Power Elite* (1956) appears as an enclave for the descriptive tradition in Western developed democracies in the middle of the 20th century. In the

[37] Mattei Dogan and John Higley (eds.), *Elites, Crises and the Origins of Regimes* (Lanham (Maryland): Rowman and Littlefield, 1998).

[38] John Higley, Jan Pakulski and Wlodzimierz Wesolowski (eds.), *Postcommunist Elites and Democracy in Eastern Europe* (Houndmills (Hampshire) & Basingstoke: Macmillan, 1998).

[39] John Higley and György Lengyel (eds.), *Elites after State Socialism. Theories and Analysis* (Lanham (Maryland): Rowman and Littlefield, 2000).

[40] Mattei Dogan (ed.), *Elite Configurations at the Apex of Power* (The Netherlands) & Boston (Massachusetts): Brill, Leiden, 2003).

[41] Eva Etzioni-Halevy (ed.), *Classes and Elites in Democracy and Democratization. A Collection of Readings* (New York: Garland Publishers, 1997).

[42] Ursula Hoffmann-Lange, "Surveying national elites in the Federal Republic of Germany", in George Moyser and Margarett Wagstaffe (eds.), *Research Methods for Elite Studies* (London: Unwin Hyman Ltd., 1987), 27-47.

[43] John Scott (ed.), *The Sociology of Elites*, 3 vol., (Aldershot: Edward Elgar Publishers, 1990).

[44] G. Eyal, Iván Szelényi and E. Townsley, *Making Capitalism Without Capitalists: The New Ruling Elites in Eastern Europe* (London: Verso, 1998).

[45] These largely empirical inquiries appear in the special context of a decade after the communist breakdown and, consequently, treat extensively the process of elite transformation in transitional societies, in the new democracies. Their contribution to the overall scholarly production in the field of elite research is irrefutable, since the focus, the interest of research shifts from the Western democracies to the mutations in East-Central Europe, opening new paths of scientific endeavor for a region constantly in development. Nevertheless, for the present paper, their importance lies in the fact of having been able to reconcile two divergent traditions of defining elites, on the basis of empirical study.

center of the normative "preoccupations" remains the issue of the "quality of elites", *i.e.* excellence, which is somehow intrinsic, inherent in the very definition of "elites"; the moment in which the "quality of elites" becomes problematic is the transition between normative and descriptive approaches, when the collocation "the quality of elites" starts to pose serious problems of definition and operationalization: what is, in effect, this "quality" ? Is it a moral one, denoting an elite that is ethnically superior, acting for the supreme "good" and being in itself of special "fabric", axiologically righteous and virtuous ? Is it a professional, technocratic one, linking the *status* of "political elite" to a certain degree of efficiency, performance, proper decision-making, good governance ? Eventually, is it the representation constructed by a group of individuals able to seize and retain political power, a public image in the face of the masses in order to consolidate power ? In his attempt to answer this series of pressing preliminary questions, György Lengyel quoted his compatriot and forerunner István Bibó, when discussing "quality of elites" as degree of "social sensitivity", defined as both "*caritas*" and "a wide sense of culture-creating, needs-refining sensibility"[46]. To this, Lengyel adds predictability, accountability, replaceability – but only if one inquires on elites as a fully-fledged, comprehensive, unified, largely homogeneous group. If analyzed as heterogeneous, fragmented, well-differentiated, easily distinguishable islands of political power forming an all-encompassing group under the banner of "political elites", the three features mentioned above might tell too little or close to nothing about the "quality of elites", about what makes a political elite actually an "elite". On the basis that current scholarly attempts a reconciliation between normative and descriptive perspective, between strictly moral considerations and specialized qualities and skills that might deviate from the common understanding of "ethical behavior", for the author of this paper, what seems of paramount importance in the definition of "political elites" in contemporaneity are the capacity to negotiate, to alternate between conflict and consent, the willingness to compromise, the inclination to political and social

[46] István Bibó, "The elite and social sensitivity", in *Review of Sociology of the Hungarian Sociological Association*, Vol. 10, 2 (2004), 103-114 (initially published in 1942) *apud.* György Lengyel, "Notes on the 'Quality of Elites'", in *idem et al.*, *Elites in Central-Eastern Europe*, (Budapest: Friedrich Ebert Foundation), 5-12 (6).

dialogue, the ability to cooperate for the benefit of the community or for the "general good" and problem-solving capabilities. Providing for "the people", insuring sustainable well-being for the population and social justice for the masses are seen to be inscribed in the series of tricky preconditions a group in leading position should fulfill in order to become a "political elite"; the trickiness of these prerequisites lies in the fact that they borrow significantly from the normative stance and in the impossibility of comprehensively operationalizing and measuring the degree and fashion in which these conditions are fulfilled. This type of preconditions lacks instrumentality in the empirical study of elites, though they might lose the moral "character" of the political elite.

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RELEVANT LEGISLATIVE INITIATIVES AND CHANGES IN THE FIELD OF LOCAL PUBLIC ADMINISTRATION

Mihai- Cristian APOSTOLACHE[1]

Abstract

The article draws attention on the legislative changes in the matter of local public administration, together with certain initiatives under debate in both Houses of the Parliament of Romania concerning local public administration. Social changes and the permanent need to keep up with these changes at a normative level, as well as the interests of certain policy makers to replace a legislative solution with another which better reflects these interests, give rise to amendments and supplements to the normative framework and imprint a new vision of certain legal institutions.

Keywords**:** *legislative initiatives, legislative changes, local public administration, Government, Parliament*

INTRODUCTION

The legislative changes mainly incurred by the Law no. 215/2001[2] regarding local public administration, republished, have brought to the Romanian legislation a series of legislative solutions questionable, both in terms of the adoption process and also the content of such norms. The article aims to analyze these legislative changes and highlight their effects on local public administration and also on those administered. Moreover, our analysis is completed by the legislative proposals under parliamentary debate.

From the very beginning we consider that the law regarding local public administration needs ampler amending and supplementing, fact caused by the frequent blockages that occur in the administrative practice and also by the need for bridging the norms of this regulation with the provisions of other normative acts, such as the Status of local elected representatives, the Law on incompatibilities and conflicts of interest, the Ordinance regarding the framework Regulation on the organization and

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[2] Republished in the Official Gazette of Romania, Part I, issue 123 of 20 February 2007.

functioning of local councils, the Law regarding the election of local public administration authorities etc.

The recent changes and amendments to the Law no. 215/2001 on local public administration solve only partially the need for regulation and, unfortunately, perpetuate the practice of adoption of primary regulations by extraordinary normative actions of the Government. Moreover, this regulation process is constantly criticized in the literature, as well as in the documents from the EU institutions or bodies of the Council of Europe[3]; nevertheless, the Government intervenes very often in the legislative act, which according to the Constitution, represents the main attribute of the Parliament[4]. The legislative changes are contained in Law no. 20/2014[5], Government Emergency Ordinance no. 18/2014[6] and the Government Emergency Ordinance no. 68/2014[7]. Besides these normative acts, before the two Chambers of the Romanian Parliament there are submitted a series of legislative proposals that proclaim the idea of an improved legislation on local public administration and mainly pursue the amendment of the current norms concerning the appointment of the county council president and the modification of the decision-making mechanism in terms of managing the patrimony of administrative-territorial units.

THE MAIN CHANGES BROUGHT TO THE LAW ON LOCAL PUBLIC ADMINISTRATION

By Law no. 20/2014, the organic legislator has amended and supplemented the legal provisions on the delegation of the powers of the mayor and county council president. Basically, this new regulation has

[3] Also see: Bogdan Dima, *Conflictul dintre palate. Raporturile de putere dintre Parlament, Guvern şi Preşedinte în România postcomunistă* (Bucharest: Hamangiu, 2014), 116-151; Mihai Cristian Apostolache, "Încurajarea migraţiei politice a aleşilor locali prin instumente legislative excepţionale. Opinia Curţii Constituţionale a României cu privire la acest fenomen", in the volume of the International Conference "Law between modernization and tradition", Bucharest, (2015): 472-478; Mihai Cristian Apostolache, "The constitutionalization of the right to good administration and the implications on local public administration", *Annals of the Titu Maiorescu University, Law Series, Special issue (2015*): 22-35.

[4] Article 61 paragraph 1 of the revised Constitution of Romania.

[5] Published in the Official Gazette of Romania, Part I, issue 191 of 18 March 2014.

[6] Published in the Official Gazette of Romania, Part I, issue 305 of 24 April 2014.

[7] Published in the Official Gazette of Romania, Part I, issue 803 of 4 November 2014.

expanded the number of lawful subjects to whom the mayor or county council president may delegate their powers. In Article 65 there were included the following rightful subjects to whom the mayor may delegate its powers: deputy mayor, secretary of the administrative-territorial unit, heads of functional departments, specialized staff, the heads of the public institutions and services of local interest, depending on their respective competences in these areas. It may be noted that this list does not include the public administrator, a position that can be set up at the proposal of the mayor and with the approval of the local council[8]. By extending the scope of the persons who may acquire, by delegation, the powers of the mayor, there can be reached a point where the mayor delegates all the powers, in the desire to be absolved of responsibility and to remain only with a position devoid of content. This is a hypothesis that must be taken into account with the legislative changes that allow the mayor to delegate his powers to the lawful subjects presented above, and which has, as seen, negative effects, underlined in the literature as well[9]. Although the doctrine[10] appreciates that a public office holder can not delegate all its powers, this argument is contradicted by the current legal text of Article 65, regulating the right of the mayor to delegate *the powers conferred by law and by other normative acts*. Therefore, both the powers of the mayor provided by the Law of public administration, and those contained in other laws and regulations, can be delegated to lawful subjects established by the law on public administration.

With regard to the county council president and his right to delegate powers, the organic legislator has supplemented Article 104 of Law no. 215/2001 on local public administration with a new paragraph, paragraph 7, which established the right of the county council president to appoint, by order, the powers provided by the law on local public administration, to the vice-presidents, heads of functional departments, the specialized staff, and the heads of public institutions and services of county interest. This case also omitted the public administrator, a

[8] Article 112 of Law no. 215/2001 of local public administration, republished.
[9] Verginia Vedinaş, *Drept administrativ*, 9th ed. (Bucharest: Universul Juridic Publishing, 2015), 493-494; Verginia Vedinaş, „The delegation in public law. Critical considerations", in *Journal of Law and Administrative Sciences*, 1 (2014): 4-10.
[10] Rodica Narcisa Petrescu, *Drept administrativ* (Bucharest: Hamangiu, 2009).

position that can also be set up at county level, at the proposal of the county council president and with the approval of the county council.

The current regulation on the *delegation of powers* has made a difference in the legal status between the mayor and the county council president, despite the fact that both authorities are elected through uninominal vote. We support this because the mayor is given the opportunity to delegate the powers conferred by the Law of local public administration and by other laws and normative acts, while the president of the county council is entitled to delegate only the powers stipulated by the Law of local public administration. We do not understand the rationale of such a legislative measure, as we cannot accept that the powers of authority elected by citizens be entrusted and exercised by a person who falls in the category of the contractual staff.

Another amendment to the Law on local public administration has been produced by the Government Emergency Ordinance no. 18/2014. Through this normative act, Article 15 of Law no. 215/2001 was completed with a new paragraph, paragraph 5, which stipulates the right of local public administration authorities in Romania to conclude union/cooperation agreements with local public administration authorities in Moldova for the implementation and financing of investment objectives of the administrative-territorial units of Moldova, as well as for the development of joint cultural, sports, youth and educational programs, of professional training and other actions that contribute to the development of the friendship relations. The same provisions were included in Law no. 273/2006[11] on local public finances, in Article 35¹.

Also in 2014, the Government adopted a new emergency ordinance, namely G.E.O. no. 68/2014, a normative act that amended the provisions of Article 72 of Law no. 215/2001 on local public administration. Through this legislative intervention, the Government eliminated the 90-day period within which it was obliged to hold elections for the position of mayor, in case this function became vacant. In our opinion, such a change is critical for the proper functioning of local public administration, and also because it comes to drain the importance of the most representative position at local level, that of

[11] Published in the Official Gazette of Romania, Part I, issue 618 of 18 July 2006, with the subsequent changes and amendments.

mayor, by allowing it to be exercised over a long period of time by the deputy mayor, a local elected appointed indirectly, who does enjoy the same popular legitimacy as the mayor. We consider the urgent need to restore the previous legislative solution and to provide sanctions for the Government, if it does not organize elections within the 90-day period.

The same emergency ordinance has provided for the right of the deputy mayor, who becomes the substitute of the mayor during the vacancy of office or the suspension from office, to a monthly allowance equal to that of the mayor position, to exercise the other rights conferred to the mayor by law and to assume the obligations corresponding to the position of mayor. What should be noted is the fact that the law does not use the phrase "interim mayor", which is encountered in the administrative practice, but uses the notion "deputy mayor appointed to substitute the mayor", lawfully or by a decision of the local council.

The patrimonial right represented by the allowance is also given to the councilor appointed by the local council to temporarily exercise the powers of the deputy mayor replacing the mayor; Article 72 paragraph 2, as amended, stipulates that he receives "*a single monthly allowance equal to that of the position of deputy mayor during the practical exercise of the position*". Furthermore, the councilor appointed is entrusted with the other rights and obligations corresponding to the position of deputy mayor.

The Government Emergency Ordinance no. 68/2014 has also considered the case in which both the mayor and the deputy mayor are suspended from office and the local council delegates a councilor to exert the powers of the mayor, as well as those of the deputy mayor, until the end of the suspension. As in the previous situations, in this case the delegated local councilor will receive a single monthly allowance, equal to that of the mayor position, and will be entrusted with the other rights and obligations corresponding to this position.

The amendments brought to the Law on local public administration by the three normative acts mentioned are largely questionable and require, in our view, a rethinking, at least in terms of the subjects that may be entrusted with the powers of mayor or county council president, or in terms of the period within which the Government must hold local elections.

LEGISLATIVE PROPOSALS UNDER PARLIAMENTARY DEBATE

In the Parliament there are recorded several legislative proposals meant to amend and supplement certain articles of Law no. 215/2001 on local public administration. Among the advanced legislative solutions, there are two of particular interest. These aim at changing the way local unipersonal bodies are designated (mayor and president of the county council) and at changing the majority needed for the adoption of patrimony projects.

Regarding the manner of appointing the mayor or county council president, the political actors agreed that the mayor continue to be elected after a single ballot, and the county council president be elected indirectly from among the county councilors. This solution is expected to receive the final vote and to be applied starting with the local elections from 2016. We consider that the proposed solution represents a step backwards in terms of appointing the unipersonal local administrative authorities and we argue for the introduction of the vote in two ballots for all unipersonal functions (mayor, president of the county council, president of Romania) [12].

The attempt to modify the legal provisions regarding the patrimony projects is very dangerous because it removes from the equation the vote of the opposition from the local county council and offers the possibility to those who hold the majority among the local and county deliberative authority to administer the estate of the administrative-territorial units at their own free will. At this moment, the decisions regarding the patrimony are adopted with the vote of two thirds of the total number of councilors in office. If the current proposal under the debate of the Parliament were approved, these administrative acts would be adopted by a majority vote of local councilors. We appreciate that such a legislative solution must be rejected by the parliamentarians and there must be maintained the provisions of Article 45 paragraph 3 of Law no. 215/2001 on local public administration, stipulating the two-thirds majority for the adoption of the decisions regarding the patrimony.

[12] Also see: Mihai Cristian Apostolache, *Primarul în România şi Uniunea Europeană* (Bucharest: Universul Juridic, 2012), 362-63.

CONCLUSIONS

The analysis performed has allowed us to recognize the amendments to the framework law on local public administration and to assess whether these changes represent a progress or a setback in terms of legislation. At the same time, the analysis has included several proposals to amend the local public administration Law under parliamentary debate.

We consider that Law no. 215/2001 on local public administration needs a substantial improvement that brings to the regulatory body certain provisions to emphasize the components of the right to good administration, reflected by legally binding regulations at EU level and by the documents valued as recommendations by the Council of Europe.

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THE RIGHT OF SECURED CREDITOR TO PARTICIPATE IN ANY DISTRIBUTION OF AMOUNTS MADE BEFORE THE SALE OF ITS WARRANTIES

Maria- Gabriela ZOANĂ[1]

Abstract:

The secured creditor has, under the law, the right to participate in any distribution of amounts carried out before the sale of its warranties. If there is a distribution of amounts from the sale of the debtor's assets, other than the property encumbered by a preference cause in favor of the creditor, the debtor is entitled to participate in the distribution. The sums received in this way by the creditor shall be deducted from the sums which the creditor would be entitled to receive later from the income resulting from the sale of property encumbered in its favor by a preference cause, if this is necessary to prevent the situation in which the creditor would receive more than he would have received if the property encumbered by a preference cause in favor would have been sold prior to the distribution. In case of violation of these rules, the debtor has handy way of an action based on unjust enrichment.

Key-words*: insolvency, bankruptcy, secured creditor, preference cause, distribution of amounts, warranty*

INTRODUCTION

According to art. 2 of Law no. 85/2014 on insolvency prevention procedures and insolvency, one of the objectives of this act is the "establishment of collective proceedings to cover the liabilities of the debtor."

In other words, the Act regulates, among other things, a procedure to cover creditors 'claims by harnessing their debtors' assets, as provided by the legislation in force.

The procedure established by Law no. 85/2014 is a special procedure different from the general procedure of execution.

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As shown in art. 5 pt. 19 of the Law, is entitled to participate in proceedings established by this act, the creditor holding a claim against the debtor's property right, which registered an application for registration of a claim, following the admission of which that it acquires rights and obligations covered by the law in every stage of the proceedings.

The quality of creditor is terminated as a result of the non-inclusion or removal the creditors tables drawn up successively in the proceedings and also in the closure procedure; the debtor's employees are creditors, without making personal statements of claim.

The procedure established by Law no. 85/2014 start on the basis of a petition filed in court by the debtor, by one or more creditors or by persons or institutions expressly provided by law. The debtor who is insolvent is obliged to petition the court to be subject to the provisions of this law, within 30 days of the onset of insolvency[2]. If at the expiry of the above debtor, in good faith, is t of an extrajudicial negotiation with its creditors of its debts, he shall request the court to open the proceedings, within 5 days after the failure of negotiations. After the submission of the request of initiating the proceedings, in urgent cases, which would jeopardize the debtor's assets, the syndic judge may order emergently, in council and without summoning the parties, the temporary suspension of any enforcement proceedings to the debtor's assets until the Decision on the application[3].

Distribution of amounts from the sale of the debtor's assets

Art. 159 of the Law establishes the order of distribution of funds from the sale of the debtor's assets and rights encumbered in favor of the creditor by the preference cause. Therefore, the provisions of art. 159 of the Act are applicable only in cases where the creditors' claims are secured by the preference cause in the event of liquidation.

An unsecured creditor does not benefit from the the applicability of art. 159 of the Act. Unsecured creditors are those that are not beneficiating from the preference cause. There are unsecured creditors

[2] art. 66 (1) of Law no. 85/2014 on insolvency prevention procedures and insolvency published in the Official Gazette number 466 dated June 25, 2014.
[3] art. 66 (1) of Law no. 85/2014 on insolvency prevention procedures and insolvency published in the Official Gazette number 466 dated June 25, 2014.

and creditors that are beneficiating from the preference cause, those whose claims are not fully covered by the value of privileges, mortgages or pledges held for the debt uncovered. By simply registering the claim in the Electronic Archive for Security Interests in Movable Property does not determine its transformation into an instrument which benefits from a preference cause.

The price of the debtor's assets is divided among creditors in proportion to each claim amount, unless there is between them a preference cause or other conventions of this type[4]. This last situation is an exception to the principle of equal treatment for creditors.

As required by art. 2327 of the Civil Code are preference causes: privileges, mortgages and pledges. According to art. 2333 par. (1) of the Civil Code "privilege is the preference granted by law to a creditor in consideration of his claim." According to art. 2343 Civil Code, the mortgage is a real right on movable or immovable affected execution of an obligation.

The pledge is an ancillary agreement between the debtor and the creditor in which the debtor gives the creditor an corporeal or incorporeal moveable property in order to guarantee its debt.

The proceeds from the sale of the debtor's assets and rights encumbered in favor of the creditor, the case will preferably be distributed as follows[5]:

1. taxes, postage and other expenses related to the sale of goods, including the costs necessary for the conservation and management of these assets and expenses advanced by the lender in the enforcement proceedings, claims arising after the opening of utilities providers proceedings, the remuneration due date distribution of persons employed in the common interest of all creditors, which will bear a pro rata to the value of all the debtor's assets;
2. the beneficiary creditors' claims arising from a preference cause during the insolvency proceedings. These amounts include capital, interest and other accessories, as appropriate;

[4] art. 2326 of the Civil Code Law 287/2009 republished in the Official Gazette, Part I no. 505 of July 15, 2011

[5] art. 159 (1) of Law no. 85/2014 on insolvency prevention procedures and insolvency published in the Official Gazette number 466 dated June 25, 2014

3. the beneficiary creditors' claims arising from a preference cause that comprises all the capital, interest, and penalties, increases of any kind, including expenses and costs related to the legal rights of mortgage on the debtor's assets that is transferred when claims arise in a leasing contract and a financier acquires a legal mortgage to those assets, with an equal rank of the initial leasing transaction.

If the sums resulted from the sale of the debtor's assets are insufficient to fully pay the claims, creditors will have unsecured claims or, where appropriate, budgeting, which will come into competition with those in the corresponding category according to their nature.

Amounts distributed among creditors in the same priority ranking will be awarded in proportion to the amount allocated for each debt[6]. Holders of claims in one category can be awarded only after only after awarding the full amounts to the holders of a higher category.[7]

If insufficient amounts needed to cover the full amount of receivables with the same priority ranking, their holders will receive a bankrupt share for an amount proportional to the percentage of their debt claims it holds in the category concerned.[8]

According to paragraph. (3) , art. 159 of the Act, the lender that is the beneficiary of a preference cause may participate in any distribution of proceeds from the sale of assets of the debtor, made before the sale of property encumbered by a preference cause in its favor. In other words, if there is a distribution of proceeds from the sale of the debtor's assets, other than property encumbered by a preference cause in favor of the creditor, he is entitled to participate in the distribution.

The sums received in this way by the creditor shall be deducted from those that the creditor would be entitled to receive later from the income resulting from the sale of property encumbered in its favor by a preference cause if this is necessary to prevent such creditor to receive more than they would have received if the property encumbered by a preference cause in its favor would have been sold prior to the distribution. In case of violation of these rules, the borrower, through his

[6] art. 162 of Law no. 85/2014 on insolvency prevention procedures and insolvency published in the Official Gazette number 466 dated June 25, 2014

[7] art. 163 (1) of Law no. 85/2014 on insolvency prevention procedures and insolvency published in the Official Gazette number 466 dated June 25, 2014

[8] art. 163 (1) of Law no. 85/2014 on insolvency prevention procedures and insolvency published in the Official Gazette number 466 dated June 25, 2014

legal representative has handy way of an action based on unjust enrichment.

Text art. 159 makes no distinction between rank the rank of the warranties, but divides debts strictly according to the time of which were generated.. So if we have many secured creditors with different goods, seems that their registration will be done with the same priority ranking, respectively according to art. 159 of Law no. 85/2014. Apparently, distribution of liquidity disregards the object of the warranty. This finding reinforces the argument that a secured creditor in the insolvency proceedings has the right to participate proportionally in the distribution, in concurrence with other secured creditors, even if funds were not obtained from liquidation of assets encumbered in its favor.

In terms of art 167 of the Law, after the assets of the debtor were liquidated, the liquidator will submit a final report to the syndic judge along with the final financial statements; copies of these will be communicated to all creditors and the debtor by publication in the Insolvency Procedures Bulletin. The syndic judge shall order the convening of the meeting of creditors within 30 days of the publication of the final report. Creditors may object to the final report by at least 5 days before the date of the convocation. On hearing, the syndic judge will resolve by closing all objections to the final report, approve it or will provide, if necessary, appropriate amends.

Claims that at the date of the registration of the final report will still be under condition shall not participate in the last distribution. After the syndic judge approves the final report of the judicial liquidator, he will have to make the final distribution of all funds of the debtor. Unclaimed funds within 30 days by the persons entitled thereto shall be deposited in the account referred to in art. 39 para. (4). Pursuant to art. 159, para. (2) last sentence, if after payment of debts resulted additional difference, they will be filed by the judiciary liquidator in the debtor's account.

CONCLUSION

The lender that is the beneficiary of a preference cause may participate in any distribution of proceeds from the sale of assets of the debtor, made before the sale of property encumbered by a preference cause in its favor. Preference causes as required of the Civil Code are:

privileges, mortgages and pledges. The guarantee quality of a creditor relates strictly to the good encumbered in its favor. Compared to the other guaranteed assets of the debtor's heritage, it holds the role of unsecured creditor.

Law no. 85/2014 on insolvency prevention procedures and insolvency, the new romanian law on insolvency, is in full agreement with the European Commission's view in relation to bankruptcy and debt recovery and meets all the requirements related to insolvency regulations at European level, increasing the creditor's capacity to recover debts and to capitalize assets.

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THE NECESSITY OF METHODS FOR DISCOVERING SIMULATED BEHAVIOR IN CRIMINAL CASES

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Abstract:

The introduction of a new criminal and criminal procedural code in the Romanian law represents a time of change, and a moment when current legislation can adapt and improve. This paper aims to bring forth arguments in favor of a type of means of evidence that is in accordance with the current technology and the ever-growing number of deception cases found in criminal trials. It is the difference between the plethora of means regarding the discovery of simulated behavior currently found in prevalence and the lack of nominalization within the current code that must be addressed, in order to improve the legislation for a better application of the law.

Key words: *(simulated behavior, defendant, rights, criminal procedural law)*

INTRODUCTION

The entry into force of a new Criminal Procedure Code and a new Penal Code is perhaps one of the most important moments in the development and application of criminal law in our criminal legislation. The former provisions, although modified, no longer met current requirements regarding the conduct of criminal proceedings in accordance with European law, thus being necessary to adopt new provisions.

Following the new modifications, one of the main changes are represented by the adoption of new provisions regarding evidence in criminal proceedings. The new Criminal Procedure Code establishes *„a definition similar to the previous rules, the evidence representing any element which serves to determine the existence or nonexistence of an offense, which serves towards the discovery of the identity of the perpetrator and the circumstances necessary for a fair settlement of the case, and contributes to the discovery of the truth in criminal*

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proceedings“[2]. And so the question that cand be stated is weather or not the current means of uncovering truth by tehnological means can and should be added to the Criminal Procedure Code, in regards to the newly instated definition.

THE EVIDENCE

The main difference between the old and the new provisions occurrres with the adoption of the phrase - *and contributes to the discovery of the truth in criminal proceedings* – that was not found in the previous one. Thus, we see a change in the optics regarding the criminal process, from the perspective of evidence, the current regulation is its contribution to finding the truth.

The legislature thus imposed a new requirement of proof, latto sensu, namely its contribution to the discovery of truth in the criminal case investigation, by *„the judiciary, who represent those who have attributions in the investigation: prosecutors and criminal investigators (both general and special)“*[3]. For the judiciary, a certain fact may serve to identify a suspect or may serve towards the advancement of knowledge of certain circumstances necessary, however, if it is not useful towards uncovering the truth in criminal proceedings, it will not constitute evidence in regards to criminal law

The new Criminal Procedure Code comes to clearly differentiate between certain notions: evidence- the fact-, means of evidence – the physical element added to the case file that states said evidence, and evidence proceeding – the way of discovering said evidence. Thus, if the presence of a person in a certain place represents the evidence, the means of evidence could be a written testimony of the victim, and the legal proceeding would be the administration of said testimony by the judiciary.

Under Article 97 of the Criminal Procedure Code, the evidence can be obtained by the following means: the statements of the suspect or defendant, injured party statements, declarations from the civil party or

[2] Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor and Victor Văduva, *The New Criminal Procedure Code. Practitioner's Application Guide* (Bucharest: Hamangiu,2014), 84.
[3] Mihail Udroiu, *Criminal Procedure, The Special Part, The New Criminal Procedure Code* (Bucharest: C.H.Beck,2014), 6.

responsible party, witness statements, documents, expert reports or finding, minutes, photos, material evidence and any other evidence not prohibited by law. We see a change in the optics of the legislative body ,by not adopting an exhaustive listing of evidence and adopting an illustrative one, while maintaining classic means of evidence – such as statements -, while also stating that any other means of evidence, not prohibited by the law can exist.

THE EXPERTISE

Found in Chapter VII, Articles 172-191 of the new Criminal Procedure Code - the expertise represents an integral part of Title IV - Evidence, means of evidence and evidentiary procedures. This title comprises the legal basis for the disposition of an expert in criminal proceedings, debuting with the phrase – an expertise shall take place when for the detection, clarification or evaluation of facts or situation that have an importance for the discovery of truth an expert opinion is required. Not discovering the truth, *„no matter if it is caused by the dishonesty of some witnesses, by inssuficient evidence"*[4], can lead to judicial errors, cases where guily people may not be convicted, or, even worse, where innocents can be convicted wrogfully.

A common principle found in virtually all criminal legislation is the one postulated by William Blackstone in his magnum opus- Commentaries on the laws of England: *„It is better that ten guily persons escape than one innocent suffer"*[5], a principle rooted within the presumption of innocence, and the fact that all accusations must be based on evidence. The fact that in our current age posibilities exist for the uncovering of truth by tehnological means leads to certain modifications in said principle. In a time where machines can state the presence of certain physiological changes, associated with deception, the discovery of truth can be attained easier than in the past, *„practical nesessities having led to a series of attempts for finding tehniques that can precisely and neutraly detect the main modifications caused by mental tension"*[6].

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[4] Tiberiu-Constantin Medeanu, *Forensics In Action. The Case Files Of A Forensic Prosecutor* (Bucharest: Lumina Lex, 2006), 5.

[5] William Blackstone, *Commentaries on the Laws of England,* (Oxford: Claderon Press,1765).

[6] Emilian Stancu, *Forensic science treaty, 5th Edition,* (Bucharest: Universul Juridic, 2010) 481.

Article 184 of the new Code of Criminal Procedure refers to the psychiatric expertise , showing cases where it should be disposed,such as thenecessity to establish the extent of liability due discernment doubt about the suspect . Article 185 refers to forensic autopsy in cases where the victim is suspected of a violent death, to determine said cause of death. In connection with this article, we find exhumation, in Article 186, and forensic autopsy of the fetus or newborn, in Article 187. Toxicological expertise is found under Article 188, if there is suspicion of poisoning. A physical examination of a person is found Article 189. Article 191 presents the genetical expertise.

We can observe that the legislative body expressly stated a series of tehniques but has unassigned any article towards the discovery of simulated behavior, and the technical and tactical methods to detect said behavior*„ in theory while not having a special value, since our legislation does not have a hierarchy of evidence, in practice the expertise has a well-deserved authority, since it is made by specialists that use the newest science achivements"*[7]

Among the means of obtaining evidence regarding simulated behavior one might find: *„ the frequently used machine for detection of the simulated behavion is the Reid conception polygrap (...) completed with the voice emotional stress tehniques and the stress found in writing. The paralell use of these scientifical means ensures, on the one hand, the posibility of completion and the simultaneous verification of the results obtained in different ways, and on the other hand, considerably reduces the risk of errors"*[8]

CONCLUSION

The criminal legislation did not need further clarification on how to detect simulated behavior, since the existing doctrine, in regards to the forensic science gave enough means to the Criminal procedure. The tactical ways regarding the discovery of truth has been, for a long time, the main purpose of Forensic science.

The main concern regarding the inclusion of expertise regarding the uncovering of simulated behavior, in criminal cases, is the fact that, at this moment, it is not expressly stipulated within the expertises stated in

[7] Lazar Carjan, Mihai Chiper, *Forensic Science* (Bucharest: Fundatia Romania de Maine, 2009), 317.
[8] Ioan Iacobuta, Mihai Covalciuc, *Forensic Science* (Iasi: Panfilius, 2004), 317.

the Criminal procedural code. Not to include a very important means of evidence, one that has a certain degree of accuracy, since it is based on expert's opinions constitutes a missstep of the judiciary, that did not provide for this institution in the new Criminal procerural code.

For these reasons we consider that the legislative body should ammend the current Chapter VII found in Title IV of the new Criminal Procedure Code by the introduction of a new article: 191¹ titled „Expertise of simulated behavior", that should have the following content: „Whenever there are doubts about the truth of a party's or a witness' statement in a case, the judicial bodies can request, with the consent of said party, an expertise regarding the discovery of simulated behavior. "

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