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CONTENTS

FORMALITIES RELATED TO THE CONSUMER CREDIT CARD CONTRACT

Livia MOCANU*

Abstract. *Both in the internal and the European legislation, the constitution of the consumer credit card contract is placed under the transparency principle, meant to insure the equality between unequal contractual partners – the consumer and the professional providing the credit. In fact, at a general level, the consumer protection policy aims to amend the information unbalance between consumers and sellers, by regulating the information provided, but also to guarantee that the consumer receives information which is easy to understand and compare, as information constitutes in fact a fundamental principle for the regulations insuring consumer protection. The transposition of the European legislation and national law on the consumer credit contracts leads to the development of a pre-contractual and contractual system of information and publicity, governed by the transparency principle, meant to insure that the consumer gives or not his consent. In this context, the current scientific approach aims to carry out an analysis of the legislative measures passed to protect the consumer's consent, so that his agreement when a credit contract is concluded is the result of complete information, reflection and freedom of choice.*

Keywords*: consumer credit, information formalities, annual effective interest, publicity, information duty, counselling duty.*

1. Introduction

Having a specific mission and nature within the relations between professionals and consumers, the consumer credit has experienced a considerable evolution in the last years. New credit instruments have appeared on the market, the use of which continues to develop and generate new challenges, both for those providing the credits and for those requesting them. An answer to this phenomenon was the adoption of Directive 2008/48/EC of the European Parliament and Council from 23rd April 2008 on the credit consumer contracts[1], having the declared objective of creating a harmonized community framework for several fundamental fields. The new regulation has instituted a set of *similar conditions for obtaining a credit* for credit consumers, in any of the EU member states, in terms of both drafting and enforcing the consumer credit. As an effect of this directive and for the purposes of its transposition, G.E.O. No. 50/2010 was adopted on a national scale, regarding credit consumer contracts[2], which modifies radically the legal regime enforceable to the elaboration of consumer credit contracts.

The present work is aimed at analysing the national regulations for the prevention of the unbalanced character of the credit consumer contract, by instituting some requirements of pre-contractual and contractual information of the consumer, to allow the latter to know his rights and duties deriving from the credit contract.

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* Conferențiar universitar doctor, Facultatea de Drept şi Ştiințe Administrative, Universitatea Valahia din Târgoviște.

[1] Published in OJ No. L 133/66 from 22nd May 2008, Directive 2008/48/EC abrogated Directive 87/102/EEC of the Council on bringing together legislative, regulatory and administrative provisions of EU member states on the field of the consumer credit

[2] Published in the Official Gazette No. 389 from 11nd June 2010, G.E.O. No. 50/2010 abrogated Law No. 289/2004 on the legal regime of credit consumer credit contracts for consumers who are natural persons, with the subsequent changes, and modified Law No. 190/1999 on the mortgage credit for housing investments.

2. What is informative formalism?

The concept *of informative formalism* refers to *a perfected protection technique*[3], regarding the consumer's consent at the conclusion of contracts with commercial professionals. Determining the cases of informative formalism and the conditions in which the mandatory information must be notified to the consumer is the duty of the lawmaker, who intervenes in this field by means of special legislation regarding consumer protection. Here resides the legal source of informative formalism. We are speaking about a new type of formalism, completely different from that described by the Civil Code, as long as it cannot be integrated neither to the category of solemn acts *stricto sensu*, nor to the formal categories *ad probationem*. Informative formalism represent a „modern, innovated version of formalism *ad validitatem*, the compulsory solemnity and information combining in a peculiar manner, perfected in relation to the traditional way of avoiding vices of consent"[4]. In its essence, informative formalism starts as a contextual rule, aiming to insure a specialized consent of the consumer, an objective which is finally accomplished by a combination of the formal rule with a formal requirement[5]. Informative formalism is present in all the stages of a credit contract elaboration, for the purposes of insuring a free and specialized consent of the consumer getting the credit, as a factor to rebalance the relation between him and credit professionals. It refers to the duty of including certain information in the credit promotion, the documents and the act certifying the contract, all these mentions having the role and being the only ones which can prove the notification of information considered necessary by law for speaking of a specialized consent. Legal literature has also called it *formalism of specifications or neo-formalism*[6], being used in practice the notion of informative formalism, which captures in the most accurate way the idea of consolidating the consumer's right of being informed and the accomplishment of the conditions necessary for insuring contractual transparency[7]. In fact, these are also the declared objectives of Directive 2008/48/EC of the European Parliament and Council from 23rd April 2008.

3. Informative formalism enforceable to credit consumer contracts

The ground is represented by article 33 of the G.E.O. No. 50/2010, which takes over the provisions of article10 paragraph (1) of Directive 2008/48/EC of the European Parliament and Council from 23rd April 2008. The legal text institutes the duty to draft credit contracts in writing, visible and easy to read, the font used being Times New Roman, size 12 p, on paper or another lasting material. When the contract is drafted on paper, the paper colour must contrast that of the font. At the same time, second paragraph of article 33 of the G.E.O. No. 50/2010 provides that the information which a credit contract contains must be complete, clear and easy to understand, elaborated in Romanian. Furthermore, the

[3] V. Magnier, *Les sanctions du formalisme informatif,* in „La Semaine Juridique" No. 5/2004, p. 178, apud Paul Vasilescu coordinator, *Consumerismul contractual. Repere pentru o teorie generală a contractelor de consum,* Editura Sfera Juridică, Cluj-Napoca, 2006, p. 84.
[4] Paul Vasilescu, coordinator, *quoted works,* p.85.
[5] Idem., p. 99.
[6] Emilia Mihai, *Lecții de dreptul consumului,* Editura Mirton, Timişoara, 2007, p. 210.
[7] É. Poillot, *Droit européen de la consommation et uniformisation du droit des contrats*, LGDJ, 2006, p. 105, apud Emilia Mihai, *quoted works,* p. 211.

law requires for this information to be detailed or additionally explained by the bank, upon the consumer's explicit request, before the signature of the contract, in the form of a note, annex to the contract. From the text of these legal provisions, it results that the lawmaker imposes certain formal requirements within the credit consumer field, which express precisely the informative formalism typical to this contract.

Concretely speaking, informative formalism enforceable to consumer credit contracts imposes on the one hand the duty of professionals to draft the contract in *writing, visibly and easy to read*, using the font Times New Roman, size 12 p, on paper or a lasting material; the colour of the paper on which the contract is drafted *must contrast that of the font used* and, on the other hand, the contract must include compulsory legal mentions provided for by article 46 of Law, for the purpose of notifying consumers in written on their essential rights and duties, according to the credit consumer credit, and obtaining a specialized consent from the consumer.

These provisions show that informative formalism represents a legal formal requirement enforceable to certain contracts concluded with consumers, which are considered to have an increased degree of danger; according to it, the professional creditor includes several written compulsory mentions established by law in the text of the contract proposed to the consumer, for the purposes of protecting the consumer's consent, which must be an authorized one and given accordingly.

Therefore, the lawmaker reunites the following legal requirements under the concept of informative formalism:

- the requirement to conclude the contract with the consumer in written, as an exception from the rule of contractual agreement acknowledged within common law;
- the requirement to include those compulsory legal mentions, listed by law, on the essential rights and duties of the parties.

At the same time, in order to insure the highest degree of transparency and compatibility of offers, as it is required by Directive 2008/48/EC, the national lawmaker has established imperative formal rules, according to which credit contracts must be drafted in written, visibly and easy to understand, the font used being Times New Roman, size 12 p, on paper or other lasting material. When the contract is drafted on paper, the colour of the paper must contrast that of the font used. In other words, when it comes to the credit contracts concluded between professionals and consumers, the latter must have access to complete information, clear and easy to understand, drafted in Romanian. In fact, the provisions of article 33 of the G.E.O. No. 50/2010 clearly refer to the duty professionals to use Romanian, but also to the transparency principle, the lawmaker forbidding any deceiving bank practice by means of which the essential information offered to consumers regarding credit contracts is not clear, excessively technical or deliberately omitting information.

The end of the text contains an implicit reference to the excessive information, taking the legal form of misrepresentation, seen in its double dimension, as illicit deed causing prejudices and as a vice of consent[8]. In essence, apart from the compulsory legal mentions inserted into the contract, the creditor can include only essential information in the main text, while the rest of the information shall be handed in to the consumer, upon his clear demand, before the signature of the contract or under the form of a note, annexed to the contract.

[8] Ana-Juanita Goicovici, *Creditele pentru consum şi de investiții imobiliare. Comentarii şi explicații,* Editura C.H.Beck, Bucureşti, 2014, p. 106.

These legal provisions characterizing informative formalism of credit contracts concluded with consumers, which are standardized and contain clauses drafted by professionals, aim to counterbalance the informational disadvantage in which a consumer is found in relation to the informational superiority which professional creditors have when the contract is concluded. In this way, the consumer has the certainty that the main rights and duties of the parties are included in the content of the contract, as they are drafted clearly and easy to understand. Thus, the consumer is aware of those legal and contractual prerogatives of which he benefits, like the right to withdraw from the contract within 14 calendar days from its signature, the right to anticipated reimbursement and so on.

The transgression of the legal duties instituted by article 33 of the G.E.O. No. 50/2010 by the professional creditor represents a crime and is sanctioned with a civil fine (article 86).

4. The information which must be included in a credit contract

According to article 46 paragraph (1) of the G.E.O. No. 50/2010, taking over the provisions of article 10 paragraph (2) of Directive 2008/48/EC of the European Parliament and Council from 23rd April 2008, a credit contract must clearly and briefly specify the following mentions:

- the type of the credit;
- the identity, address of the registered office and of the working point/address of the contracting parties, but also the identity, address of the registered office and/or of the working point/address of the credit intermediaries involved;
- the duration of the credit contract;
- the total value of the credit and the conditions regulating its enforcement;
- when a credit is offered as a payment postponement for a certain asset or service or when it comes to credit contracts legacies, the asset or service involved and its purchasing price;
- the interest rate corresponding to a credit and its type, fixed or variable;
- the conditions governing the enforcement of the interest rate corresponding to a credit and the formula to calculate it, as well as the terms, conditions and procedure for modifying the interest rate corresponding to the credit; when different interest rates are applied, in different circumstances, there must also be specified the information previously foreseen regarding all the rates of the enforceable interest;
- the annual effective interest rate and the total value payable by the consumer, calculated when the credit contract is concluded; all the hypotheses used for calculating this rate shall be mentioned;
- the amount, number and frequency of the payments which shall be done by the consumer and, according to the case, the order in which reimbursement payments shall be done, for the various left amounts to pay, with different interest rates corresponding to the credit;
- when the total value of the credit corresponding to a credit contract on a determined period is paid in instalments, the consumer's right to receive a bank statement having the aspect of a depreciation table/reimbursement schema, upon his request and freely, at any moment during the contract, on paper or any lasting support, according to the consumer's decision;
- when the costs and interests must be paid without reimbursing any part of the total value of the credit, a bank statement showing the periods and conditions for the interest payment and any other cost corresponding to the credit;

- the administration fees for one or more accounts registering both payment operations and credit withdrawals, except for the case when the opening of an account is optional, the costs for using a payment instrument both for payment operations and credit withdrawals, any other cost resulting from the credit contract and any condition in which these costs can be modified;
- the interest rate for late payments, applicable at the moment when the credit contract is concluded, and the measures for adjusting it, but also any other cost due for the lack of payment;
- a warning regarding the consequences of not making the payments; the credit contract shall mandatorily contain a provision warning the consumer on the notification which shall be sent to the Credit Bureau, the Bank Risks Central Office and/or any other similar structure existing, if he is late with the due payments, when this notification duty exists;
- a mention according to which the payment of some taxes, fees and costs will be necessary, regarding the conclusion, publicity and/or registration of the credit contract and the documents accompanying it, including notarial fees;
- the necessary guarantees and insurances, if they exist;
- the existence or lack of existence of an withdrawal right, the term within which that right can be exerted and other conditions for exerting it, including information regarding the consumer's duty to pay the credit or the part of the credit withdrew and the interest, according to the provisions of article 59 paragraph (1) letter b), paragraphs (3) and (4) and article 60, but also the amount of the interest to pay daily;
- information on the rights resulting from articles 63-65, but also the conditions for exerting these rights;
- the right of anticipated reimbursement, the procedure for anticipated reimbursement, but also any other information regarding the consumer's right to compensation and the way this compensation will be determined;
- the procedure to follow when exerting the right for demanding the termination of the credit contract;
- if there is or not an extra-judicial mechanism for complaints and compensations granted to the consumer, the ways to have access to this if the answer is yes;
- other contractual conditions and clauses;
- the address of the National Authority for Consumers Protection.

All the information provided for by the legal text, including those corresponding to some services in regard to which the consumer has no freedom of choice, must be included in the credit contract, without making references to the creditor's general business conditions, the charges and fees list or any other document [article 46 paragraph (2)].

It can be noticed from these legal provisions which is the effect of informative formalism, namely the fact that the creditor cannot avoid the request of directly notifying in written the consumer on the rights and duties generated by the credit contract, throughout the latter's content. At the same time, the information provided for by the law cannot be subject to some references made to external sources of the contract, like the professional's general business conditions.

The creditor's general business conditions regard those contractual norms governing all the operations performed by the bank/financing services society throughout the relations with its customers, comprising norms on the bank expenses for the various services provided to

customers, bank fees and the chronological succession of various bank operations[9]. As credit contracts are adhesion ones, the consumer does not have the opportunity to negotiate the content of contractual clauses, being allowed only to accept or to refuse the bank credit offer, seen on the whole. The acceptance of the credit contract by the consumer involves accepting also the creditor's general business conditions, but only if these are reminded by the contract. When the credit consumer contract only alludes to the general business conditions of the bank without explicitly reproducing them, their applicability within the credit contract concluded with a concrete consumer shall depend on them being known by the debtor. Taking into account these aspects, the informative formalism considered by the provisions of article 46 of the G.E.O. No. 50/1990 forces the professional creditor to clearly include in the content of the credit contract the mandatory mentions provided for by law but without taking into account whether these are found in the general business condition of the creditor involved.

Given that the creditor cannot avoid the formal requirements regarding the essential information provided by law, by making references to the general business conditions, if a litigation emerges and the court notices that any of the mandatory information included in the list of article 46 has been omitted, the creditor shall be sanctioned automatically, without checking if the consumer effectively took notice of the information involved by other methods.

In this form, the lawmaker offers a well constituted protection system to the consumer, if the creditor (lender) infringes the written notification duties contained by law.

The transgression by the professional creditor of his legal duties instituted by article 46 of G.E.O. No. 50/2010 represents a crime and is sanctioned with a civil fine (article 86). Besides the civil fine, an additional civil sanction can be applied, consisting in updating the contract to be according with the legal provisions, within at most 15 days.

5. Conclusions

Although the credit consumer contract has been conceived as an instrument for the development of internal market and the European credit market in particular, it continues to represent an area with an abusive potential within the relations between credit professionals and consumers. This fully justifies the legislative preoccupations for establishing those legal formal conditions defining informative formalism. As the scope of these requirements is vaster than what it has been presented, the present work has certainly not debated the entire complex field of the consumer credit, by accomplishing only a partial approach of the rules in the field, instituted by G.E.O. No. 50/1990 on the transposition of Directive 2008/48/EC in internal law.

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1. Ana-Juanita Goicovici, *Creditele pentru consum şi de investiţii imobiliare. Comentarii şi explicaţii,* Editura C.H.Beck, Bucureşti, 2014
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[9] Ana-Juanita Goicovici, *quoted works*, p. 219

DECAY UNDER THE CIVIL LAW

Eugen CHELARU*

Abstract. *The New Civil Code comprises the first comprehensive regulation of decay under the Romanian civil law. In the present study we have attempted to establish the juridical character of decay and we have reached the conclusion that decay represents a civil penalty. The terms of decay may be legal or conventional and their scope includes both rights that can be protected or exercised by bringing an action into court and rights whose exercise does not involve recourse to justice, but rather the performance of unilateral juridical acts. The calculation mode of decay terms is identical to that of prescription terms. The rule of* law actione non natae *is also valid for this case, albeit in a specific form. Exceptionally, the terms of decay are subject to suspension and interruption, but the causes that can generate these effects are numerically smaller than those applicable to prescription. The juridical regime of decay terms varies in accordance with their being of public order or of private interest.*

Keywords: *decay, suspension, interruption, force majeure, delay, public order, private interest.*

1. Preliminary Remarks

In an effort to develop a specific terminology, the law borrowed many words from the common language, words to which it has assigned new connotations. These new connotations were inspired, to a greater or lesser extent, by the original meanings of the respective word.

This observation holds valid in the case of the term „decay" as well!

„To decay" is commonly associated with the meaning of „to get into a worse condition, to be in decline; to regress". Starting from here, the law has developed a range of sanctions that can be applied under certain conditions and whose consequence is to deprive a person of a substantive or procedural right[1] or of another prerogative. Ultimately, as an effect of the application of such sanctions, the person „gets into a worse situation".

This is the case of the accessory penalty and of the additional penalty of interdiction of certain rights, governed by article 54 and article 55 letter (a) of the Criminal Code, but also of certain civil penalties, such as termination of the right to exercise of parental rights (covered by articles 508-512 of the Civil Code) and forfeiture of the benefit of the suspensive period for the debtor that is in a state of insolvency or, where appropriate, of default of payment declared under the law; who, by his deed, diminished, intentionally or out of a gross negligence, the securities constituted in favour of the creditor or did not constitute the promised guarantees or who, by his negligence, has reached a critical situation or no longer satisfies a condition considered essential for the creditor at the conclusion of the contract (article 1417 of the Civil Code).

* PhD, University of Piteşti, Faculty of Law and Administrative Sciences

[1] For the sanction of decay in the procedural civil law, please see *V.M. Ciobanu, T.C. Briciu, C.C. Dinu,* Drept procesual civil. Drept execuţional civil. Arbitraj. Drept notarial (Civil Procedural Law. Civil Execution Law. Arbitration. Notary Law), the National Publishing House, Bucharest, 2013, p. 240-241.

Nonetheless, these situations do not represent the topic of our study; instead, we intend to analyze the decay that occurs as a result of the passage of time[2], or more precisely, due to the non-exercise of a subjective civil right within the period prescribed by law. Moreover, for civil law theorists, the employment of the concept of decay, without any mitigating circumstances, acquires the significance of this penalty.

2. Definition and Juridical Nature of Decay

Article 2545 of the Civil Code states that by law or by the will of the parties one may establish decay terms for the exercise of a right or for the performance of unilateral acts. The non-exercise of the subjective right within the term established leads to the loss of the respective right, and, as far as the unilateral acts are concerned, to the prevention of their perpetration, according to the conditions provided by the law.

In doctrine, decay has received several definitions, among which we can quote the following:

As a civil law penalty, decay is the extinction of the civil subjective right non-exercised within the decay term.[3]

Decay is that civil law penalty consisting of the extinction of the civil subjective right non-exercised within the term set by law or by the parties.[4] *Decay is a measure of juridical constraint that consists of the extinction 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.* [5]

Although these definitions make reference to the fact that decay is caused by the non-exercise of a subjective right within a preestablished period and its effect is the termination of this right, there is an essential difference between them, which refers to the juridical nature of the institution of civil law.

Thus, if the first two definitions state that decay is a civil law penalty, in the third it is regarded as „a measure of juridical coercion."

The authors that have developed the last definition we quoted do not expressly tell us why they have not qualified decay as a penalty, but this is apparent from the comparison they draw between this juridical institution and extinctive prescription. Thus, they infer that the decay operates irrespective of the fault of the subjective right holder, while prescription involves his/her culpable passivity.[6]

In a more direct manner, other authors argued that decay would not be a proper sanction, as it can operate in the absence of any fault.[7]

As far as we are concerned, we continue to believe that the idea of fault, under the form of negligence, implicitly derives from the non-exercise of the subjective right within

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[2] For the juridical effects that the passage of time may produce, please see *I. Dogaru, R. Nițoiu, Cr. Stanciu,* Câteva considerații privind curgerea timpului ca eveniment juridic (Some Considerations of the Passage of Time as a Juridical Event), in *I. Dogaru,* Texte juridice, Universul Juridic Publishing House, Bucharest, 2011, p. 406-417; *E. Chelaru,* Efectele juridice ale timpului, în reglementarea Codului civil (The Juridical Effects of Time in the Regulation of the Civil Code).

[3] *Gh. Beleiu,* Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil (Romanian civil Law. Introduction to Civil Law. The Subjects of Civil Law), XIth revised and added edition by *M. Nicolae, P. Truşcă*, Universul Juridic Publishing House, Bucharest, 2007, p. 242.

[4] *M. Nicolae,* Tratat de prescripție extinctivă (A Treaty on Extinctive Prescription), Universul Juridic Publishing House, Bucharest, 2010, p. 138.

[5] *I. Reghini, Ş. Diaconescu,* in *I. Reghini, Ş. Diaconescu*, *P. Vasilescu,* Introducere în dreptul civil (Introduction to Civil Law), Hamangiu Publishing House, Bucharest, 2013, p. 755.

[6] *Idem,* p. 747.

[7] Please see *G. Boroi, C.A. Anghelescu,* Curs de drept civil. Partea generală (A Course on Civil Law. Generalities), 2nd revised and added edition, Hamangiu Publishing House, Bucharest, 2012, p. 358.

the term. On the other hand, the application of the rules established for suspension and interruption in the case of decay as well also leads to a legal sanction of this institution.[8]

Moreover, neither the legislator nor the parties shall seek to qualify the nature of the terms they refer to. Therefore, through article 2547 of the Civil Code, it has been provided that if the law or agreement between the parties does not stipulate clearly that a term is a decay term, the rules on prescription shall be applicable.[9] This legal provision that joins decay and prescription, in relation to which everyone agrees that it has the nature of a penalty of civil law, as well as the implementation of some of the rules of the latter in the case of decay,[10] also substantiates our claim.

Therefore, decay is a civil law penalty and the terms of decay are of an exceptional nature.

3. Terms of Decay

The term of decay[11] represents the time period within which an individual civil right must be exercised or an unilateral act must be committed

Not all decay terms are subject to the same juridical regime, which is why they can be classified according to two criteria. The first criterion is mentioned in article 2545 paragraph 1 of the Civil Code and represents the source of decay terms. According to this criterion, we can distinguish between legal terms and conventional terms.

The freedom of the parties to establish the decay terms by juridical act, however, is limited by Article 2546 of the Civil Code. Thus, under the sanction of absolute nullity of the provision in question, the parties are forbidden to establish a decay term that would make it excessively difficult for the interested party to exercise the right or commit the act.

The second criterion used for the classification of decay terms lies in the nature of the interest protected by their establishment.

According to this criterion, decay terms are either of public order or of private interest.

The existence of these two types of terms derives from the provisions of article 2549 of the Civil Code, which governs the waiver of the decay benefit.

Public order decay terms are those that protect the general interest and stem solely from the law. They cannot be modified by the parties.

Private interest decay terms protect the interests of private individuals. They can be set either by juridical rules enacted for private interest or by a juridical act.

From the *per a contrario* interpretation of the provisions of article 2549 paragraph 2 second sentence of the Civil Code, it follows that the parties may modify the decay terms established in private interest, either by decreasing or by increasing them.

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[8] Please see *E. Chelaru,* Teoria generală a dreptului civil (The General Theory of Civil Law), C.H. Beck Publishing House, Bucharest, 2014, p. 268.

[9] The wording of article 2547 Civil Code is not immune from criticism. This law text does not say clearly that the term which cannot be qualified, without doubt, as a term of decay is one of prescription, but only suggests this by reference to the applicable rules on prescription. But can there be a period which should be subject to all rules of prescription, but which would have a different juridical nature?

[10] As we will see below, in some cases the rules on the suspension or interruption of prescription, as well as those on the invoking of this sanction, also apply to decay.

[11] The doctrine uses other notions equivalent to that of „decay term", namely „prefix term", „term of Acquiescence" and even „term of caducity" (*caducidad*, under Spanish law). Please see *M. Nicolae,* op. cit., p. 138.

4. The Scope of the Decay Terms

Unlike extinctive prescription, which is a penalty that applies only where the substantive right of action has not been exercised under the conditions provided by law, by bringing an action into court, the scope of the decay terms is not limited only to the rights which may be defended or exercised by bringing an action into court, but also includes rights whose exercise does not involve the recourse to justice.

For example, to the category of decay terms applicable to the rights that can be capitalized only by bringing an action into court belong the terms within which the action for the rectification of the land register may be lodged, according to article 909 paragraphs 2 and 3, in relation to article 908 of the Civil Code; the 3-year term within which the claim for the recovery of movable lost or stolen from the holder in good faith may be lodged (article 937 paragraph 1 of the Civil Code); the 1-year term applicable to a seller's action for obtaining a price supplementation and to the buyer's action for reduction of the price or for rescission of the contract, when the surface of the property sold is higher or lower than that stipulated in the contract (article 1744 of the Civil Code) etc.[12]

To the category of decay terms applicable to the capitalization of certain rights, for which it is not necessary to exercise recourse to justice or within which a unilateral act must be committed, belong, for example, the 1-year term within which the right to successional option must be exercised, the 6-year term (later extended by law) provided by article 22 paragraph 1 of Law no. 10/2001 on the legal regime of property confiscated between 6 March 1945 and 22 December 1989 to formulate notifications which call for one of the remedies regulated by the normative act cited[13], the decay term provided by the parties in a contract within which a right can be exercised.

5. How to Calculate Decay Terms

The mode of calculation of the decay terms is an operation that implies both knowing the term applicable in the cause, the ascertainment of the beginning of its flow and of its fulfillment, and the circumstances, if a suspensive or interruption cause intervened.

[12] For an analytical presentation of the decay terms regulated by the Civil Code, please see *G. Boroi, C.A. Anghelescu,* op. cit., p. 359-363.

[13] The qualification of decay term was granted, in this case, by jurisprudence. Please see *H.C.C.J., Civ. S.,* decision no. 5081/2006, in Dreptul nr. 8/2007, p. 288. In the same direction, please see *I. Adam*, Legea nr. 10/2001. Regimul juridic aplicabil imobilelor preluate abuziv (Law no. 10/2001. The Juridical Regime Applicable to Confiscated Assets), 3rd edition, All Beck Publishing House, Bucharest, 2004, p. 217; *Fl.A. Baias, B. Dumitrache, M. Nicolae*, Regimul juridic al imobilelor preluate abuziv. Legea nr. 10/2001, comentată şi adnotată (The Juridical regime of the confiscated Real Estate Assets. Law no. 10/2001, Commented and Annotated), vol. I, Rosetti Publishing House, Bucharest, 2002, p. 207. Article 22 paragraph 5 provides, however, that failure to comply with such notifications „entails loss of the right to seek legal redress in kind or compensation," which signifies the extinguishment of the right of action in the material sense and not the extinguishment of the right to obtain such measures. As notifications are resolved within an administrative procedure and recourse to justice is just accidental, if the person entitled is unhappy with how the notification was resolved, we appreciated that the term in question is one of presciption. Please see *E. Chelaru,* Drept civil. Drepturile reale principale, în reglementarea NCC (Civil Law. Real Main Rights in the Regulation of the NCC), 4th edition, C.H. Beck Publishing House, Bucharest, 2013, p. 248.

5.1. The Beginning of the Course of the Decay Term

In the matter of extinctive prescription, the course of the term begins on the date the holder of the right of action knew or, in accordance with the circumstances, was supposed to know about its birth (article 2523 of the Civil Code). Thus, the rule of law expressed through the *actioni non natae, non praescribitur* adagio shall be applied.

Under this rule, prescription does not begin to run before the civil subjective right may be exercised or before the holder knows that (s)he can exercise it. The exercise envisaged by the legislator is the bringing of an action into court.

Before the entry into force of the new Civil Code, the decay terms were deemed not to be eligible for interruption, suspension or reinstatement, which meant that, in all cases, the moment they started to flow coincided with the birth of the subjective right.

However, in doctrine and jurisprudence (especially in those from France) it was held that the rule *actioni non natae*[14] is also applicable in the case of decay terms, which amounted to the acknolwedgment that there may be situations where the start of the course of decay terms does not coincide with the birth of the subjective civil right.

Unfortunately, the new Romanian Civil Code, although it governs decay, does not contain a rule on the beginning of the flow of the term. Thus, it might be understood that in all cases the decay terms begin to run when the subjective right emerges.

However, the legislator had in mind that, under the law, the decay terms may be subject to suspension and interruption (article 2547 of the Civil Code) and even regulated the suspensive effect and the interruptive effect which the force majeure and respectively the court complaint have on the decay term. Thus we may infer that if the force majeure was active when the civil subjective right was born or if the civil action was filed on the same day that this right was born, the decay term will be prevented from starting its course.

Of course, in the case of conventional decay terms, the parties may regulate even the time at which they can start to run.

5.2. Suspension of the Decay Term

According to Article 2548 paragraph 1 of the Civil Code, „decay terms are not subject to suspension and interruption, unless the law provides otherwise".

The second paragraph of the text of the law qouted adds that: „However, force majeure prevents, in all cases, the flow of the term, and if the term began to run, it is suspended, the provisions of article 2534 paragraph 1 being applied properly. This decay term shall be deemed to have been met only after 5 days from the date the suspension has ceased."

It follows from the legal provisions cited that the suspension of the decay term constitutes an exception which can operate only in the case of a force majeure event or where otherwise expressly provided by law.

[14] Please see *M. Nicolae,* op. cit., p.143-144. In respect of the decay term covered by the Land Law no. 18/1991, when requests for restoration of property rights had to be made, the same author argued that by similarity the provisions of Article 1-3 Proc. Civ. Code (old) should be applied on the reinstatement of the procedural decay terms. Please see *M. Nicolae*, Reconstituirea actuală a dreptului de proprietate asupra unor categorii de terenuri în temeiul Legii nr. 18/1991 (Current Reconstitution of the Ownership of Certain Categories of Land under Law no. 18/1991), republished, in Dreptul no. 5/1998, p. 22.

Of all general cases of suspension which the legislator has regulated by article 2432 for prescription[15], it also provided that only force majeure is applicable to the decay term.

Force majeure represents an unforeseeable and insurmountable event which renders the holder of the right unable to perform acts that could interrupt the prescription.

Such events may be represented by earthquakes, floods etc. It is the court's competence to determine whether the circumstance invoked by the party meets the conditions to be considered an event of force majeure.

The general effects of suspension of the decay term are the same as for suspension of extinctive prescription resulting from the reference that article 2458 paragraph 1 of the Civil Code, cited above, makes to article 2534 paragraph 1 of the Code. As a result, starting with the date when the cause of suspension ceased, the decay term will resume its course, the time elapsed before the suspension also being counted for the meeting of the deadline.

The suspension has therefore no effect on that part of the decay term which elapsed until the occurrence of the cause of the suspension, a period which will be added to the term that will be resumed after the termination of this cause. However, the course of the decay term is stopped throughout the period in which the cause of suspension lasts.

The special effect of suspending the course of the decay term is similar to that occurring in the case of the suspension of extinctive prescription and lies in the extension of the decay term for another 5 days, calculated from the date on which the suspension ceased[16]. This extension takes place only if there were less than 5 days from the moment when the cause of suspension emerged and the moment when the decay term would be fulfilled.

5.3. Interruption of the Decay Term

As a general rule, decay terms are not subject to interruption. However, according to the law, exceptions may be determined whether the term was set for the exercise of a right or for the commission of unilateral acts.

On the other hand, article 2548 paragraph 3 of the Civil Code states that „when the completion of the right involves the exercise of a legal action, the period is interrupted on the date the application for court complaint or arbitration or delaying was introduced, where appropriate, the provisions on the interruption of prescription being applicable accordingly".

Interruption of the decay term operates only in cases where the completion of the right it relates to involves the exercise of legal action. *Per a contrario*, the interruption, for the reasons covered by article 2548 paragraph 3 of the Civil Code, does not work in the case of the decay terms established for the commission of unilateral acts.

This is a natural consequence of the fact that committing a unilateral act depends solely on the will of its author, so that an application for a court complaint or arbitration or delaying is unnecessary.

The delaying of that in whose benefit the decay runs constitutes grounds for interruption only if it is followed by the filing of a court complaint within six months from the date of delaying.

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[15] For an analysis of these cases, please see *V. Terzea,* in Noul Cod civil. Comentariu pe articole, coordinators *Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei,* 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 2714-2716.

[16] For extinctive prescription, article 2534 paragraph 2 of the Civil Code states that „prescription will not meet before the expiry of a 6-month term from the date the suspension ceased, except prescriptions of 6 months or shorter, which will be fulfilled only after a period of a month following the conclusion of the suspension".

The fact that article 2548 paragraph 3 of the Civil Code refers to provisions governing interruption of prescription produces several consequences.

Thus, although the legal text cited mentions as causes of interruption only an application for a court complaint or arbitration or delaying, we believe, for the same reasons, that the decay term will also be interrupted through the establishment as a civil party during the investigation or in the trial court before starting the judicial inquiry, a case expressly provided for by article 2537 paragraph 3 of the Civil Code in relation to prescription.

For example, we may evoke here the 3-year decay term provided by article 937 paragraph 2 of the Civil Code, when the lost or stolen property can be claimed from the owner invoking good faith. If this owner, in spite of invoking good faith, is prosecuted for complicity to theft or concealment, and the owner was a civil party under the terms of the legal text quoted, the decay term shall be interrupted.

In all cases, interruption of decay operates even if the notice was sent to a non-competent jurisdictional or prosecuting body or even if it is null due to lack of form (article 2539 paragraph 2 of the Civil Code).

Interruption of the decay term does not work if the person who filed the court complaint or arbitration gave it up, and concomitantly if the claim was rejected, canceled or has become obsolete by a judgment that became final. However, if the plaintiff introduces a new complaint within 6 months from the date when the decision of rejection or cancellation becomes final, the decay term is considered interrupted by the previous court complaint or arbitration, provided that the new complaint be admitted, according to article 253 paragraph 2 of the Civil Code, which applies accordingly.

Article 2541 paragraph 1 of the Civil Code provides that the interruption of extinctive prescription has two effects: the deletion of the extinctive prescription that elapsed before the appearance of the interruption cause and the start of a new extinctive prescription after cessation of the cause of interruption.

As far as the interruption of the decay term is concerned, only the first effect is the one that occurs most often. Thus, coming back to the example of action to recover movable governed by article 937 paragraph 3 of the Civil Code, admission of the action will not determine the commencement of a new decay term, but of an extinctive prescription one, which seeks compulsory execution.

5.4. Meeting the Decay Term

The calculation of any term, regardless of its nature, is covered by articles 2551-2556 of the Civil Code.

According to article 2552 of the Civil Code, the terms set in weeks, months or years are met on the corresponding day of the last week or last month or year. If the last month does not have a day that corresponds to the day when the term began to run, the term shall expire on the last day of the respective month.The middle of the month is counted as the fifteenth day. If the deadline is set for a month and a half or more months and a half, the 15 days will be counted at the end of the term.

Article 2553 of the Civil Code governs the calculation of the terms established in days. In their case, the first and last day of the term are not taken into account. Thus, the system of days off, and not of full days (inclusive), was adopted.

The term is fulfilled at 24:00 on the last day. However, if it is an act that must be fulfilled within a job, the term shall be done at the termination of the normal working hours.

No matter whether the terms were set by days, weeks, months or years, if the closing date is a non-working day, it shall expire at the end of the first working day that follows (article 2554 of the Civil Code.)

When the term is determined on the hour, the first and last hour of the period are not taken into account (article 2555 of the Civil Code).

The acts of any kind are deemed to be made within the term if the documents that take note of them were handed over to the post or telegraph office at the latest on the last day of the term, up to the moment when the activity in that office usually stops (article 2556 of the Civil Code).

6. The Juridical Regime of Decay Terms

As noted above, in principle decay terms are not subject to suspension or interruption. Suspension and interruption of these terms may only intervene in cases specifically provided by law, circumstances in which some of the rules will be applicable to one of the rules regulated for extinctive prescription.

The rules applicable to invoking decay differ according to whether the decay term is of public order or of private interest.

Thus, while the jurisdictional body is forced to invoke and apply ex officio the public order decay term, whether or not the person concerned puts it into question (article 2550 paragraph 2 of the Civil Code), the decay terms established in the private interest, no matter whether they have their source in the law or in a juridical act, can be opposed only by the interested party, by counterstatement or at the latest at the first hearing at which the summons procedure was legally performed (article 2550 paragraph 1 of the Civil Code, referring to article 2513 of the Civil Code, on pleading prescription). The jurisdictional body cannot rely on such terms ex officio.

We believe that the solution chosen by the legislator, obviously inspired from the regulation of extinctive prescription, is a curious one!

Therefore, if this solution accommodates quite well with the effect of the fulfilled extinctive prescription, which extinguishes the right of action in the material sense, but leaves the subjective right itself and the correlative obligation untouched, it comes in clear contradiction with the effect of the decay term fulfilled. Article 2545 paragraph 1 of the Civil Code expressly provides that the non-exercise of subjective right within the deadline established leads to its loss, without distinction between public order decay terms and private interest decay terms. Or, if the party concerned fails to invoke the private interest decay term and the court cannot do so ex officio, this will lead to a situation where the latter will grant civil protection to a subjective right that does not exist anymore!?

The parties cannot waive public order decay terms, neither in advance nor after the commencement of their course, and they cannot change them, by decreasing or increasing them, as appropriate (article 2549 paragraph 2 of the Civil Code).

Conversely, the individual in whose benefit a certain term has been set, either by contract or by a legal provision that protects a private interest, may waive, after the meeting of the deadline, the benefit of decay. If this happens before the term fulfillment, the rules on prescription interruption by recognizing the right will be applicable (article 2549 paragraph 1 of the Civil Code).

7. Conclusion

With all the faults we believe we have identified in this field, the complete regulation of decay is, undoubtedly, a breakthrough. It is not without significance that the identification of the legal nature of terms which the legislator has not qualified will be facilitated by the rule established by article 2547 of the Civil Code, according to which, if the law or agreement between the parties does not specify without doubt that a term is a decay term, the rules of prescription are applicable.

At the same time, through the many references it makes to the juridical institution with which the decay resembles the most, namely prescription, the new regulation makes it possible to distinguish better between the two civil penalties.

Thus, the two institutions are similar given the following aspects:

a) both are civil law penalties;
b) the effect of the two penalties is the extinguishment of certain rights;
c) both imply the existence of boundaries.

The essential differences between extinctive prescription and decay are the following:

a) the effects are different: extinctive prescription extinguishes the right of material action and decay extinguishes the subjective right itself;
b) all prescription terms are prescribed by law, the parties only having to the possibility to modify them, while decay terms may be set either by law or by the will of the parties;
c) the court cannot invoke extinctive prescription ex officio but is required to invoke the fulfillment of the public order decay terms ex officio;
d) the extinctive prescription term is eligible for interruption and suspension in all cases provided by law, whilst decay terms are suspended only in the event of force majeure and can be interrupted only by filing a court complaint or arbitration or delaying.

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A NEW TYPE OF LEAVE FOR EMPLOYEES

Dan ŢOP *

Abstract: *Legislative changes in adoption law are concerning the rights that employees will have by their employers, for those who would like to adopt children. One of the significant changes is that employees in Romania will benefit from a new type of leave, namely holiday for accommodation and monthly allowance during the period in which he will entrust a child for adoption. The internal adoption process will permit not only employees but also other professionals to achieve a greater efficiency in the period of adjustment to a declaration of adoption.*

Keywords: *Adoption; accommodation holiday; custody of the child for adoption; suspension of the individual employment contract.*

Employees in Romania will benefit from a new type of leave, namely holiday accommodation during the period which they will entrust a child for adoption.

Although it refers only to employees, such a right will benefit the public officials, too, or other persons who receive income from self-employment, provided that in the event of overlapping[1] of individual employment contracts, this accommodation holiday can be granted only by the employer considered basic, other individual employment contracts to be suspended by agreement.

The best interests of the child require including the rights and obligations of the child's parents, his other legal representatives and any person to whom he has been lawfully placed[2].

A child temporarily or permanently deprived of parental protection or to protect his interests can not be left in their care is entitled to alternative care[3], which includes his adoption.

Law no. 273/2004[4] provides that adoption is legal operation which creates the connection between the adopter and the adoptee lineage and kinship between the adoptee and the adopter's relatives. Adoption ends only if it is in the best interests of the child[5].

According to art. 40 of the aforesaid enactment, adoption can not be authorized by the court until the child was entrusted for a period of 90 days to the person or family that wants to adopt, so that the court can assess rationally on family relations that would determine whether adoption would be permitted.

During the custody of the child for adoption, he will stay at the person or family which was entrusted. Making ordinary acts necessary for the exercise of parental rights and obligations, except those leading to the conclusion of a legal act are performed by the person or family to whom he was entrusted.

During the custody of the child for adoption, the direction of the domicile of the adopter or adoptive family and child traces the evolution of relations between him and the person or family who has been entrusted fortnightly reports prepared in this regard.

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* Professor Ph D, Valahia University of Târgovişte

[1] Ion Traian Ştefănescu, *Main theoretical and practical aspects arising from the content of Law no. 40/2011 amending and supplementing Law no. 53/2003 - Labour Code* in Law no. 7/2011, p. 16

[2] Alexandru Ţiclea, Laura Georgescu, *Social security law*, Juridical Universe Publishing, Bucharest, 2014, p. 319

[3] Dan Ţop, *Employment Law- Social security law*, Bibliotheca Publishing House, Târgovişte, 2013, p.571

[4] Published in the Official Gazette of Romania, Part I, no. 557 of June 23, 2004, republished in the Romanian Official, Part I, no. 259 of 19 April 2012

[5] Dan Ţop, *Social justice and national policies of social protection*, Bibliotheca Publishing, Târgovişte, 2008, p. 83

For proper performance of parental duties, the employees could benefit from a holiday accommodation during the period in which they will entrust a child for adoption.

This holiday would have a maximum period of 90 days, time during which the employee will receive a monthly allowance.

I find this holiday accommodation is a case of suspension of the individual labour contract by employee's initiative, which would add to the Labour Code expressly regulated in art. 51[6].

The doctrine stated that „when the legislature uses the expression *of initiative*, it takes into account *by unilateral act*"[7]

Suspension of employment contract provided by the Labour Code, is in reality a suspension of its main effects[8], work performed and pay, which is manifested by a temporary cessation of their translation into life, situation that emerges from the provisions of art. 49 para. 2 of the Labour Code, which expressly provides that the suspension of the individual labour contract has the effect suspending the employee and the payment of the salary by the employer.

In the position previously held by such person, requesting such leave may be assigned another person with fixed-term employment contract.

As mentioned in the literature, legislation ,, does not exclude any category of persons, identified by the nature of the individual employment contract, so that any person entitled to the rights covered by this act ... the employer is unable to assess the appropriateness of the application for leave to the employee. Essential is the employee will to benefit from this vacation and finality of the law requires to be exercised without any intervention by the employer ... he may not need any reason related to the employee's presence at work to delay the request. However, the law does not provide for a term, similar to that notice, in which the employee must inform the employer of their intention to request leave "[9]

Leave accommodation and allowance will be granted on request for people who want to adopt a child, these rights will be established and granted the day following that on which the judgment is enforced custody for adoption.

For this holiday accommodation will benefit adopter or, optionally, either parent of the adoptive family which have income subject to income tax according to Law no. 571/2003 regarding the Fiscal Code[10], by employment and assimilated or, where appropriate, individual employment or agricultural activities can benefit throughout the custody of the child for adoption, by leave of up to 90 days accommodation and allowance reported monthly to the reference social indicator[11], amounting to 6.8 ISR.

Employed person receives compensation instead of salary[12], which is a replacement of income wage, whose calculation basis is determined according to the methodological norms, because we believe that reporting to reference social indicator takes into account the maximum amount of this allowance.

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[6] I.T. Ştefănescu, *Theoretical and practical Treaty of employment law*, Juridical Universe Publishing, Bucharest, 2014 p. 401 et seq.

[7] Raluca Dumitriu, *Reflections on the suspension of the individual employment contract and need rethinking its regulation contained in the Labour Code*, in ,, Law "no. 2/2015, p. 73

[8] Dan Ţop, *Labour Law - Social Security Law*, op. cit., p. 170

[9] Georgeta Daniela Enache, *Discussions on some of the rights of the employee who has received a parental leave*, in Law no. 3/2015, p. 125-126

[10] Published in the Official Gazette of Romania, Part I, no. 927 of 23 December 2003, as amended and subsequent

[11] ISR's value is, according to art. 33/1 of Law. 76/2002, in cunatum 500 lei

[12] Dan Ţop. *Treaty of Labour Law*, Wolters Kluwer Publishing, Bucharest, 2008, p. 276

Applications for leave and allowance, shall be filed and recorded in the County Labour and Social Security in whose jurisdiction is the domicile or residence of the person entitled and shall be accompanied by:

- Certificate of registry under which of enforcement of fostering for adoption;
- Document certifying the child moved to adoptive family;
- Evidence of effective entry into leave or suspension work.

For rights of persons in leave for accommodation will not owe tax or social security contributions, excluding the contribution for health insurance, and this period will be deemed to contribution period to get sick pay for Recovery and obtaining unemployment. Leave period of adjustment will be considered seniority in service and specialty.

People who will have accomodation leave and allowance will not be required for minor entrusted to adoption, parental leave or incentive insertion being a natural application of the rule that no one may receive just a compensation from the budget State where the applicant would have other benefits.

Not approved leave request for accommodation is a failure by the employer to perform his obligations under the law, so that the employee has the opportunity to submit a resignation without notice.

Both leave accommodation and allowance payments cease at the request of the person entitled or the day after that:

- Will celebrate the 90 days of leave;
- Child turns 18;
- The child died;
- The person who was entitled to adopt as a single person died;
- Became final judgment revoking custody for adoption.

At the same time, suspension of the rights above analysed, will take place the day after ordering the placement of the child in emergency[13] or was enforceable judgment revoking custody for adoption.

Employers will be required to pay holiday accommodation, otherwise they will be sanctioned with a fine.

This bill will addto those who, apart from the Labour Code, governing offenses which are usually committed in the execution of employment[14].

However, employers will not be able to dismiss employees who are on leave of accommodation unless this is done for reasons that occur as a result of judicial reorganization, bankruptcy or dissolution.

With respect to employees who wish to make assessments to obtain the certificate and conduct practice match with the child, according to art. 16 and following of Law no. 273/2004, employers are also obliged to give free time, without lowering of wages, up to a maximum of 40 hours per year.

Free time will be granted upon application to which is attached a schedule of meetings with his child or visits program. Employers shall not grant time off will receive a fine.

Thus, as for personal emergencies employees are entitled under Art. 153 para. 1 of Labour code to unpaid leave whose duration is determined by the applicable by collective labour agreement or the internal regulations, they may choose to leave or request such leave is granted by the employer when it is to achieve certain outstanding personal interests.

[13] Alexandru Țiclea, Laura Georgescu, *Social security law*, Juridical Universe Publishing, Bucharest, 2015, p. 344
[14] Alexandru Țiclea, *Labour Law Treaty*., Eighth edition, Universe Publishing Legal, Bucharest, 2014, p.931-984.

We condiser that the employer has the obligation[15] 15 to the employee consented, as it does for the employees called as witnesses in criminal or civil trials, or if pregnant female employees who must go to medical examination.

These changes to the adoption law is achieved not only a flexible procedure to simplify it, but it also provides legal solutions that current adoption system work better for the efficiency of such a special child protection measures.

In this way, internal adoption process will permit not only to the employees but also to other professionals to achieve greater efficiency in the period of adjustment to a declaration of adoption.

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[15] Dan Țop*, Labour Law - Social Security Law,* op. cit., p. 186

FROM AUTHORITY LAW (RATIONE IMPERII) TO REASON LAW (IMPERIO RATIONE). ABOUT THE POSSIBILITY OF A EUROPEAN CIVIL CODE

Rafael SÁNCHEZ DOMINGO*

Abstract: *During the Enlightenment there came the first attempts to introduce rationalism in Law. The Napoleonic Code of 1804 is the result of an important tradition that France offers to Europe, as it firstly refers to the individual and makes all the civil law change around this point. As a matter of fact, Positivism transcended Natural Law. The legal activity is improved and it aims at being codified in the 19th century as a movement based on the existence of a Rational Law.*

Keywords: *Law, Civil, Coding, Rationalism, Unification.*

I. Introduction

After the fall of the Western Roman Empire (AD 476) and the beginning of the Middle Age, Roman law was still practised in the old Roman territory and it had great influence in the law of the invader peoples. The original meaning of the *Ius Civile* turned into the traditional legislation assumed by the first Roman clans, gathered in a political community. It was made of some principles firstly set by the religious jurisprudence and then by the secular one.

During a long period of time, there was no more Right in Rome than the costume, the territorial law, the city rules or even the corporations and trades rules. In terms of law, it was a very particular time. Between the end of the 11th century and the beginning of the 12th, Roman law was assumed, and during the 12th century, the annotators from Bologna studied it through gloss and exegesis, following the scholastic way of syllogisms, distinctions and subdivisions. The Civil law started then to be identified with the Roman law, till the point that the Justinian's code written in the 12th century was called the *Corpus Iuris Civilis.* But the Justinian Code had many public texts which were already out of time and could not be applied to the new politic society. Therefore, annotators were interested in private rules and institutions, starting the idea of the Civil Law as a Private Law. However, the Civil Law was the law of cives (citizens) and as Fernández Domingo says: „*it is obvious that" everything, until the arrival of administrative law -paradigma a public-law called, is, is civil law; Law par excellence, unique from Roman Law"*[1].

García de Enterría explains the meaning of the legal language in the Revolution quoting Fernand Bruno: „*during the Old Regime the language of lawyers was disqualified from the perspective of the noble and elegant language and the founder of the French Academy had imposed on it the duty to purge the language of the impurities of the chicane, the muddled language and garrulous of shysters and lawsuits* „[2]. In 1789, the legal and administrative language was far from being the image of purity or courtesy. It was rather

* Conf. univ. dr. Burgos University

[1] Fernández Domingo, J.I., *Orígenes medievales del Derecho civil. El universo de las formas. Lo jurídico y lo metajurídico*, Colecc. Jurídica General, Madrid 2013, p. 223.

[2] Brunot, F., *Histoire de la langue Française des origins à nos jouus*, t. X. *La Langue classique dns la tourmente*, 2ª parte. París 1968, pp. 864 y ss.

discredited in relation to literary language and censored because of its dark and pain style, plenty of archaisms. These archaisms did not regard only to juridical terms, eliminated by the Revolution when it abrogated the complex system of „privileges", but also to syntactic and lexical constructions. Because of that, and despite the predominance of lawyers in their Assemblies and Committees, revolutionary men wildly rejected this old language[3]. Against this regicide style that abolished the meaning of the new laws plenty of freedom, Mirabeau encouraged to write these new laws in a *„intelligible to put according to the enlightened citizens about their rights, linking them everything that can remind the sensations that have served to bring out freedom"*[4].

However, as P. Cappellini says about the term *„Code"* included in Dictionaries, *„Today is a valuable aid in measuring the root structuring much of the political-legal language that we still familiar and their methods formation and performance. In particular, the remarkable amount of specific words and neologisms that maintain their significant but suffer a total or partial symptomatic change its meaning, shows us directly wide circulation of those words-ideas that often anticipates even provisions in historical and etymological dictionaries"*[5].

The philosophy of the rationalist Natural law proclaimed that a group of laws had to be organized in a simple and rational way, eliminating complexity, and that the wish of the Prince was to ensure everything to enact them[6]. The governors, who were busy controlling territories, mixed the Roman law and the Customary Law and thought of „*"the imposition of a single legal code for all territories a way to unify"* [7]. Therefore, when Frederick the Great became king, decided to have a Code written in German and based on „*the natural reason and people's character*" where „*romano law do so only n would include coincide with those*" [8]. The natural school of Law advocated the formulation of law of a universal character founded in the very nature of man himself. The foundation of its proposal is the person and social ethics, in harmony with nature, even above theological or authoritarian considerations, though when specifying values of a universal character, the experts had to recur to history, so as to analyze which the accepted values were, „*and it is at this turn of history where we delve once more into the study of Roman Law*"[9]. The prevailing positivist current embraced rational and ideal law, which was offered as a new but different „*universum ius*", and as J.A. Alejandre García states" *which manifests itself in written law, that means the positivization of that doctrine, unknown to the prevailing institutions, up until then, which were common law institutions, and opposed to the existence of a natural law of theological inspiration and origin and scholastic method*"[10]. And it is precisely the value attributed to man, as the bearer of reason and the recognised faculty of the legislator, as it is his task to transform that reason into written law, equal for all, which constitutes the

[3] García de Enterría, E.*, La lengua de los derechos. La formación del Derecho Público europeo tras la Revolución Francesa*, Madrid 1995, pp. 34-35.
[4] García de Enterría*,* E., *La lengua de los derechos..,* p. 35.
[5] Cappellini, P., „Códigos", en *El Estado Moderno en Europa. Instituciones y derecho,* (ed. de Fioravanti, M.,), Colección Estructuras y Procesos. Serie Derecho, Roma-Bari, 2002, pp. 103-104.
[6] Stein, P.S., *El Derecho romano en la historia de Europa. Historia de una cultura jurídica,* (Título original de la versión inglesa: *Römisches Recht und Europa. Die Geschichte einer Rechtskultur*), Madrid 2001, p. 153.
[7] *Ibidem,* p. 153.
[8] *Ibidem*, p. 156.
[9] Fernández de Buján, A., *Derecho público romano y recepción del Derecho romano en Europa*, Civitas, Madrid 1999, p. 225.
[10] Alejandre García, J. A., *Temas de Historia del Derecho: Derecho del Constitucionalismo y de la Codificación,* I, Seville 1980, p. 19.

basis of positivism and of a tendency to set down positive law in codification; an ideology that was welcomed in the French School of Exegesis[11].

The pressure towards the unification of law underwent a modern period in time and sunk to the depths of history[12]. This movement of compilation -codification- was not unknown in other realms, since it saw itself drawn into the great intellectual movement of the Enlightenment, but the Napoleonic Code was the achievement of a wish, „*that all customs* [customary law] *be written in French*"[13].

In addition, the Trenta-Ventôse Law of year XII set out the civil laws in one single corpus, under the title of *Civil Code of the French*. Later, the law of 15 September 1807 indicated that „*Napoleonic Code*" should replace the title of „*Civil Code of the French*". The Ordinance of King Louis XVIII, of 30 August 1816, in its new edition, called the statute the Civil Code and finally, in accordance with the decree of 27 March 1852, it was ordered that the Civil Code be entitled the Napoleonic Code[14] once again. Having been appointed First Consul, with all sorts of powers and prerogatives, Bonaparte planned to give France its Civil Code. Four members sat on the commission that composed it: Tronchet, president of the Court of Cassation; Bigot Du Prèmenau, Government Commissary of the Court; Portalis, Government Commissary of the Court of Arrests; and Malleville, a judge of the Court de Cassation[15].

However it must be acknowledged that previously, in the era of the „*solemn declarations*" correction was easy, as the effectiveness of such rights came from one „supra-regulation" of higher merit than ordinary positive Law, natural Law as an abstract assertion; the Constitution or the Solemn Declarations were comparable to it in so far as they brought them together and placed them in one particular national system. This was the case of the French Declaration, which sought to have a supralegal value, that is, of higher value than the ordinary Laws, which elevated it to a limitation on the legislator[16].

With respect to Spain, during the Ancien Regime, the memory of the Romans, of the golden age of the Roman Empire, served to highlight the important beginnings of Spain in the monarchical era, up until Tarquin and Lucretia, the grand imperial expansion, the great architectural works of civil engineering, the famous emperors born on the Peninsula: Trajan and Hadrian[17], although without forgetting Augustus, recognised in the Iberian Peninsula for his political values and his stature as a brave military man. A unique Spanish historian, P. Mariana, reflects his successful military campaigns[18]. Bermejo Cabrero recalls the work of Saavedra Fajardo praising the merits of Augustus in Hispanic historiography[19]. The work of these rulers remains outstanding, especially Trajan, in his activities in the field of administration of justice.

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[11] *Ibidem*, p. 20.
[12] Cappellini, P., „Códigos...," p. 106.
[13] Cappellini, P., „Códigos...," pp. 106-107, refers to COMMINNES, Ph., *Mémoires de Philippe de Comminnes*, in Laurent, F., *Principi di diritto civile*, translation by G. Trono, Napoli 1879, vol. I, p. 8.
[14] Vid. *Code Civil*, París, Petit Cods Dalloz 1954.
[15] Planiol, M., *Traité èlementaire de droit civil*, 5th ed., París 1908, t. I, p. 27. *Cit.* MONROY LÓPEZ, J. de , „El Código Civil de Napoleón y los Derecho Humanos", in *Revista de Derecho Privado*, new era, year V, no. 13-14 (2006), p. 91.
[16] García de Enterría, E., *La lengua de los derechos…,* p. 77.
[17] Bermejo Cabrero, J. L., *De Roma Antigua a los inicios del Constitucionalismo*, U.C.M. Madrid, 2014, p. 209.
[18] Mariana, J. de, *Historia General de España*, BAE, t. XXX, Madrid 1950, pp. 87-88. Cit. BERMEJO CABRERO, J.L., *De Roma Antigua...,* p. 210.
[19] Saavedra Fajardo, D., *Idea de un Príncipe político-cristiano representada en cien empresas*, vol. III, Madrid, 1958, pp. 93 and ff.

It was in 1812 that the beginnings of Constitutional government were brought about in Spain and the same author refers to „*the preliminary Passage of the Constitution of 1812* [which] *allows no doubt, there is nothing in the text beyond historical tradition translated into its fundamental laws*"[20]. The constitution under discussion followed the dictates of the primitive historic constitution with the necessary changes for its use in practice, „*hence, it is not surprising that, in the broad deployment of arguments in favour of and against the establishment of the constitutional regime, historical ideas from long ago would be used with Romans and Goths as the initial points of reference*"[21]. For Bermejo Cabrero, if Roman tradition is kept in mind, various levels of consideration may be distinguished, such as the passages and references of writers that that can serve to illustrate or to lend theoretical support to the reasoning upheld in the speeches of the *Cortes* [Spanish lower chamber] or its published papers. For example, Cicero is quoted, through his works *De republica*, *De legibus* or his *Discursos forenses*, as well as Roman historians, such as Tacitus, Titus Livius, etc [22]. Even the political axioms of a constitutional slant became a means of maintaining Roman legal culture in the Hispanic constitutional imaginary, such as for example „*Salus populi, suprema lex esto*", already known in the time of Cicero[23]. The linguistic perspective of Philosophy has founded interesting theories in the field of the social sciences in which the Law is developed, thus for example, the theories of the discourse of truth as a guarantee in the context of deliberative democracy[24]. Since then, there have been proposals to modernize legal language, that cannot do without the weight of dogmatics and tradition in the preparation of legal culture, „*since without reflecting those* [dogmatics and tradition] *it is impossible to justify this* [legal culture]"[25]. The jurists knew that the definition of the principles of natural law should revolve around notions that are more concrete than the subjectivism of philosophical treatises, which led them to re-enunciate Roman principles[26].

II. The influence of European Civil Law

The authors of the Code Civil, written in 1804, combined a sense of balance and clarity of expression, while the radical turbulence of the Revolution was progressively dying down.

The first attempts to introduce rationalism in the field of law are attributed to Domat, in France, a lawyer of civil law of the second half of the 17th century[27]. He placed the elements of Private Law contained in the Codex Justinianus in rational order, as this author noted pre-Christian notions in Roman Law, „*the consequence of a civilization in decline and deserving to be abandoned, together with other concepts that were entirely reasonable and constitutive of written reason in legal matters*"[28]. With this author, the Romanesque

[20] Argüelles, A. de, *Discurso preliminar a la Constitución de 1812*, Madrid 1981, Centro de Estudios Constitucionales, p. 67. Cit. Bermejo Cabrero, J.L., *De Roma Antigua...,* p. 239.
[21] Bermejo Cabrero, J.L., *De Roma Antigua...,* p. 243.
[22] *Ibidem*, p. 243.
[23] La salud del pueblo es la ley suprema. *Ibidem*, p. 244. Cfr. CASTRO SÁENZ, A., *Cicerón y la jurisprudencia romana. Un estudio de historia jurídica*, Tirant, monografías, nº 723, Valencia 2010.
[24] Alañón Olmedo, F., Henríquez Salido, M. do C., Otero Seivane, J., *El latín en la jurisprudencia actua*l. Prologue by Xiol Ríos, A., Aranzadi, Navarra 2001, In the prologue, Xiol Ríos quotes Habermans, Apel on the theory of guaranteeing discourse, he quotes Austin on the theory of language acts and Gadamer hermeneutics, p. 21.
[25] Alañón Olmedo, F., Henríquez Salido, M. do C., Otero Seivane, J., *El latín*..., p. 23.
[26] Cannata, C.A., *Historia de la ciencia jurídica europea*, (trad. Laura Gutiérrez-Massón), Tecnos, Madrid 1996, p. 178.
[27] Domat, *Les loix civiles Dans leur ordre natural*. Paris 1689.
[28] Tomás Y Valiente, F., *Manual de Historia del Derecho Español*, Madrid 1990, p. 479.

tradition underwent a first rational purge. As of that moment, casuistic law, the analytical doctrine of jurists, would be respectful towards the authorities. The intention was to offer a legal system characterized by its rationality, disassociated from religious connotations and that integrates the person at the centre of legal regulation. Such an idea is consubstantial with humanism in forming the *ius commune*, which would serve as a bridge to the rationalist iusnaturalism and would be the basis and the premise of the new orders[29].

The code from the early 19th century incorporates and is the result of a magnificent tradition that is evident in France in five impressive philosophical meditations: the first emerged following the invasion of the Gauls by the Roman Empire and because of the influence of the Stoic philosopher Marcus Aurelius; the West's most ancient Christian philosophy, that is, the theology and theological teachings of Saint Hilary of Poitiers, which cover Stoicism, considering it, in itself, a pagan expression of Christianity; the second constitutes the maximum splendour of Père Abelard and Héloïse and their translations in renaissance humanism along with Michel de Montaigne; the third stage was formulated through the modern philosophy of René Descartes and the philosophical equilibrium of Blas Pascal; the fourth period situated itself in the proclamation of human rights of the Enlightenment; finally, the Napoleonic Code and its additions of 26 June 1889, 17 July 1970, and the contemporary ones of 29 July 1994 constitute the fifth period[30.]

It so happens that reference in the first place to the person means civil law revolve around this concept, which was described by Marcus Aurelius, in such a way as to link the person with society. One of the meditations included in Book V is the following: 14. „*That which doth not hurt the city itself; cannot hurt any citizen. This rule thou must remember to apply and make use of upon every conceit and apprehension of wrong. If the whole city be not hurt by this, neither am I certainly*".

Hence, it can be said that when the Napoleonic Code was drafted, these meditations were more than understood in the 'Coûtumes d'Orléans'. However, „*the broad meaning of code, in the sense of a compilation of law that integrates texts, norms, sources, etc, can be indistinctly attributed to works that are profoundly different between each other and that the code was therefore a word that had yet to be completely done*"[31.] Let us not forgot that the 18th century implies a change in the study of Law, at a time at which the transition from the modern to the contemporary era took place, as a consequence, among other factors, of the triumph of the American and the French Revolutions. The concept of the person changes as P. Duran states „*the classical definition of the person as individual substance of national nature, which refers to a philosophical and metaphysical approach to the person as a creature, is substituted by a consideration of the person in rationalist categories, which appear incompatible with dependency. The person is conceived of as an autonomous and rational being, who would lose the condition of creature, in so far as his rationality is underscored*"[32]. Hence, it was possible to lay the foundations of a system that accepted that all people are equal and have the same rights, from which it may be assumed that the

[29] Durán Y Lalaguna, P., „La génesis de la codificación en Francia. Sobre la escuela de la exégesis", in *El Ius Commune y la formación de las instituciones de Derecho Público*, (Coord. Alejandro González-Varas Ibáñez), Tirant Monografías, nº 795, Valencia 2012, p. 245. Cfr. Sánchez DOMINGO, R., *El Derecho común en Castilla. Comentario a la Lex Gallus de Alonso de Cartagena*, Colecc. Fuentes de Historia del Derecho castellano, nº 1, Burgos 2002, pp. 191-219.

[30] Monroy López, J. de J., „El Código Civil de Napoleón…", p. 82.

[31] Cappellini, P., „Códigos...", p. 107, note 10. This author states in a well-cited article that Petronio, U., „Una categoría storiografica da rivedere", in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 13 (1984), p. 705-717, warned of the tensions it described, due to its clarity and simplicity, rather than from the word „*Code*", in the word „*Code fréderic*".

[32] Durán Y Lalaguna, P., „La génesis de la codificación...", p. 244.

change in the conceptualization of the person entails a change in the conceptualization of the institutions and rights, which is transformed into a change in the organization of society, „*that moves from an arrangement in accordance with trades associations and social strata to organization around the State, which initially opted for the liberal arguments of the 18th century, to apply afterwards the lessons of the industrial revolution and later on of social demands*"[33]. As C.A. Cannata affirms, „*the theory of the law of reason is the form that the doctrine of natural law assumed in the 17th century and in the Enlightenment, the 18th century, and which postulated the existence of a social ethic in accordance with nature and which is converted into a law -natural law- that enters into conflict with positive law*"[34]. At this time, legislative activity was valued and the aspirations towards codification claimed elements common to different conceptualizations of the law of reason, because the conviction was cherished of the existence of a rational law complying with nature and dedicated to the happiness of mankind and it justified the efforts initiated to discover it, in the same way as fixing its content and promulgating it as valid law[35].

Throughout most of the 18th century, ministers, philosophers and some educated men sought to improve the type of social organization that was in existence, maintaining its fundamental principles, with the aim of achieving a rationalized and progressive social strata and an appropriate Law for that purpose. To do so, they felt that it should be rational, impartial and should emanate from sovereign authority, the absolute monarch[36]. The Law, in order to be rational, had to navigate along the channels that the most educated minds would counsel from the superiority of their knowledge. The Law had to be uniform in so far as it would refer to its territorial validity, although legal differences were respected between people due to their belonging to different social strata. Likewise, it was held as indisputable dogma that all rules created „*ex novo"* had to be promulgated by the sovereign; the way of doing so had to consist in surrounding oneself by good ministers and advisers, by educated and efficient men. However, only the will of the sovereign was capable of transforming the opinion proposed by a minister or the consensus of the Council into an imperative regulation. However, Tomas y Valiente affirmed that „*the Law created during the 18th century was on more than one occasion of doubtful rationale. It did not always have uniform validity in all of Spain and, although it was always promulgated in the name of the king, he did not intervene in the preparation of many norms*". However a problem emerged, which was that the Law that was drafted tended to be in accordance with the model outlined by philosophers and enlightened ministers.

Hence, Codification sought to place the rights of man above autocratic and absolute behaviour. The „*secularization of legislation*" became necessary, which involved a change in the heritage of the axiological scale that up until then had been taking place, without which all attempts at introducing an institutional code were destined to remain on the wayside, since „*when diversity reigns in the spirits, so too does it reign in laws*"[37] and in the same way as law is an expression of society, legislative secularization was considered the cornerstone for the new code, because the improvement of the Ancien Regime, despite the all-embracing power of the monarchs, was a regime of differences[38].

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[33] *Ibidem*, p. 244. The author in footnote. 8, cites the work of DÍAZ. E., *Estado de Derecho y sociedad democrática*, Taurus, Madrid 1981.
[34] Cannata, C.A., *Historia de la ciencia...,* p. 173.
[35] *Ibidem*, p. 176.
[36] Tomás Y Valiente, F., *Manual de Historia del Derecho Español*, Madrid 1990, p. 384.
[37] Cappellini, P., „Códigos...", p. 115.
[38] *Ibidem*, p. 116.

III. Foundations of European Law

As Torrent Ruiz affirmed, „*this community of legal principles, to which the founding Treaties appeal, appear to impact on a recurrent movement in the history of European jurisprudence, which is rediscovered in Roman law and the Romanesque tradition*[39]*, demanding a new mode of study of historical-juridical subject matter and especially Roman law, which on the basis of the codes had been reduced to an essentially historic function, prior to learning, and in a certain way ancillary with regard to other matters (particularly civil law)*"[40]. Nevertheless, no one denied the profound Romanesque roots of the grand European codes, which were presented as an end product, and superior to the *ratio scripta*[41], a Law of reason reformulated by the European Legal Science of the 18th and 19th Centuries, midway between *ius naturale* and pandectics. No one did so, because the grand modern codes of the Central and Western European states, positioned within the tendency towards legal rationalism, would emerge as a product of the union of Natural Law and political planning of the Enlightenment, as a means of achieving in the ultimate instance, a society that would coexist through peaceful means, thanks to rational and ideological organisation. But the fact must not be eluded that the constitutional value of the Napoleonic Code came to surpass the value, even of the European constitutions currently in force. This took place within a political framework that tended to exalt the authentic sense of common law, as well as magnifying the transcendence of agreements between the monarch and the political representatives of the people, while corroborating the absence of normativity in the constitutional text, admitting that the supremacy of the civil code was essentially born because „*in it and only in it did the social and economic relations organised around the key value of property find a foundation*"[42].

As professor A. Masferrer stated, the French influence in the Spanish codifying movement is undoubtable and to that end three fields may be distinguished: „*1) the inspiration from the same modern idea of the Code, a field in which the French Codes enjoyed an undeniable authority up until the mid-19th century; 2) inspiration of a structural type that could be followed in greater or lesser measure by other European Codes, among them the Spanish Code; and, 3) the strictly substantial influence, which permits the discovery of the extent to which the notions, principles and institutions of the Spanish Codes were inspired by those of the French model*"[43]. The author goes on to question whether these fields constituted an autochthonous legacy or whether they were the result of the evolution of some institutions deriving from the *ius commune*, of a supranational scope, valid and integrating the *iura propia* of diverse European territories[44].

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[39] Crifó, G., „Prospecttive romanistiche per l'Europa unita", in Michel, J., *Droit Romaní et identité européenne*, Brussels 1994, pp. 125 and ff. Torrent Ruiz, A., „Fundamentos del Derecho europeo (Derecho romano-ciencia del Derecho-Derecho europeo)", in *AFDUC*, 11 (2007), p. 947.

[40] Torrent Ruiz, A., „Fundamentos del Derecho….", p. 947.

[41] Casavola, F., „Diritto romano e diritto europeo", in *Labeo* 90 (1994), p. 163. *Cit.* Torrent Ruiz, A., „Fundamentos del Derecho….", p. 947.

[42] Rodotâ, S., „Un codice per la Europa? Diritti nazionali, diritto europeo, diritto global", in *Codici. Una reflessiones di fine milenio. Atti del Convegno internazionale*, Florence, 26-28 October 2000 (P. Capellani and B. Sordi Eds.), Milano 2002, pp. 13-68.

[43] Masferrer, A., „La Codificación española y sus influencias extranjeras. Una revisión al alcance del influjo francés", in *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular*, (Aniceto Masferrer, ed.), Thomson Reuters Aranzadi, Navarra 2014, p. 37.

[44] Masferrer, A., „La Codificación española...", p. 37. Cfr.Masferrer, A., „The Napoleonic Code pénal and the Codification of Criminal Law in Spain" in, *Le Code penal. Les metamorphoses d´un modèle 1810-1820. Actes du colloque international Lille/Gand*, 16-18 December 2012. Texts compiled and presented by Aboucava Ch., and Martinage, R., Centre d'Histoire Judiciaire, 2012, pp. 65-98.

The publication of the codes, in fact, implied a nationalization of the internal rights of each country, adding regulations derived from a multi-secular legal experience, plus the particular nationalist stamps of all kinds: legal, political, cultural, ideological[45], etc. Soemthing that appears clear in the Spanish Civil Code of 1889, which inspired in the French Code, that was born under the tutelage of political laws, meant a consolidation of traditional Castilian law. This text was heavily criticized from the perspective of its legal technique, because of its imperfect system, as it was not a code written by technocrats, but rather by practitioners and working lawyers, who knew how to write them with a technique that was simple and accessible to all. In Spain, the Civil Code was not brought to fruition with the role of symbol, myth, and a means of comprehending the law. There is no doubt that our Civil Code came to instil a certain order in the earlier legislative confusion, even though it could not overcome the essential goal of codification that aspired to bring legislative unity to the nation. Yet, if it was unable to satisfy the technical and the systematic demands that is writers might have expected, it undoubtedly meant great progress in Spanish legal life. It must not be forgotten that the Justinian *Corpus iuris civilis* is a constitutive element of the linguistic, expressive and argumentative patrimony of European legal culture and after two centuries of codes „*that have come to such a point of exhaustion, even the actual idea of codification is questioned and the unifying aspiration of the EU obliges us to propose an adaptation of the teaching of all legal matters to these new approaches*"[46].

Our Civil Code is the main heir of a legal dogma that was transferred from common law to modern law precisely through codified texts and its articles embody dogmas, figures, techniques and concepts, the fruits of tradition and of the doctrine that constitute the common *acquis* of jurists. To that end, the abandonment of the code would mean the deterioration of that body of knowledge, essential for the harmonious development of private law and even law in general, which could really happen with the decline of the codification of private law.

What is clear is that positive law born of the codes suffered the risk of subsumption into pure pragmatism that went so far as proposing, as from World War II, the convenience of having no codes at all. But behind this conflict, privacy, for example, was enshrined in article 9 of the French Civil Code: „*everyone has the right to respect for his private life"* and based on this privacy, the French Court of Cassation drafted principles and listed the rights to image and the types of protection.

But above all, and as an epilogue, a reflection must be made on the foundation of what European legal culture has meant and to do so a „*historical reconstruction*" is needed. The jurist must be considered as a man of science, a solid humanist, aware of what there may be in this project in terms of separation of empiricism as against a globalized world, which is what is observed at present in the different national legal orders, which implies an added difficulty to arrive at the intended homogenization and finally the unification of European law[47]. Although we arrive at the paradox of the modern pro-European approaches, that in the face of the slightly open code-based system, the function of which seems close to ending, there exists an aspiration, on the part of a large group to return to an open system that will surpass the prevailing perspective of the 19th and a large part of the 20th centuries,

[45] Cfr. Tarello, G., *Le ideologie della codificazione del secolo XVII*, I, Genova 1967.
[46] Montaban, D., „El Derecho romano después de Europa. La historia jurídica para la formación del jurista y ciudadano europeo", in *Cuadernos del Instituto Antonio de Nebrija*, 9 (2006), p. 365.
[47] Torrent Ruiz, A., *Fundamentos del Derecho Europeo. Ciencia del derecho: derecho romano-ius commune-derecho europeo*, Madrid 2007, p. 132.

that nothing exists on the fringes of the law and that this factor is all that needs be taken into account to rationalize social facts and resolution of conflicts[48]. To that end, it is reaffirmed that Roman Law be constituted as a useful tool for criticizing positive law and even community regulations, and not only useful for their criticism, but also for contributing to their preparation and planning, setting out from the presumed common principles of European legal science.

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[48] *Ibidem,* p. 60.

ROMANIAN CONTIBUTIONS TO THE CODIFICATION OF INTERNATIONAL LAW

Ion M. ANGHEL*

Summary: *Codification is being performed by way of conventions which are adopted and ultimately ratified by states – the sole originators of juridical norms (since contemporary international law is a law of coordination and not of subordination). Conventions are concludedat international conferences on codification or occasionally, in the framework of the U.N. General Assembly or similar fora (in its specialized agencies), but also by way of General Assembly or Security Council resolutions and declarations. The International Law Commission plays an extremely special role in codificationwhen it takes place under U.N. auspices (as a result of the studies it undertakes and following the debates both in the Commission – which has a special Raporteur - as well as during the discussions in the General Assembly Sixth Committee (Legal) - where all U.N. Member States attend, when the decision is taken to have a conference of plenipotenciaries convened, a situation in which the text it elaborates becomes the basic text of the Conference)*

Keywords: *Codification, The International Law Commission, Member States*

A. Preliminary remarks

As a term, ***codification***[1] consists of a systematic conversion of the existing rules of customary law into a set of written rules[2]**;** it represents more than a mere merger of rules and of transposing customary law into a single written document, a treaty -as long as codification in our era is conceived as an instrument to ascertain the existing rules of law (in the form of a collective convention subject to collective ratification by States)[3]**–** which has, at the same time, though, an aspect of novelty, of a progressive development of law (by defining new rules of law). Regarded as a source of law (a way to form it)[4], ***codification*** aimsmainly at a case of *lege lata,* while the progressive development aims at a case of *lege ferenda*[5].Notwithstanding the definition the **International Law Commission**gave, in Article 15 of its **Statute,** to ***codification of international law*** and ***progressive development of law*** as two separate expressions**,**we do not contemplate, though,a distinction based on the criterion of the already existing or of nonexisting certain rules of international law as relevant, for the good reason that codificationimplies also, imperatively a systematization of the existing rules, so as to have their progressive development as an effect; codification does not constitute the work of history (of setting rules into archives), but an act of regulation, namely, one which cannot be torn away from the context it occurrsin – therefore, of bringing something new.The two operations – systematization and creating

* Univ. Prof. Dr. Ion M. Anghel, honorary member of the Academy of Romanian Scientists

[1] Georg Schwarzenberg, *A Manual of International Law,* fifth edition, London, 1997, pp. 99, 102, 267 -268, 382-385 and 611-612

[2] Ch.Rousseau, *Droit international public,* 3eme ed. Dalloz, 1965, p.84; Ch.de Visscher, *La codification du droit international,* Rec. Des Cours, 1925, pp. 329-455; Shabtai Rosenne, *Codification of International Law,* Encyclopedia of International Law, volume one, North-Holland, 1992, p.633

[3] L. Diebez, *Les principes generaux de droit international public,* troisieme edition, 1964, p.59

[4] E. McWhinney, *Les Nations Unies et la formation du droit,* Pedone / UNESCO, 1986

[5] Shabtai Rosenne, *op.cit.* pp. 632 -633

new rules - go together (*uno acto*); anyhow, the rules instituted through codification should be joined up to the evolution of society and of the existing rule of law[6]**,**which has been created in the course of time. No matter whether codifications preexisted or not, the rules in the codification convention are inscribed-consacrated together and constitute rules of law of the same value and equally mandatory for States. Therefore, codification should not be confused withcumpolsory transcription (even in its more accurate and coherent form) – what they call ***restatement.*** This is the meaning the „codification" concept has – to elaborate normes, and in case they already exist, to systematize and update them, that is to make them valid and viable;otherwise, there would be no need for codification[7]**;** it is obviously a useful endeavour which takes place in the context of systematization and correlation of itsrules, whereas a codification short ofbringing regulations to the present day and of according them with current requirements would be senseless.

Codification is being performed by way of conventions which are adopted and ultimately ratified by states – the sole originators of juridical norms (since contemporary international law is a law of ***coordination***and not of ***subordination***)[8]**.** Conventions are concludedat international conferences on codification or occasionally, in the framework of the U.N. General Assembly or similar fora (in its specialized agencies), but also by way of General Assembly or Security Council resolutions and declarations[9]**.** The ***International Law Commission***plays an extremely special role in codificationwhen it takes place under U.N. auspices (as a result of the studies it undertakes and following the debatesboth in the Commission – which has a special Raporteur - as well as during the discussions in the General Assembly Sixth Committee (Legal)- where all U.N. Member States attend, when the decision is taken to have a conference of plenipotenciaries convened, a situation in which the text it elaborates becomes the basic text of the Conference) [10]**.**

The act of codifying international law represents a real contribution to consolidating international legal order. It has gained the dimentionsof a far-reaching activity with no precedent. It has done so through the area of the fields it has approached and the large attendance of States to such instruments, as well as through the authority of the promoters of the actition and the value of the adopted norms and the guarantee of their application.

There is no doubt that codification constitutes an imperative and not a mere option.It marks an action of an acute current interest, and not of one of perspective, an impact which determines the evolution of international law and in the last analysis, ensures its perennial existence; there occur also a development and perfection of international regulations; there is a restriction of the areas where the international customary law still applies (the sphere of customary law narrows continuously as codification makes progress).The „codifying" effect of certain unilateral legal acts adopted in various international organizations (U.N. General Assembly declarations of principle) is fulfilled through their application by all

[6] Re. Importance of progressive development and of codifying international law, see Dumitra Popescu, *Reflectii asupra sistemului normativ international in contextul codificarii,* in the volume *Stiinta si codificare in Romania* (contribution to the scientific session of the Juridical Research Institute, 2012, pp. 332 -333)

[7] Ion M. Anghel, *Codificarea si impactul acesteia asupra dreptului international contemporan,* in the volume *Stiinta si Codificare in Romania,* (contribution to the scientific session of the Juridical Research Institute, 2012), Universul Juridic, pp. 340-341;also, Felicia Maxim, *Codificarea in dreptul international – evolutie si efecte,* in the above mentioned volume

[8] States are both the authors of the rules of law (they decide whether rules of law should be instituted, and which such rules should specifically be), and their recipients, at the same time

[9] E.McWhinney , *op. cit.* pp. 101-109; Ion M. Anghel, *op. cit.* p 341

[10] On the factors participating in codification, see Ion M. Anghel, *op. cit.* pp 342-344; on the organs involved in codification, see Felicia Maxim, op.cit. pp. 390-392; on codification juridical techniques, methods and processes, see Dumitru Popescu, op.cit. pp. 333 -337

states. Therefore, ***common law*** ceases to be the ***international customary law, the codified law*** (written as *lex lata*)becomes the common law in the field. That is why there iseven talk of a customary law crisis.

The act of codification has multiple implications[11]**.** It has become apredilection for the creation, confirmation and modernization of the rules of international law, and being replaced the common law it ceases to be constituted of the customary law and the codified law, and becomes a general rule, with the priority shifting to the treaty[12].

The palette of fields codified until nowis a very large one: diplomatic and consular relations (through the four codification conventions – 1961, 1963, 1969 and 1975); law of treaties (1969 and 1986); the law of the sea; succession of States in respect of treaties and the one related to state property, archives and debts; states judicial immunity; the utilization of international rivers for other purposes than navigation; Rome Statute of the International Criminal Court; drafting of the Nuremberg principles and others[13].

B. Romanian contibutions to the codification of international law

Beingvitaly interested in maintaining international legal order and affirming international law, Romania has made herself known as a State which traditionally belongs to the promoters of international law, its codification included. The illustrious Romanian diplomats *Nicolae Titulescu* and *Vespasian Pella* have done a pioneer work in the field during their time. As well known, *Nicolae Titulescu,* as President of the League of NationsAssembly (twice), coordonated the codification performed by the League, and on March 11, 1930 he was appointed head of the Romanian delegation that attended the Conference on the Codification of International Law (the Hague); *Vespasian Pella,* in his turn, wasacknowledged as a pathfinder in the history of law: he took the initiative tohave the international criminal law codified; he was the artisan of setting the international criminal justice in order and the precursor of the thesis onStates liability (*La criminalite collective des Etats et le droit penal de l'avenir)*; he submitted documents dealing with the issue of aggression as a raporteur ("the war of aggression is a crime"), repressed terrorism as a participant in the Washington Conference of 1925, and put forward his ideas to the League of Nations and in his writings (*The Fundamental Principles of a Repressive Code of Nations)*; his progressive ideas and thinking have gained momentum in what would be accomplished when the U.N. was created.

During the second half of the 20th century, Romania was represented in the codification conferences by delegates sent from home or by experts with the diplomatic missions in the countries the respective meetings were held. In a number of situations, the specialists sent from home were jurists in the Ministry of Foreign Affairs, while in other cases, they were legal advisers from other entities. At the preliminary stages of conferences, Romania was a member of the **International Law Commission,** to which she submitted observations and suggestions, took part in the General Assembly (SixthCommittee) debates, and put forth data, points of view and solutions based on her experience in the matter under consideration.

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[11] Luigi Condorelli, La Coutume, in vol. *Droit international (Bilan et perspectives)*, red. General Mohammed Bedjaoumi, Ed. Pedone, Paris, 1991 plays a key role in determining their evolution.

[12] Re. implications of codification, see Ion .M. Anghel, op.cit. pp.345 – 351, *Dreptul diplomatic consular,* vol. 1, rev. ed., Lumina Lex, Bucuresti 2002, pp.698 – 706 and *Dreptul tratatelor*, vol 1, rev.ed. Lumina Lex, Bucuresti 2000, pp. 128-135

[13] Re. hierarchy of legal norms, see E. McWhinney, op.cit. pp 58 - 100

With regard to the manner in which Romania conceived codification and the importance granted to this segment of her foreign policy, one ought to mention the maturity and seriousness with which the representation in the conferences was aproached, the attention given to their sound preparation, and the delegates' mandate which was approved at the highest level – the president of Romania; the preparation was highly rigorous and responsible; the delegation was made up of the best and most experiencedexperts Romania had; there were succesive reports on the works of the conference submitted to the leadership of the country, and there were final reports and analyses regarding the positive activities of our delegates who commendably represented Romania to codification conferences; : *dr. Edwin Glaser, dr. Ion Diaconu, dr. Dumitru Mazilu, Gheorghe Saulescu, dr. Ioan Voicu, dr. Iftenie Pop, dr. Aurel Cristescu, dr. Aurel Preda, Ion Edu and the author of these remarks and other experts from the Ministry of Foreign Affairs,* as well as*prof. Victor Duculescu, dr. Alexandru Bolintineanu* and others.Sometimes, the Romanian ambassador accredited to the respective country was appointed head of the delegation, and Romania occupied several timesthe position of vice president of the codification Conference.

The existing documentation attests the fact that Romania took part in the consideration and adoption of all codification conventions; among them, one should specifically remind *the Convention on Diplomatic Relations (1961), the Convention on Consular Relations (1963), the Convention on Special Missions (1969), the Convention on the Representation of States in their Relations with International Organizations (1975), the Convention on the Law of Treaties (1969* and *1986), the Rome Statute of the International Criminal Court,Conventions on the Law of the Sea (1958* and *1982), the Convention on Succession of States in Respect of Treaties (1978), the Convention on Succession of States in Respect of State Property, Archives and Debts (1983), the Convention on States Judicial Immunity, the Convention on the Utilization of International Rivers for Other Purposes than Navigation.*

Romania is a party in the majority of these conventions and has ratified most of them; on the occasion of their adoption or ratification or when she acceded to them, Romania put forward, as the case may be, statements (re. the principle of universality of participation in international conferences and international treaties, the colonial clause) or reservations (regarding the compulsory jurisdiction of the International Court of Justice).

- For lack of sufficient documentations, I do not contemplate a comprehensive presentation of all these participations; the remarks I am going to make will therefore be of an exemplary nature (*exempli gratia).* In the documents of the codification Conferences I have consulted,I have come across, though, some of the amendments introduced by Romania (to the Convention on the law of treaties, the Convention on diplomatic relations and the one on consular relations), as well as the points raisedby our conationals (*Aurel Preda, Victor Duculescu, Gheorghe Saulescu*). At the meetings, our representatives distinguished themselves,by an active participation in the debates, by their statements during the deliberations, and by the amendments they put forth.

- Personally, I made my contribution to the preparation at the Ministry of Foreign Affairs of our participation and took part in the Conferences on codification of*diplomatic law (1961)*and *consular law (1963)*andof *the law of treaties between states and international organizations or between international organizations themselves (1986) in Vienna.* I attended the last one as a member of the U.N. delegation for Namibia, yet, I made sure that Romania wasrepresented in the Conference, unofficially though, through my addresses in the plenary meetings .

C. The most significant contributions to these participations will be offered as follows:

a) Vienna Convention on Diplomatic Relations

In the framework of *the plenipotentiaries meeting*whichtook place in Vienna, between March 2 and April 4 1961[14], the Convention on diplomatic relations was adopted on April 18, 1961[15]. The codification took account of the rules of bilateral diplomacy – the classical traditional law, without replacing the entire diplomatic law; nevertheless,its importance lies in the fact that the provisions of the Convention were taken as a starting point, for the codification of the other forms of diplomacy (diplomacy through special missions and diplomacy practiced within and by international organizations); it represents the most important display of international law codification and opens a codification process –which was to mark an unprecedented development of international law.

- While we are assessing the ***Convention,*** we shall point out the fact that the task of the convention was to codify the oldest norms of international law, under the conditions of some confrontationsat the time (the Cold War, Est – West and North – South contradictions, the lack ofa unitary practice etc). It succeeded. Thus, it built up conditions for other fields of international representation to be approached (*ad-hoc* diplomacy, through special missions, consular relations etc), which were subsequently codified[16].

The Conference also adopted: the Optional Protocol concerning acquisition of nationality

- and the Optional Protocol concerning the compulsory jurisdiction of the International Court of Justice;the first protocol was signed by 52 States, and the second one by 67 States; Romania signed neither. There were tens of revervations and declarations put forth on the occasion of the ratification of / accession to the ***Convention*** and ***Protocols*** ; Romania made a statement regarding Article 48 and Article 50 of the Convention. All States of the world are nowadays parties to the Convention. Romania ratified the Convention by Decree No. 566/1968. A number of 34 States presented reservations to the text or declaration.

Romania was represented at the Conference by a plenipotentiary delegation headed by the Romanian ambassador in Vienna; univ.prof.dr. Edwin Glaser, a couselor with the Ministry of Foreign Affairs, was a member of the delegation and took an effective part in the debates; Romania's representatives had previously participated in drafting the text within the U.N. General Assembly (the Sixth Committee).

- Romania's position at the Conference was common to the position of the other socialist countries at the time; using sound arguments, Romania's representatives expressed her position actively. In principle, the Romanian delegation endorsed the regulations in the draft the ***International Law Commission*** had drawn up and insisted that it should serve as a basic text for the debates in the Conference, since its solutions were convenient.

Attention is held by the ***amendments*** that were submitted and the ***positions*** that were supported with regard to the ***universal character***of the international law codification

[14] It was convened in conformity with the December 7, 1959 resolution of the U.N. General Assembly and was hosted by Austria

[15] The convention consists of a preambul, the stipulations related to diplomatic relations (the way diplomatic relations are established, diplomatic mission functions, ranks of chiefs of mission and their staff), privileges and immunities of the members of diplomatic missions and final clauses.

[16] For a general presentation of the Convention provisions, see Ion M. Anghel, *Dreptul diplomatic si dreptul consular,* Universul Juridic, Bucuresti, 2011, pp. 35 - 316

activities. Romania put forward a declaration with respect to Article 48 and Article 50 regarding the non-observance of the **principle of universality of participation in the Conference;**proposedthat the „promotion of friendly relations" be included among thediplomatic missions functions and supported the thesis of **unconditional recognition of the right of diplomatic missions to practice consular functions**. Romania also endorsed an amendment concerning States recognition of the **right to legation** (*ius legationis),* which would state that the differences of social, legal and constitutional regime should not constitute an obstacle in establishing diplomatic relations (at a time when this country was beginning to emerge from the isolation the West was promoting). As far as the issue of **the size of the diplomatic mission staff**is concerned, the Romanian delegate insisted that the problem be solved through negociations between the two States (in contrast with diametrically opposed positions – some delegations were in favour of putting down the right of the sending state to set up the size of the mission staff, while others categorically opposed, endorsing the right of the receiving State to decide upon the size). Again, Romania supported an as consistent **statute of privileges and immunities** as possible (especially in connection withthe inviolability of diplomatic missions premises), opposed to including exceptions to such rule and did not accept the compulsory jurisdiction of the ICJ. The documents of the Conference certify Romania's relevant participation, if one takes into account her situation at that time, when she was making her first more visible moves onto the international arena.

b) The U.N. Conference on consular relations was heldin Vienna (New-Hofburg), on March 22, 1963[17]**,** and the text of the ***Vienna Convention on Consular Relations***[18]**[2]** was adopted on April 22, 1963.; the basic text for discussions was the draft drawn up by the **International Law Commission.** The Convention also adopted *the Optional Protocol Concerning Acquisition of Nationality, the Optional Protocol Concerning the Compulsory Settlement of Disputes, the* ***Final Act***and three resolutions annexed to it.

The Conference was attended by plenipotentiary representatives of ninety-five states; the Conference elected *Stefan Verosta* (an Austrian) as its president; Romania was one of the 18 States elected as vice presidents. The proceedings of the Conference took place within the two constituted commisions (Commission I for consular relations and final clauses and Commission II for the status of consular privileges and immunities) and the Plenary meeting, where the text of the Convention was adopted.

The Convention was signed by forty-nine States; but following ratifications and accessions, 170 states became parties to the Convention. The Convention entered into force on March 19, 1967.

The variety and complexity of consular functions, the implications of international regulations upon national legislations, as well as the large number of consular offices in one

[17] It was convened through resolutions 1685 (XVI), of December 18, 1961 and 1813 (XVII) of December 18, 1962 of the U.N. General Assembly

[18] The Convention consists of a *preamble;* then comes thearticle providing the meanings assigned to the expressions in the document. *Chapter I* deals with the rules regarding consular relations, consular functions, the consular commission, the exequatur etc. *Chapter II* provides for facilities, privileges and immunities relating to consular posts, career consular officers and other members of the consular post. The regime related to honorary consular officers and consular posts headed by such officers is set up in *Chapter III* . Theprovisions of *Chapter IV* settlethe exercise of consular functions by a diplomatic mission and the relationship between the Convention and other international agreements. The final provisions in *Chapter V* refer to signature, ratification - accession, entry into force etc. For a presentation of the Convention provisions see Ion. M.Anghel, op.cit. pp.525 -713.

single place determined a circumspect attitude from many States, particularly from the host ones. There were also reservations with regard to the statute of privileges and immunities of consular posts and their staff – the idea of extraterritorial treatment was reluctantly, regarded.

Romania took part in the Conference with a delegation [19]whichcarried out a notable activity (through the amendments it introduced and the points it raised during the debates); the provision in Article 5 (b) stipulating that one of the consular functions is „to promote friendly relations" represents the joint amendement which was submitted by the Romanian delegation together with other delegations; the amendment in Article 52 extending the exemption from personal servicies to all members of the consular post was introduced by the author of these lines etc. Romania did not sign the adopted Convention, yet; Romania became party to it in 1972, by accession (Decree No.481/1971).

The participating States, including Romania, submitted numerous reservations and notes regarding the Convention (in connection with Articles 74 and 76 on the universality of participation of States in multilateral treaties etc).

- In the **plenary meeting, t**he Romanian representative (*Aurel Cristescu*) stated that the Conference had to take into account the **principle of universality[20].**
- Referring to inviolability of consular premises (Article 31), the representative of Romania (*Ion M. Anghel*)made the observation that the exceptions listed in para. (2) constituted mere pretexts for entering the consular offices, and they openedthe way to abuses and made inviolability of premises illusive – which is harmful to the activity of a consular office; the perpetration of an alleged crime could be used as a motive for the receiving State not to take all necessary steps in order to obstruct the intrusion of premises and ensure inviolability. The Romanian delegation held that the appropriate guarantee of inviolability of consular premises should be assured – a principle addmitted in international law and an indispensable condition to allow consular functions be performed.[21]
- With regard to **freedom of communication** (Article 35), *Ion M. Anghel* opposed the proposal to delete the last phrase in para. (5), because it was not possible to make a distinction between the inviolability of consular courier itself and the one of the consularbag, for the simple reason that the bearer of the consular bag was the courier himself; since the person-courier enjoys immunity, in virtue of the fact that he is the bearer of the bag, both should enjoy immunity[22].
- In his address regarding the consul's right to communicate with nationals of his State (Article 36) (the debates lasted two meetings, with the most disputed text during the entire Conference[23]**,** 89 speakers, and the Romanian delegation taking the floor five times), the Romanian representative*Ion M.Anghel* deplored the fact that, for a text of such an importance to consular relations,Commission II not only did not retain the ILC draft,but also operated modifications (exceptions) to it, deforming it, spoiling its balance and making it more confused; although the consul did haveaccess to a national who was arrested, the authorities of the receiving State were still expected to submit lists of persons in prison,periodically – and that was an excessive claim. The Romanian delegation believed

[19] The members of the Romanian delegation were: *Isidor Baltei,* the head of the MFA Consular Department and head of the delegation, *Ion M. Anghel,* legal adviser with the MFA, *Iancu Tiron,* second secretary with the MFA, *Ion Edu* and *Ion Diaconu* -MFA counselors of the delegation

[20] Nations Unies, *Conference des Nations Unies sur les relations consulaires,* Documents officiels, vol.I, Comptes rendus des seances plenieres et des seances de la premiere et de la deuxieme Commission, p. 5

[21] *bid.,* p. 28

[22] *Ibid.* p.33

[23] Following long debates, procedural aspects included, the text was rejected by 39 votes against 31, with 7 abstentions.

that the rights granted in such situations should, in any case, be exercised within the limits of laws and regulations of the receiving State.

In conclusion, he proposed that the text be put to vote, paragraph by paragraph. Such procedure was voted on and accepted by a large majority of the Conference; the result, in substance, was that certain provisions did not get the necessary majority any longer, and when the text that had been mutilated was put to a vote as a whole, it was short of the necessary majority and did not pass.

The Conference reached a major impact; ittook up the procedure of going further with the discussion of the other provisions and to the end, it submitted a new proposal (a 17 state compromise proposal which became the current text of the Convention).

We take note of Romania's delegation addressin the plenary meeting with regard to Article 41 (personal inviolability[24]**),** as well asin connection with the expression judicial arrest[25]**,** Article 55 (beginning and end of consular privileges and immunities[26]), Article 68 regarding the exercise of consular functions by a diplomatic mission (an amendment recognizing the right of the diplomatic agent to address the local authorities[27]). At the end of the Conference, the Romanian delegation reminded the plenary of the reservations Romania had to Articles 31, 36, 70 and 74 of the Convention.

- Commission I of the Conference, in which the Romanian participation was assured by *Isidor Baltei, Aurel Cristescu, Iancu Tiron* and *Ion Edu,* discussed the texts of the Convention on***consular relations*** (Article 1) and the final clauses. Our representative submitted a joint amendment (A/CONF.25/C1/L33), suggesting that the words „to develop friendly relations" be introduced in para. b). Endorsing this amendment, the delegation explained that Romania suggested the addition because such a principle was written in the 1961 Convention on diplomatic relations, came into aggrement with the spirit in which consular relations should be conceived, and also because consular officers played a role in developing friendly relations just like diplomats; the delegation also added that the amendment was in accordance with the UN Charter and the principles of friendly and cooperation relations among states[28]**.**

Aurel Cristescu took the floor in connection with the exercise of consular functions (Article 35) and supported the ILC text, because, according to modern law, functions are exercised by institutions and not by persons[29]**;** he also made his contribution to Articles 17 [30]and 22 (performance of diplomatic acts by the head of a consular post and nationality of consular officers, respectively)and proposed that para.2 of Article 19 (appointment of members of consular staff) be deleted. The delegation expressed its position against the amendments to Article 70 (non-discrimination), which would afford more favourable privileges and immunities than the Convention itself and explained its negative vote as to the settlement of disputes.

- On the final clauses, the Romanian delegate *Aurel Cristescu* underlined the role the consular Convention played: a starting point in developing consular relations, since all States participation in it constituted the very condition of its efficiency; while codifying

[24] *Ibid.* p.58
[25] *Ibid.* p. 74
[26] *Ibid.* p. 80
[27] *Ibid.* p. 97
[28] *Ibid.* p.152
[29] *Ibid.* p.207
[30] *Ibid.* p.249

rules, the Convention should be applied to all States, if we wanted to make sure that it got a universal effect. Universality of international treaties had been recognized for a long time, and one should not forget that such Convention on codification was a public instrument and not a political one. It was in that sense that sounded the wording inthe conventions in which the principle of universality of treaties had already been applied (the four Geneva conventions for protection of war victims, the principle applied by international organs –the internal regulation of the first meeting on the Convention for the protection of cultural property in the event of armed conflict(the Hague, 1954), the U.N.General Assembly resolution No. 1766/XVII recommended an extended participation in multilateral treaties, therefore, the U.S. amendment was inacceptable).

- In Commission II of the Conference (on consular privileges and immunities) Romania was represented by *Ion M. Anghel,* together with *Ion Diaconu* [31]**.**
- The Romanian delegate *Ion M. Anghel* introduced amendments to Article 52. In his address concerning ***inviolability of consular post premises*** he showed that the regulation proposed by the International Law Commission - which he supported – was similar to the one in the **Havana Convention** (1928) and the **Convention on Diplomatic Relations** (1961); in his opinion, inviolability of consular premises was as necessary as the one of diplomatic missions, and to accept new exceptions to inviolability would turn it fictitious.
- *Ion M. Anghel* raisedalso the following points:
- He spoke several times with regard to **Article 28** (use of national flag and coat-of-arms), stated his agreement with the text proposed by the ILC, without making any alterations, and expressed his opposition to the amendments restraining the right to fly the national flag on the building of the consular post or on the residence of the head of the consular post.

Romania introduced amendment A/CONF.25/C2/L207 to **Article 52** in the ILC draft, with a view to extending the allotted exemptions from personal services to the entire category of members of the consular post[32]**.**It was essential that they were exempted from personal services (public service, military obligations – requisitions and billets), in order to exercise their functions. The Romanian delegate sustained his proposal by showing that when imposing such obligations to the members of the consular posts, the receiving State was blocking their activities, all the more as in accordance with the rules of international law, foreigners did not even have the obligation to serve in the army of the host State.

- As far as ***Article 30*** is concerned(inviolability of consular premises), *Ion M. Anghel* showed how important the recognition of the principle of inviolability of consular premises was; he agreed with the amendments intended to strengthen the limit of inviolability, but rejected the other amendments, because he considered them inacceptable, since they all shared restriction of inviolability as their common feature.

In another address (the discussions of the text on inviolability of consular premises lasted more days), *Ion M. Anghel* made critical remarks both to the four paragraphs of the French amendment, because some of them contradicted one another (one of them guaranteed, while the other restricted inviolability), and to the joint amendment which was

[31] We had a perfect and a good omen cooperation, with a bright continuity. *Ion Diaconu* – a junior diplomatic attache at the time (I was not too much older than he was myself) – imposed himself through his capacities, tenacity and efforts and became an illustious diplomat and a remarcable jurist, much ahead of his generation; he stands as the best Romanian expert in the field of human rights (see *laudatio* I composed for him on the occasion of his receiving the Nicolae Titulescu International Prize).

[32] After a lot of mishaps, the Conference passed the amendment I introduced; the representatives of the socialist countries voted against it, and it was only due to the West that we have today's text; it was a moment of tension induced by our Eastern fellows, who put myself in a very delicate situation (see Conferences …vol. I, p.430)

introducing so many exceptions that the rule itself became void of substance – even inviolability itself became an exception, instead of being affirmed as a principle; it was very easy for the authorities of the receiving State to justify their entering a consular post (making an excuse for a crime, pretending a fire or invoking a passport control etc);

This would, thus, be a step backwards[33].

- With regard to the amendment intended to regulate the right of the consular post to grant **asylum,** *Ion. M. Anghel*raisedprocedural questions twice(he requested that Article 31 of the Commission regulation be applied, so as to have a decision taken on whether the provision referring to asylum be included in the Convention or not); the amendment was rejected[34].
- In connection with ***exemption from taxation (Article 31),*** *Ion. M. Anghel* stated that the ILC text was satisfactory to Romania, agreed with the drafting amendments (submitted by Italy, Belgium, United Kingdom an South Africa), but pointed out that the U.S. amendments (the words „serving exclusive consular purposes")[35]did not seem indispensable and sufficiently clear, and asked for clarifications[36]**.**
- As concerns ***freedom of movment (Article 34),*** the Romanian delegate *Ion M. Anghel* acknowleged the ILC text, but suggested that the word „assure" be replaced, because *to assure*would mean that it was the host State's obligation to do something(a positive obligation) – while the point was actually, not to impede the consul's exercising his freedom of movement (although he was supported by other delegations, the amendment was short of a few votes and did not meet the required majority).[37]
- In his reference to ***Article 36 (communication and contact with nationals of the sending state),*** *Ion M. Anghel* stated that he accepted the principle in para. 1, but looked upon the formula as obscure and hard to interpret, if account was taken of the differences among various national legislations; he noted that both the British amendment and the ILC text could be interpreted in the sense that foreigners would not be subjects to the criminal laws of the receiving State the same way their own nationals would[38];he explained his vote and showed the reason why he could not accept para.2; the issue was taken back by the plenary of the Conference.
- As for ***personal inviolability of consular officers (Article 41),*** the Romanian delegate *Ion M. Anghel* introduced an amendment to para. 1 and set forth the need not to use vague expressions, which would bring up different and abusive intepretations; phrases like"grave crime" or „grave infringements" accompanied by an objective criterion, such as the duration of punishment, would be preferable; therefore, he proposed the adoption of a definition for the concept of „grave infringement" as being a court sentence of more than five years in prison; finally, he suggested that his amendment be referred to the drafting committee, without insisting to be put to a vote **[39].** Heexplained his voteand showed that he had voted for Article 41 in the affirmative and made it clear that it was the understanding of the Romanian delegation that the expression „competent judicial authority" meant both law courts and other institutions exercising judicial activities.

[33] *Ibid.* p. 324
[34] *Ibid.* p.333
[35] I was to understand the reason of this approach by the U.S. delegation later on, when it came to imposing taxation on the building of our Permanent Mission to the UN in New York
[36] *Ibid.* pp. 333 -334
[37] *Ibid.* p. 341
[38] *Ibid.* p. 375
[39] *Ibid.* pp. 396 and 403

- Concerning ***liability to give evidence (Article 44),*** *Ion M. Anghel* pointed out that the ILC text follows logically from law rules and State practice; that was why he could not agree with the amendments which tended to eliminate provisions according to which consul post members should not be kept from giving evidence about facts that were connected to the exercise of their functions; consular officers enjoyed a minimum guarantee which had to be granted to them against any coercive measure in case they declined to give evidence [40].
- In relation to the text on ***exemption from taxation (Article 48),*** the Romanian delegate *Ion M. Anghel* declared that when it came to exemption from taxation one should make no distinction between consular officers and members of the service staff; they should also benefit, because, otherwise, you would arrive at a situation in which the salaries of the consular staff would be twice taxed; he voted in favour of the amendments aiming at widening the application of that provision[41].

c) The U.N. Conference on the law of treaties was held in Vienna, over two rounds of negociation sessions (March 26 – May 24, 1968 and April 9 – May 22, 1969)[42]**;** the debates had as a basic text the draft of the International Law Commission[43]**.**

The Vienna Convention on the Law of Treaties was adopted on May 22, 1969, with 81 votes in favour, 1 against and 19 abstentions [44]. The Conference also adopted the ***Final Act*** and some resolutions and declarations annexed to it[45].

The conference was attended by delegations of plenipotentiaries from 103 States at the first session (1966), and then by 110 States (1969), of which only 46 States had signed the Convention.

Romania was representd by a delegation headed by our ambassador in Vienna *Gheorghe Pele*[46]**[6],** and it took an active part in the debates and the adoption of the relevantdocuments.

The Conference elected Mr. *Roberto Ago* (Italy) as President; at one time, he had also served as an ILC special rapporteur. Romania was elected as one of the 24 Vice Presidents of the conference.

The Convention entered into force on January 27, 1980 (in accordance with Article 81, para. 1); on the occasion of ratification, there were a large number of reservations and declarations; as of April 2014, there are 114 State parties that have ratified the Convention, and a further 15 States have signed but have not ratified it; 66 U.N. Member States, among which Romania, have neither signed nor ratified the Convention.

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[40] *Ibid,* p. 412
[41] *Ibid,* p. 430
[42] *Conference des Nations Unies sur les droit des traites,* Premiere Session, Documents officieles, Comptes rendus analytique.
[43] The Conference was convened in accordance with resolution No. 2166 (XX) of December 5, 1966 and resolution No. 2287 (XXII) of October 6, 1967 of the U.N. General Aseembly
[44] The Convention (with a number of 85 articles and an annex) cosists of a *Preambul,* Part I –*Introduction* (field of application, use of terms, its non-retroactivity, treaties constituting international organizations), Part II – *Conclusion and Entry into force of Treaties* (full powers, adoption and authentification of the text, means of expressing consent to be bound by a treaty, reservations, entry into force etc), Part III – *Observance, Application and Interpretation of treaties* (*pacta sunt servanda,* application of succesive treaties, effects etc), Part IV – *Amendment and Modification of Treaties,* Part V – *Invalidity, Termination and Suspension of the Operation of Treaties* and Part VI – *Miscellaneous and Final Provisions*
[45] The depositary of the Convention is the U.N. Secretary General; it was registered on January 27, 1980 (No. 18232); the original was deposited in the archives of the Austrian Foreign Ministry
[46] Other members of the delegation were Gheorghe Saulescu, Alexandru Bolintineanu, Gheorghe Secarin, Ion Voicu and Iftenie Pop, *op.cit*, p XXI

The Romanian delegation submitted amendments and addressed the meeting as follows:

In the plenary meeting, the Romanian Ambassador *Gheorghe Pele* expressed his disappointment that the Conference was not attended by all states in the world, although that was such an important event, in which not only the sistematization of the existing legal rules, but also the progrssive development of the rules in the field came about. With regard to ***application of Convention*** (Article 1), the Romanian delegation (*Gheorghe Secarin*) supported the ILC Convention draft and was against the U.S. amendment which extended its rules to international organizations as well, and argued that the field of international organizations was extremely vast, yet insufficiently prepared for codification[47].Referring to agreements not within the scope of this Convention, *Gheorghe Secarin* expressed his opinion that such a provisionwas essential, because there were already the agreed limits (*ratione materiae* – treaties should be concluded in written form, and *ratione personae* – treaties should be concluded between states); such a circumscription, which was to be found in the ILC draft, was necessary also for the reason that there werea number of rules which existed and were applied, so there was nothing more than their re-affirmation[48].

As far as treaties which are *acts constituting international organizations* (Article 4) are concerned, the Romanian representative *Alexandru Bolintineanu*showed that the acts constituting organizations, as well as the treaties adopted within international organizations werealso treaties concluded by States. Therefore, such treaties ought not to depart from the general rules in the field of treaties, and under no circumstances, from the their imperative rules. Without underestimating the bulk of the special rules emerging from international organizations, the text should be drawn up in such a way as to express the real relation between the law codified through Convention and the rules embodied in the constituting acts, or in the act adopted within the international organization; in no case could a general rule in a treaty be subordinated to a rule in an act constituting an organization [49]**.** With regard to ***capacity of States to conclude treaties*** (Article 5), the Romanian representative *Ion Voicu* emphasized the fact that a convention whose purpose was to codify the law of treaties should be in harmony with the fundamental principles of international law, notably with the principle of equal rights of states. States' capacity to conclude treaties was inherent in the very concept of state, and accordingly, the Confernce should specifically set forth this *ius tractum* they had[50].

The Romanian representative *Alexandru Bolintineanu* made an extended presentation of Article 17 – ***formulation and acceptance of reservations*** to a treaty. He started from the assessement that while writing these texts out, ILC proceeded from a realist conception, basing itself on States practices and making, at the same time, its contributin to the development of the concept according to the present needs of contemporary international relations; nowadays, as a result of the application of the cooperation principle, there was a diversification of treaties categories, within which multilateral traties played an important part. The reason reservations were set up was to facilitate states which, although could not accept certain provisions, were nevertheless interested and wanted to participate in the respective regulation, and that was one more ground for an imperative necessity to have a more flexible regulation. In his opinion, states had both the right to formulate reservations,

[47] *Op.cit.* p.18
[48] *Op.cit.* p. 44
[49] *Op.cit.* p.59
[50] *Op.cit.* p.72

and the right to accept them or formulate objections to them. In the absence of an opposite intention expressly manifested, the objection to the reservation should be interpreted in the sense that all other provisions of the treaty would be appliedbetween the reserving State and the State objecting to the resevation, except for those regarding the respective objections.

- In case of treaties constituting organizations, the right to decide upon the reservation does not belong to each of the contracting states, but rather to the competent organ of the organization – when the decision might be taken either by a vote, or by the act of the director of the respective organization [51].
- Romania, together with Bulgaria and Sweden, submitted to the Conference ***a joint amendment*** (A/CONF.39/C.1./L 157 and Add. 1) regarding the ***legal effects of reservations*** (Article 19). In his statement that endorsed the amendment, the Romanian delegate *Gheorghe Saulescu* argued that the authors' intention was to formulate para. 1 in more precise terms; the amendment was suported by other delegations and the text of the article, together with the amendments, was referred to the Drafting Committee.
- With regard to the principle *pacta sunt servanda*(Article 23), the Romanian delegation, through *Gheorghe Saulescu,* one of its members, underlined that it constituted a dominant element matters regarding the law of treaties, which acquired new dimentions; treaties were concluded to solve major problems of vital importance for peace and co-operation in the world, and observance of the principle *pacta sunt servanda* guaranteed the order and stability needed in relations between States. The Romanian delegation was in favour of the text which stressed the mandatory character of treaties[52].
- Romania and Sweden amended ***applicationof successive treaties*** relating to the same subject-matter (Article 26) by means of A/CONF.39/C.1./L.204. The Romanian delegate *Ion Voicu* explained that the hang of the amendment was to make the text as concise as possible [53].
- The Romanian representative *Gheorghe Secarin* declared himself in favour of maintaining Article 33 regarding ***revocation or modification of obligations or rights of third states,*** and showed that mention should be made of the exceptions to the rules in Articles 31 to 33 (they being exceptions to the principle *pacta tertiis* themselves), settling the conditions under which the rights and obligations of third States may be revoked or modified [54].
- Romania introduced joint amendment A/CONF.39/C.1./L.240 regarding agreements to ***modify multilateral treaties*** between certain of the parties only (Article 37). The Romanian representative *Alexandru Bolintineanu* explained the goal of that amendment of a drafting nature (the three conditions should be set forth in a logical order), and suggested to be referred to the Drafting Committee.
- With regard to***fraud*** and ***corruption of a representative of a State*** as invalidating its consent (Articles 46 and 47), the representative of Romania asserted that his delegation did not accept any proposal raising an obstacle to the application of sanctions because of fraudulent conduct; international relations should be more and more based on moral norms, first of all on good faith [55]**.**
- Concerning ***coercion of a State bythe threat or use of force*** (Article 49), the Romanian representative *Gheorghe Saulescu* referred to the extremely harmful character of

[51] *Op.cit.* pp. 125 – 126
[52] *Op.cit.* p. 170
[53] *Op.cit.* p. 179
[54] *Op.cit.* p. 214
[55] *Op.cit.* pp. 339 - 340

war and use of force and insisted that the fundamental principle of the prohibition of the threat or use of force as a means of solvingdifferences in international law - asproclaimed in numerous documents – should appear among the rules dealing with conclusion of treaties. The Romanian delegation sustained that a treaty concluded by coercion, which was a case of using force or threaten with force, should be null and void; thiswas a *lege lata* principle and the Convention could not overlook it.

• In connection with ***theaties conflicting with peremptory norms of general international law*** (Article 50), the Romanian representative *Alexandru Bolintineanu* stressed the fact that the *ius cogens* concept reflected the political and legal facts of nowadays realities and its essential role in protecting the values making up the common inheritance of all peoples (peace and security). By consecreting the *ius cogens* concept as grounds for a treaty nullity, the *pacta sunt servanda* principle was not put under discussion; on the contrary, there was a coordination relation between those two concepts, because the observance referred to a treaty duly (validly) concluded. The Romanian delegation did not share the opinion of those who wanted to subordinate the adoption of the text to setting up a procedure to regulate differences[56]**[1].**

• With respect to ***the number of the paries to a multilateral treaty which falls below the number necessary for its entry into force*** (Article 52), the Romanian representative *Gheorghe Secarin* stated thatthe inclusion of that text was necessay because it offered the right solution to a situation in which it was difficult to determine whether a treaty terminated or continued to be in force.

• As for the ***temporary suspension of the operation of a multilateral treaty by agreement between certain of the parties only*** (Article 55), the Romanian representative *Gheorghe Saulescu* declared thathe agreed with the joint amendment of the five delegations, among which the Romanian one, because it was imperative that the wording be as clear as possible,so as to protect the other parties to the treaty as well.

• In relation to the case of ***an aggressor State,*** the representative of Romania *Alexandru Bolintineanu* expressed his agreement with the ILC text and rejected the amendements which soughtto dilute a measure in the situation of a grave action such as the one of an aggression.

d) The UN Confrence on the Adoption of the Convention on the Law of Treaties between States and International Organizations or between International Organizations was held in Vienna between February 18 and March 21, 1986 **[2].**

The regulation in this Convention brought to the Vienna ***Convention on the law of treaties***of 1969 the necessary completions tothe special case represented by international organizations.As a specific note to the Convention, mention should be made of the principles of **parallelism** and **adaptation** that lie at its basis**.Parallelism –** because it took over provisions from the 1969 Convention, and stated precisely which particular provisions applied to each category of international law parties participanting inthe treaty; that was the reason why many of the 1969 Convention provisions passed on to the 1986 Convention, both as structure – contents, and as wording. **Adaptation** consisted of the fact that such destination was taken into account, in the sense that although both categories of parties to

[56] vezi Ion M. Anghel, *Aspecte privind dreptul tratatelor in cazul organizatiilor internationale,* Revista romana de studii internationale, nr. 4 (96), 1988, pp. 333 -348

treaties were subjects of international law, the international organizations had their own specific features, and therefore they had to be taken into consideration.

The particularity of the Convention was the fact that, besides States, international organizations also attended all phases required by the conclusion and approval of the draft text – except for the vote, bearing in mind that they enjoyednoteworthy practicies in the field of treaties conclusion; due consideration was also given to the diversity of international organizations and to the fact that they were to become the recipient of the new regulations; such procedure was employed on the basis of UN General Assembly resolution 39/86, which, besides States and the UN Council for Namibia, invited national liberation movements and intergovernmental organizations that would traditionally participate as observers in the Conference (28 international organizations, among which the UNO and its specialized agencies, the League of Arab States, Oragization of African Unity, the Council of Europe, the Islamic Conference, the Council for Mutual Economic Assistance and others); the Convention was also open for signature by the international organizations invited to participate in the Conference (they actually made an act of formal **conffirmation** equal to **ratification** by States, and their right to accession was thus acknowledged).

Romania was represented in the Conference by a diplomat with the Embassy in Vienna (diplomatic counselor *Pamfil Roman*); I took part in the Conference myself, in my capacity as a member of the UN Council for Namibia delegation (which was a full-fledged participant as any other State), because Romania was a member of that Council. The fact is that I was listed among the members of that delegation, yet, Iensured our country's participation in the Conference together with my distinguished colleague *Pamfil Roman* (it was just formally that I was not the representative of Romania).

As in the previuos phases of the Conference, the Romanian representatives made their contribution to the debates and formulations of provisions under consideration. We have in mind, *inter alia*, the final form of the *rules of the organization* concept (meaning the capacity to conclude treaties), whenRomania introduced the amendment „aware that the practice of international organizations when concluding treaties with states…should correspond to their constituting acts" to the ILC draft Doc. A/CN/339/Add. 7, of June 10, 1981, and asked to be insertedin the Preamble, as well as the position of the delegation to support it at the 1986 Conference, Doc. A/CONF./129/5 – 8 X 1985, p.66; the restrictive interpretation of the constituting acts of the organization(explaining the principle of speciality) in connection with Article 9&2, when a State party in an international organization could be put in a contradictory situation (as a *nomine propria* participant and as a participant through the organization)[57]**;** in relation with the invalidity of treaties concluded by exceeding the rules of the

organization and with the provision establishing that an international organization could not invoke the rules of the organization in order to justify its non-execution of the object and purposes of the treaty.

e) The ***Vienna Convention on Succession of States in respect of Treaties*** was adopted in Vienna, on August 23, 1978, by the United Nations Conference on succession of States in respect of treaties, which met in two sessions: April 4 – May 6, 1977 and July 31 – August 23, 1978[58].

[57] Ion M.Anghel, *op.cit.* p.341

[58] On the Conference and Convention text, see *Documents Officiels, vol.I-III, Documents de la Conference; Comptes re ndus, Nations Unies*

That was a diplomatic Conference of plenipotentiaries representing 89 states – through Full Powers and other forms of communication. The debates of the Conference had at their basis the draft of the Convention and the commentaries adopted by the ILC (XXVI session). The Conference elected *K.Zemanek* (Austria) as President. Romania was elected as one of its 23 Vice Presidents.

As of February 2015, there are 22 parties which have ratified the Convention. A further 15 states signed the Convention but have not ratified it. It entered into force on November 6, 1996. Romania attended the Conference, but did not sign the Convention[59]**.**

Romania was represented in the Conference by a delegation headed by the Romanian Ambassador to Austria *Octavian Groza*; dr. univ. prof. *Victor Duculescu* and

*Marin Buhoara,*a diplomat with the Romanian Embassy in Vienna were members of the delegation.

The regulations under consideration were of interest to our country, in virtue of their application following the creation of ***Greater Romania*** after the Paris Peace Conference (1918 – 1920)[60] ; as long as Romania was trimmed offby the rape ofBessarabia and Northen Bucovina (by the Peace Treaty of Paris of 1947), and as a possible union (recompletion) with Republic of Moldova should not be excluded - it persists in being a present day issue - it was important to know its provisions.

- Our delegation took an active part in the debates of the Conference, introducing amendments and stating its position toward the adopted text.

In the 1977 session of the Conference, an amendment was introduced with regard to Article 1 of the ILC draft (on the basis of which the discussions in the Conference took place); the amendment (A/CONF.80/C1/L2) sugessted a new wording of Articles 1,3 and 4, as well as certain clarifications, which, in our opinion would have rendered the rules to be adopted more explicitly[61]**.**

- Another amendment referred to Article 5 in the draft (A/CONF.80/C1/L4)[62]**,** and defined more accurately the maintenance in force of obligations ***generally accepted principles of international law*** independently of the respective treaty; amendment (A/CONF.80/C1/L5) dealt with the article referring to the ***Declaration on international law principles concerning friendly relations***.

- In some of his statements, the Romanian representative prof. *Victor Duculescu*spoke and statedhe would vote in favour of draft resolution A/CONF.80/L1, that suggested that the Convention draft should mention that UN General Assembly (XXI) resolution 2145 which put an end to its mandate in South Africa was being taken into account, and the UN had directly assumed responsibility till its independence;he also explained the reasons why such measure was imperative [63]; with regradto **Article 30 (*effects of a unity of States in respect of treaties in force at the date of the succession of States),***Victor Duculescu* was of

[59] The text of the Convention (Doc. A/CONF.80/31/Corr.1) follows the structure of the system – which has now become a practice -used in Conferences on codification organized by the United Nations. A preamble; in the First Part (Articles 2 to 24) there are the General provisons(scope of the Convention, use of terms, situations not within the scope of the Convention, treaties constituting international orgniations, cases of succession of states covered by the Convention , temporal application of the Convention, boundery regimes and other territorial regimes); Part II refers to succession in respect of part of territory; Part III deals with newly independent states (bilateral and multilateral treaties); Part IV (settlement of disputes) and Final Provisions.

[60] For an assessment of the Conference and Convention see Victor Duculescu, ***The Law on Succession of States (International treaties and succession of states matters),*** Editura Veritas, Targu-Mures, 2000, pp.36-40

[61] Victor Duculescu, *op.cit.* pp. 177 -196

[62] ***Documents officiels***, vol. III, p.115

[63] *Op.cit.* vol. III, p.117

the opinion that, bearing in mind States practice and the studies in the field regarding the issues raised by the FRG amendment,problems should be solved, taking account of the necessity of maintaining international relations, and in order to do so, there was need for negociations between the FRG and the GDR; in connection with Article 33 (succession of States in cases of separation of parts of a state), *Victor Duculescu* supported the existing draft, and suggested that distinction should be made between separation from a union and at succession case,which needed objective criteria [64]to have its legalityestimated**;** concerning the manner of solving disputes, the Romanian repesentative *Victor Duculescu* held that the system adopted should be as flexible as possible, so as to take into account the realities of nowadays world which imposed cooperation between states[65]; other statements referred to Articles 6 and 7, ***definition of the expression succession of states,*** and to taking into consideration situations connected with the operation of military bases and demilitarized zones [66]**.**

In conclusion, I would like to mention the fact that participation in the conferences on the codification of international law constitutes an important segment of the foreign policy of a state, and I trust I am entitled to assess, and I do this without fearing exaggeration, that Romania was most honourably represented in such international activities. They augmented Romania's prestige as an outstanding actor in the international life. It was with earnest correctness and serious argumentation that the Romanian representatives promoted the country's interests and position of supporting the solutions submitted to conferences. They made strenuous efforts to consecrate such interests as norms of internationsl law; they displayed their professionalism, their high level of authority with a keen expertise in their respective fields, as well as their degree of excellence astop-class diplomats who were an honour to their profession, and equally to their country – Romania.

[64] *Comptes rendus, op. cit.* vol. II, pp. 7-8
[65] *Ibid.* p.64
[66] *Ibid.* pp. 91-92

PACTA SUNT SERVANDA
PRINCIPLE - MYTH OR REALITY?

Sache NECULAESCU [*]
Adrian ȚUTUIANU [**]

„Tout simplifier, est une opération sur laquelle on a besoin de s'entendre. Tout prévoir, est un but qu'il est impossible d'atteindre".
Portalis, *Discours préliminaire du premier Projet de Code civil,* 21 janvier 1801.

Abstract: *We aim at capturing the impact of unpredictability on the freedom of will and to advance some proposals for the modification of several normative texts related to these two institutions of civil law, in accordance with the project of European encoding of contract law.*
Keywords: *unpredictability, contract adaptation, contract revision, pacta sunt servanda, the basis of the contract, contractual solidarism.*

1. Actuality of Discussion

Seen in isolation, the provision of art.1270 par (1) Civil Code, according to which „the contract duly concluded stands for the law between the contracting parties", seems to continue the tribute to contractual freedom, law creator, and resumes the tradition of the classical theory of autonomy of will. Such perception is confirmed by a part of our doctrine, who, commenting the new contract regulation, affirms that „beyond the legal text, the new Civil Code relies on the theory of autonomy of will to support the provisions in the matter of the contract {…}, proclaiming that only the will of the particular creates the law{…}"[1]. In the same interpretation key, the initiator of the current Civil Code stated upon its coming into force that it is „a code of liberty because it achieves the superior idea of freedom in the domain of law"[2].

As far as we are concerned, after analyzing the new regulation of the contract, we take the liberty of noticing that never before has the contractual liberty been more limited than at present, when, according to the current Civil Code, the parties are forced to observe more and more obligations (mere duties until recently), such as good faith both in negotiations and in execution of obligations (art. 1170), obligation resumed with obstinacy in the special matter of negotiations (art. 1183), confidentiality of the same negotiations (art. 1184), to which is added the considerable enlargement of possibility to annul the contract also for the error regarding mere reasons of its conclusions or the lawful error, for the institution of some new vices of consent (lesion, state of necessity), unilateral termination of contract, to which, last but not least, is added the regulation of unpredictability, subject which significantly illustrates the position of the new legislator in relation to the binding force of

* Emeritus Professor, Faculty of Law and Social and Administartive Sciences, Honorary Science Researcher of Legal Research Institute of „Andrei Rădulescu"Romanian Academy
** Associate Professor, Ph. D., Faculty of Law and Social and Administartive Sciences, Valahia University of Târgoviște
[1] P. Vasilescu, *Civil Law. Obligations as regulated by the New Civil Code*, Hamangiu Publishing House, 2012, p. 313.
[2] C. Predoiu, *Press release regarding the Coming into Force of the New Civil Code ,* Hotnews, October 1 2011.

the contract concluded (art. 1271), subject to which we will dedicate a special place at the end of this study.

Despite the fact that the traditional syntagm „the parties' contract is the parties' law" has mainly a metaphorical value, considering that the „duly concluded" contract is the only one assimilated to the law, the new codifications and most of the contract codification projects avoid to consider the contract as law of parties. Therefore, according to art. 1434 of Civil Code of Quebec, „the contract duly formed binds the signatory parties not only in terms of what they expressed but also in terms of what arises from the nature of the contract, according to practices, equities and law". Among the more recent codifications, the Civil Code of Portugal, promulgated by Decree-Law no. 47344 of November 25 1966, does not confer the contract the power of law. It defines the notion of contractual liberty by relating to the limits stipulated by the law. If we look at the French Bills regarding the obligation law, we will notice that only the Catalan Project, more sensitive to traditions, conserves the classic formula from art. 1134 French Civil Code[3], while the Government Bill to reform the contract law (elaborated by the team supervised by François Terré), defines the contractual liberty in a similar manner as the Civil Code of Quebec. The other bills to codify the contract law (Unidroit Principles applicable to international commercial contracts, Principles of the European Contract Law, Draft Common Frame of Reference – DCFR, elaborated by the team supervised by Professor Christian von Barr), no longer confer the contract the power of law. Since the lights and shades in the legal terminology are important, especially in a matter that is so significant such as the limits of freedom of will in contracts, we believe that the text that we are analyzing may have been harmonized with the new European tendencies.

2. Evolution of the Conception on Contractual Liberty

According to the theory of autonomy of will, upon his birth the man is fundamentally free, so that nobody can force him unless he desires to do so. The society itself was seen as a social contract, according to the theory launched by J.J. Rousseau. It is the will that confers legitimacy to all obligations, conception which determined Alfred Fouillée to affirm „*qui dit contractuel dit juste*"[4]. Legal reflex of the economic liberalism expressed through the formula „*laisser faire, laisser passer*", the theory of the autonomy of will considers that every „contracting party is the best judge and therefore the best legislator of his own interests"[5]; nobody may force him to legally bind himself through a contract. Once it is concluded, the contract has yet to be observed as such, no other norms are required to authorize taking effects.

According to the same theory, the contract is binding for the judge as well, surnamed „minister of the parties' will"[6], who, called to interpret it, is obliged to relate to the common

[3] Art. 1134. Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.
Elles ne peuvent être modifiées ou révoquées que de leur consentement mutuel, ou pour des raisons que la loi autorise. Elles doivent être exécutées de bonne foi.

[4] The meaning of this famous formula is the subject of dispute in the doctrine. If most authors consider it to be the most legitimate expression of the autonomy of will, there are authors according to whom this so invoked adage would actual concern the social contract, the only way to reach justice, and not the legal contract considered *ab initio* fair and therefore worthy of absolute respect. In this sense, see Cr. Jamin, *Le procès du solidarisme contractuel: brève réplique*, in volume *Le solidarisme contractuel, quoted works* p. 160

[5] Fr. Terré, Ph. Simler, Yv. Lequette, *Droit civil. Les obligations,* Dalloz, 2013, p. 33.

[6] Ibidem.

intention of those who concluded it. For the same reasons, the judge may not interfere in the contract, may not amend or revise it, even though the conditions taken into consideration upon its conclusion have changed. Consequently, the will of man is both the source and the measure of the rights acquired and the obligations undertaken. Legal paradigm of the enlightenment period, governed by the Kant's individualist motto *sapere aude*, of which corollary in law *pacta sunt servanda*, pays tribute to the individual liberty, law creator.

The theory of the autonomy of will has not been taken into consideration by the French codifiers and not commented in the preparatory works of the Napoleon Code. This explains why, formulating the principle *pacta sunt servanda*, Portalis was to impose the idea that the freedom of will may not be unlimited and it has to be subjected to public order and good manners[7]. This is the very reason why the enunciation in art. 1134 French Civil Code takes account of not any conventions, but only of those „legally formulated", formula taken over from our old Civil Code in art. 969 which suggests that the binding force of the contract is not rendered by the parties' will, it is rendered only by the law which confers it this value.

Shortly after the French Civil Code came into force, one could notice how the liberalism transposed into law was to represent a real utopia or even a „chimera", reason why to these primordial landmarks of the will in the contract, merely sketched in the two centuries of social evolution, were imagined more and more limits and conditions, imposed by a series of moral imperatives, with increasing shades of difference, so that the name of the principle itself was contested.

3. Towards a New Foundation of the Contract

An important moment in the evolution of the conception on contract was represented by the emergence in the political thinking of the *solidarism*, trend generally linked to the political man Léon Victor Auguste Bourgeois, the author of the work „Solidarité", published in 1896, of which analysis starts not from the individual as holder of some abstract rights, but from the relations between people, „connected in time and space"[8]. If the autonomy of will, of free expression, considers that people are born free and equal, solidarism sees people unequal, *de facto*. Man is not free upon birth because ha lives in a given society which means he cannot live outside it. Upon birth he is „the debtor of his contemporaries, of the society, without which he cannot live"[9]. The author's declared purpose is to prefigure a „vast collective insurance system which aims to prevent and especially repair the ill-fated consequences of social risks occurrence by enacting a social debt of solidarity"[10]. Whereas after the French Revolution in 1789 the dominant conception was to place the politics ahead of the social, the solidarism always starts from the social to which the political factor is subordinated. Dukheim in sociology and Léon Duguit in law consider the law norms as expressions of some actual realities and not of the political will of the government representatives.

The later evolution of this doctrine was not spectacular, as one might have expected. After the World War II such reflections limited especially to the political speech, as mere ritual reflections.

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[7] Portalis, *Discours préliminaire pronounce lors de la presentation du Conseil d' Etat du projet de la commission du gouvernement,* V. Pătulea and Gh. Stancu, *Contract Lawr*, C.H.Beck Publishing House, Bucharest, 2008, p. 21.
[8] L. Bourgeois, *Solidarité*, Paris, Armand Colin, 1896, republished in 1998, Presses Universitaires du Septentrion Publishing House, p. 33.
[9] Ibidem, pp 38-39.
[10] Ibidem, p. 25.

The contestation of the autonomy of will was actually visible in the second half of the 19th century, when the positivist doctrine emphasizes on objective law [11], and notices that, in the conditions of capital accumulations, the contractual parties are no longer equal, that the weak contractual party needs legal protection. The contract no longer appears as an expression of the relation of forces, yet as union of balanced interests, instruments of loyal cooperation and execution in good faith of obligations undertaken. Rudolf von Ihering launched the warning according to which „saying that the consent of will is necessarily fair means granting hunting permit to some brigands"[12]. The public order and the good manners are more and more quoted through a series of imperative regulations. The individual excesses are therefore leveled by the judge's intervention in the contracts, intervention meant to re-establish the balance of service provisions.

At the beginning of the 20th century, referring to the interpretation in contracts, Raymond Saleilles stated that one has to consider „the social purpose of this instrument of legal solidarity and not the fantasy of each party"[13], while Louis Josserand, the one who theorized the abuse of right, supports the idea that the subjective rights are to be exercised in line with social finality[14]. Consequently, the solidarism transposed in law sees the contract as a social fact which expresses solidary relations between individuals.

René Demogue, the author of the great treaty on obligations in general, considers that any contract is concluded due to a social necessity[15], expression of increasingly accentuated division of work. To him, the finality of the law is not the individual, but the society. „The law has to consider not only the man, whose rights have to be observed, but especially the people who experience various legal situations, rich or poor, especially poor ones"[16], so that the basis of the binding force of the contract does not lie in the will, but in the social usefulness comprised in all contracts[17].

The theme of solidarism in contracts was re-updated after the consumers' protection movement gained ground, when the triad „loyalty, solidarity, fraternity" tended to become the new slogan[18], replacing the famous saying of Fouillé, *qui dit contractual dit juste* with the one according to which *entre le fort et le faible, c'est la liberté qui asservit, le juge qui affranchit*[19], expression which legitimates the judge's intervention in the contract in order to re-establish the contractual balance breached, as in the case of lesion, unpredictability, criminal clause, contract adaptation etc. Nevertheless, the author recognizes that the contract has not yet become the place of sociability and solidarity, reason for which he states that „it is not yet serious to claim that we have entered an era of divine mercy contract"[20].

Other times, the new solidary vision gains pathetic accents which trigger, when analyzing the meaning of good faith in contracts, discussions about loyalty, collaboration etc, all subsumed to a „strong connection of sociability and friendship"[21] between the

[11] See A.S. Courdier-Cuisinier, *Le solidarisme contractuel*, Paris, Litec, 2006.
[12] R. Ihering, *La lutte pour le droit*, citat de J. Flour, J-L. Aubert, É. Savaux, *Droit civil. Les obligations. 1. L'acte juridique,* 14-e éd. Dalloz, 2010, p. 89.
[13] R. Saleilles, *De la déclaration de volonté*, Paris, Pichon, 1901, p. 229.
[14] L. Josserand, *De l'abus des droits*, Paris, Rousseau, 1905.
[15] R. Demogue, *Notions fondamentales de droit privé.* Essai critique, Paris, A. Rousseau, 1911, p. 169.
[16] Ibidem.
[17] R. Demogue, *Traité des obligations en général, Sources des obligations*, Paris, A. Rousseau, 1923, t. I, nr. 23, p. 69.
[18] D. Mazeaud, „*Loyauté, solidarité, fraternité: la nouvelle devise contractuelle*?, in *L'avenir du droit, Mélange en homage à François Terré,* Presses Universitaires de France, 1999, nr. 6, p. 608.
[19] The complete formula is *Entre le fort et le faible, entre le riche et le pauvre, entre le maître et le serviteur, c'est la liberté qui opprime et la loi qui affranchit.* It belongs to the French lawyer, prelate and speaker Henri Lacordaire (1802-1861).
[20] D. Mazeaud, quoted works, p. 609.
[21] A. Sériaux, *Droit des obligations*, 2 édition, Éd. Presses Universitaires de France, 1998, no. 55.

parties, assimilated to love, „a brother-like love"[22]. Other times, solidarism is used in a narrower sense, recognizing that the term „fraternity" is the expression of a too idyllic and therefore unrealistic vision about human nature and contractual relations"[23].

As expected, the reaction of the civil fanatics was not late to come. Famous names have no hesitation in showing reserves in relation to this new principle, as it is sometimes understood, asking themselves whether the weak party to the contract will be too favored and will dictate his/her own law. This is the reason why one states that the much discussed „crisis of contract" is in fact the solidarism crisis, refused as the basis of contract"[24]. Concomitantly, Jean Carbonnier, famous for his irony, notices that „in a period in which marriage has become excessively transformed into a contract, some dream of transforming any contract into a marriage"[25].

The position of the authors of manuals of civil obligations are full of lights and shades: they either reject the solidarism understood as love by our kind, stating that „contracting does not mean entering a religion"[26] and that in reality the interests of the parties binding themselves to contracts are most time divergent even though they may be divergent in some points. According to them, if we subordinate the contract to such utopian version, we will witness „the eternal triangle", the judge being able to interfere in the contract every time, substituting himself to the parties, which would mean nothing more than a return to an outside intrusion.

Other authors discreetly avoid this subject and continue to relate to the will of the parties, „a controlled will, the basis of the contract"[27].

The debate is far from being over. The conference organized by the Faculty of Law in La Rochelle in 2002 entitled „Contractual Solidarism, Myth or Reality?", to which the main supporters of this theory participated, pointed out both supporting arguments and contradicting arguments, all being published later on[28].

Other reserves formulated by Laurent Leveneur were added to the arguments already mentioned, of which the most important are[29]:

- the solidarity invoked by the supporters of this trend has no support in reality. The ambiguous term „fraternity" relates to an idyllic or sentimental and therefore unrealistic vision in contractual relations;
- the same author wonders in what parties' union would consist in case of sale purchase contract, the main civil contract, considering that their interests are structurally divergent: the seller would like to sell his asset at a high price, contrary to the buyer's interests. The same contradictory aspect would manifest itself in the other civil contracts and contracts between professionals, consequently „the contract law has to be perceived in relation to the person, as it is and not as it should be"[30];
- the pre-contractual obligations of information may be autonomously substantiated in the absence of the solidarism theory to explain them. Georges Ripert, who did not support solidarism, rightfully mentions that „each contractual party is the guardian

[22] Ibidem.
[23] Cr. Jamin, „*Pledoyer pour le le solidarisme contractual*", in *Le contrat au début de XXI-e siècle. Études offerts à Jacques Ghestin*, Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 2001, p. 441.
[24] Ph.Malaurie, L. Aynès, Ph. Stoffel-Munck, *Les obligations*, 4e edition, Paris, Éd. Defrénois, 2009, p. 369.
[25] Jean Carbonnier, *Les obligations*, 22e éd., Paris, Éd. Presses Universitaires de France, 2000, p.227.
[26] Fr. Terré, Ph. Simler, Y. Lequette, *op. cit.*, p. 47.
[27] Ph. Malinvaud, *Droit des obligations*, Paris, Éd. Litec, 2007, nr. 75, p. 55.
[28] Sous la direction de L. Grynbaum, M. Nicod, *Le solidarisme contractuel*, Paris, Éd. Economica, 2004.
[29] L. Leveneur, *Le solidarisme contractuel: un mythe,* in *Le solidarisme*, quoted works, pp. 173-191.
[30] Apud Fr. Terré, Ph. Simler, Y. Lequette, *quoted works*, p. 49.

of his own interests and therefore he is the one who has to get the information. The party who fails to inform the other party on what they could find out on their own is not deemed as guilty. The situation is different only when one party's reticence becomes his guilt and such party abuses the ignorance of the other party"[31];

- even though they may be qualified as expressions of solidarity which characterize our era, the informing and counseling obligations of the parties during the execution of the contract are grounded in the express provisions of the law or the contract;
- asking the contracting parties to form a union with a common target, in good faith, is not a very precise objective. One cannot make law using such general and equivocal concepts;
- "loyalty, solidarity, fraternity", the new formula claimed by Denis Mazeaud, represents three vague directives which leave room for arbitrary to the detriment of the security of the contracting parties. Ever since 1937 Eugène Gaudement launched the warning that such solidary conception „risks to suppress the liberty in conventions and to lead to a state socialism"[32], legitimating more and more the state intervention in the parties' will space[33];
- the author mentioned above states that the objective of solidarism to institute „a law of unequal contractual relations" which guarantees the protection of the weak contractual party is not realistic and that is why he does not approve of such project, even though, in itself, it is correct. It may be reached only by retorting to the classic instruments of the law, building a law apt to prevent any abuse of economic power. If disloyal maneuvers have to be repressed, encouraging the sentimentalism is not necessary.

To all these adds the skepticism declared by one of the initiators of this trend of thought, according to whom solidarism is not perceived as an instrument of individual emancipation and does not conflict with the ideology of the human fundamental rights[34].

The Romanian doctrine of civil law opinionates on the essence of the contract and states that „the will of the contracting parties, free of impelled, is not absent and cannot be absent from the bases of the contract; a contract does not exist without the will of the contracting parties. The essence of the contract is made up of two inseparable elements: the will of the contracting parties and the contractual interest of each party. However, the parties are forced to observe the imperative law as well"[35].

This new relation between the freedom of will and the need to ensure the *contractual balance* is an orientation which one can find in all European codification projects regarding the contract law, taken over by our new Civil Code through a set of legal solutions, both for the pre-contractual stage, and for the formation and execution of the contract, meant to moderate the parties'' excesses of any nature.

4. Unpredictability

Between contract intangibility and contract revision by the judge in order to re-establish the balance of the service provisions agreed upon by the parties, a whole doctrinary and jurisprudential evolution exists. The theory of unpredictability was born as a response to the changes occurred in the execution of the contract, changes of nature to

[31] G. Ripert, *La règle morale dans les obligations civiles*, 4e edition, Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 1949, p. 89.
[32] *Théorie générale des obligations*, 1937, p. 31, apud L. Leveneur, quoted works p. 187.
[33] M. Mekki, *L'intérêt général et le contrat*, Paris, Éd. Librairie Générale de Droit et de Jurisprudence, Paris, 2004, pp. 258-369.
[34] Cr. Jamin, *Le solidarisme contractual: un regard Franco-Québécois*, www.themis.umontreal.ca
[35] L. Pop, *quoted works,* p. 76

disrupt the balance between the service provisions undertaken by the parties. Such changes of the circumstances in which the contract was concluded may concern both the creditor, whose debt is depreciated as a result of the price decrease, and the debtor who is forced to bear the inverse effects, obligations which are much more onerous than the ones undertaken by contract. If the tangibility of the contract could be invoked in the periods of economic stability, the spectacular changes in the price evolution, especially in economic crises, generated a conflict between the two legal imperatives: the principle *pacta sunt servanda* and the contractual justice. The conflict involves a principled option. If nothing stops the parties from amending the mutual obligations by a new accord of good faith, the difficulties appear when the amicable solutions are not possible. May the judge interfere in the contract and re-establish the parties' rights and obligations? This is a question to which the classical doctrine responds negatively, using the argument of the principle of autonomy of will, according to which, after conclusion, the contract has to be observed; this is the guarantee of the contract stability and predictability. Any amendment in the accord of the will could not be conceived in the absence of the parties, the only ones authorized to change the rights and obligations undertaken by contract. Seen as „servant of the contract", the judge could only interpret the will expressed or presumed by the parties, external interventions being excluded since they were considered as contrary to the three fundamental founding values of the contract: liberty, equality, fraternity, the ones which outlined the ideological environment in which the Napoleon Civil Code came to life. The new moralizing wave of the contractual right generates new legal solutions, among which equitable redistribution of the losses and benefits in relation to the changes occurred during the contract execution.

4.1. Notion of Unpredictability

Unpredictability is usually associated with *rebus sic stantibus* rule*,* according to which the obligations undertaken are conditioned by mentioning the situation existing upon the contract conclusion (*contractus qui habent tractum successivum vel dependentia del futuro rebus sic stantibus intelliguntur).*

The terminology used in the matter is far from being unitary. In order to refer to the same reality one uses terms such as: „change of circumstances" (art. 6:111 of the Principle of the European Contract Law and art. III. -1:110 DCFR), „hardship clause"[36] (Section II of Chapter 6, Unidroit Principles applicable to international commercial contracts), „frustration of purpose" (in the Anglo Saxon Law), „Wegfall der Geshäftsgrundlage" (in the German Law), „eccesiva onerosità" (in the Italian Law).

Unpredictability is usually defined by the Romanian doctrine of the civil law in light of the perspectives of the effects it takes, being stated that it is the „prejudice which one contracting parties suffers as a result of the serious misbalance of value occurred between his or her provisions and the provisions of the other party, during the execution of the contract, misbalance caused by the economic context, especially the monetary fluctuations"[37]. In our opinion, the prejudice suffered by one of the parties to the contract is only a condition of contract revision, and not the unpredictability itself. As in the case of lesion, the main concern of the new regulation is represented by the re-balancing of the service provisions. This is the reason why we consider both solutions to be genuine *remedies* of the contract, as they are

[36] For details, see Cr. E. Zamşa, *Theory on Unpredictability. Doctrine and Jurisprudence Study*, Hamangiu Publishing House, Bucharest, 2006.
[37] L. Pop, *Civil Law Treaty. Obligations*, *quoted works*, pp. 534-535.

qualified by the Gandolfi Project in art. 156-157, being mainly meant to save the contract and not to terminate it, in line with the rule *potius valeat quam ut pereat*. Only *in extremis*, the contract is terminated when the party whose consent was vitiated is interested in asking the cancelation or, in case of unpredictability, when the judge considers that this is the only solution in relation to the conditions stipulated at par (3) of art. 1270. Unlike the lesion, where the value disproportion between the service provisions occurs only upon contract conclusion, in case of unpredictability the relation between the provisions occurs during the execution of the contractual obligations and cannot be stipulated at the time o the contract conclusion. It takes shape in an obvious disproportion between the provisions, of nature to seriously affect the contractual balance and to prejudice the debtor's obligation to execute. The French authors take into account the theory of unpredictability, case of contract revision[38].

As far as we are concerned, we will define the unpredictability by what it actually is, namely the legal situation in which the parties are in relation to a reciprocal and commutative contract, confronted with an exceptional change of essential information of the contract, occurred during the execution of the contract obligations and which was impossible to be foreseen upon contract conclusion, shaped in an obvious disproportion of service provisions, of nature to seriously affect the contractual balance and to prejudice the debtor's obligation to execute.

The classical theory rejects the idea of contract revision as being contrary to the autonomy of parties' will, the ones who could have anticipated upon contract conclusion the possibility of a fundamental change of circumstances and stipulated a contract revision clause. Nowadays all European projects , including the French ones, famous for their conservatism, set forth the solution of contract revision.

4.2. Conditions of Unpredictability

The regulation of the unpredictability given by the current Civil Code was inspired by both Unidroit principles applicable to international commercial contracts[39] and by Principles of the European Contract Law[40]. According to the text in art. 1271 Civil Code, the following conditions are required to start the contract adaptation or termination mechanism:

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[38] J. Flour, J-L. Aubert, É. Savaux, *quoted works*, p. 381.

[39] PU: Art. 6.2.3 (Effects of hardship case)
(1) În case of hardship, the disadvantaged party is entitled to request negotiations. The request shall be made immediately and include the grounds on which it was made.
(2) The re-negotiation does not entitle the disadvantaged party to suspend the execution of the contract.
(3) Should no agreement be reached in a reasonable timeframe, either party may go to court.
(4) Should the court decide that this is a case of hardship, the former may, if reasonable:
(a)consider the contract terminated upon a date and in conditions which are to be agreed,
(b) adapt the contract taking into account the re-establishment of the provisions balance.

[40] PDEC. Article 6:111: Changement de circonstances
(1) Une partie est tenue de remplir ses obligations, quand bien même l'exécution en serait devenue plus onéreuse, soit que le coût de l'exécution ait augmenté, soit que la valeur de la contre-prestation ait diminué.
(2) Cependant, les parties ont l'obligation d'engager des négociations en vue d'adapter leur contrat ou d'y mettre fin si cette exécution devient onéreuse à l'excès pour l'une d'elles en raison d'un changement de circonstances
(a) qui est survenu après la conclusion du contrat,
(b) qui ne pouvait être raisonnablement pris en considération au moment de la conclusion du contrat,
(c) et dont la partie lésée n'a pas à supporter le risque en vertu du contrat.
(3) Faute d'accord des parties dans un délai raisonnable, le tribunal peut
(a) mettre fin au contrat à la date et aux conditions qu'il fixe,
(b) ou l'adapter de façon à distribuer équitablement entre les parties les pertes et profits qui résultent du changement de circonstances.
Dans l'un et l'autre cas, il peut ordonner la réparation du préjudice que cause à l'une des parties le refus par l'autre de négocier ou sa rupture de mauvaise foi des négociations**.**

- existence of an exceptional change of the circumstances taken into account upon contract conclusion. This condition results from the mere legal definition of the unpredictability in par (2) of art. 1271. It is about those changes which make the execution of the obligations much more onerous compared to the date of the contract conclusion, due to some objective circumstances mainly connected to the evolution of prices. As already mentioned, the problems of the unpredictability must not however be reduced to the issue of the inflation"[41]. The increase in the costs required to execute the contractual obligations may have different reasons; nevertheless they must be not known to the debtor who expresses his will[42];
- another condition resulting from the definition of the unpredictability itself is that the execution of the provisions in the new conditions has visibly become unfair. Consequently, existence of an exceptional change of circumstances under which the contract was concluded no longer suffices; it is required that the execution of the obligation by the debtor has affected the contractual balance to such an extent that the idea of contractual justice is questionable;
- the change of the circumstances under which the contract was concluded has to occur after the conclusion of such contract, as set forth by the text of art. 1271 par (3) letter a. Should the disproportion between the service provisions occur upon the contract conclusion, one shall take lesion into consideration;
- according to letter b of the same text, the changes in the circumstances and their scope have not been reasonably stated or foreseen by the debtor upon the contract conclusion. It is about the normal spirit of foreseeing which characterizes all reasonable people;
- the condition laid down by the provision in par (3) letter c of the text which we are commenting stipulates the debtor to have failed undertaking the risk of the change of the circumstances and to have been impossible for him to reasonably consider having assumed such risk. The contractual liberty allows conclusion of any contract which does not break the public order or the good manners, by assuming the risks implied by such change of the circumstances considered by the parties upon expressing their will. Undertaking such risk has to result explicitly, in a similar way as it may be presumed by use of the same spirit of foreseeing which characterizes all reasonable people.

4.3. Changes Occurred during Contract Execution

According to provision in par (1) of art. 1271 Civil Code, the contract has to be observed, even though its execution prejudiced either the creditor or the debtor of the obligation to execute, due to increase in costs of their own obligation or the obligations of the other party to the contract. Conclusion of all contracts which imply successive execution means assuming the risk of price depreciation, phenomenon which may prejudice both parties to the contract. The contract stability renders it unquestionable at the time of various changes in circumstances under which it was concluded, assuming that the parties took into consideration such perspective. Contrary to the lesion, in which case the misbalance between the service provisions exists from its very conclusion, the unpredictability implies that such disproportion occurs during the contract execution.

[41] Cr. E. Zamşa, *New Civil Code. Comments on Articles, quoted works*, p. 1331.
[42] G. Anton, *Theory of Unpredictability in the Compared Law*, Law no. 7/2000, p. 2

By exception from the first rule, the normative text in par (2) stipulates that, in case the obligation execution has become excessively onerous for the debtor of the obligation to execute, due to some exceptional changes in the circumstances which would obviously render unfair the debtor's forcing to execute his obligation, measures to adapt or terminate the contract may be taken under the terms stipulated by the subsequent texts. Therefore, we cannot speak of a principle of contract revision in this case; this applies only in the situation in which the revision may occur for exceptional reasons, when the execution of the contract under the new terms would become obviously unfair. The appeal that the regulation makes to the „obviously unfair" execution is linked to the concern of ensuring a contractual justice. Similarly to the situation when, according to art. 1227 Civil Code, the initial impossibility to execute an obligation does not affect the contract concluded, excepting the cases legally stipulated, not all misbalances between service provisions may lead to adaptation or termination of the contract, this is the case of only significant ones.

4.4. Bases of Unpredictability

To substantiate the unpredictability, several theories were launched (*rebus sic stantibus* rule, unjust enrichment, abuse of right, force majeure, contractual balance, contractual solidarism)[43]. According to an authoritarian opinion, the revision finds its theoretical and legal substance in the principle of good faith to which the demonstrative principle of contractual solidarity is attached" [44]. This would mean for us to consider that the measure sanctions the attitude of bad faith of the party who groundlessly refuses to accept the rearrangement of the service provisions.

As far as we are concerned, we consider that the contract revision is a measure imposed by objective clauses, reason for which it represents a *remedy* for the unfair situation in which the prejudiced party is, as a consequence of the exceptional changes of the circumstances under which the contract was concluded. It is the same objective explanation which we also see applicable in the case of lesion[45].

5. Effects

Pursuant to the text of par (2) of art. 1271, the court may take the following legal actions:

- adaptation of contract by equitable distribution of losses and benefits resulted from the change of the circumstances mentioned in the previous texts. Unlike the lesion, where art. 1222 par (3) Civil Code sets forth the possibility of „maintaining the contract" provided the other party offers a decrease of his own debt in an equitable way, or, if required, an increase of his own obligation, in the case of the unpredictability the text provides the possibility „to adapt the contract" which takes us back to the terminological unity of the current Civil Code. As already remarked, in case of the lesion[46], the syntagm „contract adaptation" is the preferable expression and instead of „maintaining the contract";

[43] Fore details, see L. Pop, *Civil Code Treaty. Obligations. Vol. II. The Contract*, Universul Juridic Publishing House, 2009, pp. 538541
[44] Ibidem.
[45] S. Neculaescu, *Lesion – Vice of Consent or Contractual Misbalance?*, Private Law Magazine no. 3/2010.
[46] See S. Neculaescu, *Sources of Obligations in the Civil Code (art. 1164-1395). Critical and Comparative Analysis of the New Normative Texts*, C.H.Beck Publishing House, 2013, p. 232.

- termination of the contract at the time stated herein and under the terms agreed. This is the last solution which the court may rule if the contract adaptation fails. Even though this case is not stipulated among the clauses regarding contract termination as set forth in art. 1321 Civil Code, it may be integrated in the syntagm „any other clauses provided by the law „ at the end of the text mentioned.

5.1. Observations

In our opinion, the normative texts regarding unpredictability are subjected to some reserves.

5.1.1. „Exceptional changes of the circumstances which would obviously render unfair the debtor's forcing to execute his obligation" is an insufficiently clear expression. This may not be about any „circumstances" under which the debtor would be at the time of contract execution; it would only be about *objective and relevant circumstances*, unknown to the debtor's will and not imputable to the debtor. In a legal explanation, such circumstances may be determined only by *events*.

Commenting on the new provisions in this matter, the author of this obligation manual remarks that „the terms used in the new Civil Code are too general to be presented in detail and accurately by the principle"[47]. According to the same author, „bankruptcy or decrease in the economic power of the debtor, only due to how he (badly) manages his business, shall not be considered as exceptional changes as they lack the element of exteriority"[48].

In line with this opinion, we appreciate that the text in art. 6.2.2 of Unidroit Principles, which focuses on the „events which significantly alter the contractual balance excluding the debtor's will", outlines better the objective context which one has to consider in defining the unpredictability.

5.1.2. The term „unpredictability", marginal denomination of the texts under analysis, designate only the main characteristic of the change occurred in the contract execution, that of not having been foreseen by the parties. As the French doctrine of civil law remarks, unpredictability is only the *cause* of the phenomenon, while the real grounds of contract adaptation or termination is „the objective misbalance between the service provisions"[49], taken into consideration in the Lando Principles by the syntagm „change of circumstances" (objective, we would add). It is not the unpredictability that determines the contract revision, but the change of the objective context in which the provisions of services take place. And, if the syntagm „change of objective circumstances" could seem less appropriate to designate the grounds of the contract revision, the clause of hardship, used by the same Unidroit Principles, could be a preferable solution to the current one. The perspective of edifying a European Contract Law changes our fearful perception of the important legal terms, considering that most new normative provisions are taken from foreign regulations. What matters is that the translation does not alter the meaning of the terms, as is sometimes the case.

5.1.3. Even though the texts are mainly inspired from the provisions of art. 6. 111 of Lando Principles, their translation is selective. In the version of the current Civil Code, the obligation imposed on the parties to negotiate the contract adaptation is missing; this

[47] P. Vasilescu, quoted works, p. 457.
[48] Ibidem, p. 458.
[49] J. Ghestin, *Traité de droit civil. Les effets du contrat*, Librairie Générale de Droit et de Jurisprudence, Paris, 1994, p. 345.

omission deals with the respect owed by the law and the judge to the sovereign will of the parties. Prior to the contract adaptation by the court, the parties should have been obliged to rearrange the contractual service provisions *themselves*, taking account of the new realities appeared. Such succession of contract adaptation operations, first by the parties and then by the court, is stipulated in art. 6:111 par 2 of both Lando Principles[50] and Unidroit Principles, art. 6.2.3 par (3), text according to which „in case no agreement is reached within a reasonable period of time, each party may appeal to court". The same preference order is also stipulated by the Catala Project[51]. Even though the new regulation does not stipulate the parties' obligation to adapt the contract, the normative text in par (3) letter d conditions the enforcement of the new provisions to the debtor's attempt to negotiate the contract, which means that a preliminary procedure was taken into consideration, which justifies once again the proposal which we are formulating.

In terms of other aspects, if the groundless reason of contract renegotiation or abrupt interruption of negotiation caused prejudice to the other party, the new regulation should have stipulated for the prejudiced party the right to claim compensations, solution stated by the Lando principles, in art. 6:111, last paragraph.

5.1.4. One supposes that the text in art. 1271 par (3) Civil Code according to which „the change of circumstances as well as *its scope* (s.n.) have not been and could not have been reasonably considered by the debtor upon contract conclusion", is an uncorrected version, as the syntagm „its scope" may not refer to circumstances susceptible to measurement. Only the service provisions undertaken by the parties may have a scope, but they are not mentioned in the previous texts. One cannot thus understand of which „scope" it refers to. Therefore, it is necessary that the text be revised.

6. Short Revisions

Without denying the opportunity to regulate the unpredictability, we support both the need for re-elaboration of legal provisions in art. 1271 Civil Code, according to the proposals previously set forth, and the renunciation to the typical formula referring to the duly concluded contract's power of law, from the definition of the binding force of the contract in 1270 Civil Code, avoiding therefore the formal tribute paid to the *pacta sunt servanda* principle.

[50] PECL. Art. 6 :111 : Changement de circomstances
(1) Une partie est tenue de remplir ses obligations, quand bien même l'exécution en serait devenue plus onéreuse, soit que le coût de l'exécution ait augmenté, soit que la valeur de la contre-prestation ait diminué.
(2) Cependant, les parties ont l'obligation d'engager des négociations en vue d'adapter leur contrat ou d'y mettre fin si cette exécution devient onéreuse à l'excès pour l'une d'elles en raison d'un changement de circonstances.

[51] Pr. Catala : Art. 1135-1. Dans les contrats à exécution successive ou échelonnée, les parties peuvent s'engager à négocier une modification de leur convention pour le cas où il adviendrait que, par l'effet des circonstances, l'équilibre initial des prestations réciproques fût perturbé au point que le contrat perde tout intérêt pour l'une d'entre elles.
Art. 1135-2. A défaut d'une telle clause, la partie qui perd son intérêt dans le contrat peut demander au président du tribunal de grande instance d'ordonner une nouvelle négociation

THEORETICAL AND PRACTICAL ISSUES REGARDING *MORAL DAMAGES* IN THE INTERPRETATION OF THE NEW CIVIL CODE

Cristinel Ioan MURZEA *

Abstract: *The new Civil Code uses the notion of „non patrimonial prejudice", thus emphasizing the distinction between patrimonial damages and those damages which can't be evaluated, the non patrimonial ones, also known in doctrine as „moral damages", extra patrimonial prejudice or „non pecuniary prejudice", or „immaterial". Repairing moral damages provides the victim with an amount of money which only partially makes up for the suffering and the moral or physical traumas to which the victim was subjected. Moral prejudice represents a non patrimonial consequence which results from the equivalent of a right or patrimonial interest which consists of the death, physical injuries or moral damages caused by bodily harm, an attack on the honor, dignity, reputation or public image of a person.*

Keywords: *moral damages, prejudice, compensation, victim of prejudice, personality rights*

The institution of moral damages and its impact in the process of enforcing subjective law represented and still represents a true challenge for jurisprudence but also for specialty doctrine; it is an issue which is increasingly more present in legal sentences, sometimes achieved by controversial solutions or by arbitrary means with general phrasing and insufficiently motivated.

Some civil law doctrinarian authors stated that moral damages are in a legal deficit both in regard to the definition provided by law but also from the perspective of judicial practice, as this matter is, in their opinion - an opinion which we agree with - insufficiently clarified, without proper rules and criteria in order to a achieve a unified practice in courts.

Thus, the insufficient level of regulation of this matter, even in the new Civil Code, to which we can add both the magistrate's refusal to assume full responsibility and the police's lack of necessary efforts, these are obvious symptoms of a flawed judicial system, thus emphasizing the acute necessity of continuing the reform of the entire legal system, including the area of legal mindset[1].

In a more complex approach of this institution, it is claimed that one of the main issues regarding prejudice as an essential element of civil liability is the division of prejudice, based on its nature, in patrimonial prejudice on one hand and non patrimonial prejudice[2] on the other hand, also called a moral damage.

However, jurisprudence often assimilates moral damages with the notion of compensation[3].

The new Civil Code uses the expression „non patrimonial prejudice", thus letting go of the doctrine's creation - moral damages - and attempting to distinguish between those

* University professor doctor – Transylvania University of Brasov, Faculty of Law

[1] Cf. C. Soroceanu, „Moral damages, definition, criteria" in *Society and Law*, Omnia UNISAST Publishing House, Brasov, 2001, p.441

[2] Ibidem, p.441

[3] Cf. C. Turianu, *Civil tort liability. Civil liability for moral damages*, Wolters Kluwer Publishing House, Bucharest, 2009

which can be evaluated in money, as the pecuniary criteria is obviously „expresis verbis" suggested in the content of article 252 of the Civil Code.

French civil doctrine frequently uses the notion of moral damage thus showing that it represents that certain prejudice which results from physical or moral suffering endured by a person who had its personal interests injured[4].

In this context, it was established that this type of moral damages can't bring upon a reduction of a person's patrimony by an economical loss which can be quantifiable[5].

Romanian specialty doctrine shows that if we were to define moral prejudice, we would say that it is the harmful result of the non patrimonial nature of an illicit deed committed with guilt, a deed which attacks the non economical values of human personality which, although they can't be evaluated in money, create some rights and obligations to compensate, in accordance with the provisions regarding tort civil liability. Thus, in all cases brought to trial, there is an acute need for a rigorous examination by the judge in order to establish the cause-effect relation between the action which causes the prejudice and the effects for which moral damages are claimed[6].

In the opinion of the lawmaker of the new Civil Code, moral damages are shown as a component of the prejudice caused by an illegal act with the same meaning as material damages; this results from the formal condition of article 1391 of the Civil Code as well as from the provisions of article 253-256 of the Civil Code, which regulate the means for protecting non patrimonial rights.

In our opinion, moral prejudice is a consequence which can't be evaluated in money, resulting from the violation of a right or patrimonial interest, thus causing „death, physical or moral pain caused by bodily harm of by attacks on a person's health, honor or reputation[7]".

Romanian civil law distinguishes in regard to moral prejudice, thus classifying prejudice in regard to the different forms it can have.

Thus, prejudice resulted from bodily harm or health of a person is listed (see article 1387 of the Civil Code)[8].

The new Civil Code claims the human body is intangible, as every human being is entitled to its physical and moral integrity and any harm to those is strictly regulated by law (article 64 of the Civil Code).

As a consequence, any harm of the human body which causes physical or moral pain represents a moral prejudice which needs to be compensated. We feel the opinion of professor C.Turianu[9] is very precise, showing that, for example, the loss of an arm can be qualified as material prejudice and moral prejudice, but nothing stops the judge from retaining both forms of prejudice in civil tort liability, thus awarding the victim proper damages. The entire legal doctrine places moral prejudice in the category of prejudices which can be compensated, as this is an essential condition of civil tort liability[10]. As a result of those stated above, the provisions of article 998 of the 1864 Civil Code are achieved, in relation to those of article 1382 of the French Civil Code, namely the complete compensation of prejudice, a thesis which makes no distinction between the prejudice which can be evaluated in money and those of non pecuniary nature.

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[4] H. Lalou, *La responsabilite civile*, Dalloz Publishing House, Paris, 1928, p.46
[5] B. Starck, *Droit civil,* Libraisies Technique, Paris, 1972, p.56
[6] C. Soroceanu, op.cit. p.441
[7] I. Adam, *Civil law. The theory of obligations*, C.H.Beck Publishing House, Bucharest, 2014, p.347
[8] C.f. I. Adam op.cit. p.347
[9] C.f. C. Turianu, op.cit.
[10] B.Delmas, *Du prejudice moral*. These de doctorat, Toulouse 1939, p.69

In this context, compensation of the prejudice requires reinstating the victim in the previous situation, by reestablishing the equilibrium which was affected by reduction or loss of the patrimony of the injured person[11].

However, it is true, without any relation to ethical and moral Christian principles, that compensating non patrimonial damages, especially those as reputation, honor, public image can't be compensated in money; they can however by partially compensated by improving the situation of the victim.

As a consequence, we agree with the majority opinion, according to which moral prejudice can't be qualified as a species of prejudice that can be compensated,[12] and its legal regime is somewhat different from that of pecuniary prejudice.

Thus, we distinguish between those prejudices which consist of attacks on the honor, dignity or reputation of a person, its professional qualities which, in present time, represent an issue for the courts of law considering the need of recreating the balance which was affected in regard to the personality of a human being.

The dignity of a person is a somewhat ethical concept, rather than a judicial one, being frequently called in justice and receiving different solutions, although the lawmaker of the new Civil Code expresses „expresis verbis" in article 61 that life, health and physical and moral integrity of any person are legally guaranteed and protected - as a reference to enforcing the inherent rights of the human being[13].

In many such cases, the actual situation can't be established, since there are some disturbances of the injured party, in its emotions and feelings; evaluating such damages is achieved by using both objective and subjective criteria, considering the experience and orientation of the judge. But even in these situations, awarding moral damages must be thoroughly motivated and proved, without any room for interpretation and arbitrary, a situation which exceeds the subjective conception according to which the justice act is left at „the decision and wisdom of the judge[14]".

A right solution in this kind of cases is the essence and not the idea of compensation, of providing reparation for the victim, but also attempting to reestablish the previous situation by compensating the victim of the prejudice or by the court considering other measures meant to improve the unjust situation in which the victim is found[15].

From this perspective, as it considered the previous jurisprudence, the lawmaker of the new Civil Code created the legal instruments required to protect and guarantee the non patrimonial subjective rights in the content of article 253 fourth alignment of the Civil Code:

"Also, the person who suffered a prejudice can ask for compensation or patrimonial reparation for the prejudice he suffered, even if it is a non patrimonial one, if the damage was indeed caused by the author of the deed which created the prejudice".

Thus, non patrimonial rights are protected; those rights which are closely connected to the human being and whose object is the health, integrity, personal life, dignity, honor, public image or other such rights which, if violated, can cause proper compensation for the injured party.

[11] I. Adam, *The judicial act*, C.H.Beck Publishing House, Bucharest, 2013, p.229
[12] Ibidem
[13] I. Turcu, „The respect of the human being's dignity in the new Civil Code"in the biennial conference, Timisoara 2011, p.211
[14] C.f. E. Poenaru, C.Murzea, *Representation in private law*, C.H.Beck Publishing House, Bucharest, 2007, p.102 and following
[15] I.Urs, *Compensating moral damages*, Lumina Lex Publishing House, Bucharest, 2001, p.193

We must also mention that the mere compensation of the violated right does not remove the moral prejudice which can affect the physical and moral state of the injured person, as the person will be continuously traumatized (see emotional prejudice).

The lawmaker discusses non patrimonial prejudice caused to emotional personality, resulting from a physical injury or from moral suffering as damaging the feelings of affection and love, for example the injury, mutilation or disfiguration of a close relative or physical suffering caused by the death of a close relative or some personal life trauma[16].

In these situations, awarding a certain amount of money can't compensate for the prejudice; however, money can be considered as compensating the physical or moral injury caused by the illegal action to a certain extent.

In our opinion, according to judicial practice, moral damages are always granted based on a thorough motivation, in such an amount that it represents an equivalent of the prejudice which was caused. It is extremely important that the motivation is phrased in such a way that it allows for the functions of judicial control[17].

Thus, moral damages can't be granted in a symbolical amount of money which would question the compensating function, but they also can't be granted in excessive amounts, which would exceed the limits of reason and judicial equity and would be in conflict with the principles of morals, thus creating a source of enrichment. Awarding an amount of money is subjected to the concept of equivalence and compensation, which must be both weighed and valued as unquestionable proof, as the lack of these would create arbitrary decisions. In this context, the specific motivation and the proof needed for awarding moral damages must be seen in permanent relation to the legal provision and the principles of equity, as they must ensure the continuation of the victim's life both from a subjective and objective point of view.

As shown in doctrine, amounts of money awarded as compensation „must not be excessive fines for the authors of the prejudice or unjustified income for the victim"[18].

Compensating several moral damages is achieved by non patrimonial means such as forcing the author to desist, forcing the author to pay a civil fine in case he does not desist, forcing the author to provide a public apology, forcing the author to refute or rectify by means of public knowledge, printing the judicial decision at the expense of the author[19]. Resulting from the above listed opinions, the new Civil Code lists a series of non patrimonial measures regarding the protection of non patrimonial subjective rights, in article 253 first alignment which regulates:

a. The interdiction of committing the illegal action, if it is imminent;
b. Stopping the violation and forbidding any future violations;
c. Acknowledging the illicit character of the action, if the disturbance it caused still exists.

All these reparatory measures are voluntarily fulfilled by the author of the illicit action, as, if the author doesn't act on this measures, he will be forced to pay a fine for every day of delay, a situation which basically violates the principle of compensating the prejudice suffered by the injured party. It was shown in doctrine that by such non patrimonial measures, aesthetical prejudices can't be compensated, as well as recreation or other moral prejudice caused by bodily harm[20].

[16] I. Adam, op.cit. p.347
[17] C. Soroceanu, op.cit., p.443
[18] I. Albu, *Compensating the prejudice caused by bodily harm*, p.22
[19] A. Corhan, *Compensating the prejudice by money equivalent*, Ed. Lumina Lex, Bucureşti 1999, p.44
[20] I. Adam, op.cit. p.243

The lawmaker of the new Civil Code does not distinguish between compensating patrimonial and non patrimonial prejudice, thus using notions which leave no room for interpretation in several texts of law regarding the compensation of non patrimonial prejudice. Thus, bodily harm or violating a person's health is regulated in article 1387 of the Civil Code, while article 1389 of the Civil Code discusses „the person entitled to compensation in case of death"[21] - (article 1390 Civil Code), thus discussing an indirect prejudice or „a prejudice by ricochet" and compensating non patrimonial prejudice (article 1391 of the Civil Code), also known as moral prejudice. In such situation, judicial practice provided a series of decisions by which moral damages were compensated by certain amounts of money.

In all these cases, the judge appreciated that the moral prejudice was evaluated „in concreto" in each case, considering the circumstances of that particular situation. In this context, the evaluation of the moral prejudice is not achieved based strictly on economical criteria, but also on granting compensation in relation to the nature of the prejudice as the duration and intensity of physical pain of moral disturbances as well as the consequences suffered by the victim of the moral prejudice.

By randomly analyzing the solutions of the courts, we can see that moral damages are established in relation to the effects of the illicit action, by estimating, not in a general matter but rather by considering the certain criteria of each case[22]. Based on these coordinates we must interpret the provisions of the new Civil Code, which mentions that „in case of any harm to the health or body of a person, certain compensation can be awarded for the restriction of the financial and social possibilities of the victim".

Thus, the lawmaker suggests the solution by which we can compensate bodily harm.

In doctrine, there was a pertinent opinion claiming that moral prejudice can't be qualified as a species of prejudices which can be repaired[23], as it has a distinctive regime because it can't be entirely repaired as is the patrimonial one; in this case, the awarded amount of money is merely a compensation, a consolation, causing just a minor improvement of the situation of the victim. If the moral prejudice is qualified as a debt and will be subjected to tort liability, non patrimonial rights will be converted to patrimonial ones, thus assimilating the two categories of prejudice.

As a novelty, the new Civil Code regulates the obligation to compensate the person who expressly violates the subjective rights or legitimate interests of other people. Thus, in article 1359 the Civil Code discusses the fact that „the author of the illicit act is forced to repair the prejudice and when the prejudice results from violating a legitimate interest of another person, if the interest is legitimate and serious, it creates the appearance of a subjective right".

Also, the new Civil Code discusses the loss of the chance to obtain an advantage, which entails a guilty action or inaction from the author of the prejudice and which would not have been caused had the author not alter the victim's course of life by creating a prejudice. Thus, the victim of such a prejudice is entitled to damages, but the courts must consider all the aspects which caused this situation, as well as all the circumstances regarding the precise situation of the victim[24].

The new Civil Code provides a regulation meant to remove the different solutions of the courts, acknowledging the possibility to compensate such prejudice. As a consequence,

[21] Ibidem p.228

[22] Cf. V.Pătulea, „A contribution to the study of civil tort liability in case of prejudice resulted from bodily harm", in *Romanian Law Magazine* no.11/1970, p.52-72

[23] S. Necolaescu, *Civil tort liability. A critical exam of the conditions and fundament of civil tort liability in Romanian Law*, Sansa Publishing House, Bucharest, 1994, p.49

[24] I.Adam, *Civil law. Obligations*, C.H. Beck Publishing House, Bucharest, 2013, p.224

the victims of such prejudice will be awarded compensation which will ensure the possibility to reinstate them in the previous situation based on moral justice and equity.

The courts will provide compensation in relation to the severity of the moral prejudice which is appreciated depending on the injured right and the importance of this right in the life of the victim. It was stated that the prejudice is more serious when the illegal conduct is in connection to the professional life or family life of the victim.

In contraposition with the 1864 Civil Code, the new Civil Code aims to protect and enforce the civil rights and liberties of the citizens, thus distinctively regulating the compensation of non patrimonial prejudice, without making any distinction between pecuniary and moral prejudice.

In this context, the lawmaker ensures a proper legal frame for optimal development of judicial civil relations according to the necessary rightful order which is meant to ensure the legal protection of people.

If the lawmaker before 1989 had no way to compensate non patrimonial prejudice, we notice that the current new Civil Code lists different legal solutions for compensating moral prejudice in accordance with the European principles in this matter.

As opposed to the previous regulations, namely the 1864 Civil Code, the new Civil Code capitalizes the opinions of specialty doctrine as well as the solutions of judicial practice, thus regulating the possibility to compensate the non patrimonial prejudice. Moral damages, also known as moral injuries violate the subjective rights and the legitimate interests of the people and are likely to create a climate of social insecurity and a state of anomy. While in the socialist regime compensating moral damages was inadmissible, representing merely a topic of discussion for doctrine, after 1989 the lawmaker returned to the interwar practice and doctrine which was valorized in the new Civil Code, thus granting the compensation of moral prejudice by civil tort liability.

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BRIEF CONSIDERATIONS ON THE TERMINATION OF RIGHTS. A SPECIAL LOOK ON THE TERM FOR ACCEPTING OR DISCLAIMING AN INHERITANCE

Ilioara GENOIU [*]
Bogdan PĂTRAŞCU [**]

Summary: *The present work aims to point out the main aspects involved by the sanction of termination of rights, by resorting sometimes to a comparative analysis and, hence, taking common law in the field as reference point, which is represented by the statute of limitations. The work will therefore attempt to define the sanction under scrutiny, to identify the categories of terms which it involves, to determine its scope, legal regime and effects that it generates. A particular attention shall be paid to the term for accepting or disclaiming an inheritance, having a legal nature which was always difficult to establish. On this occasion, there will be discussed only a few aspects which this term involves and which are of interest (legal nature, development and effects).*

Keywords: *termination of rights, statute of limitations, suspension, interruption, reinstatement of the term.*

1. Termination of rights. A brief presentation

Definition and types of terms

Book VI „On the statute of limitations, termination of rights and establishment of terms", Title II „General regime of the termination of rights terms", articles 2545-2550 of the Civil Code currently in force[1] regulates some interesting aspects related to the termination of rights, a legal institution having the nature of a sanction by law and several similar elements with the stature of limitations (which, in fact, constitutes the common law applying to it). Going through the legal texts mentioned above, it can be noticed that the normative act under scrutiny does not provide a definition to the termination of rights (in fact, it does not define many of the legal institutions which it regulates, although sometimes this has turned out to be useful[2]), but contains enough elements so that that the legal literature can do this. On the basis of these reference points, the termination of rights can be defined as the sanction consisting in the extinguishment of a civil subjective right, which was not exerted within the termination term established by the law or the parties, whereas when it comes to the unilateral act, it consists in the prevention to perform it, act according to law[3] (article 2545 of the Civil Code).

* Reader Dr. at the Faculty of Law and Administrative Sciences, „Valahia" University of Targoviste, ilioaragenoiu20@yahoo.fr
** Lecturer at the Faculty of Legal and Administrative Sciences, „Dimitrie Cantemir" Christian University, Bucharest, and 2nd rank researcher at the Legal Research Institute „Acad. Andrei Rădulescu" of the Romanian Academy.
[1] We are referring to Law No. 287/2009 on the Civil Code, republished in the Official Gazette, No. 505 from 15th July 2011.
[2] B. Pătraşcu, I. Genoiu, *Repere pentru simplificarea unor reglementări de drept civil, în principal din materia succesiunilor,* in the Proceedings of the Annual session of scientific meetings „Simplificarea – imperativ al modernizării şi ameliorării calităţii dreptului", Universul Juridic Publ. House, Bucharest, 2015, p. 74.
[3] See for this matter but also concerning the other aspects which the present work shall analyse regarding the termination of rights I. Genoiu, *Drept civil. Partea generală. Persoanele,* C.H. Beck Publ. House, Bucharest, 2015, p. 319 and the following.

As it results from article 2545 paragraph (1) of the Civil Code, the termination of rights terms can be established by bilateral or multilateral legal acts (therefore contracts) and by law. The first solution is undoubtedly indicated when the will of parties is involved. According to law, within the terms established in this way, certain rights must be exerted (subjective rights), or unilateral acts shall be performed. One may raise the question whether such terms can be stipulated by the will of the parties or rather by legal texts also when some material deeds are committed (for instance the legal term for handing in a winning lottery ticket), with the same consequence of extinguishing the subjective right in the contrary case.

We consider useful mentioning that the termination of rights, unlike the statute of limitations, operates by law simply when the term provided ends, irrespective of any guilt of the owner[4].

Taking into account the provisions of article 2545 paragraph (1) of the Civil Code, according to which „By law or the will of the parties can be established terms for terminating a right or the possibility to perform unilateral acts", it can be identified a first category of terms for terminating rights – the legal and the conventional ones. This classification, which is not the only one which can be made in terms of the termination of rights, is based on the source criterion, as legal terms are instituted by law, while the conventional ones are established by the parties. It should also be mentioned that the possibility of the parties to establish terms for the termination of rights is limited by article 2546 of the Civil Code, according to which „Is affected by absolute nullity the clause establishing a term for a termination of rights which would make excessively difficult the exertion of that right or the performance of the act by the interested party".

Another two criteria could be taken into account for classifying the terms for terminating a right, namely that of the interest protected by the legal norm instituting the termination of rights terms and the possibility to give up to the termination of rights term or to change it.

Speaking about the criterion regarding the interest of the person protected by the legal norm instituting the termination of rights, we can distinguish between the termination terms instituted by legal norms protecting a general interest and the termination terms instituted by legal norms protecting a private interest.

In accordance to the latter criterion above, we can also make a distinction between termination terms of public order, which are instituted by legal provisions protecting a public interest, and termination terms of private order, which are established by the parties or instituted by legal provisions protecting a private interest.

When it comes to the termination terms of public order and, respectively, private order, we believe that a few mentions would be useful. First of all, it must be pointed out that one can give up to the termination of rights benefit after the concerned term ends and that parties can only modify the termination terms of private order, and not also those of public order (article 2549 of the Civil Code). Then, if one gives up to a termination right of private order, before the term concerned ends, shall be enforced the rules regarding the interruption of the statute of limitations, by admitting the right [article 2549 paragraph (1) thesis 2 of the Civil Code]. Last, we would like to mention that termination terms of public order (hence not also those of private one) must be invoked and applied ex officio by the jurisdictional body [article 2550 paragraph (2) of the Civil Code].

[4] G. Boroi, C.Al. Anghelescu, *Curs de drept civil. Partea generală,* 2nd edition, revised and updated, Hamangiu, Publ. House, Bucharest, 2012, p. 358; National Union of the Notaries Public from Romania, *Îndrumar notarial,* II volume, Monitorul Oficial Publ. House, Bucharest, 2011, p. 263.

The scope

According to the provisions of article 2547 of the Civil Code, „*If from law or the parties agreement does not result clearly that a certain term corresponds to a termination of rights one, then the rules regarding the statute of limitations shall be enforced*".

Taking into account these legal provisions, we can assess that, from the perspective of the qualification made by the law or the parties, two categories of termination terms can be distinguished: termination terms qualified as such and terms which are not clearly qualified as being termination ones, but which must receive this qualification when from the law or the parties convention clearly results that their accomplishment triggers the loss of the subjective right not exerted within them or the prevention to perform the unilateral act, depending on the case.

The first category of terms mentioned above include, for instance, the 1 year termination term, which is enforceable to the action requesting the establishment of the legal unworthiness [article 959 paragraph (2) of the Civil Code]; the 6 months term in which the contractor, on the demand of the interested party, must confirm the cancellable contract or to file an application for cancellation [article 1263 paragraph (6) of the Civil Code]; the 6 month termination term in which the owner is entitled to demand the restitution of the asset found or the price obtained from its use [article 945 paragraph (1) of the Civil Code and article 942 paragraph (2) second thesis of the Civil Code].

The second category of terms (those which are not clearly qualified as termination ones, neither by law, nor by the parties, but the accomplishment of which undoubtedly determines the loss of the subjective right not exerted within them or the prevention to perform the unilateral act), include the 1 year term for accepting or disclaiming an inheritance, provided for by article 1103 paragraph (1) of the Civil Code; this will be briefly discussed in the second part of the current work.

Yet, on the contrary, when the term instituted by law or established by the parties did not receive a clear qualification and its accomplishment does not lead to the loss of the subjective right, nor it prevents the unilateral act from being performed, then the term in question shall be qualified as a statute of limitations one.

Legal regime

Article 2548 paragraph (1) of the Civil Code institutes the rule according to which termination terms are not subject to suspension and interruption. The next paragraphs of the same legal text also include the exceptions which this rule involves, which are represented by the following hypotheses:

a) For all termination terms, force majeure prevents the term from passing (hence postpones its start), while if the term started to pass, then it shall be suspended, being subject to all the rules applying to the suspension of the statute of limitations. Yet, the termination term is considered accomplished only 5 days after the moment the suspension ceased [article 2548 paragraph (2) of the Civil Code].
b) When the enforcement of the right involves filing a legal action to court, the term is interrupted at the moment when the application for appearing before the court, arbitration or postponement is filed, the provisions regarding the interruption of the statute of limitations being accordingly enforced [article 2548 paragraph (3) of the Civil Code].

Together with the two general causes for modifying the evolution of termination (one related to suspension, the other to interruption), in certain cases it is also provided the possibility to change the evolution of certain termination rights. This happens for instance to the 1 year term corresponding to the right to accept or disclaim an inheritance, which is subject to the rules typical to the statute of limitations in terms of suspension and reinstatement, according to article 1103 paragraph (3) of the Civil Code,

Without stopping here with the way terms are calculated (related to the termination of rights or the statute of limitations), we would only like to add that the moment when a termination term ends is determined according to the rules applying to the statute of limitations, in a different manner, expressed in years, months, weeks days or hours.

Effects

When the termination of rights term ends, the subjective right not exerted at the due term is lost or the completion of the unilateral act is prevented from taking place. This is in fact the most significant distinction between the termination of rights and the statute of limitations, as when it comes to the latter the end of the term only triggers the loss of the right to take action, in a material meaning, and not also that of the subjective right itself.

The interested party can oppose the termination of rights only in a trial court, by means of a statement of defence or, should no invocation exist, at latest at the first trial term to which the parties are legally summoned [article 2550 paragraph (1) of the Civil Code and article 2513 of the Civil Code]. When it comes to the termination rights of public order, the jurisdictional body is bound to invoke them and enforce them ex officio, no matter if the interested person proposes to discuss them or not [article 2550 paragraph (2) of the Civil Code].

The contrast between the termination of rights and the statute of limitations

As pointed out before, both similarities and differences exist between the two legal institutions in question. They are similar because they are civil law sanctions, involve terms and have the effect of a statute of limitations.

Nonetheless, the legal institutions in question cannot be mistaken, at least for the following reasons: the termination of rights extinguishes the subjective right itself, while the statute of limitations only extinguishes the right to take action in a material way; the terms typical to the statute of limitations are more and longer, comparing to those specific to the termination of rights, which are fewer and shorter; the suspension, interruption and reinstatement of the term are typical, in principle, only to the statute of limitations and not also to the termination of rights; unlike the statute of limitations (which is mainly a private order institution), the termination of rights (which is mainly a public order institution) operates by full right; termination terms can be established both by law and the will of the parties, while the statute of limitation terms are established mainly by law; the terms typical to the statute of limitations can be modified by the parties, within the legal limits, while this possibility does not exist when it comes to the public order terms for terminating a right.

2. The term for accepting or disclaiming an inheritance. Specific features

According to article 1103 paragraph (1) of the Civil Code „*The right to choose whether to accept or disclaim an inheritance is exerted within a year since the moment the inheritance is opened"*.

There are many elements which could question the one year term mentioned above[5]. Nonetheless, the current analysis will stop only at the legal nature of this term, its evolution and the effects which generates at the end.

We will only mention that, for the time being, the term for expressing the option regarding an inheritance is double than the one provided by the former Civil Code (one year versus 6 months) and that article 1103 paragraph (1) of the Civil Code clearly refers to the option term seen on the whole, with its both sides: acceptance and disclaim.

Regarding the *legal nature* of the term, the text of article 1103 of the Civil Code points out that this is undoubtedly a termination one. Indeed, within this term must be exerted the right to accept or disclaim the inheritance, which is without any doubt a subjective one (it matches perfectly the definition of subjective rights, as it regards the conduct of the legal subject which is allowed and protected by law; the legal subject is the person entitled to inherit, whereas its conduct concerns the acceptance or refusal of the heir title). According to the former regulations too, the option term had basically the same features, being considered a subjective one too. Consequently, the 6 months term was a termination one too, just like the present one. Except that both legal practice and literature considered it a statute of limitations term. This was justified by the fact that it could be therefore subject to the reinstatement of the term and suspension, typical to statute of limitations. But since the statute of limitations extinguishes not the subjective right, but the right to take action in a material way, the term for accepting or disclaiming the inheritance was sometimes considered a real right to action, so that its legal nature was misrepresented. This was a questionable compatibility, actually worth being criticized, and definitely lacking durability, as long as it was made despite scientific criteria (it is true that article 700 paragraph (1) of the 1864 Civil Code was speaking about the right *becoming subject to the statute of limitations*, hence offering a textual argument).

The current Civil Code offers mainly the same data for the issue under scrutiny: the right for accepting or disclaiming an inheritance is a subjective one; now, the term within which it must be exerted is of one year; just like in the former regulations, the statute of limitations extinguishes the material right to take action (article 2500 of the Civil Code)[6]. Finally, the persons entitled to inherit, but who did not exert this right within the term

[5] See for more details also B. Pătraşcu, I. Genoiu, „Aspecte esențiale asupra opțiunii succesorale potrivit noului Cod civil", in M. Uliescu (coord.), *Noul Cod civil. Studii şi comentarii,* II volume, Universul Juridic Publ. House, Bucharest, 2013, p. 923 and the following.

[6] Book VI of the Civil Code, named „On the statute of limitations, termination of rights and establishment of terms" contains at least the following legal texts which are relevant for the present analysis:
- art. 2500 par. (1): *„The material act to take action, subsequently named action right, is extinguished by the statute of limitations, if it was not exerted within the term established by law".*
- art. 1522 par. (1): *„The person who did not exert his action right subject to the statute of limitations within the due term, out of solid reasons, can demand to the competent jurisdictional body to reinstate the term and to bring the file case before the court"*
- art. 2547: *„If out of law or the parties' convention does not clearly emerge that a certain term is a termination one, then the rules typical to the statute of limitations shall be enforced".*
- art. 2548 par. (1): *„The terms applying to the termination of rights are not subject to suspension and interruption if the law contains no other provision*".

provided, out of solid reasons to justify their lack of action or a situation constituting a suspension case, must continue to have nonetheless the chance to do it, the more that the termination of rights triggers the extinguishment of the subjective right itself. This under the circumstances in which the reinstatement of the term and the suspension are even now institutions typical to the statute of limitations. Still, unlike the former legislation, the Civil Code in force has managed to find a suitable solution for this legal issue, which does not alter the nature of the option right nor that of the term within which it must be exerted. According to article 1103 paragraph (3) of the Civil Code, „*The term provided for by paragraph (1) is subject to the provisions contained by Book VI on the suspension and reinstatement of the statute of limitations term"*.

It becomes obvious that the term in discussion, although it is not clearly stated, can be classified without reservation as a termination of rights one[7] and that it can still be subject to the legal institutions of suspension and reinstatement of the term, which are typical to the statute of limitations. It has been necessary, only as an exception, to place the termination of rights term under the incidence of some norms specific to the statute of limitations, along with the norms typical to the latter. In other words, it was enough to admit, as an exception, that the statute of limitations can also extinguish a subjective right, and not just one to take action in a material way. This effect can intervene when the situations for suspending the statute of limitation are absent or when there is no solid ground for reinstating the term.

Regarding *the evolution of the term to accept or disclaim the inheritance*, the rule is that the one year term starts to pass from the moment when the inheritance is opened. The Civil Code, at paragraph (2) of article 1103, regulates a few exceptional cases in which the term starts to pass from another date, after the opening of the inheritance. The lawmaker has resorted to this solution out of understandable reasons, as if it had considered that the option term starts to be applied in all cases since the person leaving the inheritance dies this would have considerably diminished the useful period in which the persons entitled to inherit could express their option or would have led to the situation in which the one year period could have already passed. Also, it must be noticed that the lawmaker has resorted in this case (but also in other situations) to older solutions within the legal practice which, throughout the systematic and extensive interpretation of some texts contained by the 1864 Civil Code and other normative acts, had already provided for some exceptional instances regarding the moment subsequent to the opening of the inheritance when the term to accept or disclaim the inheritance could be applied. Of course, when describing the situations contained by article 1103 paragraph (2) of the Civil Code, it was also taken into account the new configuration of the institutions rendering necessary another beginning for considering the option term, for instance the new regulation on the legal report of one's death.

Here is the content of article 103 paragraph (2) of the Civil Code:

„The option term starts to be applied:

a) from the birth of the person entitled to inherit, if the birth takes place after the opening of the inheritance;

b) from the moment death is registered in the Registry of Births, Deaths and Marriages, if the registration is made on the basis of a judicial decision declaring the death of the person leaving the inheritance, except for the case when the person

[7] For more details, see C. Macovei, M. C. Dobrilă, „Transmisiunea şi partajul moştenirii", in Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *Noul Cod civil. Comentariu pe articole,* C.H. Beck Publ. House, Bucharest, 2012, p. 1144; M.D. Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil,* Hamagiu Publ. House, Bucharest, 2013, p. 199-200.

entitled to inherit knew the reason of the death or the decision to declare the death at a subsequent date, case in which the term starts to pass from the latter date;

c) from the moment the legatee knew or was supposed to know of his legacy, if the will comprising this legacy is discovered after the opening of the inheritance;

d) from the moment the person entitled to inherit knew or was supposed to know of the kinship relation on which his right to inherit is based, if this date follows the opening of the inheritance".

It should also be pointed out that, according to law in force, the one year term analysed here can be both extended and reduced.

Thus, the option term is expanded when the person entitled to inherit requested an inventory of hereditary assets before exerting his right to accept the inheritance or not. In this case, the option term shall not end before two months after the inventory report is notified to the person entitled to inherit [article 1104 paragraph (1) of the Civil Code]. Legal literature[8] has pointed out that, given what drafting an inventory means, there must not be made any connection between this and the willing acceptance of the inheritance, which also involves a certain procedure, and that the purpose of article 1104 of the Civil Code is that of putting the person entitled to inherit in the situation to choose fully aware of the inheritance content.

Moreover, the term for accepting or disclaiming the inheritance can be reduced, according to the conditions of article 1113 of the Civil Code. Consequently, „*For solid reasons, upon the request of any interested person, a person entitled to inherit can be made, by enforcing the procedure provided for by law for the presidential ordinance, to exert his right to accept or disclaim an inheritance within a term established by the court, which is shorter than the one provided for by article 1103*". Consequently, in this case the option term of one year can be reduced by the court, while the person entitled to inherit, who does not express his option within this term, shall be considered to have given up to the inheritance.

Finally, it must be mentioned that the current Civil Code does not contain a text to regulate *the consequences of not exerting in time the option right* or of not exerting it at all. We don't consider that such text was necessary in the first place, as providing an answer to the question is the role of those enforcing the norms of the Civil Code or commenting them, by corroborating the texts of this Code in the context of the scientific contributions within civil law.

In a text in fact inventive, with which we actually disagree, it is pointed out that „… the lack of reaction of a person entitled to inherit makes him an implicit acceptant. When the one year term provided for by article 1103 of the new Civil Code ends, the person entitled to inherit who is inactive or undecided is deprived of his possibility to give up to the inheritance"[9]. On the same line, it is also stated that „…the notion of person not having anything to do with the inheritance is no longer suitable here: after the one year term passes, the person entitled to inherit who commits no action about it will be, in principle, a tacit acceptant (articles 13 and 1120 par. (1) of the N.C.C.) or, by exception, shall be presumed to have tacitly given up to the inheritance [articles 1112 and 1113 par. (2) of the N.C.C.]. What is for sure, in both cases his option right is extinguished"[10].

In our opinion, when it comes to the inactive person entitled to inherit it shall be applied the termination of rights when the one year term ends; a right will be indeed extinguished, but not that of giving up to the inheritance, but instead *that of accepting or*

[8] M.D. Bob, *quoted works,* p. 203.
[9] Ibidem, p. 225.
[10] Ibidem, p. 201.

disclaiming the inheritance on the whole, with both its features: acceptance and disclaim. If this is the case, then there is no ground for considering the person in question an implicit or tacit acceptant. The freedom of option and the willing character of the option act involve both sides. We cannot see why, from the mere end of the one year term, without any reaction from the person entitled to inherit, the latter should be considered a tacit acceptant. The acceptance, be it even tacit, is a legal act and, hence, a manifestation of will coming from the person entitled to inherit, of taking up the heir title. Then, not exerting the option right or not exerting it within the legal term does not seem to point out any of the hypotheses listed by the Civil Code, at article 1110, having the indicative title „The acts having the value of a tacit acceptance".

Given these mentions, can the acceptance act be presumed and implicitly deduced from the lack of no one giving up to the inheritance? In other words, if no one gives up, can this be considered an act of acceptance? We believe that the answer is no. The lack of exertion or the lack of exertion within the option term of the right to accept or disclaim an inheritance cannot constitute either a presumed renunciation, except for the particular conditions of articles 1112 and 1113 paragraph (2) of the Civil Code; this is clearly stated by article 1120 paragraph (1) of the Civil Code. The same article provides for the renunciation rule at its next paragraph: „*The statement for disclaiming an inheritance must be made in an authentic form, by the notary public or Romania's diplomatic missions and consular departments, according to the legal conditions and limits*". Consequently, giving up to an inheritance is not only an explicit act but, furthermore, a solemn one.

If the passivity and the lack of reaction of the person entitled to inherit in terms of his option right would be equal to an implicit acceptance, which would be then the role of the inheritance acceptance, at least the explicit one, since the implicit acceptance would be synonymous to the tacit one? Isn't this by any chance this solution in clear disagreement with the provisions of article 1106 of the Civil Code, according to which „*No one can be forced to accept an inheritance to which he is entitled*"?

Could be considered as acceptant, but without any will being expressed in this direction, also the person entitled to inherit who made one or maybe several statements of not accepting the inheritance within the one year term, according to article 1111 of the Civil Code? Therefore, this person made one or several authentic statements, according to which he does not want to be considered acceptant, although he is to perform one or several acts which can have the meaning of an acceptance, and then he took no other action in terms of his right to accept or disclaim the inheritance.

Is it true that, according to article 13 of the Civil Code, „*The renunciation to a right cannot be presumed*? Is the renunciation to a right synonymous to the lack of exerting a right, in this case the one of choosing between accepting or refusing an inheritance?

Finally, is it wrong or unsuitable to say that the person entitled to inherit, who did not exert or did not exert in time his subjective option right which is extinguished as a result of the termination of rights does not have anything to do with the inheritance[11]?

[11] This concept is accepted even by the recent specialized literature. See for that matter D.C. Florescu, *Dreptul succesoral,* Universul Juridic Publ. House, Bucharest, 2011, p. 176; C. Macovei, M.C. Dobrilă, *quoted works,* p. 1155.

Conclusions

Bringing into debate one of the institutions reformed by the current Civil Code (in this case, the termination of rights), although more than three years have passed since this Code entered in force, is a useful and up to date initiative in our opinion. Furthermore, we believe that the effort to discuss some controversial aspects of such institutions, in this case the legal nature of the term to accept or refuse an inheritance or the effects generated by the end of the term, is one which will be rewarded.

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WILFUL MISCONDUCT VICE OF CONSENT ACCORDING TO THE NEW CIVIL CODE

Silvia Elena OLARU *

Abstract: *The wilful misconduct represents the misleading of a person by another person by using evil means to cause him/her to clinch a legal act to which he/she would not have consented otherwise. Similarly to error, the wilful misconduct falsifies reality, but this false reality is caused by evil means by the other contracting party. Some authors define wilful misconduct as „an error caused" by the other contacting party. The party whose consent was vitiated by wilful misconduct may request cancellation of the contract, even if the error which he/she was involved in was not essential. The penalty is relative nullity of the legal act concluded, because the rule of law protects a private interest with the right of the wilful misconduct's victim to claim damages, that is to say damages compensation to cover the loss suffered. Being a relative nullity, it can only be invoked by the party whose consent was vitiated, the heirs having no active procedural standing to invoke the relative nullity because it is a personal action; they may continue the lawsuit if after initiating the action the victim of the wilful misconduct died.*

Keywords: *wilful misconduct; vice of consent; fraudulent acts; obtaining by insidious means; suggestion; fraud; relative nullity.*

General considerations

Wilful misconduct - cunningness. The wilful misconduct is that vice of consent that represents the misleading of a person by cunning means in order to induce him/her to conclude a legal act.

The wilful misconduct is a vice only to the extent to which it results in causing an error in the will of the document's author. If the author discovers the error induced before signing the legal document, it is not signed under the spur of the error caused by the wilful misconduct and if the legal document is signed, it is valid.[1]

The wilful misconduct represents the misleading of a person by another person by using cunning means to cause him/her to clinch a legal act to which he/she would not have consented otherwise.

Similarly to error, the wilful misconduct falsifies reality, but this false reality is *caused by evil means* by the other contracting party. Some authors define wilful misconduct as „*an error caused*" by the other contacting party.

According to the stipulations of article 1214 of the Civil Code, the consent is vitiated by wilful misconduct when the party was involved in an error caused by the fraudulent manoeuvres of the other party or when the latter failed, fraudulently, to inform the contractor of certain circumstances that ought to have been disclosed to him/her.

The party whose consent was vitiated by wilful misconduct may request cancellation of the contract, even if the error in which he/she was involved in not was essential.

* Consilier, Comisia Juridică de Disciplină şi Imunităţii din Camera Deputaţilor.

[1] C.Hamangiu, I.Rosetti-Bălănescu, al.Băicoianu – *Tratat de Drept civil român (Romanian Civil Law Treaty),* All Beck Publishing House, 2002. p. 83.

The structure of the wilful misconduct

The wilful misconduct vice of consent has two components:

- the material element (objective), represented by the fraudulent manoeuvres, that is to say machinations, artifices, deceitfulness, falsification of documents, to distort reality and to conceal the truth, which is called positive wilful misconduct, for example, changing the odometer in a car before selling it to hide how long it has been used, and the negative wilful misconduct (by reticence) consists of concealing or failing to inform the other party about certain critical circumstances which, if the other party had known, he/she would not have signed the legal document, such as the concealing by the seller of a house the fact that it was built of adobe and failing to inform the buyer about this reality because if he/she had known the reality, he/she would not have contracted.

- the subjective element, that is to say the intention to deceive the other contracting party in order to persuade him/her to sign the legal document. We meet the intention to deceive also in the case of the liberalities where the wilful misconduct has the form of obtaining by insidious means and suggestion[2]. Thus, a part, in the case of o*btaining by insidious means*, uses its influence over the testator and directs the liberality that he/she will perform. That means the use of evil means in order to win the holder's affection and thus determine him/her to make a liberality (a donation, a legacy) for the author of these cunning means, which otherwise he/she would not have done.

Obtaining by insidious means consists of fraudulent means to gain the holder's confidence and to deceive his/her good faith to determine him/her to donate a good to be gratified by will, and the suggestion is exercised by concealed and tendentious means in order the plant in the holder's mind the idea of making the liberality which he/she would not have made on his/her own initiative

Suggestion is the act through which the testator is suggested the idea of making a liberality to an individual to whom he/she would not have made such gratification.

Suggestion is exercised by concealed and tendentious means in order to plant in the holder's mind the idea of making a donation or of establishing a legacy that he/she would not have done on his/her own initiative.

The obtaining by insidious means and the suggestion represent the cause for revocation of liberality only if the means used are indeed deceptive, fraudulent. The insidious means cannot invalidate the liberality if they are not characterised by wilful misconduct. Therefore, liberality may be cancelled only if the fraudulent manoeuvres had as result the alteration of the holder's will, in the sense that without their exercise, the holder would not have made the act of liberality.[3]

In case we have an intention to mislead and the party is still deceived, the legal document will be cancelled for error and not for wilful misconduct.

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[2] Decision no.1160/16.06.1992 of the Supreme Court
The provision documents available as a gift are subject to the rules of the common law regarding vices of the consent.
The wilful misconduct is a cause of nullity of the legal act when the evil means employed by one of the parties are such that it is obvious that without these manoeuvres the other party would not have contracted. In terms of liberalities, the wilful misconduct manifests itself as obtaining by insidious means and suggestion. Obtaining by insidious means consists of fraudulent manoeuvres and fraudulent means to gain the holder's confidence and to deceive his/her good faith to determine him/her to donate a good or to be gratified by will, and the suggestion is exercised by concealed and tendentious means in order the plant in the holder's mind the idea of making the liberality which he/she would not have made on his/her own initiative. Obtaining by insidious and suggestion represent the grounds for nullity of liberality only if the means used were deceptive, fraudulent and resulted in the alteration of the holder's will, meaning that without their exercise he/she would not have made the act of liberality.

[3] Decision no. 953/08.06.1978 of the Supreme Court. Civil Division. Decision no. 1917/27.08.1974 of the Supreme Court. Civil Division. Repertoire of civil judicial practice of the Supreme Court and of other courts for the years 1969 to 1975.

Terms

To be considered wilful misconduct, two conditions must be fulfilled:

- the error caused by the wilful misconduct to be decisive, that is to say that without it, the respective party would not have signed the act, although the Civil Code no longer provides the crucial character of fraudulent (evil) manoeuvres. The wilful misconduct is defined as having two assumptions, namely:

a) *the party was involved in an error caused by a fraudulent manoeuvres of the other party;*

b) the *wilful misconduct by reticence when the party failed, fraudulently, to inform the contractor of the circumstances which ought to have been reveal to him/her.*

- the wilful misconduct comes from the other contracting party (there are also situations where the wilful misconduct comes from a third party, but aiding and abetting of the party using the error caused).

This condition concerns the contracts for pecuniary interest, the wilful misconduct coming from the other party. This condition is not met in the unilateral acts, such as the case of the will when we talk about obtaining by insidious means or suggestion and not by the other contracting party.

The contract can be annulled and when the wilful misconduct comes from the representative, the official in charge or the managing director of the other party's business.

The wilful misconduct committed by a third party

The party who is the victim of a third party's wilful misconduct may not request the cancellation of the legal act concluded except if the other party knew or, according to the case, should have known the wilful misconduct upon signing the contract.

Independent of the cancellation of the contract, the author of the wilful misconduct is liable for damage that would result.

Classification of the wilful misconduct

Originating in Roman private law – which distinguishes between Dolus malus (serious wilful misconduct) and Dolus bonus (minor wilful misconduct), the new regulations do not make this distinction anymore, the old civil code distinguished according to the consequences it had on the validity of the legal act, distinguishing between *the primary wilful misconduct* and *the incident wilful misconduct*.

The primary wilful misconduct covers the main elements of the contract and has the effect of cancellation.

The incident wilful misconduct refers to the secondary elements, accessories and which do not entail the nullity of the contract.

Direct and indirect wilful misconduct

The direct wilful misconduct is crucial for the very completion of the legal act; it is a ground for nullity.

The indirect wilful misconduct does not lead to the cancellation of the act, but only justifies the introduction of an claim for damages.

Wilful misconduct by committing and wilful misconduct by omitting

The Civil Code distinguishes between the wilful misconduct by committing and omitting which are also called positive wilful misconduct, respectively negative wilful misconduct or by reticence.

The positive wilful misconduct (by committing) – the consent is vitiated by wilful misconduct when the party was involved in an error caused by the fraudulent manoeuvres of the other party, it is materialised in fraudulent manoeuvres, machinations, artifices, deception, falsification of documents.

For example, the transaction which covers all the disputes between the parties remains valid even if subsequent to the clinching of the transaction there were discovered documents unknown to the parties, except when they had been concealed by the deed of one of the contracting parties or by either party knowingly, by a third party, in which case the transaction is cancellable by invoking the wilful misconduct (article 2276 paragraph 1 of the Civil Code) „*The subsequent discovery of documents unknown to the parties and which could have influence the content of the transaction does not represent a ground for its invalidity, except the situation in which the documents were concealed by one of the parties or, knowingly, by a third party."*

The negative wilful misconduct (by omitting or by reticence) – the other party has fraudulently omitted to inform the contractor of the circumstances which ought to have been revealed to him/her, is materialised in the failure to inform the other party about the conditions of closing the legal act or about the hidden defects of the property that is the subject of the contract, although he/she had this obligation.[4]

According to article 298 of the Civil Code, marriage can be annulled at the request of the spouse whose consent was vitiated by error, wilful misconduct or violence.

A marriage may be annulled because of the error caused by wilful misconduct if the person whose consent has been vitiated in this way had a false representation of his/her future spouse's qualities which if he/she had known in reality, would not have consented to the marriage.

It is noteworthy that the wilful misconduct can be considered a vice of consent also in the case when the cunning manoeuvres were manifested by reluctance.

An example of wilful misconduct by reticence is met when one of the future spouses did not communicate his/her health condition to the other future spouse and has knowingly concealed a certain disease, its extent and manifestations, although he/she had this obligation; thus article 278 of the Civil Code provides that marriage does not happen unless the spouses declare that they have notified each other of their health.[5]

The most common cases of wilful misconduct by reluctance is the concealment of a serious chronic disease state upon entering marriage, but not the concealment of: some minor ailments curable even if they have a sexual nature (they may be invoked as a ground

[4] Law no. 363 of 21.12.2007 on fighting unfair practices of professionals in their relationship with the customers and harmonisation of regulations with the European legislation on consumer protection, published in the Official Gazette, Part I no. 899 of 28.12.2007, as amended by Law no.130/2010 published in the Official Gazette no. 453/02.07.2010.
Article7
A commercial practice shall be regarded as misleading omission if, under the present facts, taking into account all its features and circumstances, as well as the limits of the media used to transmit the information, omits essential information necessary to the average consumer, given the context for making a trading decision knowingly and therefore causes or is likely to cause the consumer's making a transaction decision that otherwise he/she would not have taken.
A commercial practice shall also be regarded as misleading omission when, taking into account the matters referred to in paragraph (1), a trader conceals or provides in an unclear, unintelligible, ambiguous or out-of-time manner essential information or does not indicate the commercial intent of the practice, unless it is already apparent from the context, and when, in any of the cases, the average consumer is caused or is likely to be determined to make a trading decision that he/she would not have taken otherwise.

[5] Decision no.324/1990 of the Supreme Court. Civil Division
Decision no.658/1971 of the Supreme Court. Civil Division. R.R.D. no.7/1972, p.115-117.

for divorce, but not as nullity of marriage), the poor material status, the spouse's age or the existence of a child out of wedlock. It is considered wilful misconduct when concealing a serious chronic disease such as inability to conceive[6], except the state of insanity or mental debility which entails the absolute nullity of the marriage according to article 293 of the Civil Code or in the case of the wilful misconduct the sanction is relative nullity.[7]

The marriage annulment for wilful misconduct by reticence was ruled by the court of justice when, in case the wife hid in marriage the pregnancy condition as a result of her relationship with another man, although the wife was not required to notify this state to her husband, because according to article 278 of the Civil Code, marriage does not happen if the future spouses do not declare that they have notified each other of their health, yet her conduct is fraudulent affecting the trust between the spouses on which marriage is based.[8]

The wilful misconduct by reticence is characterised by that the material element of its structure consists of a fact by omission (inaction) materialised in the concealment by one of the contract partners, or by the fraudulent non-communication with the other party of an essential circumstance that had to be known by him/her in order to have a correct representation of the real facts of concluding the civil act (the contract), a circumstance that ought to have been revealed.[9]

The evidence of the wilful misconduct

The wilful misconduct is not assumed, it must be demonstrated so that the party invoking the nullity of a legal act based on the fact that vitiation of consent has occurred through wilful misconduct must prove by any evidence, written documentary evidence, assumptions, including witnesses[10] and according to the rules applicable to the probation of

[6] Decision no.5267/2005 of HCCJ. Civil and Intellectual Property Section.

[7] Decision no.1206/2003 of the Supreme Court
Absolute nullity occurs without distinguishing if the insane or the feeble-minded are or are not banned or if they marry during moments of transient lucidity or during moments when they do not have such lucidity. It is essential to determine whether, because of the mental illness one sufferers from, a person is classified as someone who cannot enter into marriage, even if the conclusion date would be in a moment of lucidity.
Therefore, the insane or the feeble-minded cannot marry, not only because their condition is exclusive of free consent expression, but also because of the biological considerations. In order to establish the nullity of marriage in the case of insanity or mental debility, these situations must exist on the date of marriage and may be proved by any means, not only at the time of the marriage, but also later. The circumstance in which the spouse had known or not, prior to the marriage, the existence of a state of insanity or of mental debility in the other spouse is irrelevant and therefore absolute nullity sanctioning the marriage cannot be ruled out, being justified by a social interest. The acknowledgement of the spouse's poor health status at the time of entering into marriage does not lead to its validation.

[8] Decision no.1049/10.06.1976 of the Supreme Court. Civil Division

[9] Sache Neculaescu, Livia Mocanu, Gheorghe Ghiorghiu, Ilioara Genoiu, Adrian Țuțuianu – *Instituții de drept civil (Institutions of civil law).* Universul Juridic Publishing House. Bucharest 2012. pp.57-60.

[10] Law no.134/2010 Civil Procedure Code, published in the Official Gazette no.485/15.07.2010 amended by Law no.76/2012 published in the official Gazette no.365/30.05.2012, republished in the Official Gazette no.545/03.08.2012.
Article 309 paragraph 4
(4) The testimony with witnesses is also inadmissible if in order to prove a legal document the law requires the written form, except the cases in which:
1. the party was in material or moral impossibility to produce a document to prove the legal act;
2. there is a beginning of written proof, according to the stipulations of article 310;
3. the party lost the evidencing document because of unforeseeable circumstances or force majeure;
4. the parties agree, even tacitly, to use this proof, but only regarding the rights that they may have;
5. the legal act is attacked for fraud, error, wilful misconduct, violence or is null and void for illegality or immorality, according to the case;
6. it is required to clarify the terms of the legal act;

the legal fact.[11]

According article 1214 paragraph 4 of the Civil Code the wilful misconduct is not assumed. The wilful misconduct involves, in addition to the intention of misleading, an actual activity.

In the case of the wilful misconduct by reticence when the party has fraudulently failed to inform the other, such as concealing a defect of the item sold, the proof will be done with the defect of the item and which if the party had known, would not have signed the contract.

Fraud and wilful misconduct

The Civil Code regulates in article 14 the bona fide, so that any natural or legal person must exercise their rights and perform their civic obligations in bona fide, in accordance with the public order and the good morals.

According to article 723 of the Code of Civil Procedure, „Procedural rights must be exercised in good faith and in accordance with the purpose for which they were acknowledged by law. The party using these rights abusively is responsible for the damages caused."[12]

The enforcement of the law, in its letter and spirit, is a public interest necessity and therefore the legal acts committed fraudulently shall be penalised with absolute nullity.

Fraud differs from wilful misconduct, although it has a common element: the bad-faith of its author.

While the wilful misconduct is exerted on one of the parties of the legal act, whose consent it vitiates, fraud is committed by the parties at the expense of the third parties, leaving unaltered the consent of the parties in order to achieve an unfair advantage for those who commit fraud.

Fraud to law represents a fraudulent manoeuvre used by the parties to make, by means of the legal act, a finality prohibited by the regulations in force, by the occult and indirect circumvention of a prohibitive rule. Unlike the wilful misconduct practiced by one party over the other, thus vitiating his/her consent, fraud to the law is an act committed by collusion by the contractors at the expense of the third parties.

Absolute nullity, as civil penalty, occurs in case of infringement upon the conclusion of a legal act of certain mandatory rules and which protect the general public interest and has the

[11] Decision no. 2330/2001 of the Court of Appeal Bucharest. 3rd civil section
The wilful misconduct is a ground for nullity of the agreement when one of the parties has used evil means (machinations, artifices, cunningness, fraudulent manoeuvres) to mislead.
The wilful misconduct is not assumed, so that the claimant must prove by relevant evidence the nature of the evil means used by the defendant to cause the signing of a different act than the agreed one.

[12] Law no.134/2010 Civil Procedure Code, published in the Official Gazette no.485/15.07.2010 amended by Law no.76/2012 published in the Official Gazette no.365/30.05.2012, republished in the Official Gazette no.545/03.08.2012
Article 12 Good faith
(1) Procedural rights must be exercised in bona fide, according to the purpose for which they were acknowledged by law without infringing the procedural rights of another party.
(2) The party exercising his/her procedural rights in an abusive way is liable for the material and moral damages caused. It may be required, according to the law, to pay a judicial fine.
(3) The party who fails to fulfil in good faith his/her procedural obligations is liable according to paragraph (2).

effect of abolishing the legal act and of restoring the parties to the previous situation.[13]

The interest of the distinction between fraud and wilful misconduct is that the former is sanctioned by the absolute nullity of the legal act and the latter draws the relative nullity.

According to article 45 of the Civil Code, the fraud committed by the incapable is the simple statement that he/she is able to contract, made by the one lacking the exercise or with limited exercise capacity, and does not remove the cancellability of the act. *But if he/she used fraudulent manoeuvres, the court, at the request of the party misled, may keep the contract when it considers that this would be an appropriate civil penalty.*

According to article 1237 of the Civil Code, fraud by law is also when the cause is illicit and when the contract is only the means to circumvent the application of mandatory legal rules.

The sanction of the wilful misconduct

According to article 1214 paragraph 2 of the Civil Code, the party whose consent was vitiated by wilful misconduct may request the cancellation of the contract, even if the error in which he/she was involved in was not was essential.

The penalty is the relative nullity of the legal act concluded, because the rule of law protects a private interest, with the right of the victim of the wilful misconduct to claim damages as well, that is to say damages covering the loss suffered.

Being a relative nullity, it can only be invoked by the party whose consent was vitiated, the heirs have no active procedural standing to invoke the relative nullity because it is a personal action, they may continue the lawsuit if after starting the legal action the victim of the wilful misconduct died.[14]

According to article 1214 paragraph 3 of the Civil Code, the contract is also cancellable when the wilful misconduct comes from the representative, official in charge or the managing director of the other party's business.

In all cases, the act ended as a result of the wilful misconduct is not null and it entitles the victim only to an action for annulment. The act of a person of using cunning means in relation to another person may represent, in criminal law, the offense of fraud.[15]

According to article 1249 paragraph 2 of the Civil Code, relative nullity may be invoked by means of action only in the prescription term established by law. However, the

[13] Decision no.32/2010 of Craiova Court of Appeal. Commercial section.
By the fraudulent manoeuvre of the two defendant companies it was aimed that SC S. J. SRL created a state of forced, artificial insolvency and which cannot be enforced for those earlier claims because the amount from the sale price obtained from selling the two estates by N. to SC E. COM SRL was not reflected in the heritage of SC S. J. SRL at the onset of the judicial liquidation procedure. Also the aim of the sale was that in case of restoring the previous situation, the applicant is unable to repossess the properties, just by raising the status of bona fide purchaser of SC E. COM SRL, in reality he/she was a screen interposed by SC S. J. SRL. This makes the legal object of the contract, the aim set by the parties to be an illicit one.

[14] Gabriel Boroi, Liviu Stănciulescu – *Instituții de drept civil (Institutions of civil law).* Hamangiu publishing House. Bucharest 2012. pp. 105-109.

[15] Article 215 of the Criminal Code in force Fraud.
Paragraph 3 Misleading or maintenance in error of a person on the occasion of entering into or performance of a contract, committed so that, without this error, the wronged would not have concluded or executed the contract under the terms stipulated, shall be sanctioned by the penalty provided in the preceding paragraphs according to the stipulations shown there.
Article 244 of the Criminal Code – Law no.286/2009 published in the Official Gazette no.510/24.07.2009.
Fraud
1) The misleading of a person by presenting as true a deceitful deed or as deceitful a true deed in order to obtain for oneself or for another person an unjust patrimonial good and if there has been done any damage it shall be punished by imprisonment from 6 months to 3 years.
2) Deception committed by using false names or deceitful qualities or other fraudulent means shall be punished with imprisonment of one to five years. If the fraudulent means are in themselves an offense, the rules on offenses are applied.
3) Reconciliation removes the criminal liability.

party asked to perform the contract can always oppose the relative nullity of the contract at any time, even after reaching the prescription term of the right to action for annulment.

According to article 2529 of the Civil Code, the prescription term of the right to an action for annulment of a legal act begins:

a) in the case of violence, since the day it ended;

b) in the case of the wilful misconduct, since the day when it was discovered;

c) in case of error or in the other cases of cancellation, since the day when the righteous, his/her legal representative or the one called by the law to approve them or to authorise their acts, has known the cause of the cancellation, but no later than 18 months from the completion of the legal document.

In the cases in which the relative nullity may be invoked by a third person, the prescription begins to run, if it is not otherwise provided by law, since the date when the third party knew about the existence of invalidity cause.

According to article 298 of the Civil Code, marriage can be annulled at the request of the spouse whose consent was vitiated by error, by wilful misconduct or by violence.

The error represents a vice of consent only when it concerns the physical identity of the future spouse. According to article 301 of the Civil Code, marriage annulment may be claimed within 6 months.[16]

In the case of the nullity for vices of consent or for lack of discernment, the term begins to run from the date of cessation of violence or, where applicable, since the date on which the person concerned has undergone the wilful misconduct, the error or the temporary lack of discernment.

According to article 479 of the Civil Code, adoption may be cancelled at the request of any person called upon to consent to its conclusion and whose consent was vitiated by error related to the adoptee's identity, wilful misconduct or violence.

The action may be brought within 6 months from the discovery of the error or wilful misconduct or from the cessation of the violence, but not later than 2 years since the end of the adoption.

According to article 1215 paragraph 2 of the Civil Code, independently from the cancellation of the contract, the author of the wilful misconduct is liable for the damage that would result. Thus, if through the wilful misconduct produced the author caused damage by his/her unlawful conduct, there arises the right of the victim to request, together with the request for annulment of the contract or separately, the repair of the damage caused by the wilful misconduct according to article 1357 of the Civil Code.[17]

[16] Decision no.3746/2003 of the Supreme Court
In the action for annulment of marriage, the plaintiff has the obligation to prove that his/her claim was brought within 6 months after the discovery of the deception ascribed to the defendant.

[17] Article1357 of the Civil Code
He who causes injury to another by an unlawful act committed with guilt, is forced to fix it.
The author of the damage is liable for the slightest fault.

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THE PROMISE TO SELL

Viorica POPESCU *

Abstract: *The sale agreement is one of the most important civil contracts due to its frequency of use in the transmission or acquisition, mainly, of the right to property. The practical importance of this contract has determined the legislator to also state with extreme rigor the institution of the promise to sell, thus insuring the security of the civil circuit. In the new Civil Code the promise to sell and/or promise to buy are manifested under several forms, such as: the unilateral promise, the option agreement, the bilateral promise, the preemptive right, the preference agreement. For the current study I aimed a brief analysis of the new regulations stated by the Civil Code regarding this institution of civil law, by relation both to the specialists' opinions expressed in the doctrine, as well as to the legal practice.*

Keywords*: sale agreement, new Civil Code, promise, preference agreement, option agreement, preemptive right*

Terminology, regulation and legal regime

Terminologically, in the legal theory and practice, the promise to agree is also known as „promissory agreement", „pre-contract" or „provisional agreement", having numerous implications in the area of sale-purchase of immovable assets. The representative doctrine defines the promise to agree as a contract by which the parties (or just one of them) firmly and mutually (or just unilateral) undertake to conclude in the future an agreement whose essential elements are established in the present[1]. In this meaning, the promissory agreement is created to offer the parties the certainty that neither of them shall capitulate from the intention to conclude the foreseen agreement[2].

In the NCC (new Civil Code), the promise is generally stated by Art 1279 which represents the common law in this area. For the establishment of the precise content of this legal institution, Art 1279 Para 4 differentiates between the conventions, by which the parties agree to negotiate for the conclusion of a contract, without containing the firm intention to conclude the contract and the promise to conclude a contract in which the firm intention of the parties to contract is essential. This differentiation was taken from the French doctrine which distinguishes between the „contract for negotiation" (whose object are the debates carried out for the perfection of the main contract) and the „agreement in principle" (in which the parties oblige themselves to conclude a contract in the future)[3].

By analyzing Art 1279 NCC it results the following aspects (parties, content and effects) of the promise to agree, which represents its legal regime[4]:

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* Assistant PhD, University of Pitesti, Faculty of Law and Administrative Sciences

[1] See in this regard, Liviu Pop, *Obligațiile*, 2nd Volume, p. 225

[2] Gabriel Boroi, Liviu Stănciulescu, *Instituții de drept civil în reglementarea Noului Cod Civil*, Hamangiu Publ.-house, Bucharest, 2012, p. 337

[3] See in this regard, Gabriel Boroi, Liviu Stănciulescu, *op. cit.*, p. 337

[4] F. Baias, E. Chelaru, Rodica Constatinovici, Ioan Macovei (coord.), *Noul Cod civil. Comentariu pe articole*, C.H. Beck Publ.-house, Bucharest, 2012, p. 1340

1. The **parties** are named *promisor* and *beneficiary*, who depending on the unilateral or bilateral feature of the content of the promise are different for each contract;
2. The **content** of the promise to agree considers those essential clauses of the contract, without which the parties could not honor their promise;
3. The **effects** of the promise – the most important effect consists of that the promise to agree generates only the obligation of to do, which in case of non-fulfilment may be foreclosed;

Forms of promise in the sale agreement

1. The unilateral promise to sell or to buy

The unilateral promise is stated by the literature as being a contract by which one of the parties, named *promisor*, binds himself to sell or to buy an asset, for a determined price, to the other party, named *beneficiary*, who accepts the promise, reserving the right to subsequently manifest his agreement[5]. The promise, in this case, has a unilateral feature, because it generates obligations only for one of the parties[6].

Though the Civil Code does not expressly states the institution of the unilateral promise, Art 1669 Para 3 states that the provisions of the bilateral promise to sell „are applied accordingly only in the case of the unilateral promise to sell or to buy".

It must be mentioned that the most common met in practice is the unilateral promise to sell. The legal practice has mentioned that the promise to sell does not transfer the property, but generates certain personal obligations for one of the parties, the other party maintaining its freedom of choice[7]. If the promissory does not comply with the obligation he assumed, the asset being no longer in his property, the beneficiary is entitled to ask only for damages according to the rules applied for the obligations of to do. If the asset is still found in the promisor's patrimony, the court, in the virtue of the principle of the performance in nature of the obligations, shall issue a decision replacing the sales agreement. Unlike the old regulation, Art 1669 Para 2 of the NCC establishes a special term for prescription of the right to action of 6 months from the date when the contract must be concluded.

Regarding the unilateral promise to buy, it has been defined by the literature as the obligation of the promisor to acquire an asset, for an established price, if the owner, namely the beneficiary of the promise shall decide to sell[8]. From the definition it results that the unilateral promise to but does not generate obligations for the owner of the asset, being able to sell it at any time.

As it refers to the form of the unilateral promise, if the contract states the resettlement of certain real rights which are about to be enlisted in the Real Estate Register, the act shall be concluded in authenticated form, under the sanction of the absolute nullity.

[5] Florin Moțiu, *Contracte speciale în Noul Cod Civil*, 4th Ed. revised and amended, Universul Juridic Publ.-house, Bucharest, 2013, p. 29
[6] Fr. Deak, Tratat de Drept civil. *Contracte speciale*, 4th Ed., 1st Volume, Universul Juridic Publ.-house, Bucharest, 2007, p. 34
[7] Supreme Court, Decision No 561/1949, published in the National Journal No 5-6, 1949, p. 608
[8] F. Baias, E. Chelaru, Rodica Constatinovici, Ioan Macovei (coord.), *op. cit.*, p. 1750

2. The option agreement

A more efficient institution than the unilateral promise is the option agreement, a novelty of the Civil Code.

The option agreement is stated by Art 1278 of the Civil Code, which states that „when the parties agree that one of them remains bounded by its own declaration of will, the other one having the option to agree or to deny it, that declaration is considered to be an irrevocable offer". From the legal definition it results that the option agreement must state all the elements of the contract which the parties wish to conclude. The foreseen contract shall be concluded when the beneficiary shall accept the offer of the promisor under the conditions established by the agreement (Art 1278 Para 3-4 of the Civil Code).

Though the legal definition sends to the offer which is a unilateral legal act, the option agreement is a unilateral promise to conclude a contract, thus it is a contract (bilateral legal act).

The option agreement is a special unilateral promise to conclude a contract[9] by its effects, because the apparition of the contract is discretionary determined by the beneficiary, by accepting the irrevocable declaration of will of the promisor.

From a technical-legal perspective, the option agreement has two stages:

- The first one is represented by the conclusion of the option agreement;
- The second one is represented by the beneficiary's declaration of accept.

According to Art 1668 Para 1 NCC between the date on which the option agreement is concluded and when the option is fulfilled, the asset representing the object of the agreement is unavailable. Regarding this aspect the literature has mentioned that the option agreement in the area of sales is accompanied by a clause of perpetuity of the asset, which is temporary by its nature[10].

As well as the unilateral promise, also in the case of the option agreement having as object the alienation of immovable assets, the procedure is subjected to a double formalism. In this regard, on the one hand the legislator has established the need of expressing the agreement, as well as that of the declaration of accepting in authenticated form, and on the other hand has stated the obligation of enlisting the option agreement in the Real Estate Register.

If the owner of the asset shall not comply with the right to option of the beneficiary and shall alienate the asset to a third party, the beneficiary is entitled to ask for the compensation of the prejudice caused as damages.

3. The bilateral promise to sell-buy

The bilateral promise to sell-buy is a form of promise also stated by the previous Civil Code.

In the new Civil Code, the bilateral promise (synallagmatic) to sell-buy is defined as being that contract by which one of the parties binds himself of selling, and the other party binds himself to buy a certain asset for a determined price[11], contract which shall be perfected in the future[12].

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[9] F. Baias, E. Chelaru, Rodica Constatinovici, Ioan Macovei (coord.), *op. cit.*, p. 1338

[10] Regarding the clause of inalienability, see also Gh. Comăniță, *Despre clauza de inalienabilitate şi efectele ei*, in R.D.C. No 5/2007, pp. 56-63

[11] The promise to sell-buy can generate its specific effects only if the price is determined or determinable. Sibiu County Court, Decision No 504/1992 in Dreptul Magazine, No 1/1993, p. 71

[12] I. Zinveliu, *Contractele civile – instrumente de satisfacere a intereselor cetățenilor*, Dacia Publ.-house, Cluj-Napoca, 1978, p. 49

The bilateral promise is a pre-contract, any of the parties being entitled to ask for its conclusion.

The effects of the bilateral promise are characteristic for the obligations of to do and depend on the existence of the asset in the patrimony of the promissory-seller, as following:

- If the promissory-seller does not comply with his obligation and sells the asset to a third party, the beneficiary-buyer is entitled to ask for damages[13];
- If the asset is still in the seller's patrimony and there are no other legal impediments, the beneficiary may ask the court to issue a decision replacing the sales agreement[14]. In this case, in the legal practice was raised the question of establishing the feature of the action submitted for the issuance of a decision replacing the sales agreement for an immovable asset. Thus, according to an opinion, the courts have considered that this action has a real personal feature, because the plaintiffs aim the capitalization of a right of claim correlative with the obligation assumed by the other party, to conclude the contract in the authenticated form stated by the law *ad validitatem*, while another opinion considers these actions as being either real immovable, or joint, because it aims the capitalization both of a real right, namely the conclusion of the contract transferring the property, as well as of a right of claim which has as correlative obligation, an obligation of to do.

This debate has been permanently solved by an appeal in the interests of the law, issued by the High Court of Cassation and Justice[15]. According to the general prosecutor who submitted this appeal in the interests of the law admitted by the judges from the supreme court, the bilateral promise to sell-buy represents, without any doubt, a synallagmatic contract which exclusively generates a right of claim, correlatively with the *obligation of to do*, namely to conclude, in the future, the sales agreement.

The legal act concluded does not transfer the property, but only states the consent of the promisor to transfer the right of property at the established date and/or in the *ad validitatem* form.

Using the request for a ruling replacing the sales agreement it is aimed the capitalization of a right of claim, and not of a real right which has not been transferred in the promissory-buyer's patrimony, this effect arising only when the decision for admitting the sue petition has remained definitive.

Therefore, the action can only be real and personal, since the right of claim whose fulfilment and legal protection are aimed has as object an immovable asset.

As such, it can only be stated that the actions analyzed would be joint actions and much less real estate actions, because in the content of the legal relations resulting from the bilateral promises to sell-buy is not registered a real right, this right not being transmitted in the promissory-buyer's patrimony at the moment when the introductive action has been submitted.

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[13] See in this regard, Bucharest Court of Appeal, Decision No 2289/2001, published in the *Practica judiciară civilă* 2001, pp. 80-83

[14] For details see also B. Dumitrache, *Antecontractul de vânzare – cumpărare şi promisiunea sinalagmatică de vânzare-cumpărare* in Dreptul No 2/2002, pp. 44-66; I Lulă, D. Hantea, *Discuţii cu privire la promisiunea sinalagmatică de vânzare-cumpărare a terenurilor*, in Dreptul No 9/2003, pp. 67-78

[15] High Court of Cassation and Justice, Decision No 8/10 June 2013, published in the Official Gazette, Part I, No 581/12 September 2013

4. The preference agreement

The preference agreement represents a form of the promise to sell[16] being defined in the literature as being the promise assumed by one of the parties named promisor, as if he decides to conclude the agreement considered by the other party (beneficiary), to give the latter one preference for contracting, at an equal price.

In this case also the promisor of asset does not bind himself to sell it, but only to give preference if he decides in this meaning, reason for which the party whose interests have been violated is entitled only to damages.

The preference agreement is a valid promise because it is affected both by a simple potestative condition, as well as by circumstances external from the will of the promisor which could have determined him to sell the asset[17].

As in the case of other forms of promise, also for the preference agreement the beneficiary's right can be transmitted either through acts between livings, or by debit assignment agreements, or by *mortis causa* acts.

5. The preemptive right

Unlike the preference agreement which has a conventional feature, because it is generated after the expression of the consent of the parties, the preemptive right has a legal feature, being stated by the legislator.

Through the new Civil Code, the legislator has stated in Art 1730 the general framework applicable for the preemptive right and its means of application, regardless of its legal or conventional feature.

The preemptive right is defined as being a legal or conventional benefit, given to a certain person named preemptor, of buying with priority an asset, unlike other persons for the same price.

From the analysis of Art 1730 Para 3 NCC results that the seller has the possibility to fulfil the formalities specific for the use of the preemptive right either prior to the sale, or subsequent to it, case in which the contract shall be concluded under the conditional clause determined by the possibility that the preemptor to not use his preemptive right.

The procedure to use the preemptive right is stated by Art 1732 of the Civil Code, according to which the seller is compelled to notify immediately the preemptor regarding the content of the agreement concluded with a third party. The notification can also be made by the latter one, and shall state the name and surname of the seller, a brief description of the asset, the duties imposed on it, the terms and conditions of the sale, as well as the location of the asset. The preemptor can use his right by notifying the seller about his agreement to conclude the sales contract, accompanied by the record of the price at the disposal of the seller. The preemptive right is used, for the sale of movable assets, within maximum 10 days, and for the sale of immovable assets, within maximum 30 days. In both cases, the term shall begin from the communication of the preemptor of the notification stated by Para 1.

[16] See also F. Deak, *op. cit.*, pp. 38-39
[17] C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, Bucharest, 1929, pp. 895-896

The *exertion of preemptive right* generates two effects:

- The conclusion of the sales agreement between the seller and preemptor;
- The cancelation of the contract previously concluded between the seller and the third party.

If the seller and the third party have agreed upon certain clauses impeding the exertion of the preemptive right, these are not opposable for the preemptor and cannot generate effects referring to him[18].

For the case of the plurality of preemptors who have exerted their preemptive right for the same asset, Art 1734 NCC imperatively states a certain order for them, the contract being considered as concluded as it follows:

- With the owner of the legal preemptive right, when is in concurrence with the owners of certain conventional preemptive rights;
- With the owner of the legal preemptive right chosen by the seller, when is in concurrence with other owners of other legal preemptive rights;
- If the asset is immovable, with the owner of the conventional preemptive right which was the first enlisted in the Real Estate Register, when he is in concurrence with other owners of conventional preemptive rights;
- If the asset is movable, with the owner of the conventional preemptive right having the oldest certain date, when he is in concurrence with other owners of certain conventional preemptive rights.

For the plurality of assets, in the meaning that were sold assets different than the one subjected to preemption, assets which could not be separated, Art 1735 Para 2 of the Civil Code states that without a prejudice caused to the seller, the exertion of the preemptive right can be performed if the preemptor states the price established for all the sold assets.

Also, it must be mentioned that according to Art 1737 NCC, for immovable assets it is necessary the enlistment in the Real Estate Register of the preemptive right. If such enlistment has been made, the agreement of the preemptor is not necessary for the person who bought under a conditional clause to be able to enlist his right in the Real Estate Register, based on the sales agreement concluded with the owner. The enlistment is made under the conditional clause that within 30 days from the communication of the decision which ordered the enlistment, the preemptor to not notify the Real Estate Register with the proof of the statement of the price at the disposal of the seller.

According to Art 1740 NCC, the conventional preemptive right is extinguished by the preemptor's death, except the case in which was established for a certain term. In this latter case, the term shall be diminished to 5 years from its establishment, if a longer term was initially stated.

Non-compliance with the general provisions regarding the preemptive right shall be sanctioned with the relative nullity, the owner of this right or his heirs being entitled to ask the court the annulment of the contract, regardless if the buyer was of good or bad faith.

[18] F. Baias, E. Chelaru, Rodica Constatinovici, Ioan Macovei (coord.), *op. cit.*, p. 1783

Conclusions

By stating the promise to agree, the New Civil Code leaves open for the parties the possibility to conclude any kind of promises, stating that the court can issue a decision replacing a contract only when the nature of the contract allows it, and the requirements for its validity are fulfilled.

Regardless of its legal form, the promise is an institution of the civil law most often used in practice especially regarding the sales agreement, reason for which the Romanian legislator has understood to state it in the new Civil Code, establishing its features and specificities.

Nowadays, the specific promises of the sales agreement are no longer procedures often used and only by certain categories of owners who wish to ease the sale of their assets, but are considered true instruments offered by the legislator for all categories of subjects of law, from professionals to private persons, the purpose being that of satisfying the wishes and needs, easing the free movement of assets and the economic activity. The technical and economic evolution has determined the parties who aim the conclusion of a sales agreement regarding an asset of a special importance to use different provisory agreements, multiplied and differentiated in our contemporary law.

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NEW APPROACH TO CORPORATE GOVERNANCE IN THE CAPITAL COMPANIES: CHANGES ON THE BOARD OF DIRECTORS AND THE GENERAL MEETING. ANALYSIS FROM A COMPARATIVE LAW POINT OF VIEW

Eva M. DOMÍNGUEZ PÉREZ *

Abstract: *The research article deals with the recent developments in Corporate Governance within the Company Law scope. As the article is written from a Comparative Law perspective, the starting point is the United States Business judgment rule, which has been recently adopted in several European Union legislations. The articles also clearly show the main reforms in Spanish Capital Law though Law 31/2014.*

Keywords: *corporate governance, business judgment rule, board of directors, capital companies, administration body, shareholder meeting.*

I. Brief review about Corporate Governance in the Capital Companies.

The issue of Corporate Governance in the Capital Companies has gained a greater dimension in the last years; being so, the legislator on the one hand and private institutions on the other have incorporated this subject as one of the main goals to achieve in the field of Capital Companies.

Apart from this increasing importance, it is also obvious that the aspects that belong to the so-called good Corporate Governance have been progressively broadened. This way, initially it was mainly focused in the analysis of a correct functioning of the Board of Directors in the Capital Companies and the problems that may arise dealing with information spreading. But nowadays, apart from this, new issues have merged, such as those dealing with the payments and professionalization of administrators and executives in the Capital Companies.

The increasing interest in good Corporate Governance has been based on two cornerstones: *on the one hand*, the general conviction about the utility of these kinds of business practices, which implies to acknowledge the value of a suitable and clear management of the corporations, especially in the case of listed corporations. This way, good Corporate Governance is an essential factor to regenerate the value of the company, to improve the economic efficiency and to reinforce the investors' confidence[1].

On the other hand, the G-20 leaders have stated that the complexity of the structure of the Corporate Governance in certain organizations, added to the lack of transparency and inability to stablish the chain of responsibility within the organization, are aspects that can be considered as direct causes of the recent financial crisis. It is obvious that both financial and non-financial organizations have experienced situations of economic crisis due to the

* Associate Professor Phd., in the Faculty of Law, from the National University of Distance Learning, Madrid, Spain.

** *Traducido por Mercedes Domínguez Pérez.*

[1] . Vid. Vives Ruiz, F., „Sistema de la propuesta de reforma en el estudio de la Comisión de expertos en materia de gobierno corporativo", p. 45 and following., in AA.VV, dir. Ibáñez Jiménez. J., „Comentarios a la reforma del Régimen de la Junta General de accionistas en la reforma del buen gobierno de las sociedades", ed. Thomson Reuters Aranzadi, 2014.

reckless acceptance of economic risks, to a great extend because of unsuitable payment systems and the composition of the management and administration bodies[2].

For this reason, important modifications about good Corporate Governance have been made lately in the Capital Companies; this way, Act 31/2014, 3rd December, which modifies the Capital Companies Act for the improvement of Corporate Governance, is the last step in a long process of reforms in the field of Corporate Law, and specifically regarding Corporate Governance.

These approaches –the problems related to Corporate Governance– already have a long treatment (jurisprudence, mainly) in the American practice although, as we are going to discuss, from different points of view that do not entirely concur with those accepted by Spanish Law, where the inspiring principles of the *business judgement rule* -of jurisprudence origin and with a long and consolidated application in the courts of *common law*-, have played the main role to stablish the due diligence of the administrators of the corporation. This doctrine, which origins go back to 1742 (Charitable Corp. V Sutton) and consolidates with later pronouncements (Percy v. Millaudon, 1829, among others), basically aims to avoid the responsibility of the administrators of the corporations in the case of management errors when those have acted in the decision-making process in the fulfilment of their duty. This way, the actions taken by the administrators as part of their duty would be on the fringes of the subsequent procedures in the courts, in order to protect the discretional management of the administrators –which is left outside of the courts examination- and to encourage their stability in the position[3].

II. The Business judgment rule and its influence in the Spanish Law on Capital Companies (corporate governance)

1. The business judgment rule as the protection rule of the discretionary action in the management of capital companies by the administrators

The so-called *business judgment rule* aims to minimize as much as possible the number of lawsuits that can be brought by the stockholders to review the decisions adopted by the administrators of the corporation. The goal is to gain a balance between the need to preserve the discretionary decisions of the administrators on the one hand and the need to control their actions on the other. According to this approach, the business decisions taken by the administrators among all the possibilities could not be questioned nor revoked in the courts, and the administrators cannot be declared responsible for the consequences of their decisions when having acted in the fulfilment of their general duties. The reason that takes to this conclusion is that the administrators, as the management force of the corporation, are in charge of making the decisions dealing with business issues, and it is not the role of the judges to evaluate later the quality of such decisions, as long as there is no doubt that the decisions were made placing certain interests before the interests of the company, and thus showing no respect for their loyalty duty. As a conclusion, we can assert that the aforementioned doctrine starts from the presumption that the administrators act in an independent way, in good faith, promptitude and with the certainty that they acted in favour

[2] Preamble Law 31/2014

[3] Vid. in extenso, Guerrero Trevijano, C., „El deber de diligencia de los administradores en el gobierno de las sociedades de capital", ed. Civitas, 2014, pag. 44 and following.

of the shareholders´ interests. According to this premise, it can be said that the main goal of this Anglo-Saxon rule is to provide the administrators and their business decisions with confidence and stability.

The American doctrine[4] has stated that the rule intends, *in the first place*, to encourage well prepared people to take the positions of responsibility in the administration bodies of the corporations who, in spite of making their decisions in a selflessly, informed and well-meaning way, could cause a negative result or effect for the corporation with their business decision. The point is to encourage them to take the position as an administrator in spite of the consequences or negative effects that their decisions could originate, because otherwise they would not accept the position for the fear of the responsibility which derives from their mistakes[5].

In the second place, this rule aims for administrators´ decisions to be made in a more innovative way and accepting new risks and challenges. All in all, it is considered that the administrators' decisions imply the assumption of new challenges that could require the acceptance of risks and dangers which are considered necessary for the administrators to make their decisions in a more efficient way and without being taken to court afterwards. Some of the administrators´ decisions may seem reckless, but the business system necessarily requires the administrators to take certain risks.

In the third place, the point is to avoid that judges, inexperienced in business matters, make an opportunity assessment about the decisions made by the administrators, who are better qualified than the judges to make business decisions. It is also stated that the circumstances surrounding the facts because of which the administrators made one business decision or another do not merge later when the judges judge the opportunity of the business decision adopted by the administrators.

In the fourth place, with the Anglo-Saxon rule we can avoid the interference of the associates in the management of the corporation, bearing in mind that the administration and management of the corporation should be performed by the administrators and not by the shareholders, who are not in charge of the management issues.

Finally, it is stated that the shareholders who wish to express their dissatisfaction with the administrators´ management can vote for their dismissal, without the necessity to apply the disproportionate social action of responsibility as a mean of control and censure of the management on the part of the administrators.

Anyway, this doctrine must not be understood as a doctrine without limits –the decisions of the administrators of the corporations are not outside the judicial control. In fact, the point is to differentiate the responsibility that the administrators accept, not for the decisions per se but for the correctness of the procedure when making them, which let us conclude that the administrators´ duty is a duty of means rather than of result.

Despite the frequent application of the *business judgement rule,* it is not widely encompassed and regulated in all of the states of the USA. On the contrary, there has been a very unequal typification depending on the states, and even those which have typificated the rule have not done it with the same level of development[6]. In fact, there has been an intense debate about the convenience of typificating a rule that, originated from the *case*

[4] Vid., among others, Block, D./Barton, N./Radin, S., „The Bussiness Judgment Rule: Fiduciary Duties of Corporate Directors", New York, 1998, pag. 12 and following.
[5] Vid. with general character Guerrero Trevijano, C., „El deber de diligencia …", p. 29
[6] For a very detailed analysis of this question, vid. Guerrero Trevijano, C., „El deber de diligencia …", op. cit., pp. 44 and following.

law[7] – in harmony with Anglo-Saxon law–, is constantly being developed by the courts, so its codification would not be desirable for the development of the legal definition.

The rule is still in force as a general rule in the USA after the Disney[8] issue, despite the fact that the Sarbanes Oxley Act (2002) established a responsibility regime on the part of the administrators which was much more exacerbated in comparison with the previous regime[9]. In particular, the obligation to monitor the fulfilment of the rule was introduced (*Corporate compliance*), as well as effective mechanisms of supervision and control. It was precisely with the Disney issue that the courts reasserted the *business judgement* doctrine as they considered that the infraction of the duty of care can only be argued on the basis of gross negligence in the administrators' action. Those occasions in which the administrators act without gross negligence stand on the sidelines, as they take some risks in their management that son not imply responsibility.

2. Influence of the *business judgment rule* in the Spanish Law on Capital Corporations

The incorporation of Spain to the European Union implied the acceptance of the Common Law on Corporations that existed in that time. Although this task was not easy from a technical point of view, it is also true that our country was deep into an Europeanist fervor in that moment, and the Spanish doctrine was identified with the unifying tendencies of the Law on Corporations in the EU[10].

However, during the 80s and especially in the 90s, the strong unifying feelings from the European Union on Corporate Law have been halted to a large extend due to the majority tendencies in the international scenary about the corporations regime. In the frame of a clear tendency towards deregulation, an unsuitable atmosphere for the continuity of the ruling program of European Corporate Law[11] arose slowly. Many jurists and even some institutions of the European Union focused their attention on issues related to *Corporate Governance*, in accordance with the approaches from the United States. Following the foreign postulates, autoregulation was considered the preferential instrument for the legal system regarding Corporate Law.[12]

Recently there have been relevant statements regarding this line of importance of the *Corporate Governance*, on the occasion of Law 31/2014, 3rd December. In particular, as we will see later, the business judgement rule has been specifically introduced into the Spanish legal system (Capital Corporations Law, C*CL*), on occasion of the protection of business discretionality.

It is not strange that Spanish legislators have specifically acknowledged the mentioned rule as a law (a rule which was already applied by our courts) as other legal systems around us

[7] Case „Charitable Corporation V. Sutton", 1742; case „Percy V. Millaudon", Pensilvania Supreme Court, 1829; case „Goldboch V. Branch Bank, Alabama Supreme Court, 1847; case „Hodges V. New England Screw Co.", 1850 and 1853, Rhode Island Supreme Court; case „Aronson V. Lewis", Delawe, 1984; case „Smith V. Gorñom", Delawe, 1985;and more recently case „Disney" (Del. Ch. 2003, Del. S.C, June 6 th, 2006).

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[11] Vid. Embid Irujo, J.M., „Apuntes …", p. 154.

[12] Vid. Embid Irujo, J.M., „Apuntes …", p. 154.

have already accepted it, although in different degrees and intensities. The doctrine has had a strong influence, but with different intensities, in the changes that had been made in the continental Corporate Law during the last years. This way, the German *AktienGesetz* directly refers to it in parragraph 93. 1. 2., or article 22.a. of the Greek Law 2190/1920, among other countries. We even find recent rules that do not specifically mention the doctrine -Italy, Holland or Luxemburg-, but apply it in the courts and sets of laws that do not specifically regulate this doctrine and do not apply it either in the courts (Cyprus or Latvia)[13].

But anyway, the recent changes just mentioned show the „renewed urge" of Corporate Governance on Corporate Law. This was evident in the Declaration of Pittsburgh (September 2009), as well as in the *Green Book,* published in 2011, to analize the effectiveness of the non-binding rules on Corporate Governance (European Commission, COM 2011, 164 final) and the Parliament Resolution of 29th March 2012 about a rule on Corporate Governance for European Companies (2011/2181, IM), which left the door open for the possibility of a further regulation on Corporate Governance through binding rules.

Along the same lines, and with a considerable delay in comparison to the legislators and courts of other countries, the Spanish legislator has also ruled upon good Corporate Governance in a recent law. It is true that prior to Law 31/2014 the Spanish legislator had already ruled on some aspects of good Corporate Governance, but it is not until Law 31/2014 when this subject finally gets a full regulation in the field of Companies Law.

In the middle of the 90s, movements of good governance that claimed for new measures of autoregulation in the context of Corporate Governance started to gain strength (other legal sectors have not been oblivious to this movements of good governance and autoregulation codes, like Competition Law, through the specific regulation of the codes of conduct in Law 29/2009 30th December that modified the Law on Unfair Competition of 1991).

This way, the movement of Corporate Law had its first manifestation in Spain with the *Olivencia Report* (1998) –which pretended to reach the degree of agility, transparency and responsibility in the governance of corporations that the financial markets were demanding –. The *Aldama Report* (2003) came later – focused in the establishment of a suitable functioning system of the management bodies, setting a number of requirements about professionalism and efficacy in order to encourage the active participation of the administrators in the management of the corporation–. This report was mirrored in the Transparency Law (2003) that changed the Public Limited Company Law of 1989 and the Stock Market Law (1988)[14]. The Capital Corporations Law (CCL) of 2010 did not face in a complete and definitive way the questions of good Corporate Governance; it only separated the traditional duty of care and loyalty on the part of the administrators, which were established in two separate provisions following the opinion of the major doctrine in this aspect. Anyway, the duty of care ruled in the CCL should be completed with the regulations of the Unified Code on Good Corporate Governance (2006) to this respect, basically a series of recommendations aimed to guarantee a diligent action by the administrators of the corporations.

Law 31/2014 is to a large extend the result of the work and the proposal of the Experts Commission on Corporate Governance appointed by the Council of *Ministers in May 2013, with the function of „analyzing the situation of good* governance in the corporations in Spain and proposing measures for the improvement of efficacy and responsibility in the management of corporations".

[13] Vid. Guerrero Trevijano, C., „El deber de diligencia …", *op. cit.,* pp. 65 and 66.
[14] Vid. *in extenso* Guerrero Trevijano, C., „El deber de diligencia …", *op. cit.,* pag. 108 and 109.

III. Novelties in the subject of good Corporate Governance: General Meeting and Board Of Directors in Capital Companies.

As specifically stated in Preamble (IV) of Law 31/2014, the changes of Law 31/2014 are focused on the improvement of Corporate Governance in Capital Companies, changing for this purpose two of the bodies of the companies: on the one hand, the General Meeting and, on the other hand, the Board of Directors in the Capital Companies.

1. New approaches relating to the General Meeting and the rights of the shareholders

As stated before, the changes in the Law of Capital Companies are also focused on the General Meeting. The goal of the reform is precisely to reach good governance in Capital Companies, so it seems imperative to achieve a real and efficient communication between the Meeting and the Board of Directors. It is evident that during this reform process the new technological resources have been particularly important as they are safe and efficient communication instruments between the Meeting and the Board of Directors of the company. For this purpose, and bearing in mind the measures included in the Experts Commission Report of 2013, the new law suggests a set of measures with the clear goal of strengthening the Meeting as the decision-making body and main power body in the companies, in comparison with the Board of Directors. The goal is to recover the role that the Meeting had in its origins as a *body of effective control* for the executing and managing function of the administrators[15].

For this purpose, *in the first place,* the powers of the General Meeting are significantly broadened –in all Capital Companies and not only in listed companies as established in the Experts Commission Report– as the Meeting will be competent in all the operations with similar consequences to those of a structural operation (art. 160), including as well the possibility to give instructions related to management (art. 161), which this way broadens the possibility (reserved so far to the Law on Limited Liability Company ("SL") to the Partnership Limited by Shares Company (SA").

Another important change about the expansion of the powers of the Meeting refers to the possibility of buying or alienating essential assets, being so when the amount of the operation exceeds 25% of the value of the assets in the last approved balance (art. 160 f).

In the second place, art. 190 contains new approaches on conflicts of interest that are also applicable to limited companies and refer to a couple of factors: on the one hand, there is a prohibition to vote in the most severe assumptions of conflicts of interest (although it is settled, for limited companies it must be contained in the statutes). On the other hand, there is a presumption of damage to the company interest in those cases in which the agreement had been adopted with the decisive vote of the shareholder or shareholders subjected to a conflict of interest; the test charge then inverts.

The *promotion of the shareholders´ political rights* is closely related to the reform of the General Meeting. It could be said that the reforms performed in this subject clearly aim for a greater protection of the interest of the company and the defense of the rights of the minority shareholders.

[15] Vid. Ibáñez Jiménez, J., „La cuarta reforma del buen gobierno corporativo español: antecedentes y consecuencias para el régimen de la Junta General", pag. 236, in „Comentarios a la reforma del Régimen de la Junta General de accionistas…", *op. cit.*.

In the third place, the shareholders´ right to information is regulated in a new way (art. 197), adjusting the exercising of the right according to the good faith principle and thus avoiding an abusive exercising of the right to information (it is determined that the administrators must provide the requested information to the shareholders except in the assumptions specifically included, art. 197, (i), (ii), and (iii)), and it is even included the obligation to make up for the damages and prejudices that the shareholder may have caused through exercising an abusive right to information.

Regarding the vote of agreements, *in the fourth place,* art. 201 specifically states that the calculation criteria of the majority needed for the General Meeting to adopt agreements is simple majority, without excluding those assumptions in which special majorities are necessary (assumptions of art. 194). Furthermore, the legislator has established several assumptions in which it is compulsory to vote separately the subjects that, in the practice, are usually submitted as a group of subjects to deal with in the agenda (art. 197 bis).

Finally, *in the fifth place*, the Law has made very important changes in relation to the contestation of corporate agreements, in order to defend the interest of the company and the rights of minority shareholders, as well as to avoid the abuse of the right to contestation[16]. This way, art. 204 establishes only a regime to void agreements – eliminating the traditional differentiation between void and voidable agreements –, and a general deadline of a year, except in the case of against the public order agreements (in these cases the action does not expire nor prescribe (art. 205). In addition, the Law has increased the cause of action for contestation and includes several causes that allow the agreement to be appealable. It introduces as a novelty the contestation of agreements that are contrary to the Regulations of the Meeting of the company. Finally, it establishes some assumptions in which there is not possibility of contestation of the agreements as the company interest is not damaged.

2. New approaches in relation to the Board Of Directors

Law 31/2014 contains important and numerous reforms of the Board of Directors, among which the detailed regulation of the Administration Council stands out.

In the first place, the Law includes a more complete and detailed regulation of the duties of care (art. 225) and loyalty (art. 227) on the part of the administrators. This is not surprising as the subject of the administrators´ responsibility has been considered an essential question in the field of Corporate Governance; this way, the contents of the paradigmatic duty of care of the administrators is modified to delimit and adjust the duty of care that they must show. The Law has also strengthened the regime of the duty of loyalty, typifying and structuring perfidious behaviors with a clear aim to establish the sanctions and to require responsibilities in every particular assumption.

The development of the *duty of loyalty* stands out particularly (art. 227), and its identification with „the action in order to defend the interest of the company" is replaced by „the good faith action for the interest of the company", interest of the company that must be considered as the interest referred to the interests of the company as a whole (shareholders,

[16] Art. 206 establishes at least 1% of participation in the social capital to be qualified to file a contestation; minority shareholders under this minimum will not have the right to contestation but rights to compensation for damages (vid. Ibáñez Jiménez. J., „La cuarta reforma del buen gobierno corporativo español: antecedentes y consecuencias para el régimen de la Junta General", pag. 40 and following., in „Comentarios a la reforma del Régimen de la Junta General de accionistas …", *op. cit.*).

employees, clients, vendors) –beyond the sole interest of the shareholder–, and that has a mandatory nature (art. 230) with the possibility of exemption.

In addition, the legislator has included specific cases of the administrator´ duty of loyalty (art. 228), one of the most important for its novelty the express prohibition of exercising their powers as administrators with other purposes different from those they were granted for (art. 228. a).

In the field of administrators´ *responsibility* – including administrators of fact[17]-, it is necessary to include the existence of wilfull misconduct in the action of the administrator so that they can be required for responsibility (art. 236), and the presumption of culpability is determined in those cases in which the administrator illicit behavior is proven. This way, the Law intends to make it clear that the plaintiff must prove the illicit consideration of the administrator´s behavior, but it is not necessary to prove that they are guilty as it is presumed[18]. It also specifically establishes a time limit to exercise the action for responsibility (art. 241 bis), which is 4 years and can be exercised by minority shareholders (5%) without being necessary to request for a summons of the General Meeting (art. 236.1.)

Probably the most relevant novelty is the recognition of the doctrine of „lifting the corporate veil" which is included in art. 236. 5., when it is established that the natural person who represents an administrator artificial person will respond jointly with the artificial person to whom they represent.

It is worth mentioning the inclusion to the Spanish legal system of the American „*Business judgement rule*", a doctrine that our courts had already been applying. Art. 226 specifically recognizes it under the title „Protection of business discretional nature", pointing out that „In the field of strategic and business decisions, subject to business discretional nature, the diligence standard of a business person will be considered as fulfilled when the administrator has acted in good faith, without any personal interest in the issue subjected to the decision-making process, with enough information and in accordance with the appropriate decision procedure". This way, the law provision allows the exclusion from judgement in the courts those decisions with a strategic and business nature made by the administrators to determine the existence of a negligent behavior on their behalf.

In the second place, within the framework of the detailed regulation of the functioning of the Board of Directors, it is stablished that it is compulsory to hold a meeting at least once in a quarter (art. 245) in order to improve de Corporate Governance.

In the third place, non-delegable powers are increased (art. 249 bis), as well as the obligation that the relationship between the company and a chief executive officer or a manager with executive powers is reflected in a contract approved by the Board of Directors (art. 249).There are also important novelties about the payment for the CEO (art. 249), which must be set according to the payments policy approved by the General Meeting if applicable.

Equally relevant are the novelties about impeachment of agreements of the Board of Directors (art. 251) that eliminate the distinction between void and voidable agreements, so the agreements adopted by the Board of Directors that are contrary to the Law, the company statutes, detrimental for the interest of the company and contrary to the regulations of the Board of Directors are considered appealable. In addition, the needed percentage of the shareholders that enables them to appeal such agreements is reduced to 1%, offering this way a greater protection for the minority shareholders (art. 251. 1.).

[17] Art. 236. 3, defines them as those who act as so in reality „untitled, with void or extinguished title, or with another title".
[18] Vid. Guerrero Trevijano, C., „El deber de diligencia…", *op. cit.,* pag 336 and 337.

In the fourth place, the Board of Directors is organized as a needed structure in listed companies, with directors appointed for a maximum period of 4 years, according to gender diversity criteria, experience and knowledge (art. 529 bis). The Law also includes a detailed regulation of the powers of the Secretary and President of the Board (art. 529 sexies), and it also regulates the new position as Coordinating Director for the cases in which the position as President has the condition of executive officer.

In the fith place, the existence of an auditing committee (art. 529 quaterdecies) and an appointment and payments commission (art. 529 quindecies) is compulsory by law.

And, *finally,* the Law, for the transparency in Corporate Governance which it intends to gain, contains important novelties about the payments for the administrators, that must adjust to the practices in the market, and it demands more transparency (way of payment included in the company statutes, approval by the Board of the maximum payment according to the company economic situation and the standards in the market) (art. 217, art. 529 septdecies, 529 octodecies); the payment previsions for the directors must be approved by the General Meeting every 3 years (art. 529 novodecies).

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EXECUTION OF THE „TO DO" AND „TO DO NOT" OBLIGATIONS IN THE NEW CIVIL CODE AND IN THE NEW CIVIL PROCEDURE CODE

Daniel GHIȚĂ[*]

Abstract: *In the new Codes, the execution of the „to do" and „to do not" obligations does benefit from a more rigorous regulation. On one side, this latter does eliminate a series of previous controversies which did exist within doctrine and, on the other side, it does enforce the necessary elements of novelty vowed to render more effective the fulfillment of some categories of obligations which, constantly, do involve an activity to be performed by the debtor. In what concerns the matter of their execution, this „personal touch" from the debtor'side does distinguish these obligations and renders a direct execution by the debtor difficult to obtain. When their execution comes to be performed by the creditor, the rising question is: what could be the satisfaction that this latter could obtain from such a fulfillment of an obligation which had been lawfully assumed by his debtor? The novelty elements are brought by the new Civil Code, through the introduction of a stipulation which does rule over the execution of the „to do" obligation by enforcing the possibility of its execution by the creditor at the debtor's expenses, with no intervention from the judicial court; but it is especially the new Civil Procedure Code which does underline this trend, by the institution, for the cases of executing intuitu personae „to do" or „to do not" obligations, of the penalties per day of delay as an appropriate mean of constraint. The new solutions brought by the legislator are superior to the ones from the prior regulation, yet they do not exhaustively respond to some objections which concern the practical effectiveness of the instruments that are offered to the creditor in order to enable him to determine the debtor to execute the obligation this latter had assumed, should the former find himself unable to make use of the classical procedures which exist in the matter of execution.*

Keywords: *the penalties per day of delay; New Civil Code; New Civil Procedure Code.*

Principle of execution in kind. In the context created by the new Codes, the approach towards the questions raised by the execution of the „to do" or „to do not" obligations ought to less rely upon the items which represent this matter's constant issues, which have been brought to common knowledge by the juridical literature through statements beyond doubt and have been, consequently, ratified by a constant and long since lasting judicial practice; it ought, instead and especially, to spot the innovative elements within the frame of a matter which has, indeed, benefitted from some steady theoretical grounds but the practical instruments of which were not always that effective as they had been expected to be. No matter which might be the obligations'respective objects and independently from their respective sources (should they be contractually shaped or not), the theoretical configuration of their execution ought to be established by starting from the concerned obligation's general effect that is to say, for the creditor, the possibility to obtain from the debtor the exact fulfillment of the deed this latter has obliged himself to, as well as from the principles longtime since instituted in this matter: the principle of the contracts'compulsory

[*] Associate Professor, PhD, University of Craiova, Faculty of Law and Social Sciences

force (*pacta sunt servanda*) and the principle, for civil obligations, of their execution in kind (*ad ipsam rem*). The obligations'execution is fundamentally important for the civil circuit'security; should the debtor choose a bona fide behaviour, the obligations'execution could be achieved voluntarily, through a payment; however, it might also be obtained under constraint; to this latter purpose, the creditor is entitled to make use of the legal means which are placed at his disposal so that the debtor would become constrained to execute his assumed obligation[1]. Should we take into consideration the bona fide attitude, the use made of the constrained execution's procedure ought to represent the exception in respect to the rule constituted by the willful execution of one's assumed obligations.

In the absence of a voluntary execution, the constrained execution's procedure should, in priority and usually, concern the deed in kind; the debtor would, therefore, be obliged to execute the precise deed which does form the object of the concerned obligation; it is through this only way that the creditor could obtain the full satisfaction of his claim[2]. Thus, firstly, the creditor is entitled to request for the precise execution of the concerned obligation, while the debtor is not allowed to just offer the pecuniary equivalent of the deed to which he had obliged himself. We may as well consider the fact that, even when the concerned obligation's constrained execution in kind should be requested, in reality this would still be a payment to be done - thereby the creditor obtaining the exact object of the concerned obligation - yet this payment would not be fulfilled willingly but would be a „constrained payment"[3]. It is only under the circumstance when the concerned obligation's constrained execution in kind could no more be possible or would no more be useful to the creditor that the obligation would come to be executed through equivalent means or through granting damage compensations or indemnifications to the creditor. Thus we do estimate as being fully justified the legal enforcement and the doctrine's acknowledgement, for civil obligations, of their constrained execution in kind. The creditor's possibility of obtaining the concerned obligation's execution in kind is, legally, grounded upon the new Civil Code's art. 1516; as the former Code's art. 1073 did before, this article does institute the principle of the obligations'execution in kind and, to this purpose, it does also open the way for its constrained execution. The principle of the obligations'constrained execution in kind is enforced by art. 1527, in the virtue of which the creditor may constrain the debtor to execute in kind the concerned obligation. The goal aimed to by the legislator is, in this case too, to support the obligations' execution in kind, that is to say in the precise terms under which it had been assumed by the debtor.

The constrained execution's procedure does constitute itself as an aggregate of direct and effective means of constraint to be exerted upon the debtor, through the use of which he could be determined to execute the obligation he had previously assumed. The most obvious form of constrained execution (which is usually applied in order to ensure the obligations'execution in kind) is the direct execution; however, in order to overcome the debtor's reluctance about fulfilling his obligation, other means of constraint may also be made use of, apart from the constrained execution. These latters could be direct or indirect ones; some of them should be applied before the constrained execution, others should be applied independently from it. The execution of the „to do" obligations (and, consequently, the one of the „to do not" obligations either) is surveyed by the same principles which do support the obtaining by the creditor of the exact deed which had been previously

[1] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, Editura ALL, Bucureşti, 1998, p. 325.
[2] T. R. Popescu, P. Anca, *Teoria generală a obligațiilor*, Editura Ştiinţifică, Bucureşti, 1968, p. 314.
[3] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor*, Editura All, Bucureşti, 1994, p.287.

established as the concerned obligation's object. Because they do preserve the configuration which had been imparted to them by the former regulation and because the present analysis does exceed the particular issue of the „to do" obligations in what concerns their execution, we will no more insist upon their voluntary fulfillment, neither upon the rules of their execution through equivalent means; the issue we are going to develop in the present work is the one of the occurring situations when the creditor cannot obtain from his debtor the „to do" deed through the usual means of execution. Thus, we will carry on with our analysis within two distinct spheres: the one of substantial law, respectively the one of procedure law, to which the execution does pertain; yet, we will attempt to point out the eventual common zones generated by their superposition. Due to the importance held, in the sphere of material law, by the principle of the obligations' execution in kind, the same goal (namely the exact fulfillment of the deed which does constitute the concerned obligation's object) does come to be sought for by procedure law too; or, the most appropriate mean to reach for it is, for this latter sphere, the constrained execution.

In respect to the concerned deed's object understood as a criterion, the „to do" obligations'constrained execution in kind does establish a distinction between, on one side, the obligation of handing over a good and, on the other side, the whole lot of the other obligations which do suppose the existence of an activity to be performed by the debtor. As a principle, the exact fulfillment of the deed which does constitute the concerned obligation's object, in the case of „to do" obligations, could obviously be achieved through the use made of the direct constrained execution as a procedure tool. The handing over of an existing and determined good does, indeed, illustrate this hypothesis, because it can always be obtained through the forms of direct constrained execution; yet, in the cases of the other „to do" obligations (including the one which consists in individualizing then handing over some gender goods), the need for some supplementary means able to ensure the concerned execution has been taken into consideration, should the debtor refuse to perform it. Moreover, the „to do" obligations which, due to their own distinctive peculiarities, do involve an important or ultimately essential contribution to be brought by the debtor do require, in view of their execution, some constraint instruments which could never act directly upon the concerned deed required to be performed, neither upon the debtor's person itself. This is the reason why, apart from the direct forms of execution, for the purpose of realizing the creditor's claim, the law has placed at this latter's disposal some other means of constraint, the actions of which are indirect ones. Such is, for example, the creditor's entitling by the law to take by himself some actions in order to ensure the execution in kind of some obligations[4]. This constraint mean aiming for the execution in kind may be applied to the obligations through which the debtor was due to do something or not to do it (and, in this latter case, he has not restrained himself from doing it). In these cases, the concerned deed (should it be either positive or negative) does not require from the debtor a distinctively personal contribution, but just some simple actions or abstainings of his only. Some other times, it is the judicial practice by itself which has come to create instruments which do act upon the debtor's patrimony, such as the comminatory indemnifications. In time, these latters have been joined by other juridical means vowed to indirectly ensure the constrained execution, among which let us mention the comminatory amercements or, in the new Civil Procedure Code, the pecuniary penalties established per day of delay.

[4] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op.cit.*, p. 327.

The idea is commonly accepted that, in the cases of obligations which do necessarily suppose, from the debtor, a strictly personal involvement or contribution, the constrained direct execution in kind cannot be taken into consideration. This is the case of the so-called *intuitu personae* obligations, which are envisaged through taking into consideration the debtor's person itself or certain qualities of his own. These are „to do" or „to do not" obligations and they can be executed in kind by the debtor only but not by the creditor at the debtor's expenses nor by third sides. Yet, by the debtor, these obligations can be executed in kind voluntarily only but not under constraint because, in this latter case, on one side prejudice might be brought to the human personality or to a human being's personal freedom of choice and, on the other side, such a constrained execution in kind might not be even useful to the creditor because, under such circumstances, the concerned deed's wished for quality might not always be certainly ensured. To this category of obligations comes to be applied the principle nemo praecisse potest cogi ad factum , that is to say: no one could ever be constrained to execute a deed which is strictly pertaining to his own person. Should a voluntary execution in kind by the debtor lack, we would be in the presence of a situation where the debtor could be able to choose between the execution in kind and the one through a pecuniary equivalent. Consequently, these obligations'modality of execution could only be the pecuniary equivalent (this is, at least, how things do seem to stand). This interpretation was sustained (or, again, seemed to be so) by the 1864 Civil Code's art. 1075 , according to which: „should the debtor not execute it, whatever obligation to do or to do not would turn into pecuniary indemnifications". The fact is by now obvious that such an interpretation has since remained in a minority, as the sense sustained by the actual legal stipulations is the one that the execution through a pecuniary equivalent could only become appropriate should the execution in kind have become impossible even under its constrained form or should it have become useless for the creditor. As we are speaking of the former Civil Code, let us say that, even at that time, its subsequent legal texts were offering some appropriate means which did enable the creditor to obtain the execution of the „to do" obligations; the rule nemo praecise potest cogi ad factum was as well applied, but a prior and strict distinction was made about it: the creditor was entitled to obtain the execution in kind for all the categories of „to do" obligations, except for the ones the constrained execution of which would have necessarily implied the use made of means which would have brought a prejudice to someone's individual freedom, that is to say except for the obligations which would have supposed, from the debtor, an intense personal involvement.

The predominant attitude has as well been the same in the French juridical literature: they too have started from a legal text which is analogous to the Romanian one[5]. They have taken into consideration the recourse to the execution through a pecuniary equivalent, but only as a solution for the occurring case when the execution in kind of the concerned „to do" obligation might have become inpossible to achieve; the French legislator had, by all means, instituted for the judicial courts the duty (understood as their prime option) to sentence the debtor to the concerned claim's execution in kind[6].

[5] Civil Code , art. 1142 : " The obligations to do or to do not would turn into indemnifications in the case when the debtor should not execute them."

[6] G. Baudry-Lacantinerie, L. Barde, *Traité théorique et pratique de droit civil. Des obligations,* troisiéme édition, tome premier, 1906, p. 468 şi urm.; M. Planiol, G. Ripert, *Traité pratique de droit civil francais*, Paris, Librairie générale de droit et de jurisprudencee, tome VII, 1931, p. 75 şi urm.; J. Carbonnier, *Droit civil*, tome II, Paris, 1962, p. 801; A. Bénabent, *Droit civil. Les obligations*, 5-e édition, Montchrestien, Paris, 1995, p. 441 şi urm.

As a conclusion, what we appreciate as being of a capital importance is the principle-shaped statement issued by the Romanian legislator according to which the „to do" or „to do not" obligations can be executed in kind under constraint, except for the cases when, from the physical and/or juridical perspectives, the execution in kind could no more be effectively possible or either when, should it be still possible, it would, however, no more be useful for the creditor.

Once we have chosen to accept this rule, the next action to be taken ought to be the one of identifying the most effective means which could be able to ensure or to impose this type of execution, especially in what concerns the „to do" or „to do not" obligations that distinguish themselves through their deep personal involvement from the debtor and the executional regime of which is even more restrictive than the ones imparted to other types of obligations. In the case we are debating of, due to the fact that a direct constraint cannot be exerted upon the debtor's person, a constraint of another nature had, ultimately, to be instituted, an indirect one, through which the debtor could be determined to fulfill the concerned obligation by his own will. This roundabout procedure has been conceived under the form of some established and certain sums of money, which ought to be due by the debtor per each of his delay days; their accumulation has been thought of as the reason for which the debtor ought to come, in the end, at the freely adopted decision of fulfilling his assumed obligation.

Execution of „to do" and „to do not" obligations as the new Civil Code does enforce it. The new Civil Code does rule over the execution of the „to do" or „to do not" obligations in the frame of the chapter dedicated to the obligations'constrained execution, situated in the V-th title of the V-th Tome of the Code. The respective stipulations do benefit from a more rigorous elaboration, able to eliminate the ambiguities which had been instituted through the former article 1075. The new Civil Code does institute, as a principle, the obligations'direct and in kind forms of execution through its article 1516. Should the debtor, being already behindhand with it, refuse the concerned obligation's execution with no legal justification brought for his refusal, then the creditor would be entitled to require the constrained execution of the concerned obligation or either to make use of whatever other means stipulated by the law in order to realize his claim. When he does request for the constrained execution of an obligation, what the creditor is seeking for is still, as a prime option, to obtain the respective obligation's execution in kind, that is to say integrally and exactly as it has been previously assumed by the debtor, even if not in the initial „due time". The Civil Code's art. 1527 does effectively enforce the principle of the obligations'direct and in kind forms of execution as prime options, in virtue of which the creditor does become entitled to constrain the debtor to the concerned obligation's execution in kind only.

The juridical modalities which are placed by the law at the creditor's disposal in order to satisfy to his claim are: the respective obligation's constrained execution (no matter if its source would be contract-shaped or not); its resolution; its cancellation; the reduction of the other side's correlative deed (in the case of contract-shaped obligations) and, finally, whatever other mean established by the law that would enable the creditor to satisfy his claim.

In the first place, what we have to notice is a certain established hierarchy among the options placed at the creditor's disposal: in its virtue, the constrained execution does prevail, and not only through its positioning within the implicit ranking offered by the legal text, but as well through the systematical interpretation of the corroborated dispositions of the Civil Code's articles 1517 , respectively 1527. Among the other means indicated by the law the resolution, the cancellation or the reduction of the other side's correlative deed do

hold, ultimately, a subsidiary position in respect to the constrained execution, because they would be, respectively, applied only if the former procedure should not be requested for. In what concerns the other means towards which the legal text does refer, they could be made use of only if the execution's direct modalities should be unavailable or unable to act.

Secondly, let us remark the fact that the new Civil Code does not make use of a norm which would be endowed with the highest extent of generality in order to rule in the most explicit way over the means of constraint which are especially meant (in the case when the usual modalities of execution could not be made use of, as it does happen when the concerned obligations do suppose, from the debtor, an essential involvement) to lead towards an execution in kind. Although the creditor's (general) right to constraint the debtor for the aimed to purpose of an execution in kind is duly instituted, there are, however, no specific execution procedures that would pertain to substantial law and could be able to act with no infringement brought to the rule: nemo praecisse potest cogi ad factum (the present study speaks here of the execution of intuitu personae „to do" or „to do not" obligations).

Thirdly, we have to remark the explicitly stated conjunction of the right to indemnifications with the right to make use of the means placed by the law at the creditor's disposal so that he could satisfy his claim. In other words, should the creditor constrain the debtor to execute in kind an obligation by making use of a coercive procedure which, by itself, would suppose the accumulation of some money amounts, the former would not lose by this taken action the right (which he keeps owning) to moratoria or compensatory indemnifications.

As an important difference from the former regulation, let us remark the effective enforcement (even though this is done through a reference norm only) of the creditor's right to make use of whatever legal mean available in order to determine the debtor to execute the concerned obligation (of course, in kind).

In a refusal case concerning the execution of „to do" or „to do not" obligations involving, from the debtor, a distinctively personal deed, the Civil Code, through its art. 1527, does place at the creditor's disposal two procedures that are able to ensure the respective obligation's execution in kind; these are: the obligation's execution by the creditor at the debtor's expenses or (for the infringement brought to a „not to do" obligation), the agreement of the judicial court given to the creditor so that this latter could eliminate by himself what the debtor has done through infringing the concerned „not to do" obligation. In comparison with this matter's former regulation - located in the former Civil Code's art. 1077 - the first procedure imparted to the creditor for his benefit (the obligation's execution at the debtor's expenses) does appear as a novelty, due to the fact that he has no more to be authorized by the court to do so. Doctrine has even considered it to be a „private mean of execution"[7]. The new Civil Procedure Code does - in spite of their similarities - enforce a different procedure (the creditor becomes entitled to fulfill the concerned obligation, either by himself or through other persons). The difference between the two execution procedures is constituted by the court's intervention - since, in the latter case, the creditor needs to be entitled by it in order to execute the concerned obligation by himself - as well as by the subsequent issue by the court of an executory title. As for the second such procedure, its location is the new Civil Code's articol 1529; its purpose is to ensure the execution of the „not to do" obligations and it also requires for the court's agreement.

[7] D.A. Ghinoiu, „Comment (upon the C.C.'s art. 1528)", in Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod Civil. Comentariu pe articole. Art. 1-2664*, Editura C.H. Beck, Bucureşti, 2012, p. 1614.

The obligation's execution by the creditor himself or either by a third side at the debtor's expenses - though it formally pertains to the direct execution's procedures and in spite of the fact that its final result is the exact fulfillment of the concerned deed - is not a direct procedure, but an indirect one. This type of execution procedure does rely upon the idea that some (gender) goods always have a same price and a same usefulness, which is valid for each of them. Whoever might be the person able to provide and hand them over, the important matter would, therefore, be that the respective (gender) goods should be obtained within the correct limits. For a contract-shaped liability, these ought to be the amount and quality respectively stipulated by it, while for a misdemeanour-type liability, these ought to be the amount and quality of the respectively stolen or destroyed goods. In what concerns the „to do" obligations as well, the essential idea is the one that there are some activities or actions which do preserve a constant value of their own, no matter who could be the person able to accomplish them[8]. This execution procedure has the meaning that it is the creditor now, either by himself or through the intermediary of another person, who comes to execute the deed that does form the object of the concerned obligation at the debtor's expenses, that is to say it is the creditor, now, who does perform the respective activity or who provides the disputed good (the one meant to be handed over, in the case of such an obligation). Yet, all the expenses occasioned by this situation are going to be recovered afterwards, as in the case of whatever other sum of money, through the procedure of constrained execution (a constrained pursuit) exerted upon the debtor's patrimony, should this latter refuse to pay them willingly. This is, effectively, the reason why the opinion has been issued that we are in the presence of a fully accomplished indirect execution, because what the creditor does indeed obtain is, ultimately, the pecuniary equivalent of the concerned deed (the one which initially had been sought for in kind)[9].

Doctrine has also considered that the juridical means to which the new Civil Code's art. 1516 does refer are the same as the ones stipulated by the new Civil Code's articols. 1558-1565 , that is to say: the ensuring distraint, the ensuring sequester, the oblique lawsuit and the revocatory lawsuit; to them may as well be added the contract's unfulfillment exception to be raised[10].

These juridical mechanisms do, undoubtedly, fit well within the category of the means placed at the creditor's disposal and they can, indeed, lead to an obtained execution from the debtor; thus, the new Civil Code's art. 1516 does operate a correct reference towards them. However, we do estimate that this consequently obtained execution is only an indirect one and that the main function exerted by these procedures is another one. As doctrine has seen them, the functions they do fulfill are either the one of a formal prelude to the (already envisaged by the debtor) execution in kind or the one of an effectively exerted psychological pressure the result of which may, sometimes, be the same execution in kind[11]. We are, however, due to establish a clear distinction between, on one side, this type of constraint means and, on the other side, the constrained execution itself, because, among the formers, not all of them are modalities of execution, although all of them do involve coercion. In many cases, a voluntary execution from the debtor may be obtained as a result of the psychological pressure felt by him due to the existing possibility, for the creditor, to

[8] A se vedea D. Bîrlădeanu, „Note upon the Civil Decision nr. 1412/1967 issued by the Region's Tribunal Cluj", *Revista română de drept* nr.7/1968, p. 143.
[9] I.F. Popa, „Remediile neexecutării contractului (Contractul civil)", în L. Pop, I.F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile*, Editura Universul Juridic, Bucureşti, 2012, p. 271.
[10] D.A. Ghinoiu, *op.cit*., p. 1597.
[11] A se vedea D.M. Fruth-Oprişan, „Executarea în natură a obligaţiei de a face", *Revista română de drept* nr. 8/1986, p. 13.

effectively make use of such juridical means. Yet, in our opinion, the sphere which does include all these means that the creditor has at hand to use in order to satisfy his claim (and which may hold a role in precisely favouring the execution in kind, not the one through a pecuniary equivalent) is more comprehensive and it does also involve some means of indirect constraint which do act upon the debtor's patrimony, such as the comminatory indemnifications, the comminatory amercements or the pecuniary penalties established per day of delay. Once obliged to pay a sum of money per each of the successively passed and equal time intervals, a sum scheduled to accumulate its increasing until an eventual execution or until this latter would become either useless for the creditor or physically impossible to achieve for the debtor, this latter might come to prefer (and effectively perform) an execution in kind or the destruction of what he had been doing when he had wilfully infringed the „not to do" obligation.

These procedures of indirect constraint are meant to be applied in the domain of the intuitu personae „to do" and „ to do not" obligations, upon which the usual forms of direct execution could not be effective.

The problem which does rise in front of us is the one of identifying such means (that would be ruled over by the law) which could render effectively applicable the reference operated by the new Civil Code's art. 1516. Or, the only such means actually stated by the law are the behindhand penalties (applicable within the constrained execution's phase), which are ruled by the new Civil Procedure Code and which do appear as adequate substitutes for the comminatory indemnifications in the currently enforced texts of various special laws (in accordance with the dispositions of the Law nr. 76/2012 for the applicative enforcement of the new Civil Procedure Code in its art. 11) .

Execution of „to do" and „to do not" obligations as the new Civil Procedure Code does enforce it. The former Civil Procedure Code had been modified in 2000. On this occasion, the comminatory amercements had been enforced as a mean able to ensure the execution of the intuitu personae „to do" and „ to do not" obligations, to be made use of in the constrained execution phase. At that moment, the legislator had chosen the amercements established per day of delay, thereby eliminating the other mean of indirect constraint, represented by the comminatory indemnifications which, by then, had come to be generally applied in judicial practice and to be ruled by law within a few matters, like: the real estate sphere (Law nr. 18/1991, art. 64 par. 2) or the constitution of trading societies (Law nr. 31/1990 , art. 48). Until 2000 , the comminatory amercements had been enforced (and barely applied) within only a few tight domains, such as: the Decree nr. 31/1954, the Law nr. 554/2004 upon the administration's disputed claims'office and the Law nr. 47/1992 concerning the organisation and functioning of the Romanian Constitutional Court.

Comminatory amercements and comminatory indemnifications are juridical procedures of indirect constraint to be exerted upon someone's patrimony, which aim to overcome the debtor's resistance through the legal threat and the psychological pressure which they do apply upon him, for the purpose of ultimately determining him to execute the obligation he had assumed. These means of constraint are both comminatory, a feature the goal of which is to oblige the debtor to fulfill in kind his „to do" obligation or to destroy what he had been doing through the infringement of his „ to do not" obligation. But between them a great difference does exist. It consists in the fact that comminatory amercements are due to be paid towards the state itself, consequently flowing into the income side of the state's budget; apart from being legal threats and means of indirect pressure, they also present the strong feature of functioning as legal quasi-sanctions,

thereby fulfilling some among the functions of a genuine civil amercement. On the other side, comminatory indemnifications are due to be paid towards the creditor (in respect to whom the concerned obligation is not executed).

The draft of the new Civil Procedure Code had, therefore, preserved the legislator's option for the currently enforced system of comminatory amercements till the new Code's applicative enforcement law had been elaborated. Through the Law nr. 76/2012 for the applicative enforcement of the Law nr. 134/2010 concerning the Civil Procedure Code, the penalties per day of delay were enforced. In order to ensure the execution of the „to do" and „ to do not" obligations which could be fulfilled by no other persons but the debtor himself, the possibility had been instituted of obliging the debtor to pay such behindhand penalties, which are destined to be cashed in by the creditor.

Through special laws, comminatory indemnifications had been recognized (within certain domains) as a mean of constraint able to ensure the execution of some categories among the „to do" obligations. Through the Law nr. 76/2012 for the applicative enforcement of the Law nr. 134/2010 concerning the Civil Procedure Code, these formers were, consequently, substituted by the same penalties per day of delay, destined to be cashed in by the creditor and understood as an indirect mean of coercion in respect to the obligation's execution[12]. Through Civil Procedure Code 's art. 907 (the contents of which is analogous to the one of the former Code's art. 5803 par. 5), the statement is made concerning the fact that, in the phase of constrained execution, for the fulfillment of intuitu personae „to do" or „ to do not" obligations, comminatory indemnifications cannot be granted.

We do consider as being just the solution of substituting the comminatory amercements by penalties per day of delay and these latters'extension towards other domains which are ruled by special laws. These changes do come to support the doctrine's actual orientation towards the use to be made of comminatory indemnifications instead of comminatory amercements; an argument line is by now edified which is able to justify the necessity, in what concerns the accumulated money amounts, of the fact that they ought to be cashed in by the creditor. The argument lines which may sustain this solution are of both theoretical and practical natures; in what concerns the amounts of money which represent the patrimonial constraint exerted upon the debtor, the most important issue is that they should rightfully be cashed in by the creditor and that, indeed, they should not be a benefit for the state[13]. We do as well estimate as lacking of strength the oppositely raised argument that, under such circumstances, the creditor would become wealthier through no rightful grounds[14].

The legal dispositions stated by the new Civil Procedure Code and by its applicative enforcement law do point out the legislator's intentions of granting a general extension to the system which does consist of penalties per day of delay and, consequently, the one of eliminating the similar mechanism until now constituted by the comminatory indemnifications. This latter procedure had taken a long time in order to make its way in the Romanian judicial practice through the jurisprudential path and had, ultimately, come to constitute a particularly effective mean of constraint in spite of the fact that, when the

[12] Its art. 11 does stipulate that: " if, for the disrespect of a "to do" or of a "not to do" obligation which could not have been fulfilled by another person but the debtor himself, the special law would stipulate the debtor's obligation to the payment of comminatory indemnifications or, suiting the case, to the one of a civil amercement then, since the moment of the Civil Procedure Code's enforcement on, penalties could be applied, under the conditions stated by the Civil Procedure Code's art. 894 (republished as the art. 906 - author's note)" .

[13] I. Lulă, „Discuții în legătură cu problematica daunelor cominatorii", *Dreptul* nr. 9/1994, p. 30; D.C. Tudorache, „Executarea daunelor cominatorii", *Dreptul* nr. 3/1995, p. 25.

[14] T. R. Popescu, P. Anca, *op.cit*., p. 318.

moment had come for the effective execution of the amounts of money that had been accumulated under the title of comminatory indemnifications, they were usually reduced to the level of the real prejudice which had been initially suffered by the creditor due to the lack of execution or to a postponed one. This situation used to diminish this procedure's comminatory effect. These two alternative procedures made use of as indirect means of constraint favouring the obligation's execution do accomplish a same function, the one of ensuring the execution in kind of the intuitu personae „to do" obligations; they also both lead to the cashing in by the creditor of the sums involved.

The problem we are now raising is how the newly enforced by the Civil Procedure Code penalties per day of delay might be made use of within the sphere of substantial law, that is to say into the frame of the existing juridical relationship between creditor and debtor but before the constitution of an executory title and the initiation of the constrained execution procedure.

After the former Civil Procedure Code had enforced the comminatory amercements'procedure, the same problem had risen: how to make use of them prior to the initiation's moment concerning the constrained execution? The (by then existing as possible) alternative between the respective uses made of comminatory amercements and of comminatory indemnifications had led to situations which denoted a lack of unity in the judicial practice and, as well, in the general perspective upon this matter. Under these circumstances, two Decisions in the interest of the law had been stated[15]. On one side, the Supreme Court had stated that the requests concerning the debtor's obligation to the payment of comminatory indemnifications were(by then) to be lawfully admitted, although the Civil Procedure Code had (by then) instituted the civil amercements per day of delay; on the other side, the Supreme Court had stated that, to the debtor of an intuitu personae „to do" obligation, the civil amercement stipulated by the same Code's dispositions could be applied, but only within the frame of the executional procedure the initial step of which is the constrained execution's acknowledgement by the court.

In respect to the above mentioned Decisions in the interest of the law issued by the Supreme Court, let us remark the fact that the use of comminatory amercements was (at that moment) lawfully possible only in the phase of constrained execution, that is to say in the presence of an executory title which should legally stipulate the execution of the concerned „to do" or „to do not" obligation. Since the above mentioned Decision has maintained its actuality in this respect, the conclusion we should come to is the one that the penalties per day of delay could, indeed, be used as means of constraint against the debtor, but only within the phase of the constrained execution and after the court should have issued an executory title aiming to this respective effect.

The problem of the execution by the debtor in the cases of some „to do" obligations, as we have seen, may be situated within two separate domains of law: the material side and the procedure'side. Therefore we ought to perform a systematical analysis in regard to the possibility of making use of an executional procedure (which, according to common knowledge, does, indeed, pertain to procedure law) within the domain of substantial law, more precisely as prior to the initial moment of the constrained execution. To this purpose, we should take into consideration the dispositions stated by both the actual Civil and Civil Procedure Codes, as well as by the latter's applicative enforcement Law.

[15] Î.C.C.J., Secțiile unite, Decizion nr. XX din 12.12.2005, published in Monitorul Oficial, Part I, nr. 225 of March 13-th, 2006 şi Decizion nr. 3 of January 17-th, published in Monitorul Oficial, Part I, nr. 372 of May 27-th , 2011.

We have seen that, on one side, the new Civil Code, through its art. 1516, does provide to the creditor, in order to satisfy his claim, the faculty to make use of some other means established by the law. The penalties per day of delay do pertain to this latter category, but they are limited through their conditioned applying in respect to the prior existence of an executory title . On the other side, in what concerns the procedure norm, the legislator has understood to, simultaneously, extend the penalties per day of delay's range of action towards the sphere of substantial law (in some domains ruled by special laws of their own), where these procedures are destined to substitute the comminatory indemnifications and to be applied independently from the existence or not of an executory title . De *lege lata* and in virtue of the two above mentioned Decisions issued in the interest of the law (the dispositions of which do preserve their argument lines'accuracy), we do find ourselves entitled to appreciate that the system of comminatory penalties (actually enforced by the new Civil Procedure Code) may be made use of only within the phase of constrained execution or, either, independently from the existence or not of a constrained execution procedure, only within domains stated by some respective special laws.

Of course, in the sphere of material law, it is still possible for the judicial court to sentence the debtor, through its issued decision, to the execution in kind of an *intuitu personae* „to do"[16], yet without endowing this decision with a procedure able to constrain the debtor towards the concerned execution. But, should the debtor refuse to voluntarily execute the concerned decision of the court, such a solution would be deprived of its practical effectiveness, because it could not be followed by a *manu militari* execution due to the infringement which would be brought by it to the principle *nemo praecisse potest cogi ad factum.*

What we do deplore as a lack is the non-existence in the Civil Code of a disposition (thereby endowed with the highest degree of generality) through which should be stipulated the possibility to make use of such a particularly effective mean of constraint - as for the rest, it would be the only one available, since the comminatory indemnifications have been eliminated - which could ensure the execution of intuitu personae „to do" or „to do not" obligations. The lack of a general regulation, issued through substantial norms and endowed with the highest extent, that would institute some specific means of constraint upon the debtor of an intuitu personae „to do" obligation or of a „to do not" one (means that could surely determine him to exactly fulfill the concerned obligation in the first case or to change his mind about the planned action in the second case), means which could create their effects before the effective start of an executional procedure - this absence has generated the examples of juridical practice deprived of an unitary perspective which have led to the issue of the above mentioned Decisions in the interest of the law. Or, we do estimate that the circumstances we have described in the present work render imperative the existence of this regulation (which ought to be sought for) .

[16] C.E. Zamşa, *Efectele obligațiilor civile*, Editura Hamangiu, Bucureşti, 2013, p. 120 şi p. 124.

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CONSIDERATIONS ON THE JURISDICTION TO SETTLE LABOUR LITIGATION REGARDING PUBLIC SERVANTS AND CONTRACTUAL PERSONNEL

Grety CRISTEA *

Abstract: *A matter widely debated in jurisprudence relates to the jurisdiction to settle litigation regarding public servants and contractual personnel. Thus, the raised issue is wether litigation regarding public servants should be settled by the administrative contentious sections of tribunals or by the sections or panels of judges specialized in settling labor litigation within the same courts. Our opinion is that, in order to unitary settle this type of litigation, it is mandatory for all these litigation to fall under the jurisdiction of the sections or panels of judges specialized in settling labor litigation, especially since there are also legal grounds to this extent.*

Keywords: *jurisdiction, labour litigation, public servants, contractual personnel, labour relationships, administrative contentious court, liability of public servant.*

Regulation. According to art.109 of Law no. 188/1999 on the status of public servants, as republished[1], „litigation having as object the activity relationship of public servants falls under the jurisdiction of the administrative and fiscal contentious section of the tribunal, except for the cases where the jurisdiction of other courts is especially established by law".

Art.6 of Law no. 188/1999 on the status of public servants expressly establishes the categories of employees which do not fall under the applicability of such enactment, letter a) referring to the contractual employed personnel within the own apparatus of public authorities and institutions. Art.266 of the Labour Code states that „labour jurisdiction has as object the settlement of labour conflicts regarding the conclusion, amendment, suspension and termination of individual employment agreement or, as the case may be, of the collective bargaining agreements set forth by the code, as well as settlement of requests regarding the legal relationship between social partners, established by the code".

Law no. 62/2011 on social dialogue[2] defines the concepts of labour conflict and individual labour conflict[3], assimilating the activity relationships of the public servants to labour relationships of the other employees in what other aspects[4] are concerned, but excluding the different jurisdiction. From a procedural standpoint, art. 208 of Law no. 62/2011 states that settlement of individual labour conflicts fall under the jurisdiction of the tribunal, the settlement of such category of litigation being thus regulated by a special law.

The Statute regulates the general regime of legal relationships between public servants and the state or local public administration, through the autonomous administrative authorities or through public authorities and institutions of the central and local administration, called

* Judge, Dâmbovița Tribunal

[1] Published in the Romanian Official Gazzette, Part I, no. 600 of December 8, 1999, amended and completed by Law no. 161/2003, published in the Romanian Official Gazzette, Part I, no. 279 of April 21, 2003 and GEO no. 40/2003, published in the Romanian Official Gazzette, Part I, no. 378 of June 2, 2003.

[2] Published in the Romanian Official Gazzette, Part I, no. 322**,** of May 10, 2011.

[3] Art.1, lit.n, p

[4] Separate opinion of Prof. Dr. Mona – Maria Pivniceru, dec. CC no. 30/2014, published in the Romanian Official Gazzette, no. 144/26.02.2014 on the stamo duty applicable to claims and actions resulting from work relationships of public servant - Legalis website, legal news - 21.04.2015

activity relationships, its provisions being completed by the labour legislation, as well as with the general civil, administrative or criminal legislation, as the case may be, to the extent that these do not contravene to the specific legislation of public positions.

The public function represents the totality of attributions and responsibilities established based on the law with the view to achieve the prerogatives of public power by the public central administration, the public local administration and the autonomous administrative authorities. The public servant is a person appointed in accordance with the law in a public position[5].

According to art.10 of the Labour code, the individual employment agreement is the contract based on which an individual, called employee, undertakes to work for and under the authority of an employer, natural or legal person, in exchange of a consideration called salary.

What fundamentally and irrevocably particularizes the activity relationships of public servants compared to the labour relationships of employees is the fact that public servants are carriers of public power which they exercise within the limits of their position. The employees, even hired in a public institution or authority, can be considered, in light of their attribution, mere servant of their employers[6].

Depending on the source of the labour relationship, there are two professional categories: public servant appointed through an administrative deed (decision, order, disposition) and contractual personnel performing its activity based on an individual employment agreement, concluded in accordance with art. 10 of the Labour law, as republished.

In what concerns the manner a labour relationship results, the litigation resulting from the capacity as employee fall under the jurisdiction of the sections of administrative and fiscal contentious or sections of labour and social insurance litigation within the tribunal where the claimant has its domicile.

According to art. 36, para. 3 of Law no. 304/2004, tribunals have separate sections for claims regarding the administrative and fiscal contentious and labour and social insurance litigations, such provision not regarding only courts' organization, but also the material jurisdiction, depending on the nature of the submitted claim. Such interpretation is the only possible one, being totally accepted the fact that a legal provision must be interpreted as to produce effects.

Consequently, if a court has a specialized section or panel of judges, a claim with a certain object must be allocated to the specialized section (or panel) relevant for the nature of the respective claim. Before the entering into force of the new Civil procedure code, the transferring of litigation from a section to another was grounded on the provisions of the Internal regulation of the courts of law[7], by observing the principle of the continuity of the panel of judges, to the panel judging in the same day, to the section having jurisdiction, respectively to the specialized panel having jurisdiction and is in session that same day.

Following the amendment of the Civil procedure code by Law no. 138/2014, entered into force on 19.10.2014, the settlement of the issue regarding the jurisdiction of the section of the court of law is grounded on the quoted legal provisions as well as on art.136, para.1 of the Civil procedure code[8].

From the interpretation of the provisions of art. 135, para.4 and art.136 of the Civil procedure code it results that, in case the court considers that it does not have jurisdiction to settle a litigation and declines its jurisdiction in favour of another court, the decision issued in this respect is a binding one. On the other hand, if the lack of material jurisdiction

[5] I.T. Ştefănescu, *Tratat teoretic şi practic de dreptul muncii,* Universul Juridic Publishing House, Bucharest, 2014, p. 23.
[6] Alexandru Ţiclea, *Tratat de dreptul muncii,* 8th edition, Universul Juridic Publishing House, Bucharest, 2014, p. 25
[7] Art.99
[8] The provisions of such section on the exception of lack of jurisdiction and the jurisdiction conflict is applicable by analogy also to the case of specialized sections of the same court of law, which render a judgment through a minutes.

pertains to one of the specialized sections of the same court, the transfer of the litigation is made through a minutes of the court session.

The old regulation (prior to the amendment of the Civil procedure code by Law no. 138/2014) stated that transferring of litigation between sections was settled through court decision, similar to the case of declining jurisdiction between different courts, the reasoning being grounded on the fact that the provisions of art. 135 of the Civil procedure code were not making distinction between different courts or different sections (ubi lex non distinguit, nec nos distinguere debemus), but currently, through the entering into force of new proceeding regulations, a clear distinction was made depending on whether the declining of jurisdiction regards different courts or the same court but different sections.

Another issue appeared in practice refers to the jurisdiction to settle the claims regarding the pecuniary liability of former public servants. Apparently, such issue was clarified through a jurisdiction settlement mechanism (in Romanian language, „*regulator de competenta*"), through decision no. 1026/2012 rendered by the High Court of Cassation and Justice which stated that, in such case, the pecuniary liability may be engaged through civil liability in tort, according to the provisions of the Civil Code, the jurisdiction thus pertaining to the general courts of law.

There are, though, some difficulties regarding the existence or inexistence of the capacity as public servant in relation to the moment when the damage was acknowledged and the the claim was filed with the administrative contentious court.

Thus, if, at the moment when the damage was acknowledged and the claim was filed with the administrative contentious court, the capacity of public servant no longer existed, the prejudice may be only repaired based on general legal provisions and not based on the special law, i.e., Law no. 188/1999; if, at the moment when the damage was acknowledged and the claim was filed with the administrative contentious court, the capacity as public servant subsisted, the jurisdiction pertains to the administrative contentious court, the provisions of Law no. 188/1999 being applicable; if, at the moment when the damage was acknowledged, the condition regarding the capacity as public servant was fulfilled and the assessment decision was sent within the legal term, but the capacity as public servant had ceased when the claim was filed with the administrative contentious court, the administrative contentious court will be entitled to render a judgment with respect to prejudice repair only if the verification of the legality of the administrative deed was requested. On the other hand, in this latter situation, if the assessment decision was not issued within the legal term, the administrative contentious court is no longer entitled to render a judgment on the pecuniary liability, since there is no administrative deed to be controlled by a judge.

The solution anticipated in practice is that the object of the action in front of the administrative contentious court regarding the pecuniary liability of the former public servant may only consist in an assessment decision and, if such decision was not issued, the way to make restitution is the one established by the general legal provisions (the action) Soluția ce se prefigurează în practica judiciară este în sensul că obiectul acțiunii în contencios administrativ privind răspunderea materială a fostului funcționar public nu îl poate constitui decât o decizie de impunere, iar în cazul în care o asemenea decizie nu a fost emisă, calea de reparare a pagubei este cea prevăzută de dreptul comun (court proceeding triggering the civil liability in tort, the court having jurisdiction being the first court as a general court)[9].

[9] The Minutes of the meeting of the representatives of the Superior Council of Magistracy with the presidents of the administrative and fiscal contentious sections within the High Court of Cassation and Justice and Courts of appeal, Suceava, 23-24 October 2014.

We consider, however, that, despite the lack of constantly non-unitary practice, but taking into account that all pieces of legislation relevant to this aspect lead to another solution, namely that, in the future, all litigation regarding public servants and contractual personnel should be settled by the judges or sections specialized in labour litigation.

The provisions of art. 28 of Law no. 62/2011 support such opinion, art. 28 regulating the right of public servants and contractual personnel to be part of a union[10], being represented in court by the union organization.

According to art. 219 of the Labour Code, upon request of their members, unions may represent the same within labour litigation. The wording imposes the necessity of an *express mandate* from the members of the union in order for the union to be enabled to submit a court claim (and to withdraw the same) in the name of its members. The previously regulated *implied mandate* is thus replaced[11], replacement aimed at by the practice.

Another reason justifying the proposal for a unitary settlement of this category of litigation is contained by art.1, lett.p of Law no. 62/2011 which defines the concept of individual labour conflict as „the exercise of rights or fulfillment of obligations deriving from individual employment agreements and collective bargaining agreements or from collective agreements and the activity related relationships of public servants, as well as from laws and other enactments", thus not making a distinction depending on the source of the labour relationship.

The legal literature proposed[12], *de lege ferenda*, before the entry into force of Law no. 62/2011, that all labour litigation pertaining to public servants to be settled by the courts enabled to settle labour litigation, considering that the work relationship of the public servant is a typical form of labour legal relationship, he is not a third party, a beneficiary of the public service, the authority or institution where it works treats him as an actual employee, it is avoided the difference between public servants and other employees when the panel of judges is constituted and, at the same time, a unitary regime governing the work relationships would be created.

Taking into account the above considerations, as a legislative amendment proposal, we deem that it is mandatory the enactment of a unitary jurisdiction of settling the labour litigation regarding both public servants and contractual personnel, in favour of the specialized panels/sections, all the more so as, besides the fact that there were contrary solutions in practice, there are legal provisions, unfortunately not clear enough, to justify such opinion.

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[10] Art.3, para.1 of Law no.62/2011
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THE ROLE OF THE JUDICIAL ADMINISTRATOR / LIQUIDATOR EMPLOYMENT RELATIONSHIP

Marius MIHALACHIOIU *

Abstract: *In a society that is in continuous transformation in which the capital is a major concern must be to consider the duties and obligations of the administrator / liquidator in relation to labor. The worker should not be left unprotected in the face of an exceptional situation , as insolvency.*

Keywords: *the judicial administrator / liquidator, employment relationship, dismissing employees, payment of salaries, collective labour agreements, insolvency, Labour Code, Decision 2011-03-03 Claes Social Policy*

In the economic context of the last years, the insolvency of employing companies generated a series of legal issues, some of which were settled by the legislator, while others, by the practice.

It was, nevertheless, mandatory a clearer and, potentially, more consistent regulation of the attributions and obligations of the official receiver or of the legal administrator[1].

Under labour law, the official receiver/legal administrator has at least the following attributions:

- Dismissing employees;
- Payment of salaries/granting compensatory wages – accessing the salaries guarantee fund[2];
- Amending the collective labour agreements;
- Issuing letters attesting to the personal status of each employee.

Dismissal

The ongoing contracts are considered to remain in place upon the start of the insolvency proceedings, art. 1.417 of the Civil code being inapplicable. Any contractual clauses stipulating the termination of the ongoing contracts, the withdrawal of the benefit of the term or accelerating a due date due to the start of the insolvency proceedings are considered null and void. The provisions regarding the maintenance of the ongoing contracts and the nullity of termination or obligations acceleration clauses are not applicable to qualified financial contracts and to bilateral compensation operations under a

* Asistent judiciar, Tribunalul Dâmbovița

[1] Government emergency ordinance no. 86/2006 on the organization of the activity of insolvency practitioners.(as amended and completed by Law no. 254/2007 and Law no. 85/2010) defines the legal administrator as „the insolvency practitioner compatible, authorized in accordance with the law, designated to perform the attributions established by the law or by the court of law, within the insolvency proceedings, during the supervision period and during the reorganization period (art. 2)", and the official receiver as „the insolvency practitioner compatible, authorized in accordance with the law, designated to manage the debtor's activity within the bankruptcy proceedings within the general proceedings, as well as during the simplified one, and to exercise the attributions provided by the law or established by the court."

[2] The legal grounds are composed of Law no. 200/2006 on the creation and use of the guarantee fund for the payment of salary related receivables (published in the Romanian Official Gazette, Part I, no. 453 of 25.05.2006)

qualified financial contract or under a bilateral compensation agreement. In order to maximize the debtor's fortune, within a statutes of limitation term of 3 months as of the start of the proceedings, the legal administrator/official receiver is entitled to terminate any contract, the ongoing leases, other long term contracts, as long as such contracts have not been entirely or substantially performed by all the involved parties. The legal administrator/official receiver must answer, within 30 days as of receipt, to the notification of the contractor, issued within the first 3 months as of the start of the proceedings, whereby the termination of the contract is requested; in lack of such answer, the legal administrator/official receiver will no longer be entitled to request the performance of the respective contract, such being considered terminated[3].

The contract is considered terminated:

a) upon expiry of a 30 days term as of the receipt of the notice issued by a contractor with respect to the termination of a contract, if the legal administrator/official receiver does not answer;

b) on the date of the termination notice issued by the legal administrator/official receiver.

As an exception, a labour agreement or a lease agreement where it holds the capacity as lessee may be terminated only with the observance of the legal prior notice terms[4].

Most of the times, the legal administrator/official receiver was forced to dispose a collective dismissal when fulfilling its attributions.

The initial regulation provided that, as an exception to the provisions of Law no. 53/2003 – the Labour Code, as further amended and completed, the termination of individual employment agreements of the debtor's personnel is to be made with emergency by the legal administrator/official receiver, without being necessary to observe the collective dismissal proceedings. The legal administrator/official receiver was only to grant a 15 business days prior notice[5].

By means of decision no. 64/2015[6], the Constitutional Court stated that informing and consulting the employees are components of the constitutional right to labour social protection, joinung through interpretation the express provisions of art. 41 para. (2) second thesis of the Constitution.

Under such circumstances, the Court stated that the information and consulting right in case of collective dismissal is incident in any collective dismissal, irrespective of the particulatiries of the field where implemented. The legislator can adapt the right's configuration manner, by observing the proprotionality principle, based on the aforementioned particularities, but it is obvious that it cannot deny such right.

Also, it was considered that the legislator, through the manner in which it understood to regulate the collective dismissal proceedings in the case of a company undergoing the insolvency proceedings, denied the employees right to be informed and consulted, which is equivalent to the denial of the provisions of art. 41 para. (2) of the Constitution, so that it is no longer necessary to appreciate the the proprtionality of the measure, the criticised legal provision being without equivoque. As a consequence, the Court stated that art. 86 para. (6) first thesis of Law no. 85/2006 are not constitutional, being contrary to art. 41 para. (2) of

[3] Art. 123 para (1) of Law no 85/2014 on the proceedings for preventing insolvency and insolvency proceedings, published in the Romanian Official Gazette no. 466 of 25 June 2014, Part I,

[4] Art. 123 para. (7) of Law no 85/2014 on the proceedings for preventing insolvency and insolvency proceedings. Art 75 para (1) of the Labour Code provides that the dismissed personnel benefits from a prior notice which cannot be smaller than 20 business days.

[5] Art. 86 para. (6) of Law no 85/2014.

[6] Published in the Romanian Official Gazette, Part I, no. 286 of 28 April 2015

the Constitutions, as such is interpreded based on art. 20 para. (1) of the Constitution, from the standpoint of part I point 21 and 29 of the revized European Social Charter.

But more important is the fact that the legislator acknowledged such regulatory deficiences and changes the legal solution through Law no. 85/2014 on the proceedings for preventing insolvency and insolvency proceedings (which repealed Law no. 85/2006) and which states, in art. 123 para. (8) that „after the date of the start of the proceedings, termination of the individual employment agreements of the debtor's personnel may be made with emergency by the legal administrator/official receiver. The legal administrator/official receiver will grant the dismissed personnel only the legal prior notice term. In case the collective dismissal related provisions of Law no. 53/2003 – the Labour Code, as republished and further amended and completed, are applicable the terms provided by art. 71 and art. 72 para. (1) of such law are reduced to half."

The legal administrator has the supervision right, if the administration right of the debtor was not withheld. The supervision exercised by the legal administrator consists of the permanent analysis of the debtor's activity and the prior approval of the measures monetary binding the debtor, as well of the measures meant to lead to the restructuring/reorganization of the same; the approval is made based on a report drafted by the legal administrator, which also mentions the reality and opportunity of the legal operations subject to approval were verified and the related conditions are fulfilled. The supervision of the administration operations of the debtor's patrimony is made through the prior approval granted at least with respect to the personnel restructuring measures[7].

Courts practice[8] stated that by means of art. 68 and 69 of the Labour Code art. 1 and 3 of Decision no. 98/59/EC of July 20, 1998 on the synchronization of EU member states legislation on collective dismissal were transposed in the national legislation, establishing, amongst others, the employer's obligation to initiate in due time and with the view to reach an agreement, consultations with the union or, as the case may be, with the employees' representatives with respect to the methods and means to avoid collective dismissal, to the attenuation of the collective dismissal consequences through social measures which envisage amongst others, support for the requalification or professional conversion of the dismissed employees. During the period when consultations enabling the unions to formulate proposals in due time are carried out, the employer is bound to supply all relevant information and to notify in writing the total number and categories of employees affected by the dismissal, the reasons generating the dismissal, the criteria taken into account for establishing the priority to dismissal, the measures takes to limit the number of dismissed personnel, the measures to attenuate the consequences and the compensation to be granted to employees, the date when dismissal will take place and the term within which the union may submit proposals to avoid or minimize the number of dismissed employees.

Due to the superior legal force of European enactments compared to the national ones and by virtue of the exclusive prerogative of CJEU to interpret the secondary European legislation with the view to ensure the uniform interpretation and application of European regulations, it is to be taken into account the interpretation given by CJEU to art. 1-3 of Directive 98/59/EU within connected cases C235/10- C239/10, within the proceedings David Claes, Sophie Jeanjean and others against Landsbanki Luxembrourg SA[9], stating that such directive must be interpreted as being applicable in all circumstances when an

[7] Art.5 point 66 of Law no. 85/2014,
[8] Civil decision no.. 1250/22.10.2014 rendered by Dâmbovița Tribunal within file 4012/120/2013*, not published,
[9] http://curia.europa.eu/juris/document/document.jsf?docid=84210&doclang=RO,

individual labour agreement is terminated due to reasons not related to the employee. Therefore, the derogation established by art. 86 para. 6 of Law no. 85/2006 from the mandatory character of taking all steps of collective dismissal proceedings provided for by the Labour Code contravenes to the European law (art. 1- 3 of Directive 89/59/EC), for which reason the dismissal decision is null and void[10].

Consequently and in case of insolvency, the legal administrator/official receiver must observe the employees' rights provided by the collective dismissal proceedings, provision synchronized with the national legislation only through the new insolvency law no. 85/2014.

Salaries payment

Receivables resulting from salaries are receivable generated by labour relationships and similar relationships between the debtor and its employees. Such receivables are registered ex officio with the receivables table by the legal administrator/official receiver[11].

The employees of the debtor are considered creditors without being necessary to personally submit the receivables declarations[12].

Within the meetings of the creditors' assembly, the debtor's employees can be represented by a delegate amongst themselves, which can vote for the entire value of the receivables consisting in salaries and other monetary rights they are entitled to[13].

The employees of the credit institution undergoing the bankruptcy proceedings will designate two persons to represent them within the proceedings for recovering the receivables representing salaries and other monetary rights[14].

As an exception, the salaries related receivables will be registered by the legal administrator according to the accountancy books, while all other creditors, whose receivables are prior to the start of the proceedings, will submit the request for the acceptance of receivables within the term set by means of the decision for opening the proceedings; the requests for accepting receivables will be registered with a registry to be kept within the actuary records.[15].

The employees dismissed for reasons not pertaining to themselves benefit from active measures against unemployment under the circumstances provided by the law and the applicable collective labour agreement[16].

But in most cases, for the payment of the outstanding salaries as well as for granting certain compensations, the salaries guarantee fund is used. To this extent, Law no. 200/2006 on the creation and use of the guarantee fund for the payment of salary related receivables[17].

[10] Civil decision no. 1250/22.10.2014 rendered by Dâmbovița Tribunal within file 4012/120/2013*, not published,
[11] Art. 5 point 18 of Law no. 85/2014,
[12] Art. 5 point 19 of Law no. 85/2014,
[13] Art 48 para. (5) of Law no. 85/2014,
[14] Art. 223 of Law no. 85/2014,
[15] Art. 102 para. (1) of Law no. 85/2014,
[16] Art. 66 of the Labour Code,a s republished,
[17] For example, the lack of a collective labour agreement and the existence of an agreement concluded based on art.153 of Law no. 62/2011 leads to the non-payment of compensation from the guarantee fund, as per Law no. 200/2006 on creation and use of the Guarantee fund for the payment of salary related receivables (published in the Romanian Official Gazette, Part I, no. 453 of 25.05.2006), because the legal grounds for granting is the collective labour agreement or the individual employment agreement, and not an agreement between the company and the union, irrespective of its contents.

The guarantee fund ensures the payment of the salary related receivables resulting from collective labour agreements concluded by the employees with the employers against which binding decisions for starting the insolvency proceedings were issued by the courts and against which the measure of totally or partially withholding the administration right was disposed, hereinafter referred to as employers undergoing insolvency[18].

From the Guarantee fund the following types of receivables are to be paid[19], within the limits and conditions described in this chapter, but excluding the social contributions due by the employers undergoing insolvency[20]:

- Outstanding salaries;
- Outstanding monetary compensations, due by the employers for the annual leave not used by the employees, but only for maximum one year of work;
- Outstanding compensatory payments, at the value established in the collective labour agreement and/or the individual employment agreement, in case of termination of the labour relationship;
- Outstanding compensation which the employers are bound to pay, as per the collective labour agreement and/or the individual employment agreement, in case of labour accidents or professional diseases;
- Outstanding payments which the employers are bound to pay, in accordance with the law, during the period when the activity is suspended.

The total amount of salary related receivables incumbent upon the Guarantee fund may not exceed the equivalent of 3 average gross salaries for each employee[21]. Receivables resulting from labour relationships, paid in case of bankruptcy, as per the applicable legislation, are diminished with the monies paid from the Guarantee fund[22].

Amendment of collective labour agreements

During the supervision period, the debtor shall be entitled to continue performing its current activities and may perform payments to the known creditors, which fulfill the regular conditions for performing the current activity, as follows[23]:

- under the supervision of the legal administrator, if the debtor made a reorganization request[24] and the administration right was not withdrawn;
- under the lead of the legal administration, if the administration right of the debtor was withdrawn.

Deeds, operations and payments exceeding such conditions may be authorized under the supervision of the legal administrator; the legal administrator shall convene a meeting of the creditors committee with the view to submit for the approval the request of the special within maximum 5 days as of receiving the same. In case a certain operation exceeding the current activity is recommended by the legal administrator and the proposal is approved by the legal administrator, this shall be mandatorily performed by the legal administrator. In case the activity is led by the legal administrator, the operation will be

[18] Art. 2 of Law no. 200/2006,
[19] Art. 13 para. (1) of Law no. 200/2006,
[20] Art. 13 para. (2) of Law no. 200/2006,
[21] Art. 14 para. (1) of Law no. 200/2006,
[22] Art. 16 of Law no. 200/2006,
[23] Art. 87 para (1) of Law no. 85/2014,
[24] As per art. 67 para. (1) lett. g) of Law no. 85/2014,

performed by the same upon approval of the creditors' committee, without the approval of the special administrator being necessary[25].

The conclusion resulting from such provisions is that for the amendment of the collective labour agreement the involvement of the legal administrator. The legal deed itself is more important as for accessing the Guarantee fund the existence of the collective labour agreement is necessary.

As revealed by the legal literature, the amendment and conclusion of a new collective labour agreement triggers eo ipso – if it is applicable – the amendment or completion of individual labour agreements, so that these are synchronized with the provisions of the collective labour agreement.

According to art.149 of Law no.62/2011, the provisions of the collective labour agreement may be amended (in writing) during its performance, in full compliance with the legal provisions, at any time when the parties entitled to negotiate the collective agreement so agree. „Thus, it results that amendment is possible through parties' agreement and impossible through the unilateral act of one of the parties"[26].

Law no.62/2011 through art.150 para.1 sets out that amendments brought to the collective labour agreement are contained by an addendum signed by all parties executing the respective contract.

The amendments brought to the collective labour agreement must be transmitted in writing to the authority keeping the respective contract and tot the signatories and become applicable upon registration or at a later date, as per the parties agreement[27].

The doctrine as well as the practice established that not any agreement between the social partners may amend, exclusively by completing, the collective labour agreement. Only an agreement which, irrespective of its name, follows such purpose and is registered with the relevant authority generates amendment effects upon its registration. Otherwise, another agreement, if not registered, produces effects between parties only, as any other agreement, without generating the amendment of the initial collective labour agreement[28].

The legal administrator, especially when the debtor's activity is continued, is bound to observe the labour legislation, becoming party to a collective labour agreement due to an extraordinary legal situation.

Issuing letters attesting to the personnel status of each employee

The employer has the obligation to set up the employees' general registry[29] and to perform the registrations required by the law and to issue, upon request, all documents attesting to the capacity as employee of the person thus requesting[30].

During the supervision period, the debtor/ employer can handle by itself such personnel situations, but under the supervision of the legal administrator.

If the legal status of the debtor is modified[31], the official receiver takes over such attribution until the discharge of responsibility by the syndic judge[32].

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[25] Art. 87 para (2) of Law no. 85/2014,
[26] Bucharest Tribunal, 3rd civil section, decision no. 117/1995,
[27] Art. 150 para (2) of Law no. 62/2011,
[28] Ion Traian Ştefănescu, **Treaty on theory and practice in labour law**, 2nd edition, op.cit., p.174. See also Bucharest Court of Appeal, 7th civil and labour section, decision no. 1706/R/2010 in the Romanian Gazette of Labour Law, no. 6/2010, p. 96,
[29] Art. 40 para. (2) lett.g of the Labour Code, as republished,
[30] Art. 40 para. (2) lett.h of the Labour Code, as republished,
[31] It is envisaged the amendment in the sense of art. 145 of Law no. 85/2014,
[32] According to art. 271 of Law no. 85/2014,

Conclusion

Under Romanian law, the legal administrator/official receiver has legal attributions and obligations which are synchronized with European law. Moreover, the same are consistent with the measures disposed by CJEU. Thus:

1. Articles 1-3 of Directive 98/59/EC of the Council dated 20 July 1998 regarding the synchronization of the collective dismissal legislations of the member states must be interpreted as being applicable to the cessation of activity of an employer upon a court judgment disposing its dissolution and liquidation for being insolvent, even if, in case if such cessation, the national legislation providing for the immediate rescission of the employment agreements of the workers[33].
2. Until final cessation of the legal personality of a company for which dissolution and liquidation was disposed, the obligations deriving from articles 2 and 3 of Directive 98/59 must be fulfilled. The obligations incumbent on the employer based on such articles must be fulfilled by the management of the respective company, as long as such is still in place, even with limited attributions with respect to the administration of the respective company or by the official receiver of the same, if the administration of the respective company is entirely taken over by this receiver.

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2. Bucharest Court of Appeal, 7th civil and labour section, decision no. 1706/R/2010 in the Romanian Gazette of Labour Law, no. 6/2010,
3. Law no. 200/2006 on the creation and use of the guarantee fund for the payment of salary related receivables (published in the Romanian Official Gazette, Part I, no. 453 of 25.05.2006)
4. Law no 85/2014 on the proceedings for preventing insolvency and insolvency proceedings, published in the Romanian Official Gazette no. 466 of 25 June 2014, Part I

[33] Decision 2011-03-03 Claes Social Policy http://curia.europa.eu/juris/document/document.jsf?docid=84210&doclang=RO.

SOME CONSIDERATIONS REGARDING CONTRAVENTIONAL LIABILITY IN LABOR LAW

Isabela STANCEA *

Abstract: *Legal liability is now an institution present in all branches of law and is a subject that presents great practical importance as it ensures the effectiveness of the rule of law, contributes to establishing and maintaining social order and stimulates the attitude of compliance with the law. Although legislation is extremely restrictive in practice there can be met frequently causes as to remove the character contraventional of the act committed by an employee during work or in connection with it. The Labor Code refers only to sanctioning certain offenses without covering contraventional liability as a whole, and without establishing possible causes that would exempt from this form of liability.*

Keywords: *employee, employer, contraventional sanction.*

Liability, as a social institution has been reported since the archaic society, by the fact that the person who suffered an injury, responded immediately through an act of violence. As society has evolved and were adopted rules that regulated human conduct have also been established new forms of responsibility, outlining the idea that he who violates basic obligations is liable to pay, under certain conditions, sanctions that would give him the opportunity to review his future conduct.

A huge step forward in the evolution of legal liability was the establishment of proportions between deed and punishment, and between intention and punishment, key issues in individualization and sanction.

Also through the evolution of society has emerged the idea that whoever has violated basic obligations may, under certain conditions, bear a penalty that would give him the opportunity to realize his own moral decay and that would give him the opportunity to correct his behavior, atonement the guilt by serving a penalty to avoid humiliation and physical violence. Neither the law, nor the jurisprudence, define in a single text, the concept of legal liability. The legislator sets only as the person who rejects the prescription of the juridical norm is liable, the principles of legal liability, the limits within which manifests some form of legal liability, the nature and extent of the legal sanction that would apply[1].

„In turn, the case law and legal literature have shown to be more concerned with categories of legal liability branch, rather than the concept of legal liability, regarded as a general category of law. This broad concept can be understood only in the depth of its structure starting from the concrete forms (criminal, civil, disciplinary, employment law, etc.). This is because, even though the liability sums up different features, they present an amount of common elements, through whose synthesis can develop a general definition of the concept of legal liability[2]."

The legal authors were not concerned about the definition of legal liability in a form that has the vocation of generality. For them, the meaning commonly attributed to the

* Assistant Professor, University Constantin Brancoveanu of Pitesti

[1] Nicolae Grădinaru, Ion Mihalcea, M. Agheniţei, E. Neagu, *General Theory of Law, Publishing House. Economic Independence, Pitesti, 2009, p. 103.*

[2] M.N. Costin, *Legal liability law Socialist Republic of Romania, Publishing House. Dacia, Cluj-Napoca, 1974, p. 104*

concept of responsibility is identified with the obligation to bear the consequences of non-compliance with rules of conduct, ultimately, the responsibility of identifying with the penalty for breaking the rule of law[3].

„Within social responsibility, legal liability is detached from other forms of liability by the fact that it concerns the obligation to take account for violation of a rule of law"[4].

Social responsibility is an institution aimed at society's regulatory system, under which either the complex social relationships between the society concerned and its members. It mediates promotion and preservation, of social values, crystallized and recognized within the society given against all those who violate social order, to ensure and promote the order and the public good[5].

Legal liability is now an institution present in all branches of law and is a subject that presents great practical importance as it ensures the effectiveness of the rule of law, contributes to establishing and maintaining social order and stimulates the attitude of compliance with the law.

The notion of responsibility is very broad, all human actions likely to generate some form of liability since the rules of conduct, containing prescriptions of regulatory nature, by which society defends its general interest[6].

Thus, social norms are the institutionalized form by which operates the appreciation of human behavior, and in the event of the individual conduct and the imperative norms, social responsibility intervenes, which may take the form of, legal, moral, religious liability[7].

The notion of responsibility is not exclusively specific to law: the common sense notion of liability, regardless of the form is to manifest obligation to bear the consequences of non-compliance with rules of conduct, which incubate the perpetrator's obligation contrary to these rules and always bearing mark the social disapproval of such conduct[8].

In the branch of labor law, legal liability takes many forms: disciplinary, which works exclusively for the employee, financial liability that interested both employee and employer, which concerns criminal liability only employer, and contraventional liability which also almost exclusively aimed at the employer.

According to Art. 260 of the Labor Code[9], constitutes a contravention and is sanctioned as the following facts:

a) failure by the employer to guarantee the payment provisions on minimum gross salary, with a fine from 300 lei to 2,000 lei;
b) breach by the employer of the obligation to issue, at the request of the employee or a former employee a document certifying the work done by him, activity duration, salary, seniority in the profession and specialty, with a fine of 300 lei to 1,000 lei;
c) preventing or obligation by threats or by violence of an employee or group of employees to participate in the strike or to work during the strike, with a fine of 1,500 lei to 3,000 lei;

[3] Nicolae Grădinaru, Ion Mihalcea, M. Agheniței, E. Neagu, *General Theory of Law, Publishing House. Economic Independence, Pitesti, 2009, p. 104.*
[4] Ioan Huma, Introduction to the study of law, Publisher Call Foundation, Iaşi, 1993, p. 135.
[5] Gh. Mihai, R.I. Moțica, *Optima justice, Publishing House. CHBeck, Bucharest, 1999, p. 102.*
[6] Paul Apostol, *Ethical and normative activity, Scientific Publishing Bucharest, 1968, p. 52.*
[7] Nicolae Grădinaru, Ion Mihalcea, M. Agheniței, E. Neagu, *General Theory of Law, Publishing House. Economic Independence, Pitesti, 2009, p. 102.*
[8] M.N. Costin, *Legal liability law Socialist Republic of Romania, Publishing House. Dacia, Cluj-Napoca, 1974*, pag. 15.
[9] The Labour Code updated by Law no. 12/2015, published in the Official Gazette Part I, no. 52 of January 22, 2015.

d) providing individual employment contract clauses contrary to legal provisions, a fine of 2,000 lei to 5,000 lei;
e) receiving to work up to 5 persons without concluding an individual employment contract, in writing and with the legislation in force, with a fine of 10,000 lei to 20,000 lei for each person identified;
f) work performed by a person without an individual employment contract with a fine from 500 lei to 1,000 lei;
g) breach by the employer of the law on public holidays are not working, with a fine of RON 5,000 to RON 10,000. Exceptions are employees working in public health and in public administration, in order to ensure health care, respectively food supply to the population of basic necessities, according to art. 140 and 142 of the Labor Code, are provided with appropriate compensation with free time in the next 30 days. However para. (2) of art. 142 provides that where, for justified reasons, are not granted days off, employees receive for work during official holidays of an increase to the base salary can not be less than 100% of basic salary the work they performed in normal working hours.
h) breach by the employer of the obligation on working in public health and in public administration, with a fine of RON 5,000 to RON 20,000;
i) failure to comply with the provisions on overtime, with a fine of 1,500 lei to 3,000 lei;
j) failure to comply with legal provisions regarding weekly rest, by a fine of 1,500 lei to 3,000 lei;
k) not granting allowance of 75% of the basic salary appropriate to the position held, if the employer provided to pause their work to maintain the service, with a fine of 1,500 lei to 5,000 lei;
l) violation of legal provisions relating to night work, with a fine of 1,500 lei to 3,000 lei;
m) breach by the employer of the obligation to seek employment medical certificate, showing that the employee is fit for performing that work, and the obligation to keep records of hours worked by each employee and inspection control work this out whenever requested, with a fine of 1,500 lei to 3,000 lei;
n) breaching the law on registration of resignation by the employer, by a fine of 1,500 lei to 3,000 lei;
o) violation by the temporary employment agency obligation not to charge any fees in exchange for arranging temporary employees to recruit them by user or for concluding a temporary employment contract with a fine of RON 5,000 to RON 10,000 for each identified person without exceeding the aggregate amount of 100,000 lei;
p) breach by the employer of the obligation to hand over the employee's a copy of the individual contract before the start of labor, a fine of 1,500 lei to 2,000 lei.

Comprehensively regulated in Article 260 of the Labor Code contains no provision contraventional liability which exempts subjects against such liability, ie situations where if the employer (and in one case the employee) commits the act in one of the causes removing character contraventional of it. If the employer is excluded for committing such offenses in one of the cases, which exempts from liability for the employee, there may be circumstances in which he might commit an offense while on duty or in connection with the service, in circumstances exempt it from liability.

More specifically, from the provisions of law unequivocally that the only situation that concerns if the employee could commit an offense is regulated by the letter f. In the art. 260

of the Labor Code. Thus, according to the text of the law, work performed by a person without an individual employment contract shall be sanctioned with a fine from 500 lei to 1,000 lei. In other words, the situation in which the employee activity on behalf of a legal entity, in exchange for a salary, and it shall not enter into an individual contract of employment within the period prescribed by law, the legislature has provided for sanctions to a fine of employee 500-1000 lei, without withholding irresponsibility of the perpetrator, the only question that removes contravention liability of the employee who is unable to psycho-physical realizes the significance of his actions, especially for workers aged between 16 and 18 years .

As shown, although legislation is extremely restrictive in practice there can be met frequently causes that the character to remove contraventional of the act committed by an employee during work or in connection with it.

Thus, art. 254 para. (2) of the Labor Code provides that employees not are responsible for damage caused by major force or other unforeseen causes that could not be eliminated and no damage falling within the normal risk of the service.

And mistrial could be invoked in support of an employee who had a false representation of reality when they committed the offense and could exempting him from liability.

Article 48 of the Labor Code provides that the employer may temporarily change the location and type of work, without the consent of the employee and in the case of force majeure, as a disciplinary measure or as a measure of protection for the employee without specifying the penalties that apply to it if the excessive use of this provision of the law.

In certain jobs even complete involuntary intoxication can constitute a ground for exemption from liability contravention, which can be retained in respect of employees who work in environments that predispose to such facts.

So The Labor Code refers only to sanctioning certain offenses without contraventional liability covering as a whole, and without establishing possible causes that would exempt from this form of liability.

There are also offenses provided by other regulations that may apply to labor relations, such as:

- The situation in which the employer does not take measures to ensure the conditions necessary to perform medical examinations on recruitment;
- The employer does not comply with medical prescriptions determined after medical examinations performed during employment;
- The employment of persons of another nationality without work permit;
- Explicit or implicit refusal of the employer to employ persons belonging to a particular race, ethnic or disadvantaged groups or on the grounds of age.

According to art. 10 of Government Decision 500/2011[10] concerning the preparation and completion of the general register of employees, republished and renewed, the following shall constitute contraventions committed by natural or legal persons:

a) failure to communicate the registry with all elements of the individual employment contract stipulated by law, no later than the day preceding the entering the service of the employee concerned;
b) refusal to provide the labor inspector the register in electronic form and the personal file of employees;

[10] GD. 500/2011 on the general register of the employees was published in the Official Gazette of Romania, Part I, no. 372 of 27 May 2011.

c) not filling in the elements of the individual employment contract under the law, namely not submitting the registry within the time prescribed by law;
d) completing the registry by persons other than those nominated by the written decision by the employer;
e) completion of the registry with incorrect or incomplete data;
f) alteration or deletion from the register, as well as unauthorized interference is on software application of the register;
g) breaching the law on the employer's obligation to inform in writing the territorial labor inspectorate about the conclusion of the service contract;
h) employer's refusal to release copies of documents requested the employee;
i) breach of the provisions on the prohibition providers, to subcontract, in turn, complement and transmission services, of the register, entrusted by the employer.
j) breaching the law, according to which the register is kept in electronic form, at the employer and, where applicable, at the headquarters branch, agency, representation, or other such units without legal personality, who delegated the establishment of the register.

Labor legislation provides that, finding contraventions and enforcement of sanctions are done by labor inspectors, but in practice, even if the employee who committed the act invokes one of the causes removing the contraventional character of the act, often labor inspector in the absence of concrete evidence, finds unlawful act and sets penalty offenses.

The form of guilt of the employee or employer is likely to influence whether or not a SANTOS offenses and complementary, taking into account the seriousness of the offense and of its nature or form of guilt that has driven the person who committed the offense.

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THEORETICAL AND PRACTICAL IMPLICATIONS FOR THE DEFINITION OF THE LEGAL CHARACTERISTICS OF THE CLAIM IN ENFORCEMENT PROCEEDINGS

Nicolae-Horia ȚIȚ [*]

Abstract: *The enforcement procedure aims at completing the obligation laid down in the enforcement order. The title is the basis for the enforcement procedure, and yet its existence is not sufficient to trigger it. It is also necessary to observe three substantial conditions, provided by article 663 Civil Procedure Code (CPC): the certainty of the claim, i.e. its undisputed character resulting from the title itself; the liquidity or determinability of the obligation to be enforced; the maturity, namely the condition that the claim has fallen due. These conditions are of a substantive nature, so they must be interpreted according to the rules provided by the Civil Code (CC), but also in the context of the specificity of enforcement procedure.*

Keywords: *enforcement, claim, certainty, liquidity, maturity, judgement, European enforcement order.*

1. Introduction

The procedural activity of enforcement is triggered by the creditor's application according to art. 664 para. 1 CPC, which is the point at which the enforcement body is vested with the application of the title, according to art. 622 para. 2 CPC. Any enforcement proceeding may be made only pursuant to an enforceable title or order (art. 632 par. 1 CPC); this procedure cannot be conceived in the absence of a formal instrument that has, by law, the legal force needed to be enforced. Enforceability is conferred by the law, but we must distinguish between judgments and other documents which the law confers the status of enforceable, because for the latter is necessary a declaration of enforceability (art. 641 CCP).

Also, there is no need of any other formalities prior to enforcement of European Enforcement Titles (art. 636 CCP), including in this category the European enforcement order for uncontested claims (Regulation 805/2004), the European order for payment (Regulation 1896/2006) and the titles emitted in the European small claims procedure (Regulation 861/2007)[1]. Also, due to the application of Regulation 1215/2012 starting January 10th, 2015 recast of Regulation 44/2001, the possibility of certification as a European enforcement order is extended over all decisions taken in one Member State no longer needed recognition in the Member State the execution is to be performed. Free movement of enforcement orders in the entire Union space is guaranteed by the inclusion of appropriate provisions in national legislation, as art. 636 CPC, according to which a European enforcement Order enforced on its territory is not subject to any formality accomplished before the courts or administrative bodies of that member state. This applies

[*] Senior Assistant Ph. D., Faculty of Law, Alexandru Ioan Cuza University of Iasi.

[1] Carla Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgements, Summary Judgements and Orders for Payment*, Wolters Kluwer Law&Business, 2009, p. 61 et seq.

only if the decision is accompanied by a European Enforcement Order certificate issued in accordance with art. 42 para. 1 letter b) and art. 53 of Regulation 1215/2012[2].

The provisions concerning the nature of the European Enforcement orders of judgments is extend to authentic instruments and court settlements, according to art. 58 and 59 of Regulation 1215/2012. For judgments, the European Enforcement order certificate is contained in Annex 1 of the Regulations and for authentic instruments and court settlements, in Annex II. Therefore, given that both judgments and authentic instruments and court settlements become European Enforcement orders only after issuing the certificate, they have to fulfil a formal condition prior to enforcement, but this condition is not subject to regulation by national law but resulting directly from the Union law; national law may not impose additional formal conditions other that the ones laid down by the Regulation, as it cannot provide a different procedural legal regime for enforcement of the European Enforcement orders and national titles. This way, the free movement of European Enforcement Orders is guaranteed, contributing to the development of uniform procedural law and in particular enforcement law.

However, the existence of an enforceable title is not a sufficient condition for triggering enforcement proceedings. Even if the legislature formally indicates the enforcement order as the sole basis for enforcement[3], however, in order to seize enforcement body and to trigger the procedural mechanism of enforcement, the creditor must demonstrate a substantial number of conditions relating to the claim to be accomplished. In this regard, it should be noted that the term claim must be understood in the context of execution in a broader sense than in the substantive law, not only referring to a pecuniary obligation, but any obligation enforceable under the law[4].

The claim is the right recognized or acknowledged by the enforcement order and whose realization is made through the enforcement body. The purpose of the procedural activity of enforcement is the full accomplishment of the right recognized by writ of execution (art. 622 par. 3 CPC). We cannot talk about enforcement in the absence of an enforceable title, but it is only a means of realizing the right. The title does nothing else but to translate into procedure the substantial right, giving it greater legal force because it makes it achievable through enforcement body. The claim, that the obligation contained in the enforcement order and whose realization is monitored through the enforcement procedure is a reflection of the legal relationship, emanating from it. Even if the title changes sometimes the object of the obligation, we cannot fail to see the close connection between the legal relationship of obligations, substantial, and the execution, procedural, especially in cases where execution is made in kind or when the title is represented by another item than a judgment[5]. This link makes the activity of enforcement, although

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[2] Gabriel Boroi, Mirela Stancu, *Drept procesual civil*, Editura Hamangiu, Bucureşti, 2015, p. 950-960; Flavius George Păncescu, *Drept procesual civil international*, Editura Hamangiu, Bucureşti, 2014, p. 253-254.

[3] This rule is materialized by at least two procedural arrangements: on the one hand, the obligation to lodge the writ of execution, the original or a certified copy, together with the request for enforcement (art. 664 par. 4 CPC), which is a extrinsic condition leading to an unconditional nullity in case of non-fulfilment (Art. 176 pt. 6 CPC); on the other hand, the rule that abolishing the title, de jure, leads to the abolition of all enforcement activities conducted under it, unless the law provides otherwise, becoming applicable in this case the provisions relating to the return of enforcement (art. 643 CCP). See Nicolae-Horia Țiț, „Considerations Regarding the Will of the Parties in Enforcement Procedures", in *Journal of Public Administration, Finance and Law*, issue 6/2014, pp. 303-304.

[4] Evelina Oprina, Ioan Gîrbuleț, *Tratat teoretic şi practic de executare silită. Vol. I. Teoria generală şi procedurile execuționale conform noului Cod de procedură civilă şi noului Cod civil*, Universul Juridic, Bucureşti, 2013, p. 292-293.

[5] For example, in the case of art. 1798 CC, i.e. if the lease agreement by document under private signature which was registered with the tax authorities or notarial attested shall be enforceable for rent under the terms and arrangements laid down in the contract or, failing that, by law. In this situation, the enforcement strictly implements the elements of civil legal relationship, the lessor's right or claim represented by the rent is apt to be brought to fruition by way of enforcement without the need for court vested with a request for summons in this sense. Similarly, in the case of art. 1809 par. 2 C. civ., for the obligation to return the leased asset at lease expiry.

essentially procedural, one with important and significant substantial meanings, particularly as regards the trigger conditions.

According to art. 663 para. 1 CPC, enforcement cannot be done unless the claim is certain, liquid and has fallen due. By other words, in order to begin the enforcement procedure, beyond the verification of the enforceability of the title, it is necessary to analyse the substance of the right in relation to the three characteristics to be dealt with below. Verification is done preliminarily by the bailiff, within the enforceability approval procedure (art. 666 CCP) and the request for enforcement is to be refused if the claim is not certain liquid and payable (art. 666 pt. 5 CPC). As we will outline below, the verification that the bailiff is bound to do must refer exclusively to the enforcement order, because all three features of the claim able to be accomplished by way of enforcement, should result directly from the wording of the writ of execution[6].

On the other hand, and to the extent that is considering an appeal against enforcement itself (art. 712 par. 1 CPC) or against the decision for the approval of enforcement (art. 712 par. 3 CPC), the enforcement court will check if the creditor's claim meets the three characteristics, and if not would allow the appeal and set aside the enforcement itself. The court of enforcement may also make checks in connection with certain, liquid or payable character of the claim if it is called on an appeal by alleging factual or legal reasons relating to the enforceable title, but only if the law does not stipulate a specific legal remedy for the dissolution of the title (art. 713 par. 2 CPC).

2. The certainty of claim

The first of the features that a claim must meet in order to be enforced is that of certainty. Art. 663 par. 2 CPC defines certain debt as one whose undoubted existence results from the execution title itself. Therefore, to the extent that to establish this requirement we must relate to an outer title, the condition is not satisfied and therefore, the claim cannot be enforced[7].

The concept of certain debt is essential to trigger the enforcement procedure. No enforcement procedure can be triggered or not cannot be pursued to the extent that the enforcement order does not include it unequivocally, that to the extent that its existence depends on an external element. In this regard, it is important to make a distinction between situations where the enforcement order may be appealed by means prescribed by law and situations in which the claim is conditional.

As regards the first category of cases, we should distinguish between judgments and other enforceable titles. Thus, appeals against judgments, to the extent that they are enforceable titles under the law (i.e. either are provisional enforcement decisions, enforceable or definitive - art. 632 par. 2 CPC), do not lead to loss or termination of certainty of the claim on which that judgment refers, namely the obligation to which one party is doomed. We are referring, of course, to judgments which settled a condemnation action, since only they are able to emanate an enforceable obligation, a benefit that can be forcedly accomplished[8].

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[6] Gabriel Boroi, Mirela Stancu, *op. cit.*, p. 939.

[7] Nicolae-Horia Țiț, „Considerații cu privire la caracterul cert al creanței", *Dreptul între modernizare şi tradiție. Implicații asupra organizării juridice, politice, administrative şi de ordine publică*, Hamangiu, Bucureşti, 2015, pp. 381-389.

[8] Gheorghe Durac, *Drept procesual civil. Principii şi instituții fundamentale. Procedura contencioasă*, Hamangiu, Bucureşti, 2014, pp. 78-79.

According to art. 637 CPC, judgments which are enforceable titles, but can be appealed in front of higher court cannot be enforced other than on the risk of the creditor. If the judgment is subsequently amended or abolished, the creditor will be obliged to restore the rights of the debtor, in whole or in part, where appropriate, the legal provisions on the return of execution being applicable (art. 723 et seq. CPC). The same regulation applies to arbitration awards, even if they are challenged by an action for annulment (art. 637 par. 2 and art. 635 CPC), except that in their case it is necessary to previously apply for a declaration of enforceability (art. 615 and art. 641 CPC).

On the other hand, in the case of other organs jurisdictional rulings, they will be enforced only after becoming definitive, either because they were not appealed before the courts, whether as a result of the rejection of the appeal brought in front courts. In their case, the launching of the appeal before the competent court makes, in relation to the requirement in art. 663 para. 2 CPC, the claim not certain.

Therefore, the certainty of the claim must be interpreted differently, depending on the title. In some cases, the fact that the law opens a certain appeal against the writ of execution not preclude the claim of certainty (judgments and arbitration), while in other situations (judgments of jurisdictional bodies), provision for appeal and its access by the debtor makes the claim not certain[9].

Regarding conditional claims, CPC does not include definitions or special rules, so there are fully applicable the provisions of the Civil Code. Art. 1399 CC defines the conditional obligation the one who's effectiveness or dismantle depends on an uncertain future event. In terms of execution law, the claims can be subject to a suspensive condition, i.e. those whose effectiveness depends on the condition (art. 1400 CC). The efficacy referred to in articles 1399-1400 CC, cover both the substantial sense, i.e. the legal relationship between the parties, but also the procedural sense, i.e. enforcement of the obligation. To the extent that future and uncertain event whose realization depends on effectiveness or underperformance of the claim was not fulfilled, the claim cannot be enforced.

An example might be that of the success fee included in a contract of legal assistance. Legal assistance contract constitute enforcement writ according to art. 31 para. 3 of Law no. 51/1995 on the organization and the legal profession, but if it includes a success fee condition, for example, winning a lawsuit, the claim is uncertain and cannot be enforced as long as this lawsuit is pending. The result of the trial is an uncertain future event and only from the time when the case is solved the claim can be considered certain. These issues will be considered, on the one hand, by the court vested with the application to declare the contract enforceable (it is worth noting that Law no. 51/1995 establishes a special rule in relation to its territorial jurisdiction, in favour of the court in whose jurisdiction is situated the professional office of the lawyer, unlike common law rule, which establishes an alternative territorial jurisdiction between the court in whose jurisdiction is located the residence or place of business of the creditor or of the debtor), on the other hand by the bailiff entrusted with the execution of that contract, in approval of enforcement procedure, according to art. 666 para. 5 pt. 4 CPC.

Even if an uncertain claim cannot trigger the enforcement procedure, it may participate in the distribution of the amounts resulting from the forced sale of goods belonging to the debtor (art. 663 par. 5 CPC). In this respect, art. 882 CPC provides that when the condition is to terminate, the amount due cannot be released to the creditor unless he is given a bond

[9] Evelina Oprina, Ioan Gârbuleț, *op. cit.*, pp. 293-294.

or a mortgage in favour of those who would return the amount in case the condition is fulfilled. But if the condition is suspensive, the amount due to the creditor whose claim is subject will to it be distributed to creditors coming after him, if they give a bond or a mortgage to guarantee the repayment of the amount if the condition would be met. If bail is not given or mortgage is not established, in either situation, the amount due to the creditor whose claim is subject to the condition will be recorded on the unit provided by law until the condition is completed (art. 882 para. 3 CPC)[10].

If the debtor waives the condition, the claim becomes definite, so it can move immediately upon execution. Waiver of condition is a unilateral act (art. 1406 par. 1 CC) so the provisions of art. 1326 CC are applicable. The waiver is subject to disclosure because it constitutes a right of the recipient and recipient information is required by the nature of the act. Consequently, the debtor's waiver requirement take effect when the communication reaches the creditor, even if it had not been aware of this for reasons that are not attributable (art. 1326 par. 3 CC).

3. The liquid nature of the claim

The liquid nature of the claim is related to its object. If in the case of certainty we consider entitlement and undisputed nature of its claim, in terms of liquidity, we must consider the determined or determinable object of the claim. Therefore, the certainty of the claim is a matter that relates to the content of the legal relationship, for it refers to the subjective right, while liquidity is related to the object of the legal relationship because it relates to the allowance which the debtor must carry on under the writ of execution. Enforcement is aimed at realization of the right recognized by the writ of execution (art. 622 par. 3 CPC), which concretely means that the debtor will be forced to meet the benefit which the realization of that right implies. From this point of view, we have to distinguish between the situation where the debtor's benefit is to pay a sum of money or he has to carry out another benefit, positive or negative[11]. Whatever the situation, the definition of the liquid nature of the claim is the same: debt is liquid when its object is determined or when the enforcement title contains elements which enable it. As with certainty, liquidity claim may be determined solely by reference to the enforcement order, any determination in terms of external criterion leading to inability to trigger the execution or if it has already been triggered, its cancellation[12].

As noted above, we must have regard to the distinction between the pecuniary claims and those represented by another performance, positive or negative. Under the name „enforceable obligations", art. 628 CPC states in paragraph 1 that can be seized obligations whose object is to pay a sum of money, handing of goods or handing the use of goods, dismantling a building, a plantation or of another work, child custody, or other measures provided by the enforcement title. Basically, to be enforced, the obligation of the debtor must result from an enforcement title, which contains enough criteria under which its scope

[10] Mădălina Dinu, Roxana Stanciu, *Executarea silită în noul Cod de procedură civilă*, Hamangiu, Bucureşti, 2015, p. 98.
[11] This distinction is important for the classification of enforcement procedures in the enforcement indirect ways and means to direct enforcement.
[12] Mădălina Dinu, Roxana Stanciu, *op. cit.*, p. 96.

can be established and the law provides for an execution procedure by which this obligation can be brought out[13].

According to art. 628 para. 2 CPC, where the enforcement order has been established or granted interest, penalties or other amounts that are due the creditor, without being fixed amount thereof, they shall be calculated by the bailiff. The execution body has in this context an important role in the process of liquidation of the claim because, based on criteria established by the enforcement order it determines the actual amount of interest, penalties or other amounts owed by the debtor by way of default interest, i.e. damages for late performance obligation (art. 1535 to 1536 CC). Conclusion of the bailiff that determines the amount of default interest shall be enforceable without the need of investiture of enforceability (art. 628 par. 5 CPC) and may be subject to appeal to the execution court within 15 days from notification (Article . 715 par. 2 CPC). But if the enforcement order does not include provisions relating to interest, penalties or other amounts, but they are entitled to as creditor under art. 1535 CC or other specific legal provisions, they shall be determined by the enforcement court at the request of the creditor after summoning the parties (art. 628 par. 4 CPC). The decision of the court of enforcement is enforceable and can be appealed within 10 days after it has been served to the parties (art. 651 par. 4 CPC). The law placed an effective tool for the creditor, because there is no need for a request for separate lawsuit covering default interest[14].

A different situation is that under art. 628 para. 3 CPC. The legal text refers to the situation where, although no default interest is due, the creditor wants to update the claim. This update will be made by the bailiff only at the request of the creditor, unlike the situation referred to in art. 628 para. 2 CPC (where enforcement order includes interest, penalties or other amounts to cover damage caused as a result of the failure to fulfil the obligation), in which the fixing is done by the bailiff entrusted with the execution of the title without the need of an express request of the creditor in this respect. Also, it is noted that the updating under art. 628 para. 3 CPC is aimed exclusively to pecuniary obligations; an update cannot be conceived where the subject of the claim is the delivery of the good in kind or another positive or negative performance of the debtor (if obligations to do or not to do).

The update will be made according to the criteria contained in the executory title, and in the absence of such a criterion in the title, by the inflation rate, calculated from the date the judgment became enforceable or, in the case of other executive titles from the date when the claim became due until the date of actual payment of the obligation contained in any of these securities. Therefore, in case of updating the claim, the creditor does not have to go to court to secure the execution criterion in this regard but the law shall provide an update criterion, namely inflation. As covered in art. 628 para. 3 CPC, the bailiff's conclusion updating the claim is enforceable without requiring a declaration of enforceability (art. 628 par. 5 CPC)[15].

Another issue that the liquid nature of the claim is related to is the situation when the enforcement title contains an alternative obligation[16], but without indicating the term of choice (art. 676 par. 1 CPC). In this case, to enable the debtor to choose the benefit which he intends to bring to fruition, the bailiff will notify the borrower to exercise this right within 10

[13] To determine the ways of enforcement it is necessary to have regard to the provisions of art. 624 CPC, noting that the list made throughout this text is incomplete by reference to the special rules of enforcement.
[14] Gabriel Boroi, Mirela Stancu, *op. cit.*, p. 936.
[15] *Ibidem.*
[16] Art. 1461 par. 1 CC provides that the obligation is alternative when covers two main benefits, and executing one of them would discharge the debtor's entire obligation.

days of the conclusion of enforceability, under penalty of forfeiture. Clearly, given the moment of commencement of the 10 days period, the notification is to be served to the debtor after the creditor has applied for enforcement and after the enforcement body has approved it under art. 666 CPC. By other words, the application of enforcement may not be rejected by the bailiff because the title contains an alternative obligation and the debtor has not yet made a choice about the benefit to be accomplished, because the choice will be made by the debtor after the enforcement is approved, within 10 days from service, by written instrument notified to the bailiff, who shall promptly notify the creditor (art. 676 par. 2 CPC). The term is one of decay, so in case of non-exercise of the right of choice within the 10 days, the rights it goes on to the creditor. In this case, the executor will summon the debtor, asking him to perform the obligation chosen by the creditor (art. 676 par. 3 CPC).

Given that, whether the right to choose is exercised by the debtor or the creditor, the obligations are determined by the title, the executor is not required to issue a conclusion finding the chosen performance to be enforced. Without going through the procedure of art. 676 CPC, namely proceeding with enforcement activities without the debtor being served to choose one of the alternative obligations, the entire enforcement procedure is invalid, but in the absence of any in provision in art. 686 CPC, the nullity is conditional and virtual. Therefore, the debtor will have to prove an injury and the fact that the injury could not otherwise be rectified only by annulment of execution (art. 175 par. 1 CPC)[17].

4. The condition that the claim has fallen due

The third characteristic of claim refers to its maturity. Art. 663 par. 4 CPC provides that a claim is payable if the debtor's obligation has fallen due or if the debtor is deprived of the benefit payment period. It is envisaged, obviously, the situation where the creditor's right is affected by a term, i.e. fulfilment of the obligation depends on a future certain event (art. 1411 par. 1 CC), until when maturity of the obligation is delayed (art. 1412 par. 1 CC).

In enforcement law, the meaning of the term is not substantial, but procedural, i.e. a deadline given to the debtor in order to fulfil his obligation and stipulated by the title. In this regard it should be noted that the period is granted by the court by its judgement, indicating the reasons for the award in this period (art. 397 par. 3 CPC). The period of grace can be granted even if the obligation was affected by a substantial term, but not where the debtor has been given a reasonable time for payment to the creditor or had the opportunity to perform in a reasonable time calculated from the date the application for summons, according to art. 1522 CC on formal notice to the debtor and whether the date of delivery subsist any of the grounds specified in art. 675 para. 1 CPC, to which we refer below (art. 397 par. 3, second sentence CPC).

Given the distinction made above, between the substantial and procedural deadline, it should be noted that, according to art. 675 para. 1 CPC, the creditor may require the debtor forfeiture of the benefit of payment period in four categories of situation, namely: the debtor does not fulfill his obligations regarding the enforcement procedures; if the debtor is dissipating his fortune; if it is commonly known as insolvent or by his act, intentional or extreme negligence, lowered its creditor guarantees or has given them as promised or, where appropriate, assented; if other creditors commenced enforcement procedures against the debtor. These situations are more numerous than those covering substantially expiration

[17] Evelina Oprina, Ioan Gârbuleț, *op. cit.*, p. 296.

of the time. In this respect, art. 1417 par. 1 CC provides that the debtor shall lose the benefit period if it is insolvent (inferiority resulting from the assets that may be subject by law to enforcement, to the total amount of debts) or, where appropriate, declared insolvency under the provisions of the law, and where, intentionally or in a grossly negligent, diminished by his deed the creditor securities or has not constituted the promised guarantees. Therefore, there is not a total overlap between the situations provided by the CC and CPC regarding substantial term and grace periods. The period of grace is exceptional in nature and, therefore, situations of decay are more numerous, and the court will decide upon them by a wider margin of discretion than they have to take into account when analysing the expiration of the time substantially[18].

From a procedural standpoint, the debtor creditor's request for revocation of the period of benefit is settled by court of enforcement in an urgent procedure, in chambers, by summoning the parties in a short term. If the debtor has no known residence or registered office, it will be his last quoted at home or office. In this case, the provisions of art. 167 CPC do not apply, as the law expressly provides that citation will be made at the last domicile or headquarters of the debtor. Also, to the urgency of procedure, we consider that in the procedure for an application requesting the revocation of the period of grace, the provisions of art. 200-201 CPC regarding verification and regularization of applications do not apply. The ruling of the enforcement court on the request for revocation is subjected only to appeal within 10 days from notice. The provisions relating to the forfeiture of the debtor grace period does not apply when the debtor is the state or an administrative territorial unit (art. 675 par. 3 CPC).

As conditional claims, the one under may participate, under the law, at the distribution of proceeds of property belonging to the debtor (art. 663 par. 5 CPC). With regard to this matter, art. 881 CPC provides that if the debt is affected by a standstill period, it will pay even if the term was not fulfilled. When such debt is interest-free, early payment will not be made unless it falls accrued interest until the date. However, if the creditor does not agree to make the decrease, the amount is recorded in the unit laid down by law, to be released at the deadline. The law therefore establishes a legal case for revocation of the benefit of the standstill period when the debtor's assets have been recovered and passed to the distribution of proceeds of prosecution. In this situation, the creditor does not have to require forfeiture of the term to the enforcement court, but it is sufficient to register his claim to distribution by lodging of the security within the prescribed period of art. 869 para. 2 CPC.

5. Conclusions

The claim enforced in the enforcement procedure is characterized by certainty, liquidity and chargeability; these conditions are subject to verification in the proceedings for a declaration of enforcement. The conditions of the enforceable claim are substantial, because they derive from the elements of the legal relationship between the creditor and the debtor, but acquire a strong formal identity, due to the fact that these conditions must be based on the wording of the writ of execution. Even if a conditional claim or one that has not fallen due cannot trigger enforcement, it can still participate in the distribution of proceeds of enforcement under the law. Definition and characterization of these conditions has particular practical implications for both enforcement proceedings and for actions taken

[18] Mădălina Dinu, Roxana Stanciu, *op. cit.*, pp. 96-97.

by the creditors to defend their rights, such as or oblique action or action against fraudulent conveyance (Paulian action); in the case of an indirect or oblique action, art. 1560 par. 1 CC provides for the claim to be certain and fallen due, and art. 1563 CC provides for the admissibility of action against fraudulent conveyance that the claim must be certain when the action is brought to court. These features must be defined, in the absence of any definitions contained in the CC, considering art. 663 CPC.

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SPECIFIC DUTIES OF LOCAL POLICEMAN

Ioan Laurenţiu VEDINAŞ*

Abstract: *This study aims to analyze the local policeman duties that are specific to it and customize him in relation to other categories of public officials. According to Law no. 155/2010, local policeman fulfills a specific public function, its legal status is regulated mainly by Law no. 188/1999 regarding the status of civil servant, whose provisions are supplemented by special regulations applicable local police.*

Keywords: *local policeman, local police, specific civil service, specific duties, rights, general law, special law.*

I. General considerations concerning local policeman

Local police in Romania was created two decades of rule of law by Law no. 155/2010[1], which was intended to create a legislative and institutional framework through which to provide a public service more efficient and able to satisfy the interests of citizens.

Establishing local police reorganization was done by community police[2], in the village, town, city or district of Bucharest, the newly created local police structures replacing those of the former community police, which abolished[3] and Law. 371/2004 was repealed[4].

The reasons that led to the establishment of local police focused on the need to increase the quality of public service which protects the core values for human life or the fundamental rights and freedoms and property in both its forms, public and private. The term „local police" must be understood in a double sense:

a) in terms of territorial jurisdiction, namely the extent of the tasks they perform and which must be reported to the basic administrative units, as they are determined by Article 3 para. (3)[5] of the Constitution[6], namely the **municipalities and cities (municipalities),** including their components, such as **sectors of Bucharest.**

b) in terms of mission which it undertakes this, as it follows from the framework law that **is serving the interest of the local community**, based solely on law and in its enforcement and acts deliberative and executive authority of local government[7].

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* PhD student at the Police Academy Alexandru Ioan Cuza. E-mail: dodo.emre9@yahoo.com
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[1] Law no. 155/2010 was republished in the Official Gazette no. 339/2014.

[2] Law no. 371/2004 regarding the establishment, organization and functioning of the Community Police, published in Official Gazette no. 878/2004.

[3] Law no. 371/2004 was repealed by art. 45 para. (3) of Law no. 155/2010 with existing amendments.

[4] Except art. 8:21 p.m. on guard to ensure the public services of county interest objectives, which reads as follows: Art. 20 "Public Guardians assets given, according to law, by county councils or by the General Council of Bucharest, who have the obligation to assign, within 90 days from the date of entry into force of this law, the authorities local government for the establishment of the Community Police. "and art. 21 "The rights and obligations arising from contracts concluded by the Public Guardians are retrieved according to art. 20. "

[5] According to the constitutional text, the Romanian state is organized on administrative aspect in villages and towns and counties basic administrative units as intermediate units.

[6] Romanian Constitution republished in the Official Gazette no. Official Gazette no. 767 of 31 October 2003.

[7] This mission is provided by art. 2 para. (1) a) of Law no. 155/2010.

We understand so that **by his status and powers conferred by law, the local police is inextricably linked to the local government in administrative-territorial units,** whose organization and operation are regulated by Law no. 215/2001[8].

The law recognizes[9] two ways you can organize local police:

a) as the structure without legal personality, namely a functional department in the mayor's specialized apparatus or, as the case of the mayor of Bucharest;

b) as local public institution with legal personality.

Whatever solution is chosen, the creation is done by the Local Council of the village, city (municipality) and the General Council of Bucharest Bucharest.

II. Local police staff

The regulation of this is found in Chapter IV of the Law. 155/2010 entitled *„the status of the staff local police"* the contents of which the local police that **the two major operating staff namely:**

a) staff has the status of employees (staff)[10] mainly regulated by the Labour Code and other documents forming labour laws[11].

b) public servants have the status of public and, in turn, is two categories:

- Public officials occupying public officials specific local policeman:

- Public servants occupying general public official.

In both cases, the legal status is regulated by Law no. 188/1999 regarding the status of civil servants[12], which is the regulation framework applicable to all categories of civil servants, public officials whether general or specific public office. In local policeman case, we find certain features established by Law no. 155/2010, regarding their respective rights and duties and the use of funds provided, including use of weapons.

In this material, we will refer to local police duties, as part of the legal status specific to the staff.

III. Brief analysis policeman- local policeman

The legal regime of local police duties, as well, and his rights and duties, must be analyzed from the law according to which local policeman is vested with the exercise of official authority, during and in relation to carrying out the tasks and duties of service within the remit set by law, and within the provisions of the criminal law on persons who fulfill a function involving the exercise of state authority[13].

We conclude from these provisions that the element that gives local police identity status is that **he is vested with public powers or state authority.** Moreover, as it is considered in the literature[14], the presence of these powers in the legal status of a public official in general distinguishes him of contract staff (employees).

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[8] Republished in the Official Gazette no. 123 of 20.2.2007.

[9] By art. 4 of Law no. 155/2010.

[10] Approved by Law no. 53/2003 republished in the Official Gazette no. 345/2011.

[11] Example: Social Dialogue Law no. 62/2010, published in the Official Gazette of Romania, Part I, no. 322 of 10 May 2011 and republished under art. 80 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure.

[12] Republished in the Official Gazette no. 365/2007.

[13] The provision contained in art. 17 para. (2) of Law no. 155/2010.

[14] Ion Traian Ştefănescu - Treaty of Labour Law, Ed. Legal Universe, Bucharest, 2012, pp.21-27.

If we consider this aspect, which is enshrined in Law no. 188/1999, we can say that it was not necessary to mention in the law of local police, the local police that the exercise of official authority vested in the context of such a provision characterizes all civil servants. As holders of a specific public functions, local policemen, as any officials, are bearers of public authority. But legislator felt the need to emphasize this feature to better shape the identity of this category of civil servants.

The existence of such public powers found in the legal status of the policeman, as it is regulated by Law no. 360/2002[15].

Thus, Article 2 of Law no. 360/2002 has a relatively identical to that of Article 17 para. (2) of Law no, 155/2010, provides that: „the policeman is vested with the exercise of public authority, during and in connection with the performance of duties and service duties, within the powers established by law." What differentiates the two legal texts is second sentence of Article 17 para. (2) of Law no. 155/2010, which states that local policeman „receives disposals of the criminal law on persons who fulfill a function involving the exercise of state authority."

This can not be interpreted as meaning that the policeman would not benefit from the protection of the law in carrying out his work. Existance of such protection emerges, first, the general statute for civil servants, represented by Law no. 188/1999. Article 41 of this act provides that „civil servants benefit in their duties, by the protection of the law."

Both policeman and local policeman are part of public officials. Art. 1 paragraph (1) of Law No, 360/2002 provides that „civilian police officer is a public servant with special status, armed, wearing the uniform rule and exercise the powers established by law for Romanian Police as a specialized institution of the state „.

The contents of this provision, in relation to that contained in Article 14 para. (1) a) of Law no. 155/2010[16] 17we have the following two conclusions:

a) that **both the policeman** and **local policeman are part of public officials** are public servants.
b) what **distinguishes them** is that the **police officer is a public servant with special status** as **local policeman is a civil servant occupying a specific function,** being the provisions of Law no. 188/1999 regarding the status of civil servants, which is supplemented by the Law no. 155/2010.

IV. Specific duties of local police

Law no. 155/2010 uses two concepts to evoke the same legal reality. On the one hand, the term „obligation" found in the title of Chapter V of it[17], on the other hand, the „duties" under Article 17 para. (2) of it[18].

As far as we are concerned, we consider that the term „duty" is the best and we like to use it, the more relevant meaning to public law, the 'obligation' is more suitable for private law[19].

[15] Law no. 360/2002 on the Statute of the policeman, published in Official Gazette no. 440/2002.
[16] Art. 14 letter a of Law. 155/2010 provides that "local police staff consists of:" a) civil servants public officials specific local policeman.
[17] Name of Chapter V of the Law. 155/2010 is "local policeman rights and obligations".
[18] Article 17 para. (2) of Law no. 155/2010 reads: "local police officer is invested with the exercise of official authority, during and in connection with the performance of duties and service duties within the remit set by law, and within the provisions of the criminal law on persons who meet a function involving the exercise of state authority. "
[19] Likewise, Verginia Vedinaş - Law no. 188/1999 regarding the status of civil servants, with subsequent amendments, comments and jurisprudence, Ed. Legal Universe, Bucharest, 2009, pp.169-205.

In accordance with Law no. 155/2010, local policeman has the following specific duties:

a) to respect the rights and freedoms of citizens provided by the Romanian Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms.

This is a task which is common to all public authorities and personnel operating within them, whether we refer to officials, public servants or contract staff. It follows that it is not a specific task for local police. The legislator wanted to mention, however, in developing mission incumbent to local police, as it results from the very first article of the Law no. 155/2010, according to which „local police duties are established in order to defend the fundamental human rights and freedoms ...".

With regard to the wording of the text, it is, in our opinion, **lacking** in context as **it relates, in addition to the Constitution, only the Convention for the Protection of Human Rights and Fundamental Freedoms**. Understanding that local police have no obligation to comply with the other rights and freedoms provided for in other laws, domestic or international ratified by Romania, thus becoming part of the law ?[20]

The question is obviously **rhetorical**. Therefore, in our opinion, the text is required to be amended and supplemented as follows: „to respect the rights and freedoms of citizens provided by the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms and all other international instruments that have been ratified by Romania „;

b) respect the principles of rule of law and to defend democratic values. And this duty is common to all other staff of public authorities. In terms of its significance, we think it should be listed as the first duty of the local police, fundamental rights and freedoms representing a component of the rule of law and genuine democracy;

c) comply with the laws and administrative provisions of the central government and local authorities. Rule of law in the broad sense of the term[21]-speaking, is a duty incumbent on all persons[22];

d) to respect and to carry out the orders and laws of superiors. This task is discussed in the literature as „complying with the order superior (head) hierarchical" and is common to all civil servants, the more local policeman who has a specific public, in a manner characterized by discipline and rigor. The legal regime of this duty is covered by Article 45 para. (2) and (3) of Law no. 188/1999[23]. The contents of this text that this duty is not absolute and unlimited public official has the right to refuse execution of the order if it considers illegal, but may do so in writing and motivated. If you insist hierarchical superior order execution, public servant is obliged to obey unless the order is manifestly unlawful. In such a case, the official shall inform him about the existance the hierarchical chief of his superior.

We note the complexity of the regulations, which caused many disputes at doctrinal level[24].

In our opinion, this rule also applies to local police, even if the special law does not refer to the general law on the status of civil servants. In their role as public servants exercising a specific public function, local police are subject to the law on the general status

[20] Art. 11 para. (2) of the Constitution provides that "treaties ratified by Romania are part of he law".
[21] For the purpose of the broad sense, the term includes laws, ordinances and decisions of the Government and all other legal acts which are binding.
[22] It is in the art. 1 para. (5) of the Constitution, which states that "the Constitution, its supremacy and the laws shall be mandatory."
[23] Article 45 para. (2) of Law no. 188/1999 reads: "The civil servant shall comply with the provisions received from superiors".
[24] For example see Vedinaş Verginia - Law no. 188/1999 regarding the status of civil servants, with subsequent amendments, comments and jurisprudence, Ed. Legal universe, Bucharest, 2009, pp.181-185.

of civil servants. To eliminate any confusion, we think it would be desirable that the text should read as follows: „to respect and to carry out the orders and laws of superiors, according to Law no. 188/1999 regarding the status of civil servants „„ meaning that propose expanding it;

e) comply with the rules of conduct and civic provided by law. Law that sends text is, first, Law no. 7/2004 regarding the Code of Ethics and Professional Conduct for civil servants[25] 26 plus other regulations which establish such rules, including those contained in Law no. 155/2010;

f) declining in advance and submit quality police badge and ticket service, unless the outcome of the action is compromised. In developing this duty, the law provides that „the entry into action or early intervention that can not be postponed, local police officer is obliged to submit, and after completion of any action or intervention, to legitimize and state police unit function and the local part „.

We find that the way it is worded, the legislature has paid great attention to this duty, which enjoys the most extensive editing. The reason, in our opinion, lies in the role of the tasks through which local police reveal their identity, because people who come about in the performance of tasks that may require intervention even forced or use specific means and use of weapons, to have accurate representation of the quality of local police;

g) to intervene and outside working hours, within the means at his disposal to exercise his duties, within the area of jurisdiction when acknowledges the existence of circumstances which justify intervention. Through this duty, one of the constants materializes the legal status of civil servant, that it must meet two types of duties: duties and tasks outside of work. Local policeman is thus obliged as outside of service, in his spare time to intervene when it encounters a situation requiring intervention or is informed by their existance

h) to be present at the local police station immediately or where requested in disaster, natural disasters or major disturbances of public order or other such events, and the imposition of a state of emergency or a state of siege or in case of mobilization and war.

And this duty is abaut police program for both local and hours outside this program, he has the obligation to be present whenever requested when there is an extraordinary situation that requires his presence. Text refers to the „catastrophe, calamity or major disturbances of public order" and .. „such events" representing all facets of the existence of extraordinary circumstances as defined by law[26];27

i) to represent the professional secrecy and confidentiality of data acquired during work in the law, unless the job done, needs justice or law require its disclosure.

And this is a duty incumbent customization of any public official, namely state secrecy, the service and privacy of data and information which they receive in the line of duty. We note the completeness and correctness of the legal provision which, on the one hand, provides secrecy and confidentiality **rule,** on the other hand **exception** as represented by cases justifying derogation from this law;

j) to exercise fairness in resolving personal problems, so that they do not receive nor give the impression that receive confidential information obtained in his official capacity.

[25] Published in the Official Gazette no. 157 of 23 February 2004.
[26] We consider the GEO no. 1/1999 on the state of siege and emergency published in the Official Gazette no. 22 of 21 January 1999.

This is the last task in the enumeration contained in Article 21 of Law no. 155/2010. Fairness is a feature which should characterize the work of all civil servants. Particularity that the law requires for local police is that they must neither benefit nor give the impression that it would benefit from some data, information coming to their knowledge by virtue official held. This lends support to the good faith of the local police must show its work. This requires it to have a dignified, fair, objective and responsible in equal measure.

Conclusions

We analyzed in this study, some components of the legal status of local police, which is a public official who has a specific public function. The central theme was the matter of specific duties, as they are covered by Article 21 of Law no, 155/2010. As I already said, I opted for the term „duty" instead of obligations, given that it has a load richer, legal and moral alike, which makes it more suitable for the analysis of public law institutions,

We have seen that the duties contained therein Law. 155/2010 for the local police are either customize the duties common to all civil servants, or a replay of their many similarities of Law. 188/1999 and transposed into local police status.

They argue, in their entirety, along with other elements (local police rights), the specificity of local civil police.

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THE NOTION OF PROFESSIONALS, CRITERIA FOR THE DELIMITATION OF THE LAW OF PROFESSIONALS

Dumitru VĂDUVA*

Abstract : *The new Civil Code has unified the private law by replacing the autonomous branch of the commercial law with a special regime for professionals. This category of subjects of the private legal relations is a novelty for our law, because it has enlarged the regime applied under the rule of the previous Commercial Code only for traders, namely merchants, intermediaries within the economic circuit, to all the participants in the economic activity: production, commerce (as trading) and services, regardless that their activity, organized as a systemic exploitation, has a productive purpose or not. In the new Civil Code, the area of professionals is very broad, the subjects of the private law relations being currently divided into two categories: professionals, who systematically perform an activity of production, trading and services, regardless that it has or has not a productive purpose, and nonprofessionals, persons performing a domestic activity or just consumers. The professional can be also qualified by exclusion: if he is not nonprofessional, easier to identify, it means he is a professional.*

Keywords*: professional, trader, enterprise, economic activity, the unity of the private law*

1. The repeal of the Commercial Code and its defining notions. New replacing notions.

Law No 71/2011 for the application of the Civil Code has repealed most part of the Commercial Code[1], also its fundamental notions: trader, commercial relation, commercial legal act or fact losing their utility as instruments for the identification of trade[2]. The new Civil Code uses, sporadically, the term of „commercial", for instance in Art 2446 which defines the „reasonable commercial sale", or Art 8 of the Law No 71/2011 according to which the notion of professional „(…) includes the categories of traders (…)". Essentially, the legislator does not recognize for the legal acts and facts of the traders a special regime, autonomous towards the civil law, and a specialized jurisdiction for them. Their importance has been diluted, their place now being taken by the notions of the civil law, invented or redefined by the new Civil Code: professional, economic activity (production, trade or provision of services), notion which has replaced the terms of „trade act" or „trade fact" (Art 8 of the Law No 71/2011), enterprise's civil legal relation etc. It is thus preserved the notion of „enterprise" (Art 3 Para 3 of the NCC), as it was stated by the Commercial Code (Art 3 Pct. 5-10 and Pct. 13), as organized activity, regardless it is or not a legal person, being defining its economic aspect. This notion is very important due to its contribution to the definition of another notion, namely of professionals, essential because in the subjective

* Lecturer PhD, Faculty of Law and Administrative Sciences, University of Piteşti

[1] Art 130 of the Law No 71/2011, published in the Official Gazette No 409/10 June 2011, entered into force on 1 October 2011 (Art 221) repealed most part of the Commercial Code, and with the entrance into force of the New Code of Civil Procedure (15 February 2013, according to Law No 4/2013) were also repealed the rules of Art 46-55, 57-58 of the Commercial Code, remaining valid only Book II, „The maritime trade and navigation", as well as Art 948, Art 953, Art 954 Para 1 and Art 955.

[2] Angheni, S., *Dreptul comercial între tradiție și modernism*, in Curierul Judiciar No 9/2010, Bucharest, 2010

system of the new Civil Code the professional is the beneficiary of a special right, the right of professionals. Under this aspect we are close, as principle, to the German law, whose criterion in the determination of the area of the commercial law is the subjective one.

2. The utility of the repeal

The stake of the repeal and of the dilution of the fundamental notions from the Commercial Code has been the removal of the difference of regime previously existing between the civil law relations and those of commercial law and of all inconvenience brought by them, the existence of the double jurisdiction, civil and commercial; the difficulty in the qualification of certain legal relations etc. At the border between the civil and commercial law there were legal acts or facts, whose legal nature was difficult to establish, such as the isolated legal acts of traders or the ones related to immovable assets (buildings), the difficulty being caused by the option of the legislator of the former Commercial Code to choose the double objective and subjective criterion in the determination of commerce. In order to make short work of this difficulty, the legal practice has chosen, starting with 1990s, a practical way, qualifying the commerciality of a legal act concluded by a trader, according to the subjective criterion. All acts concluded by traders were considered as commercial and thus entered under the regime of the commercial law and in the competence of the commercial courts. By their nature, civil legal acts, such as the sale of a used equipment of the enterprise, or buying an immovable asset by it, were qualified as commercial by applying the criterion of accessories.

This is the context in which the Romanian legislator has reached the conclusion that it is artificial the existence of a second branch of private law, especially as it borrowed the majority of the concepts from the civil law and imposed a special jurisdiction based on the criterion of subject, trader, which was reached contrary to the principles of law. This legislative policy is contested by the commercial doctrine[3]. It shall wipe off the judicial practice and doctrine existing from over a century and a half.

3. The notion of professional

In the actual law the only criterion for determining the area of application of the special law, the law of professionals, is the notion of professional, fundamental nowadays in the new Civil Code, replacing the one of trader of the former Civil Code.

Art 3 of the Civil Code defines the professional using another notion, that of enterprise, stating that „are considered as professionals the ones exploiting an enterprise" (Para 2); „it represents the systematic exploitation of an enterprise, by one or more persons of an organized activity consisting in the production, management or alienation of assets or provision of service, regardless if its purpose is productive or not" (Para 3).

According to Art 8 Para 1 of the Law No 71/2011 for the application of the new Civil Code, the notion of professional used by Art 3 of the Civil Code „includes the categories of merchant, entrepreneur, economic agent, as well as other persons authorized to perform

[3] Cărpenaru, St., *Dreptul comercial în condițiile noului Cod civil*, in Curierul Judiciar No 10/2010, p. 543 and next; Tudor, A., Rosemberg, P., Rădulescu, O., *Dreptul comercial trebuie să rămână o disciplină autonomă şi după intrarea în vigoare a noului Cod civil*, in RDC No 7-8/2011, Lumina Lex Publ.-house, Bucharest, 2011; Cărpenaru, St., *Tratat de drept comercial român*, Universul Juridic Publ.-house, Bucharest, 2012, p. 19

economic or professional activities, as these notions are stated by the law, at the date of the entrance into force of the Civil Code".

Thus, are professionals in the meaning of the mentioned texts, the ones exploiting an enterprise, namely they unfold activities related to production, trading or provision of services. Only the ones exploiting an enterprise perform an economic activity as a profession, and not randomly or for domestic consumption.

All these activities, less than that of service, defined in the past the traders. In addition, non-profit activities were not the object of the former Commercial Code.

The notion of trader, to which Art 8 Para 1 of the Law No 71/2011 refers to, essential in the former Commercial Code, is also useful for the new Civil Code only to identify one of the categories of subjects included in the area of professionals, „traders", namely merchants who interfere in the area of moving assets (Art 3 NCC, corroborated with Art 8 Para 1 of the Law No 71/2011). It is the core of the notion of professional, because the activity of traders has dictated the special regime of the law of professionals, and it represents the engine of the national economy.

The Commercial Code did not knew the notion of services, and the classic notion of trader (merchant) was incompatible with certain activities, reason for which were left outside the area of application of this code a series of subjects unfolding economic activities, but did not fit in the list stated by Art 3 of the Commercial Code, being implicitly or expressly stated as civil acts, such as services provided by self-employed: lawyers, architects, public notaries, doctors etc., or by the state or its administrative-territorial units. Moreover, it expressly left outside the area of traders the economic activities of production by which it was processed their own raw materials, such as farmers (Art 5 Thesis II of the former Commercial Code), or artists (Art 3 Pct. 10).

The new Civil Code has assimilated within the category of traders also other categories of subjects unfolding an economic activity by exploiting an enterprise, regardless of its productive or non-profit nature or purpose, by subordinating them to the special law together with the traders.

Are professionals, first of all, traders and entrepreneurs (Art 8 Para 1 of the Law No 71/2011), namely: trading companies (traders); and also, enterprises and family enterprises organized by entrepreneurs or by registered sole traders, co-operative societies or organizations etc., stated by the Law No 31/1990, G.E.O No 44/2008, Law No 1/2005, Law No 566/2004, Law 36/1991 etc. All these societies or natural persons are subjected to the registration in the Trade Register (Art 1 of the Law No 26/1990) and to the rules of insolvency (Art 1 of the Law No 85/2006). The notion of trader is here used in its broader meaning, of trading companies performing activities of production, trade and provision of services.

Business operators are also enlisted in the area of professionals (Art 8 Para 1 of the Law No 71/2011). This name is synonym in the actual legislation with that of trader in its broader meaning, namely producer, merchant or provider of services (Art 2 Pct. 3 of the G.O No 21/1996). Sometimes the names shown are synonymous with that of economic agent (Art 6-7 and Pct. 1 of the Annex to the Code of Consumption).

Also, fall within the scope of business operators: associations, foundations and other legal persons without productive purposes, such as the NGOs, if they perform a systematic activity of services, even if are not productive, or exploit an enterprise, systematically unfolding an economic activity (Art 3 Para 2-3 of the Civil Code) organized for the achievement of the purpose for which were established. This is the example of consumer associations, because they perform the activity of protecting the consumers by defending

their rights and interests, among other exercising in their behalf the right to legal action (Art 31-32 and Art 37 of the G.O No 21/1992).

Finally are professionals the registered sole traders who perform professional activities (Art 8 Para 2 of the Law No 71/2011). Hence, are included in the area of professionals, which represents the proximate genus, together with traders, lawyers, architects, pharmacists, liquidators, doctors, mediators, public notaries, psychologists etc. The professional activity of self-employed is organized as: private offices, associated private offices, private partnerships etc. These are registered in the national registries for each profession, from that moment being authorized to unfold their activity.

Autonomous administrations, state owned enterprises and corporations are legal persons of public law[4] organized in branches of national interest: *arms industry, power industry, mining and natural gas exploitation, mail system and railway transports – as well as in other fields of activity established by the Government* (Art 2 of the Law No 15/1990). The law expressly qualifies as being assimilated to the administrative legal acts the contracts concluded by contracting authorities (public institutions, administrative-territorial units, other national economic agents, or commercial society/company with entirely or majority capital owned by a public authority [Art 3 Let f) and Art 8 Let b1) of the G.E.O No 34/2006]).

The majoritarian doctrine and the legal practice have qualified certain legal acts concluded by autonomous administrations, as well as by state owned enterprises and corporations, as being commercial acts. It is the same case for legal acts concluded by public authorities or institutions, such as hospitals, education institutions etc. Also, G.E.O No 119/2011 expressly qualifies *the contract between a trader and a contracting authority as being a commercial contract* (Art 1 Para 1); the contracting authority being defined by this normative act as being any public authority of the Romanian state or of another Member State of the European Union, acting at a central, regional or local level; any organism of public law, with legal personality, which has been created to satisfy needs of general interest, without a commercial feature, which is found in at least one of the situations mentioned by the text (Art 1 Para 2 Let a-c)).

According to these criteria fall within the above mentioned category also the regulatory, supervisory or control authorities (National Health Insurance House, National Bank of Romania, National Securities Commission).

Therefore, are professionals also the autonomous administrations and the state owned enterprises and corporations if they conclude acts of trade.

As a conclusion, according to Art 3 of the Civil Code and Art 6 and 8 of the Law No 71/2011 are professionals all those who exploit an enterprise, not interested in whether or not are registered in the trade registry or in the occupation or associations and foundations registry, or that they have a productive or not purpose, or that are profit or non-profit; including the institutions and economic agents from the central or local administration exploiting an enterprise, except the case in which their act is expressly defined by a special law, as being of public law.

4. Categories of professionals. Legal regime of their professional organization

Starting with 1990, with the return to the market economy and the reorganization of the private ownership by the privatization of state enterprises, the Romanian legislator has

[4] The doctrine qualified them as joint legal persons, of public and private law. See also David, S., *Contractul de concesiune*, in Dreptul Review, No 9/1991, Universul Juridic Publ.-house, Bucharest, 1991

started an extensive legislative work for the organization of the economic agents, which had to ensure the development of the economic activity after the privatization. Implicitly, the legislator should have taken measures for protection of the new enterprises by an antitrust legislation and for the protection of competition.

4.1. Traders, legal persons of private law and entrepreneurs, natural persons

Starting with 1990 a first step was taken towards a legislation of the capitalist market economy by regulating the *new legal regime of the organization* of economic agents, legal or natural persons, and of their registration, as well as of certain nonprofit legal persons. Subsequently, was stated the insolvency of trading companies and of the arrangement with creditors, replacing the rules of bankruptcy and of the agreement stated by the Commercial Code.

Regardless of the area of activities with a productive purpose, production, trading or services, was placed at the disposal of the groups of persons, exhaustively stated by the law, the patterns of organization of the legal persons of private law: trading companies (Law No 31/1990), agricultural companies (Law No 36/1991), or of different groups with economic interests or European groups with economic interests (Title V of the Law No 161/2003).

For small craftsmen or individual manufacturers – natural persons from agriculture, industry, services or trading, were created patterns of organization in trading companies, cooperatives or cooperative organizations (Law No 1/2005; Law No 566/2004) or in individual enterprises (G.E.O No 44/2008).

For individual natural persons were created simplified forms. They can organize themselves either in an individual enterprise, whose owner is an entrepreneur natural person, or in a family enterprise whose owner is a natural person, or, finally, the entrepreneur can organize himself as a self-employed person, all these enterprises not having legal personality, but having a patrimony dedicated to the enterprise, different than the one of the owner – natural person (Art 2 of the G.E.O No 44/2008)[5], a novelty inserted in our law, dominated by the principle of singularity of a person's patrimony. All these legal or natural persons organized in individual enterprises are subjected to the obligation of registration in the Trade Register.

4.2. Economic agents – nonprofit legal persons

Associations, foundations, syndicates, sport clubs etc. were organized as nonprofit legal persons, but are able to perform economic activities only to the extent to which are necessary for achieving their statutory purpose. Courthouses shall authorize their establishment and shall register them in the registers preserved by the office of the clerk of the court (Art 8 and 17 of the G.O No 26/2006[6]). Also the political parties and religious cults are nonprofit legal persons.

Extremely active are the associations known as NGOs. These are qualified by the law as being economic agents, even if, by definition, they are nonprofit. Thus, are the associations for consumers' protection (Art 2 of the G.O No 21/1992).

[5] The dedicated assets were stated in our national law since 2006, by Law No 95/2006 on healthcare reform
[6] G.E.O No 26/2000 on associations and foundations, published in the Official Gazette, No 39/31 January 2000

4.3. Freelancers, persons authorized to provide professional activities

Also, each of the categories of liberal professions, such as lawyers, experts in insolvency, doctors, psychologists etc. were organized by special normative acts, as private limited companies, private practices or associated practices. The last two are legal forms without legal personality. All of them are simplified forms of organization of certain liberal activities, the owner dedicating it a patrimony, different than his own. These organizational forms are not registered in the Trade Register, but in the one held by each specialized professional association, being the ones competent to authorize them.

4.4. State enterprises

Finally, autonomous administrations, state owned enterprises and corporations, have been established by the reorganization of the former state enterprises, being destined to provide services in areas of strategic importance, such as electric and nuclear energy, ammunitions, railroad transportations, exploitation of natural resources, gas, waters, forests etc. (Art 2 of the Law NO 15/1990), which may also have a profit, from which the state holds the entire or partial capital. The ones of national interest are established by a Government Decision and the ones of local interest by a decision of the administrative-territorial unit. State enterprises are qualified as legal persons of public law. The legal acts of these legal persons are subordinated to the regime of administrative law (Art 3 of the G.O No 34/2006).

Autonomous administrations, state owned enterprises and corporations are registered in the Trade Register (Art 1 of the Law No 26/1990); they are autonomous and are self-financed, reason for which the jurisprudence, as well as the doctrine has qualified certain of their legal acts as being of common or public law.

5. The importance of the activity of professionals, the source of the surplus value added to the level of the national economy, justifies the special law of professionals

This regime is translated into punctual legislative interventions by which it is organized a particular regime for the professionals' obligations, as well as the species of contracts created for their activity. All these rules now form a special law, not an autonomous branch.

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BUYER'S RIGHT TO SPECIFIC PERFORMANCE UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Emanuela IFTIME*

Abstract: *The article seeks to provide a comprehensive analysis of buyer's right to specific performance when the seller fails to perform the obligation of conformity of the goods under the United Nations Convention on contracts for the international sale of goods (Vienna, 1980). According to art. 46 (2) and (3) of the Convention if the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods, but only if the lack of conformity constitutes a fundamental breach of contract, or may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. Both requests must be made in conjunction with notice given under art. 39 or within a reasonable time thereafter. These remedies are not to be regarded as alternatives but can both be resorted to in the same case.*

Keywords: *substitute goods, delivery, lack of conformity, repair, reasonable term.*

1. Introduction

The United Nations Convention on Contracts for the International Sale of Goods, which was concluded at Vienna in 1980, came into force in 1988. At 26 september 2014, United Nations Commision on International Trade Law reported that 83 states adopted the Convention.

Paragraphs 2 and 3 of art. 46 of Convention provide buyer's right to specific performance when the seller fails to perform the obligation of conformity of the goods. These two paragraphs, complemented with buyer's possibility to require performance by the seller of his obligations, are an expression of the principle *pacta sunt servanda*.

According to art. 46 (2) if the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter. Pursuant to art. 46 (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter. Although the language of art. 46 (2) and (3) shows that the remedies provided under these two paragraphs are separate remedies, they are not to be regarded as alternatives but can both be resorted to in the same case.

2. Non-conformity

Although the concept of ,,conformity'' is not defined by art. 46 (2) and (3), the evaluation of non-conformity has to be made pursuant to art. 35 and to contractual

* PhD. Student, Faculty of Law, University 'Alexandru Ioan Cuza', Iaşi

provisions. The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract (art. 35 alin. 1). Additional criteria for defining the notion of conformity can be found in art. 35 (2). Thus, except where the parties have agreed otherwise, the goods do not conform with the contract unless they: are fit for the purposes for which goods of the same description would ordinarily be used; are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; possess the qualities of goods which the seller has held out to the buyer as a sample or model; are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. Therefore, conformity should be determined taking into account contractual provisions on the quantity, quality, type and packageof the goods.

It seems to be irrelevant to apply art. 46 (2) (delivery of substitute goods) when seller's obligation is only delivering of specific goods according to contractual provisions because the nature of the goods makes such redelivery impossible. Consequently, redelivery of substitute goods can be made only if the goods are generic. In the other cases the buyer can require the seller to repair the lack of conformity pursuant to art. 46 (3).

The Convention does not make any distinction between apparent and latent defects of goods, and although according to art. 35 (3) the seller is not liable for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity, this article does not clarify the notion of lack of conformity which the buyer knew or could not have been unaware of it at the time of the conclusion of the contract. Taking into account the language of art. 35 (3), the lack of conformity which the buyer ,,knew'' or ,, could not have been unaware of it'', it is obvious that art. 35 refers especially to apparent defects of goods.

It was said in legal literature that because of references to art. 39 (lack of material conformity) that one can find in art. 46 (2) and (3), non-conformity of the goods with the contract can only be a material one and the goods would conform with the contract even if the goods are not free from any right or claim of a third party according to art. 41 or art. 42[1]. Nevertheless, cases of defects in title are covered under art. 46 (2) and (3), because these buyer's remedies are performance remedies in the acception of art. 46 (1). Taking into account that the language of the text is a general and unrestricted one, referring to performance of seller obligations, these obligations include also delivery of goods free from any right or claim of a third party. Hence, non-conformity means defective quality, wrong deliveries (art. 35) and goods which are not free from any right or claim of a third party. However, as concerning deliveries of goods with deficiencies in quantity, art. 51 will be applicable for partial delivery and art. 46 (1) for the missing part.

In addition to art. 46 (2) and (3), the seller is liable in accordance with the contract and this convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time (art. 36 alin. 1). The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics (art. 36 para. 2).

[1] D. A. Sitaru, *Dreptul comerțului internațional. Partea specială*, Ed. Universul Juridic, Bucureşti, 2008, p. 70.

3. Delivery of substitute goods (art. 46 para. 2)

Art. 46 (2) governs the scope of specific performance when the delivery of goods has already been made but the goods do not conform to the contract made between the parties. According to art. 46 (2) if the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under art. 39 or within a reasonable time thereafter.

Buyer's right to require delivery of substitute goods under art. 46 (2) is expressly limited by the existence of the fundamental breach. This means that the non-conformity under art. 46 (2) must amount to a fundamental breach. According to art. 25 of Convention a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. The precondition of the fundamental breach can be explained by the following judgement. Since it could be expected that the cost of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably greater than the buyer's loss from having non-conforming goods, the Convention adopts the approach that a buyer will be entitled to resort to require the seller to deliver replacement goods only where the non-conformity is serious enough to constitute a fundamental breach. Therefore, minor defects are not covered by art. 46 (2) and, in this case, the buyer would resort to another remedy.

Applying art. 46 (2) it is possible only when the contract made between the parties consists of generic goods. When the contract consists of specific goods, a requirement of redelivery of substitute goods seems to be irrelevant as the nature of the goods makes such delivery impossible. Consequently, the buyer would only have a right to require repair under art. 46 (3) or claim damages[2].

The precondition of fundamental breach is similarly with the requirement of fundamental breach under art. 49, according to which the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations amounts to a fundamental breach of contract. Therefore, the buyer has a possibility to choose between avoidance of the contract or requirement of delivery of substitute goods. The economic consequences of a delivery of substitute goods may be the same for the seller as in the case of an avoided contract. In fact, the economic consequences in case of the delivery of substitute goods could even surpass those of an avoidance of contract because the additional expenses incurred and the risks involved in transporting substitute goods are to be born by the seller. The seller will not, however, refuse to deliver substitute goods offering equivalent damages on the ground that such a delivery would involve higher costs to him than the losses suffered by the buyer.

If the buyer does require the seller to deliver substitute goods, he must be prepared to return the unsatisfactory goods to the seller. According to art. 82 (1) the buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them. This provision does not apply, according to paragraph 2 of art. 81: if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission; or if the goods or part of the goods have perished or deteriorated as a result of the

[2] *Idem*, pp. 70-71.

examination of the goods made by the buyer; or if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity. As concern the cost of performance it is the seller who has to bear te costs of delivery of subtitute goods, and will be the same even if under the original contract it had been for the buyer to cover the costs of carriage of the goods. The reason for explaining this situation is that the problem of delivery of substitute goods arises only because the seller did not perform his obligations according to the originally contract[3].

4. Repair of lack of conformity (art. 46 para. 3)

Unlike art. 46 (2) the remedy to require repair governed by art. 46 (3) is not restricted by a requirement of fundamental breach. Although the right to require repair seems to be more permissive than the right to demand substitute goods, it is also limited by situations where it is reasonable to repair, having regard to all the circumstances. The reasonableness of the demand is judged according to the circumstances surrounding the contract and the conflicting interests of the parties. Unreasonable in this context means unreasonable to the seller and it does not depend on the character of the breach, but rather on the nature of the goods delivered and all the other circumstances[4].

Generally, it can be considered that the demand to repair the lack of conformity is not reasonable if the costs involved would be significantly higher than those required by other remedies which would entitled the buyer to obtain performance of the contract. It is unreasonable if the cure is disproportionately expensive for the seller. However, the relation between the cost to cure and the purchase price is irrelevant. The seller has the burden to prove the facts from which the unreasonableness of the cure is alleged, since the obligation to cure is the rule and unreasonableness the exception[5].

The provisions of art. 46 (3) applies as well to specific as to generic goods. If specific goods are burdened with a third party right, there is no right to require repair in case the seller cannot buy the third party out[6]. In this case, the buyer will be entitled to damages, reduction in price or avoidance of the contract.

5. Time limitations

The two buyer's specific remedies for breach of conformity obligation by the seller are subject of a procedural condition. The delivery of substitute goods or the repair of the lack of conformity must be required either in conjunction with notice given under art. 39 or within a reasonable time thereafter. According to art. 39, the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years

[3] S. Kroll, L. Mistelis, P. P. Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, Ed. C.H. Beck; Munchen, 2011, pp. 696-697.
[4] M. Davies, D. V. Snyder, *International transactions in goods. Global sales in comparative context*, Ed. Oxford University Press, New York, 2014.
[5] Oberster Gerichtshof, Austria, 14 ianuarie 2002 (Cooling system case), http://cisgw3.law. pace.edu/ cases/020114 a3.html.
[6] Harry M. Flechtner, *Buyers' remedies in general and buyers' performance-oriented remedies*, Journal of Law and Commerce vol. 25, Pittsburgh, 2005, p. 345.

from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee. If the buyer does not exercise the right to require delivery of substitute goods or the repair of the lack of conformity in these time limitations, he would not be able to rely on the remedies under art. 46 (2) and (3).

The scope of time limitation serves the interests of both parties. It is important for the buyer to receive the goods within a certain period of time, preferably the one established in the contract, otherwise the receipt of the goods will have no meaning for him. As for the seller, by setting a time limit, he is protected from the constant and continuous threat of interests[7].

Although the provisions of art. 39 are clear enough, reasonable time, as provided by art. 46 (2) and (3) is not defined. Taking into account both the provisions of art. 39 and the necessities of international trade, the reasonable time should be maximum two years from the date the goods are actually delivered to the buyer. What prevails is that this term should be minimized. Moreover, it is important to make a distinction between the reasonable time provided by art. 46 (2) and (3) and the period of time set by art. 39. These terms are not the same and it will be the courts' option to choose according to the specific of each contract and to the interest of both contracting parties. Whereas these terms are alternative, it is not possible to set a short period of time, and to add another two year period as provided by art. art. 39[8].

6. Seller's right to cure the lack of non-conformity

Art. 46 (2) and (3) give an aggrieved buyer the right to demand substitute goods or repair from the seller, but do not give the breaching seller the right to replace non-conforming goods or to repair. Therefore is necessary to make a distinction between an aggrieved buyer's right under art. 46 (2) and (3) to require the seller to replace the goods or to repair and a breaching seller's right to cure under art. 37 and art. 48 (1). This distinction is important because of two reasons. Firstly, the scope of this distinction is a proper application of the Vienna Convention, and, secondly, the seller's cure provisions impose different conditions than those in art. 46 (2) or (3). Thus, according to art. 37 if the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. Pursuant to art. 48 (1), the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. Consequently, on one hand, if a seller has the intention to cure under art. 37, he must do so without causing the buyer unreasonable inconvenience or expense, and, on the other hand, to cure a non-conforming delivery under art. 48 (1), the seller must do so without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. These limitations are different from those applicable under art. 46 (2) and (3). Art. 46 (2) restrains the buyer's right to demand substitute goods to the cases where the lack of conformity amounts to a fundamental breach. Art. 46 (3) limits the buyer's right to demand repair of the non-conforming goods to situations where such repair is not unreasonable in the circumstances.

[7] Chengwei Liu, *Remedies in International Sales*, Ed. JurisNet LLC, New York, 2007, p. 78.
[8] *Ibdem.*

The time limitations on a breaching seller's right to cure under art. 37 and 48 (1) differ from the time limitations imposed on an aggrieved buyer's right to require substitute goods or repair under art. 46 (2) and (3). Thus, if under art. 37 seller's cure has to be made before the date for delivery and under art. 48 (1) seller's cure has to be made after the date for delivery, under art. 46 (2) and 46 (3), buyer's right to require the seller delivery of substitute goods or repair the lack of conformity must be made in conjunction within the reasonable time provided by art. 39 or within a reasonable time thereafter.

7. Conclusions

Generally speaking, paragraphs 2 and 3 of art. 46 describe the buyer's right to demand seller to perform the contractual obligations after the seller has in some way failed to perform the contract provisions. Art. 46 (2) grants the buyer to require delivery of substitute goods in the case of non-conforming delivery and art. 46 (3) provides that the buyer may require the seller to repair the lack of non-conformity. These two remedies of specific performance are limited to some conditions. Thus, according to paragraph 2 of art. 46 the delivery of substitute goods may be required only if the breach of contract amounts to a fundamental breach, and, pursuant to paragraph 3 of art. 46, the repair of the lack of the conformity can be demand only if such a requirement is not unreasonable having regard to all circumstances. However, the buyer does not lose his right to recover damages, because the right to claim damages essentially supplements the buyer's right to require specific performance according to art. 46 (2) and (3).

The United Nations Convention on contracts for the international sale of goods chose the civil law approach with respect to performance remedies. However, in practice, parties strongly prefer damages instead of specific performance, even in civil law systems where the specific performance remedies are the rule. There are often cases when the seller may not be able to deliver the substitute goods or to repair the lack of conformity. Taking into account this situation, an efficient breach of contract should be prefered to the buyer's specific performance remedies as provided in paragraphs 2 and 3 of art. 46.

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WHAT LIES BEHIND ENVIRONMENTAL TAXES?

Mario Gil AGUILAR SANCEZ*

Abstract: *Economic globalization has accelerated the deterioration of the environment, worrying politicians, scientists and civil society, and also to international organizations. Derived from this concern have been carried out various international agreements as well as certain economic measures to reduce this damage. Under the pretext of protecting the environment, many state governments have seen an opportunity to cleave economic resources, through the so-called environmental taxes, which in its capacity extra fiscal, want to justify its introduction as a means of protection environment, when in fact, these taxes have only revenue purposes, thus constituting a fallacy.*

Keywords: *Economic globalization, environment, environmental taxes, fallacies, externalities.*

1. A look at the state of the environment

As a result of economic globalization, the market through their marketing processes has led to environmental deterioration of such magnitude that has made the international community become aware of what is and means the environment as well as the need to protection and proper exploitation of its natural resources.[1] This deterioration is reflected in global warming. The phenomenon of global warming can be summarized in the following points [2]: 1. Since last century the Earth has been warming on average one degree Fahrenheit; 2. Despite the fact that seems insignificant, small changes in temperature can have significant effects; 3. The rate of increase in global warming is unprecedented, it has never happened in a few million years in time; 4. Has been rising sea level; 5. As the temperature, small changes in sea level can have serious consequences; 6. The increase in greenhouse gases in the atmosphere has been amazing, reaching alarming levels; and 7. It is likely that the pace of change accelerates temperatures, with small increases in the concentration of greenhouse gases that lead to still greater than those of our recent past climate changes.

The first record that has regard to environmental protection is at 1962 Rachel L. Carson in his book entitled Silent Spring, where the author states a warning to stop the massive destruction of the environment.[3]The world recognized that there was a potential problem and in 1988 the United Nations established the Intergovernmental Panel on Climate Change [4](IPCC), whose purpose was to conduct a study for the impact on the environment is valued. The IPCC published three significant studies between 1990 and 2001, which concluded that whenever they had more evidence of the dangers of global warming.[5]

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* PhD student in law, Universidad Autónoma del Estado de Morelos, México.

[1] Ibarra Sarlat, Rosalía, *La explotación petrolera mexicana frente a la conservación de la biodiversidad en el régimen jurídico internacional*, México, D.F., Instituto de Investigaciones Jurídicas, UNAM, 2003, Serie DOCTRINA JURIDICA Núm. 150, p. XVIII.

[2] Stiglitz, Joseph E., *Cómo hacer que funcione la globalización*, trad. de Diéguez Amaro y Gómez Crespo, Paloma, Madrid, Santillana Ediciones Generales, S.L., 2006, p. 217.

[3] Ibarra Sarlat, Rosalía, *op. cit.*, p. 106.

[4] Panel Intergubernamental sobre el Cambio Climático.

[5] Stiglitz, Joseph E., pp. 219 y 220.

In 1992, more than a hundred heads of state met in Rio de Janeiro where Layered a process for making a treaty that would restrict emissions of greenhouse gases by which the heads of state pledged to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system [...] within a time frame sufficient to allow ecosystems to adapt naturally. After a series of technical meetings on global warming held in Kyoto, he was formed the so-called *Kyoto Protocol*[6].

As a result of the persistent undermining of ecosystems, the international community led to the creation of international organizations in order to create rules that allow prevent, avoid, reduce or restore problems married man to nature.[7]

After the environmental doctrine was consolidated international action sought to harmonize the economy with environmental protection.[8]The agreements were established for globalizing solutions constitute the main instrument of international environmental policy. Thus the theoretical and political debate begins to give its true value to nature, and internalize the social and environmental externalities into the economic system, the concept of sustainable development appears, setting new styles of development, based on the conditions and potential of ecosystems and rational management of resources[9].

In 2002 the World Summit on Sustainable Development in Johannesburg, South Africa was held, establishing important goals such as halving by 2015 the number of people without access to basic sanitation; 2020 production and use of chemicals that do not harm human health and the environment, through the Kyoto and Cartagena protocols.[10]

2. Taxes

The tax systems of most countries were developed over a long period; the state needed resources to function. The origin of public needs is the origin of the state, which is required to satisfy the contribution.[11]

The definition of tax contains many elements, and therefore may be various utterances of the same. Some of these definitions are as follows: To Sergio Francisco de la Garza[12], he notes that tax is a tax ex-lege mandatory provision, whose budget is in fact not an activity mentioned State and forced to cover public expenditure."; Juan Manuel Ortega Maldonado[13], tells us that tax are the taxpayers contributions required by the authority either permanently without compensation. Taxes are classified as: a).- Direct and Indirect, direct taxes are those that are set on the income or assets of persons, and are those established indirect consumption or transfers (Criterion manifestation of taxable capacity[14]); and, b).- Real and Personal. The first are those that are set in response to property; the second in care for people[15].

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[6] *Ibídem*, p. 220
[7] Ibarra Sarlat, Rosalía, *op. cit.*, p. 161.
[8] Aguilar Rojas, Grethel, *Derecho Ambiental en Centroamérica*, Suiza, 2009, Serie de Política y Derecho Ambiental Núm. 66, Tomo 1, IUCN, p. 8.
[9] Sachs, Ignacy, *Ecodesarrollo, desarrollo sin destrucción*, México, El colegio de México, 2007, Programa sobre desarrollo y medio ambiente, p 86.
[10] *Ídem.*
[11] Fernández, Luis O., *Recaudar impuestos en un mundo globalizado*, Buenos Aires, EDICON, 2009, p. 17.
[12] De la Garza, Sergio Francisco, *Derecho Financiero*, 11ª ed., México, Ed. Porrúa, 1982, p. 337.
[13] Ortega Maldonado, Juan Manuel, *Primer Curso de Derecho Tributario Mexicano*, México, Ed. Porrúa, 2004, p. 55.
[14] *Ibídem*, o*p. cit.,* p. 56.
[15] *Ibídem*,p. 57.

An important aspect of taxes is what is called the operative event or taxable event of the tax, about Ortega Maldonado[16]say that the taxable event must have an economic nature in the form of a position or movement of wealth and the tax consequences are measured in terms of this wealth.

Taxes have on the economic system under great significance that through these various objectives can be reached. So taxes are tax and non-tax purposes. For tax purposes relate to obtaining resources to meet public spending, while non-tax purposes relate to the production of certain effects that may be economic, social, cultural, political, etc.

3. Environmental taxes

Both the Single European Act and the Maastricht and Amsterdam nothing is said about using the tax aspect, as an instrument of environmental protection, the fact is that if used with non-tax purposes. Who introduced the concept of externalities, establishing the idea of taxing the external costs of pollution, was Pigou[17] (1920). Thus, in the case of „pollution" it is said that there is a negative externality when the effects of the actions of an economic agent affect other agents, or society in general, and these are not reflected properly in market prices.[18]

To explain the concept of externality, we can say that when a subject uses natural or pollutes resources, achieved a profit because they do not consider the cost of cleaning or environmental degradation, and as a result, this cost is not reflected in the and market prices, ie is external to the price system, being called him negative externality, or if this guy makes or spends without transferring the cost is called positive externality. To repair these alterations, economic instruments to internalize the negative externalities are proposed, and thus market prices and reflect the economic cost of environmental damage, subject to the polluter is required to support the environmental cost; Thus arises from the principle that the polluter pays.[19]

Under the polluter pays principle, in the last two decades, most European OECD countries created new taxes and existing ones modified in order to achieve environmental objectives, calling environmental taxes or green taxes, for its dual objective to generate revenue and to change the economic signals received by natural and legal persons on the environmental costs of their actions.[20]The criticisms of this principle focus on its sanction or penalty character, and what weakens, allowing you contaminate a fee.

The establishment of environmental taxes can be carried out by the restructuring of existing taxes or introducing new environmental taxes.[21]In the first case, many countries have restructured some of their taxes so they are now indexed to the emission levels of

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[16] *Ibídem*, p. 61.

[17] Arthur Cecil Pigou se considera el fundador de la Economía del Bienestar y principal precursor del movimiento ecologista al establecer la distinción entre costes marginales privados y sociales y abogar por la intervención del estado mediante subsidios e impuestos para corregir los fallos del mercado e internalizar las externalidades., en http://www.eumed.net/cursecon/economistas/pigou.htm, consultado el 9 de agosto de 2014.

[18] Gómez Sabaíni, Juan C. y Morán, Dalmiro, *Política tributaria y protección del medio ambiente: Imposición sobre vehículos en América Latina*, Santiago de Chile, Naciones Unidas, 2013, CEPAL-Serie Macroeconomía del Desarrollo No. 141, p. 7.

[19] Figueroa Neri, Aimée, „Tributos ambientales en México. Una revisión de su evolución y problemas", México, *Boletín Mexicano de Derecho Comparado,* nueva serie, año XXXVIII, núm. 114, septiembre-diciembre de 2005, p. 995.

[20] Moreno Arellano, Graciela et al., *Impuestos ambientales. Lecciones en países OCDE y experiencia en México*, México, Secretaría de Medio Ambiente y Recursos Naturales, Instituto Nacional de Ecología INE-SEMARNAT, 2002, Moreno Arellano, Graciela et al., (Comps.), p. 9.

[21] *Ibídem,op. cit*., p. 17.

sulfur dioxide, lead, benzene or phosphorus. These were created in order to produce tax revenue for governments. Currently, in OECD countries, 80% of fuels are imposed.[22]The environmental tax is basically a non-fiscal purpose, that is, besides raising, seeks to influence the behavior of individuals or agents that pollute.

The definition of environmental tax was agreed by the OECD, the International Energy Agency and the European Commission saying it is any compulsory unrequited payments, applied to certain tax bases that are considered of particular relevance to the environment. Regularly these tax bases correspond to energy products, motor vehicles, solid and liquid waste, gaseous emissions, natural resources, etc.[23]

The activities that damage the environment are the source of environmental taxes. For that reason, it may tax the manufacture and marketing of products that degrade nature, polluting emissions to air, discharges of solid waste, noise, use of fertilizers and pesticides, among others.

Moreover, the issue of environmental taxes, the tax base of the tax is the extent of the environmental damage to be avoided. Do not forget that the purpose of the environmental tax is to reduce or prevent pollution and especially the obligor must be determined under the polluter pays principle.[24]

Fallacies

Recently, Matt McGrath BBC reported that scientists and officials convened in Japan unveiled the most comprehensive assessment to date of the impact of climate change in the world noting that the global warming is likely serious, widespread and irreversible, according to a report UN.[25]

Under the pretext of non-fiscal nature of the tax, they can be identified as different fallacies:

The tax base of environmental taxes is the measure of environmental damage is to be avoided; when taxes levied what is the manifestation of the wealth of individuals, which occurs through monetization, ownership of an estate or consumption.

The source of environmental taxes are activities that damage the environment; when it is known that the source of the tax refers to the amount of assets or wealth of a natural or legal person, that is, the sources turn out to be the capital and labor.

The event for environmental taxes comprise activities that directly or indirectly harm the environment; that the doctrine be noted that the chargeable event must have an economic nature as a situation or a movement of wealth.

The most serious of the fallacies is that it has been led to believe that by environmental taxes is to reduce or even prevent damage to the environment.

Perhaps, it would not be the implementation of all policies towards environmental protection through environmental taxes the mother of all fallacies?

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[22] *Ídem.*
[23] Gómez Sabaíni, Juan C. y Morán, Dalmiro, *op. cit.*, p. 13.
[24] *Ibídem*, p. 60.
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Conclusions

The establishment of environmental taxes is not the solution to the serious problem of environmental degradation that humanity faces.

Under the pretext of non-fiscal nature of the taxes to solve the problem of environmental pollution, have created a number of environmental taxes and, if it is true that unlike common environmental taxes and have the virtue to ensure that the taxed sectors incorporate into their costs the environmental impacts of the activities, it is also true that the environmental tax is tax collection.

The governments of the countries have seen an extraordinary means of opportunity to cleave economic resources through the implementation of environmental taxes, champions with the principle of polluter pays, since by internalizing the negative externality, prices and market reflect the cost real economic, increasing the tax.

Finally, it is inconceivable that contaminate allow a fee.

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CONTRIBUTIONS TO THE ANALYSIS OF THE OFFENCE PROVIDED UNDER ART. 62 OF LAW NO. 64/1991 ON PATENTS, AS FURTHER AMENDED BY LAW NO. 187/2012

Bujorel FLOREA *

Abstract: *This study analyzes the amendments brought to the offence of disclosing the patent application, provided under Law No. 64/1991 on patents, such amendments being provided under Law No. 187/2012 concerning the implementation of Law No. 286/2009 regarding the Penal Code. The amendments brought to this offence are analyzed by reference to the related penal regulations comprised in the Penal Code in force. Furthermore, the text also deals with the specific elements of the substance of the discussed offence, both by reference to other provisions in the special law that it overlaps with, and to the provisions under the Penal Code, relating to the researched field. The reference area is explored taking into account as well the doctrine produced by established authors. The doctrine points of view are examined, confirmed or supplemented by according to the author's opinions on the matter. This article is equally meant for theoreticians but also to practitioners carrying out their activities in the field of industrial property law.*

Keywords: *disclosure; confidential information; information qualified as state secret.*

1. Relevant Governing Provisions

The offence of disclosing the data mentioned on the patent application is regulated under Art.62 of Law No. 64/1991 on patents[1].Further to the amendment introduced by Art. 40 item 3 of Law No. 187/2012 for the implementation of Law No. 286/2009 regarding the Penal Code[2], para. (1) of Art. 62 has the following legal contents: „*(1)The disclosure by the staff of OSIM*[3]*, as well as by the persons carrying out activities in relation to inventions, of the data provided on the patent requests before the publication thereof, is deemed to be an offence and is punished by imprisonment ranging from 3 months to 3 years or by a fine.*"

Prior to the amendment, para.(1) ofArt. 62 had the following wording: „*(1) The disclosure, by the staff of OSIM, as well as by the persons carrying out activities in relation to inventions, of the data provided on the patent application, before the publication thereof, is deemed to be an offence and is punished by imprisonment ranging from 3 months to 2 years.*"

It can be easily noted that the amendments implemented by Law No. 187/2012 are targeting:

- On the one hand, increasing the upper limit of the punishment by imprisonment;
- On the other hand, introducing the punishment by finein addition to the punishment by imprisonment.

We shall be analyzing below the amendments performed by the lawmaker and the specific elements of the subject matter of the amended offence.

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* Lecturer at the Bucharest Faculty of Law and Public Administration of "Spiru Haret" University, Attorney at law, member of the Bucharest Bar

[1] Republished in the Official Gazette of Romania, Part I, No. 541 of 8 august 2007. *Brevitatis causa*, for simplifying the language and to ensure the ease of use thereof, whenever we shall be using in the study he term „Law" or we shall be referring to any text of law without specifying the regulation that it is part of, we shall be referring to Law No. 64/1991.

[2] Published in the Official Gazette of Romania, Part I, No. 757 of November 12th2012, in force as of February 1st 2014.

[3] OSIM is the abbreviation for the State Office for Inventions and Trademarks.

2. Amendments implemented by Art. 62 of the Law

2.1. The punishment by imprisonment was amended, in the sense that the special upper limit was increased from 2 to 3 years.

We believe that the increase of the special upper limit of the punishment by imprisonment, although against the general penal policy of reducing the punishment and multiplying the means of individualizing the actual performance thereof, was adopted by the lawmaker because the said offence, once committed, may lead to committing other offences, such as unlawfully assuming the identity of the inventor and counterfeiting the industrial creative product mentioned on the request for the release of the protection title.

Thus, since committing this offence leads to possibly committing another, in order to end this potential but probable criminal phenomenon, we believe it was deemed that one of the solutions would be to increase the special upper limit of the punishment by imprisonment, in order to discourage the committing of other offences.

At the same time, *we believe* that increasing the special upper limit of the punishment by fine for the analyzed offence was necessary also for the purpose of correlating the sanction applied for this offence under the Special Law to the sanction for the offence of disclosing classified business information or non-public information, regulated under the Penal Code [Art. 304 para (1)]. In accordance with the legal text under the said Penal Code, the unlawful disclosure of classified business information or information not meant for publication, by the person in possession of such information due to its work-related tasts, shall be punished by imprisonment ranging from 3 months to 3 years or by a fine. The condition under the offence provided under Art. 304 para. (1) of the Penal Code that the disclosure of information should affect the interests or the activity of a person is no longer attached to the material aspect of the offence provided under Art. 62 of the Law, presuming in absolute terms that the interests of the passive subject (the patent applicant, the inventor, the successor in title of the latter, the unit for which the inventor created the invention) are affected.

2.2. The second amendment to this offence consists of introducing, in addition to the punishment by imprisonment, the alternative of the *penal fine*.

Please note that as per the current Penal Code, the fine is set forth by a new system as compared to the Penal Code in 1969, i.e. the method of the day-fine[4].

In case of the analyzed offence, the active subject is seeking to obtain certain material benefits. If this should occur, then in addition to imprisonment, the punishment by fine could be applied as well[5]; the value of the benefit obtained or sought by the defendant shall be taken into account when determining the value of a day-fine.

3. Specific Elements of the Subject Matter of the Offence Provided under Art. 62

The legal subject matter consists of the social relationship ensuring that the secrecy of the data mentioned on the patent applications submitted to OSIM is kept as of the submission date until the publication thereof in the Official Gazette of Industrial Property – Inventions Section. The information related to information recorded by OSIM as

[4] See Art. 61 of the Penal Code.
[5] See Art. 61 para. (1) of the Penal Code.

international applications, based on the Patent Cooperation Treaty[6]are not public until the date provided in the treaty[7].

The material object consists of the data included on the patent application. The doctrine[8]proposed that the text of Art. 62 para. (1) should be supplemented, so as to set forth as an offence the disclosure of the data comprised in the documents accompanying the patent applications, and not solely the disclosure of the data mentioned in the patent application. We agree to this remark, although not all documents accompanying the patent application comprise data which reveal the main features of the inventions for which the protection is requested.

Therefore, pursuant to Art. 14 of the Regulation for the implementation of Law No. 64/1991, hereinafter referred to as the Regulation, the patent application includes an application form to request the issuance of a patent, accompanied by a description of the invention, one or several claims and, as the case may be, the drawings referred to in the description and/or claims. Furthermore, in Art.20 of the Regulation, the application form, the description, the claims and the drawings are integral parts of the patent application.

On the other hand, the application for the granting of a patent may be accompanied[9]by other documents, such as: the summary of the application, the proxy appointing the authorized attorney-in-fact, the priority deed, the authorization concerning the transfer of the priority rights, the document certifying that biological material was submitted to an international storage authority, the document naming the inventors, the deed of transmission of the right to the issuance of the patent, the exhibition certificate.

Among these documents which may accompany, as the case may be, the patent application, only some of them, such as the application summary[10], the priority deed[11]orthe certificate of exhibition[12]include information characterizing the invention, while the other supporting documents refer to various rights and circumstances or the capacity of certain persons involved in the granting of the patent. The fundamental issue, influencing the reply to the question whether the disclosure is only targeting the data included on the patent application, or whether it also bears an impact on the data comprised in the documents supporting the patent application, is to determine the nature of the information to be kept secret until the publication of the patent applications. Is it about keeping the secrecy of the information defining and characterizing the invention, or over all information of any nature, pertaining to the invention the protection of which is being sought.

We deem that the offence of disclosure targets ant information pertaining to the invention for which a patent application was registered.

Our opinion is based on the provisions under Art. 40 para. (1) of the Law and of Art. 7 para. (1) of the Regulation. Pursuant toArt.40 para. (1) of the Law, the invention subject of the patent application filed with OSIM may not be disclosed without the applicant's

[6] Approved by Romania under Decree No. 1175 of December 28, 1968 and Published in Official Gazette No. 1 of January 6, 1979.
[7] See Art. 7 of the Regulation for the implementation of Law No. 64/1991 concerning patents, an appendix to GD No. 547/2008 for the approval of the Regulation on the implementation of Law No. 64/1991. GD No. 547/2008 was published in the Official Gazette of Romania, Part I, No. 456 of June 18, 2008.
[8] See T. Bodoaşcă, *Dreptul Proprietății Intelectuale*, 2nd edition, revised, Universul Juridic Publishing House, Bucharest, 2012, p. 272.
[9] See Art. 14 para. (2) of the Regulation.
[10] See Art. 21 of the Regulation.
[11] See Art. 23 of the Regulation.
[12] See Art. 28 of the Regulation.

consent, until the publication thereof, and its status is established by the special law until the publication.

Furthermore, pursuant to Art.7 para. (1)of the Regulation, *the information pertaining or relating to inventions* created by Romanian citizens or by individuals domiciled in Romania and *filed with OSIM as patent applications, shall not be public until the date of publication thereof in BOPI*[13] (emphasis added – B.F.).

Therefore, all data pertaining to inventions for which protection deeds were requested, including information comprised in the documents accompanying the patent application, belong to the category of information which may not be revealed publicly, since it is confidential information. This is why we support the proposal of *de legeferenda*, so that the material object of the offence should be supplemented, in the sense that both the disclosure of the data included on the patent applications and of the data on the documents accompanying said application should constitute an offence.

The Law[14] regulates a special status for the inventions created on Romanian territory, containing information pertaining to national defense and safety. This information may be classified by the competent institutions as state secrets, within 60 days as of the filing of the patent application[15].The information pertaining or related to the invention must be must be classified by the competent institutions prior to submitting to and registering the patent application with OSIM[16].

The distinction between inventions comprising confidential information on the one hand, and the inventions comprising information classified as state secret, on the other, shall be significant to the criminal investigation bodies in case the offence of having disclosed same is committed.

Establishing the invention category of the disclosed information determines the classification of the deed: offence provided under Art. 62 of the Law in case of inventions not comprising information classified as state secrets, and respectively the offence of disclosing state secrets, regulated under Art. 303 of the Penal Code[17], in case that the inventions comprise information classified as state secrets.

*The active subject*s explained in detail by the lawmaker[18]. It may be the individual belonging to the „OSIM staff" or the person „carrying out works in relation to the inventions".

The specialized literature[19] rightfully emphasized that the OSIM employee doesn't need to fulfill direct duties relating to the receipt, keeping or settlement of invention registration applications in order to be a passive subject. In case another OSIM employee, accidentally or in performing its work-related duties acquires the data on a patent application and discloses it, the latter shall become the active subject of the offence.

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[13] BOPI means the Official Industrial Property Bulletin.
[14] See Art. 40 para. (2) of the Law.
[15] The competent institutions are the Ministry of National Defense, the Ministry of Interior and the Romanian Intelligence Services, see Art. 7 para. (3) of the Regulation.
[16] See Art. 7 para. (12) of the Regulation.
[17] Pursuant to Art.303 para. (1) of the Penal Code.:"*(1) The unlawful disclosing of information classified as state secret, by the person who is aware of same due to its work-related duties, is punishable by imprisonment ranging from 2 to 7 years and the prohibition of exercising certain rights, if it affects the interests of one of the legal entities provided under Art. 176.*"Note should be made that Art. 176 of the Penal Code provides these legal entities, *i.e.* the public institutions or other legal entities managing or operating public assets.
[18] See V. Lazăr, *Infracțiuni contra drepturilor de proprietate intelectuală*, Lumina Lex Publishing House, Bucharest, 2002, page 120.
[19] See C. R. Romițan, *Protecția penală a proprietăți intelectuale*, C. H. Beck Publishing House, Bucharest, 2006, page 226.

The passive subject of the offence provided under Art. 62 is the patent applicant, the inventor, its successor in title or the unit where the invention was created while fulfilling work-related tasks.

The doctrine[20]emphasized that said offence also has a *secondary passive subject*, i.e. OSIM, whose liability is engaged for the damages caused by its agents through this offence. There is no doubt that in such a situation, OSIM shall recover the amounts paid to cover the damage by seeking legal remedy against the active subject, agent of the latter.

The material element of the objective aspect consists of the disclosure of the data comprised on the patent application or on the documents accompanying same. Pursuant to the linguistic dictionary[21], „*disclosure*" means, for the purposes we are interested in, revealing state secrets to a person who is not entitled to be in possession of same.

The disclosure can be made both directly and indirectly. Furthermore, the disclosure may be total or partial[22]and it is carried out either by actions (such as issuing the application or a copy thereof, extracting data and informing the interested party), or by inaction (such as leaving the application or another document related to the invention in a place accessible to the interested party). There are *three premise-situations* for the offence to be determined.

The first among them consist of the pre-existence of a patent application filed with OSIM in accordance with the substance and formal conditions provided by the law.

The second premise entails that the disclosure occurs within a certain term, *i.e*. within the within the deadline as of filing date of the patent application, until the publication thereof. The publication deadlines and the time as of which they start to run are provided under the Law [23].The third premise-situation refers to the fact that the data on the patent application or on the documents accompanying same must be confidential or classified as state secrets. *The immediate consequence*s that the moral and asset-related rights of the passive subject, arising from the patent application, are affected. *The causality* between the action or inaction constituting the material element and the immediate consequence results *ex re*.*The performance* of the offence is the time when the action or inaction of disclosure occurs, notwithstanding the means of communicating the invention-related information: means of communication; direct dialogue; courier etc.[24]

4. Conclusions

Maintaining the patent application off the public domain until the publication thereof ensures the protection of the patent holder rights, but it also plays an important part in assessing the patentability of the invention. Until the publication of the patent application (before the granting of the patent) mainly required by the need to provide the public with information on the latest technological developments, the data included on the patent application must have the status of confidential information or that of classified state secrets, so as not to breach the exclusive right of the patent holder. The disclosure of the patent application within the term running from the filing thereof with OSIM until the

[20] See R. Bodea, *Infracțiuni prevăzute în legi speciale: infracțiuni privind societățile comerciale, infracțiuni contra drepturilor de proprietate intelectuală, infracțiuni în legătură cu protecția mediului*, Hamangiu Publishing House, Bucharest, 2011, page 79.
[21] See the Romanian Academy, „Iorgu Iordan" Institute of Linguistics, *DEX. Dicționarul explicativ al limbii române*, 2nd edition, Univers enciclopedic Publishing House, Bucharest, 1998, page 312.
[22] SeeV. Lazăr, *op.cit.*, page 122.
[23] See Art. 23 of the Law.
[24] See R. Bodea, *op.cit.*, page 80.

publication thereof would lead to suspending the conclusion of license agreement and the prohibition of promoting the quicker use of the latest technological knowledge integrated in the invention[25].

There are just a few reasons for which the objective interpretation of the legal rules incriminating the disclosure offence regulated under Art. 62 of the Law becomes a first-rate imperative so as to overcome the difficulties which may arise during the application of the norms.

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[25]See Al. C. Ştrenc, B. Ionescu, Ghe. Gheorghiu, *Dreptul brevetului. Tratat. Volumul I*, Lumina Lex Publishing House, Bucharest, 2005, page 407.

THE EXTENSION OF THE PREPARATORY FORMS IN THE ROMANIAN PENAL LAW

Oana Roxana IFRIM *

Abstract: *The author notices that there are currently no proposals on extending the forms of sanctioning the preparatory acts for terrorist crimes and for other serious crimes, proposals that emphasize the compatibility or incompatibility of the legal provisions in relation to the fundamental provisions recognized by international documents and national constitutions. Consequently, the author suggests extending the preparatory forms for the mentioned offenses, to prevent and combat the worst forms of crime and to contribute to strengthening the European and global legal order.*

Keywords*: preparatory acts, terrorism, organized crime.*

In the penal doctrine[1] (Vintilă Dongoroz) states that any human activity involves an unfolding in time and space, and it can cover in its way several moments or phases, each having a specific role in relation to the result, the change in the outside world. The same way is covered by an act done in the view of committing a crime. Yet, these acts have certain specificity. Some of them, by their nature do not reveal the purpose to which they are committed, while others, on the contrary, indicate by their nature their direction and the aim of the perpetrator.

Typically, the legal doctrine makes the difference between the preparatory act and the act of execution (within the limits in which the preparatory act is assimilated to the act of execution) according to the criterion indicated by law. It will be a preparatory act the act that does not fulfill the conditions of assimilation, i.e. it does not consist of production or acquisition of means or instruments or of taking measures (negative criterion).

On the contrary, it will not be a preparatory act the act that meets the conditions of assimilation with the act of execution.

In other cases where the assimilation does not work, the preparatory act will be differentiated from the act of execution in relation to the existent criteria in the doctrine (the criterion of unambiguity, the criterion of equivocality, the criterion of inert causality, the formal criterion, the criterion of proximity, etc.).

By a preparatory act is meant therefore any event that is preparing the unfolding and implementation of an action that someone has proposed to accomplish; acts which do not betray the intention with which the perpetrator acted.

A performed act - *subjectively* – in the view of committing a criminal offense, at the moment when it was committed did not reveal its specific direction - as an expression of the decision taken by the author, is an irrelevant act from the penal viewpoint, being as we

* Conf.univ. dr. al Facultății de Drept „Spiru Haret” din Bucureşti, rionescu_2007@yahoo.com.
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[1] Vintilă Dongoroz, *Explicațiile teoretice ale codului penal român (Theoretical Explanations of the Romanian Penal Code)*, vol. I, The Publishing House of the Romanian Academy, Bucharest, 1969, p.131.

have shown only a physical act, the simple externalization of the criminal intention, not susceptible to be qualified *ex ante as a preparatory act of a certain crime*[2].

An act can be qualified as a preparatory act of a crime, in the sense of the penal law, if at the moment of its commitment has at its basis the decision of the perpetrator to commit it in the view of a crime, even though by its nature, i.e. in its materiality, the act does not betray such a resolution. Therefore, so that an act can be qualified from the beginning as a preparatory act with penal implications, it should be known from the moment of its commitment that it was aimed at the commitment of a crime[3].

The preparatory act was characterized having objectively an ambiguous character and hence even if it is committed fully by the author it cannot be known its direction.

In other words, the preparatory act means that external manifestation through which the author prepares the commitment of an illegal act that he aims to accomplish but that does not represent yet a beginning of the execution of the intention, but only the material expression of the criminal intention[4].

The preparatory act involves thus an external manifestation that precedes the execution, usually existing a supplementary period of time between the commitment of the preparatory acts and the beginning of an execution. In this respect, the preparatory act is considered the act that creates the material or spiritual *conditions* of the act. If an external act meets only the features of the preparatory act or does not meet the conditions of the preparatory act assimilated to the act of execution, the law does not incriminate it.

If the act of execution occurred instantaneously, the preparatory act would not occur because it would lack that period of time in which to such acts register.

The preparatory acts or the acts of execution, viewed in a broader sense, as we have shown, are only those acts that enforce the criminal resolution, being situated on successive steps of carrying out the criminal act; in essence these acts represent only the commitment on different segments of the same act described in the norm of incrimination as committed action.[5]

But the preparatory act should not be mistaken for the act of execution, because by its nature is a prior to the commitment, in other words it is an act which prepares the execution.

As it is known, the criminal law as a general rule does not incriminate the preparatory acts of crime and does not sanction them.

Exceptionally this act is incriminated when it is *assimilated* with when the act of execution. For example, in the case of the crimes against state security, of the crimes of illegal deprivation of liberty, of offenses related to air traffic, of the crime of trafficking in drugs, of the offense of terrorism[6], the preparatory acts are incriminated only if they are assimilated with the acts of execution.

Referring to other very serious crimes, the preparatory acts are incriminated only exceptionally (for instance in the case of organ trafficking) when they are assimilated with the acts of execution.

Participation in terrorist acts is punishable in compliance with the common rules, according to the Penal Code and to the special law.

The Romanian law defines the terrorist acts by reference also to the subjective element in the sense that the active subject must know that the acts are committed with the purpose

[2] George Antoniu, *Tentativa (The Attempt)*, Tempus Publishing House, 1996, p.19.
[3] Vintilă Dongoroz, *Drept penal (Penal Law)*, updated, Bucharest, 2000, p.212.
[4] Oana Roxana Ionescu, *Regimul juridic al actelor pregătitoare*, Ed.Universul Juridic, Bucureşti, 2012, p. 14.
[5] George Antoniu, op.cit., p.56.
[6] Special law no.535 on 25 November 2004.

of serious disturbance of the public order by intimidation, terror or by the creation of a state of panic. In defining the offense the law-maker took into account the provisions of the European Union Council Framework Decision.

In matters of terrorism it should be mentioned an extension of the preparatory forms, to the extent that, in certain cases, the preparatory acts are assimilated with the acts of execution. In these situations the preparatory acts, in terms of objective aspect, gain through the will of the law the character of acts of execution. In other cases, these acts remain to be considered as preparatory acts with the respective treatment (non-incrimination and non-punishment nesancționare)

In defining transnational organized crime, the Romanian law-maker took into account the United Nations Convention. In this regard, it should be specified that the Romanian legislation does not contain any specific definition of the act of terrorism or of other very serious forms of crime in relation to those international documents.

Unlike the matter of terrorism, in the case of organized crime the special law stipulates explicitly that there must be a purpose of forming a criminal organization, i.e. it should exist the aim of committing one or more serious crimes to obtain directly or indirectly a financial benefit or other material benefit. In the case of the preparatory acts to the organized crime common law is applied as concerns the preparatory acts (they are not assimilated with the acts of implementation).

The preparatory acts both to the crime of terrorism and to the offense of organized crime are regulated by common law and there is no enlargement process of these institutions, except that the law incriminates as a distinct crime the act of association for committing acts of terrorism and the act of association within an organized criminal group.

Also, some preparatory acts such as manufacture, procurement of the means or instruments and taking measures in the view of committing crimes are considered acts of execution and consequently their commitment will represent attempt crimes or, when incriminated, autonomous, *independent* crime.

For example, the Penal Code incriminates in the matter of forgery, both counterfeiting of writing or of subscription (equivalent to the production of the document) and the alteration of the document in any way if it is likely to lead to legal consequences. The mere possession of a forged document is not an offense. If the author of the forgery uses the forged document he will commit besides the crime of forgery of public documents, the crime of use of forgery. If it is a private document, the act constitutes a single offense only if the author of the forgery also uses the forged document or entrusts it to another person to use it in order to produce legal consequences.

It is *autonomously* incriminated the act of putting into circulation counterfeit coins or valuables (art.310 Criminal Code) and holding the mentioned coins or valuables in order to put them into circulation, the latter act as an alternative modality.

The penal law also mentions the possession of instruments to falsify valuables (art.314), a crime that the Romanian doctrine considers to represent autonomous incrimination of the act of preparing the crime of counterfeiting money or other valuables.

A special law (Article 25 of Law No. 121 of 2006 amending Law no.365 of 2002 on electronic commerce) incriminated the acts of possessing equipment to forge electronic payment instruments. It also penalizes the manufacture or possession of equipment including hardware and software in order to be used to forge electronic payment instruments.

Referring to weapons and explosibles, we notice that the Romanian law incriminates in art.342 of the Penal Code the possession, the holding, the manufacture and the transport and any operations regarding the circulation of arms and ammunition or the unlawful functioning of the workshops for repairing weapons.

It is also incriminated the production, experimentation, processing, storing, transportation or use of explosives and any other unlawful operations on this matter (art.346 Penal Code).

The mentioned acts, if committed in connection with acts of terrorism or organized crime will be held in ideal conjuncture of crimes, as they are crimes serving as a means to commit other crimes.

It should be noticed that the law-maker sanctions the preparatory acts only in the above mentioned exceptional cases. The penalties stipulated in these exceptional cases will be: if the preparatory act is punished as an autonomous crime, it will have the limits of penalty stipulated by law for that offense; if the preparatory act is assimilated to the act of execution, the sanction will be identical with the penalty for the attempted offense (art.33, in this case the penalty is between half of the minimum and half of the maximum stipulated by law for the offense without a minimum lower than the general minimum of the penalty. If the penalty stipulated by law is life imprisonment, it is applied the punishment of 10 up to 25 years of prison (paragraph 2 of article 33 of the Penal Code).

The participation in terrorist acts is sanctioned according to the common rules in compliance with the New Penal Code and the criminal law in force.

Participation in a criminal offense is regulated in detail in the general part of the Penal Code, unlike other forms of plurality.

Romanian criminal law indicates the author and the participants. Thus, *the author* is the person who directly commits the offense stipulated by the criminal law. The author is the person who directly performs by an immediate and direct activity, i.e., without the interposition of another person, the acts of execution of the typical action constituting the material element of the objective side of the offense, that is why the authorship has an essential and necessary character (art. 46 Penal Code). According to article 48 of the Penal Code, an accomplice is a person who intentionally assists or facilitates in any way the commitment of an offense stipulated by the criminal law. It is also an accomplice the person who promises, before or during the commitment of the offense, that he will hide the goods derived from it or that will favor the perpetrator, even if after the commitment of the offense the promise is not fulfilled. Specific to the complicity is its character of indirect contribution to the commitment of an offense stipulated by the criminal law: it appears as a secondary participation, adjunct in relation to the authorship or instigation, and the accomplice's liability arises from the fact that the help he provided falls under the causal antecedence of the result, is a condition thereof; the indirect and mediated activities done by the accomplices, helping the author to commit the act faster, easier, safer, also contribute to the commitment of the offense like the activity of direct and immediate commitment of the typical action, only that they have a secondary character; they are part of the secondary antecedence of the offense, that is why complicity is an act of participation. There is not an act of complicity the support of the professionals (lawyer, doctor, accountant, etc.) to the extent to which they have been exercising their profession and are not members of a terrorist organization or of other criminal organizations.

The Penal Code defines *the instigator* in art. 47 as the person who intentionally determines another person to commit an offense stipulated by the penal law. As a form of criminal participation, the instigation is the offense of a person (*instigator*) who

intentionally makes, by any means, another person (*instigated*) commit an offense stipulated by the penal law. Specific to the instigation is the mental aspect (moral) because it creates in the mind of the instigated person the decision to commit the offense stipulated by the penal law, making the mental causality (which precedes and accompanies the physical causality, i.e., the commitment of the acts of execution) that is why they were also called moral authors, because they contribute to the achievement of the subjective side of the content of the offense stipulated by the penal law under criminal law content, i.e., the author's criminal decision-making. The activity of determining the perpetrator includes not only a psychic activity but also a physical activity (the instigator establishes a contact with the instigated, convincing him, providing information etc.). Without these material acts often the instigator's contribution would remain inefficient as it could not be externalized[7].

Reporting the participants' activity to the offense stipulated by the penal law allows the separation of the *occasional plurality of criminals* from the *occasional plurality of non-criminals*.

It also allows *the differentiation of legal treatment* between *participation* (when the perpetrators acted with the same form of guilt) and *improper participation* (when the perpetrators acted with different forms of guilt)[8].

The instigator and the accomplice shall be punished with the sanction stipulated by law for the author. In establishing the punishment there are taken into account each individual contribution to the commitment of the offense and the general criteria for the punishment individualization (art. 72) (the punishment in the case of improper participation). The Penal Code regulates in art. 52. In addition, art. 52 para. (1) of the Penal Code regulates the improper participation in the case of the coauthor. According to this text, the direct, intentional commitment by a person of an offense stipulated by the penal law, to which, guilty or innocently another person contributes with acts of execution, is sanctioned with the punishment stipulated by law for the act committed intentionally.

As a special rule not only in relation to the participation in the offense of terrorism, we mention the provision which incriminates the mere mention understanding (initiation) in the view of constituting an association with the aim of committing terrorist acts, an event that is less reduced than the coauthorship and than the constitution of a criminal association with the view of committing terrorist acts.

The simple understanding for constituting an association with the aim of committing terrorist acts requires a minimum of moral element, namely the agreement of more people to express knowing that these manifestations take into account constituting an association that aims to commit acts of terrorism. If there are will be no such representations at the basis of the agreement, it will not be possible to retain the crime of terrorism.

If in the case of the ordinary offenses any understanding among participants has relevance only if there were made steps towards the commitment of offense under the form of a punishable attempt or a consumed offense, in the case of the mere agreement in the view of forming an association that seeks to commit acts of terrorism, it is not necessary to be made steps to the execution of the act planned by the people who made that agreement, being sufficient only their agreement to commit such acts.

In the case of the criminal associations, the Penal Code sanctions the forms of participation also from the part of people who do not belong to the association if the

[7] George Antoniu, *Explicatii preliminare ale noului Cod penal (Preliminary Explanations of the New Penal Code)*, p.507.
[8] Ibidem, op.cit., p. 494.

supporting acts are based on the intention to help those concerned knowing that they are performing an activity harmful to the entire society.

The Romanian penal law also incriminates the act of constituting criminal association for terrorist purposes, as well as the establishment of such associations (criminal organizations) for committing serious crimes other than terrorism. In this case are sanctioned the manifestations that go beyond the mere agreement to commit the crimes, representing thus the constitution of organized criminal groups. If the members of the association commit an offense, they will be punished for *a train* of offenses, being retained in their case also the autonomous offense of criminal association.

The Romanian penal law also sanctions the legal person who has committed an offense to attain its object of activity or his interest or on behalf of the legal person if the offense was committed with the form of guilt stipulated by the criminal law. The criminal liability of the legal person does not exclude the criminal liability of the natural person who has contributed in any way to committing the same offense.

However, the Penal Code stipulates in art. 135 that legal entities, except for the public authorities are criminally responsible for the crimes committed in carrying out of the object of activity or in the interest or on behalf of the legal person. Para. 3 of the same text states that criminal liability of a legal person does not exclude the criminal liability of the natural person who has contributed in any way to committing the same offense. This means that according to the law-maker, the legal person shall be liable for any offense committed under the above conditions including terrorism or other serious crimes.

Referring to the Romanian procedural law, this does not contain provisions to simplify probation in matter of participation to the commitment of acts of terrorism.

It should be remarked that currently there are no proposals for the extension of the forms of sanctioning the preparatory acts to terrorist crimes and other serious crimes, proposals that emphasize the compatibility or incompatibility of the legal provisions in relation to the fundamental provisions recognized by international documents and national constitutions.

Consequently, we propose extending the preparatory forms for the mentioned offenses, to prevent and combat the worst forms of crime and to contribute to strengthening the European and global legal order.

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THE ISSUE OF PREVENTING AND COMBATING MONEY LAUNDERING IN THE EUROPEAN UNION

Elise-Nicoleta VALCU [*] **Andreea DRĂGHICI** [**] **IANCU Daniela** [***]

Abstract: *Considering the increased evolution of the phenomenon of money laundering, as well as of the fact that the methods and techniques for money laundering are in a permanent change, it is noted an enhanced institutional cooperation between the E.U and its Member States, establishing rules and methods for the identification of the offenders, as well as for the preservation of documents.It must be noted that in order to improve the cooperation between the Union's Member States in the area of prevention, combating, as well as sanctioning the criminality, at the communitarian level were taken specific measures concretized by a set of legal instruments relevant in this matter. Regarding Romania, we must note the presence of an appropriate legislative framework which has answered the needs to sanction the offences specific to organized crime, as well as to the need to harmonize our legislative system with the communitarian provisions.*

Keywords*: money laundering, directive, precaution measures, real beneficiary, clientele*

I. Introduction

Money laundering often occurs at an international level and implicitly, at the level of the European Union. This is why any measures adopted only at a national level without considering the international coordination and cooperation would have limited effects.

It must be recognized the fact that the risk of money laundering is not the same for all cases. Thus, in accordance with an approach based on the risks, both the communitarian, as well as the domestic legislations have inserted the principle according to which in appropriate cases are allowed both the simplified precaution, as well as the supplementary one regarding the high risk clientele, as well as the appropriate procedures created to ascertain if a person is politically exposed.

II. The communitarian and domestic legislative framework on the prevention, combat and sanctioning of the offences of money laundering

The need for laundering illicit winnings from criminal activities, many of them with a cross-border feature (thus communitarian) has led to the internationalization of this phenomenon and to the perfection of the activities of criminal groups. Thus it was born the need to legislate the regime of sanctions applicable to this calamity.

Specifically, at the European Union's level it was imposed the creation of a coherent internal legal space to insure effective measures in the prevention, combat and sanctioning of the money laundering phenomenon.

[*] Associate Prof PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Pitesti, Romania
[**] Associate Prof PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Pitesti, Romania
[***] Lecturer PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Pitesti, Romania

An analysis from this perspective is related to knowing the Union's legislation in this area, namely the provisions of the reforming treaty, the Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, of Directive No 2006/70/EC laying down implementing measures for Directive 2005/60/EC as regards the definition of „politically exposed person" and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, but also of the Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, the Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property and the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.

To the above mentioned is added the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (European supervision order). Actually, this measure also applicable for money laundering, allows the Romanian judge to order that a French citizen suspected of having committed an offence within the Romanian territory present himself twice a month to the French police authorities, not to the Romanian ones, thus being able to leave Romania, but existing in this entire time a supervision of his movement[2]. We consider that this system contributes to the prevention of new offences, implicitly of the ones of money laundering from occurring.

Regarding Romania, with its adhesion to the European Union became necessary the creation of a legislative framework according to the communitarian one based on derived law norms necessary for the intensification of the efforts in the combat, limitation or even elimination of the negative effects generated by the money laundering. In this regard was adopted a set of normative acts[3], with the purpose of sanctioning the actions circumcised to organized crime, among which we identify the money laundering.

Precisely, for this type of special offence, namely the money laundering, the framework norm is represented by Law No 656/2002 with its subsequent modifications inserted by the rectification published in the Official Gazette of Romania[4] and by the Law No 255/2013[5].

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[2] We also could mention in this regard, the Council Framework Decision 2009/315/JHA on the organization and content of the exchange of information extracted from the criminal record between Member States, by which was established a computerized system of exchange of information on criminal records – ECRIS. Due to this system, the judges, prosecutors and administrative authorities of resort have easy access to complete information regarding the criminal record of any European citizen.

[3] Law No 21/1999 on the prevention and combat of money laundering, Law No 78/2000 on preventing, discovering and sanctioning of corruption acts – this law expanded the area of corruption offences and of those assimilated to it. As for instance, the intended establishment of a diminished value to the real market value of assets belonging to economic agents to which the state or a local public administration authority is a shareholder, granting credits or subventions by violating the law or the norms for crediting, the use by any means, directly or indirectly, of information which are not public or allowing the access of unauthorized persons to these information; G.E.O No 159/2001 for preventing and combating the use of the financial-banking system with the aim to finance the terrorist acts, approved by Law No 466/2002, Law No 704/2001 on international judicial assistance in criminal matters; Law No 39/2003 on preventing and combating organized crime; Law No 508/2004 on the setting up, organization and operation within the Public Ministry of the Directorate for the Investigation of Offences of Organized Crime and Terrorism – D.I.O.O.C.T with its subsequent modifications among which we mention G.E.O No 3/2014 adopting implementing measures necessary for the enforcement of Law No 135/2010 on the Code of Criminal Procedure and implementing other regulatory acts.

[4] Official Gazette, Part I, No 117/1 March 2013

[5] The entrance into force of Law No 656/2002 repealed the Law No 21/1999 for the prevention and sanctioning of money laundering, with its subsequent modifications

III. Criminal and criminal procedural aspects concerning the offence of money laundering

The offence of money laundering is represented as a complex of activities, methods and technics by which the assets resulted from the commission of one or more offences are subjected to a dissimulation process having as main purpose the removal of their illicit provenience and implicitly the acquiring of an apparent legality in order to subsequently benefit from them. I.e. the „passing" of an asset, of assets or certain sums of money from their illicit feature to the licit one involves the following steps:

- The *premise situation* of the commission of an offence (conceiving or applying certain criminal schemes or the existence of the offence of money laundering is conditioned by the prior commission of a predicate offence or offence generating dirty money) which resulted in the assets[6] subjected to the laundry process;
- The continuous mixture of illegal capitals for their integration within the legal circuit. This mixture involves speed of operation, namely the illicit winnings are rapidly transferred to avoid their detection;
- The complexity of the financial circuits, thus the money become untraceable;
- Confidentiality from certain entities involved in money laundering[7].

As the literature states[8], this complex process has three stages: *pre-laundry* (converting dirty money into clean money), *main laundry* (converting money into accounting entries), *drying or recycling* (using the money to obtain profits).

As the two texts define the offence of money laundering, namely Art 2 of the Directive No 2005/60/EC, and Art 29* of the Law No 656/2002, it results that we are in the presence of a subsequent and complementary offence generating money.

Regarding the material object, it if formed by the assets generated by the commission of offences resulting in dirty money.

Regarding the objective side, we notice that Art 29* of the internal law transposing the Directive is almost an *ad literam*taking over of the last one's text, thus the offence of money laundering, expressed under three forms:

- The exchange or transfer of assets, knowing that they are resulted from offences, with the purpose of hiding or dissimulating their illicit origin or with the purpose of aiding the person who committed the offence to evade prosecution, trial or the service of the penalty;
- Hiding or dissimulating the true origin, location, disposition, movement or property of the assets or of the rights for them, knowing that are resulted from offences;
- Acquisition, possession or use of assets, knowing that are resulted from offences.

From the definition of the offence above presented, it results as form of guilt for its commission the direct intention because the active subject, who can be any criminally liable natural person performs the exchange, transfer, hiding, dissimulation, acquisition, possession or use of assets, knowing the fact that are resulted from offences.

Specifically, the active subject of the offence of money laundering appropriates or receives a sum of money or assets generated from the commission of offences resulted in

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[6] *"Assets" means any category of corporeal or incorporeal values, including money, as well as legal documents or instruments evidencing a title to property or a right upon them.*

[7] Law No 485/2003 amending and supplementing the Banking Act No 58/1998, inserted Art 37 which states that „in the criminal cases, at the written request of the prosecutor or the court or, where appropriate, of the criminal investigation organs with the authorization of the prosecutor, the banks shall deliver information of the nature of the professional secrecy".

[8] C. Voicu, F. Sandu, A. Boroi, I. Molnar, *Drept penal al afacerilor*, Rosetti Publ.-house, Bucharest, 2002

dirty money (predicate offence). The second activity of the active subject consists in the unfoldment of a scheme of money laundering by which he aims the placement of this money into the legal circuit.

From the brief analysis of the all the above, we may conclude that the existence of the offence of money laundering is conditioned by the prior commission of an offence generating dirty money (predicate offence).

Together with the application of a main criminal penalty (according to Art 29* of the Law No 656/2002 the offence of money laundering is punished by imprisonment for 3 to 10 years), the court aims the ordering of precautionary measures mandatory for the assets being confiscated[9]. We thus remember the Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, Council Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, but also Art 32 and next of the Law No 656/2002.

In this regard, Art 33 of the internal rules for the implementation of the directive, applied in corroboration with Art 112 of the Criminal Code on the confiscation of assets and by relation to the provisions of the Code of Criminal Procedure regarding the precautionary measures.

Thus, are confiscated with priority the assets generated by the commission of the offence of money laundering. If these are not found, then it shall be confiscated their equivalent in money, in assets obtained in their place, or in the incomes or material benefits obtained. If the assets subjected to confiscation cannot be individualized from the assets legally obtained, then it shall be confiscated up to the value of the assets initially subjected to confiscation.

IV. Relevant aspects on the prevention of money laundering in the vision of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing

In the meaning of this Directive, by money laundering are defined the following behaviors when are committed with intent (we note the direct intent), with the mention that it is noted the criminal act as such even when the activities which have generated the assets which are about to be laundered have been performed within the territory of another Member State or of a third party state:

i) *Conversion or transfer of property*[10], knowing the fact that those assets come from a criminal activity or from an act of participation in such activities with the purpose of concealing or dissimulating the illicit origin of the assets or of supporting any person involved in the commission of those activities in order to evade from the legal consequences of his actions;

[9] *"Confiscation" means a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property*, for more details see Art 1 of the Council Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property.

[10] *"Property" means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form including electronic or digital, evidencing title to property or an interest in such assets*, see in this regard Art 3 Para 3 of the Directive 2005/60/EC.

ii) Concealment or disguise of the nature, source, location, use, movement of the related rights, of the right to property or of other real rights, knowing that these originate from a criminal activity or from an act of participation into such activity;

iii) Acquisition, possession or use of such assets, knowing that, at the moment of their receipt, these originate from a criminal activity or from an act of participation into such activity.

Thus are punished the attempt, but also the support, incitement, facilitation and counseling for the commission of any of the actions above mentioned.

It must be mentioned the fact that the communitarian legislator brings under the empire of criminal sanctions, the actions above mentioned if are committed with direct intent, in the meaning in which the suspect has known that the assets originate from a criminal activity[11] or from an act of participation into such activity. Knowing the origin of the assets or the purpose aimed is deduced from the objective factual circumstances[12].

Are placed under the incidence of the current Directive the following natural and legal persons:

- Credit institutions[13];
- Financial institutions, including authorized insurance companies[14];
- The following natural persons in the performance of their professional activities:
  a) Auditors, external accountants and tax advisors;
  b) Notaries and other independent legal professionals (lawyers according to the Romanian legislation), when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction or business entities; managing of client money, securities or other assets;
- Real estate agents;
- Other natural or legal persons trading in goods, only to the extent that payments are made in cash in an amount of EUR 15.000 or more, whether the transaction is executed in a single operation or in several operations which appear to be linked;
- Casinos.

The current Directive establishes certain customer due diligence measures, identifying by its provisions:

a) The cases in which are applied the standard customer due diligence measures;

b) The content of these measures;

c) Identification of the simplified customer due diligence measures;

d) *Identification of the enhanced (supplementary) customer due diligence measures*.

a) According to Art 7 of the current communitarian norm[15], *the cases in which the customer due diligence measures are applied* are the following: a) when establishing a business relationship; b) when carrying out occasional transactions amounting to EUR 15.000 or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked; c) when there is a suspicion of money laundering or

[11] It represents any kind of criminal involvement in the commission of a serious offence; a serious offence represents at least the acts defined by Art 1-4 of the Framework Decision 2002/475/EC, corruption, fraud defined by Art 1 Para 1 and Art 2 of the Convention on protecting the financial interests of the Community, all the offences punishable with deprivation of freedom or with a safety measure for more than 1 year or as it refers to the states which have a minimal threshold for offences in their legal system, all the offences punishable with deprivation of freedom or safety measure for at least 6 months.

[12] See in this regard Art 29 of the Law No 656/2002 with subsequent modifications

[13] See Art 1 Para 1 first line of the Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, as it has been modified by Directive 2005/1/EC

[14] According to Directive 2002/83/EC concerning life assurance, as it has been modified by Directive 2005/1/EC

[15] See in this regard, Art 13 of the Law No 656/2002 with subsequent modifications

terrorist financing, regardless of any derogation, exemption or threshold; d) when there are doubts about the veracity or adequacy of previously obtained customer identification data.

b) *What is the content of these measures?*

The precaution requirements specifically aim:

- Identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
- Identifying and verifying the beneficial owner (Art 9 of the Directive recommends that the verification of the customer, as well as of the beneficial owner be performed until the establishment of a business relation or the carrying-out of the transaction);
- Obtaining information on the purpose and intended nature of the business relationship;
- Conducting ongoing monitoring of the business relationship including scrutiny of transactions to ensure that these are consistent with the business and risk profile, including, where necessary, the source of funds;
- For the casinos subjected to public control, the customers must be identified, and their documents be verified at the entrance or before entering into the gambling room, regardless of the amount of chips[16];
- Within cross-border banking relationships with correspondent institutions from third party states, the credit institutions have the following obligations: to be fully informed about the nature of the activity of the correspondent institution, its reputation and the quality of the supervision; to insure that the correspondent institution, by applying a policy of the permanent precaution, verified the identity of its customers with direct access to its bank accounts (for the corresponding accounts of transfer).

c) *Identification of the simplified customer due diligence measures*

The current communitarian norm inserts in its content relaxing provisions regarding the application of certain customer due diligence measures, at least standard in respect of: i) credit or financial institutions being the customer; ii) listed companies whose securities are admitted to trading on a regulated market within the meaning of Directive 2004/39/EC; iii) beneficial owners of pooled accounts held by notaries and other independent legal professionals; iv) domestic public authorities; v) life insurance policies where the annual premium is no more than EUR 1.000 or the single premium is no more than EUR 2.500; vi) insurance policies for pension schemes if there is no surrender clause and the policy cannot be used as collateral.

d) *Identification of the enhanced (supplementary) customer due diligence measures*

According to Art 13 of the current Directive, it is necessary an enhanced customer due diligence measure by the application of specific and adequate measures if the customer is not physically present for identification purposes.

These measures refer to the guarantee of the customer's identity, the supplementary verification of the documents attesting the identity, or the request for the confirmation of a credit or financial institution, or the guarantee of the first payment of the operation through a bank account opened in the customer's name to a credit institution.

The above mentioned persons are responsible that in the performance of their activity to take measures for the prevention of money laundering and thus, on a risk-sensitive basis,

[16] For other cases than the ones mentioned, the casinos' customers must be identified and their identification be verified if they purchase chips of at least EUR 2.000.

shall apply *standard, simplified or enhanced measures* for knowing the customer, which shall also allow them to establish the *beneficial owner or the customer*[17].

Chapter 3 of the current Directive states the issue of the *reporting obligation*, which implies the identification of the customers and processing of the information regarding money laundering.

Specifically, each Member State shall establish a FIU (financial intelligence unit) responsible for receiving, analyzing and disseminating to the competent authorities, disclosures of information which concern potential money laundering. In this meaning, Art 22 states that the natural or legal persons covered by this Directive or, where applicable their directors or employees have the obligation to promptly inform the FIU if they know, suspect or have reasonable grounds to suspect that money laundering or terrorist financing is being or has been committed or attempted.

In Romania, the FIU is represented by the National Office for Prevention and Control of Money Laundering, stated by Law No 656/2002. According to Art 26 of the mentioned law, N.O.P.C.M.L works as a specialized organ with legal personality subordinated to the Government. The Office has as object of activity the prevention and combat of money laundering, for which it shall receive, analyze and process information and shall notify, according to Art 8 Para 1, the Prosecutor's Office attached to the High Court of Cassation and Justice and the Romanian Intelligence Service (if it ascertains the financing of terrorism).

According to Art 5 of the Law No 656/2002, if the any of the persons stated by Art 10, among whom we mention the credit institutions, financial institutions, private pensions funds administrators, casinos, auditors, accountants, tax advisors, notaries, lawyers, real estate agents etc. (text in accordance with Art 2 of the Directive 2005/60/EC) have suspicions that an operation which is to be performed has as purpose money laundering, shall notify the National Office for Prevention and Control of Money Laundering. By exception, as Art 6 of the law states, for the cases in which these persons though have knowledge about an operation which is to be performed has as purpose money laundering, may perform the operation without informing the Office, only if the transaction is to be carried out immediately or if its failure would hamper the efforts to track the beneficial owner of the suspicious transaction. Nevertheless, the text states the obligation that in 24 hours from the transaction to inform the Office by stating the reasons for which Art 5 has not been applied.

The Office shall receive the reasoned notifications regarding the suspicions that the operation which is to be performed has as purpose the money laundering, from the above mentioned persons, who have the obligation to report to the Office in maximum 10 days the performance of:

- Operations with cash, in LEI or in foreign currencies whose minimum limit is the equivalent of EUR 15.000, regardless if the transaction is to be performed by one or more operations which seem to be connected (are exempted from the obligations to report the following operations unfolded in name and on their own account: between credit institutions and National Treasury, between the National Bank of Romania and National Treasury);
- External transfers in and from accounts of amounts whose minimum limit is represented by the LEI equivalent of EUR 15.000;

The same persons have the obligation to notify the Office if:

- Have knowledge that an operation or more which have been carried out in the account of a customer have clues of anomaly for the activity of that customer and if

[17] According to Art 3 of the current Directive „beneficial owner" means the natural person(s) who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted.

there are suspicions that the deviations from normality have as purpose the money laundering;

- They ascertain that towards an operation or more which have been carried out in the account of a customer are suspicions that the funds have as purpose the money laundering;

Regarding these notifications the Office may request information, data or documents which may be laid at its disposal by the persons enlisted by Art 10 within 30 days from the submission of the notification. As result of the analysis and process of information, data or documents, the Office may ascertain the existence of solid clues of money laundering, case in which it shall notify the Prosecutor's Office attached to the High Court of Cassation and Justice (if it ascertains the financing of terrorism, it shall also alert the Romanian Intelligence Service), on the contrary the Office shall preserve the information in his evidence.

Conclusions

We consider that in the actual context, the issue of preventing and combating the crime phenomenon regarding money laundering affects both the European Union's financial interests, as well as the national budget and the state of law.

Thus, we consider that it is necessary an activation of the police and judicial cooperation in criminal matters following a recipe of communitarian investigation management according to the new European architecture shaped by the Lisbon Treaty. Thus, it is necessary the introduction of new judicial and administrative mechanisms, as well as of multiple legislative initiatives.

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3. Council Framework Decision 2009/315/JHA on the organization and content of the exchange of information extracted from the criminal record between Member States
4. Law No 656/2002 with the modification inserted by the Rectification published in the Official Gazette of Romania (Part I, No 117/1 March 2013) and by the Law No 255/2013 (the entrance into force of Law No 656/2002 repealed Law No 21/1999 for the prevention and sanctioning of money laundering, with subsequent modifications)
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REASONABLE PERIOD OF TIME FOR CARRYING OUT THE TRIAL STAGE IN CRIMINAL PROCEEDINGS

Raluca-Viorica GHERGHINA *

Abstract: *Promptness in the criminal proceedings is one of the principles that do not receive a specific regulation in legislation. The European judge, as well as the national one, must interpret the concept of reasonable period of time both from the point of view of the rules included in the laws and from the point of view of the treaties and jurisprudence, particularly that of the European Court of Human Rights. It is important to note that no legislation defines the term „reasonable period of time". The European Court of Human Rights, through its jurisprudence, covers at least a part of the explanation of this concept. Regarding the celerity of the procedures, in its judgments, the Court refers to article 6 paragraph 1 of the Convention, where it is stated that: „Everyone has the right, as cause, to be judged (...) in a reasonable period of time."*

Keywords: *efficiency, period, reasonable principle.*

The concept of „reasonable period of time", so often used in the legal discourse lately, has acquired multiple meanings. However, it is important to stress that no legislation defines the notion of „reasonable period of time". The European Court of Human Rights, through its jurisdiction, covers at least a part of the explanation of this concept. Regarding the celerity of the procedures, in its judgments, the Court refers to article 6 paragraph 1 of the Convention, where it is stated that: „Everyone has the right, as cause, to be judged (...) in a reasonable period of time."

The European judge, as well as the national one, must interpret the concept of reasonable period of time both from the point of view of the rules included in the laws and from the point of view of the treaties and jurisprudence, particularly that of the European Court of Human Rights.

From the doctrine[1] it results that „reasonable" is a legal term whose content must be given not according to personal extra-judicial considerations, but according to a judgment based on law.

The compliance with the reasonable period of time aims primarily to protect the persons involved in a criminal case „against the excessive slowness of the procedure, in order to avoid extending over a too long period of time the uncertainty regarding the fate of the accused.[2]"

Promptness in the criminal proceedings is one of the principles that do not benefit from a specific regulation in legislation. The principle of properness, celerity, rapidity was

* PhD, Professor's Assistant, Constantin BrâncoveanuUniversity, Piteşti.

[1] Olivier Cornet, *L`interpretation du "raisonnable" par les juridictions internationales: au-dela du positivisme juridique?*, Revue Generale de Droit International Public, Tome CII, 1998, p. 24.

[2] MihailUdroiu, OvidiuPredescu, *„Termenulrezonabil al procedurilorpenale"[Reasonable period of time of criminal proceedings]*, in the Law journal, no. 2/2009, p. 233.

stipulated in article 1 paragraph 1 of the former Code of Criminal Procedure, as follows: „The criminal proceedings aim at establishing *on time* and completely the facts representing offenses, so that any person who has committed a crime can be punished according to his/her guilt and no innocent person should be held criminally liable."

In an effort to harmonise our criminal procedural legislation with the Community rules from the European Union regarding criminal proceedings, the Romanian legislator understood to stipulate in the current *Criminal Procedure Code* the fair character and the reasonable period of time for the trial. Thus, article 8 of the Criminal Procedure Code states that: „The judicial bodies are obliged to carry out the prosecution and the trial by observing the procedural safeguards and the rights of the parties and procedural subjects so that to establish on time and completely the facts constituting offenses, no innocent person shall be held criminally liable, and any person who has committed an offense shall be punished according to the law, within a reasonable period of time." The purpose of the criminal trial is emphasised (stipulated in the former regulation in article 1 from the Criminal Procedure Code), complemented by mentioning that both the prosecution and the trial shall take place in a reasonable period of time, by observing the procedural guarantees and the rights of the parties and of the procedural subjects.

This principle is closely related to the work of gathering evidence, administering the evidence, the active role of the judiciary bodies, the purpose of the criminal trial, and quality assurance in carrying out the judicial activities.

As indicated by the assessments from many European countries, including France, Germany, Italy etc, but especially the reform of the European Court of Human Rights, justice is in a crisis of volume, of celerity and of efficiency.

For this reason, justice does not respond sufficiently to the expectations of the citizens, despite the quality of its magistrates, being considered, generally in Europe, too complicated, slow and expensive, turning, not only once, into injustice.

Currently, to obtain a judicial decision, the „reasonable" period of time imposed by the European Convention on Human Rights is usually exceeded. Therefore, the central object of the legislative and institutional reform is to modernise the judicial system once with the establishment of certain non-judicial bodies to take over some of the litigations, and certain special procedures (for example, the procedure of conflict mediation, prior conciliation, payment procedure, etc.)

The negative effects of this poor state of justice are seen more strongly in the Central and Eastern European countries, where the lack of trial celerity, the low specialisation of the judiciary personnel and the poor logistics, but especially the hyperinflation, which „produces" a high rate of monetary erosion, fully affect the ineffectiveness of justice and the distrust in it.

There is a series of factors that generate the celerity crisis of the Romanian criminal proceedings and, actually, the Romanian judicial process in general, such as:

a) the unusually high volume of applications and trials, their diversity and the complexity of many of them, the novelty, and often the difficult legal issues, have also represented real obstacles in the judicial activity, causing, along with the other factors mentioned, most cases to greatly exceed the reasonable period of time for trial required by article 6 paragraph (1) C.E.D.O.

b) The poor quality of many laws, but especially the legislative instability or the excessive legislative mobility represents the cause that acts negatively in the reality of an

optimum justice, desired by all litigants, within a period of time as short as possible, especially in the context of a high inflation rate and, therefore, of monetary erosion.

c) Legislative diversity and mobility of the material skills has often „confused" the judicial process, blocking, sometimes even the proper administration of justice.

d) The economic situation of justice was and still remains, unfortunately, in its chronicle, a negative element; the lack of material conditions, the poor logistics and a poor or inadequate infrastructure place justice under the minimum standards of modernisation. The state of the meeting rooms, of the offices and archives, of the files, the absence or reduced information technology, no other adequate facilities, the lack of specialised Romanian, and especially foreign, books and magazines, are realities that cannot be ignored.

e) The lack of experience and professionalism in the management of the courts, the professional mediocrity and the poor performance of the trial participants in the optimal management of each case, and also a certain culture of slowness practiced and accepted even within the courts, among other factors, have facilitated the delay in certain periods, as a rule of justice, annihilating, to a great extent, the convention principle – the trial within a reasonable period of time.

Article 6 paragraph (1) of the European Convention on Human Rights states that everyone is entitled to trial of his/her case within of a reasonable period of time, meeting the „demand for celerity". The slowness of justice is sometimes denounced, which means convictions for states at European level. Nevertheless, by accelerating the procedures one could reach an opposite excess. A too fast procedure could be contrary to article 6, thus the period to be judged becoming „unreasonable".[3]

The Old Criminal Procedure Code did not expressly provide a regulation of this principle. It found its application in the Romanian criminal trial through some articles included in the Criminal Procedure Code, connecting with article 6 of the European Convention on Human Rights.

The present study aims to analyse the celerity of the trial phase deployment, mainly from the perspective of article 6 paragraph 1 of the European Convention on Human Rights. This clarification is necessary because the Convention also contains in article 5 paragraph 3 the provisions concerning the right of trial within a reasonable period of time of any person under preventive custody. This text has the character of a special rule as compared to article 6 paragraph 1, characterised by the fact that it relates only to the proceedings before the first instance, and the examination of reasonableness is much stricter in the case in which the defendant is taken into custody[4]. Also, article 5 paragraph 3 aims to protect people against excessive preventive detention, despite the right to liberty and the presumption of innocence, while article 6 paragraph 1 establishes the right to a reasonable duration of the procedure.[5]

The differences between article 5 paragraph 3 and article 6 paragraph 1 have been established by the European Court of Human Rights through a decision[6]: „the provisions of article 6 paragraph 1 do not overlap with those of article 5 paragraph 3 since the former give rights to every individual (...), while article 5 paragraph 3 refers only to the persons

[3] Jean-Francois Renucci, *Tratat de drepteuropean al drepturiloromului [Treaty of European law of human rights]*, EdituraHamangiu, 2009, pp. 460-461.

[4] Radu Chiriță, *Convențiaeuropeană a drepturiloromului. Comentariişiexplicații [The European Convention on Human Rights. Comments and explanations]*, 2nded, Editura C.H. Beck, Bucharest, 2008, p. 303.

[5] Radu Chiriță, *"Celeritatea procedurii – Misiune imposibilă?" [Celerity of the procedure – Mission impossible?]*, Pandectele Române Journal, no. 6/2005, pp. 164-165.

[6] Stogmuller vs. Austria Case, court decision of 10 November 1969, paragraphs 5-6, www.jurisprudentacedo.com.

who are in a state of detention (...). Article 5 paragraph 3 appears thus as an independent provision which produces its own effects, regardless of the facts that appear in the grounds of the arrest or the circumstances that have caused the extension of the training phase."

At international level, the right to trial within a reasonable period of time within the carrying out of the case is also regulated in the Covenant on Civil and Political Rights, where it is stipulated, in article 14 paragraph 3, that any person charged with an offense has the right to be tried without undue delay.

Internally, the Constitution of Romania stipulates in article 21 the right to a trial conducted with celerity. The constitutional text leads to the conclusion that the reasonable period of time is a characteristic of the trial in general, in the present case of the criminal trial. A trial that would take, without valid justification, a long period of time cannot be a reasonable one, affecting both the general interest of the society and the personal interest of the parties involved in the trial. In the same way, the current Code of Criminal Procedure includes, in article 8, the principle of fairness and reasonableness of the criminal trial, stating that any person who has committed an offense is punishable by law, within a reasonable period of time.

Celerity is a constant of European law; it is worth noting that the requirement for procedural celerity very often comes back from the texts of the European Convention on Human Rights as an obsession and that the Strasbourg Court is very strict on this principle, both in civil matters and in criminal matters.[7]

Since the overly extended duration of the proceedings affects the smooth achievement of justice, similarly, a too short procedure tends to lead to the same result. This duration varies from country to country. Thus, it was argued that it is strange for a continental, especially for an Italian, to understand that the English constantly complain about the length of the criminal trials, given that in England, in general, most criminal trials last up to maximum 6 months, while in Italy it often takes six months between the filing of the indictment and the first hearing day.[8]

The calculation of the „reasonable time" in which a case must be resolved, as the Court has pointed out, happens much before the beginning phase of the trial or even the prosecution. Thus, there have been situations in which the Strasbourg Court has emphasised that, in criminal matters, the duration of the procedure is counted, as initial term, from that moment for which there is an official document of the state containing, explicitly or implicitly, a formal charge against the applicant or from the moment when a document of the State appears and which has important consequences for the applicant's situation.[9] The starting point of the procedure is not the one of the applicant's indictment, but the one from which there is an accusation against him/her.[10]

Regarding the final moment of this term, the Court held that it is represented by the date of the final judgment of the conviction or acquittal of the person concerned.[11]

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[7] Gheorghiță Mateuț, *Tratat de procedură penală. Partea generală [Treaty of Criminal Procedure. The general part].* Volume I, Editura C.H. Beck, Bucharest, 2007, p. 239.
[8] Radu Chiriță, op. cit., p. 307.
[9] ECHR, Lehtinen vs. Finland Case, court decision of 13 September 2005, available on the website of legal abstracts www.jurisprudentacedo.com.
[10] ECHR, Intiba vs. Turkey Case, court decision of 24 May 2005, available on the website of legal abstracts www.jurisprudențacedo.com.
[11] VasilePătulea, Fair trial. Commented jurisprudence of the European Court of Human Rights, Romanian Institute for Human Rights, Bucharest, 2007, p. 164.

In many decisions, the European Court of Human Rights has considered the „overall length" of a procedure, thus including various procedural stages before all judicial authorities called upon to decide, including, for example, the Court of Cassation (the Rapacciuoloc against Italy Case, decision of 19 May 2005), as well as the fact according to which in a state there are several levels of jurisdiction cannot be used to justify a longer settlement term of the appeal because the duty belongs to the states to organise their judicial system.[12]

In its jurisprudence, the Strasbourg Court has considered that there is also the possibility that the last point of the length of the procedure is that of the order to withdraw from prosecution, since until that date the defendant has been waiting for the outcome of his/her case, and the fact that for three years there has been no pleading leads to the conclusion that there is a huge period of inactivity on the part of the prosecution.[13]

Furthermore, the European Court of Human Rights adopted nuanced and balanced solutions, deciding, for example, that the temporary overloading of the role of a Court does not bind the international liability of the State found in such a situation, if it shall promptly adopt steps to remedy such a situation, which would seem justified in such cases, the very establishment of a provisional order in solving certain cases, based on their urgency and importance.[14]

The criteria for assessing the reasonableness of the length of the procedure outlined by the European judges are: the complexity of the case, the conduct of the parties, and the behaviour of the competent authority.

The complexity of the case is a commonly used criterion. It analyses all aspects involved in the case: the volume of the probation, the difficulties related to the administration of the evidence, the investigations required in the case, the international dimension of the dispute, the need for expertise, the complexity of the procedure etc.

The conduct of the parties can sometimes be a factor in making the procedure harder and slower. Some examples in point can be: failure to be present at hearings, delay in communication the name of the witnesses, the frequent replacement of the defence counsel, the delay in communication some data necessary for the trial, etc.

The state is only liable for the delays imputable to it since a person who claims the unreasonable length of the proceedings must prove that he/she has filed diligence in order to carry it out normally (Case Pretto and others vs. Italy, court decision of 8 December 1983). Thus, the period of time in which the applicant has avoided prosecution and judgment is not taken into account in calculating the „reasonable period of time".[15]

The behaviour of the competent authority means that the State has not adequately fulfilled its celerity obligation stipulated in article 6. Here are some examples of such situations: the unusual length of the criminal investigation, the long duration of the transfer of the case between courts, the extended absence of the defendants' interrogation, the delay of the court in hearing the witnesses, hearing sessions too distant in time, failure to communicate the date of the trial, etc.[16]

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[12] Dragoş Bogdan, *Arestarea preventivă şi detenția în jurisprudența CEDO [Preventive arrest and detention ECHR jurisprudence]*, 2nd edition, revised, enlarged and updated, Bucharest, 2011, p. 256.

[13] ECHR, Schumacher vs. Luxembourg Case, court decision of 25 November 2003, available on the website of legal abstracts www.jurisprudențacedo.com.

[14] VasilePătulea, „*Theoretical and practical summary of the European Court of Human Rights in relation to article 6 of the European Convention on Human Rights. The right to a fair trial. Guarantees regarding the proper conduct of the trial. Explicit requirements. Reasonable period of time (II)*" in the Law Journal, no. 2/2007, year XVIII, Series III, p. 202.

[15] MihaiSelegean, *„Article 6 of ECHR – „The right to a fair trial," Studies on the jurisprudence of the ECHR*, National Institute of Magistracy, Bucharest, 2003, p. 165

[16] Bianca Selejan-Guțan, *European protection of human rights*, 4th ed., CH Beck, Bucharest, 2011, p. 140.

The Strasbourg court has emphasised that „only the delays attributable to the competent judicial authorities may lead to the possible finding of exceeding a reasonable period of time in which any case must be tried, an exceeding contrary to the Convention."[17]

The examination of a case by five instances of three different levels, which lasted eight years, eight months and eighteen days is a violation of the reasonable period of time. Thus, the case was sent twice to the court of appeal, as a result of the omissions of the Court of Appeal, this reference could have gone on forever since no legal provision may have stopped it. The assessment of the Strasbourg Court is that the national courts should have acted more promptly, given the subject-matter of the litigation which referred to a repair as a result of an illegal arrest.[18]

Referring the cases for retrial is usually ordered as a result of some errors committed by the lower courts, the repetition of these provisions within one and the same set of proceedings discloses a serious deficiency in the judicial system, the case being resolved by the trial court only after 8 years, a period in which, for six years, the trial courts were continuously on trial.[19]

Furthermore, also related to the assessment of celerity in criminal cases, it was admitted[20] that there were strong motivations for suspending a civil proceedings for waiting for the resolution of a criminal dispute on which the settlement of the civil case depended, but it was found that, in this case, during the period of the time in which the civil litigation was suspended, the criminal proceedings have experienced long periods of inactivity which are imputable to the State. The States are obliged to organise their judicial systems in such a way as to provide a reasonable period of time to any dispute.

In order to meet the need for celerity in the Romanian justice, the current Criminal Procedure Code introduces a new institution, the preliminary Board. The introduction of this new institution is based on the realities of the current legal life, namely the lack of celerity in carrying out criminal trials, the individuals' distrust in justice and the high social and human costs of the current criminal proceedings through the high consumption of time and financial resources. The main problems that the criminal judicial system has to face are related to the overload of the prosecution and courts, the excessive length of the proceedings, the unjustified delay of the unfinished cases and the failure to complete the files on procedural grounds.[21]

The object of the procedure of the Preliminary Board is regulated in article 341 Code of Criminal Procedure, which stipulates that the „preliminary board's procedure is to check the legality of starting the trial, as well as checking the legality of the evidence administration or of the performance of the procedural acts by the prosecution". The duration of the preliminary board's procedure cannot be longer than 30 days from the date of registration of the case to the court, but shall not be less than 10 days from the same date

[17] CorneliuBîrsan, *European Convention on Human Rights. Comment on articles. Volume I. Rights and freedoms*, Ed C. H. Beck, Bucharest, 2005, p. 533.

[18] ECHR, Damian-Burueană and Damian vs. Romania Case, court decision of 26 May 2009, paragraphs 96-98, ECHR Jurisprudence collection. Recent cases against Romania, Volume I, European Institute of Romania, Bucharest, 2009, pp. 340-341

[19] ECHR, the Bragadireanu vs. Romania Case, court decision of 6 December 2007, paragraph 120, available on the website www.csm1909.ro.

[20] ECHR Todorov vs. Bulgaria Case, court decision of 18 January 2005, available on the website of legal abstracts www.jurisprudențacedo.com.

[21] VersaviaBrutaru,"*Camera preliminară, o nouăinstituție de dreptprocesual penal" [Pre-Trial Board, a new institution of criminal procedural law]*, in the Law Journal, no. 2/2010, p. 199.

(article 342 of the Criminal Procedure Code), aiming at a greater celerity in solving the cases and the limitation of the criminal proceedings.

Conclusions

The celerity crisis affects the course of justice and the efficient settlement of the criminal cases.

When reference is made to the „reasonable" period of time for settling the cases, it is intended to conduct the trial efficiently, but in the context in which the requirement to establish the truth and defend the parties in the trial would be also ensured. The reasonable period of time means both efficiency and accepting the duration on which would depend the proper settlement of the case.

Establishing with certainty the fact that the person concerned is the offender triggers the calculation of the „reasonable period of time" in which a case must be settled.

The purpose of this procedural guarantee is to protect the parties against excessive length of the proceedings, as well as making an efficient and reliable judicial act. In the same way, through trial of the case within a reasonable period of time it is sought to avoid keeping the person accused of committing a crime in a state of uncertainty about his/her situation for a longer period of time.

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ASPECTS OF THE ACTIVITY IN THE *COURT WITH JURY* OF DAMBOVITACOUNTY, REFLECTED IN DOCUMENTS KEPT BY THE NATIONAL ARCHIVES

Ramona Elena STANCIU [*] **Nicoleta ENACHE** [**]

Abstract: *The tools characteristic of the classic juridical trial, namely the* ***Courts with Jury****, appeared for the first time in England, marking an important triumph in the fight for guaranteeing the citizen's individual freedom: they were meant not to allow any abuse of power from judges, from the State in general and, consequently, in time, they became part of the Statal system and basis of the judicial system.Therefore, in numerous countries with a democratic tradition, unlike the professional judge, they do not depend in any way on the power structures, both the quantitative component (a number of 12 jurors), and the representation of the different social groups subjecting the judicial act to social control.Taken over from the French law system, the Courts with Jury existed in our law between the middle of the 19th century and the beginning of the 20th century, the Constitution of 1864 foreseeing that they should be created alongside every Appellate Court.The present study focuses, however, on the provisions of the „New Law of Judicial Organization", of 24 March 1909, whose Title V (Art. 33-38) referred to the activity of the Courts with Jury, followed by the „Regulation of Public Administration for the Functioning of the Courts with Jury" of 28 July 1909, published in the Official Journal (MonitorulOficial) no. 97 of 30 July 1909.To these, we have added the main bibliographic source used in this research, namely the Fund Curtea cu Juraţi (The Court with Jury), with the extreme years of the documents created by the respective institution locally between 1911 and 1938 and kept at present by the National Archives – the Dâmboviţa Branch.For a complete exemplification, we have used a file of calumny by press, closely related to the political orientations of the inhabitants in the area of DâmboviţaCounty.*

Keywords: *Court, Law, Documents, Code*

The object of the present study is the description of one of the juridical institutions that existed in DambovitaCounty among the judicial institutions present here during the first half of the 20th century: **The Court with Jury**, appeared as a tool characteristic of the classical trial.The Courts with Jury appeared for the first time in England and the fact marked a triumph, especially in the fight for guaranteeing individual freedom for the citizen. Appeared in the 18th century, they were meant not to permit an abuse of power from judges, from the state in general and soon become part of the state system, practically lying at the basis of the present judicial system. In the beginning, The Court with Jury appeared out of the need to solve financial litigations.The notion of jurydefined a group of non-professional people, called to establish the guilt of the accused and pronounce a verdict. This procedure freed the judge from an unpleasant task, but it also offered the full guarantee that a person shall not be unjustly accused of having committed a criminal act. The jury participating in the trial was made up of people who knew the locality and the customs; the accomplishment of the task of juror was considered a public duty, while being delivered from it was a privilege. Out of the

[*] PhD., Valahia University of Targoviste, ramonaestanciu@yahoo.com
[**] Valahia University of Targoviste

people called to participate when lots were cast, 12 jurors were chosen, who then became part of the jury. The verdict was pronounced with a majority of votes. If the jurors were unable to reach a decision, the judge-president of the Court in the trial had the possibility of dissolving the Court.In France, The Court with Jury appears after the French Revolution of 1789, among the democratic principles whose bases were laid right then being the guarantee of individual rights and freedoms, through the participation of the people to the accomplishment of the act of justice.The New Criminal Procedure Code of the time of Napoleon, adopted in November 1908, remained in force with some modifications until 1958, since March 1959 being introduced essential changes regarding the makeup of the Courts with Jury, whose number increased to nine people, an unfavorable decision for the accused being possible only with a qualified majority of votes, namely no less than eight.The German Criminal Procedure Code, which continues to function with some modifications even at present, was adopted on February 1, 1877, also regulating the judicial procedure in the Courts with Jury, reestablished in 1950, with a component of three judges and six jurors.The institution also occupies an important place in the system of the judicial organs of the U.S.A., where the first Constitution in the history of mankind regulated in Art.3, the citizens' right to participate in the realization of justice; being judged by one's fellow citizens was, for any person, a constitutional right claimed not just by the citizens but also by professional jurors who consider that this institution undeniably assures the protection and guarantee of the parties' rights. In the makeup of the jury there are 12 people, in some States a lower number being acceptable as well. The verdict is pronounced by secret vote, based on the majority of votes[2].Therefore, the Courts with Jury, as institutions of judicial power, occupy an important place in the counties with democratic traditions. Unlike the professional judge, they do not depend on the structures of power from any perspective, both the quantitative component (a number of 12 jurors), and the representation of the different social groups submitting the judicial act to social control.Taken over from the French law system, Courts with Jury existed in the Romanian law between mid 19th century and the beginning of the 20th century, the Constitution of 1864 foreseeing their creation at every Appellate Court; since the year 1868, one such Court appeared in every county, and they judged political and press crimes, as well as criminal acts. The Court of Jurors was made up of a presidium including 3 jurors (the president being judge of Appellate Court, and the other two members - judges of the zonal Tribunal) and a commission of 12 jurors chosen from among the citizens of the county[3].Our interest in this study went, however, towards the study of the regulations of the „New Law of Judicial Organization", of 24 March 1909, whose Title V (Art. 33-38) referred to the activity of the Courts with Jury, followed by the „Regulation of Public Administration for the Functioning of the Courts with Jury" of 28 July 1909, published in the Official Journal (*MonitorulOficial*) no. 97 / 30 July 1909.The reason of this interest is the extreme years covered by the documents created by the respective institution locally and kept today at the National Archives – Service of Dambovita County, namely 1911-1938[4].The Regulation foresaw the creation of a Court of jurors for each county, prefects having the obligation not to omit from the tri-annual and annual lists with possible jurors any of the people reuniting the conditions set by the criminal procedure to accomplish this quality[5]. Mayors were to post the lists in a public place for those

[2] http://www.rasfoiesc.com/legal/drept/Curtea-cu-jurati-institut-indi26.php
[3] http://www.avocatnet.ro/content/articles/id_36028/Curtea-cu-jurati-ati-vrea-sa-dati-verdictul-intr-un-proces.html
[4] It is well known that the institution on which the present research has focused was annulled when the royal dictatorship of Carol II set in, and its prerogatives were taken over by other institutions.
[5] XXX, Codul General al Romaniei (General Code of Romania), V, Legiuzuale (Ordinary Laws), Supliment II (Supplement 2), f.619, Bucuresti, 1909

concerned to be able to see them, accompanied by a „*warning* regarding the term within which the discontent people had the right to turn to the prefect and to the tribunal, and to denounce any illegal presence in the list, omissions or exemptions. The mayor of every town shall prepare for the time during which the session was going to be held, the place of the County Council or any other roomy place, if such a place does not exist at the tribunal, where the jurors' meetings would be held."[6]For counselors-presidents, lots were cast, using balls, and the names were communicated to the Minister of Justice.The counties that were in the circumscription of every Court were grouped into two series, and the sessions of the Courts with Jury were going to take place successively, in each of the two counties, in three ordinary sessions per year. The meetings were opened at 12 a.m. and could legally last up to 6 hours. The garrison commanders of the cities that were also administrative centers of the county made available for the Courts the necessary people to guard the jury during the meetings and the urban police service sent an agent to the residence of the president of the Court, to accomplish the orders and measures taken by them. When he came into the city or left it, he was supposed to be „met at the train station by all the members of the tribunal and of the parquet."[7]DambovitaCounty was part of the circumscription of the Appellate Court of Bucharest, in series I, along with Ilfov, Arges and Vlasca and had its ordinary sessions between 15-25 October, 15-25 February and 15-25 May[8].The documents researched, which are part of the Fund *The Court with Jury of Dambovita County*, containing 137 files created between 1911-1938, most of them referring, as one could have expected, to: acts of violence and murders, robbery, battery, illegal arms possession, calumny in press, but also applications for the delivery of rehabilitation certificates.[9]In a few of these documents there are situations concerning: the people who had the possibility to have the quality of jurors, tables requested at the Prefecture, but also a significant number of applications for exemption from presence at the Court's meetings.[10] Studying the tables of the names of the citizens who had the possibility to become jurors, we can see that they are, most of them, self-employed or property owners, but here and there one can also find a pensioner, a veterinarian, an advocate, or an institutor. In the third category there appears the director of the Primary School for Boys No. 1 of Targoviste, who requested his exclusion from the list, as his profession made it impossible to exert this function of juror. Yet, his demand is denied:"Jurnal de respingere" ("Overruled").[11]Some of the applications for exemption were nevertheless fully justified and this is why they receive „Accepted", as in the case of losing the quality of self-employed (ex. IonescuVasile of Motăeni) or of the ceasing, for other reasons, of the possibility to meet the conditions foreseen by the law for the exercise of this citizen obligation.At the same time, the justified requests, triggered by medical conditions or an advanced age are also accepted (such is the case of the famous Stan Rizescu, „over 63 years of age, an age making it impossible for me to..."[12]), as well as the situation when it was urgent and absolutely necessary to be present at home (ex. Ion Călinesti who had been called by telegraph to intervene to save his 600 sheep threatened by floods)[13].The demands are also rejected when, although medical certificates are

[6] *Ibidem*
[7] Idem, f.624
[8] Idem, f.622
[9] See SJAN Dambovita, Inventar nr.144 (Inventory no. 144), Fond *Curtea cu Jurati a JudetuluiDambovita* (Court of Jurors of DâmboviţaCounty), f.1-6
[10] SJAN Dambovita, Fond *Curtea cu Jurati a Judetului Dambovita,* dos.5/1922, dos.11/1924, dos.47/1932, dos.61/1932
[11] SJAN Dambovita, Fond *Curtea cu Jurati a Judetului Dambovita,* dos.5/1922
[12] *Ibidem*
[13] Idem, dos.61/1932

presented, it is considered that the problem is not serious or does not sufficiently justify the absence from a meeting.While in most of the files judged in similar cases one can notice repeatability in time of the instrumentation of the cases and solutions of the Court, the last case is singular and this is precisely why it has drawn our interest.It actually refers to the public accusations made in the year 1930 against the director of the school of GuraOcnitei, namely VasileStăncescu, in a memo printed and disseminated by the members of the National Peasants' Party (PartidulNaționalTărănesc), on the occasion of the election of the new local School Committee.[14]In the indictment drafted by the first prosecutor of the Tribunal of Dambovita, it was shown that the defendant IancuPopescu, a mechanic, claimed that the school director had „taken in his pockets, out of the school income", almost two million lei, illegitimately.The minute of the meeting of the Court, of 2 November 1931, just as all those of the cases in development at The Court with Jury of Dambovita County, reflects the stages of the meeting as well as the membership of the Court during the respective meeting: president - MirceaOdobescu (first president of the Tribunal of Dambovita), assessors - N.Georgescu Ceptura (judge in the respective meeting) and C-tin Oprescu (alternate judge), both of them from the Tribunal of Dambovita County, attorney general of the Tribunal of Dambovita County: Al.Popescu and the actuary IoanRădulescu.There were also present the witnesses, located in a special room.The actuary called the names of the 25 titular jurors and of the 2 alternate jurors, the defendant and the representative of the Public Ministry having the right to challenge 6 of them on two occasions, for the first one the challenge being assured by his advocate, V. Alexe.After the drawing of lots, the names of the 12 members of the Commission of jurors were read, who took their oaths, after which the actuary began to read the documents in the file.One by one, the attorney general, the defendant and the witnesses and the defendant's advocate were inquired, then the President of the Court asked the jurors - if things were „clear as the light of day" - to withdraw to the room meant precisely for deliberation.On his return in the court room, the president asked the first juror to announce the result of the deliberation, then the defendant was introduced, to be announced about it as well.Following the unanimously negative answer to all the accusations emitted, the conclusion was, in the end „Acquittal ordinance".[15]

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MEDIATION IN CRIMINAL MATTERS

Dan BOTEZ *

Summary: *Mediation in criminal matters differs from mediation in other areas. Criminal action forces the parties involved in a conflict to overcome a difficult emotional and the fundamental discussion takes place after a period in which the parties are calmed down and involved in active listening and other techniques that the mediator should apply. The mediator, in most of the cases, must overcome, due to his psychological training and his natural ability, the fact that the parties are guilty, which might create a communication barrier. We intend to analyze how mediation can be applied to criminal matters/ conflicts.*

Keywords: *mediation, crime/ offense, victim, process, responsibility.*

1. Introduction

Mediation in criminal matters represents in the Romanian legal system a relatively new field which, somehow, arouses certain interest, although, this happens much later than in other European countries.

Romanian legal system, following the directions of principle established within the European Union, adopted legislative rules which offers the possibility and the conditions of solving the civil lawsuit, commercial and also a restricted category of criminal cases, through mediation[1].

The institution of mediation is regulated by Law No. 192/2006, which was amended[2].

Mediation is a voluntary process through by the parties, in the presence of a neutral mediator, impartial and in completely confidential, with the help of the solutions found by the mediator himself, will resolve the dispute[3] which is to be solved.

However, mediation is an alternative way to solve a conflict – the parties have to choose a specialized person (mediator) who may assist them, helping them to reach an agreement in a dispute they may be involved.

In criminal matters, the system of solving amicably a dispute – ADR[4] (Alternative Dispute Resolution) is more difficult to be applied because of the special nature of the criminal actions, which, considering the social danger exhibited and its gravity are judged by courts only after thorough investigations made by the prosecutors.

The mediation agreement may intervene in the offenses for which the law provides that the withdrawal of prior complaint or of reconciliation of the parties removes criminal

* Lecturer PhD - University of Wallachia, Faculty of Sciences and Engineering, Alexandria Department.

[1] Dragne Luminita, Tranca Ana Maria, *Mediation in criminal matters*- Legal Publishing House, Bucharest, 2001, p.9.

[2] Published in the Official Gazette nr.441 of May 22nd - 2006. Law nr.370 / 2009, published in the Official Gazette nr.831 of December 3rd -2009. OG no.13 / 2010, published in Official Gazette No. 70 of January 30th 2010. Law no.202 / 2010, published in the Official Gazette nr.714 from October 26th - 2010.

[3] Mugur Mitroi, *Mediation and conflict*. Conflict analysis - the amount of disputes, Rotech Publishing House - Pro, Bucharest, 2010, p.62.

[4] Dragos Radulescu Marian, "Alternative Dispute Resolution", *Magazine of Statistics*, Supplement first trimester / 2012, Bucharest, 2012, p.133

liability. This may happen only if the conditions provided by law are met. (Penal Code art.158-159)

These offenses are: art.193 - hitting or other acts of violence; art.196 – culpably bodily injury; art.199 - domestic violence; art 206 - threat; art.208 - harassment; art. 218, paragraphs 1 and 2 - rape; art.219, paragraphs 1 – sexual aggression; art. 213 - sexual harassment; art.224 – breaking into a house; art.225 - violation of professional secrecy; art. 226 – violation/ invasion of privacy; art.227 - the disclosure of professional secrecy; art. 231 - theft among relatives; art. 238 - breach of trust/ trust abuse; art. 239 - breach of trust by defrauding creditors; art.240 - simple bankruptcy; art. 241 - fraudulent bankruptcy; Art.242 - fraudulent management; art. 243 - acquisition of a property/ good found or which arrived at the offender by mistake; art.244 - swindling; art. 245 - Insurance deception/ trickery; art.253, paragraphs 1 and 2 - destruction; art.256 - possession disorder.[5]

According to art. 16, letter c of the Code of Criminal Procedure, it is prevented the initiation and pursuit of criminal proceedings when „the preliminary complaint was withdrawn, concerning the offenses for which the withdrawal removes criminal liability, reconciliation occurred or it was concluded a mediation agreement obeying the law. „

In the rest of the cases, the prosecutors may decide by themselves to investigate the cases, having legal obligation to discover, track and catch the offender and ask the competent court, during the trial, the application of appropriate penalties as required by the deed committed, in accordance with the law.

Mediation is defined by art. 1 of Law no.192 / 2006, revised, concerning mediation and the mediator profession:

„(1) Mediation is a way of resolving conflicts amicably with the help of a third party who is specialized as a mediator, in conditions of neutrality, impartiality, confidentiality and having the free consent of the parties.

(2) Mediation is based on the trust that the parties share with the mediator, considering him a person able to facilitate negotiations between them and support them to resolve the conflict by reaching a solution mutually convenient, efficient and sustainable. „

As regards the profession of mediator, the 7th article of this law stipulates:

"It can become mediator the person who meets the following conditions, cumulatively:

a) having full legal capacity of acting;

b) having higher education;

c) having a working experience of at least 3 years;

d) being able, medically, to accomplish such an activity/ profession;

e) enjoys a good reputation and was not finally convicted for committing an intentional crime, such as to affect the prestige of the profession;

f) the party has graduated a mediator training course, as requested by the law, or another course after finishing faculty, accredited by law and approved by the Mediation Council;

g) the party was authorized as a mediator, according to this law. „

The mediation agreement is governed by article 58 of the present law:

„(1) When the parties involved in a conflict reached an agreement and it can be drawn up a written agreement, which will include all the clauses consented by the parties and

[5] See also detailed analysis of these crimes by reading Gheorghe Diaconescu, Duvac Constantin – „Treaty of criminal law. Special Part", Ed.Ch.Beck, Bucharest, 2009. Also see Antony George, Bulai Constantin, „Dictionary of criminal law and criminal procedure", Hamangiu – Publishing House, Bucharest, 2011.

which is equivalent of a document under private signature. Usually, the agreement is drawn up by the mediator, unless the parties and the mediator agree otherwise.

(2) The understanding of the parties must not contain stipulations affecting law and order, in this case, the stipulations of art. 2 being applicable.

(3) The understanding of the parties may be affected, according to the terms and conditions of the law.(4) If the dispute which is mediated concerns the transfer of ownership concerning immovable property and other real rights, shares and inheritance cases, under penalty of total nullity, the mediation agreement drawn up by mediator will be presented to the public notary or to the judgment court, because these documents, based on the mediation agreement, must check through their content and form the procedures prescribed by the law and issue an authentic document or a court order, as appropriate, in compliance with legal procedures. Mediation agreements will be checked to make sure that the conditions of substance and form are met, the public notary or the court, as appropriate, could bring them appropriate amendments agreed between the parties.

(4.1) The mediator is bound by the obligations stipulated under par. (4) and if the mediation agreement is established, it is modified or eliminated any real estate right.

(5) The obligation under par. (4) applies in all situations which the law requires, under the penalty of nullity, and under the fulfillment of some conditions of substance and form.

(6) Where the law requires that the conditions for advertising must be met, the public notary or the court will ask that the logged enrollment contract or the judgment decision be included in the Land Registry. „

2. Mediation in criminal matters

Bringing the parties to a face to face discussion, mediation is a procedure which tries to resolve an existing conflict, with the assistance of a specialized person, neutral and impartial, called mediator, and who is specialized in the management of conflict situations.

As it is defined and designed, mediation is applicable to numerous disputes, particularly those concerning services, but also those related to family issues or civilian issues, being considered a way to reduce conflicts at low cost in a shorter period of time, benefiting by civilized conditions and, of course, full confidentiality.

In criminal matters, it can be seen that mediation is very useful in conflicts of lesser importance, which range from interpersonal conflicts or from situations of good neighborliness and to whom the legislature itself has left the parties the choice of prior complaint to start criminal proceedings and also the choice of reconciliation to stop the criminal proceedings.

Therefore, the mediation procedure cannot be used in conflicts where the parties, even if they reach reconciliation they cannot escape criminal liability, the reconciliation, in this case, is nothing but as a way of finding their peace of mind in what it is called restorative justice and where the finding and understanding the actions which led to a criminal offense, and the ways by which the psychological trauma left after committing a crime can be separated and removed.

In criminal matters mediation there can be several different forms of mediation, among which the most common[6] are:

[6] Fiscuci Carmen, "Particular aspects to apply mediation in disputes in the private sector," *Romanian Magazine of ADR,* no.1, Ed.Nomad Lex, Bucharest, p.24-25

Victim-offender mediation, which can be direct (the victim and offender meet face to face) and indirect (used when one party, for good reasons, does not want direct encounter with the other party).

Family victim-offender meetings. The victim and the offender are accompanied by their families or other related persons indirectly affected by the crime and who can express views on the situation as a result of the offense.

Community Meetings victim-offender. Along with the victim and offender, and their families the entire community can participate in finding the most appropriate solutions to remove the causes that led to committing the crime and to solve the consequences that appeared after that.

Groups victims-offenders. Criminals and victims who form groups are not directly linked, but they have committed or suffered the same type of offense. It is met when criminals have not been found or one party refuses to participate in a restorative process.

Surrogate victim-offender mediation. When a party refuses to participate in restorative action and the other part is too vulnerable to attend a group meeting, we rely on a surrogate victim or an offender, namely a person who has suffered or committed the same type of offense and it is in the same situation of refusal or vulnerability.

The adoption of mediation in criminal matters comes up with a change of perspective as compared to the classic justice, where the offense was regarded as an act directed against the state, a violation of criminal law, without taking into account the trauma brought to the offense, by a participatory approach of the parties involved in the conflict resolution.

Thus, mediation in this new criminal philosophy is based on the understanding of the party who committed the crime and the harm done to the victim by his deed, by accepting his responsibility and trying to repair the harm done, and, on the other hand, by the understanding of the victim the reasons which made the offender act accordingly.

From this perspective, it is clear that mediation encourages the direct involvement of the victim and offender in conflict resolution through dialogue, by offering to the offender the opportunity to take moral responsibility for the deed and rectify, as much as possible, the evil that was caused, while the victim is given the opportunity to express directly his feelings and points of view concerning the offense committed.

In this way it can be coated the victim's need for protection and the need for social reintegration of the offender.

Because of the remembering of the facts that occurred, during the mediation process, the process is quite difficult. For this reason special thorough training of both the mediator is required and of the parties too, in order to be able to handle any situation that may arise, a new trauma of the victim is undesirable due to the consequences that may occur.

3. Principles of criminal mediation

Mediation in criminal matters is governed by certain principles that must be respected within it. These principles are.

I. Ensuring the victim a psychological comfort;

II. Avoiding re-victimization;

III. Providing psychological comfort for the offender.

I. Ensuring the victim of psychological comfort

Due to the shock suffered as a result of the crime, the victim may experience various states such as - fear, shame, confusion, posttraumatic stress etc. Although the victim consents to participate in the mediation process, meeting face to face with the offender can lead to difficulty in expressing the perspective of the victim of the offense and its consequences on her life, to express his feelings and emotions. The victim can avoid offering certain items because the victim may consider them unimportant or the victim may feel ashamed to talk about them or ha may actually forget (post-traumatic amnesia) certain stages of the victimization process.

To create the necessary psychological comfort, even from the first contact with the victim, the mediator must provide the victim the possibility of choosing the time and the place of the meeting with the offender and let the victim decide whether the first mediation session will begin with her story or with the offender's story. The mediator must ensure the victim that he/she may stop anytime the mediation session unless he/she feels safe or he/she suffers a feeling of re-victimization. During mediation sessions, the victim must be helped to control his/her feelings and emotions and also to feel that he/she is a priority.

The breaks and moments of silence must be obeyed and the parties should be allowed enough time to express their opinions or to unfold a dialogue, provided that it does not escalate into aggression or lead to reliving the traumatic event. This can have an extremely negative effect on the victim, in addition to negative psychological consequences, causing major alterations of the mediation process, the victim can get into an emotional blockage.

II. Avoiding re-victimization

The worst effect, psychologically, which the victim can feel during the mediation process is re-victimizing.

Measures to avoid re-victimization:

- *Contacting the two sides*. At first the offender is contacted, then he is asked to admit the offense he has committed and finally, he is asked for his agreement to participate in mediation.

- *Preparing the victim and the offender for the common mediation session.* The mediator provides the parties with information on the role and conduct of the mediation process, of how to conduct a proper meeting, of the participants and any other information requested by the victim. It is highly likely that in individual meetings, prior to the process of mediation, both the offender and the victim may ask for information concerning the other side/ party. It is forbidden for the mediator to provide such information without prior consent of both parties.

III. Providing psychological comfort for the offender

During the mediation process the offender must be treated with the same attention as the victim is treated. There must be an express consent of the offender to participate in the mediation process, and throughout the mediation the offender must be ensured physical security.

Stigmatization/ denigration and humiliating the offender must be avoided, with the emphasis on the deed committed and how to repair the harm done by the offender, making him understand the consequences of his deeds on the victim.

Also, the offender must be protected by any possible attacks coming from the victim with the opportunity to withdraw from the mediation process if he considers that he does not feel comfortable.

To streamline the dialogue and enabling a favorable environment, the mediator must allow free discussions without any constraints between the victim and aggressor.

4. Conclusions

The resolution of the disputes through mediation clearly brings benefits on many levels. First of all it contribute to improve the act of of justice - courts shall relieve the causes, shifting the center of gravity from the quantitative criterion of cases to the quality of the solutions adopted, litigants have an alternative to the judicial system and their defendants assists them or presents the mediation procedure.

The concept of mediation and the idea of solving amicably the conflicts is closely related to cultural identity and traditions of a people, and thus, their implementation involves a long process.

Mediation in disputes between victim and offender enables each party to describe the way he perceived and lived the deed, in order to agree that there has been an injustice, certain damage occurred and in order to participate in helping to return to reality.

Through mediation, both the interests of the victim and the offender and society are satisfied, thus demonstrating that they are not incapable, and that the solution is for the benefit of all parties involved.

Taking a conciliatory nature, mediation supports the criminal justice system to achieve the fundamental objectives of ensuring peace and order through the establishment of normality in the development of social relations.

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CONSIDERATIONS REGARDING THE IDENTIFICATION OF THE PERSON THROUGH GENETIC METHODS

Alina Daniela PĂTRU [*] **Diana Anca ARTENE** [**]

Summary: *The identification of the person based on their genetic imprint can have as a scope the medical or scientific research, as well as, in a civil or criminal proceedings, it can be subject to the conditions provided by law. The genetic imprint represents the generic name of a plurality of complex investigations that concern fragments of nucleic acids research structures that exist in biological samples in order to identify the persons from whom they originate from. By taking into consideration that each cell, except the red blood cells (which are cells without nucleus) is carrying nucleic acid, which means that in practice, any biological sample containing cells can be analyzed and compared with samples taken from the person we suspect, this can provide the more accessible manner in which the extreme lightness large area spreading methods or genetic can be understood. The introduction of these advanced methods of identification was possible mainly due to its benefits relating to the reduced amount of samples required, but especially, accuracy and precision, for which Western states gave up to other methods of identification, the genetic methods becoming therefore exclusive.*

Keywords: *modern genetics, genetic identification, genetic imprint, DNA profile*

I. Introduction

The examination of genetic characteristics is likely to affect the human person and his fundamental rights to privacy, dignity, liberty and physical integrity.

The danger of using information obtained in this way, with a total contrary purpose to the person`s interest, is extremely large reason why the Romanian legislator has limited circumstances where such a breach of the inviolability of the human body could be permitted by regulation made under the Civil Code.

In legal proceedings, based on the identification of the person`s genetic imprints is to obtain evidence of the upward or downward of a person and to establish the presence of the person in a certain place, committing a crime by another person.

On 22ndFebruary 2001, The Romanian Parliamentratifiedthe European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, adopted in Oviedo on 4 April 1997, which provides, inter alia: „any form of discrimination against a person on account of his genetic heritage is prohibited „[1].

For a better understanding of the concepts mentioned above, is necessary to clarify some aspects of DNA - the genetic and modern.

The times at which the modern genetics have emerged can be established in 1900, with the rediscovery of the rules emphasized by Gregor Mendel who was a biologist and

[*] Assistant Professor PhD, Spiru Haret University, Faculty of Law and Public Administration Bucharest.
[**] PhD Lecturer, Spiru Haret University, Faculty of Law and Public Administration Bucharest.
[1] Council of Europe *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Council of Europe Treaty Series no. 164, Oviedo 1997, art. 11.

mathematician, after nearly 30 years of absolute ignorance, the rules set by the founder and father of genetics since 1865 in a series of scientific magazines. Seemingly, the year 1869 is considered the year of the discovery of DNA.

In 1900, it was coined for the first time, the word „gene" and in 1910, the first demonstration that each gene can assimilate a particular chromosome, was notified to the scientific environment. The year 1913 is when the first genetic map that shows the relative location of six genes on a chromosome has seen the light of the day.

The American researcher Oswald Avery had a decisive role in the development of modern genetics and has established the role of the cellular component of DNA (deoxyribonucleic acid) in the transmission of hereditary characters, which occurred in 1944.

For a long time, research on DNA were considered to have a purely medical interest, a „*peripheral interest to forensic*[2], but its communication by the English geneticist Alec Jeffreys John in 1985 opened another path in the possibility of individual identification based on hyper variable repetitive areas of human DNA being the manner in which the forensic revolutionizes. The investigation into the human genome project, consisting in identifying the DNA of every living cell of an organism, proving that the code is heredity support, id est footprint absolutely unique genetic nature, of each individual.

Alec John Jeffreys British has proved within the justice system the importance and value brought by his discoveries in the field. In this regard, the first applications allow solving problems of emigration and paternity leave, and soon, the famous Queen vs Pitchfork murder case in which a teenage girl was raped and murdered, the killer was identified by looking at his genetic imprinting which followed after the genetic screening performed on 550 men aged between 13 and 30 years, the region where the crime occurred, genetic profile of one of the donors subsequently proved to be identical with that obtained from semen collected from the victim's body. A local, Colin Pitchfork was eventually arrested and convicted after a friend's admitted that he provided false identification to Pitchfork`s evidence.

Within the American legal system, the introduction of the DNA testing was based on Frye standard according to which a new technique science must be sufficiently stated as to achieve general acceptance in the scientific field to which it belongs, before being brought in front of the judge[3]. In essence, to apply the Frye standard court had to decide whether the procedure, technique or principles in question were generally accepted by a significant part of the relevant scientific community.

The DNA is a polymer, a large molecule with a helical structure and is composed of two chains of genetic material, coiled around each other in a spiral, each chain comprising a sequence of nucleotides which are designated conventionally by ACGT letters: adenine, cytosine, guanine and thymine grouped along a twisted band, whose structure has been designated as the „double helix"[4]. Therefore, the biological scheme of each individual represents their own unique such that there cannot be two identical genetic imprints, except those of the identical twins and those resulting from a single fertilized egg divided into two. In order to obtain a genetic imprint are usually being used two techniques: RFLP and PCR. Polymerase chain reaction, PCR id est, compared with a „copying at the molecular level", is a method for in vitro enzymatic amplification of a specific DNA sequence, the process cycle is repeated several times, resulting in the exponential increase the amount of the desired genetic material. This technique, very fast and reliable, has completely replaced the

[2] Aron Ioan, *Biometrics – forensic method for the identification of people*, Summary of PhD thesis, Bucharest, 2010, p. 52.
[3] Cârjan Lazăr, Chiper Mihai, *Forensics*, Publishing House of Tomorrow Foundation Romania, Bucharest, 2009, p. 146.
[4] *Ibidem.*

one designed by Jeffreys, more laborious and time consuming[5]. Molecular biology techniques allow each individual to assign a numeric literal code, for example, XZ-34-68-10I2-33-46-98-1516-45-33-88-91-1212. The letters signify gender (XZ = male, XX = female), and the figures are characteristic genetic configuration of each individual[6]. As recorded literature, writing code that is universally valid information and biochemical mechanisms involved are complex on the one hand and on the other hand very precise[7].

II. Advantages and disadvantages of the genetic imprint

The genetic expertise gained an important place among the sample material means and is considered a real „queen of evidence" or „perfect test". In fact, this is a real weapon, relatively recent, forensic arsenal, infallible, establishing the exact circumstances of the crime, the perpetrator or perpetrators through DNA.

Among the advantages brought analyze forensic DNA can mention: Reliable identification of persons sought by justice of the declared missing after disasters or suspected commission of serious crimes: murders, rapes, robberies; establishing paternity, etc. emigration problems, subject to genetic analysis sample size can be reduced to the size of a molecule, DNA is present in all living organisms and in all nucleated cells (blood, semen, saliva, sweat, urine other body fluids, tissues, pulp, amniotic fluid, etc.), age is not an impediment evidence in making them and cannot be confused with the human DNA of other living organisms, whereas in 2000 it was brought in first plan an absolute scientific novelty: the full map of the human genome, the possibilities of error in identifying human DNA or the DNA confused with other living organisms (insects, animals or plants), is practically impossible[8].

It is imperative to mention that genetic imprinting method has some disadvantages, namely: the level of performance depends heavily on the technique used, the degree of specialization and ultimately, the experience of technicians can possibly challenge the admissibility of such evidence by invoking the family relationship, the apparatus used, quality analyzes, specific reagents and training level technicians leading to significant cost determination, genetic techniques while using fragments of nucleic acids and reagents multiplier, creating the possibility of inter- contamination some or contamination of samples by the staff in charge, obviously, if not absolute respect all rules and safety precautions.

In Romania, there were spectacular results in solving complicated cases, doomed to remain unidentified authors, specialists of the National Institute of Forensic Medicine „Prof. dr. Mina Minovici" of Bucharest (paternity) and the Institute of Forensic Medicine Craiova (made famous cases: identification based on the expertise of hairs of psychopathic killer in Satu Mare Otto Varadi who raped and brutally murdered several girls in summer 1998; identifying the murderer Mircea Potopand the rapist Marin Neacşu from Iaşi, etc. - see bulletins DNA typification)[9].

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[5] CoculescuBogdanIoan, „*DNA profile (genetic imprint) - Part II, Analysis by polymerase chain reaction (gene amplification technique - PCR)*", Journal of Military Medicine, No. 4, Bucharest, 2006, p. 330.
[6] CârjanLazăr, Chiper Mihai, *op.cit*., p. 146.
[7] PotoracRomică, *Tactics identifying and valuing genetic samples from crime scene*, Journal of criminology, penology and criminology, no. 4, 2009, p. 224.
[8] Dawkins Richard, *A river flowed out of Eden*, Humanitas Publishing House, Bucharest, 1995, p. 12.
[9] CârjanLazăr, Chiper Mihai, *op.cit*., p. 148.

III. The identification of biological traces in the crime field

Identifying biological traces of the crime scene is a stage where an experience officer or prosecutor plays a key role in investigating the crime scene forensic. At this stage of forensic investigation cannot identify the nature of biological traces (blood, secretions, etc.) that can be performed only after an examination in the laboratory, according to the result of biochemical tests.

In terms of DNA, biological traces are divided into three categories, namely: biological traces with high degree of accuracy in identifying DNA profile which includes samples of blood, saliva and semen and those with potential biological traces DNA definition, category which includes vaginal fluid, nasal secretions, haircuts, skin cells, urine, body parts, bones, traces of potential mitochondrial DNA analysis.

The transfer of biological traces may be the result of the following situations: DNA transfer suspect the victim (the body of his clothing or objects), the suspect DNA transfers an object from the scene, the transfer of DNA victim to suspect (on his body or clothes) DNA transfers an object belonging to the victim from the scene, DNA transfers a suspect witness or victim, a witness DNA transfer on an object from the scene.

Blood, semen, tissue, bone, hair and saliva can be transferred directly on a person's body, their clothing, or an object found at the scene[10].

Sometimes, biological traces can be transferred to the victim, suspect, witness or object through an intermediate vector. In this case, there is an indirect transfer of direct physical contact between DNA source and target surface transfer vector can be a person or an object. It is important to point out that this indirect transfer of all biological sample is not likely to tie an individual to a particular offense.

The investigation of forensic biological traces lies clearly in the area of interference with forensics forensic science but cannot speak of a mere forensic or forensic examination, but an interdisciplinary research typical for forensic expertise which in the judicial practiceis called „complex expertise"[11].

Biological traces showing some features, such as color, layering, fluorescent etc., but that may be common to other materials. Given this, the only applicable rule is that absolutely all traces found in the criminal field with common aspect of biological traces are collected, packaged, marked and submitted to the laboratory for determining the nature and species belonging to these traces.

The genetic analysis purposes judicial biological traces from the crime field, ie judicial genotyping, is increasingly becoming a challenge in specialized laboratories, due to the addressing techniques adapted quantity and conservation status of biological material made available[12].

Sometimes, traces containing DNA can be transferred (the victim, suspect, witness, and object) through intermediate vector. If there is an indirect transfer of direct physical contact between the source and target surface DNA. In these cases, the transfer vector can be a person or object. Indirect transfer of a trace does not constitute evidence to link a person to an offense.

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[10] *Idem*, p. 149.
[11] Stancu Emilian, *Forensics,* Third Edition, Actami Publishing, Bucharest, 2000, p. 187.
[12] Potorac Romică, *op.cit.*, p. 234.

Investigating the genetic identification of traces meant to serve exactly the same technical steps through specific biological traces (blood, semen, saliva) from discovery, to fixing photographic and lifting.

IV. Rules of lifting and handling of samples for DNA analysis

The genotyping success of high biological traces on the ground depends significantly on how is being lifted and their conservation. In this respect, the technique of harvesting and registration of samples, the amount and nature, manner of handling, packing method and, not least, the storage conditions are vital in order to achieve real and sustainable results through DNA analysis. Thus, if the biological traces are not registered, harvested, packed and stored properly, observing all the rules of art, they will not meet the basic conditions to their admissibility as evidence in court. Even their valuable origin cannot be contested if the samples are properly registered before collection. If the harvesting was done incorrectly, it can destroy the evidence incorrectly, the samples may be contaminated and also keeping a degraded samples can lead to degradation. Absolutely all of these elements may negatively influence and decisive success genotyping biological traces collected from the crime field.

In order to avoid the negative influence of genotyping tests on-site, investigation will be used, especially, latex surgical gloves which will need to be changed every time a move to raise new evidence is made. Consequently, evidence will be used for handling sterile instruments, simultaneous handling of multiple samples is strictly prohibited. Also, the samples do not come into contact with one another during collection of objects from victims and suspects from being permanently separated.

At the same time, it strictly prohibits hand contact objects discovered areas where it is assumed that there may be biological traces, touching face, nose or mouth during sample collection and packaging, coughing or sneezing into objects bearing traces of the crime field but also during lifting speech samples for DNA analysis.

Smoking and / or drinking or food during harvest samples are some of the aspects that are also prohibited.

Whenever possible, bearing traces object will be sent to the laboratory in original condition, without traces trying to collect or crop areas suspected to contain traces of DNA. Obviously, the samples will always previously dry packing, exposure to air, is strictly prohibited to use heat sources.

The packaging is then done in new packaging samples of paper or unused envelopes (totally banned plastic packaging materials and reuse of packaging) of adequate size to prevent tension and / or breakage during transport. Once packed, the samples will not be open to be presented during investigations and also is strictly prohibited packing multiple objects in the same container.

Regardless of the type of analysis to be performed, the collection of samples for comparison is compulsory for the laboratory for analysis, and for this not only are being made available not only the high disputed evidence from the field samples but also the model comparison samples collected from the victim and the suspects to exclude or criminalization of people in the circle of suspects.

The results of DNA analysis of biological samples in question are compared with the results of the analysis of samples whose origin is unknown, the review may / may associate victim (victims) of crime and / or suspicious persons among themselves or with the crime scene[13].

The expertise requests will be allowed only for samples collected from the crime scene in cases where the judicial investigation, there is a circle bounded suspect, from which arise comparison samples, except in cases of sexual offenses in the buffers harvested from the victim shall be submitted for DNA analysis even if there is currently a circle of suspects. Obviously, the number of samples sent for analysis will be strictly limited to evidence that may be relevant to the case by sending it, above all the samples with significant amount of biological material.

In conclusion, genetic imprints have become generally accepted not only technologically speaking, but also as an essential aspect to identify the person and not only for forensic investigations. The velocity of its scientific consistency and acceptance demonstrates its molecular genetics that underlines the genetic imprint technology.

We share the view expressed in the literature that future steps in the DNA forensic expertise undoubtedly will involve automating the entire process, from DNA sampling to the generation and detection of discrete markers, leading, eventually and the digital watermark in a database to allow significant research in the field[14]. Another major challenge facing forensic laboratories around the world, is to adopt a common set of standards for human identification, claimed the same author[15].

The Genetic imprint is being assumed to be a too precious tool to be overlooked; the debates, controversies and even criticism related literature profile having a beneficial effect for remediation, correcting and improving it in order to achieve justice by identifying and thorough testing of guilt author / offenders, particularly for crimes related to the life and integrity.

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[15] *Idem*, p. 19.

CONSEQUENCES OF PARLIAMENTARY ELECTIONS IN 7 MAI 2015 IN UK AND FUTURE OF UK POSITION IN THE EUROPEAN UNION

Claudia GILIA *

Abstract. *The UK is one of the powerful states of the European Union. Nevertheless, the UK has always had a position if not divergent, though very conservative in relation to the European Union. In this study, we analyze the results of the last legislative elections in the UK and the effects of the new policies of the Conservative government led by David Cameron regarding the position of the United Kingdom within the EU. In our research, we highlight the requests addressed by the British to the EU. The latter, under the pressure of a referendum to be held in 2017 on the topic of the UK leaving the EU, maximizes every chance of success in renegotiating its treaties. Being in a position of power within the EU, which currently faces not only the crisis in Greece, but also the eurozone preservation, the UK will negotiate strongly in order to impose its views.*

Keywords: *election, European Union, referendum, renegotiating, Brexit*

I. The context and the UK Election results

Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. The British Parliament comprises two Houses: the *House of Commons* and *House of Lords*. The MPs of the House of Commons are elected for *five years*. For a long time the legislature was not set and the Prime Minister could decide to convene an election at any time. Since 2011 and the *Fixed Term Parliaments Act* general elections have taken place on the first Thursday of May in the fourth year that follows the previous election.

The Fixed-term Parliaments Act 2011 set the date of the last election as 7 May 2015. He formal end of the parliamentary session is marked by what is known as „prorogation"[1]. The 2014-15 session of Parliament was prorogued on Thursday 26 March 2015 until Monday 30 March 2015. Under the Fixed-term Parliaments Act 2011 Parliament was dissolved on Monday 30 March 2015[2] and the date of the next general election has been set as Thursday 7 May 2015.

The United Kingdom is currently divided into 650 parliamentary constituencies[3], each of which is represented by one Member of Parliament (MP) in the House of Commons. There are currently:

* Associate Professor, Ph.D, Faculty of Law and Administratives Sciences, Valahia University of Târgovişte.

[1] It is the formal name given to the period between the end of a session of Parliament and the State Opening of Parliament that begins the next session. Prorogation marks the formal end of the Parliamentary session. The parliamentary session may also be prorogued before Parliament is dissolved.

[2] Under the Fixed-term Parliaments Act 2011, Section 3 a Parliament is dissolved *25 working days before the general election - http://www.legislation.gov.uk/ukpga/2011/14/section/3*

[3] The typical size of constituencies differs between parts of the UK. The Office for National Statistics gives the median total parliamentary electorate across constituencies of about 72,400 in England, 69,000 in Scotland, 66,800 in Northern Ireland and 56,800 in Wales.

- 533 constituencies in England;
- 59 in Scotland;
- 40 in Wales;
- 18 in Northern Ireland.

Voting takes place according to a *uninominal single* round majority poll. *The first past the post system* is one which privileges the candidate that comes out ahead in the election whether this person has won 80% or 30% of the vote. This system is fatal to the „small" parties that can only hope to win a seat if their vote are geographically concentrated, which explains why the regionalist parties (Scottish, Welsh and Irish) are those which win seats with the greatest ease. The lists of candidates have to have the support of at least 10 voters. A deposit of £500 (690€) has to be paid which is reimbursed if the candidate wins at least 5% of the vote cast in the constituency.

Major themes in the campaign debate were: *employment*, *security* and *immigration*, the *referendum on Brexit* etc.

2/3 of Britons turned out to vote (66%) with the count being up by 0.9% in comparison with the previous election on 6th May 2010.

UK results - House of Commons – 7th May 2015

Partid[4]	**Nr. de voturi**	**%**	**Nr. de mandate**
Conservative	11,334,576	36.9	331
Labour	9,347,304	30.4	232
Scottish National Party	1,454,436	4.7	56
Democratic Unionist Party	184,260	0.6	8
Liberal Democrat	2,415,862	7.9	8
Sinn Fein	176,232	0.6	4
Plaid Cymru	181,704	0.6	3
Social Democratic & Labour Party	99,809	0.3	3
Ulster Unionist Party	114,935	0.4	2
Green Party	1,157,613	3.8	1
UK Independence Party	3,881,099	12.6	1
TOTAL			**650**[5]

The Conservative Party won *36.9%* of the vote and with *331 seats*[6] and it took the absolute majority in the House of Commons. *The Labour Party* which won 30.4% of the vote and 232 seats suffered a severe defeat, their lowest score in 28 years. *The LibDems* suffered also a severe defeat and paid for their participation in the outgoing government. One result of this election was that no less than three political leaders resigned the next day: Labour's Ed Miliband, LibDem, Nick Clegg and UKIP leader, Nigel Farage[7].

David Cameron's victory might make his relations slightly difficult with his European partners with whom he is trying to negotiate a reform of the way the European Union is run. President of the European Commission Jean-Claude Juncker recently said that he did not rule

[4] For details: *http://www.bbc.com/news/election/2015/results*
[5] 191 women were elected to Parliament in the 2015 General Election. Almost a third of MPs in the House of Commons are women - more than ever before. In the Lords, 25 per cent of members are women.
[6] The Conservative Party won *+24 seats* in comparison with the previous elections on 6th May 2010.
[7] See: *http://www.robert-schuman.eu/en/doc/oee/oee-1590-en.pdf*

out modifying some treaties slightly. Investors and the financial markets that were happy with the Conservative victory have already expressed their fears about the damaging effects that a referendum on the country's future in the European Union would have on the economy.

The LibDems and Labour are against the organisation of a referendum on the EU except - and this is highly unlikely - there is a further transfer of power over from London to Brussels. Nearly two thirds of Britons say they are eurosceptics (63%) according to an annual report by NatCen Social Research published on 26th March last. However more than half of those interviewed (57%) said they wanted their country to stay in the EU with one third (35%) saying they wanted it to leave.

II. The government's policies after the UK election in 7 May 2015

The State Opening of Parliament[8] marks the formal start of the parliamentary year and the Queen's Speech sets out the government's agenda for the coming session, outlining proposed policies and legislation. It is the only regular occasion when the three constituent parts of Parliament – the Sovereign, the House of Lords and the House of Commons – meet. State Opening happens on the first day of a new parliamentary session or shortly after a general election. The State Opening of Parliament for the 2015-16 session took place on *Wednesday 27 May 2015.* The Queen's Speech is delivered by the Queen from the Throne in the House of Lords. Although the Queen reads the Speech, it is written by the government. It contains an *outline of its policies and proposed legislation* for the *new parliamentary session*.

The Queen's Speech[9] sets out the government's policies and proposed legislative programme for the new parliamentary session.

When the Queen leaves, a new parliamentary session starts and Parliament gets back to work. Members of both Houses debate the content of the speech and agree an 'Address in Reply to Her Majesty's Gracious Speech'. Each House continues the debate over the planned legislative programme for several days, looking at different subject areas. The Queen's Speech is voted on by the Commons, but no vote is taken in the Lords.

The main directions of government action outlined in the Queen's Speech in terms of domestic policy are:

- Legislation will be brought forward to help achieve full employment and provide more people with the security of a job. Measures will also be introduced to reduce regulation on small businesses so they can create jobs.
- Legislation will be brought forward to ensure people working 30 hours a week on the National Minimum Wage do not pay income tax, and to ensure there are no rises in Income Tax rates, Value Added Tax or National Insurance for the next 5 years;
- Measures will be brought forward to help working people by greatly increasing the provision of free childcare;
- Legislation will be introduced to support home ownership and give housing association tenants the chance to own their own home;
- Measures will be introduced to increase energy security and to control immigration. The Government will bring forward legislation to reform trade unions and to protect essential public services against strikes;

[8] Traditions surrounding State Opening and the delivery of a speech by the monarch can be traced back as far as the 16th century. The modern state opening ceremony dates to 1852, when the new Palace of Westminster was opened.
[9] For details: *https://www.gov.uk/government/speeches/queens-speech-2015*

- To give new opportunities to the most disadvantaged, the Government will expand the Troubled Families programme and continue to reform welfare, with legislation encouraging employment by capping benefits and requiring young people to earn or learn;
- Legislation will be brought forward to improve schools and give every child the best start in life, with new powers to take over failing and coasting schools and create more academies;
- In England, the government will secure the future of the National Health Service by implementing the National Health Service's own 5 year plan, by increasing the health budget, integrating healthcare and social care, and ensuring the National Health Service works on a 7 day basis;
- Measures will also be brought forward to secure the real value of the basic State Pension, so that more people live in dignity and security in retirement;
- To bring different parts of our country together, the Government will work to bring about a balanced economic recovery. Legislation will be introduced to provide for the devolution of powers to cities with elected metro mayors, helping to build a northern powerhouse;
- The Government will continue to legislate for high-speed rail links between the different parts of the country;
- The Government will bring forward legislation to secure a strong and lasting constitutional settlement, devolving wide-ranging powers to Scotland and Wales. Legislation will be taken forward giving effect to the Stormont House Agreement in Northern Ireland. The Government will continue to work in cooperation with the devolved administrations on the basis of mutual respect;
- The Government will bring forward changes to the standing orders of the House of Commons. These changes will create fairer procedures to ensure that decisions affecting England, or England and Wales, can be taken only with the consent of the majority of Members of Parliament representing constituencies in those parts of our United Kingdom;
- The Government *will renegotiate the United Kingdom's relationship with the European Union and pursue reform of the European Union* for the benefit of all member states;
- Measures will be brought forward to promote social cohesion and protect people by tackling extremism. New legislation will modernise the law on communications data, improve the law on policing and criminal justice, and ban the new generation of psychoactive drugs;
- The Government will bring forward proposals for a British Bill of Rights.

Regarding foreign policy, the Queen read the draft of David Cameron assumed. The action of government departments include:

- The Government will continue to play a leading role in global affairs, using its presence all over the world to re-engage with and tackle the major international security, economic and humanitarian challenges;
- The ministers will remain at the forefront of the NATO alliance and of international efforts to degrade and ultimately defeat terrorism in the Middle East.
- The United Kingdom will continue to seek a political settlement in Syria, and will offer further support to the Iraqi government's programme for political reform and national reconciliation.

- The Government will maintain pressure on Russia to respect the territorial integrity and sovereignty of Ukraine, and will insist on the full implementation of the Minsk agreements;
- The UK Government looks forward to an enhanced partnership with India and China[10].

III. BREXIT - Should the UK withdraw from the EU?

After winning the elections in May 2015, David Cameron started a European offensive that aims to convince the leaders of the 27 EU member states about the need for a renegotiation of the UK Treaty on EU. Britain's relationship with Europe is low down on the list of concerns for most voters in the coming election, but the subject of the „BREXIT" – Britain's secession from the *European Union* – will come to dominate our political lives should the Conservatives find themselves in some kind of power after 7 May.

David Cameron has promised a 2017 referendum on our place in the EU, a referendum our survey suggests is favoured by the majority of the population.

If you're a Eurosceptic, the impositions of European Union bureaucracy are daily infuriations, with Britain supposedly ceding control to Brussels of immigration policy, of its legal system, of its famously curved cucumbers. Britain contributes a small fortune to the European Union budget each year (somewhere between £8bn and £20bn, depending on whom you believe) and that's after the hard-won common agricultural policy[11].

The report produced by *NatCen Social Research*, released on Thursday 26 March 2015 says 63% of Britons are Eurosceptic, an attitude defined as wanting to leave, or reduce the powers of the EU. When asked a straight choice between withdrawing from the EU and remaining a member, 57% said they wanted to stay in, with 35% wanting to leave[12].

Control of EU immigration has been one of the most headline-grabbing arguments in the Brexit debate. The facts about the effects of migration on the UK economy, wages and employment are often distorted, difficult to understand or poorly explained. The Government demanded a series of changes, including imposing a four-year waiting period on the ability of EU migrants to claim in-work benefits and to remove jobseekers after six months if they have not found work. Mr. Cameron's plans to introduce an *income test* for the *non-European spouses of EU migrants* are also likely to require changes to the treaties, because it curbs freedom of movement.

The Prime Minister, David Cameron opened in *July 2015* a new front in his battle with Brussels by *demanding an opt out on the working time directive* which guarantees workers' holiday and rest breaks, and the agency workers' directive, which gives equal rights of pay and conditions to temporary employees and their permanent counterparts[13].

Cameron wants the EU to permanently repatriate sovereignty over workplace rights to Britain.

A referendum on Britain's membership of the European Union could be held as early as 2016 if treaty negotiations are successful.

[10] Details: *https://www.gov.uk/government/speeches/queens-speech-2015*
[11] See:*http://www.theguardian.com/politics/2015/apr/19/what-would-happen-if-britain-left-the-eu-consequences-of-exit*
[12] See: *http://www.natcen.ac.uk/news-media/press-releases/2015/march/british-social-attitudes-the-verdict-on-five-years-of-coalition-government/*
[13] See: *http://www.telegraph.co.uk/news/newstopics/eureferendum/11735368/Brexit-campaigners-to-recruit-trade-unions-as-David-Cameron-takes-axe-to-EU-job-laws.html*

The EU (Referendum) Bill was introduced in the House of Commons on Thursday 28 May 2015. The wording of the referendum question which has been included in the Bill is as follows: „*Should the United Kingdom remain a member of the European Union?"*[14]

If the UK decided to withdraw from the EU will apply the text of *Article 50, a provision which was introduced in the Treaty on EU (TEU) by the Lisbon Treaty*[15] [3], is pertinent in that regard. It reads as follows:

„*1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

The experts revealed the seven legal options after „BREXIT"[16]:

1. *The establishment of a new structured relationship between the EU and the UK would be provided for in the withdrawal treaty itself, which would establish custom-made arrangements* - that would mean that the British Government would try to keep the benefits of EU policies, and especially of the EU internal market;
2. *UK to try and join Iceland, the Liechtenstein and Norway as a Member of the EEA, together with the twenty seven remaining Member States of the EU.*
3. *UK to try and become a member of the European Free Trade Agreement (EFTA).*
4. *the UK to try and negotiate a free trade agreement or an association agreement with the EU, like the EU has concluded with most countries in the world.*
5. *he UK to try and negotiate a Customs Union with the EU, along the lines of the existing Association Agreement between Turkey and the EU.*
6. *the UK to try and negotiate a Customs Union with the EU, along the lines of the existing Association Agreement between Turkey and the EU.*

[14] See: *http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum*
[15] The Lisbon Treaty entered into force on 1st December 2009.
[16] For details: *http://www.robert-schuman.eu/fr/questions-d-europe/0355-si-le-royaume-uni-quittait-l-union-europeenne-aspects-juridiques-et-consequences-des*

7. *in case no agreement were to be found on any of the six options examined above, the UK would simply become a third State vis-à-vis the EU, as from the date of its withdrawal, in a similar way as the United States, China or other countries.*

There is about a one-in-six chance of the UK leaving the European Union over the course of the next Parliament, according to a new *Brexit Barometer*. The measure, drawn up by thinktank OpenEurope, put the chances of the UK quitting Europe at 17%, with an overwhelming 83% likelihood it will stay. A poll carried out for OpenEurope found that 41% of voters would opt to quit the EU and just 37% to stay in if a referendum was held under the current terms of membership. But positions were reversed - with 47% voting to remain and 32% to leave - if the 28-nation bloc was successfully reformed[17].

Regardless of which solution will be chosen, everybody has a strong interest in finding a solution which would allow the United Kingdom to remain a Member State of the European Union.

[17] See: *http://openeurope.org.uk/today/open-europe-alert/*

PRINCIPLES OF PROPORTIONALITY CONTRIBUTIONS OF PHILOSOPHY AND JURIDICAL DOCTRINES

Dr. Marius ANDREESCU*

Abstract: *The proportionality is a general principle of law, signifying the ideas of balance, justice, responsibility and the needed adequate suiting of the measures adopted by the State to the situation in fact and to the purpose aimed by the law. The principle is expressly formulated in the European Union documents but also in the constitutions of other states. The normative or jurisprudential regulation of the principle explains the numerous preoccupations at scientific level to identify its dimensions. In this study, the principle of proportionality is analyzed from the perspective of the philosophy of the law, in order to try to identify its value dimensions that are to be found in the normative consecrations or in jurisprudence. The normative of jurisprudential dimension of proportionality, as a law principle has its content in the concepts and philosophical categories that make up the contents of the principle of proportionality, in the law philosophy's main periods and currents. We consider that such a scientific attempt is useful, having into consideration the importance of this principle for the contemporary law. The principle of proportionality is an important guaranty in the observance of the human rights, mainly in situations in which their exercising is being restricted by the actions ordered by state's authorities, being at the same time an important criterion to delimit the discretionary power from the power excess in the activity of state's authority. In our opinion, only in the extent of our knowledge and understanding of the philosophical contents of this principle it is possible this one's correct applying in jurisprudence. This study is aiming to be a pleading for the possibility and usefulness of law's philosophy in this epoch dominated by juridical pragmatism and normativism.*

Keywords: *Proportionality; Equity; Idea of Justice; Lawful state, Rational law; Adequate relationship; Freedom of action; Margin of appreciation; Just measure; Principle of Law; Human rights;*

I. General comments on proportionality as a principle of law

Proportionality is a modern synthesis of some classical principles of law. This principle is at its origin, outside the law and it was imposed within the state and legal system rather late. As a principle of law, proportionality involves the ideas of reasonableness, fairness, tolerance but also the necessary adequacy of the measures to the state of facts and to legitimate purpose aimed. The fact that this principle appears inscribed in the juridical documents of European Union Law, in other states' constitution, but also in Romania's constitution, explains the concerns more and more frequent for research, but mainly to identify its dimensions.

* Judge ,Court of Appeal Piteşti ; University doctor Lecturer, University of Piteşti , E-mail: andreescu_marius@yahoo.com

This principle is implicitly or explicitly consecrated, in the international[1] juridical deeds, or in the majority of the democratic[2] countries' constitutions. Romania's Constitution expressly regulates this principle in article 53, but there are also other constitutional provisions involving it. In the constitutional law, the principle of proportionality finds its application especially in the field of protection the human fundamental rights and liberties. It is considered as an efficient criterion for assessing the legitimacy of state authorities' intervention in situation of limiting the exercising of certain rights. The principle of proportionality is present in the public law of most European Union countries.

The principle of proportionality is applied not only in the constitutional law but also in other internal law branches. In the administrative law it is a criterion that allows the delimiting of the discretionary power, of the administrative authority from the power excess in respect to which is achieved the jurisdictional control of the administrative deeds for power excess[3]. At the same time it is expressly stipulated in the law as a criterion for individualizing the contravention sanctions. Applications of the principle of proportionality exist in the criminal law[4] or in the civil law[5].

In the European Union law, the principle of proportionality is expressly provided by article 5 paragraph 4 of the Treaty regarding the European Union and it is regulated, along with the principle of subsidiarity, by the „Protocol concerning the applying of the principle of subsidiarity and proportionality", in the meaning of the necessary adequacy of the means and decisions of European Institutions to legitimate purpose aimed.

The jurisprudence has an important role in the analysis of the principle of proportionality, applied to concrete cases. Thus, in the jurisprudence of the European Court of Human Law, the proportionality is conceived as a just, equitable ratio, between the situation in fact, the means for restraining the exercising of some rights and the legitimate purpose aimed or as an equitable ratio between the individual interest and the public interest. Proportionality is a criterion that determines the legitimacy of the states'

[1] To remind on this meaning, article 29, paragraph 2 and 3 of the Universal Declaration of Human Rights, article 4 and 5 of the International agreement with regard to the economical, social and cultural rights; article 5, paragraph 1, article 12, paragraph 3, article 18, article 19 paragraph 3 and article 12 paragraph.2 of the International agreement with regard to the civil and political rights; article 4 of the Frame - Convention for the protection of national minorities; article G the 5th part of the European Social Charta - revised; article 8, 9,10,11 and 18 of the European Convention for defending the human rights and fundamental liberties.

[2] For example, article 20, point 4; article 31 and article 55 of Spain's Constitution; article 11, 13, 14, 18, 19 and 20 of Germany Constitution or the provisions of article 13,14,15,44 and 53 of Italy Constitution.

[3] For developments see: Dana Apostol Tofan „Puterea discreționară şi excesul de putere al autorităților publice", „Discretionary Power and the Power Excess of Public Authorities", All Beck Publishing House, Bucharest, 1999, Rozalia-Ana Lazăr, „Legalitatea actului administrativ. Drept românesc şi drept comparat","Legality of the administrative Act. Romanian Law and Compared Law" All Beck Publishing House, Bucharest, 2004, Marius Andreescu, „Principiul proporționalității în dreptul constitutional", „Principle of Proportionality in the constitutional Law", Ch.Beck Publishing House, Bucharest, 2007, Iulian Teodoroiu, Simona Maya Teodoroiu, „*Legalitatea oportunității şi principiul constituțional al proporționalității","The lawfulness of opportunity and the constitutional principle of proportionality"* in: The Law nr.7/1996, pp.39-42. See the provisions of article1 paragraph 4 and article 2 paragraph 1 letter **m** of the Law of Administrative Prosecution, nr. 544 /2004, republished, on which grounds the law courts can censor an administrative act for power excess.

[4] The provisions of article 74 of the Criminal Code involve the proportionality as a general criterion for judiciary individualization of sanctions. The provisions of article 19, paragraph 2 of the new Criminal Code consider proportionality as a condition of legitimate defense. Also as an example we mention the provisions of article 242 in the new Code of Criminal Procedure that involves the principle of proportionality as a condition for which is disposed by the law court the replacement of a preventive measure with another preventive measure.

[5] The proportionality criterion or proportionality as a principle is not regulated expressly in the Civil Code. In our opinion there are provisions involving it, it may be deduced by way of interpretation. We have into consideration the regulations contained by article 15 that sanctions the abuse of right, article 75 with regard to the limits of exercising the subjective rights or the regulations of article 1221 of the Civil Code that allows the cancellation of a contract for the obvious disproportion of services (the lesion).

interfering into Romania's Constitutional Court, through several decisions determined that proportionality is a constitutional principle[6]. Our constitutional Court asserted the necessity for establishing some objective criterions, through the law, for the principle of proportionality: „it is necessary that the legislative establishes objective criteria that reflect the requirements of the principle of proportionality"[7].

Therefore, proportionality is more and more imposed as a universal principle, consecrated by most of the contemporary law systems, explicitly and implicitly found in the constitutional norms and recognized by the national and international jurisdictions.

The analysis of proportionality, in the doctrine, legislation, international treaties and jurisprudence needs to answer several key issues: 1. Whether the proportionality is a principle of law and if affirmative, whether it is a constitutional principle; 2. The rational, normative and jurisprudential significance of the principle; 3. The procedural dimension of the principle; 4. Its application in the activity for exercising the state power; 5. The significance of proportionality for human rights' protection; 6. The consecration and applying of of principle of proportionality in the Community law; the possibility of the judge, including of the constitutional one, to exercise the control in regard to the respecting of principle of proportionality and to sanction the power excess; 8. the developing of a definition for the proportionality as a principle.

As a general principle of law, the proportionality assumes a relationship considered fair, between the juridical measure adopted, the social reality and the aimed legitimate purpose. Proportionality can be analyzed at least as a result of a combination of three elements: the decision taken, its finality and the situation in fact which it applies to. Proportionality is correlated with the concepts of legality, opportunity and discretionary power[8]. In the public law, the breaching of the principle of proportionality is considered as exceeding the freedom of action, left at the disposition of authorities, and lastly, the abuse of power. There are interferences between the principle of proportionality and other general principles of law, respectively: the principle of legality and equality and the principle of of equity and justice. The essence of this principle consists in the relationship considered fair between the component elements. The question then is whether the syntagma „just relationship" is synonymous with the one of „adequate relationship" sometimes used in the doctrine. We believe that there are sometimes differences, because the concept „just" may have a moral dimension, while „adequate" does not necessarily assume this meaning also.

Summarizing, one can say that proportionality is a fundamental principle of law, explicitly consecrated or deducted from the constitutional, legislative regulations of the international juridical instruments, based on the values of the rational law, of justice and equity and expressing the existence of a balanced or adequate relationship, between the actions, situations, phenomena and between limiting of the measures disposed by state's authorities to what is necessary to achieve a legitimate purpose, in this way being guarantied the fundamental liberties and rights, and avoided the abuse of right.

[6] Decision nr.139/1994, republished in the Official Gazette, Part I, nr.353/1994, Decision nr.157/1998, published in the Official Gazette, Part I, nr.3/1999; Decision nr.161/1998, published in the Official Gazette,Part I, nr.3/1999
[7] Decision nr.71/1996, published in the Official Gazette, Part I, nr.13/1996
[8] M.Guibal, *De la proportionnalité,* în L'Actualite juridique Droit administratif, nr.5/1978, pg.477-479.

II. Philosophical and juridical concepts involving the principle of proportionality

The principle of justice and implicitly the idea of proportionality are well highlighted, in antiquity, in the works of Aristotle many such considerations are remaining valid until today.

In order to get to define justice and law, and then to explain the nature of the state, Aristotle started from the concept of sociability: „man is through his nature a sociable being".[9] In this context, „the justice is a social virtue, as the right is nothing but the order of the political community".[10] In another work, Aristotle stated that „right is what creates and maintains for a community, the political happiness and its constitutive elements, and the happiness in the city is given by the lawfulness and equality"[11]. For the philosopher, the justice and law is an average term providing the balance between the two extremes, in other words the justice and implicitly the principle of justice have within their content and express the idea of proportionality.

Aristotle distinguished between the *distributive justice and the corrective justice.*[12]The first assumed the fact that each one is assigned what is in his due, to achieve not a formal equality but a corrective one, an equivalence of the services with the condition to respect the criteria for distribution. The distributive justice is based on the *proportion,* being conceived as an equality of ratios. „The justice we are talking about here is, therefore, *a proportion,* and the injustice is what it is outside the proportion, assuming on one side more and less on the other side, than it is in its due."[13] Aristotle considered that the justice consists in reciprocity and in the existence of a common standard according to which the facts are to be appreciated. The reciprocity ensures the links between people, which is the juridical relations, it being based on proportion, and not on equality in the strict sense.

The justice or the corrective justice intervened when between people litigations arise, and the judge established the proportion, granting the needed compensation. Interestingly is the fact that Aristotle conceived the justice, as a proportion, but not purely quantitatively, but as an equality to be achieved between the persons participating to the juridical relationships, through various counter services: „Justice is therefore a kind of *proportion* (as the proportion is not only a property of the abstract number, yet of the number in general), the proportion being an equality of ratios and is assuming at least four terms." [14]

The Romanian legal experts have brought their own contribution to defining and understanding of the principle of justice. It is known the Latin addition that was defining the law as the *„Jus est boni et aequi".* The idea of equity, existing in this definition, represents a dimension of proportionality. The principles of law, such as they have been considered by the Romanian legal experts, are three in number: to give each one what is his; not to harm one's neighbor; to live honestly. [15] The principle „to give each one what is his", expresses a distributive justice, which at its turn requires the idea of proportion between the services of participants to justice relationships.

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[9] Aristotel, *Politica*,"The Politics", Antet Publishing House, Bucharest, 1997, p. 29.
[10] Ibidem, *quoted works* p. 7.
[11] Aristotel, *Etica Nicomahică*, „Nicomachean Ethics", IRI Publishing House, Bucharest , 1998, Cartea I, pg.28
[12] Aristotel, *Etica Nicomahică*, „Nicomachean Ethics", *quoted works*, p. 128.
[13] Ibidem, *quoted works* , p. 115.
[14] Ibidem, *quoted works* , p. 114.
[15] For developments see Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *Filosofia dreptului. Marile curente."Philosophy of Law. The Great Currents",* All Beck Publishing House, Bucharest, 2002, pg. 83.

We note in this context the conception on law of the great theologian Thomas Aquinas, who trying to ensure the dignity of the human being within the universal space created, defined the law as the „proportion of one thing with another thing. This proportion has as purpose the establishing of equality which is subject of justice.[16] Proportionality is expressed in the juridical conception of Thomas Aquinas in another meaning also. Thus, in search of justice, man uses the ‚fair reason", which is nothing else but the achieving of the existential harmony. The fair reason is balance, and as such a balance is the „prudence". In author's conception, prudence brings the human being back to equilibrium, is a counterbalance to the absolute freedom, it limits the free will and involves the awareness of the limits imposed by the presence of other people that have the same rights. The just reason and prudence expresses the proportionality as an element of contents of the principle of justice. To be noticed that the great theologian, for the first time in the doctrine, admits the existence of the freedom limits determined by a balanced relation, proportional as we say, between the liberties people enjoy.

Proportionality, as a concept, appears in natural law doctrine, either by direct reference such as is happening in the work of Jean Jacques Rousseau, or in terms of some categories, such as the „fair reason", which expresses the essence of law and signifies the idea of justice and equity. Equality is a consequence of sociability that results from the natural law. Proportionality appears in the analysis of the relations between state and citizen, and of the way it has been conceived the individual's freedom in relation to state's authority.

One of the greatest contributions that Montesquieu has brought to juridical doctrine is theorizing of the principle of separation of powers in the state. The essence of this theory, developed in his work „About the Spirit of the Laws", is the prohibition of accumulation of state's powers. On first examination it appears that the author is promoting the equality between the powers. However he argues that the judiciary power does not have a very important role in relation to the other powers. However, in the author's concept the separation of state's powers is accomplished, with reference to the law, or in this case, the legislative becomes the dominant power in the state.[17] Among the powers of the state is being achieved, not as much the equality as the balance, based on role differentiation, which is a form of the principle of proportionality. The activity of the executive and of judicial power has as purpose the sovereignty of law and ensuring the freedom of citizen.

Related to the idea of social justice, the principle of proportionality appears explicitly formulated, or through other concepts, in the work of Jean Jacques Rousseau. [18] It is noticed the author's effort to harmonize the rights of the individual with sovereign power. Man transmits a part of his rights to the sovereign that is driven by the general will expressed by the law. On the other hand, the general will can not cancel the natural rights of individual.

The principle of proportionality is applied to the relation between the sovereign, executive power (Government) and the state. „So what is the Government? An intermediate body placed between the subjects and sovereign, for their mutual connection and in charge with the enforcement of laws and the maintenance of liberty, both civil and political".[19] In Jean Jacques Rousseau's concept, the government is the average term between the sovereign and state that exist in a mathematical relation, of a „continuous proportion". This proportion is not arbitrary, but rather a necessary consequence of the nature of political

[16] Ibidem, *quoted works* , p. 91.
[17] Ibidem, *quoted works* , p., vol.II, 200.
[18] Jean Jacques Rousseau, *Contractul social (1962)I,* Antet Publishing House, Bucharest, 1999, p. 23.
[19] Ibidem, *quoted works* , p. 53.

body. The failure of respecting the proportionality between the three terms may have, in author's conception, consequences that would disturb the balance and social harmony. If the power of government increases too high in relation to that of the subjects, the domain of the law and of individual decisions will be mistaken. This can lead into despotism. In situation the subjects get too powerful they will then defeat the anarchy. Proportionality appears in this relation, more in the mathematical, quantitatively sense, but also as a juridical principle based on which the state powers are organized and it is explained the connection between the state and individual. The author reveals the nature of the social relations with reference to the relationship between the individual, society and sovereign power, the proportionality expressing the balance and harmony, necessary for the stability of state.

Proportionality as a way of expressing the principle of justice and equity is to be found in the work of the representatives of rational law school. This doctrine claims that by the law one must not understand only the positivist sense, but one must consider also the rational dimension which represents in fact the essence of law, meaning its understanding as „jus-dike", or in other words, as „just measure". This is an expression of proportionality as the rational principle of law. For the rationalists, the applying of proportionality to the juridical norm means to give it a meaning and value, achieving at the same time the equivalence between the right understood as the totality of the juridical norms, and justice as a principle.

Immanuel Kant believes that the right comes from reason and man can rise to the pure universal, intelligible through morality, whose fundamental concept is that of freedom. [20] For Kant „the right is therefore a set of conditions by which one's arbitrator can adjust to the other one's arbitrator following the general law of liberty." [21] The conditions referred to by Kant impose limits to freedom in order to correlate with the freedom of other. Although Kant does not refer explicitly to the principle of proportionality, *freedom as a relationship*, lying at the foundation of law, means balance, equity, in a single word, an appropriate *proportion* between individual freedoms.

In Hegel's work, man loses his central place, being replaced by society. The human individual, as a person is replaced by the *subject of law*, whose reality is determined by the juridical norm. Unlike Kant, for Hegel the man becomes a simple element in a gear which he considers as absolutely alien and domineering. [22]

In Giorgio del Vecchio's concept, a prominent representative of the juridical rationalism, the neo-Kantian ideas constitutes as a reaction to juridical positivism and empiricism. Giorgio del Vecchio builds a philosophy of law starting from an *apriori* principle, which is the ultimate limit on which the whole edifice of law rests. This fundamental principle is the *principle of justice*. The author makes an analysis of the Aristotelian conception on justice, criticizing the fact that different species of justice appear in the Aristotelian theory, that are not derived from a single principle. „What is essential – claims Giorgio del Vecchio - in any species of justice is the element of inter subjectivity, or correspondence between many individuals, to be found in the final analysis, even there when he does not show at the first hearing".[23] The author believes that in a very general sense, justice involves a harmony, congruence and a certain *proportion*, also referred to by

[20] Immanuel Kant, *Metafizica moravurilor (1785)*, „Methaphysics of Morals" Antaios Publishing House, Bucharest, 1999, p. 49.
[21] Ibidem, *quoted works* , p. 50.
[22] Hegel, *Principiile filozofiei dreptului (1831)*, „Principles of philosophy of law", I.R.I, Publishing House Bucharest, 1996, p. 22.
[23] Georgio del Vecchio, *Justiția*, „The Justice", Romanian Book, Bucharest 1936, p. 64.

Leibnitz.[24] However, the great legal expert said, „not any congruence or correspondence is doing – in a proper way - the idea of justice, but only the one that verifies or can be checked in the relationships between several people; not any proportion between objects (whatever they are), but only the one which, in Dante's words, is a *hominis ad hominem proportio*. Justice, in its meaning, is the coordination principle between subjective beings „[25]. Proportion is the quality of relations between people, which only to the extent that meet this requirement means justice as a principle. The author emphasizes other features of the principle of justice, one of the most important being that positive law provisions are subjected to this principle. [26] Thus the laws can be unjust if they do not correspond to the concept of „Justice", understood as a balanced, harmonious proportion, between the content of the norm and social reality. In this situation it is required the changing of laws and even of the existing law order to achieve the imperative of Justice.

The law, as a normative act, is general, impersonal, and the juridical equality it implies is formal because the law generality is of category nature. Unlike this, the equality understood as a fair proportion, such as required by the principle of justice, assumes a relating to specific cases and juridical appreciations to be achieved according to rigorously established criteria. Equity, understood as a juridical proportionality, requires to be taken into account the factual situations, personal circumstances, the uniqueness of the case, the relation between the juridical means employed and the adequate legitimate purpose, thus completing the legal norm generality. For Giorgio del Vecchio, the law norm corresponds to the principle of justice, only if adequate to the diversity of social reality, but also to the ideal of justice, as a rational value. This adequate relation is the expression of proportionality as a general principle of law.

For Rudolf Stammler the law is justified to the extent that the objectives pursued by it are fair. The „just law" must always agree with the social aspirations. The fairness grounds of a juridical system must be sought in the fundamental law of the will. We deduce the possibility that a juridical will be fair exclusively from the highest concept of free will. The justice will therefore harmonize to all social wills. The harmony about which Stammler is speaking is in our opinion the expression of proportionality as value and principle of law.

The Belgian author Chaim Perelman identifies six ways of understanding the concept of justice, having as a common conceptual element the equality, but which should be adequate to social diversity. The essential function of law is to determine the categories applicable to society. Among the members of society must be equality through out various criteria: work, rank, needs etc.[27]

An important representative of the liberal doctrine, John Stuart Mill, evoked proportionality as a relationship between the fundamental rights of individuals and the state power, or in other words, between freedom and authority, two concepts that a first analysis exclude mutually.[28] The author believes that a limit had to be found beyond which the state's interference in the sphere of independence of the individual is no longer legitimate. „To find this limit and to defend it against any infringement is an indispensable condition for the good run of human life, essential for protection against political despotism"[29]. Therefore, there must be a balance between human rights and state right to intervene into

[24] Ibidem, *quoted works* , p. 33.
[25] Ibidem, *quoted works* , p. 33
[26] Ibidem, *quoted works* , p. 56
[27] Chainm Perelman, *Justice et raison,* Press, Universitaires de Bruxelles, 1963, p.5-120.
[28] J.S. Mill, *Despre libertate (1859),* Humanitas Publishing House, Bucharest, 1994, pg.7.
[29] Ibidem, , *quoted works* , p.12.

individual's life. This balance means in fact a relationship of proportionality. So that the intervention of state authorities in the individual's life be justified a legitimate purpose must exist: „the sole purpose that justifies people, individually or collectively, to the interposition into the sphere of liberty of action of any of them, is the self-defense, the only goal in which the power may be exercised legitimately, on any member of a civilized society against his will, is to prevent harming the others „[30].The equilibrium the author speaks about, is an application of the principle of proportionality and it requires the existence of some limits for the individual freedom, beyond which starts state authority. The first limit of individual freedom is not to bring touch to the rights of others. The second restriction is that each one bears the tasks imposed by the existence of society. This self-limitation of individual behaviors expresses the proportionality, in the relationships between the members of society.

To be noticed Alexis de Tocqueville's conception on democracy as a form of government. The basic principle of democracy, in the view of the author, is the equality of conditions. Tocqueville believes that the ideal democracy distinguishes through the reciprocity of juridical equality and political freedom, the latter one signifying the possibility and the right of everyone to participate to the government. A hazard that occurs in a democratic society, says the author is the „tyranny of the majority and the tendency to centralize the power"[31]..The tyranny of the majority is the result of equality and independence of each individual in society. If everyone is right, the disproportion to believe the mass increases, in other words, the view of the majority rules the world. This danger is an obvious disproportion between state power and freedom of individuals. To mitigate this risk one must ensure the political liberty of man having the role to limit state power related to the individuals and in the same time to limit individual excesses. Consequently the equilibrium is reached, which is a proportionality relationship between state power and individual freedoms, and out of this equilibrium ultimately the man benefits.

Another representative of the liberal doctrine in law, whose conception is reflected in the principle of proportionality, is John Rawls. His main objective is to substantiate theoretically a constitutional democracy. His whole conception of law is based on the principle of justice[32]. The theory of justice, in which equity plays a major role, supports the consecration and respect for human rights, of the principle of fair equality to opportunities and the principle of difference. In a democratic, pluralistic society, the idea of reasonableness plays a major role. The reasonableness in John Rawls' conception is one that brings together different situations and expresses the „tolerance", achieving the harmony and stability within a pluralistic society. The principle of the „just equality of chances, the principle of difference, fairness and reasonableness" are categories that express, in our opinion, the proportionality in the social relationships. The democratic equality, in author's conception does not exclude the „differences" and the social harmony is achieved through equitable, proportional relations, between the participants in social life.

The lawful state is also based on the idea of harmony, balance between its constituent elements. This balanced relationship „is another aspect of the principle of proportionality, in fact is a dimension of the general principle of equity and justice. Thus, the analysis of the fundamental rights or the perpetuation and preservation of human life, in the light of the

[30] Ibidem, *quoted works* , p.17.
[31] Alexis de Tocqueville, *Despre democrație în America (1840),* „About democracy in America", Humanitas Publishing House, Bucharest, 1994, p.160
[32] John Rawls, *Liberalismul politic, „Political Liberalism" (1988),* Sedona Publishing House, Bucharest, 1999, p. VIII

thinking way of the natural right, will reveal the principle of proportionality. Between individual and in general, between the public and private, should exist a fair extent, a balance because the „exacerbated individual bears in himself the seal of absolutism and totalitarianism"[33], such as the exaggerated and disproportionate state's power in respect to the fundamental human rights leads to same finality: the abuse of power of power and right. In the classical conception of natural right taken from the lawful state doctrine, the right was only a „fair measure", meaning the proportionality.

The principle of proportionality represents in the lawful state's doctrine the introduction of a new concept, namely the legitimacy. The right that limits the state power is not only the „right to power" in the sense of „legislative power", which is to create juridical norms as an expression of the will of the legislature, neither the „subjective rights", in the sense of human rights, as powers of the individual to claim something, even to the state, unless such rights are recognized by the objective right, as juridical norms enacted by the legislature, but the right should be understood, in addition to these two meanings, that are real, also through the criterion of the right as a „just measure, in the meaning to give to everyone what's in his due, as Aristotle said. The legitimacy, conceived as an adequate relation is the expression of the principle of proportionality

Heinzz Mohnhaupt considers the principle of proportionality, together with other definitions of specific value, such as human dignity, freedom and juridical equality, separation of powers and powers' control, subjecting all state actions, law and right, protection of the courts, compensation for unlawful actions of the state, contrary to the law, as being important aspects of the lawful state.[34] The author invokes the principle of proportionality in the analysis he makes to the relation between the public interest (principle of social security) and the guaranteeing of the property rights. Thus, the distribution of property represents obvious antinomies within the lawful state that are not easy to reconcile. The problem is that the principle of social security can be put in a position not to be able to bring prejudice to the principle of guaranteeing the property, contained in the notion of lawful state by means of redistribution by the fiscal right. In this way, the concept of lawful state may be devoid its true meaning. Here, says the author, comes back the essential problem of the classic natural right, whose basic principle is the „principle of just measure" or in the modern version, the principle of proportionality.[35] Equally is the question for the relationship between the social security and the guaranteeing of freedom, contained in the notion of the lawful state. The borders between state's intervention and guarantees of the fundamental rights provided by the lawful state will be fixed in each case separately, by using the criterion of proportionality. [36]

One of the important issues of the doctrine of lawful state, within the German model limits, refer to the interpretation of the Constitution of the Federal Constitutional Court. The question was raised whether the fundamental law is a norm to be interpreted and applied according to the same methods as the common law or should it be interpreted according to specific techniques.[37] An important finding is that a distinction is made between *law and*

[33] Louis Dumont, *Eseu asupra individualismului, »Essay on individualism »* Anastasia Publishing House, Bucharest, 1998, pp.27-35
[34] Heinzz Mohnhaupt *L'État de droit en Allemagne: histoire, notion, fonction, in L'État de droit,* Presses Universitaires de Caen, 1994, p.88
[35] Ibidem, *quoted works*, p.88
[36] Ibidem, *quoted works,* p.88-89.
[37] Michel Fromont, *La Cour Constitutionnelle Fédérale et le droit,* in „Droit" Revue française de théorie juridique, Nr.11/1990, pg. 120

right, even in the text of the Constitution. According to article 20, paragraph 3 of the German Basic Law, the „Legislative power is related to the constitutional order, the executive and judicial powers are bound and obliged by law and right." German Federal Constitutional Court, by a decision handed down on October 23rd, 1951, stated: „The Constitutional Court recognizes the existence of a super-positive right that is imposed even to the Constituent and has jurisdiction as such to appreciate the compliance of a rule or juridical norm with such a right."[38] Subsequently, the Constitutional Court appreciated that by this „super positive right" understands the fundamental juridical principles. Analyzing the Constitutional Court jurisprudence, Michel Fromont notes this is practicing a very constructive interpretation of the Basic Law. The Constitutional judge carries on a „materialization" of the constitutional rule rather than an interpretation in the usual sense of the term. Through the distinction between the interpretation of the laws and their realization, the constitutional court gets nearer the issue of the fundamental juridical principles, among which the principle of proportionality.[39] In relation to these premises, the Constitutional Court has developed the great principles for interpretation of the Constitution: 1) the unity of Constitution; 2) the evolving nature of the Basic Law, and 3) binding the unwritten rules to a general principle stated by the Basic Law. Thus, from the principle of the lawful state, arising from Article 20 and 28 of the Constitution, the Court held a series of unwritten rules, among which the principle of proportionality, which requires at the same time, that the law be adequate to the situation in fact and to the purpose for which it was adopted.[40]

III. Theoretical fundamentals of proportionality shown in Romanian juridical doctrine

Mircea Djuvara analyzes the principle of justice from the perspective of rational right inspired by Kantian philosophy. For neo-Kantian school representatives of law, justice is transcendental. It may be, or where applicable, not be ensured by law enforcement. The law as a system of juridical norms is not always equivalent to the principle of justice. Professor Mircea Djuvara split the „characteristics of justice" into rational and factual elements. As rational elements he suggested: a) equality of the parties; b) by the objective nature (rational) and logic of the justice; c) the idea of equity that establishes a balance of interests in essence; d) the idea of proportionality in the development of justice. The proportionality would operate primarily through the qualities that are established between the relationships. Secondly it would operate through the idea of equivalence.

Analyzing the juridical relation and provisions applicable to it, the author states that the ideal of justice requires the „rational equality of the free persons, limited in their actions only by the rights and duties."[41] This is the grounds in respect to which exists the possibility of a normative generalizing and consecration of formal equality of the law without any discrimination. Nevertheless, the equality as a principle can not be achieved unless by taking into consideration of the situations in facts, of the particular elements and individual cases. The author emphasizes that the achieving of justice makes necessary the idea of proportion in any juridical relationship, including the criminal one: „The idea of proportion proceeds through quantities between which relationships[42] are being established".

[38] Ibidem, *quoted works* p.106
[39] Ibidem, *quoted works* p.122
[40] Ibidem, *quoted works* p.124
[41] Mircea Djuvara, *Teoria generală a dreptului.Drept raţional izvoare şi drept pozitiv*, „General Theory of Law. Rational Law, springs and positive Law", All Beck Publishing House,Bucharest,1999 p. 268
[42] Ibidem, *quoted works*, pg. 271.

Proportionality as a factor of contents of the principle of justice and equity, developed into the right. The concept about proportionality, applied to juridical, criminal and civil relationships developed and was determined by economical, social, geographical, political interests, but also in the way the people represented proportionality into juridical relationships. The author shows that there is a breakthrough of the idea of proportionality in the juridical relationships, consisting in achieving as much as possible, the *equivalence* in any juridical relationship. The existence of disparities between the services to which the subjects of law are obliged to is contrary to the principle of justice. The proportionality assumes the equity, which means the „fair appreciation", in legal terms, of each individual case.

Interestingly Mircea Djuvara did not oppose the proportionality to generality of juridical norm, on the contrary, he considers it an element of contents, through which, the concrete fact, the individual case, may be raised to the generality specific to juridical norm. Respecting the principle of proportionality is a general condition for a law be „just, or otherwise said to comply to the principle of justice and equity. In this respect the author states: „Why in the administering of justice we learn of the idea of proportion? The sanction should always be proportionate to the blame. If the idea of proportion wouldn't be a reasonable idea, this statement would have no meaning. The idea of proportion proceeds by amounts, among which are established relationships. The rational appreciation tends, ever, for amounts through which are established relationships. The science also, has as object to establish quantitative relationships; it is known that the contemporary science, in any branch, is reckoned the more advanced when are eliminated more of the subjective elements of experimental knowledge, reducing them to simple amounts and thus reaching to get matured.[43]" It is obvious that for Mircea Djuvara, proportionality is a principle of rational right, which evokes the idea of fairness and justice. In an effort to provide rigor and precision to the application of juridical norms, the author conceives proportionality more mathematically, as a quantitative relation, between two dimensions or values.

Eugeniu Speranția, another representative of the Neo-Kantian school of law, considers that the spirit is the one leading human activity. The need for normality and non-contradiction is achieved in the social life „by organizing the law, norm and sanction"[44] According to the author, the coercion and sociability are the two elements, that may define the law and both belong to rationality. The law is „a system of norms of social action, rationally harmonized and imposed by society."[45] The normativity signifies the fact that, in all his actions, the man must follow certain guidelines and must comply rigorously with certain limitations. The author does not refer to the proportionality as a principle, but as I noted in other situations, proportionality, even if not explicitly formulated is implicitly found in the idea of rationality that signifies a certain harmonious ordering of the constituent elements of society and the respecting of the limits imposed by the norms in order to achieve the social order, finally of the justice. The French juridical expert Francois Geny shows that the rule of law is guided by *the ideal of just* and from now on by including of elementary precepts, not to harm, not to damage another person and to give everyone what is in his due, implies the deeper thought for establishing a balance between the conflicting interests in order to ensure the essential necessary to maintain the progress of human society. [46]

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[43] Ibidem, *quoted works*, pg. 272.
[44] Eugeniu Speranția, *Principii fundamentale de filozofie juridică*, „Fundamental principles of Juridical philosophy" Institute of Ardeal Graphical Arts, Cluj,1937, p. 7.
[45] Ibidem, *quoted works*, p. 8.
[46] François Geny, *Science et tehnique en droit positif, „Science and Technique in Positive Law"* Sirey, 1925, tom.I, p.258.

The principle of proportionality, though not expressly invoked, results from doctrinal formulations. Thus, the references to equity and justice, to the relationship between the state and citizens to the power limits in relation to the exercising of the limits of powers, but also to the limiting of the exercise of citizenship rights, evokes the idea of proportionality. We encounter such ideas in the work of some Romanian constitutionalists, Constantin Dissescu analyzing the sovereignty, considers it to be limited. The means of action of the state can not exceed the purpose in which view they are used, respectively the social good and public interest. Also, the state authority can not abolish the fundamental rights, and if it does it becomes unjust[47].

The limitation of state power against the fundamental rights is the expression of a balanced relationship between the exercise of sovereignty and its purpose, the public interest. „Sovereignty is limited. Sovereignty is not a purpose, but a means to procure happiness, which is the preservation and progress of society. Or the means, by their nature and essence are limited. Sovereignty is also limited also on the grounds that it cannot exceed the social interests' frame, the framework asked by the need for preservation and social progress. If sovereignty exceeds its limits, it becomes unjust and oppressive. In such a case appears the resistance that can go right up to a revolution. If the sovereign power suppresses the right to think freely, to communicate the ideas in writing or by speech, if is imposing religious beliefs to those who do not share them voluntarily, in such cases the sovereign power no longer has a reason for being."[48]

George Alexianu evokes the principle of proportionality, though he does not explicitly use this concept. Referring to the role of the state in contemporary society, the author shows that it should ensure a social order and guarantee individual freedoms. Its power must be limited in relation to the exercising of individual freedoms. State authorities may restrict individual freedoms only if the measure is absolutely necessary for the preservation of society. The state is only a means to guarantee individual freedoms. Limiting the state's power, the fact that state actions must not exceed the purpose of exercising them and also the existence of the „necessity" to justify the state interposition in the exercising of the fundamental freedoms implies the principle of proportionality.[49] „The state has the duty to ensure the social order without which society's life is not possible. Ensuring the social order, it provides and guarantees the individual life, because the individual cannot live unless in society. He must ask to the individual freedom only those sacrifices that are absolutely necessary for human coexistence in society. The state is therefore a means to provide individual life... The minimum strictly necessary to which its intervention is limited is dictated by the political science.[50]"

The idea of the Romanian historian Nicolae Iorga is interesting, which analyzing the individual freedoms such as they existed in various forms of social organization, believes that the essence of freedom means, „fair inner proportionality of the three terms", so that related to their ideal state, maximum values of the liberty both in the domain of work as in the political one, and in the thinking sphere, no historical society appears with the „*golden proportion"* of freedom, as in one we have some freedom to work but is lacking the political freedom and of thinking or vice versa. What offers this proportion a particular

[47] Constantin Dissescu, *Curs de drept public român,* « Course of Romanian Public Law » Graphical Establishment Bucharest, 1890, p.286

[48] Ibidem, *quoted works* pp.286-287

[49] George Alexianu, *Curs de drept constituțional, « Course of Constitutional Law »* The House of Schools Publishing House, Bucharest., p.149.

[50] Ilie Bădescu, *Conceptul de libertate în gândirea lui Nicolae Iorga în: Nicolae Iorga – Evoluția ideii de libertate, »The Concept of liberty in Nicolae Iorga thinking » in : Nicolae Iorga – evolution of the idea of liberty,* Meridians Publishing House, Bucharest, 1987, pp.9-10.

value are precisely the social structures. Starting in the search of the „golden number" in which optimal freedoms are combined, Nicolae Iorga will discover each time an expression, a „degraded one" thereof, as a result of the historical framework that pours its constraints over the liberty's proportion, forcing it to gain an unmistakable historical configuration and also non transposable from one society to another."[51]

State involvement in civil society, the possibility of restricting the exercise of citizenship rights in exceptional circumstances, led to the assertion in lawful state's doctrine of the principle of responsibilities of state authorities. The theory of state's responsibility is unanimous accepted. Administrative and constitutional prosecution can be considered the most significant contributions in articulating the theory of state responsibility and some of the most expressive dimensions of the lawful state.[52] In this context, the principle of proportionality is considered by doctrine and jurisprudence as an important criterion which the administrative authorities must respect because the measures disposed by them be not only legal, but also appropriate. Of course, the opportunity is not rigidly separated by the condition of the administrative acts' legality. Therefore, proportionality is not only a condition of opportunity but also a condition of legality, for public administration acts. [53]. „If we have in mind, the correlation proportionality - legality and opportunity, we note that, the implementation of proportionality requires first, the adapting of means to the finality, which is an essential aspect of the decision, and thus a matter of opportunity."[54] However, proportionality is one of the criteria limiting the discretionary power of the executive.[55]

The principle of proportionality requires the establishing of a balanced relation between the means employed by the administration and the aimed legitimate purpose. State means used must be necessary and appropriate with the purpose that aims to be achieved. It is necessary to establish a balance between a concrete situation, the purpose of the action and administrative decision. To the situation - a decision - finality assembly applies the principle of proportionality as a criterion for the assessing of the adopted measures. Passing over the proportionality represents the exceeding of the limits of freedom of action, left to the public administrative authorities, respectively a power excess.

Is proportionality a constitutional principle? If so, which are the constitutional meanings of this principle? To the first question the answer can only be yes. Ion Deleanu believes that: „The principle of proportionality is indisputably a constitutional principle, but in the absence of legal predeterminations of proportionality, it is a practical matter, in fact, to be checked and assessed by the competent authority before which the proportionality[56] has been invoked".

In our view, proportionality is not only a matter of fact, but also a principle that can be understood and explained through its normative dimension, including by the constitutional norms that implies it .In accordance with the doctrine of the social contract, the constitution is an original form of the social pact. It is not only a fundamental law, but also a political and state

[51] Ibidem, *quoted works* p.149

[52] Ion Deleanu, *quoted works* vol.I, pg.121; Tudor Drăganu, *Drept constituțional şi instituții politice. Tratat elementar*, « Constitutional law and political institutions. Elementary treaty » Lumina Lex Publishing House, Bucharest, 1998, vol. I, pp.335-351.

[53] For developments see Antonie Iorgovan, *Tratat de drept administrativ, »Treaty of administrative Law »* Nemira Publishing House, Bucharest, 1996, vol.I, p.299-302.

[54] Dana Apostol Tofan, *Puterea discreționară şi excesul de putere al autorităților publice,"Discretionary powers and power excess of the state authorities",* All Beck Publishing House, Bucharest, 1994, p.47.

[55] Ibidem, *quoted works*, pg.45-50.

[56] Ion Deleanu, *„ Drept constituțional şi instituții politice", „The Constitutional Law and Political Institutions"*, Europa Nova Publishing House, Bucharest, 1996, vol.II, p.123

reality that „is even identified with the society which it creates or shapes."[57] The Constitution also expresses a philosophy and ideology characteristic to human society, organized as a state, it consecrates a certain form of political organization of society, guaranteeing the fundamental rights and freedoms and establishing the state power's limits. The Constitution is not confined to the establishing of the way to exercise the power, but also the essential principles, governing the society. Therefore, the essence and finality of constitution, but also of constitutionalism as a historical process, and the social reality, is to achieve a balance, a rational relation between realities and different forces, but which must coexist and harmonize to ensure the social stability, individual freedom, but also the legitimacy and functioning of the authorities exercising state power. In other words, the goal of a democratic constitution is to achieve a fair, rational balance between different realities, between individual interests and the public interest. This balanced report, which is of the essence of the constitution and constitutionalism, expresses the proportionality as a general principle of law.

From the perspective of a sense of justice, the principle of proportionality is important also for the constitutional law. The Constitution is „the political and legal settlement of a state"[58]. „Moreover - says John Muraru - a constitution is viable and efficient if achieving the balance between people (society) and public authorities (state) on one hand, then between the public authorities and of course even between the citizens. It is also important that the constitutional regulations to realize that the public authorities be in the service of the citizens, ensuring the protection of the individual against state's arbitrary attacks against its freedom."[59] It does not limit only to regulate the way of exercising the power. At the same time it regulates also the principles governing the society. Thus, Article 1 para. (3) of the Constitution, consecrates the *justice*, as a supreme value of the state and society. The term „justice" is equivalent to the principle of justice and it implies the proportionality. Aristotle stated that „justice is a median term"[60], that explains why the principle of justice has a regulatory role in law enforcement.

Taking this idea in the contemporary Romanian doctrine it was asserted that „the purpose of positive regulations must be the justice so that all other principles operating in society must be subordinated to this ideal binder of all other principles and at the same time, as a regulatory principle by their limiting. It therefore has a positive role to ensure the social cohesion and a negative one, because it watches that neither of these principles becomes predominant.[61]"

Constitution, as a fundamental law, in order to be efficient, must be *adequate* to the social, economical and political realities of the state. The dynamics of these factors will determine, in the end also the changes of the constitutional norms. The appropriate ratio between the constitutional regulations and the realities mentioned, expresses the principle of proportionality. In view of those mentioned above, John Muraru, referring to the meanings of constitutionalism, says: „In the socio-legal and state contemporary realities, the constitutionalism must be seen as a political and legal complex status, expressing at least two major issues: a) on one hand, the reception in the constitution of the demands of ideas' movement (originating throughout its evolution), regarding the lawful and democratic

[57] Ioan Muraru, Simina-Elena Tănăsescu, Drept constituțional şi instituții politice, „Constitutional Law and Political Institutions",. All Beck, Publishing House, Bucharest,2003 , vol.I, p.36.
[58] Ion Deleanu, *Drept constituțional şi instituții politice",The Constitutional Law and Political Institutions"* Europa Nova Publishing House, Bucharest, 1996, vol I, p. 260.
[59] Ioan Muraru, *Protecția constituțională a libertăților de opinie,*"Constitutional Protection of the liberties of opinion" Lumina Lex Publishing House, Bucharest, 1999, p.17.
[60] Aristotel, *Etica Nicomahică*, "Nicomachean Ethics" IRI Publishing House, Bucharest, 1998 p. 112.
[61] Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *Filosofia dreptului.Marile curente*, „Philosophy of the Law. The great currents" All Beck Publishing House, Bucharest, 2002, pp.77-78.

state, civil liberties, organization, functioning and balance of the powers; b) on the other hand, a wide acceptance of law subjects, constitutional provisions. This mutual reception is the only one that can provide the efficiency and mainly the viability of constitution, can ensure a correspondence between constitutional rules and political practice"[62].

The achieving of a proper ratio between constitution and state political, ideological and economic realities is a complex issue that should not be formally understood. We emphasize that on a strictly legal plan, the constitution can define both a liberal regime and a dictatorial one. If in that kind of state, whether democratic or totalitarian, there is a constitution, it is arguable if everywhere exist a genuine constitutional regime.[63]

The concerns of the contemporary Romanian doctrinarians to establish proportionality connotations are significant.[64] The mentioned author considers as specific to proportionality the syntagma of „just balance". It is expressed the idea that „proportionality or the just balance is the objective form of dealing in concreto of a determined legal situation. It can appear in abstracto, nevertheless it remains essentially or exclusively a formal requirement without any practical effect"[65]. Answering to the question which structures are constituting the proportionality, the same author emphasizes the idea of „relation", which is specific to proportionality. Unlike mathematics, in law, the proportionality is not a quantity relationship, but a qualitative type o matter, „expressing the requirement of *adequacy* between a legitimate objective ... the *means* employed to achieve this objective and its *result* or effect produced by putting these means to work. Proportionality is marking the transition from a judgment based on binary logic to a reasoning based on a gradual logic"[66]

So we can talk about a „dialectical reasoning, proportionality con-substantial „ or as we called it a „*proportionality reasoning*" based on a comparative relation of a qualitative nature, specific to value juridical syllogism designed to exceed the formalism of abstract and impersonal dimension of the juridical norm and thus to raise the particular up to the concrete universal level. For example, the principle of equality, consecrated to one of the foundations of law and of any democratic society from the perspective of proportionality that achieves a logical, value related relation between elements, different in their concreteness, they exceed their abstract nature and the inevitable trend for standardization, finding themselves as a universal concrete in a dialectical relationship between the juridical norm and the diverse of reality. Applying the „proportional reasoning" one can say that the principle of equality, regarded in its quantitative formal dimension is a particular case of the principle of proportionality.[67]

In the end of this brief doctrinaire analysis on the principle of proportionality we mention the conclusion of Professor Ion Deleanu to which we subscribe: „Thus briefly said, the putting to work of proportionality - contextualized and circumstantial - implies the transition from the rule to the *meta-rule*, from *normativity* to *normality*, from the hypostasis in front of the juridical norm to the discovery and appreciation of its meaning and purpose. The reference criterion in such a reasoning is above all, the ideals and values of a democratic society, as the only political model considered by the Convention ("European"

[62] Ioan Muraru, *Constituţie şi constituţionalism*, „ Constitution and Constitutionalism" in: Constitutional studies, Actami Publishing House, Bucharest, 1995, p.96
[63] Ion Muraru, *quoted works* , p.97
[64] Ion Deleanu, Drepturile fundamentale ale părţilor în procesul civil, „Fundamental rights of the parties in a civil trial" Juridical Universe Publishing House, Bucharest, 2008,pp.365-406
[65] Ion Deleanu ,quoted works p 364
[66] Ion Deleanu ,quoted works ,p. 366
[67] Ion Deleanu, *Drepturile fundamentale ale părţilor în procesul ci*vil," Fundamental rights of the parties in a civil trial", quoted works p. 367

Convention for defending the Human Rights and Fundamental Freedoms) and, thus the only one compatible with it"[68] .

IV. Conclusions

An argument for the philosophy of law must be a reality present not only in the field of theoretic but also for the practical work for drafting the normative acts or for the administration of justice consists in the existence of the general principles and branch ones of law, some of them being consecrated in the Constitution, such as the principle of proportionality

The need of the spirit to climb up to the principles is natural and especially persistent. Any scientific construction or normative system must relate to principles which can guarantee or substantiate. In this respect the Romanian philosopher Mircea Djiuvara said: „All law science consists not in reality, for a serious and methodical research only in releasing from the multitude of law provisions their essential, which is precisely those ultimate principles of justice from which derives all other provisions. Thus, entire legislation becomes of a greater accuracy and what is called legal spirit is being grasped. Only thus is done the scientific development of a law „.

The principles of law by their nature, generality and deepness are themes for reflection primarily for the philosophy of law. Only after their construction in the sphere of law metaphysics these principles can be transferred to the general theory of law, can be normatively consecrated and applied to jurisprudence. Moreover, there is a dialectic circle because the „meaning" of the principles of law after the normative consecration and jurisprudential development are about to be elucidated, also in the sphere of philosophy of law.

The application of the principle of proportionality has as result the concretization of juridical norm, whose legitimacy is given by the just application to each case or particular situation. At the same time, by this principle, the individual is not subsumed to the general, the last one being expressed as juridical norm, has its own legitimacy, that requires a different relationship, other than the logical-formal one, which grants existence and necessity only to the general. Therefore, the principle of proportionality used in its philosophical meanings requires just adequacy of the law norm (of the general) to the individual, which in essence is the man in all his existential determinations. Thus, the juridical norm is not only „legal" but also legitimate.

Through its concrete dimension, but not empirical, the proportionality is a concept whose sphere can not be determined through a formal - logical definition. The principle of proportionality, as well as other juridical category, such as: spirit of tolerance and mutual respect, dignity, the lawful sate principles, general interest, public order, etc. are part of opened concepts category that can not be defined, but only definable. There is an ongoing process through which the connotation and denotation of some juridical categories get complete, through the inter-connection between the drafting and formulations of the philosophy of law, and on the other side the interpretations and solutions conferred by the jurisprudence.

In this context it is legitimate the question, to what extent the law metaphysics is possible and especially necessary. Such a problem is a present day one and must be analyzed within the social, political and cultural policy contemporary context, especially in

[68] For developments see Marius Andreescu, „Principiul proporționalității în dreptul constitutional", „The principle of proportionality in the constitutional Law", quoted works , pp 317-341

relation to various juridical disciplines but also at the act of judgment by which the law courts „state the right".

Schleiermacher's words are still valid and apply today, including for any actor in the field of law: „Any scientist must philosophize not to remain only a point for the transition of a tradition that is transmitted throughout him, a material collector, as either representation in which you don't see either principles or links, is nothing but only a material."

One can notice even presently a certain imprecision and even a restraining of the law maker for the normative consecration, on scientific grounds of the fundamental principles of law. How actual are the words of the great German philosopher Kant, which we propose for meditation to a contemporary legislator: „It's old the wish which, who knows when?, will ever be fulfilled, to discover at once, in the place of the infinite variety of civil laws, their principles, for only in this may reside the secret to simplify, such as legislation says".[69].

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[69] Kant, *Critica Rațiunii Pure* , „*Critique of pure reason*" Encyclopedic Universe Gold Publishing House, Bucharest, 2009,p 276-277

CONTRIBUTION OF ROMANIAN FEUDAL LAW TO THE DEVELOPMENT OF JURIDICAL SCIENCE

Andreea RÎPEANU[*]

Abstract: *Evolution of thought and Romanian juridical science are closely related to the development of society. In this study, referring to the period prior to constituting law as science, we shall deal with the ideas and conception of some significant personalities of the time. We shall focus on their juridical, as well as political thinking, both expressed in documents and legislations, that had an important role in the development of Romanian juridical science.*

Keywords: *Juridical doctrine, feudal law, juridical principles, unwritten law, written law.*

The period of IX-XIV centuries is characterised by the assertion of Romanian people, as distinct personality from an ethnical perspective, with own political organisation and juridical norms. The ancient Romanian law, as Dimitrie Cantemir stated as well, was *ius non scriptum*, that is an unwritten law.

The existence of Romanian unwritten law, with a strong identity, was acknowledge as well by our neighbours, calling it in the official documents, drafted in Latin, *ius valachicum.*

In the Romanian chancelleries, the law is known as *The Custom of Ground* or *The Law of the Country*[1], with the same disposals for all Romanian countries.[2]

Therefore, the name of *Law of the Country* means at the same time its territorial, unitary nature, since it is the law of a country, of a territory inhabited by the same Romanian population.

The Law of the Country is a Romanian creation, generated by the lifestyle of ancestors, developed by Romanians under the conditions of organisation in collectivities and feudal political formations.[3]

In order to define the sphere of enforcement of the *Law of the country*, one shall rely on the assertions of Nicolae Bălcescu:

The Law of the Country substituted as well the political constitution and of civil register and of criminal register. The Law of the Country is an inclusive law system, of a society politically organised in countries, including all norms of unwritten law that rule the organisation of states on local and central level, the juridical regime of property, the juridical status of individuals, the organisation of family, the successions, contracts, collective liability in criminal and tax field, repression of criminal acts and judging trials.

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[*] University PhD lecturer, Faculty of Law and Administrative Science, Ecological University of Bucharest.

[1] The expression of *Law of the Country* presents the best the contents of Romanian juridical custom.

[2] Romanians have called these norms, *law*, having the signification of *unwritten norm*, signification explained by Nicolae Noica (in *Romanian philosophical saying*, Scientific and Encyclopaedic Publishing House, Bucharest, 1970, p.174), coming from the Latin *re-ligio*, that is *inner law with faith and consciousness*, since *law* at Romanians means as well *religious faith*. Christian law influenced the moral contents of the consciosness of Romanians since their ethnogenesis. Therefore, when *nomocanons* (church laws) appeared, in the XV century, Romanians called them *God's laws* or the *Laws of God*.

[3] The juridical norms related to the organisation of principality and voivodeship represent the beginning of *public law* in the Romanian Countries.

These norms of law must be construed and enforced in conformity to the principles of equity, since in the Romanian conception[4], justice is equity.

It must be considered that during all this period the Romanian feudal law had a strong religious nature, and also that unwritten law predominates comparatively to written law.

More bound forms of political-juridical thinking with laic character started to appear, both in Moldova and in the Romanian Country, towards the middle of XV century, when, promoting a policy of consolidation of feudal state and of a more focused centralisation, under the conditions of constituting a religious organisational unity, the lords leading the state, with the support and through Church, introduced written legislation, the same on the entire Romanian territory.

During the following period, that lasted until the end of the XVI century, when feudal immunities started to be limited, and lord force to consolidate, the feudal law includes juridical principles more and more systematised and crystallised.[5] Naturally, the juridical thought registers evolutions, as well the base of which cannot dispense with the legislative, unwritten or written background, certain in terms of contents and accurate as formulations.

In this respect, *the Precepts of Neagoe Basarab to his son Teodosie* (1519-1520) may be considered the first attempt of theorizing the policy of centralised feudal state. With a double character, laic and religious, the work contains elements of public law (receiving messengers, military organisation, rules concerning the organisation of war etc.), for the explanation of which the author declares himself partisan of the idea of authority of lord power for the substantiation of which he used the religious argument.

In the same XVI century, it is noticed a beginning of differentiation between canonic law and laic law, between church law and royal law, being focused distinctions, both practical and theoretical, between public and private law. On their turn, the by-laws of Saxon borough included own regulations.

These include *Statuta iurium municipalium saxorum* (1583), juridical masterpiece which, inspired from Roman and German law, was to satisfy the new desires of urban economy in full development from Saxon towns. The drafting of *bylaws* was preceded by a juridical activity rather intense, carried out by the humanists of the era, one of them being Johannes Honterus from Braşov. In this two juridical works, he supports the substitution of feudal law with a new Roman ruling, based on humanism, which may correspond to the needs of municipal bourgeoisie in formation.

Also, in the same period, some principles of natural law are also established. Thus, in Transylvania, in the *Tripartitum of* Ştefan Werböczi -1517[6], code of laws appearing immediately after *the peasant war headed by Gheorghe Doja*[7], it is defined the notion of „people", including only the aristocrats, and the notion of „populace", assigned to non-aristocrats, to the peasants constituting the majority of Romanians. By this act, the Romanians are completely excluded from the political life of Transylvania. Distinction was made between law and customs, between church and laic law, between law, justice and jurisprudence, between public law and private law and even between natural law and positive law. By its contents, the *Tripartitum* occupies an intermediary place between written and customary law, being a codification of both forms of law in force in such era.

[4] Based on the Romanian principle, according to which, the law system is conceived by Celsus as, *ars boni et aequi,* where *bonus* is the social wellbeing which refers to the protection of social values, and *aequi* is equity.

[5] From a doctrine perspective. Traian Ionaşcu, Mircea Duțu, *History of juridical sciences in Romania*, Publishing House Academia Română, Bucharest, 2014, pag.17.

[6] The original title is *Tripartitum opus iuris consuetudinarii inlycti Regni Hungariae partiumque adnexarium.*

[7] He was a small Szekler nobleman from Transylvania, who led the peasant revolt against great Hungarian owners (magnates) of ground from 1514, which bears his name.

The code has an introductory part, *prologus,* which includes a range of juridical principles and three parts widely corresponding to tripartite division of law in the law of individuals, goods and actions, division used by Romanian jurisconsults in the presentation of their juridical system. The third part deals with the law and local customs of Transylvania.

In the XVII century in the writings of great scribe aristocrats and mainly in the works of historians, elements of laic thought appeared theoretically substantiating the restriction of lord prerogatives and the increase of the role of great aristocrats, by consolidating the political power of manorial council, by control of state apparatus by the great aristocracy, through the organisation of military forces under the heading of great aristocrats, by their consolidation of feudal exploitation etc. It was simultaneously acknowledge, in a more restricted form, however, the role of Ottoman suzerainty, in the life of Romanian Countries. For instance, Grigore Ureche (1590-1647), partisan of aristocrat regime, supported the need of written laws with a view to restrict central power and secure the political power of great aristocracy, declaring himself however an adversary of Ottoman power.[8] A similar conception we encounter at Miron Costin 1633-1691 and Ion Neculce 1672-1745 in Moldova, as well as at Constantin Cantacuzino 1650-1716 in the Romanian Country.

The feudal law of these times is characterised by beginnings of codifications, founding their expression in the juridical monuments of XVII century, firstly, in the codes of laws of Vasile Lupu, *Romanian book of learning* (1646) and Matei Basarab, *Rectification of law* (1652), both being an original arrangement of Roman – Byzantine law to the realities of Romanian life. Acknowledging as sources of law, the law and customs, the *Book* …. makes a difference between world law, *ius humanum* and God law, *ius divinum* and the law of human nature, *ius naturale*. The first concept corresponds to positive law, the second to the canonic law, whereas the third, to the idea of natural law. It makes an important step on the line of development of Romanian juridical thought, approaching, although only implicitly, issues of a classical juridical importance: principles of enforcement of laws, rights and obligations of individuals, patrimony, field of obligations, successions, institutions of criminal law etc.

The second law, *Rectification of law,* has the same contents as the *code of laws* of Vasile Lupu, to which it is added a part of canonic law from Byzantine law.

Feudal laws by excellence, these codes provided for the inequality of individuals in front of law in a pyramidal medieval society, focused on multiple vassalage relations, consolidating, simultaneously, a state heading when the lord aspired more and more obviously to the position of Byzantine autocratic.

The crisis of aristocratic regime determines the occurrence of new forms of government, of absolute monarchy, supported by lords such as Şerban Cantacuzino (1640-1688)[9] and Dimitrie Cantemir (1673-1723)[10].

An important contribution to the development of juridical science in this period was that of the patriotic lord and great scribe Dimitrie Cantemir, representative cultural personality of his era who, by his wide and multilateral activity, as well as by these advanced, laic and humanistic ideas, was one of the most important European science people. Referring to his works that include as well researches in the field of juridical sciences[11], we should outline the signification of his contribution by knowing the history of

[8] *Annals of the Country of Moldavia*, 2nd edition, managed by P.P. Panaitescu, Publishing House Academia, Bucharest, 1959.
[9] He was the lord of Romanian Country between 1678 and 1688.
[10] He was lord of Moldavia (March-April 1693; 1710-1711) and great scribe of Romanian humanism.
[11] Such as, *Description of Moldavia* (*Descriptio Moldaviae*), Academy Publishing House, Bucharest, 1973.

Romanian law, the scientific value of his theories and the manner of presenting it[12]. Partisan of the ideas of the school of equity, supporter of the state of law, where the lord himself is subject to laws and justice, for the sake of the people, protector of law and justice towards the people and predecessor of illuminism, Dimitrie Cantemir considered necessary the evolution of people by culture, with a view to provide the social evolution and preparation of the conditions for the achievement of reforms with a view to improve the situation of peasants. Dimitrie Cantemir supported from a historical perspective the traditions of hereditary monarchy in the Romanian Countries, the subordination of aristocrats to central power and the independence of the country towards the Ottoman Power, proving that the tribute which the lords of Moldavia agreed to pay to Turks was only a sign of rendering, not a tribute of submission.[13] The absolute monarchy, *the lordship that dominates alone*, regarded by Dimitrie Cantemir in the form of European enlightened absolutism, was not however a monarchy of divine law, since, in his conception, the lord had to observe law and consider the *voice of vulgus* and the *whispers of herds*. Consequently, he conceived political history as a succession of monarchies, led by the laws of nature, with periods of ascension and regress.

These ideas were reflected in Romanian written law at the end of XVII century and the beginning of XIX century.[14]

Absolute monarchy, in the form of enlightened absolutism, was supported by the annalists of the time[15], in their works.

During the period of division of feudalism (end of XVIII century – first half of XIX century) primary were the norms of the *customs of ground*, the norms of feudal law, as well as the written norms. In parallel, it was developed the action of codification of law, being removed the regional and municipal particularities. There were however enforced as well the norms included in the *charters* and *lord establishments*, with respect to financial organisation, the organisation of courts, procedure of judgement[16], adoption[17], alienations of premises, gypsy servants[18] etc.

The rulings of Fanariot lords included juridical norms concerning the state organisation and social structure.[19] They included advanced measures, with respect to the organisation of administration, by introducing the waging of state officers and mainly with respect to tributes, with a view to remove the abuses concerning the determination and collection of it.[20]

Register of laws (1780) of Alexandru Ipsilanti, elaborated in Greek and Romanian, reflects some authoritarian ideas concerning the state heading, equally taken over from Byzantine law (*Basilicans*) and from the *customs of ground* and included in the scope of

[12] Roman origin of ancient law; receiving the Romano-Byzantine law; hereditary nature of lordship and of succession to lord seat, supporting an enlightened monarchy relied on equity; origin of high dignities; suzerainty and position of Romanian Countries in international relations.

[13] Traian Ionaşcu, Mircea Duțu, *History of juridical science in Romania*, Romanian Academy Publishing House, Bucharest, 2014, p.20.

[14] *Register of laws* (1780) and *Code of Calimach* (1817).

[15] Ion Neculce and Mihail Cantacuzino.

[16] *Charter of Alexandru Ipsilanti* in the Romanian Country from 1775.

[17] *Charter of Alexandru Moruzi* in Moldovia from 1800.

[18] *Catholic charter* in Moldavia from 1785.

[19] *Establishments of* Constantin Mavrocordat from 1740 in the Romanian Country and 1743 in Moldavia.

[20] *Manual of laws* of Mihail Fotino (Photinopoulos), written in neo-Greek, in three different draftings (1765, 1766, 1777), it may be characterised as code of laws, treaty and legislative codification meant to be adopted as legislation in the Romanian Country. It included excerpts from *Basilicans* and from other Byzantine collections adapted to Romanian social realities. Meant to become an official *Code*, *the Manual from* 1766 was used in Romanian Country and Moldavia only as simple private collection of Byzantine law. In its drafting from the year 1777, where it is paid a special attention to the *customs of ground*, it served to the drafting of the *Register of laws*.

defence of the privileges of feudals and their power (consolidation of ownership) a range of improvements concerning the concerning the court organisation and judgement procedure.

The civil code of Moldavia (1817) of Scarlat Calimach, having as source of inspiration *the Austrian Civil Code* (1808) and maintaining some feudal traits, reflects the beginnings of division of feudalism and constitution of capitalist relations. It provides a wide juridical frame, which materialises the newest requirements of juridical and political thought.

The Law of Caragea (1818), having as source of inspiration the *custom of ground*, *Basilicans and Register of Law*, although it provided for the feudal relations and even the rests of servitude, it included as well few new disposals, due to some sporadic influences of the *Code of Napoleon* (1804).

A characteristic of bourgeoisie ideology was the modern concept of *illuminism* which, following the instauration of a *national state* and the creation of a *national society*, included all fields of social life. Therefore, *illuminism* represented a political-cultural formula corresponding to the needs of renewal of feudal state and of adjustment of it to the new economic development. *The new formula* intended to prevent the revolutionary subversions, that had taken place in England and France and to shape the medieval institutions in the spirit of the new social-economic requirements and bourgeois claims.

The only solution was the *enlightened absolutism,* meant to modernise, by reforms, *a state crushed by social contradictions*.[21] The enlightened absolutism claims new concepts and positions opposite to state and justice. The monarch exercises the prerogatives in virtue of equity (and not divine), based on a *contract* concluded with its people, to whom it has to provide *happiness*.

In its first form, illuminism developed in our country as a wide progressive movement, the beginning of which was noticed in the *Transylvanian School*, by its representatives: Samuil Micu (1745-1806), Gheorghe Şincai (1753-1816), Petru Maior (1761-1821) and Ion Budai-Deleanu (1760-1820). They criticised the feudal structure and the exploitation of peasants by aristocrats and bourgeois, supporting the need of acknowledgement of equal political rights for the Romanians from Transylvania. Their program claims, besides the elimination of bondage[22], equal rights for all inhabitants, political emancipation of Romanians, by acquiring the status of *constitutional nation*[23] and not *tolerated.* Such claims relied, both on equity, and the right of Romanians resulting from their number and proportion of duties incumbent upon them opposite to the state.

On the same line, by *Supplex Libellus Valachorum* from 1791, Romanian bourgeois from Transylvania asked for being instated in full citizenship rights, equal rights with *constitutional nations*, proportional representation in the political life of the country. This report was grounded, both on historical arguments, proving the authority of Romanians opposite to all the other nations of the country and juridical (constitutional)[24] based on which one asked for proper rights in public life. We notice that these aren't *new rights* but a *reinstate in the prior status* (*restitutio in integrum*).

In this context, it must be outlined the contribution of the first Romanian author of juridical treaties, Vasile Vaida (1780-1835), who, in the three volumes approaching Transylvanian civil law and his history (1824-1826)[25], proved to be the partisan of the ideas of Latin school, by the

[21] Traian Ionaşcu, Mircea Duțu, *quoted work*, p.23.
[22] This was as well one of the objectives of reformist policy of Iosif II.
[23] State component.
[24] Romanians were the most numerous nation and with the highest number of duties.
[25] It was considered the *first treaty of civil law* drafted by a Romanian.

historical-juridical arguments brought in favour of Roman origin and continuity of Romanians from Transylvania, as well as their claims and social and national rights.

In juridical plan, a first manifestation of illuminism takes place in the form of spreading the theory of equity, on which it shall rely the elaboration of codes in the centuries XVIII-XIX. It will influence as well the activity of the jurists of the time, such as: Petre Depasta, Greek annalist of Constantin Mavrocordat; Toma Cara, translator of the books of Armenopol from 1804 and author of the tree parts of *Pandects* (including the law of individuals); Andronache Donici, representative of the new rationalist-metaphysical thinking, of the centuries XVII-XVIII and author of the famous juridical manual, used as an authentic code of laws, until the adoption of the *Code* of Scarlat Calimach; Damaschin Bojinca, personality with a wide juridical culture; Christian Flechtenmacher[26], one of the main authors of the *Code* of Calimach.

An important thinker of such times, in the Romanian Country, was also Naum Râmniceanu (1764-1839) who, under the influence of the French Revolution and Illuminism, supported the annulment of privileges, equality of all citizens and their representation in the Public Assembly, by deputies, equal rights to learning, as well as the other *illuminated nations of Europe*.

The illuminist conception entailed other important juridical demarches as well. Therefore, the report of the Moldavian middle bourgeoisie, from 1822, entitled *Carbonaro Constitution*[27] reflected the influence of the ideology of lights and of the ideas of Montesquieu, preoccupation to enforce equal rights for all categories of aristocrats, as well as the maintenance of feudal relations in agrarian economy. *The report* included almost accurate translations of the *French declaration of rights*[28]. As for state organisation, the conception of authors relied on the restriction of the lordship powers and acknowledgement of the law of Public Assembly, as representative body of aristocracy of all categories, of effective heading of the country.

Based on the same illuminist ideas and with a view to develop juridical education, the bourgeois conceptions about the state were amplified; it was gradually created a scientific terminology; the juridical notions were advanced and works with high scientific level were published. Therefore, the main characteristics of juridical sciences in the century XVIII – the beginning of the century XIX-lea consisted in the preoccupation of spreading juridical knowledge and creating a Romanian legislation according to the requirements of Romanian people. Consequently, during the lordship of Constantin Mavrocordat (1711-1769)[29] more consolidated forms of studying law appeared, and during the times of Ioan Gheorghe Caragea (1812-1818)[30] it was constituted a position of Latin and jurist professor occupied by Nestor Craiovescu[31], author of a law course, highly appreciated by contemporaries.

[26] He considers that the development of national culture is a decisive factor for social and political emancipation.

[27] Whose main author was Ionică Tăutu (1798-1830), social-political thinker from the beginning of XIX century in Moldavia, partisan of the ideas of French Revolution and active participant to the political fights, being speaker of middle and small aristocrats and thus a predecessor of forty-eighters.

[28] Law of property, freedom of consciousness, individual freedom, equality in front of law etc.

[29] In the Romanian Country, he reigned six times: September 1730 - October 1730; 24 October 1731 - 16 April 1733; 27 November 1735 - September 1741; July 1744 - April 1748; c. 20 February 1756 - 7 September 1758 and 11 June 1761 - March 1763 and in Moldavia four times: 16 April 1733 - 26 November 1735; September 1741 - 29 June 1743; April 1748 - 31 August 1749 and 29 June 1769 - 23 November 1769.

[30] Former Fanariot lord of Romanian Country he became famous for the first *Code of laws* from Walachia bearing his name, *Caradja Legislation*.

[31] Erudite aristocrat from Romanian Country, knowing the laws of the country and Roman-Byzantine law.

The Charter from February 1816, of constitution of the position of *professor of laws teaching this science to those who want to learn it*, included significant recitals, *since the science of law, both for judges, and for those summoned and eventually for all people is useful, as one which, based on a natural principle, stands as the most healthy support for humanity*.

The Fanariot lords, like bourgeois, to whom juridical attributions were assigned, knew the Byzantin and occidental legislations in original.

During the same period, it was manifested as well the wish of juridical specialisation on superior schools.[32]

The development of capitalist relations influenced the development of the process of systematising the law on subjects. Thus, at the *College from Saint Sava*, Constantin Moroiu[33] (1837-1918) was teaching Roman law[34], criminal law and commercial law, and at Mihăileană Academy from Iaşi it was made the proposal to present during the classes the public legislation and private legislation of peoples. Between 1839-1840, Petru Câmpeanu[35] (1809-1893) sustained for the first time a course of public law and theory of law, and Gheorghe Costaforu (1821-1876), the first rector of the University of Bucharest, professor of civil law, published, in the form of a magazine, *Historical Magazine*, including studies of civil law.

At the beginning of the century XIX the political-juridical conceptions of the era encountered their expression in the *Organic Rules*, introduced by tsarist occupation, in 1831 in the Romanian Country and in 1832 in Moldavia. They were considered by specialists our first constitution, since the state organisation relied on the principle of separation of powers in the state. Thus, the legislative power is entrusted to the Public Assembly, the executive power – to the lord, elected for life, and the court power – to county courts, independent bodies. Also, one stipulated measures concerning the organisation of the profession of lawyer. By the document entitled *Science of collectivity* dated 30 September 1831, published in the *Official Gazette*, it was issued the registration certificate of Ilfov Bar[36], further turned into the Bar of Bucharest.

During the revolutionary year 1848, the juridical science expressed the basic ideas of the political acts of revolution concerning the state and law.

Thus, Nicolae Bălcescu (1819-1852) criticised acerbically the existent social-juridical structures, supporting the need of a new and modern constitution, state suzerainty, equal rights of states. In this respect, he supported with legal arguments, the right of Romanian principalities to independence towards the Ottoman Empire, proving that the so-called *Capitulations* were in fact, treaties of alliance, based on which suzerain power was to provide to Romanian Countries military protection and support.[37]

By its form and contents, *the Proclamation from Islaz* (9/12 June 1848) was above all political acts of the times, being considered an authentic constitution. Among the *social-economic claims*, recorded in the program of Romanian revolution we state: observance of

[32] In this respect, in 1817 Gheorghe Bibescu and Barbu Ştirbei went to Paris, followed in 1820 by the brothers Filipescu, Bălăceanu, Racoviță, and the sons of Dinicu Golescu left to Switzerland.

[33] Pioneer of national education, he was officer of Royal Army, with degree of captain. He participated to the Russian-Turkish war against Ottoman Empire. He was one of the most important masons from Romania and also a very active philatelist.

[34] Deemed right of the country.

[35] Of Transylvanian origin, professor of philosophy, successor of Eftimie Murgu.

[36] An *authentic Board of lawyers,* subscribed by the Great Logothete of Justice Iordache Golescu, where are mentioned 22 lawyers *ranged at the Divans from Bucharest*, see Mircea Duțu, *History of Bar of Bucharest*, Publishing House Herald, Bucharest, 2006, pp. 50 and the following.

[37] Traian Ionaşcu, Mircea Duțu, *quoted work*, p.28.

the principles concerning freedom and equality; putting peasants in possession of lands, with or without compensation; removal of feudal privileges; overall tax contribution.

As for the *rights of people and citizens,* one drafted a range of petitions concerning: removal of feudal ranks; abolishment of bondage; political equality of all citizens of any nationality; securing the rights and freedoms of citizens; elaboration of democratic reforms in administration, justice and army; enforcement of the principle of justice and equality in exercising public functions.

As for the *modernisation of political life*, the program of Romanian revolution, includes a range of principles characteristic to bourgeois constitution: constitutional monarchy; separation of powers in the state; ministerial responsibility; inamovibility of judges; equality of all citizens opposite to laws; institution of national guards.

An important representative of this period of national renaissance, who expressed his convictions, both in his scientific, historical and legal works, and in the reforms' program targeting a modern state organisation, was Mihail Kogălniceanu (1817-1891). In this respect, he stated that social evolution may be achieved by reforms, as well as by the spread of culture. In the revolutionary program entitled *Desires of national party of Moldavia* (Iaşi, 1848), drafted by him, measures and reforms were included finding continuation, in the juridical form, in the *Constitution Project for Moldavia*, document to which he had as well a significant contribution: removal of any ranks and personal or birth privileges; equality in civil and political rights; *Public Assembly* to include all states of society; lord elected by all states of society; ministerial responsibility and of public officers; individual freedom, of domicile and press; equal and free school education; incorporation of jury for political, criminal and press cases; introduction of civil, commercial and criminal bourgeois registers; removal of beat to death and beat; reform of county courts, inamovibility of judges, removal of county courts and special commissions; freedom of cults; political rights for all inhabitants of Christian religion; gradual emancipation of Jewish; secularization of monasteries' fortunes; new norms concerning policy and prisons; measures for removal of corruption.

Innovative political and juridical conceptions were presented as well by the lord Alexandru Ioan Cuza (1859-1866), jurist. With Mihail Kogălniceanu will incorporate the modern Romanian state, creating a range of reforms such as: agrarian reform (putting peasants in possession of lands), electoral reform based on qualification (but with a lower qualification), reform in education; modern state organisation, development of national institutions, unification and modernisation of legislation by adoption of civil code, criminal code, code of civil proceedings, code of criminal proceedings.

In parallel, the social-economic and national claims of Romanians from Transylvania in the revolutionary year 1848, were sustained with strong juridical arguments by Avram Iancu[38], *Rake of mountains (1824-1872)*, being himself a good knower of law. In this respect, on 20 December 1850 he bequeath all his movable or immovable fortune, *as support for the incorporation of an Academy of Laws, strongly believing that the fighters with the weapon of law may impose the rights of the nation*.[39]

A remarkable Romanian politician, historian, philosopher and jurist, university professor, Simion Bărnuțiu (1808-1864) was one of the main organisers of the revolution of 1848 in Transylvania. He participated to the *National Meeting from Blaj* on 18/30 April

[38] He was head in fact of the Motilor Country in the year 1849, leading the army of Transylvanian Romanians, in alliance with Austrian Army, against Hungarian revolutionary troupes under the heading of Lajos Kossuth.

[39] Dr. Ioan Fruma, *About Transylvanian juridical spirit*, *Transylvania Magazine, Organ of Astra*, Sibiu, February 1944, no.2, p.101.

1848 and in May 1848. He conceived and shared his famous manifest *Proclamation from March* 1848, presenting his principles, previously formulated, starting with 1842, about Romanian nation and the fate of Romanians from Transylvania. His social claims were indissolubly related to acquiring independence and suzerainty of Romanian nation, acknowledgement of the nationality of Romanians, observing the principles of equal rights of all nations living in Transylvania. He was a partisan of national-idealist theory of equity putting it in accordance with the requirement of the era, using it in the scope of satisfying the desires of social and national release of Romanians from Transylvania, as well as democratic organisation of Romanian national state. In his works, *Dereptulu naturale privatu* (1868) and *Dereptulu naturale publicu* (1870), defining equity as *primitive fontana and conditioning validity of all positive law*, he elaborated the practical precept according to which, *any honourable and noble man cannot observe but that positive law corresponding to a national law*.

As professor at the Mihăileană Academy (1855-1860) and then at the University of Iaşi (1860-1864), Bărnuțiu educated people with new thinking, people who further on asked for democratic reforms, universal vote, expropriation of aristocrat and monasteries' properties.

Conclusions

The Romanian modern state, before becoming an institutional reality, was imagined as a political project, of entire generations of tourists, thinkers, political people. This project was outlined in the XVIII century. He continued in the XIX century, when the juridical and political thinking created a program of reforms and national emancipation, which outlines the project of modern Romanian state. In this respect, the programs of the revolutions from 1821 and 1848, as well as of secret political societies, between the two revolutions contributed to the clarification of the political project.

In conclusion, we may assert that, in the first half of XIX century, the Romanian society developed progressively, looking for new models and forms of organisation. Between the reforming theoretical activity (reform projects, reports) and social-political action (revolutions, secret societies), the official reform programs only accelerated the achievement of this political project.

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THE SPECIAL RESPONSIBILITY OF THE NATIONAL BANK OF ROMANIA

Adriana PÎRVU[*]
Iulia BOGHIRNEA[**]

Abstract: *The National Bank of Romania is an independent public institution, governed by Law no.312/2004 regarding the statute of the National Bank of Romania*[1]*. The independence of the central bank is an essential feature deriving from its main role, i.e. to ensure and maintain price stability. We appreciate that, although the independence is necessary for the central bank to perform its activity, it cannot be absolute. That is why we consider that its special statute „should not lead to the alienation of this institution from the judicial control system, and its independence should not be understood as leading to its isolation from the other powers of the state, especially from the judicial power".*

Keywords: *National Bank of Romania, public institution, contentious administrative matters*

In order to identify the way in which the National Bank of Romania [N.B.R.] can be held responsible, we should analyse both its legal statute and the legal statute of its personnel.

The National Bank of Romania was initially conceived as a state emission bank, being named „discount and circulation bank" by its act of establishment[2]. The bank had a mixed capital (two thirds private capital and one third, state capital).

Gradually, the legal statute of the National Bank of Romania suffered many changes, the bank having in time more and more important responsibilities. The doctrine emphasised that the central bank evolved from the statute of a body of the central public administration to that of an independent public institution[3], operating based on the autonomy principle. At the same time, this evolution can be seen from the analysis of the legal acts regulating the central bank statute in time[4].

The National Bank of Romania is an independent and autonomous public institution, governed by Law no.312/2004 regarding the statute of the National Bank of Romania[5]. But its autonomy is rightfully considered to be partial[6].

Though the central bank has a supervisory position and recently more and more tensions have emerged between the independence of the central bank and its accountability

* PhD University Asisstant, Faculty of Law and Administrative Sciences, University of Pitesti
** PhD University Lecturer, Faculty of Law and Administrative Sciences, University of Pitesti
[1] Published in the Official Journal no.582 of 30.06.2004.
[2] Law on establishment of a discount and circulation bank, of 11 April 1880, published in the Official Journal no. 90/1880.
[3] I.Silberstein, The National Bank of Romania. From a body of the central administration to an independent public institution, Ed. Hamangiu, Bucureşti, 2006, pp.93 and foll.
[4] R.Radu, G.Ghionea, *The National Bank of Romania, from state body to autonomous authority*, in the magazine Management Intercultural, Vol.XVI, no.3 (32), published by the Romanian Foundation for Busines Intelligence 15.55
[5] Published in the Official Journal no.582 of 30.06.2004.
[6] R.Postolache, Banking Law, Ed.Universul juridic, Bucureşti, 2009, pp.19-20

towards the third parties for the errors committed during the supervision, the literature has rarely touched this subject[7].

The independence of the central bank is an essential feature deriving from its main role, i.e. to ensure and maintain price stability. It is to be appreciated that the independence of the central bank „is absolutely necessary, because there could be difficult economic situations in which the Government could pursue some subjective interests, mainly political, different from the long term assurance of the financial stability"[8]. This is the reason why the lawmaker understood to offer the central bank some responsibilities regarding the drawing up and application of the monetary policy, the exchange rate policy or the authorisation of credit institutions[9].

The management of the central bank is ensured by a board of directors and by the governor. The board of directors is a body whose independence is reflected both in the way of designation of its members, public servants, and also in the special incompatibilities imposed to them.

The members of the Board of Directors, having the nomination of the executive management, are appointed by the Parliament, at the proposal of the specialised permanent commissions of the two Chambers of the Parliament. The appointments are made for a five-year period, with the possibility to renew the appointment. Appointments, withdrawals and revocations from the position are published in the Official Journal of Romania, Part. I.

The members of the Board of Directors have a special statute, the specialised literature emphasizing that they enjoy a „special stability; revocation from the position is only made by the Parliament, at the joint proposal of the permanent commissions of the two chambers and only under the conditions provided by law;

a) no longer fulfils the conditions to exert his/her duties;

b) is guilty of serious deviations."[10]

The decision of revocation from the position of the members of the Board of Directors can be appealed at the High Court of Cassation and Justice within fifteen days from its publication in the Official Journal.

As for the special incompatibilities imposed to the members of the board of directors, the law provides that they cannot be members of parliament or members of a political party, they cannot be part of the judicial authority or public administration.

Not all the „workers" of the National Bank of Romania have the same legal statute and regime as the ones of the members of the board of directors. The rest of the personnel, N.B.R. employees, do not have the capacity of public servants. Consequently, they are applied the provisions of the labour legislation, and also their own rules[11].

The specificity of the activity of the central bank generates special rights and obligations for its personnel. For example, pursuant to art. 52 para (1) from Law no. 312/2004 regarding the statute of the National Bank of Romania, „the members of the Board of Directors and the employees of the National Bank of Romania shall keep the professional secrecy on any information not meant to be published, that they became aware of during the exercise of their positions, and they shall not use such information in order to obtain personal gain, any

[7] P. Athanassiou, Financial Sector. Supervisors' Accountability. A European Perspective, in European Central Bank, Legal Working Paper Series, No. 12/August 2011, p. 10
https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp12.pdf, accessed on 02.03.2015, at 17:30

[8] R.Radu, G.Ghionea, op.cit., p.67

[9] L.Săuleanu, L.Smarandache, A.Dodocioiu, Banking Law, Ed. Universul Juridic, Bucureşti, 2011, p.28

[10] R.Postolache, op.cit., p.39

[11] R.Radu, G.Ghionea, op.cit., p.68

deviation being sanctioned according to the law. The members of the Board of Directors and the employees of the National Bank of Romania shall keep the professional secrecy also after the termination of the activity within the bank, any breach being sanctioned according to the law".

As far as the responsibility is concerned, the central bank employees can be engaged in civil (asset) responsibility, disciplinary responsibility and criminal responsibility.

Civil responsibility can be engaged when employees cause to third parties some damages resulting from the defective way in which they perform their duties. The action for damages can be filed against the bank, the latter having the right to sue for compensation. In such a situation, we talk about the principal's responsibility for the deed of the person in charge.

In case employees do not perform their duties accordingly, breaching the internal regulations of the bank, then disciplinary responsibility can be engaged. In case of accomplishing a disciplinary deviation, the employee can be sanctioned disciplinarily under the conditions provided by the Labour Code and also by the central bank regulations.

Finally, the central bank employees can be held responsible from a criminal point of view when they are found guilty of accomplishing an offence.

But there are some certain states, such as Turkey, where the statute of the central bank reflects on the employees' statute, too. Although they are not considered public servants, investigation and indictment of the central bank employees fall under a special procedure provided in the special act of the central bank. In order to start the criminal procedure against an employee or to impeach an employee of the Central Bank of Turkey, it is necessary that the bank should send a petition to the competent authorities in this regard.Otherwise, the employees could not be held responsible[12].

As mentioned before, independence is important in the legal and judicial statute of a central bank. However, the full independence of the central banks was many times contested, claiming that it „violates the democratic control over the monetary policy and leaves one of the most important issues of government organisation in the charge of some unelected individuals"[13].

Recently, doctrine invoked the guilt of the National Bank of Romania in spreading the irresponsible lending[14].

Responsible loaning is a relatively recent term internationally developed after the financial crisis started in 2008. The responsible loaning assumes a more reserved behavior of the banks in their activity of „selling" the financial products. They should take all the necessary measures to be sure that the debtor may reimburse the loan and its „accessories"[15].

The responsible loaning concept has emerged as a reaction to a phenomenon which affected worldwide, not long time ago, namely the *irresponsible loaning*, also known as

[12] In this regard, O.Akan, The Statues, Legal and Criminal Liabilities of the Central Bank of the Republic of Turkey employees, 2014, http://www.tcmb.gov.tr/wps/wcm/connect/a9915679-6155-4c66-82d7-26a4e561219f/ozge-akan.pdf?MOD=AJPERES, accessed on 17.04.2015, time 17:05.

[13] M.Kvasnicka, Independence and Responsibility of Central Banks, in New Perspectives on Political Economy, Vol.1, Nr.2, 2005, p.52, http://pcpe.libinst.cz/nppe/1_2/nppe1_2_3.pdf, accessed on 17.04.2015, time 18:00.

[14] Gh.Piperea, interview in *Bizlawyer:I'm not fighting against banks, but against of some banks abuses, I'm fighting against the hypocrisyof NBR and the bank lobby, I'm fighting against theft,* http://www.piperea.ro/interviu/gheorghe-piperea-nu-lupt-impotriva-bancilor-ci-impotriva-abuzurilor-unor-banci-lupt-impotriva-ipocriziei-bnr-si-lobby-ului-bancar-lupt-impotriva-furtului/, accessed on 02.03.2015, time 17.45.

[15] A.Pîrvu, *The Legal Liability for Reckless Loaning*, article sustaind in the International Biennial Conference „Legal system between stability and reform", Craiova, 20-21.03.2015, p.1.

„*the mis-selling of financial products*"[16]. The „mis-selling" refers to „the action to sell something unsuitable for the person buying it"[17].

The *National Bank of Romania*, as the central bank, would have had to be able to prevent this undesirable phenomenon from occurring. Since, based on the Basel Agreement II[18], the financial products must be approved by the central bank prior to their launch, we consider that the NBR would have had the necessary leverages to combat baneful financial phenomenon, such as „the credit contracted based only on an ID card", or the more recent phenomenon generated by the CHF loans. We consider that launching on the market of such products and their consequences were not efficiently monitored by the NBR, which has a significant guilt in this matter[19].

Although the central bank evolved from the statute of autonomous administrative authority[20], we appreciate, together with other authors[21], that the interpretation given to the new regulation, meaning that the central bank should be assigned a *sui generis* statute, a statute of a public institution situated outside the administrative control, cannot be admitted[22]. Such an interpretation could lead to the erroneous understanding of the notion of independence, for as long as the NBR's actions or inactions could lead to prejudices caused not only for credit institutions, „without the legal possibility to receive compensations for the damaged caused, based on the inadmissibility of the action on grounds of *opportunity* or *qualitative analysis*"[23]. Therefore, at least theoretically, the actions of the NBR could be censored using the administrative contentious, according to Art 126 Para 6 of the Constitution[24].

A series of considerations makes us agree to the opinion provided in the doctrine, according to which „the National Bank of Romania is an independent public administrative institution (...). In this regard, the judicial nature of the responsibility of the National Bank of Romania, regarding its acts of regulation and supervision of the payment systems, is undoubtedly an administrative-patrimonial one"[25].

The documents issued by the National Bank of Romania, as acts if authority that can jeopardize third parties, can be subjected to the control of the contentious administrative court, pursuant to art. 1 para.(1) from Law no.554/2004 of contentious administrative matters[26]. The central bank statute engages an objective responsibility to such bank and consequently we adopt the opinion in the doctrine, according to which „proving that the damage was produced due to the exact compliance with the legal act issued by the National Bank of Romania, is enough to engage the responsibility pursuant to art. 1 from Law no.554/23004, the presence or absence of the fault is not relevant in this matter"[27].

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[16] *Ibidem.*
[17] http://dictionary.cambridge.org/dictionary/business-english/mis-selling, accessed on 28.02.2015, time 09:45
[18] http://www.bis.org/publ/bcbs107.pdf, accessed on 04.03.2015, time 11:15
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[22] I.Sielberstein, quoted., p.304
[23] Ibidem. The authors refer to Art 275 Para 3 of the Government Emergency Ordinance No 99/2006 on credit institutions and capital adequacy, according to which the NBR „is the only authority able to rule on opportunity reasons, on the qualitative evaluations and analysis grounding the issuance of its acts".
[24] A.Pîrvu, quoted, p.5.
[25] I.Sabău-Pop, R.F.Hodoş, quoted, p.128
[26] Published in the Official Journal no. 1154 of 7 December 2004.
[27] I.Sabău-Pop, R.F.Hodoş, op.cit., p.129

Pursuant to art. 275 para. (1) from Government Emergency Ordinance no 99/2006 regarding credit institutions and capital adequacy[28], „the acts adopted by the National Bank of Romania according to the provisions of this emergency ordinance, of the (EU) Regulation no.575/2013 and of the regulations issued for their enforcement, regarding a credit institution, including those of art. 108 para. (1), or regarding the persons assigned to ensure the management of the branches of the credit institution, and the documents regarding its shareholders, can be appealed within fifteen days from communication to the Board of Directors of the National Bank of Romania that should issue a grounded decision within thirty days from the introduction date". In its turn, a decision of the Board of Directors of the National Bank of Romania can be appealed at the High Court of Cassation and Justice within fifteen days from communication (art. 275 para. (2) from the emergency ordinance).

The courts of law shall issue only on the lawfulness of the acts of the National Bank of Romania (art.275 para.(4)).

The provisions of art.275 para. (3) from the above-mentioned emergency ordinance were criticized in the specialised literature[29]. It is considered that the supremacy of art. 126 para. (6) of Constitution is violated when it is provided that „the National Bank of Romania is the only authority that should make a decision on the considerations of opportunity, assessments and quality analyses based on which such bank shall issue its acts".

In our opinion, the National Bank of Romania is a public institution with extremely important responsibilities.

The specialised literature emphasized that „the central bank plays a key role – of an economic manager, lately accumulating more and more responsibilities related to the stabilization of its own economy".[30]

At the same time, we notice the tendency of the National Bank of Romania not to assume responsibility for its actions or inactions[31].

Its actions or inactions have an effect direct positive or negative effect on the economic indicators, and an indirect effect on the social ones. We appreciate that independence is necessary for the central bank to perform its activity, but this independence cannot be absolute. That is why we consider that its special statute „should not lead to the alienation of this institution from the judicial control system, and its independence should not be understood as leading to its isolation from the other powers of the state, especially from the judicial power"[32].

[28] Published in the Official Journal no.1027 of 27 December 2006

[29] I.Sabău-Pop, R.F.Hodoş, op.cit., p.130

[30] www.ase.ro/upcpr/profesori/165/banca%20centrala.doc , accesat în data de 15.03.2015, ora 12.30.

[31] For example, in a recent study, they emphasized that the way in which the National Bank of Romania [BNR] contributed to the creation and perpetuation of the myth according to which „BNR controls the monetary conditions in the economy (an to a certain extent, the financial ones) by its regime of aiming of inflation. This myth is useful to the central bank in order to remove the responsibility for the internal economic evolutions...". C. Ban, D.Gabor, Recalibrarea înțelepciunii convenționale: o analiză aprofundată a relațiilor dintre România şi FMI, Friedrich Ebert Stiftung, 2014, p.2, http://www.fes.ro/media/2015_news/Binder_raport_FES_FMI_ro.pdf, accesat în data de 15.03.2015, ora 12.40

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DISSOLUTION OF PARLIAMENT IN THE ROMANIAN LAW AND IN THE COMPARATIVE LAW

Mihaela-Bogdana SIMION*

Abstract: *The present paper approaches the problem, rather controversial, of dissolution of Parliament in the Romanian constitutional system, but also in France or Germany.Dissolution of Parliament represents a necessary procedure for balancing the relations between the power in state, but it also represents a way of resolving political and institutional crises, in case of repeated attempts to form a Government. In general, the power to dissolve Parliament lies with the President, who, according to the constitutional system , may invoke it conditionally (the Romanian case) or discretionary (the case of France).*

Keywords: *dissolution, Parliament, President, Government, early elections*

1. General considerations

According to the dictionary of constitutional law, „dissolution" is a procedure characteristic to political regimes with a flexible separation of powers[1], allowing to an executive authority to stop the mandate of the elected parliamentary assembly. Such circumstance involves the organization of new legislative elections[2].

Dissolution of Parliament appears as an exceptional situation and it represents either a penalty to the legislature in extreme situations of serious violation of constitutional provision and of blocking the activity of state institutions or, in many cases, as a manoeuvre by which the parliamentary power seeks a recapture of the public confidence and an extension of the governmental period[3].

Originally owned by the King, the right to dissolve the legislature has become, over time, the prerogative of the Prime Minister in Britain, in the 18th century, a period in which the parliamentary regime stabilized on several criteria: political autonomy of the Prime Minister towards the King; joint political responsibility of the Government in front of the Parliament and, accordingly, the recognised possibility of the Prime Minister to cause new elections for the House of Commons, by dissolving it.

Since then, all parliamentary regimes know this procedure, widely accepted as capable of balancing the political responsibility of the Government: if the Assembly may change the Government at any time, the Government, too, may dissolve the legislature. But, most often, dissolution appears as a solution to repeated attempts to form a new Government, either after the parliamentary elections either, or as a result of a vote of no confidence in the existing Government. In this respect, it is considered that, if by political or technical reasons the dissolution can hardly be practiced, the political instability in that society may increase[4].

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* Lecturer PhD, Faculty of Law and Social Sciences, „1 Decembrie 1918" University of Alba Iulia.

[1] Dissolution of Parliament is not allowed in presidential political regimes or in directorial political regimes, such as in the United States of America or Switzerland.

[2] Thierry Debard, *Dictionnaire de droit constitutionnel*, 2 édition, Ellipses, Paris, 2007, p. 151.

[3] Ştefan Deaconu, in *Constituţia României. Comentariu pe articole*, coord. Ioan Muraru, Elena Simina Tănăsescu, C.H.Beck, Bucureşti, 2008, p. 827.

[4] Philippe Lauvaux, *La dissolution des assemblées parlementaires*, Economica, Paris, 1983, p. 520.

Currently, in the parliamentary and semi-presidential regimes this prerogative is conferred on the Head of State, being the usual method by which conflicts arising between the Government and Parliament are resolved. Where Parliament has a bicameral structure, dissolution may be ordered, either on both Chambers, or on a single Chamber, usually, the lower one, to which the Government is responsible, on the model of the House of Commons[5].

2. Dissolution of Parliament in Romania

In accordance with Article 89 of the Constitution, the President of Romania holds the exclusive power to dissolve Parliament.

Dissolution of Parliament does not mean a sanction of the legislative by the President of Romania. This statement is based on the following considerations[6]:

a. the president of Romania is not above the Parliament, which is elected by direct universal suffrage electoral body and which is, according to Article 61 of the Constitution, the supreme representative body of the Romanian people;
b. Romanian fundamental law does not provide the possibility of dissolution of Parliament as a penalty subsequent to a conflict between Parliament and the President, a conflict from which the President emerges victorious in front of the electorate. Thus, the suspension of the President by Parliament, under Article 95 of the Romanian Constitution, and the reconfirmation of the President, after the referendum for his dismissal, does not result in the dissolution of Parliament.
c. from the regulation of Article 89 paragraph 1 of the Constitution, it results that the subjects of the dissolution are the candidate or the candidates nominated by the President for the office of Prime Minister and the Parliament. At the time, referred to Article 89 paragraph 1 of the Constitution, the President of Romania is not in a direct institutional report to the legislature.

In conclusion, we can say that the dissolution of Parliament by the President of Romania has an apparent meaning of a conflict between the two authorities; in reality, we are in the presence of a constitutional solution to remove an obstacle to the formation of the Government, which is an undesirable situation for any constitutional system.

According to Article 89 paragraph 1 of the Constitution, the exercise of the right of the President to dissolve Parliament is subject to multiple conditions, almost impossible to achieve in practice[7]. Thus, we deduce the idea that the 1991 Constitution did not understand to absorb the French solution, according to which the President may cause early elections when he has this intention. This demonstrates that the Romanian fundamental law set the

[5] In Italy, in accordance with Article 88 of the Constitution, the President may dissolve both Houses or only one of them, the Government being responsible to both Chambers; in Spain, in accordance with article 115 of the Constitution, the President of the Government, after deliberation of the Council of Ministers and on his own responsibility, may propose the dissolution of the Congress of Deputies, of the Senate or of the Parliament, which is decreed by the King, although the executive is responsible only to the Congress of Deputies. In contrast, in France, according to article 12 of the Constitution, the President may decide only on the dissolution of the National Assembly.

[6] Cristian Ionescu, *Raporturile Parlamentului cu Guvernul şi Preşedintele României. Comentarii constituționale*, Universul Juridic, Bucureşti, 2013, p. 460.

[7] Dana Apostol-Tofan, *Răspunderea preşedinților de republică în unele state europene, cu privire specială asupra regimului constituțional românesc*, Analele Universității din Bucureşti, Seria Drept nr. III-IV/2008, p. 29. In this regard, it was considered that regulation of the right to dissolve the Parliament of Romania is even more restrictive than in countries with a similar Parliamentary political regime. See Antonie Iorgovan, *Tratat de drept administrativ*, vol. I, C.H. Beck, Bucureşti, 2005, p. 295.

Parliament in the core of the Romanian governmental system. Therefore, Parliament is the institution receiving the greatest stability.

No less than six conditions must be fulfilled in order to operate the dissolution of Parliament, namely: (*i*) consultation with the Presidents of both Chambers and the leaders of the parliamentary groups; (*ii*) no vote of confidence has been obtained to form a government within 60 days after the first request was made; (*iii*) the Parliament rejected at least two requests for investiture; (*iv*) the Parliament may be dissolved only once in a year; (*v*) the Parliament cannot be dissolved during the last six months of the office of the President; (*vi*) the Parliament cannot be dissolved during a state of mobilization, war, siege or emergency.

Some clarifications must be made on these conditions, which must be fully respected when questioning the dissolution of Parliament[8].

Dissolution of Parliament by the President of Romania may intervene only when forming a new Government, following the parliamentary elections or the dismissal of the executive by passing a motion of censure.

In order to form a new Government, the President of Romania propose a candidate to the office of Prime Minister. This candidate, under Article 103 of the Constitution, shall within 10 days of the designation to request a vote of confidence of Parliament upon the program and government team. In this stage, the President must take care to propose an eligible candidate for Prime Minister, following consultation with the party which has the majority in Parliament or, failing this majority, with the parties in Parliament. During the consultations, the President must consider the options of the parliamentary parties since the vote of confidence or rejection of the Government validation depend on the parliamentary support[9].

The failure of the candidate nominated by the President in his quest to obtain a vote of confidence means, somehow, the failure of the President, too, in carrying out his task of nominating a candidate for Prime Minister, after consultations with political parties stipulated by Article 103 paragraph 1 of the Constitution, a candidate able to meet the parliamentary majority.

After the first nomination, the President of Romania will make another attempt to appoint a person who would be more likely to persuade Parliament that his governmental program and the list of the future cabinet members deserve a vote of confidence on the part of the Legislature. Otherwise, as we have shown, according to the text of the Constitution of Romania, after the rejection of the two requests for investiture within 60 days after the first request, the President of Romania shall consult the presidents of both Chambers and the leaders of parliamentary groups in a last step of finding a compromise solution to form a Government.

We notice that, unlike Romanian constitutional regulation, in most Central and Eastern European States Constitutions it can be observed both the absence of temporary conditioning of the right to dissolve the legislature, namely the passage of a specified period after the first request investiture, and the lack of certain provisions related to consultation that are prior to dissolution. This fact demonstrates that the Constituent Assembly of these states have found this procedure as a logical result of a whole process that failed. Furthermore, these states did not want to condition, in a legal manner, the

[8] According to an opinion, Parliament can be dissolved without the observance of conditions laid down by Article 89 of the Constitution, by the election of a new constituent assembly meant to draft the text of a new Constitution. Thus, according to this view, the dissolution of Parliament can take place anytime, by initiating a referendum to form a Constituent Assembly. See Radu Carp, Ioan Stanomir, *Limitele constituției. Despre guvernare, politică şi cetățenie în România*, op.cit., p. 105.

[9] Ştefan Deaconu, in *Constituția României. Comentariu pe articole*, p. 828.

balance between executive and legislature, with formalities that are specific to other types of political crisis, other than those having a governmental nature[10].

However, Romania's President is not bound by the options or opinions of the Presidents of Chambers or of the parliamentary group leaders in the decision to be taken. The power of dissolution of Parliament is a possibility conferred by the Constitution to the President when the constitutional requirements shown above are met. Also, the dissolution of Parliament is not an obligation, in the sense that if the President does not want to resort to this method or if he does not consider it appropriate, he may not use it. In this case, he will proceed with a new designation, because the Constitution does not prohibit it. Nevertheless, in some situations, this option given to the president may become a liability, under his duty of ensuring the proper functioning of public authorities, when the political crisis cannot be solved and it cannot lead to the formation of the Government. This extreme situation requires the calling to the polls to arbitrate the conflict of political interests in Parliament.

Dissolution of Parliament is made by a presidential decree and is published in the Official Gazette of Romania, Part I. The decree of dissolution of Parliament has the legal nature of an administrative act exempted from the possibility of being brought to court. It cannot be verified upon its constitutionality since the Constitutional Court does not have the power to verify and ensure the compliance with the procedure for dissolution of Parliament.

Also, the decree is not countersigned by the Prime Minister, circumstance that makes the President fully political responsible for his action. However, his liability can be driven only to the extent that the dissolution of Parliament would be made in violation of constitutional provisions.

The Head of State may exercise this right only once in a year. By „one year", it is understood the passage of 12 months, otherwise it would be contrary to the intention of the legislature if the Parliament may be dissolved once at the end of a calendar year, and second at the beginning of the next year.

The final paragraph of Article 89 of the Constitution provides two situations in which Parliament cannot be dissolved: in the last 6 months of office of the President of Romania, restriction explained by the need to preserve continuity of state structures even during the election campaign; during a state of mobilization, war, siege or emergency, exceptional situations in which the President needs the support of the Parliament in order to take appropriate measures.

Following dissolution, within no more than 3 months from the dissolution, elections will be organised for a new Parliament, according to Article 63 paragraph 2 of the Constitution.

From the analysis of the aforementioned issues, we may notice that due to the way in which it is currently regulated, the dissolution procedure available to the President, in the exercise of his powers to ensure the proper functioning of state authorities, it is practically impossible to use it. Or, if the President of Romania would use it, than the result would be an accentuation of the political and institutional crisis. Perhaps because of this, in the practice of the Romanian state after the entry into force of the 1991 Constitution it was not identified any case of Parliament dissolution.

An adjustment of these provisions is needed to be made in a future constitutional regulation, because their present stipulation does not solve any problem. Basically, the current regulation does not offer to the President of Romania any legal leverage to unlock the political

[10] François Frison-Roche, *Les chefs d'Etat dans les PECO. Pouvoirs constitutionnels et poids politique*, Le Courrier des Pays de l' Est nr. 3/2004, p. 62.

and institutional crisis linked to the impossibility of appointing a Government. Also, the term of 60 days, which must elapse after the first request of investiture of a Prime Minister so as the Parliament may be dissolved, is much too long. Extending a governmental crisis for at least 60 days could have serious consequences, especially because, in all this time, the Government that lacks legitimacy will manage the public affairs of the state. whose mandate has ceased or been dismissed by approving a motion of censure.

3. Dissolution of the National Assembly in France

According to article 12 of the Constitution of France, the President of the Republic may dissolve the National Assembly (the lower House of Parliament). The President may invoke this right after consultation with the Prime Minister and the Presidents of the two legislative assemblies. Legislative elections will be held in the interval between the twentieth and fortieth day from the date of issuance of the decree of dissolution. The newly elected National Assembly does not have to wait for a convocation. It shall sit as of right on the second Thursday following its election. Should this sitting fall outside the period prescribed for the ordinary session, a session shall be convened by right for a fifteen-day period.

After the election of the new Parliament, a new dissolution of the National Assembly is possible only after 12 months. Also, the dissolution cannot be decided if the President has used his exceptional powers according to Article 16 of the Constitution.

Some clarifications are needed. First, the President of the Republic may dissolve only the National Assembly, not the Senate. Secondly, the President of the Republic decided freely the dissolution of the Assembly, but only after consulting the Prime Minister and the Presidents of the Houses. Consultation signifies an advisory opinion, being a procedural formality. It consists of expressing an opinion by the holders of offices mentioned in the constitutional text. However, it is clear that the President may not decide on the dissolution without fulfilling this formal procedure in an effective manner[11]. Third, the decree of dissolution of the National Assembly should not be countersigned. This is an additional argument in favour of the idea that the reasons of dissolution are left to the discretion of the President. Also, the decree of dissolution implies a total immunity of jurisdiction and it may not be censored by the State Council or by the Constitutional Council[12].

Since the establishment of the Fifth Republic, the right of dissolution has been used five times, for different reasons: twice by general de Gaulle (1962 and 1968), twice by F. Mitterrand (1981 and 1988) and once by J. Chirac (1997).

During the mandate of General de Gaulle, the dissolution of 9 October 1962 is typical for the parliamentary regime, being a response to the adoption of a motion of censure by the National Assembly. On the contrary, the dissolution occurred on 30 May 1968 was not the result of a political crisis as the Parliament sustained the Government headed by G. Pompidou. Furthermore, this Government was favourable to the President. Thus, this dissolution was the result of an academic and social crisis. In this context, the dissolution of the Assembly and the return to the electorate pursued, especially, to reconfirm the trust of the electorate for the President in office, General de Gaulle, and less the need to solve a conflict between the legislative and executive.

[11] François Luchaire, Gérard Conac, Xavier Prétot, coordinatrice Clémence Zacharie, *La Constitution de la République française. Analyses et commentaires,* Economica, Paris, 2009, p. 478.
[12] Louis Favoreu coord., *Droit constitutionnel,* 16e édition, Dalloz, Paris, 2014, p. 687.

We cannot ignore that the two dissolutions of the National Assembly decided by Charles de Gaulle have particular features. Basically, every time, by dissolving the assembly, the President of the Republic discussed his own political responsibility, conditioning his office by choosing a favourable parliamentary majority.

The two dissolutions (22 May 1981 and 14 May 1988) decided by François Mitterrand appeared in identical contexts: elected, then re-elected President of the Republic, Mitterrand found himself in front of an hostile Assembly.

Election of the President by universal suffrage was therefore the main cause of these dissolutions: elected under a political program directly by the electorate, the President of the Republic could not effectively exercise his role in terms of cohabitation with a hostile parliamentary majority. Using the process of dissolution, President Mitterrand won every time a favourable result of the implementation of his political program[13].

Finally, Jacques Chirac has used, in his disadvantage, the right of dissolution, in a political context that apparently was favorable to him. Thus, on 21 April 1997, after two years of mandate, Chirac dissolved the National Assembly of the same political affiliation with him, elected in 1993. Previously, immediately after his election, Chirac refused to dissolve the Assembly, arguing that no political crisis justifies such a decision.

Taken later, with only a year before the next parliamentary elections, the decision to dissolve the Assembly was perceived by the electorate as a decision of personal convenience and, consequently, the result was disappointing for the President. Thus, a majority of the Left, opposed to Chirac, engendered a majority in the National Assembly for five years.

As the presidential and legislative elections take place simultaneously, due to the reduction since 2000 of the presidential mandate to five years, makes it unlikely that, in the future, such disagreements shall exist between the presidential and parliamentary majority. Of course, this situation could happen in case of unforeseen circumstances, such as death or resignation of the President. Therefore, in the future, the Presidents of the Republic, enjoying a devoted and solid majority elected at the same time with them, will be less tempted to recourse to the dissolution of the National Assembly under Article 12 of the Constitution of France.

4. Dissolution of Parliament in the Federal Republic of Germany

In accordance with Article 68 of the German Constitution, the Bundestag can be dissolved by the Federal President, if against the Federal Chancellor in office was voted a motion of censure or, if after the elections any candidate for Chancellor fails to obtain the absolute majority of the Bundestag members.

So, according to this constitutional text, the President is the one who decides, by decree, the dissolution, but he can do so only regarding one of the Chambers, the Bundestag, and not the other, the Bundesrat, which comprises representatives of the Governments of the Federal States.

As it can be seen, the Federal President may decide the dissolution in two situations: the fall of the Government by voting for a motion of censure and the impossibility of constituting the Government in the absence of an absolute majority. In practice, the second situation under the German Basic Law was never found. Instead, the Bundestag was dissolved three times, in 1972, 1982 and 2005, when the Chancellors in office, Brandt,

[13] Francis Hamon, Michel Troper, *Droit constitutionnel,* 30e édition, L.G.D.J., Paris, 2007, p. 742.

Kohl and Schröder agreed, deliberately, the vote of a motion of censure against their Cabinets, in order to organize new elections.

Thus, in 1982, Chancellor Helmut Kohl, although he had a large majority recently made up of Christian-Democrats and the Liberal-Democrats, wanted his confirmation in office by the electorate, using the process of dissolution of the Lower Chamber. The decision has sparked much controversy, given that the censure motion was voted inclusively by the party of which came Kohl. He basically reached his goal, manipulating the constitutional mechanism. Even the President in office at the time, Karl Carstens, was extremely reserved about convening of new elections, but he finally ordered the dissolution.

Subsequently, the decree of dissolution was attacked by the opposition to the Federal Constitutional Court, but without success.

From the above, we can deduce that, in practice, in the Federal Republic of Germany, the dissolution of Bundestag occurred based solely on the initiative of the Chancellors in office, who wanted to receive their reconfirmation by the electoral body. Their success is due to the fact that they enjoyed a favourable situation at the time. In this equation, the role of the Federal President is more symbolic and none of the three presidents faced with such an initiative of dissolution has not declined it.

5. Conclusions

Dissolution of Parliament appears as a necessary procedure for balancing the relations between the executive and legislative powers.

In general, the power to dissolve Parliament lies with the President, who, according to the constitutional system , may invoke it conditionally (the Romanian case) or discretionary (the case of France).

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WHAT MORE SHOULD BE DONE TO OPTIMIZE THE ACTIVITY OF THE PREFECT INSTITUTION?

Ion POPESCU-SLĂNICEANU[*], Cosmin-Ionuț ENESCU[**]

Abstract: *According to Art. 123 of the Constitution, the Government shall appoint a prefect in each county and in Bucharest. The prefect is the representative of the Government, locally and leads, thedecentralized public services of the ministries and other central public administration bodies of the administrative-territorial units. The Powers of the Prefect are established by organic law, now Law no. 340/2004 regarding the prefect and the prefect institution. A critical study was conducted in the light of the regulations regarding the prefect and his role in public administration in following administrative decentralization and strengthening of local autonomy given to local communities. The critically analyzed a range of responsibilities of the prefect, and their way of fulfilling such as legal control / compliance in general of law enforcement, management of decentralized public services and were proposed some measures to improve and streamline the prefect institution's activity.*

Keywords: *the prefect, legality, deconcentration*

The state, defined as a mode of public power organization of a population located in a particular territory carries out its functions through a system of public authorities and institutions to which also belongs the prefect institution. Implantation of these authorities in the territory is a prerequisite to ensure the functionality of the state[1].

The prefect is a public institution led by the prefect, made up of a group of people and endowed with material and financial resources, as well as the competence legally recognized of the prefect.

The prefect as the central character of the institution is located at the confluence of political action, with the administration. He represents thus a component of the state's devolved public administration in the state administrative-territorial constituency with the highest degree of extension, namely the county.

As representative of the government in the territory, the prefect has the role of leader, namely of coordinator the ministerial of public services of the administrative-territorial constituency in which it operates.

It should be emphasized that the state administration is unified from a legal point of view and is administered for and on behalf of the state. All state administration bodies (so the prefect as well) act in service of the state, whose responsibility it commits.

In relation to local authorities (county council, local councils, mayors), the prefect represents the government.

Taking into account the important role of law enforcement supervisor in the work of local public administration authorities, we highlight relationships of control, in which is the

[*] Univ. dr. at „Constantin Brancoveanu"Universityof Pitesti
[**] Dr., The Prefect Institution - Arges county
[1] Antonie Iorgovan, Administrative Law Treatise, Publishing House. Nemira, volume II, Bucharest, 1996, p. 283

prefect with the local councils, with the mayors and the county council. This is a control called guardianship established by law and not by a control sprang from hierarchical relations.

Given the general power that government has to lead the entire national government, we can appreciate the right of control of the legality of the prefect as an expression of the relations of authority between the central organ of public administration and local authorities, councils and mayors[2], necessary authority to be exercised strictly within the law and with respect for their functional autonomy.

Thus, at county level as administrative-territorial constituency of the state, are found state the public administration subsystem components - the prefect and external services of ministries and other central public administration bodies - with those of the local government subsystem - the county council, local councils and mayors, performing local public interest activities.

For carrying out the tasks of the public administration in the county are found two categories of public services - some grouped around the county council and others around the prefect.

We believe that the structure of government services at county level is perfectible.

This you might discuss, grouping the county council and prefect services around a single institution - the prefecture, whose management is carried out by the prefect. In this way, the prefect be might assigned powers of representation of state administration and enforcement of decisions of the county council, ensuring both greater unity of action as well as greater efficacy of its activity[3].

Consequently, between the prefect and the county council would be achieved a mutual control targeting both the legality as well as the efficiency of execution of decisions, being able to recognize the county council an important role in the appointment and dismissal of the prefects.

In our country, in the interwar period, at one time, there were two prefects, a political choice, which acted as executive for the county council and an administrative one, named, which represented the government[4].

In legal literature[5] it has also been expressed, the opinion that by the regionalization and decentralization, the current power of the prefect to lead the decentralized public services of ministries and other central public administration bodies of the territorial administrative units will be conferred to the presidents of county councils.

However, the prefect remains the depositary of State authority, the Government Delegate, watching the execution of governmental decisions, respect for laws and public order in the county.

We speak thus of a dual dimension, political and technical of the prefect.

On the one hand, he represents „power", and on the other, he is the depositary of state authority in the county.

He is charged with implementing the political guidelines of the Government in office, also having a general mission to inform the power, on the state of the county in which he operates.

This way of organizing is a result of the general phenomenon of interpenetration of politics and society administrative. Reflecting the current situation in our country, we can

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[2] Valentin Prisacaru, Administrative Roman Law, Publishing House. All Beck, Bucharest, 1996, p. 321

[3] Emil Bălan, The prefect andthe Prefecture of the public administration system and Publishing Foundation "Romania of Tomorrow", Bucharest, 1997

[4] Antonie Iorgovan, Administrative Law Treatise, vol. I, third edition, Publishing House All Beck, p. 454

[5] Andrei Puică, The prefect institution in the regionalization process, article published in Public Administration - Between missions and budgetary restraints - legal and managerial dimensions, coordinated by Emil Bălan, Cristi Iftene, Dragoş Troanță, Gabriela Varia and Marius Văcărelu, shown at Editura Wolters Kluwer, Bucharest, 2014, p. 350

say that we are witnessing an acceleration of politicization of the prefects who, in many cases, are considered first representatives of the majority political and then those responsible of national interests and supervisors of compliance with the laws and public order in the counties.

Beyond its political and ceremonial role, however carries the prefect important administrative responsibilities: representing the state,maintaining public order, legality control of the activity of local communities etc.

Then, the prefect has „power hierarchical" of the provisions of the mayor, when acting as a representative of the state in the administrative-territorial unit[6].

It consists in the power of education, which allows prefects to prescribe the mayor how he should exercise its functions on behalf of the state.

If the mayor refuses or neglects to fulfill one of the binding acts which are regulated by law, as a state representative, the prefect should have the necessary powers to compel him to comply.

The Prefect may complete his control over the mayors, suggesting dismissal from office.

Of course, it is necessary to regulate strictly the conditions which may lead to requests to the Government in this regard, to avoid excesses.

On the nature of the control exercised by the prefect, it was qualified as combined control of administrative and legal nature. Noting the illegality of the administrative acts, the prefect can not take any measure of closure, but merely has the referral pathway of a contentious instance, which will rule on the legality of the contested measure[7].

This kind of control is unprecedented and has no tradition of organizing the local public administration in our country.

More practical seems to be the administrative procedure for control. The prefect to have the opportunity to suspend and eventually to dismantle the illegal administrative act, remaining open theadministrative contentious action oftheauthority whose act has been abolished.

This solution stems naturally from the principle of local autonomy, local government not being hierarchically subordinated to the central government (it is a legal entity distinct from the state administration).

Regarding the review of legality, aimed at fulfilling law enforcement, the Romanian Constitution enshrines, moreover, also the main task of the prefect (probably his only credible reason to exist) and gives him the right to appeal to the contentious administrative court, the administrative acts issued / adopted by local authorities, which he considers illegal (Article 123 para. 5).

The legislator has considered that through this control can limit the excesses of „regulation" of local governments in the new aspect of local autonomy conferred by establishing a legal control over the acts and not their opportunity.

Law no. 554/2004[8], art. 3 defines this as guardianship administrative control, according to which

„Prefects may appeal before the administrative court, the documents issued by local public administration authorities, if he deems them unlawful".

The administrative decentralization process transferred every year more and more tasks and responsibilities from the careof the executive in the portfolio of local authorities,

[6] R.N. Petrescu, Administrative Law, Publishing House. Cordial Lex, Cluj Napoca, p.121
[7] Alexandru Negoită, Administrative law and administration science, Publisher Atlas Lex, Bucharest, 1993
[8] Published in the Official Gazette of Romania, Part I, nr.1154 / December 7, 2004

for example, schools and hospital units entered the county councils or local administration, public order services, emergency, record of the person entered the subordinated municipalities. Sodid social assistance, protection of disabled persons or child protection.

The state keeps in general law enforcement powers exercised by external services of ministries: labor legislation through labor inspectorates, environmental legislation by environmental clearance, tax laws by public finance or antifraud directorates etc.

The fact reminded led naturally to an increase in acts issued / adopted by local authorities, which would make us believe that the prefect's activity to control them from the legality aspect, increases.

Is it true? Reality and official data taken from the website of some prefectures prove a different situation. Let's take a few examples.

The Prefect Institution	**No.of verified documents**	**No. of acts considered unlawful**	**Procentage %**	**The Document**	**Source**
Hunedoara	31.867	44	0,13%	Activity Report 2013	http://www.prefecturahunedoara.ro/fileadmin/user_upload/_temp_/Rapoarte/Raport_2013.pdf
Satu Mare	26.998	47	0,17%	Activity Report 2013	http://www.prefecturasatumare.ro/index.php/rapoarte/2-continut/generale/195-raport-activitate-institutia-prefectului
Brasov	50.769	112	0,22%	Activity Report 2013	http://www.prefecturabrasov.ro/upload/files/2013%20Raport%20Activitate%20Prefectura%20Final%20verificat.pdf
Vaslui	27.940	93	0,33	Activity Report 2013	http://www.prefecturavaslui.ro/pdf/doc2014/Raport%20de%20activitate.pdf
Ilfov	13.664	104	0,76%	Activity Report 2013	http://www.prefecturailfov.ro/Institutia-Prefectului/Raportul-de-activitate-pe-anul-2013.pdf

From the accompanying table, on five randomly chosen prefectures from the Internet, it can be seen that the administrative acts, which are considered illegal by the prefect institution are extremely scarce.

This analysis leads us to ask the next question. Either the control of, the administrative acts of local authorities is made superficially by lawyers of the prefectures without thoroughly checking their legal motivation or it is done rigorously, but local authorities work with the utmost seriousness, respecting a high legislative technique and regulations.

In this case we accept the second option because we have not enough arguments for the first.

Verifying the legality of the administrative acts is a complex activity that requires solid legal expertise and not only, as well as a rich professional experience in the field, but the specialized personnel in many institutions is insufficient to thoroughly check the documents multitude of the local public authorities. Then also found in practice that, instead of being attacked, acts considered wrongful in the administrative contentious court, it is customary to send addresses through which the local authorities are asked to revoke acts deemed unlawful.

As is known, regulations take effect from their entry into force, meaning from the date of publication or communication, unless provided otherwise. Therefore we believe that It is appropriate for the prefect's action to be introduced as soon as possible so that the act in

question to be suspended by law, thus limiting the the effects, possibly unlawful, on its legality, following the administrative contentious court to rule.

On line of the activity for verifying the legality of administrative acts, had an important role the secretary general of the prefecture, who led the prefecture apparatus, and which possess judicial or administrative higher education. It was replaced with the deputy prefect for who has not been provided the required administrative or legal studies for the position of prefect.

Or, at this moment deputy prefects can have any higher education, although they fulfill the powers which require legal training or administrative. Furthermore, legislative technique rules, provide countersignature requirement for legality of the prefect's orders. In these circumstances we consider unsuitable that an engineer or an economist, for example, to countersign the order.

We appreciate necessary to revert to the earlier provision on specialized studies, so that the deputy prefect undertaking tasks of control of legality but also of endorsement of the orders issued by the prefect, to have administrative or legal studies.

In another aspect, we note that prefects in the application and enforcement of law, have not precise functions and powers. In each field, the duties of control, are the prerogative of the decentralized services of ministries and other central government bodies, on the specialty criteria: tax, environmental, consumer protection, labor law, social legislation and unemployment, emergencies public order, public health.

Thus raises the question, what specific powers of control, has the prefect? One of them is that in the field of property laws, the prefect may, under Law no. 247/2005 regarding the reform in property and justice, as well as some additional[9] measures to contraventionally sanction the Members of local commissions of Land for delaying the process of reconstitution of the land ownership. But these sanctions may be imposed by the National Authority for Property Restitution.

As I mentioned, another prefect task is, according to art. 4 of Law no. 340/2004 regarding the prefect and the prefect institution[10] of leading decentralized public services of ministries and other central government bodies subordinated to the Government, organized in administrative-territorial units. This leadership, however does not have regard to the direct subordination of heads of decentralized public services, totheprefect. They are the leading civil servants and are appointed or dismissed by the administrative act of the minister or the head of another organ of the specialized central public administration (ex. National Consumer Protection Authority President, Head of County Commissioner for Consumer Protection).

The prefect may propose according to art. 21 of Law no. 340/2004, the ministers and to other heads of central bodies of public administration to sanction those leaders of decentralized public services. For these proposals, usually if there are ,they are not much taken into account. Furthermore, performance appraisal of heads of decentralized services, according to the Statute of civil servants do a higher authority, namely the Ministry or other specialized body of central public administration.

And then the question arises how the prefect leads these services, if he does not have administrative or disciplinary subordinates? Hence the term lead, seems at least unfortunate. Specifically, what does the prefect in this direction? Only symbolic matters: approves budget of revenues and expenditures of these services, proposes to ministries measures to improve their work, designates one person in the competition commission for these positions, and the Prefecture college, it seeks to harmonize the decentralized public services activity, according art. 22 para. 4 of Law no. 340/2004.

[9] Published in the Official Gazette of Romania, Part I, nr.653 / July 22, 2005
[10] Republished in the Official Gazette of Romania, Part I, no. 225 of March 24, 2008

In this regard, we believe that we have redefined the role of the Prefectural Board, which reviews the decentralized public services and propose measures for its improvement. Thus, this body no longer has to have a formal role, but should be the means through which the prefect, carries out its leading duties, of the decentralized public services.

Regarding the powers from the European integration field, it should be noted that the prefect, ensures implementation of the plan for European integration and orders enforcement measures of European integration policies (art. 19 paragraph 1, letter k and l of Law no. 340/2004). It's said much thathedisposessuch measures, because they are the clearly established, by legislation harmonized to community acquis, and their implementation addressing strictly specialized sectoral issues (in the veterinary, agricultural, environmental, etc.)

Specifically, the prefect of the specialized department drafted these documents, showing time-bound measures to achieve and follows their application.

In fact these measures and actions have been set at the level of ministries and decentralized departments report their application in each county. Prefects piece together these measures and report them in turn, to the Ministry of Interior.

We conclude that it is necessary to establish a much clearer role of Prefect Institution, we need an organizational transformation to give priority to the prefect the role plays in supporting the process of deconcentration and decentralization.

The Prefect Institution is also intended to promote simplification, streamlining and reducing the administrative procedures at local and regional level, which would be achieved effectively if they would adopt the Code of Administrative Procedure[11].

Efficiency in the activity of the prefect institution may come from the ability to combine a number of key elements such as: 1) knowledge of regional and local realities, institutions, people facing difficulties to be in a position to understand exactly how to implement national policies on the ground; 2) partnership relations with as many actors at regional level to maximize efficiency and investment policies and to exploit existing capabilities; 3) monitoring the implementation of national policies and capacity of all those involved in overcoming any obstacles and 4) a permanent contact with representatives of ministries and other specialized bodies of the central government and their direct representation, thus gaining a clear role in the context of work organizations regional and local.

Focusing on these key elements and in view of the changes taking place at the regional level, we can say that The Prefect Institution should focus on three strategic directions, namely: 1) changing the way the government works in the territory, helping local and regional partners, including Local Action Groups (LAGs) to understand priorities and to improve their performance; 2) supporting local public authorities and institutions to transform policies into operational objectives by maintaining a permanent communication and cooperation in finding common solutions to resolve issues and 3) supporting the implementation of regional strategies to improve the efficiency and consistency.

We must also consider the importance that The Prefect Institution has, in providing feedback to the central level regarding implementation of policies designed for various government departments, a process on which they shaped their future approach at regional and local level.

[11] See also Andrew Puică, The Prefect Institution, and crisis situations in his published article Public Administration in crisis situations, led by Emil Bălan, Cristi Iftene and Marius Văcărelu, Publisher Wolters Kluwer, Bucharest, 2015, p. 326

HUMAN RESOURCES MANAGEMENT IN THE CONTEXT OF INCREASING THE EFFICIENCY OF THE PUBLIC FUNCTION AND OF IMPROVING THE PERFORMANCE OF THE LOCAL PUBLIC ADMINISTRATION SYSTEM IN ROMANIA[1]

Cezar Corneliu MANDA *
Cristina Elena NICOLESCU **

Abstract: *The object of the scientific research is constituted by the approaching of the problematic of human resource management at the level of public administration, in general, and of local public administration, in particular, in the context of the need to increase the efficiency and to improve the functioning parameters of the administrative system in Romania, according to the exigencies and challenges induced by the belonging to the EU space, to the benefit of the citizens. Without focusing on the landscape of identifying with priority concrete solutions, the authors rather aim at establishing correlations and influence relations between the manner of managing the human resources and the mechanisms for increasing the dynamism and performance of the Romanian local public administration structures.*

Keywords: *public administration, management, human resource, public function, increased efficiency, public intervention.*

1. Introductory aspects regarding the importance of human resources in public administration

The creation of a modern and efficient public administration which is close to the citizen, to his needs and interests, represents anessential priority of Romania's integrationprocess into theEuropean Union.

One of the major and constant concerns of the decision makers at the governmental and local levels is the assessment of public management and public policies, understood as „sides" of the same „coin" – *publicdecision*, in the center of this concern being the exigency of optimizing the performance levels in using the resources: human financial, material, informational etc., for the purpose of consolidating the relationship state-public administration-citizen.

The state reform implies substantial changes of its major components, both at the level of the central public administration, and at the level of the local public administrationin general, a long-term vision regarding the management of public expenditure, but also of the manner in which the process of implementing public policies is undertaken. One of the key-points of this challenge is the strengthening of the mechanisms of public policy formulation, implementation and assessment.

* Univ. senior lecturer, PhD, FAP/NUPSPA.
** [1]Univ. lect., PhD, FAP/NUPSPA.

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In the context of the multipleadministrative reforms registeredin Romania, the ample process of organizational and functional changes known by the administrativeapparatus also reflected in the evolution of the transformations recorded by human resource management in the public sector.

The changes at the economic, social and politic level call for the need that thepublic sector undertakes new goals in what concerns staff management, for the purpose of obtaining increased productivity and greater results.

Thehuman factor is considered by the specialists as being the key-factor of an organization's success and*humanresource management*represents the fundamental pillar of organizational management, the vector that draws organizationaldestiny and success.

From thisperspective, the *successful*publicorganizationis that organization whose human resource management treats in an integrated vision the problematics deriving from areas such as staff, laborорganization, human resource capacity, decisional processes, motivation etc. the advantages of this type of approach reflect in an increased degree of efficiency, efficacy, quality, satisfaction and staff involvement in the work process.

The results of the activity performed in a public institution or authority are conditioned, *to an increasingly higher extent, on by the manner in which the public managers manage, train and develop human resources competence, professionalism, intelligence and creativity*[2].

The objectives of human resource management target, as indicated in the specialty literature: the creation, maintaining and development of a human resources group with the competences and motivationnecessary to reach the objectives of the organization;the creation, maintaining and development of the organizational conditions to apply, develop and give satisfaction to the staff and to reach individual objectives;reaching efficiency and efficacy with the help of the human resource available within the organization.

Modern theories on human resource management assign o it a series of important traits, out of which we mention:the mostcompetitiveorganizational resource;integral proactive function of the organization; implies the participation of the organization's entire staff;fundamental pillar for developing organizational management;its fundamental challenge is to reach the efficiency and efficacy of the organization.

In the recent years, the specialists in the field, theoreticians and practitioners, felt the need to expand the analysis field, in order to assess the activity performed by the public sector personnel, for the purpose of obtaining increased productivity and greater results.

2. Analytical perspective on human resource management in the public sector

One of the important analyseswhich allow the identification of the complex situations faced by the decision-makers while elaborating a public policy with impact on the human resource management process in the public sectoris represented by the *quantitative analysisof the different human resources within this sector.*

An analysis of the evolution of the civil employed population, in activities of the national economy[3],as seen in Table 1,indicates the fact that the evolution of staff within public administration has known an increase of almost 57% in year 2009, compared to year 2000, while in year 2010 it decreased with almost 12.68%, compared to year 2009(Fig. 1-2). The cause of this significant decrease is the enforcement of Law no. 329/2009 *regarding the reorganization of certain public authorities and institutions, the rationalization of*

[2] Androniceanu, A., *Noutăți în managementul public*, Universitară Publishing House, Bucharest, 2005, p.212.
[3] National StatisticsInstitute, *section NACE Rev.1, Public administration and Defense; Social security from the public system.*

public expenditure, the support of the business environment and the observance of the framework-agreements with the European Commission and the International MonetaryFund. This regulation introduced the restriction to hire personnel, with the observance of the condition: if 7 positions become vacant, a competition may be organized for the occupation of a single position.

Table 1

NACE Rev.1 (activities of the national economy-sections)	Genders	Macro-regions, development regions and counties	Years													
			Year 2000	Year 2001	Year 2002	Year 2003	Year 2004	Year 2005	Year 2006	Year 2007	Year 2008	Year 2009	Year 2010	Year 2011	Year 2012	Year 2013
			MU: thousand persons													
PUBLIC ADMINIS-TRATION AND DEFENSE; SOCIAL SECURITY FROM THE PUBLIC SYSTEM	Total	TOTAL	146.7	142.6	148.1	154.8	159.4	173.2	183.2	208.7	223.1	230.1	204.2	196.8	192.1	191.7

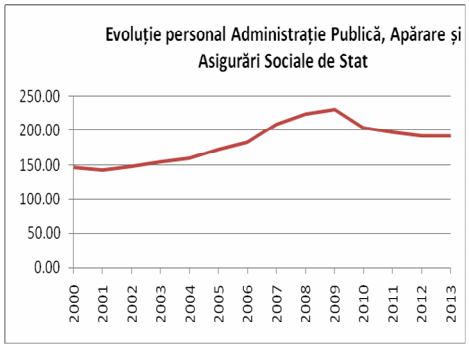

Figure 1

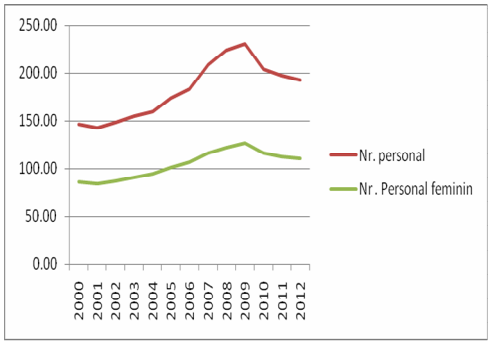

Figure 2

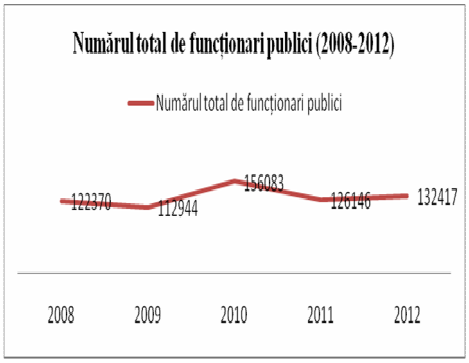

Figure 3

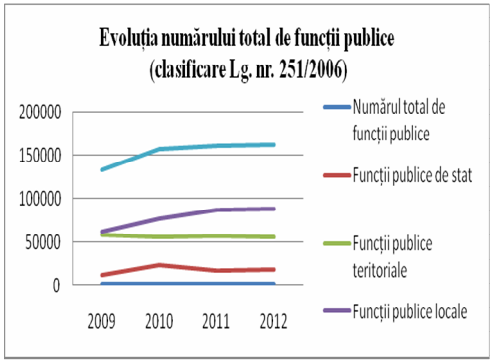

Figure 4

Table 2

Total number of public functions	State public functions	Territorial public functions	Local public functions	Total
2009	12105	58973	62268	133346
2010	22860	55986	77237	156083
2011	17009	57716	86073	160798
2012	17729	56094	87760	161583

Table 3

Year	2008	2009	2010	2011	2012
Total number of public servants	122370	112944	156083	126146	132417

Source: *National Statistics Institute*

Within the 2009-2012 Governance Program, among the measures proposed as necessary in order to diminish the impact of the crisis, for year 2009, was also the reduction of expenditure with the staff within public administration, with up to 20%, by eliminating the vacant positions within the public institutions and authorities and by reducing the expenses not directly related to the performance obtained. A second measure that targeted public administration was institutional rationalization, by analyzing the number, structure, activity and staff of institutions.

Another initiative to diminish public expenditure and to redirect the amounts saved towards other activity sectors, which materialized in a first stage in the reduction of the budgetary positions, was represented by Government Expedite Ordinance no. 77/2013 *for the establishment of measures regarding the assurance of functionality of the local publica dministration, of the number of positions and the reduction of expenses within the public institutions and authorities under the subordination or coordination of the Government or of the ministries.* The initiative aligned to the vision comprised in the 2013-2016 Governance Program to reduce the effects of the economic crisis Romania faced until 2012.

This initiative was started on the grounds of a worrying increase of the number of positions in the budgetary sector starting with August 2012, such as in March 2013 1,189,861 positions were occupied in the budgetarysector.

As derived from the grounding memo of this regulation, the expected social impact took into consideration the reduction of a number of approximately 2,735 occupied positions in the*centralpublicadministration*and the employment of a number of approximately 1,101 employees at the level of the *localpublicadministration*. At the moment of adopting GEO no. 77/2013, at the level of the centralpublic administration, as a consequence of maintaining the rule „7 employees go, one employee may be hired",there were 64% higher rank executionpublic functions, 34% main rank execution public functions, 1.2% assistant-rank execution public functions, 0.8% starting-level public functions. One of the scenarios for reducing the number of budget-paid employees consisted on the reduction, on the average, with 15% uniformly in the entire budgetary system, which meant approximately180.000 positions were going to be vacated, most dismissals going to take place in the local, not central, public administration.

GEO no. 77/2013 was declared*unconstitutional* through Decision no.55 of 2014 of the ConstitutionalCourt, which mentions that certain articles of this ordinance affect the regime of the central and localpublic administrationauthorities. Moreover, the Court shows that GEO no. 77/2013 is of a nature to affect the regime of the local public authorities, with directreference tolocalautonomy, principle that governs this regime. In these conditions, the preliminary authorization granted by the Government is interference in the performance of the activity of local public authorities, which cannot decide the occupation of their vacant position through competition/exam, even if they fall under the approved threshold of staff expenditure.

In fact, an analysis of the positions in the public sector in the period 2008-2013, demonstrated that at the level of the local public administrationthe evolution was almost constant, and at the level of the centralpublic administrationthis number decreased with approximately 15%.

In what concerns public functions management and the management of the body of public servants, an important source for the *analysis of the evolution of the number of public functions and public servants* in Romania is constituted by the reports of the National Agency of Public Servants.

From the analysis of these documents, we deduce that the evolution of the total number of public servants, comprising the 3 categories, execution public servants, management public servants and high public servants, for the period 2008-2012 is comprised in Table 2 and Figure 3.

Law no. 251 of 23 June 2006,as subsequently modified and completed, proposes a new classification of public functions, namely: *statpublic functions, territorialpublic functions and localpublic functions*[4].According to this classification and on the basis of the data available for the period 2009-2012, the evolution of these categories of functions can be found in Table 3and Figure4.

Depending on the classification which divides the public function in the category of public functionsafferent to the centralpublic administration and the public functions afferent to the localpublic administration, on the basis of the data available for the period 2005-2012, the evolution of these categories of functions in found in Table 4and Figure5.

Table 4

No. functions/Year	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
Nr. public functions CPA	65315	70232	86333	76642	71078	78846	86073	73823
Nr. public functions LPA	55417	58282	57309	65000	62268	77237	74725	87760

[4] *State public functions* are the public functions established and approved, according to the law, within ministries, specialty bodies of the central public administration, as well as within the autonomous administrative authorities. *Territorialpublic functions* are the public functions established and approved, according to the law, within the prefect's institution, the deconcentrated public services of the ministries and of the other bodies of the central public administrationin the administrative-territorialunits. *Localpublic functions* are the public functions established and approved, according to the law, withinthe own apparatus of the local public administration authorities and of the public institutions subordinated to them.

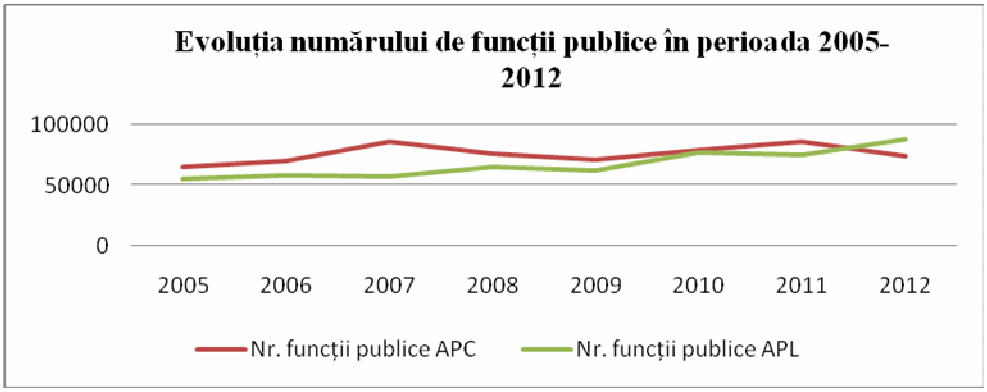

Figure 5

On the basis of the data available for the period 2005-2012, the evolution of the weight of public functions, according to the level of duties, can be seen in Table 5and Figure6.

Table5

	2005	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
Execution public functions	89.95%	89.99%	88.86%	89.19%	90.77%	89.38%	90.65%	89.14%
Management public functions	9.79%	9.87%	11.01%	10.67%	9.03%	10.47%	9.18%	10.71%
High public servants	0.26%	0.14%	0.13%	0.15%	0.20%	0.15%	0.17%	0.14%

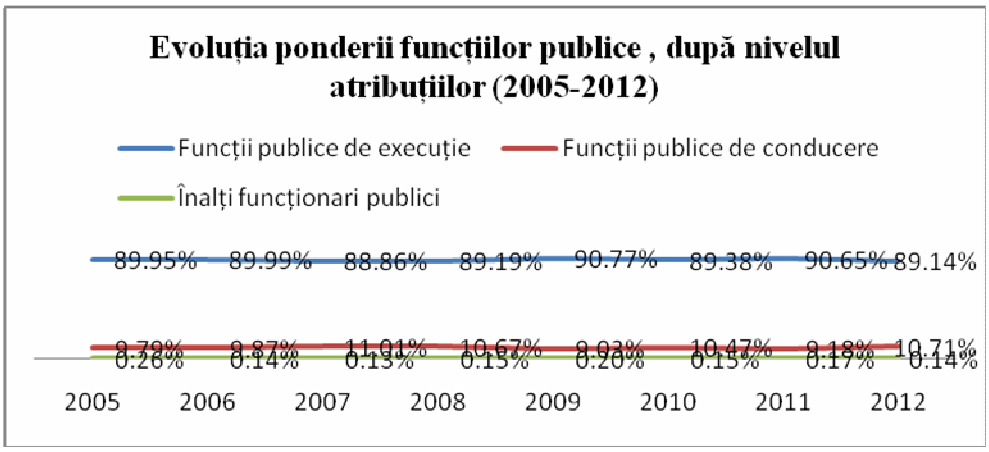

Figure 6

Not lastly, but relevant for the analysis of the evolution of the public function and servants, on the basis of the data available for the period 2005-2011, the degree of occupation of public functions can be found in Table 6and Figure7.

Table 6

	2005	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
Degree of occupation of public functions	84.03%	86.86%	84.33%	86.40%	84.70%	77.32%	78.56%

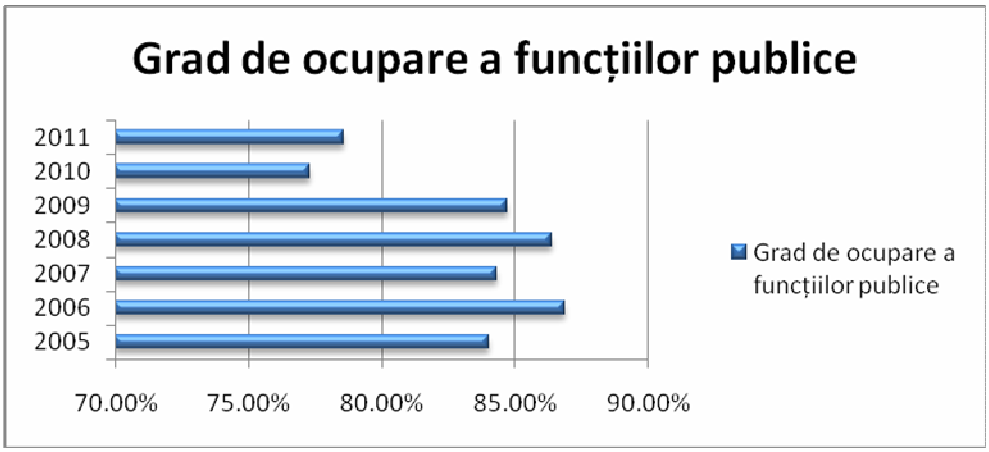

Figure 7

The number of public functions temporarily filled at the level of years 2012-2014decreased significantly, due to the austerity measures taken after 2008 regarding the public function and public servants management (reorganizations, dismissals, blocking employment to vacant positions).

The global financial and economic crisis was felt in Romania's economy also in the period 2013-2014, but with a much lower intensity than in the previous years, the unemployment rate in a form adjusted to the season being estimated in January2015 at6.5%, dropping from 7.2%, in March 2014,according to the preliminary data made public by the National Statistics Institute.

The need to consolidate the capacity of human resources at the level of the local public administration and the absence of agovernmental public policy in the field of unemployment call for firm solutions on the side of the local authorities.

However, the reactions of those authorities are determined by their modernization degree, reached following a long reform which the Romanian public administration experienced after accession and which aimed at the*continuation of the decentralizationprocess*and, respectively, at *improving the local public policy formulation process* bypromoting the concept of *better regulation* also at this level of the public administration.

From this perspective, in the specialtyliterature, foreign and Romanian, it is underlined that *public administrationis nothing more than a human collectivity that organizes actions in favour of other people*.[5]This also explains the*growing importance of thehumanelement*" which, in order to be able to enforce the laws, must be composed of persons who are

[5] See Manda, C. C., *Elemente de ştiința administrației.* University course, Universul Juridic Publishing House, Bucharest, 2012, p.159.

competent, active and devoted to the common good,[6]namely to the public cause and to the generalinterest.

In other words, we must establish that *public administrationefficacy depends on the humanquality and the technical capacity of the people* who act within public administration, *which values exactly as much as the people composing it*.[7]

In this context, it is obvious that even the achievement of political decisions, as well as the obtaining of good results in theeconomic and social field*become dependent*, to a large extent, on the *quality of administration*.[8] However, this cannot be obtained except as a consequence of a good training and then of continued training of the professional knowledge of the entire staff within the public administration.

Especially due to these reasons, among the *objective as*set by the government in the last years, in the field of public administration reform, *the public function*is approached distinctly within the measures regarding the strengthening of the institutional capacity.

Among the measures necessary to achieve this important objective are mentioned the following main directions:

- *update and adaptation to the new socio-economic and administrativerealities*of the regulation framework regarding the public function, regarding the recruitment, career,performance assessment, professional training, salary, disciplinary regime and, not lastly, social dialogue in the relationship employee-employer;
- *de-monopolization of the system for the creation and professional training of public servants and the strengthening of its capacity to answer to the objective of professionalizing the body of public servants; training public servants*in fields corresponding to Romania's undertaking its status as European Union member state;
- *de-politization of the public function*,by adopting measures that have as result a better bordering of the political level from the administrative level, the observance of the good governance principles by means of the administrative grounding of the political decision and, not lastly, the reform of the management system of public functions in the category of high public servants[9].

Therefore, it seems evident any function within public administration, as an obligation, must have a minimum support of training, not only of general knowledge, but especially of specialty knowledge, as well as maintaining the knowledge at the *level of the contemporary development of the specialty science and technique*.[10]

3. Conclusions

The changes at the economic, social and politic level call for the need that the public sector undertakes new goals in what concerns staff management, for the purpose of obtaining increased productivity and greater results.

In the context of the multiple administrative reforms registered in Romania, the ample process of organizational and functional changes known by the administrative apparatus

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[6] *Ibidem*.
[7] *Idem*, p. 71.
[8] Alexandru, I., *Administrația publică.Teorii.,Realități*, *Perspective*, Lumina LexPublishing House, Bucharest, 1999, p. 426.
[9] See*Report regarding the management of the public functions and public servants for year 2007*, (Online) at www.anfp.gov.ro.
[10] Oroveanu, M.T., *Introducere în ştiința administrației, Bucharest, 1994,* p. 136 and the following, quoted in Manda, C. C., *op.cit.*, p.159.

also reflected in the evolution of the transformations recorded by human resource management in the public sector.

The performance of the public authorities and institutions is determined by the competence and professionalism of its human resources, the success of any organization resulting from the efficient commitment of these resources.

An analytical perspective on the human resource in the public sector constitutesareal support on the path to increase the efficiency of the human resource activity and of the performance of the administrative system.

However, to an equal extent, the consolidation of the local public interventions through the optimization of the process of public management and of elaborating and executing the local public policies must take into account theincreasing of the*transparency* of the process of formulating and implementing local public policies, the *consultation of the citizens and the civil society* within this process, in order to increase the quality and legitimacy of these interventions.

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REFLECTIONS ONSMART REGULATION IN THE EUROPEAN UNION AND THE SIMPLIFICATION OFLEGISLATION IN ROMANIA – SELECTIVE ASPECTS

Nicolae PAVEL[*]

Abstract: *What seems relevant to highlight in this paperis the approach on the simplification of legislation in Romaniain correlation with the smart regulationprocedure in the European Union. Considering the approach of this generous object of study, it is imperative to point out since the beginning the need of a diachronical approach of the proposed theme, under the form of the selective aspects both at the level of the EU and in Romania. Due to this approach, the proposed study opens a complexe and complete view, but not exhaustive in the current sphereon smart regulationprocedure in the European Unionand the simplification of legislation in Romania.Following a key-scheme, the two main parts of the paper are successively analyzed, i.e., thesmartregulation procedurein the European Union and the simplification of legislation in Romania.*

Keywords: *Smart regulation,European Union, European Commission, simplification of legislation, Constitutiobn of Romania.*

1. Introduction

The object of study of the scientific approachwill becircumscribed to the scientific analysisof its two main parts: 1.Smart regulation in the European Union; 2. Simplification of legislation in Romania.

In our opinion, the studied field is important for the constitutional doctrine, for the doctrine of parliamentary law, and for the Joint Commission of the Chamber of Deputies and the Senate for the alaboration of the legislative proposal of revision of the Constitution of Romania, as well as for the Parliament of Romania, when the Draft Law for the revision of the Constitution of Romania is voted, because it is our intention by this scientific approachto set, diachronically and selectivelyacomplex and complete coverage, but not exhaustiveof the current sphere regarding:Smart regulation in the European Union and Simplification of legislation in Romania.

From the perspective of the full but not exhaustive coverage of the sphere regarding Smart regulation in the European Union and Simplification of legislation in Romania, a logical scheme was introduced, regarding the diachronicand selective approach of the evolution of European regulations and Romanian constitutional regulations starting with 1991 and, including theDraft Law for the revision of the Constitution of Romania, concerning the themes approached.

Even ifSmart regulation in the European Uniongoes back in time tothe Declaration of Birmingham of 16 October 1992, and the Simplification of legislation in Romaniagoes back in time to 1991, the theoretical interest for resuming them is determined by the fact that the

[*] Associate professor, Ph. D. Spiru Haret University, Bucharest, Romania, Faculty of Law and Public Administrationand Research Associate at the Institute of Legal Research "Acad. Andrei Rădulescu" of the Romanian Academy, E-mail: nicolaepavel@yahoo.com

field literature has not always paid enough attention to some theoretical aspectsof the mentioned themes.

The two parts of the paper may be considered a contributionto the extension of the research in the line of Smart regulation in the European Union and Simplification of legislation in Romania, regarding the evolution of such regulations in the European Union and in Romania.

Moreover, we would like to point out that this paper opens a complex and complete view, though not exhaustive, in the researched domain.

The key-scheme proposed, considering the selective approachof the two above-mentioned themes,may be multiplied and extended for further research in the field, considering the amplitude of the analyzed field.

2. Smart regulation in the European Union

2.1. The references considered for this study show that the current European Union, in its diachronic evolution, since the emergence of the European Communities till todaycovered the following two historical stages: 1. Fromeconomic to political. 2. From national to federal.

2.2. In the mentioned period, the main treaties of the European Communities and The European Union were concluded, signed and ratified:

2.2.1. *The Treaty of Parisestablishing the European Coal and Steel Community (CECO).*[1]It was signed in Paris, on 18 April 1951, by 6 European statesand became effective on 23 July 1952.The Treaty has the legal nature of a treaty-law.Among the CECO institutions, we hereby mention for this section, *the Court of Justice – a judicial bodyfor the legal compliance of the Community.*

2.2.2. *The Treaty of Rome*establishing the European Economic Community (TCEE) and the Treaty of Rome establishing the European Atomic Energy Community (TCEEA) EURATOM,[2]both signed in Roma on 25 March 1957,and effective since 1 January 1958.

The Treaty of Rome establishing the European Economic Community (TCEE), includedprovisions on*the establishment of a common market, having characteristics similar to national markets* „The Treaty contains no definitionof the common market; but the specification is made by the Court of Justice, which defines it as a unified economic space, deprived of internal obstacles, within whichthere should be achieved progressively the customs union and the economic union".[3]

The normative content of art. 52 of the Treaty of Rome establishing the European Atomic Energy Community (TCEEA) Euratom, sets forth*expressis verbis* the following prerogatives of the European Commission: „Euratom has a right of option on the minerals, the raw materials and the fusionable materials specialy producedon the territory of the member states, as well as the possibility of exercising a security control on the final destination of the products, so that they should not be used in military purposes.*To such purpose, any enterprise handling nuclear materialsis liableto submitto the Commission information on the activities, except for the materials meant for the defense needs*".[4]

[1] Augustin Fuerea, European Union Manual, Universul Juridic Publishing House, Bucharest, 2011, pp. 32-36.
[2] *Idem,* pp. 36-39.
[3] *Idem,* p. 38.
[4] *Idem,* pp. 39-40.

2.2.3. *The Treaty of Brussels*was signed in 1965 and became effective in 1967,with the intention of achieving a fusion of the norms included in the three Treaties in only oneTreaty, as set forth in the Preamble to this treaty and by art. 32 of theTreaty. „*The unification achieved under the Treaty of Brusselsoccurred only at the institutional level, the three Communities remained distinct, each of the three Treatiesconstitutive continuing to produce legal effects independently. Newly established institutionsthe Commission and Councilof Ministerscarry out the tasks set in all the three constitutive treaties*".[5]

2.2.4*. The Schengen Agreement*was signed in 1985 and became effective in 1995, „which intended*to define the freemovement of persons*and, more than that, the clarification of the meaning of such a freedom at the level of the member states of the European Union"[6]. The signature of such an agreement as well as becoming effective was postponed due to divergences between the EU member states. „A system of information (SIS) was elaborated in the Schengen system, subject to Title IV of the Convention of enforcement ofthe Schengen Agreement, which enables the national authorities responsible forborder control andjudicial review in the member states to obtain information related to SIS persons and goods".[7]

2.2.5. *The Single European Act* (SEA), was signed on 17 February 1986 and became effectiver on 1 July 1987. The Preamble toSEArefers to „*the transformation of the relationships of the member states in a European Union*". „The merit of SEAresides inthe fact that, for the first time in a ratified internationaltreaty, The European Union is mentioned as an objective of the member states".[8]

2.2.6. *The Treaty of Maasstricht*on the European Union (TUE), was signed on 7 February 1992, and became effective on 1 November 1993. „Title I is reserved to*common provisions,* related to the three pillars of the Union; foreign policy and of common security; cooperation in the line ofjustice and domestic affairs.[9]The other titles set the content of the three pillars.

2.2.7. *The Treaty of Amsterdam*, was signed on 2 October 1997, and became effective on 1May 1999. This Treaty modifies the treaty on the European Union, as well as the Treatiesestablishing the European Communities. „According to the Treaty of Amsterdam, *the European Union is, to a certain extent, transformed, in the sense that new objectives are defined, the citizen's role is enhanced, and the democratic character of the institutions is copnsolidated*. If until the Treaty of Amsterdam, *the community construction had developed in a historical sense, around the economic objectives, the emphasis is on the political responsibilities of the Union, both inside, and in the rest of the world*".[10]As mentioned above, in the onset of the study, *The Treaty of Amsterdambegins with the shift from economic to political.*

2.2.8. *The Treaty of Nice*, was signed on 26 February 2001, and became effective on 1 February 2003.*A new share takes effects, concerning the number of votes alloted to every state, including Romania and Bulgaria.The modifications brought to competence and functioning of the European Commission and the reform brought in relation with the Court of Justice of the European Union, are interesting for this section from among all the modifications brought to the treaty,because both the Commission and the Courthave important prerogatives in the smart regulation procedure in the European Union, a theme analyzed in this very section.* „At the level of the Commission important modifications

[5] *Idem,* p. 40.
[6] *Idem,* p. 41.
[7] *Idem,* p. 48.
[8] *Idem,* p. 56.
[9] *Idem,* p. 56.
[10] *Idem,* p. 59.

were brought both concerning the designation and the composition of the Commission concerning its functioning. The reform brought in relation with the Court of of the EU was an essential one. It aims at: - the establishment of the supporting judicial chamberswith theCourt of First Instance (CFI); – the distribution of competencesbetween theCourt andCFI;- the composition and the functioning of the two courts.

2.2.9. *The Treaty of Lisbon*, was signed on 13 December 2007, and became effective on 1 December 2009.As pointed out above and in the previous paragraph and from the content of the Treaty of Lisbon we willretain for the present study, the provisions related to*the modifications brought to the competenceand functioning of the European Commission as well as the reform brought in relation with the Court of Justice of the European Union, because both the Commission and the Court have important prerogatives in the smart regulation procedure in the European Union*. The selected provisions, which represent the novelty in this case are: „a) Subject to thelegal personality acquired by the Union under the Treaty of Lisbon, it (the Union) is in no way authorized*to enact or to act beyond the competences conferred to it by the member states under treaties;* b) for the first time, *the citizens may request directly to the Commission to proposean initiative of interest for themand which is the responsibility of the Union, by gathering one millionsignaturesfrom various member states*:"[11]

2.3. *The notion of European Law*.As in this section, we intedn to make a selective analysis, *smart regulation in the European Union*, in our opinion, it is imperative to have a definition of European law. „*European law*is a generic concept, which exceeds the space of European community legal order, having a multidisciplinary character.[12]

2.4. *The general responsibilities of the European Commissionin the line of Europeanlaw whici are related to smart regulation*

The European Commission is*the executive bodyof the European Union*, and, subject to art. 9 of the Treaty of Brussels, a Single Commission of the European Communities was established. Concretely, the Commissionperforms the following tasks in the line of interest of this paper: „makes sure that the provisions of the Treaty and the measures takenby the institutions according to it are enforced; - will formulate recommendations orwill present opinions on the matters considered by the Treaty, if so required, orwhen the Commission deems necessary; - will have the powerof making decisions and will participate inshaping the measures taken by the Council and the Parliamentas provided by the treaty; - exercisesthe powers conferred by the Council for the implementation of the rules set by the council"[13]

2.5. *Powers and duties of the European Court of Justice and Courts*, in the line of European law *which are connected to smart regulation*

According toart. 164 andart. 220 of theTreaty of Brussels, the Court of Justice of the European Union, has the*fundamental responsibility to provide for therespect for the right of the European Unionand of the European Communitiesin the matter of providing for the*

[11] *Idem,* pp.80 - 83.

[12] Marin Voicu, *Introduction to European Law,* Universul Juridic Publishing House, Bucharest, 2007, p. 17. „It includes, according to European doctrine and jurisprudence: - *community law,* elaborated by the European Communities and Union , including four big sources: Primary law, secondary law, foreign relations law and complementary law;. - *the law elaborated by the Council of Europe*and in particular *Eurpean law of human rights,* dominated by the Convention of Rome (1950), *whichimpregnated the branchesof European law*:- *European lawregardedas regional international law*, grouping in particular all the bilateral and multilateral agreements concluded by the European states, among them, by the EU with third parties ş.a.

[13] *Idem,* p. 159.

*respect of the European rightto intwerpret and enforce the treaties.*This power is applied also in the matter of the smart regulation procedure.

2.6. Defining the concept of*Smart Regulation* bythe European Commission.On 8 April 2010, the European Commissionset the following definition for*smart regulation*:[14] „The experts interested in the new concept,that of*smart regulation*adopted in the European Commissionwill verify the recently published*Commission Work Schedule*, for 2010 (COM) 2010 135 final, pages 10-11 in the section: „Modernization of instruments and ways of working in the EU" *smart regulation*, defined as an initiativeto make sure that the EU policies are efficient, intends to provide for „a high quality regulatory frameworkfor the citizens and enterprises". It proposes ways ofe „complete connection and integration" throughout the available regulatory cycle,„*smart regulation instruments*".

They are listed as: impact study, „Simplification, reducing the administrative burden and withdrawals" as well as interventions, including by juridical measures, to provide for the complete and comple enforcement of the existing legislation.

Other ways of improving the elaboration of policies are followed „Communicating on Europe" and „adapting EU financial framework to meet political priorities". The work schedule also provides for a listof political initiativesto be adopted in 2010, useful for the concerned partieswho wish to participate in future consultation."

2.7. A function of the Commission that we consider important enoughis its involvement in „*the European Citizen's Initiative*" (ECI)[15]. Thus, „the citizens of the European Unionmay request the Commission to propose a legislative act, in a field of interest, by means ofECI. In order to make the proof of the support that it enjoys, the initiative must be signedby one million European citizens, coming fromn at least a quarter of the number of the member states (7 of 28)".

2.8. „The issue of the simplification ofEU law was raised for the first time officially by the Declaration of Birmingham in 1992, where the European Council expressed its wish that „the community legislation should become more simple and clear". This objective would be consecrated bythe European Council in Edinburghbetween 11-12 December 1992 aresolutionadopted on 8 June 1993 related to the editorial qualityof the community legislation, in whose terms were set „guidelineswhich should establish assessment criteria" for this quality, forthe purposeof „making the community legislationso*clear, simple, conciseand perceptible, as possible*".[16]

2.9. *Smart regulation is a continuous process*, not a simgle operation. If we want to rebring Europeon tracktowards a better economic growthand more jobs, it is essential that EU legislation be „adapted to the purpose". Therefore, the Commission launched, inDecember 2012, a *Programmeon an appropriate and functional regulation (REFIT).* REFIT expressesthe Commission's commitmentfor *asimple, clear, stable and predictible regulation framework, for the enterprises întreprinderi, workers and citizens.*It will bring benefitsboth to the citizens and enterprises, provided that the other institutions and the member states demonstratein their turn, a similar level of ambition.[17]

[14] regplus.blogspot.com/.../new-official-definition….
[15] ec.europa.eu/smart-regulation/index_ro.htm
[16] Mircea Duțu, *Smart regulation,.Simplification of legislation and of the administrative action,* Pandectele Romane Periodical, No 12/2014, Wolters Kluwer Publishing House, Bucharest, 2007, pp. 27- 37.
[17] http://ec.europa.eu/smart-regulation/index_ro.htm.

3. Simplification of legislation in Romania

3.1. *The notion of legislation and of law*. In order to understand the proposed procedure of simplification,at the beginning of this paragraph we intend to definethe concept of fundamental law – the Constitution, oflaw as a legal act of the Parliament, of ordinanceissued by the Governmentsubject to a specialenabling law, of emergency ordinance adoptedby the Governmentunder extraordinary circumstances, of law which results from the legislative initiativewhich belongs to the Government, the deputees and the senatorsor no less than 100,000 voting citizens, orlaw revising the Constitution.

3.1.1. Approached in the wide sense by the the explanatory dictionary of Romanian[18]theterm*law*has the following meaning: *Normative actderiving from the state legislator*, an d the term*legislationm*means: *All the laws of a statet,* or*The ensemble of normative actsof a cergtain branch of law.*

3.1.2. *The approach of the concept of law from the point of view of the General Theory of Law*

3.1.2.1. Approached*from the perspective of the general theory of law*[19]we can find that the term*Legal normative act*is sometimes called*Law as a source of law,*we may notice that in the author's opinion, *Legal normative act*is the righful source*issued bypublic authority bodies, investedeith normative competences* (*parliament, government, local administrative bodies*).The system of normative acts, in the opinion of the author consists of laws, laws decrees and decisions and government ordinances, regulations and orders of the ministries, decisions and resolutions of local adminsitrative bodies. The following are relevant for this research: a) The Law is the normative act elaborated by the Parliament, the legislative power body, which expresses the will and interests of the voters. b) the Government may regulate primarily the social relations by *ordinances*, subject to art. 114 of the Constitution.c) *Constitutional laws* of modification of the Constitution formulate the fundamental values under a normative form and generate the belief that there is a rule of law superior to public power that it confines and to which it imposes certain tasks.

3.1.2.2. Also approached from*the perspective of the general theory of law*[20], we point out that the term*law*is approahced by the author according to the criterion of their legal force, as follows: a) *Constitutional laws*, „the Parliament adopts constitutional lawswhich, when mentioned, first, they have a higher legal force than the other lawsand, of course, than the other normative acts. b) *Organic laws*have a legal forceafter the Constitutionand constitutional laws, but higher than all the other sources of law, due to the special importance of their object of legal regulation. c) *Laws,* the other laws, have a legal forceafter the Constitution, constitutional alws and organic laws, but higher thanall the othersources of law. d) the fundamental law of a state, the Constitution consists in a defined system of legal norms vested with a superior legal force.

[18] Vasile Breban, Small dictionary of the Romanian language, Rnciclopedică Publishing House, Bucharest, p. 568.
[19] Nicolae Popa, *General Theory of Law*, Universul Juridic Publishing House, Bucharest, 1998, pp. 215-219. „As compared to the other normative acts the law distinguishes itself at least by three specific features: a) the law has a special procedure of elaboration; b) the law always has a normative character; c) the law has the competence of primary and original regulation.
[20] Ion Dogaru, *General Theory of Law*, SitechPublishing House,Craiova, 1998, pp. 178-179.

3.1.2.3. Also approached from *the perspective of the general theory of law*,[21]the following highlights related to the law approached generically are mentioned:a) *The law is the normative act with a superior legal value actul normativ cu valoare juridică superioară*, the most important source of law deriving from the Parliment, the supreme body of state power, a representative of the people's sovereign power.b) On the other hand, by its content, the Constitution (implicitly the laws of modification of the Constitution) has as an object of regulation the fundamental principles of social and state organization, body system andseparation of powers, the rights, liberties and fundamental duties of the citizens. c) *Special law*, interferes with a specific regulation, special, particularcompared to the regulations of general common law, also called common law. d) The laws orexceptional regulationsare issued under special circumstances, and they set the legal consequencesof their enforcement (for example the laws which establish thestate of emergency). e) Normative acts with the force of laware also the government acts issued under the*delegate legislation*, under circumstances specially provided by the Constitution. e) As sources of law with the same level with the law are considered*some other international acts signed and ratified by Romania.* f) *Consitutional laws*are those of revision of the Constitution.

3.1.3. *Approach of the notion of law from the perspective ofConstitutional Law.*

3.1.3.1. Approached from *the perspective ofconstitutional law,*[22], we point out that the term*law,* is approcahed by the authors, as a fundamental lawof a state, under the name of*Constitution,* considered to be*the fundamental law of a state, consisting of legal rules, vested with a supreme legal force, which regulatesthose fundamental social relationsthat are essential for the establishment, maintenance and exercise of power*. Concerning the law, the authors also define the following categories of law:[23]a) *Constitutional laws*are those ofrevision of the Constitution.b) *Organic laws*are adopted for the regulation of the categories of social relationsprovided by art..73 of the Cobnstitution. c) All the other social relatioons eemain in the sphere of*ordinarylaws*, i.e. those making the object neither of the constitutional laws nor of the organic laws,upon which the legislator has a general competence.

3.1.3.2. Approached also from *the perspective of constitutional law*[24]another author starting from the idea thatthe*Constitution is alsoa law containing legal norms vested with supreme legal force, is defined as representing an ensemble of legal rules vested with supreme forceand adopted according to a special procedure, such rules which set the essential authorities of the stateand their functioning, as well as the rights, liberties and fundamental duties of the citizens*. Concerning the law, the author also defines the following categories of law:[25]a) *Constitutional laws* are those of revision of the Constitution.b) *Organic laws* are those whichintervene in important areas of economic, political, social life etc., of the state. The fields of regulationare as expressly provided by art. 73. par. (3) of the Constitution.

c) *Ordinary laws*regulate the relations of less importance for the state. d) *The Ordinances*areissuedbased on a special enabling law, within its limits and terms. e) *The Emergency Ordinances*may be accepted by the Governmentonly in extraordinary situationswhose regulation cannot be postponed, with the obligation to give reasons in its

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[21] Ion Craiovan,Treaty of general theory of law, Universul JuridicPublishing House, Bucharest, 2007, pp. 374-381. „The law distinguishes itseld from the other normative acts both by its superior position in the system of the sources of law, being enacted by the supreme body representative of the state power de, according to a certain procedure, and by its normative content of the regulations set by it.

[22] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institution,* 14 Edition, Vol. I,C. H. BeckPublishing House, Bucharest: 2011, p. 45.

[23] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institution,* 12 Edition, Vol. II, C.. H. Beck Publishing House, Bucharest: 2006, pp. 150 – 151.

[24] Ştefan Deaconu,*Constitutional Law,* C. H. BeckBeck Publishing House, Bucharest, 2011, p. 39.

[25] Ştefan Deaconu, *Political Institution,* C. H. Beck Publishing Hous, Bucharest, 2012, pp. 238-284, pp. 274-284.-

content for the emergency. f) *Legislative delegation*is that institution of constitutional lawby which the Parliament, based on and within the limits ofthe constitutional and legal provisions, grantsthe Government and the Chief of State the power toadoptprimary normative acts.

3.1.3.3. Approached also *from the perspective of constitutional law*[26]another author starting from the idea that the *Constitution* is a legal act, defines it*as the act which determines the status of power, all the legal ruleswhich set the ways of entrusting power and the exercise thereof*. a) The author *defines* the*lawunder its general form*as follows: *The lawmay be definedas the legal normative act adopted by the legislatorandaccording to the procedure established for this purpose, setting, within its legislative competence, the general and repeated application rules whose effectiveness is provided by the virtuality of state coercion*.

Concerning the law, the author also defines the following categories of law: a) *Constitutional laws*are those whicha – constituent power, derivedorestablished, modifiesrepeals or completes the provisions of theConstitution. b) *Organic laws*, have two features: - they regulate those problemsexpressly provided by the Constitution: - Usuallyit follows a distinct procedure of adoption and modification. c) The ordinary lawsare all the other laws adoptedby the legislative power, based on its usual deliberative prerogativesand according to the common rules in the matter. d) *The ordinances*are issued by the Government, subject to art. 115 of the Constitution, when the Parliament adoptsa special enabling law of the Government to issue ordinances. e) *The emergency ordinances*may be adopted by the Governmentin extraordinary situationswhose regulation cannot be postponed.

3.2. *The comparative evolution of the regulationsconcerning the legislation in the Constitutions of Romaniaof 1991, 2003 and in the Draft Lawon the revision of the Constitution of Romania of 2003 – selective aspects* [27]

3.2.1. For this studywe will retain only the comparisons that we consider the most meaningful.

3.2.2. With reference tothe number of domains thata re regulated by the organic law.

3.2.2.1. art. 72 par. (3) of the Constitution of Romaniaof 1991,[28]includes 17 domains.

3.2.2.2. art. 73 par. (3) of the Constitution of Romania of 2003,[29]includes 19 domains.

3.2.2.3. art.. 73. alin,. (3) of the Draft Lawon the revision of the Constitution of Romaniaof 2003, includes the 19 domains, with 3 more domains proposed to be added.

3.2.3. With reference to obliging the Governmentto motivate the emergencywhen it adopts emergency ordinancesin legislative delegation.

3.2.3.1. art. 114 par. (4) of the Constitution of Romaniaof 1991, establishes the following procedure: „In exceptional cases, the Governmentmay adoptemergency ordinances. The latterbecome effective only after their submission for approval of the Parliament. If the Parliament is not in session,it is convened obligatorily".

3.2.3.2. art. 115 par. (4) of the Constitution of Romania of 2003, establishes the following procedure: „The Government mayadoptemergency ordinancesonly in extraordinary situationswhose regulation may not be postponed, being bound tomotivate such emergency in their content".

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[26] Ioan Deleanu, Institutions and constitutional procedures *– in Romanian law and in comparative law,* C. H. Beck Publishing House, Bucharest, 2006,: p. 211, p. 671, p. 691, pp. 220-221, pp. 690 – 702,

[27] The Draft Lawon the revision of theConstitution of Romania, published in the Official Gazette of Romania, Part I, no. 100of10 February 2014.

[28] The text of the Constitution of Romania of 1991, was published in the Official Gazette of Romania , Part I, nr. 233of21 November 1991.

[29] The text of the Constitution of Romania of 2003, was published in the Official Gazette of Romania, Part I, nr. 767of31 October 2003.

3.2.3.3. art. 115 par. (4) of the Draft Lawon the revision of the Constitution of Romania of 2003, includes no modification, as compared to that of the Constitution of Romaniaof 2013.

Harnessing the above-mentioned, we find an increase of the domainswhich are not regulated by organic law, that we consider negative, and the introduction of the obligation to motivate the emergency, was a good solution, which in our opinionresulted in the decrease of the number of emergency ordinances issued by the Government.

3.3. *Establishing programs for the simplification of the legislation in Romania*

3.3.1. As Prof.Mircea Duțu points out, in the paragraph*Simplification as a remedyand for a „Romanian evil"*, in his article*Smart regulation. Simplification of the legislationand of the administrative action* metnioned in the beginning of the study, makes the following specificationson the status of the legislation in Romania: „Indeed, a mere statistical radiographyreveals*an alarming situation. Thus, it shows that we have currently in forcenot less than 65,240 normative acts, of which 6,247 laws, 2,336 emergency ordinancesof the government, 854 Government ordinances, 21,480 Government decisionsand 34,323 other acts (in this category, in particular acts of the county and local public authorities).*"

In our opinion, international law is added to these above-mentioned normative acts which according to art. 11 par. (2) of the Constitution, *the treaties ratified by the Parliament, belong under the laws to domestic law*. Moreover, under art. 148 par. (2) of the Constitution, onthe accession to theEuropean Union, the following are set: *as a result to accession, the provisions of the constitutive treatiesof the European Union, as well as other binding community regulations have proprity as compared to the adverse provisions of domestic laws, with the observance of the accession act.*

The same situation regarding the increase of the volume of normative actswas found at the level of the European Union, but the European Commission, considered to be the executiveof the Union, set several programs, among which RIFIT 2012 program, a *Program regarding an appropriate and functional regulation*, is presented in this research.

Considering the experience of the European Commissionin the matter, I propose that in Romania, the Government of Romania, should initiate various Programsfor the simplification of the legislation based on the documentation providedby the Legislative Councilwhich underLaw nr. 73/1993, as republished, has some responsibilities in the matter.

3.4. *Conclusions*

3.4.1. The objectives of this research on smart simplificationin the European Union and the simplification of the legislation in Romania were attained.

3.4.1.1. As shown by the objectives of this research, this article is structuredinto two parts: a) Smart regulationin the European Union; b) Simplification of legislation in Romania.

3.4.1.2. The first part of the researchstarts with a presentation of the main treaties of the European Communities, starting with the*the Treaty of Paris establishing the European Coal and Steal Community (CECO),*signed in Paris, on 18 April 1951 and ends with the*Treaty of Lisbon*, signed on 13 December 2007, and effective as of 1 December 2009. Between 1951 and 2009, nine treaties were signed, considered to be the main treaties both by the European Communities and by the European Unionand by the specialized doctrine in the matter of community law and of the European Union. In these treaties I identified the regulations on the European Commission and the European Court of Justicewhich are related to the Smart Regulation procedure.

3.4.1.3. Then, I dealt with the notion of European law.

3.4.1.4. In the same part of the paperI defined the concept of smart *regulation*.

3.4.1.5. Another topic approached refers to the legislative initiative of the citizens, established by theTreaty of Lisbonof 13 December 2007.

3.4.1.6. REFIT 2012 project is among the last projects proposed by the European Commission.

3.4.1.7. The main sources of documentationwere theTreaties of the European Unionmentioned above in the original (EN andFR), Romanian and foreign documentationin the field of community and European law.

3.4.2. *The second part of the researchis dedicated to the theorization of the simplification of legislation in Romania*

3.4.2.1. The second part of this paperstarts with the determination of the notions of law and legislation.

3.4.2.2. I used in order to define these notions the encyclopedic dictionary of Romanianand Romanian and foreign treaties of general theory of law and constitutional law and political institutions.

3.4.2.3. Another paragraph of this part refers to the comparative evolution of the regulations on the legislation in the Constitutions of Romaniaof 1991, the Constitution of Romania of 2003, and the Draft Lawon the revision of the Constitution of Romania of 2003.

3.4.2.4. The last part of the research refers to*Establishing programs for the simplification of the legislation in Romania.* These programs are designed according to the European model, and coordinated by the Government of Romania.

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THE AMENDMENT OF THE REGULATION OF THE CHAMBER OF DEPUTIES IN THE LIGHT OF THE CONSTITUTIONAL JURISPRUDENCE AND ROMANIA'S STATUTE AS A MEMBER STATE OF THE EUROPEAN UNION

Cristina TITIRIŞCĂ *

Abstract: *The need to amend the Regulation of the Chamber of Deputies is always an element of date, both in terms of the various decisions of the Constitutional Court that have found certain provisions as unconstitutional, and through the development of our country's status as a Member State of the European Union. The recent attempt to change the Regulation, which unfortunately resulted in a failure, requires a brief overview of the main elements that should be considered in the future.*

Keywords: *regulation, jurisprudence, constitutionality, member-state, European Union*

Under article 61 of the Romanian Constitution, republished, the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country. The Chamber of Deputies, together with the Senate, forms the Parliament of Romania. The two Chambers are designated by universal, equal, direct, secret and freely expressed ballot. Both the Chamber of Deputies and the Senate are elected for a term of four years that may be extended, by law, in a state of mobilization, war, siege or emergency.

Before any examination of certain provisions of the Regulation of Chamber of Deputies[1], it is called for to be specified the legal nature and the position of this Regulation within the system of the normative acts and, of course, the scope of the legal rules which, according to the Romanian Constitution, the said Regulation may cover.

Under article 67 of the Romanian Constitution, republished, the two Chambers of Parliament adopt laws, resolutions and motions. From the examination of these constitutional provisions, as well as those which provide for the legislative procedure (articles 73-79) results that, by its content and the adoption procedure, the Regulation of the Chamber of Deputies does not fall within the category of laws. This is because, unlike the law, the regulation may only regulate on the internal organization and functioning of the Chamber[2], it is voted by the concerned House and it not subject to promulgation. It is true that article 76 of the Romanian Constitution, republished, stipulates that the decisions on the regulation of the Chambers shall, as well as the organic laws, be adopted by a majority vote of each House, but this is not sufficient to give a different legal nature to the regulation than the one of a decision.

* PhD in Law, parliamentary advisor at the Legislative Department of the Chamber of Deputies, member of SRDE.

[1] Approved by the Chamber of Deputies Decision no. 8/1994, published in the Official Gazette of Romania, Part I, no. 50 of 25th of February 1994, and republished in the Official Gazette of Romania, Part I, no.762 of 13th of November 2012, with subsequent amendments.

[2] Article 64 paragraph (1) thesis I of the Constitution of Romania, republished.

As stated by the Constitutional Court[3], the majority required by the Constitution for the adoption of such a decision aims „to ensure the widest possible expression of the will of deputies on the regulatory provisions, a natural act in a democratic parliamentary system that involves, by definition, a parliamentary majority and an opposition". Therefore, the Regulation of the Chamber of Deputies is a decision and it is going to be the subject to the constitutional regime of this category of legal acts.

As regards the legal sphere, which corresponds to the Regulation of the Chamber of Deputies, according to the Romanian Constitution, it must be determined by identifying the legal effects resulting from the systematization of the constitutional provisions on the Parliament, as well as the interpretation of article 64 paragraph (1) in conjunction with articles 69-72 of the Basic Law. The constitutional regulations on the Romanian Parliament have the following legal and technique structure: Organization and functioning (Section 1); Statute of Deputies and Senators (Section 2); Legislation (Section 3), a structure which is not without some major legal consequences in terms of the normative content of the Regulation of the Chamber of Deputies.

Given the above, in accordance with the firm jurisprudence of the Constitutional Court, one can make the following clarifications:

1. The provisions of the Regulation of the Chamber of Deputies are constitutional insofar as they concern only the internal organization and functioning of the Chamber of Deputies and only if that does not regulate matters which, according to the constitutional provisions, must be regulated by other legal acts.
2. In connection with the statute of the deputies, it is noted that in the Constitution is regulated separately from the internal organization of the two Chambers, hence no doubt that the regulation may not exceed the limits of the organization[4]. Such limitations are explicitly provided for by the Constitution, they result both from the structure of the provisions on the Romanian Parliament and the provisions of article 71 paragraph (3), according to which any other incompatibilities (on the quality of deputy or senator) are to be established by organic law. Of course there are constitutional provisions that establish themselves issues that fall under the statute of deputies, such as article 72 on parliamentary immunity. It obviously results the clear intention of the constituent legislator to remove certain provisions outside of the regulatory scope of the Regulation.
3. Since the Regulation of the Chamber of Deputies is a judgment that regulates the internal and adequate organization of the Chamber, its provisions may establish rights and duties only for deputies and the authorities, dignitaries and civil servants, according to their constitutional relationship with the Chamber. As such, the Regulation of the Chamber of Deputies may not establish rights and above all duties for subjects of law outside the Chamber of Deputies, subjects of law that do not fall into the above circumstances. Such provisions may only refer to laws, in the sense of legal acts of the Parliament.
4. Being a lower legal act compared to the Constitution and the laws, the Regulation of the Chamber of Deputies may not include rules of substance, which fall under their

[3] Constitutional Court Decision no. 45/1994 on the constitutionality of the Regulation of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 131 of 27th of May 1994.

[4] There is no doubt that in general, a regulation on the organization and functioning of a structure, including the state may contain rules on the statute of the members that make up the respective structure; however, in case the law provides that this is not possible, the regulation may not include such norms.

domain, but may include rules of procedure aimed at making these rules. These rules should allow only the capitalization of the constitutional and legal provisions, and are unable to affect them in terms of the regulatory domain and content.

5. Some articles of the Regulation of the Chamber of Deputies faithfully reproduce certain articles of the Constitution, a procedure commonly used in Romanian law. Obviously, in such situations, the constitutionality of these provisions is out of the question.

As to the principles issues above, we specify that, despite the fact that those provisions of the Regulation that relate to certain rights of the deputies, such as the right to leave[5], were declared unconstitutional, motivating that they are not statutory provisions, but are related to the statute of deputies which, under the fundamental law, is regulated by organic law, they have not yet been repealed from the Regulation of the Chamber of Deputies, nor was amended the Law no. 96/2006 on the Statute of Deputies and Senators, republished[6], with the subsequent amendments.

Next, we refer to recent attempts to amend the Regulation of the Chamber of Deputies in view of its agreement with Romania's status as a member-state of the European Union.

An important element for the activity of the Chamber of Deputies, resulting from Romania's property as a member-state of the European Union was the creation of the Committee on European Affairs, as a standing committee, which shall:

- contribute to the forming of the national position on the adoption of the decisions at EU level, with the participation of the Chamber of Deputies;
- examine consultation documents, draft European legislative acts and other documents from European Union institutions and integrate the views expressed by other standing committees in the reasoned opinions and views;
- examine the key strategies and policies of the European Union, the way Romania complies with European Union treaties and how the European Union legislation is integrated into national law;
- ensure parliamentary supervision of European affairs;
- represent the Chamber of Deputies in relations with the European Union, under the law and parliamentary regulations.

Recent[7] amendments of the Regulation of the Chamber of Deputies were aimed, among other things, at regulating the parliamentary control over the decision-making process at European Union level. Thus it was established the exercise by the Chamber of Deputies of the constitutional powers regarding parliamentary control over decision-making process at European Union level, under article 111, article 112 and article 148 paragraphs (4) and (5) of the Constitution of Romania, republished, article 10 and article 12 of the Treaty on the European Union[8], Protocol no. 1 and Protocol no. 2 annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union and Law no. 373/2013 on cooperation between Parliament and the Government in European affairs[9], in the following forms:

[5] Constitutional Court Decision no. 45/1994 on the constitutionality of the Regulation of the Chamber of Deputies, published in the Official Gazette of Romania, Part I, no. 131 of 27th of May 1994.
[6] Republished in the Official Gazette of Romania, Part I, no. 459 of 25th of July 2013.
[7] The amendments were proposed during this year (2015); we specify that the decision on amending and supplementing the Regulation of the Chamber of Deputies was dismissed on March 25th, 2015 with 186 votes „for", 4 votes „against" and 108 abstentions. Under Article 76 paragraph (1) of the Constitution of Romania, decisions on the Regulations of the Chambers shall be adopted by a majority vote of each House, and, at that time, in case of the Chamber of Deputies, the vote should have met 198 votes „for".
[8] The consolidated version is available at http://europa.eu/pol/pdf/consolidated-treaties_ro.pdf.
[9] Published in the Official Gazette of Romania, Part I, no. 820 of 21st of December 2013.

a) participation to the forming of Romania's position on European Union proposals, that are adopted in the Council of the European Union, as selected by the Chamber of Deputies for parliamentary scrutiny, by analysis of the proposals and issuing of observations and recommendations on policy options and recommendations for additions or amendments to certain provisions;
b) the exertion of prerogatives provided by the Protocol no. 2 annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union concerning the early warning mechanism for the *ex ante* control of subsidiarity by national parliaments;
c) participation in informal political dialogue proposed by the European Commission in its Communication „Delivering results for Europe";
d) participation to forming Romania's position in the European Council, by adopting proposals concerning the mandate that Romanian delegation intends to present;
e) ensure the fulfillment by the Government of its obligations towards the Parliament;
f) the exercise of the prerogative son actions before the Court of Justice of the European Union, on grounds of breach of the subsidiarity principle;
g) exercise of other prerogatives established by the Treaties and destined for action of the national parliaments.

In the procedure for examining draft laws and draft non-legislative acts of the European Union, it was necessary to define certain terms, as follows:

a) *reasoned opinion* - the document adopted by the Chamber of Deputies, by decision, setting out the reasons why it considers that a draft legislative act violates the subsidiarity principle[10];
b) *review* – document adopted by the Chamber of Deputies, by decision, following the completion of the parliamentary examination of a draft legislative act or a draft non-legislative act of the European Union;
c) *parliamentary examination* - the procedure by which the Chamber of Deputies examines and evaluates draft legislative or non-legislative acts of the European Union in terms of regulation and their implications or the procedure by which the Chamber of Deputies evaluates how the draft European Union legislation respect the principles of subsidiarity and proportionality, under Protocol no. 2 on subsidiarity and proportionality principles annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union;
d) *mandate* - negotiating position of Romania within the Council of the European Union or the position of the Romanian delegation at European Council meetings;
e) *draft legislative acts of the European Union institutions* - the proposals of the European Commission, the initiatives from a group of Member States, the initiatives from the European Parliament, the requests from the Court of Justice of the European Union, the recommendations of the European Central Bank and of the European Investment Bank on the adoption of a legislative act, such as regulations, directives or decisions of the European Union;
f) *draft non-legislative acts* - draft acts of the European Union institutions, that are not adopted by legislative procedure, under the Treaty on European Union and the Treaty on the Functioning of the European Union;

[10] In accordance with the Protocol no. 2 on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

g) *parliamentary scrutiny reserve* – the procedure whereby the Romanian Government has informed the Council of the European Union regarding the commencement of the proceedings of parliamentary scrutiny by the Parliament or by one of the two Chambers, according to Law no. 373/2013 on cooperation between the Parliament and the Government on European affairs.

According to their relevance, they would be subject to parliamentary examination of draft laws and draft non-legislative acts of the European Union. The draft European Union legislation was to be examined in terms of compliance with the subsidiarity principle, as the case may be, and from the point of view of substance of the proposal. Parliamentary examination was supposed to end by development of one of the following documents: *reasoned opinion*[11] or *review*[12].

The Chamber of Deputies was to select drafts of legislative and non-legislative acts of the European Union for their consideration. Selection was do annually, immediately following the adoption of the Annual Work Programme of the European Commission, or whenever the European Union proposes a legislative or a non-legislative act that shall be considered relevant by the Chamber of Deputies and subject to examination. The Committee on European Affairs was to make a selection of the proposals from the Annual Work Programme of the European Commission, after assessing their relevance; the selection was based on prior consultation with the specialized standing committees and on the debate in the Committee on European Affairs.

A new procedure concerned the closer examination of draft laws and draft non-legislative acts of the European Union. Thus, it was stated that the Standing Bureau of the Chamber of Deputies transmits the list of all draft laws and draft non-legislative acts adopted by the European Union to all specialized standing committees and to the Committee on European Affairs, mentioning the ones selected and approved for consideration in terms of enforcing the principle of subsidiarity, respectively in terms of the substance of the regulation, the informed Committees and the deadlines for completion of the review. Any special standing committee, other than the Committee on European Affairs, could have requested, with the notification of the Committee on European Affairs, the approval of the Standing Bureau of the Chamber of Deputies for the consideration of a draft legislative or non-legislative act selected for examination, when the respective Commission was not informed, on the one hand, as well as for the stopping of the examination for draft laws and draft non-legislative acts for which it was submitted, on the condition of showing the motivation, on the other hand.

The Committees examine the draft European Union acts which were notified with by organizing debates, hearings and information exchange, in view of the deadlines set by the Standing Bureau of the Chamber of Deputies. After examination, the specialized and informed standing committees, other than the Committee on European Affairs, draw up a draft opinion which includes observations and recommendations on the merits of the proposal and, if necessary, on the compliance with the principles of subsidiarity and proportionality by a legislative act of the European Union, forward it to the Committee on European Affairs, no later than 5 working days before the deadline set by the Standing Bureau of the Chamber of Deputies for the completion of the review by the Committee on

[11] If the Chamber of Deputies identifies a non-observance of the principle of subsidiarity by a draft legislative act of the European Union, selected for examination by the Chamber of Deputies.

[12] In case of the analysis of the draft legislation and draft non-legislative acts of the European Union, selected for examination by the Chamber of Deputies.

European Affairs. Where are non-compliance with the principle of subsidiarity by a legislative act, the draft opinion, including the observations and the recommendations on this fact, is transmitted by the standing committee to the Committee on European Affairs, but not later than 35 days from the receipt of the letter referral from the European Union institutions. The Committee on European Affairs, after examining the draft opinions submitted by the specialized standing committees and the conclusions from its own debates, shall adopt, where relevant, the following documents:

a) *reasoned opinion* for failure to observe the principle of subsidiarity by a legislative act of the European Union, which showcases the reasons;
b) *review*, which includes observations and recommendations on policy options and recommendations for additions or amendments to certain provisions, following the analysis of the European Union proposal.

The Committee on European Affairs was the one who drafted the decision of the Chamber of Deputies for adoption of the reasoned opinion or of the review, which was sent to the Standing Bureau of the Chamber of Deputies in order to be entered on the agenda of the Chamber of Deputies.

Both the Committee on European Affairs and the specialized standing committees follow the entire evolution of the negotiation process within the European Union institutions and the successive documents that may be adopted during this process. In case of significant evolutions or changes in a draft act or a draft non-legislative act, the Committee on European Affairs or any other specialized and informed standing committee may request the Standing Bureau of the Chamber of Deputies to reopen the examination. The Standing Bureau of the Chamber of Deputies approves the reopening of the examination.

There were interesting provisions related on lodging an action before the Court of Justice of the European Union: the Committee on European Affairs or at least one fourth of the deputies could submit to the Standing Bureau of the Chamber of Deputies a draft decision of the Chamber of Deputies covering the lodging of an action before the Court of Justice of the European Union for the infringement of the principle of subsidiarity by a legislative act of the European Union that was in force, pursuant to article 8 of the Protocol no. 2 on the application of the subsidiarity and proportionality principles, annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union and to article 263 of the Treaty on the Functioning of the European Union. The decision of the Chamber of Deputies was to be adopted by a majority vote of the present deputies and to be communicated immediately to the Romanian Government, in order to trigger the representation proceedings before the Court of Justice of the European Union. Before the Court of Justice of the European Union, the Chamber of Deputies was represented by a proxy specially appointed by the plenary of the Chamber of Deputies, at the proposal of the Chairman of the Chamber.[13].

[13] The Government could not withdraw the action before the Court of Justice of the European Union on behalf of the Chamber of Deputies, the withdrawal of the action before the Court of Justice of the European Union taking place by decision of the Chamber of Deputies, adopted with a majority vote of the present deputies.

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b) DCC no. 45/1994, published in the Official Gazette of Romania, Part I, no.131 of 27th of May 1994.
c) DCC no. 62/2005, published in the Official Gazette of Romania, Part I, no. 153 of 21st of February 2005.
d) DCC no. 989/2008, published in the Official Gazette of Romania, Part I, no. 716 of 22nd of October 2008.
e) Law no. 96/2006 on the Statute of Deputies and Senators, republished in the Official Gazette of Romania, Part I, no. 459 of 25th of July 2013, with subsequent amendments.

2. Websites:

a) www.ccr.ro
b) www.cdep.ro
c) http://europa.eu
d) www.gov.ro

THE TRANSPOSITION OF THE DIRECTIVE 2014/42/EU TO SPANISH LAW BY THE ORGANIC ACT 1/2015[1]

Marina Sanz-Diez de ULZURRUN LLUCH *

Summary: *I. Introduction. II. The modification of Spanish regulation on confiscation by Organic Act 1/2015. 1. Legal nature of confiscation in Spanish Law. 2. The extended confiscation (article 127 bis of the Spanish Criminal Code). 2.1 Concept. 2.2 Problems due to regulation previous to the 2015 reform. 2.3. The extended confiscation as regulated by Organic Act 1/2015. 2.4 Third party confiscation. Bibliography*

I. Introduction

The Organic Act 1/2015, of March 30th, has made very ambitious changes in our Criminal Code, affecting, among many other aspects, the confiscation of the instrumentalities and proceeds of a crime. The main objective of this Law, although it has gone much further than required, is to transpose to Spanish Law the changes demanded by the Directive 2014/42/EU on the freezing and confiscation of the instrumentalities and proceeds of crime in the European Union, which mainly affects extended and third party confiscation. The objective of this article is to analyse those changes.

The EU´s regulation, as well as the international regulation on the subject, has brought to light the importance of the confiscation regarding the fight against organised crime. The effectiveness of this commitment requires not only the establishment of serious legal consequences for the commission of the felonies related to this kind of crime, but also instruments to avoid that criminals profit from them. Therefore, the confiscation of the profits of those crimes accomplish several functions:

- They are socially dissuasive, eliminating incentives to commit this kind of crimes, as these criminals, mostly, are only moved by a desire to obtain profit. That way, activities such as human, arms or drug trafficking, child prostitution or corruption, will hopefully start lacking profitability and will be less attractive to begin with.

- On the other hand, the confiscation of the proceeds of a crime avoids the reinvestment of them on other criminal activities such as terrorism, reducing therefore the criminal rate of other criminal organizations.

- Finally, it also avoids money laundering, as the confiscated profits will not be reinvested in legal markets. The main objective of these criminal organizations is to launder their profits, turning them lo legal activities. These is completely undesirable, specially if taking into account the enormous volume of capitals managed by these organizations –in many occasions, bigger than the GDP of some countries-.The laundering of these capitals

* Law Professor, Rey Juan Carlos University, Madrid (Spain)

[1] This work is part of the proyect of R+D „Blanqueo de Capitales y corrupción: acciones e interacciones desde el Derecho internacional y los sistemas nacionales para su efectiva erradicación", financed by the Ministry of Economy of Spain .

not only implies that they obtain what they sought, but it gives them the control of legal markets and economies[2].

Due to all these reasons, the EU has decided to pass regulation in order to facilitate and promote the localization, freezing and confiscation of the proceeds of the crime, slowly extending the limits of these legal institutions. That way, along with the traditional modalities of confiscation, such as those referred to the instrumentalities of the crime (goods used to prepare the commitment of the felony) or those referred to the proceeds of the crime (profits obtained with the commitment of the crime) new kinds have been developed (extended confiscation, confiscation of property of equivalent value, and third party confiscation) and introduced into the Law of the countries members of the EU[3], in order to avoid the profitability of crime.

On the other hand, it is a fact that criminal organizations know not of geographical limits or borders and act at a transnational scale by distributing their assets among different countries. That makes transnational cooperation essential in order to make confiscation effective, so the EU´s objective is that a ruling made by any member can allow the confiscation in the rest of the member countries. The regulatory differences in this matter are, therefore, an obstacle for the transnational cooperation, and must be eliminated by coordinating the different regulatory systems existent in the EU.

It is in this context where the Directive 2014/42/UE comes to play, changing several aspects regulated by Council Framework Decision 2005/212/JAI[4] and Council Framework Decision 2001/500/JAI. On the one hand, the Directive establishes a unified regulation for extended confiscation. The objective of this change is to eliminate the difficulties that the transposition of Council Framework Decision 2005/212/JAI brought by establishing three possibilities of regulation, generating differences between the regulations of the country members. On the other hand, the third party confiscation is regulated, trying to fight the very common practice of transferring goods to third parties, in order to avoid confiscation.

II. The modification of Spanish regulation on confiscation by Organic Act 1/2015

As said before, Organic Act 1/2015 does a deep modification of confiscation in Spanish Law, affecting nearly all of its modalities. Currently, and after Organic Act 1/2015, our Criminal Code contains the following kinds of confiscation: direct confiscation of the instrumentalities, proceeds and property used for the commitment of the crime; confiscation of the profits obtained from the commission of the crime, no matter the transformations the may have been through; confiscation of property of equivalent value, in case of impossibility of confiscation of the proceeds obtained by the commission of the crime or related to it (this modality of confiscation applies not only to

[2] Also, if the State recovers the goods, they can be reinvested in projects of public interest and socially useful iniciatives, compensating in some way the great damage caused by the commission of those nies.

[3] Regulation of Council Framework Decision 2005/212/JAI, on Confiscation of crime-Related Proceeds, Instrumentalities and Property, was transposed on to Spanish Law by Organic Act 5/2010, which modified our Criminal Code. Council Framework Decision 2001/500/JAI, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime was transposed on to Spanish Law by Organic Act 15/2003, wich modifies our Criminal Code.

[4] The new Directive abolishes articles 3 and 4 of Council Framework Decision 2001/500/JAI, regarding confiscation of value and aid application and Council Framework Decision 2005/212/JAI regarding „products", „goods", „instruments" and „confiscation", and also the regulation on extended confiscation.

direct confiscation but also to extended confiscation, third party confiscation, and confiscation of goods obtained by a continued criminal activity); extended confiscation; confiscation without sentence; third party confiscation and confiscation of goods obtained by a continued criminal activity.

The complexity and broadness of the modifications makes it impossible for me to explain them fully in this communication. Therefore, I will focus on the modifications that have been directly determined by Directive 2014/42/EU, that is, modification of extended confiscation and the incorporation to our regulation of third party confiscation. But before it is necessary to briefly refer to the nature of confiscation in Spanish Law and, related to it, to the problems of legitimacy that it arises in Spanish criminal doctrine.

1. Legal nature of confiscation in Spanish Law

The recently acquired importance of confiscation in recent years and the extension of its limits in national regulations, has been questioned by a sector of the criminal doctrine who consider that such an expansion has been done sacrificing basic criminal principles and guarantees in order to make effective the fight against certain crimes and their profits. In this line of thought, it has been said that figures such as extended confiscation, confiscation without sentence or third party confiscation compromise the requirements of principles such as proportionality or presumption of innocence, among others. Obviously, such objections can only be analysed attending to the particular case and taking into account the specific regulation of the different modalities of confiscation in Spanish Law. But to begin with we must analyse the legal nature of confiscation in order to understand some of the legitimacy problems the figure arises.

The now abolished Criminal Code of 1973 regulated the confiscation as an accessory punishment. It was therefore a punishment, and its purpose was sanctionatory. The Criminal Code of 1995 changed this regulation, considering confiscation as a consequence to the punishment. This denomination does not show very clearly the nature of the figure, but it clearly shows that it is not a punishment.

This lack of clarity can be eliminated by deeply studying the regulation. In order to do that, we must distinguish the two kinds of confiscation that exist in Spanish Law; „securement" confiscation and „profit" confiscation.

The first one refers to the instrumentalities, properties or effects that have been used to commit or prepare the commitment of the crime and its basis lays on the objective danger of this objects, which can be because of their illegal nature or because they can be used for the commitment of a crime. This modality of confiscation, aimed to neutralize the risk those objects create, is similar to a security measure, and therefore must be limited by all of the principles that limit the imposition of punishments and that must be extended to these kind of measures.

The confiscation of profits and products obtained through the commitment of the crime does not find its basis in the danger of the goods but in the existence of an illegal property that must be eliminated. The authorities cannot tolerate the existence of an illegal patrimonial situation. Therefore, its legal nature is not sanctionary, but it is really a nearly civil measure, even if established in a criminal procedure. This is the position maintained by the preliminary part of the Organic Act 1/2015, that states, regarding the extended confiscation, that „it is not a criminal sanction, but it is an institution by which it is intended

to end an illegal situation provoked by an illegal activity. Its foundation is, therefore, of a civil and patrimonial nature, similar to the figures of unfair enrichment".

The differences in the foundation of each modality of confiscation explain the differences in their regulation. In the case of „securement" confiscation, its basis is the danger it represents and it can therefore affect goods that have been acquired legally. It consequently implies the privation of the right to property, if the confiscated asset has a legal origin. That explains the limitation of the measure to the principle of proportionality, which is stated in the article 28 of our Criminal Code which states that „when the effects and instrumentalities are of legal nature and its value does not keep a proportion with the nature and gravity of the infraction, or the civil responsibilities have been completely satisfied, the Judge or Court may not confiscate them or de it partially".

This situation changes when the confiscated object has been acquired through the commission of a crime. In this case, the foundation of the measure is to eliminate the unfair enrichment, and it therefore implies no restriction or privation of rights whatsoever, because there is no right of property –or any other right for that matter- to have those assets, as they have been obtained illegally. Consequently it has no sense here to apply the principle of proportionality, as this principle implies comparing and weighing two rights – the right of the criminal and the right that he has damaged-, in order to determine if the restriction or privation of the first corresponds with the gravity of the damage caused by the crime committed. Therefore, article 28 of our Criminal Code does not include „profit" confiscation among the measures where the principle of proportionality has to be considered.

From all that has been stated, the main conclusion –which must be tinged afterwards- is that the „profit" confiscation does not imply an infringement if the principle of proportionality. This does not mean its regulation cannot be contrary to other principles or guarantees.

2. The extended confiscation (article 127 *bis* of the Spanish Criminal Code)

2.1 Concept

Confiscation implies the definitive privation of an asset, for its attribution to the Government. This figure has several modalities, among them the „securement" confiscation and the „profit" confiscation, and within the second one we must differentiate between direct and indirect confiscation.

The direct „profit" confiscation, regulated in the first paragraph of article 127 of the Spanish Criminal Code, consists on the final privation of the assets and profits obtained through the commitment of the crime that has originated the sentence. This modality of confiscation requires a proving the direct connection between the crime and the profit. The extended confiscation, on the contrary, currently regulated in article 127 *bis* of our Criminal Code, allows the incautation of goods and profits that do not directly come from the commitment of the crime in which the sentence is based on, but that come from other illegal activities done by the criminal.

The foundation of the figure is clear. It pretends to eliminate the existence of big illegal patrimonies, obtained through enormous illegal activities, without a previous criminal sentence for each and every crime that has originated that patrimony. The existence of a criminal sentence for a crime is the basis for the rest of the confiscation of the rest of the goods and profits obtained by the criminal from other illegal activities.

2.2 Problems due to regulation previous to the 2015 reform

This modality was incorporated to the Spanish regulation on the subject by Organic Act 5/2010, in compliance of Council Framework Decision 2001/212/JAI. It was established as compulsory, but only in the case of goods that belong to people who had committed crimes in within a criminal or terrorist organization or a terrorist crime. This regulation generated several doctrinal critics among Spanish doctrine:

- It was objected that the limitation to criminal and terrorist organizations was not justified, as there are other kinds of criminal conducts –such as corruption or economical crimes- that are committed by one person but still generate great profits and provoke great social damage.

- But the main objection was regarding the old requirements of article 127, in order to prove the criminal origin of the goods to be confiscated. Direct proof of the connection between the goods and the criminal activity was not required, and the legislator presumed –*iuris et de iure*, that is, without admitting proof against it- the illegal origin of the goods if there is disproportion between the patrimony of the person and his legal income. This objection does have foundation, but cannot be completely shared.

According to our Constitutional Court, the presumption of innocence is referred to the elements in which the criminal sentence is based on; it implies that no one can be declared guilty without enough and valid proof, referred to every element of the crime and circumstances in which the criminal responsibility lies on. This principle implies that the burden of proof in the criminal process lies on the prosecutor or private accusation, who are the ones that must prove that the defendant is guilty, and not the other way round.

But the legal origin of the goods is not an element of the crime, but the requirement to impose an accessory consequence to the punishment imposed for a crime that has been proved. Therefore, as stated by our Constitutional Court, „once there is a sentence and what must be proved are the requirements to the accessory consequences of the punishment, the presumption of innocence is no longer relevant, but other principles or guarantees must be taken into account, as the right to a rightful process and the guarantees of it". Those are basically the right to an attorney and a correct defence, the principle of accusation and the right to obtain a motivated ruling.

In conclusion, the establishment of presumptions to establish the illegal origin of the assets, in order to make a confiscation, does not affect, as exposed above, to the presumption of innocence, even if it may violate some of the procedural principals listed above. It is true that the presumption does not admit proof against it. This kind of presumptions do not have as an objective to facilitate the proof, but to eliminate any possibility of proof against the presumed crime (illegal origin of the assets), that is automatically inferred from a certain fact (disproportion of assets and income), based on a certain experience established by the legislator that may not be correct in the case examined. These presumptions, when referred to the elements of the crime, are against the presumption of innocence. But in other cases, they are against other procedural principles –also established in our Constitution- that do affect the confiscation. By denying the right to prove otherwise, demonstrating the legal origin of the assets, the principles of contradiction between the parties, equality of legal weapons, and the right to use as much means of proof as necessary are compromised. This opens the possibility of legal assets being confiscated and which legality could have been proved.

Also, it was objected that the extended confiscation discouraged the investigation and sanction of other crimes committed by the defendant, from which the confiscated assets come from, therefore achieving impunity. And also the infraction of the principle of proportionality, as the extended confiscation could lead to a complete confiscation of the assets of the defendant. Both objections must be taken into consideration, but relatively.

Regarding the first objection, it must be said that it is more efficient to confiscate first the goods that criminal organizations use to finance new criminal activities, and this does not imply that the crime will not be investigated[5].

With regard to the principle of, the extended confiscation does not necessarily entail the complete confiscation of the criminals patrimony, but only the confiscation of the excess in comparison with its legal income, that is, the difference between his real patrimony and his legal income. And this part of the patrimony cannot be subject to the principle of proportionality, as what is confiscated is related to illegal activities and with the objective of eliminating an illegal situation. There is no right to property to protect, as there is no title of property to legitimate it. A different problem would be a situation where the defendant lacks legal income; in that case the confiscation of his whole patrimony would be possible. But this would not be a problem of disproportion but of an extreme measure which should, maybe, be limited based on humanity reasons, either allowing the Judge discretion to decide whether to confiscate the goods, or by a partial confiscation. In this line of thought, the Directive 2014/42/EU allows the member countries to establish measures to avoid that, as a consequence of the confiscation, the defendant can find himself in an inhuman situation.

[5] However, it is true that in the case that, afterwards, they iniciated a process to investigate the criminal activities that provoked the extended confiscation, the direct confiscation of the goods would not be possible, as they would already have been confiscated, and it wouldn´t be possible to confiscate them by confiscation of equivalent value, as that would be contrary to the principle of *ne bis in idem* (one crime, one punishment). It is also true that in the case that the patrimony of the criminal, or a part of it, comes from illegal activities, then the individual could be charged with money laundering, as in Spanish Law this crime has a very extensive nature and includes being in possession of goods obtained by the criminal through his criminal activity. Therefore, what can be questioned is the need to include a measure such as extended confiscation when those goods could be confiscated directly by charging the defendant with money laundering.

2.3. The extended confiscation as regulated by Organic Act 1/2015

The Organic Act 1/2015 modifies the figure of extended confiscation in Spanish Law, and regulates this modality in the article 127 *bis* of the Spanish Criminal Code[6]. That way the Spanish legislator adapts the Directive 2014/42/EU, although, in many aspects, it goes much further than required. Even if, globally, the modifications done are positive and improve the previous situation, they also arise certain objections.

As currently regulated, the extended confiscation is not limited to crimes committed by criminal or terrorist organizations, but it extends to individual crimes. This modification is completely justified, as it allows the confiscation of assets from economic or corruption crimes, which also generate great profits.

Also, extended confiscation is only applicable to a certain and closed number of felonies. This criteria is established by the Directive and it is positive as it guarantees legal certainty. But some of the crimes added by the Spanish legislator lack justification. It is very questionable the incorporation of all economical and patrimonial felonies, even if both reoccurrence of the felony and continuity on it are required, including robbery and theft or other felonies against intellectual an industrial property. No limits based on the gravity of these crimes are established, such as a minimum punishment or belonging to a criminal

[6] The article 127 *bis* states as follows:

"1. El juez o tribunal ordenará también el decomiso de los bienes, efectos y ganancias pertenecientes a una persona condenada por alguno de los siguientes delitos cuando resuelva, a partir de indicios objetivos fundados, que los bienes o efectos provienen de una actividad delictiva, y no se acredite su origen lícito:
   a) Delitos de trata de seres humanos.
   b) Delitos relativos a la prostitución y a la explotación sexual y corrupción de menores y delitos de abusos y agresiones sexuales a menores de dieciséis años.
   c) Delitos informáticos de los apartados 2 y 3 del artículo 197 y artículo 264.
   d) Delitos contra el patrimonio y contra el orden socioeconómico en los supuestos de continuidad delictiva y reincidencia.
   e) Delitos relativos a las insolvencias punibles.
   f) Delitos contra la propiedad intelectual o industrial.
   g) Delitos de corrupción en los negocios.
   h) Delitos de receptación del apartado 2 del artículo 298.
   i) Delitos de blanqueo de capitales.
   j) Delitos contra la Hacienda pública y la Seguridad Social.
   k) Delitos contra los derechos de los trabajadores de los artículos 311 a 313.
   l) Delitos contra los derechos de los ciudadanos extranjeros.
   m) Delitos contra la salud pública de los artículos 368 a 373.
   n) Delitos de falsificación de moneda.
   o) Delitos de cohecho.
   p) Delitos de malversación.
   q) Delitos de terrorismo.
   r) Delitos cometidos en el seno de una organización o grupo criminal.

2. A los efectos de lo previsto en el apartado 1 de este artículo, se valorarán, especialmente, entre otros, los siguientes indicios:
   1.º La desproporción entre el valor de los bienes y efectos de que se trate y los ingresos de origen lícito de la persona condenada.
   2.º La ocultación de la titularidad o de cualquier poder de disposición sobre los bienes o efectos mediante la utilización de personas físicas o jurídicas o entes sin personalidad jurídica interpuestos, o paraísos fiscales o territorios de nula tributación que oculten o dificulten la determinación de la verdadera titularidad de los bienes.
   3.º La transferencia de los bienes o efectos mediante operaciones que dificulten o impidan su localización o destino y que carezcan de una justificación legal o económica válida.
3. En estos supuestos será también aplicable lo dispuesto en el apartado 3 del artículo anterior.
4. Si posteriormente el condenado lo fuera por hechos delictivos similares cometidos con anterioridad, el juez o tribunal valorará el alcance del decomiso anterior acordado al resolver sobre el decomiso en el nuevo procedimiento.
5. El decomiso a que se refiere este artículo no será acordado cuando las actividades delictivas de las que provengan los bienes o efectos hubieran prescrito o hubieran sido ya objeto de un proceso penal resuelto por sentencia absolutoria o resolución de sobreseimiento con efectos de cosa juzgada.»

organization. Therefore, confiscation could be used against, for example, *pickpocketers* , and they would have all their patrimony confiscated, as these kind of criminals rarely count with legal income. This consequence is not only disproportionate, but it stimulates crime and has nothing to do with the intended objective of the extended confiscation, which is to fight against great fortunes obtained through crime and that can also be reinvested on the commission of other crimes.

It is also unclear one of the kinds of felonies for which this measure is thought; the „felonies against patrimony and socioeconomic order". This title matches the title of one section of our Criminal Code, but some of the felonies contained in this section –such as felonies against intellectual or industrial property- appear independently in further letters of article 127 *bis*. It seems that in this cases, continuity in crime and reoccurrence are not required, but this differentiation has no clear explanation. Similar problems happen with other kinds of felonies.

The best modification of the reform is to eliminate the presumption of illegal origin of the goods, asking this origin to be proven by *indicia*. I understand, even if the literacy of the Law may induce otherwise, that the reform does not introduce for this matter a *iuris tantum* presumption (which would imply that, if not proven otherwise, the assets are assumed to be of illegal origin) but it requires proof by *indicia*. This conclusion can be induced by the following rules established in the reform:

- The illegal origin of the assets can only be determined by a judge, if he reaches that conclusion, through „objective and founded" *indicia* of the illegal origin of the assets.
- The legislator establishes a list of *indicia* considered to have special value; but they are merely illustrative and therefore do not prevent the judge from taking other kind of *indicia* into account.

Nevertheless, the *indicia* chosen by the legislator are absolutely decisive when establishing the origin of the assets; disproportion between assets and legal income, using a front man or fraudulent maneuvers to hide those assets. These *indicia* must be completely proven at Court, although neither all are required nor do they automatically prove the illegal origin of the assets. In conclusion, as said before, they are illustrative, not compulsory, and they do not necessarily prove the illegality of the assets.

Therefore, the new regulation does guarantee the principle of contradiction –as the defendant can prove the legal origin of the assets-; the right to a motivated ruling –as the judge must explain the reasons why he assumes the illegality of the funds and with what *indicia*- an the principle of equality of procedural weapons –as the existence of a series of *indicia* gives the defendant the advantage of knowing what will probably be used against him, and, consequently, what he must prove false-.

To conclude, we must mention two key aspects of the new regulation. The article 127 *bis* 3 establishes the possibility of a confiscation for equivalent value if, for any circumstance, the confiscation of the original goods is not possible. And article 127 *bis* 5 prohibits the extended confiscation in several cases; operation of the Statute of Limitations, or a ruling favourable to the defendant. The case of the Statute of Limitations is arguable, as it the objective is not to judge the felony but to confiscate the assets it generated. And the reference to a favourable ruling is not only unnecessary but odd, as in that case it is obvious that those assets cannot be confiscated, as it has been proven they do not have an illegal origin.

2.4. Third party confiscation

A very common practice in economic, corruption and organized crime-related felonies is to hide the assets by the use of a front man, selling them for a very low price to third parties, normally friends or family, or to partnerships controlled by the criminal. They are fictitious transmissions of assets where the criminal maintains the control over them and still enjoys them. Those assets cannot be confiscated by extended confiscation, as they are not in the criminal´s patrimony. Therefore, it can happen that in the moment of the freezing order, there will no assets to freeze because most of them are already in third parties hands.

To avoid this, the Directive regulates the confiscation of assets from parties with bad faith. This new possibility did not exist in Spanish Law and has been introduced by Organic Act 1/2015. What was regulated as a prohibition to confiscate goods from assets faith third parties, is now regulated as the confiscation of assets to bad faith third parties[7]. In any case, as we are dealing with assets in the power of third parties, we must examine if their rights are sufficiently guaranteed.

Third party confiscation has a discretional nature, it is not compulsory, which grants more flexibility to attend the circumstances of each case. However, it has been criticised that this modality has not been given a subsidiary nature in relation with the rest of modalities of confiscation. That is, that it can only be used when it has not been possible to use direct, extended or equivalent value confiscation, because there are no assets in the patrimony of the defendant.

There are two modalities; confiscation of assets of illegal origin and confiscation of assets that do not have an illegal origin but can be confiscated by confiscation of equivalent value.

Regarding the first kind, the third party must have acquired the assets with knowledge of their illegal origin (intentionality) or there must be reasons for a diligent person to suspect the illegality of the assets (negligence). As for the other kind, the third party must have acquired it knowing that he was helping to stop the confiscation (intentionality) or there must be reasons for a diligent person to suspect that (negligence).

The problem with the new regulation is that the confiscation of equivalent value can affect the third parties right to property, as it can affect assets with a legal origin, that are therefore legitimate property of the third party.

To determine if there is intentionality or negligence with regard to the legality of the origin of the assets, that is, to prove the bad faith required for the third party confiscation, the legislator establishes a *iuris tantum* (admits proof against it) presumption: if the assets have been acquired for free or for a price lower than market price, it is presumed that the third party has knowledge of the illegal origin of the assets or could have had it. That way, the burden of proof lies on the defendant instead of the prosecution.

[7] This is regulated in article 127 *quarter*, which states as follows:

"1. Los jueces y tribunales podrán acordar también el decomiso de los bienes, efectos y ganancias a que se refieren los artículos anteriores que hayan sido transferidos a terceras personas, o de un valor equivalente a los mismos, en los siguientes casos:

a) En el caso de los efectos y ganancias, cuando los hubieran adquirido con conocimiento de que proceden de una actividad ilícita o cuando una persona diligente habría tenido motivos para sospechar, en las circunstancias del caso, de su origen ilícito.

b) En el caso de otros bienes, cuando los hubieran adquirido con conocimiento de que de este modo se dificultaba su decomiso o cuando una persona diligente habría tenido motivos para sospechar, en las circunstancias del caso, que de ese modo se dificultaba su decomiso.

2. Se presumirá, salvo prueba en contrario, que el tercero ha conocido o ha tenido motivos para sospechar que se trataba de bienes procedentes de una actividad ilícita o que eran transferidos para evitar su decomiso, cuando los bienes o efectos le hubieran sido transferidos a título gratuito o por un precio inferior al real de mercado."

But these conditions match the ones required by our Criminal Code for the existence of a money laundering felony, as the third party is acquiring assets that have an illegal origin or is helping the criminal elude the legal consequences of his acts. Therefore, in my opinion, what should happen in this circumstance is that the acquisition should be reverted (articles 6.3 and 1305 of our Civil Code), the defendant should be charged with a money laundering felony, and, in the case of a condemnatory sentence, confiscate the assets through extended or equivalent value confiscation.

What the legislator is doing with the new regulation is avoiding a criminal procedure against the third party, making it all quicker. The system is quick, but it can generate problems. Regarding the assets acquired, the acquisition is illegal, so the right to property is not damaged, but it does seem to damage the right to a correct and fair process (guaranteed by our Constitution). And if the kind of confiscation used was equivalent value and the assets had been acquired legally, the right to property would be damaged, on top of what has been said before.

In my opinion, the third party confiscation through third party confiscation should be eliminated, and the third party should be guaranteed the possibility to intervene in the trial in order to be able to defend himself. I also believe that it should be required that the property of the third party is merely formal, enjoying the criminal the assets as if they were his (this limit has actually been suggested when discussing the Directive).

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REGIONAL AND LOCAL LOBBY AROUND THE EU INSTITUTIONS- EFFECTIVE MECHANISM TO INFLUENCE EUROPEAN DECISIONAL PROCESS?

Constanța MĂTUȘESCU *

***Abstract**: Although the decisions taken at EU level have increasingly important implications on local and regional authorities in Member States, regional and local interests are poorly represented in the European decision-making. To be able to defend the interests of their local aces on the European stage, local and regional authorities have set up representative associations at national level and ensured their concrete presence at European decision-making by setting up representative offices near the institutions of the European Union, or they gathered in associations or European networks of local authorities. The paper aims to identify the extent to which this lobbying activity carried out by local sub-ways allows an actual influence on the process of adopting European standards.*

***Keywords**: local authorities, the European Union, decision-making, lobby*

1. Introduction

The poor representation of local authorities in the European decisional process through national and European institutions has led them to seek to develop direct relations with the EU institutions to be able to defend the interests of their local aces on the European stage. By forming nationally representative associations and securing a concrete presence at European decision-making by setting up representative offices near the institutions of the European Union or meeting in European associations or networks of local authorities, they implemented an important lobbying that allows them to influence the adoption of European norms concerning them directly.

2. Bringing together regional and local associations nationally representative

National association of various categories of local authorities in order to promote the common interests of all members is a characteristic of all European states. European Charter of Local Self-Government adopted in Strasbourg on 15 October 1985 and ratified by all EU Member States[1], provides in article 10 paragraph 1 that „Local authorities are entitled, in exercising their powers, to cooperate and to associate, under the law, with other local public administration authorities to carry out tasks of common interest. Paragraph 2 of the same article states that the right of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local public administrative authorities „must be recognized in every state." In this respect, Romania's domestic legislation (Local public administration law no. 215/2001,

* Associate Professor Ph.D., Faculty of Law and Administrative Sciences „Valahia" University of Târgoviste

[1] Romania signed the Charter on 4 October 1994 and ratified by Law no. 199 of 17 November 1997, published in the Official Gazette, Part I, no. 331 of 26 November 1997, except art. 7 paragraph 2 of this European legal instrument.

article 11 paragraph (4)) provides that „the protection and promotion of their common interests, the administrative-territorial units have the right to join national and international associations, under the law".

The national association of local authorities in Romania has resulted in the establishment of four representative associations appropriate to each type of local: Association of Municipalities of Romania (ACOR), the Association of Cities in Romania (AOR), Association of Municipalities of Romania (AMR) and the Union of National County Councils of Romania (UNCJR). Local public administration law no. 215/2001 article 8 recognizes their existence and possibility of building other associative forms of general interest. According to their status, these associative structures are legal persons of private law, nongovernmental bodies and non-political, non-profit, incorporated under arrangements by putting together and with no right of return material contribution, their knowledge or their work contribution in order to achieve activities in the community interest and consistent representation of their members. Some of these associations were recognized as a public utility[2].

To achieve a uniform representation in relations with the Parliament, the Government, and other public authorities and in relations with European and international institutions and bodies ACOR, AOR and AMR were associated in the Federation of Local Authorities in Romania. Its mission is to become the unified voice of local authorities.

Aiming, among other things, to increase the involvement and participation of local authorities in decision making and their unified representation at national and European level, the representative associations of local collectivities have access to relatively modest opportunities of real influence on the internal process of decision-making. The main mechanism to reach their obligation derives from article 8 of local government law number 215/2001 which establishes the responsibility of a central public administration authorities to consult them before taking any decision in all matters which concern them directly, obligation embodied in the procedures described above, the consultation in formulating national positions in European affairs and in the process prior to the adoption of internal legal acts that concern them directly. As regards relations with the Parliament, although the statutes of these representative associations provides a permanent cooperation with the Parliament[3], as any formal procedure isn't provided, the opportunities can be characterized more as resulting from an act of lobbying[4], being addressed to senators or deputies to persuade them in order for their proposals in legislative matters to be taken into consideration.

3. Direct presence at European decision-making through representation/contact offices

The relatively unconsolidated position as a work and dialogue partner of the Government and Parliament[5] made aware the local representative associations of Romania of the influence the European institutions through state authorities are hardly feasible. Gradually, they became interested to establish direct relations with European institutions.

[2] See Government Decision no. 156/2008 on the recognition of the Association of Municipalities of Romania as a public utility, published in the Official Gazette no. 125 of 18 February 2008.

[3] See Article 5 paragraph (2) of the UNCJR Statute. In this regard, during the month of April 2013 UNCJR has concluded cooperation agreements with the Senate and Chamber of Deputies

[4] Although such activity is not regulated at this time in Romania, even though there have been several initiatives in this respect, it has a negative connotation and is often associated with trading in influence and considered undemocratic.

[5] See in this respect C. Mătuşescu, *National Association Procedures of decentralized authorities in the establishment of EU rules*, Law Study, no. 2/2014.

There were, even before Romania joined the European Union, in Brussels representative offices of the associations of local authorities[6], and even individual representation offices of certain communities[7]. The role of these offices is, on the one hand, to transmit information both ways - from the European institutions to local collectivities, on the initiatives being prepared by the Commission directorates or European Parliament concerning regional and local issues, but in reverse presenting local and regional problems and interests in the European institutions. At the same time, they also serve an economic purpose by bringing together local economic interest groups with European structures. Finally, their declared aim is to access European programs managed in Brussels or promote partnerships and best practices in accessing European funds.

In Brussels there are over 300 regional and local „representative offices"[8] of whose typology and endowment are highly heterogeneous. Some belong to a single entity, region or municipality (London, Vienna, Prague), others represent a consortium of local or regional authorities (eg offices in Eastern provinces of the Netherlands), while others are an association of communities or even a mixed one made up of public and private sector entities in order to promote the interests of the community (Valencian Community Foundation). There are cases of transnational communities made up of two Member States which have traditionally various forms of cooperation and aimed at promoting the common interests at European level (Anglo-French Essex and Picardy office). In terms of staffing and financial resources are significant differences. Most offices have one employee, although there are offices with dozens of employees (for example, the region of Valencia has 20 employees). The budget varies from several tens of thousands of euros (Romanian representative offices have a budget which amounts to around € 10,000 per month and events) up to one million euros (Southern Denmark).

Regarding the possibilities of influencing the European decision-making through these representative offices, they are still quite limited, their participation in the decision being direct and informal. The development of positions on legislative proposals reports, the European Commission consultations[9] and participation in the work of the Committee of the Regions[10] are the main means of action. Often, the offices are focusing on influencing MEPs in their region or in the national delegation to convince them to support their cause.

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[6] Such permanent representative offices are the National Union of County Councils (UNCJR) and the Association of Municipalities of Romania (AMR).

[7] They established such offices, for example, Teleorman County Council, the County Council of Cluj or Dambovita County Council. Amid the financial and economic crisis, local authorities have seen those unable to further finance their activities so that these offices have ceased operations. Other local authorities, as the Iaşi County Council maintained a sporadic representation at European level by organizing certain events.

[8] The uncertain legal status of these offices, which don't have legal coverage in European law or national law, see N. Levrat, *L'Europe et ses collectivités territoriales. Réflexions sur l'organisation et l'exercice du pouvoir dans un monde globalisé,* PIE-Peter Lang, Bruxelles, 2005, pp. 195-196.

[9] See in this respect the Commission Communication of 19 December 2003 on dialogue with associations of local authorities European Union policy, COM (2003) 811 final. According to the Commission, this consultation has "alternative and complementary" character to other forms of consultation of local subnational. The Committee of the Regions, which draws up an indicative list of national associations, has a key role in their involvement in dialogue with the Commission.

[10] In Romania, representation offices work closely with the national delegation of the Committee of Regions, the coordinator of UNCJR representation office in Brussels is also the coordinator of the national delegation of the Committee of Regions.

4. Collective representation through the European Associations

Although, individual efforts of some representative associations ensures greater visibility to the subnational components collectivities, they are not sufficient to exert a real influence. This, more so as national associations such represented often act individually and not in concert with their European neighbors through the adoption of common positions to be taken before the European institutions, with more chance of success. The solution that their voice to be better heard by the European institutions is the collective representation through associations or European networks of local authorities, who took increasingly more widespread.

European Association phenomenon of local collectivities originates in the '50's of last century, when they became aware of the need for coordinated action to bring more support and legitimacy to represent and defend the interests of local and regional authorities, both within national and European level.

Municipalities Council of Europe, founded in 1951, became in 1984, by integrating the regional dimension, the Council of European Municipalities and Regions (CEMR), is the largest organization of local and regional authorities in Europe[11]. It now includes over 57 members (national associations of cities, provinces and regions) from 41 countries[12], representing about 150,000 local communities[13]. Actively contributing to various stages of European construction[14], the Council seeks to provide a better consideration of regional and local interests in European legislation, developing position papers that are presented before the European legislative process, hoping to influence European institutions.

Amid regionalization movements in the years 1970 - 1980 and the creation of the Community regional policy, has triggered a veritable movement of regional association with certain geographical specificities bodies at European level[15] in order to bring attention to regional interests in European institutions. To exercise more influence, regional associations met in 1985 at the Assembly of European Regions (AER), marking the desire to be a political forum of all regions. Composed of 47 European regions and 9 interregional organizations[16], AER has set as a key objective the strengthening of regional representation in the European institutions and facilitating their participation in the construction of Europe and in community life[17].

Besides these two European associations with more general vocation, numerous other associations and networks promoting the specific interests of certain sub-categories of authorities have assured presence at European decision.

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[11] CCRE does not directly represent local collectivities, but representative national associations of local and regional authorities.

[12] From Romania, CEMR are represented in all four associations representing local collectivities (National Union of County Councils of Romania, the Association of Municipalities of Romania, Romania Municipalities Association and the Association of Cities in Romania).

[13] *Gouvernements locaux et régionaux en Europe. Structures et competences*, CEMR study published in the framework of the 60th anniversary, in 2011, available at www.ccre.org/.../Local_and_Regional_Gov

[14] See C. Mătuşescu, C. Gilia, *Regional and local powers in the European Union*, *op. cit.,* pp. 12-15.

[15] This is the case, for example, of the Association of European Border Regions (1971), the Conference of Peripheral and Maritime Regions (1973) or the Association of European regions with an industrial tradition (1984).

[16] Today, AER brings together more than 270 regions from 33 countries and 16 interregional organizations.

[17] According to AER Staff, available online at http://www.aer.eu/fileadmin/user_upload/GoverningBodies/GeneralAssembly/Events/AG-2009/AER-Statutes-080310-GB.pdf

The major European cities met in 1986 at Eurocities, a network that today includes 130 members[18] from 35 cities of European countries, comprising 130 million inhabitants. The organization's mission is to ensure visibility interests of large urban communities and that they occupy a place on the agenda of European policies, ensuring transnational cooperation and networking between members in the network.

Unlike CEMR and AER, whose establishment was the result exclusively of the local and regional initiatives, Eurocities was created with the support of the European Commission, interested in having a network with relevant actors in areas where it has management competence. The Commission supports this network financial and logistical activity through specific programs (such as the PROGRESS program, which follows Union policy development and coordination in the field of employment, social protection and inclusion, anti-discrimination and gender equality[19]). Working in close cooperation with the Commission services in areas of interest to major cities and ensuring its active presence in European decision-making system, the organization seems to be better placed to ensure the representation of its members' interests[20].

Local intermediate powers have recently (2011) secured their presence on the European scene by establishing the European Confederation of Local Intermediate (CEPLI), which groups nine national associations representing 1,167 local authorities intermediate level (departments, counties, etc.) from eight European countries (Belgium, Bulgaria, France, Germany, Italy, Poland, Romania[21] and Hungary) and two European networks of local intermediate (Arco Latino and PARTENALIA). Its aim is to increase the participation of local authorities in European intermediary decision-making, developing a direct dialogue with the European institutions responsible for policies and programs of interest and with other European associations and NGOs which groups local and regional authorities, strengthen the coherence and visibility of their intervention in the European territory.

Amid the search by the European institutions, of a democratic character of European decision-making as possible as it can get, this multiplicity of associations and European networks of local and subnational allowed the appearance on the European stage to local interests and concerns, though in the conception of union treaties, they do not represent specific interests which are represented at European level. The European institutions, mainly the Commission, began to regularly consult and seek their deliberations, with valuable expertise, as they are based on data from the field and on local solutions offered. Joining them on stage prior to the adoption of European decisions, it is obtained a better understanding of the policy guidelines of the EU and European legislation in general to citizens. Through the European Convention, European representative associations were involved including the drafting of the text of the Constitutional Treaty. A dedicated platform has been made available and some of the proposals put forward by them (such as recognition of regional and local dimension of the subsidiarity principle, to include the

[18] The list of members can be found at http://www.eurocities.eu/eurocities/members/members_list . At this time, only the city of Timisoara is a full member of the network, although this participation is strongly contested at local level, being considered too expensive (annual fee amounts to about 16,000 euros) and no real advantages. Bucharest joined the Eurocities in 2001, but, considering that it hadn't had the expected benefits, this association only offering access to a database on access to a range of projects, without giving effective support in realization of the projects decided in 2009 to withdraw. The same decision was taken by the City of Constanta, which had joined Eurocities in 2005.

[19] http://ec.europa.eu/social/main.jsp?catId=327&langId=en

[20] N. Levrat, *op. cit.*, p. 189.

[21] National Union of Counties Councils of Romania is a founding member of these Confederates.

territorial dimension of cohesion and recognition of the principle of consultation and partnership[22]) were retained and included in the Constitutional Treaty.

However, there is no formal procedure to their combination on the European decisional section; the associations activity representing local authorities is often confused with lobbying held around the European institutions by numerous influential civil society groups, although these associations represent public interests.

The absence of a precise definition of the concept of proliferation lobby in Europe and lobbyists gravitating around the European institutions have led the Commission to try to regulate the practice of lobbying and consultation procedures of these groups. The Commission adopted on 3 May 2006, a Green Paper[23] on the „European Transparency Initiative"[24], followed by a Communication in March 2007 on actions in implementing the green paper[25] and another in May 2008 regarding relations with lobbyists[26]. An agreement on such proposed measures was concluded between the Commission and Parliament in 2011[27]. The Commission uses neutral terminology, describing lobbying as one of „interest representation" which consists in „activities to influence policy formulation and decision-making processes of the European institutions". In this broad definition is less important the quality of the author or the nature of the represented interest and included associations of regional and local powers.

At the same time, the Commission proposed a new framework for lobbying activities which is the establishment of a Register of representatives interests, based on a voluntary registration system with incentives (automatic alerts of consultations on issues of interest to stakeholders) which lead the lobbyists to register. The recorded agencies have the obligation to respect a common code of interest for all lobbyists, or at least common minimum requirements (providing information about their objectives and structure) being provided a system of penalties for breaching its (temporary suspension or register exclusion and loss of benefits). These measures, according to the Commission, will not only increase overall transparency but will also contribute to the achievement of the Commission's better regulation.

Among the activities for which the Commission established is not required the entry in the register included „activities in response to the Commission's direct request, such as ad hoc or regular requests for information, data or expertise, invitations to public hearings, or participation at advisory committees or other similar forums „. However, European representative associations are not happy to only intervene to at the Commission's requests, but seek to wear all existing channels to represent their members' interests. Thus, although the Commission's initiative on transparency has not aimed primarily representative associations of local authorities took advantage of the broad definition and guidelines that have been made to require the emergence of a regional and local level lobby[28], which is answered before possible. Most of them already enrolled in the register of business

[22] For a summary of these proposals, see Information Note contact group "Regions and local authorities", CONV 523/03, of 31 January 2003, available at http://europeanconvention.europa.eu/pdf/reg /fr/03/cv00/cv00523.fr03.pdf.
[23] COM (2006) 194.
[24] SEC (2005) 1300.
[25] COM (2007) 127.
[26] COM (2008) 323.
[27] Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organizations and self-employed persons involved in the drafting and implementation of EU policies (Official Journal L 191 of 22.7.2011).
[28] For a detailed treatment of the issue of lobbying in Europe, see D. Gueguen, *Lobbying européen*, LGDJ, Paris, 2007.

representation (which now became Common transparency register from 1 June 2011)[29], along with nearly 300 other organizations representing local, regional and other public or mixed entities, etc. Moreover, although local authorities, regional, national and international are excluded from the registration requirement, which means that sub-structures that have a representation office / liaison in Brussels are exempt from this requirement, unlike any other associations national or European, some of them voluntarily enrolled in the Register in order to take advantage related to this record.

Conclusions

By participating in an early phase as compared to European time of the decision (possibly during formulation of proposals, or even as the originator of the proposal) or European institutions providing joint expertise of their members, lobbying European associations held at European level by the representative associations of the local collectivities may exercise considerable influence over the European legislative process. Effectiveness also depends on lobbying institutional organization and internal common decision-making procedures -specific to each association, being favored the associations whose members have a homogenous structure (representing, for example, big cities, such as Eurocities) and where a coherent position can be more easily adopted.[30]

However, the lobby appears as the most likely solution for the sub-communities to make their voice heard in Europe given that neither the Union nor any national mechanisms are provided to enable a direct involvement in the drafting of European law implications of an increasingly large for them. Remedies for such direct involvement can be identified at European level (the prospect that the Committee of Regions to obtain the status of institution and be involved in all decision-making procedures appearing often in public debate), and especially at the national level. The state should be most interested in associating its local production in a formal manner at the European legislation because, not giving them any role in this respect, will lead them to develop direct links with European institutions. Or, it could lead to the discrediting of state in Europe[31], so the fact that he can support the institutions on a different position than the one suggested by its communities directly in front of them, and the fact that difficulties may trigger the application of certain rules on its territory may totally escape him.

[29] The registration statistics are available at http://ec.europa.eu/transparencyregister/public/consultation/reportControllerPager.do?action=search&categories=45&

[30] With regard to the internal procedures of the main European associations, see M. Granger, op. cit., pp. 222-225.

[31] M. Boulet, *Les collectivités territoriales françaises d'intégration européenne dans le processus d'intégration européenne*, Sciences humaines Combinées, Nr. 8 - Actes du Colloque interdoctoral 2011, 31 août 2011, Available at http://revuesshs.u-bourgogne.fr/lisit491/document.php?id=827

THE NECESSITY OF SETTING UP THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: (1993-TODAY)

Denisa BARBU *

Abstract: *This tribunal has been set up for the punishment of persons responsible for serious violations of international humanitarian law[1] committed in the territory of the former Yugoslavia since 1991. The International Criminal Tribunal for the former Yugoslavia is a United Nations structure established for the prosecution of serious crimes committed during the wars in the former Yugoslavia. The Tribunal is an ad hoc court, which sits in Hague, Netherlands, and was established by resolution 827 of the Security Council of the United Nations, adopted on May 25, 1993,[2] as a measure to restore the international peace and security, adopted under Chapter VII of the Charter of the United Nations [3].*

Keywords: *the investigations, crimes, violations of the Geneva Conventions, jurisdictions.*

This Court has material jurisdiction over four groups of crime committed on the territory of the former Yugoslavia: violations of the Geneva Conventions (article 2 in the Statute), violations of the laws or customs of war (article 3 in the Statute), genocide (article 4) and crimes against humanity.[4]

The maximum penalty that can be imposed is life imprisonment,[5] different States have signed agreements with the United Nations for the implementation of custodial punishment (17 States).

The final indictments were issued in December 2004; the last being confirmed in the spring of 2005,[6] the Tribunal intending to complete all investigations by the end of 2012[7] and all appeals by 2015, unless Radovan Karadzic who is expected to be completed in 2014.[8]

The Security Council of the United Nations has asked the Tribunal to complete the procedures until 31 December 2014, to prepare the transfer of responsibilities from the International Residual Mechanism for criminal courts which began operating for TPIFI

* Assistant, PhD., Valahia University of Targoviste, Faculty of Law and Administrative Sciences ,The Department of Administrative Sciences.

[1] (See annex I, p. 5); Denisa Barbu, *Răspunderea persoanei fizice în dreptul international penal,* Ed. Lumen, Iaşi, 2015,pp.55-61.

[2] Ackerman, JE and O'Sullivan, E, *Practice and procedure of the International Criminal Tribunal for the Former Yugoslavia: with selected materials for the International Criminal Tribunal for Rwanda,* The Hague, KLI, 2000.

[3] Beatrice Onica – Jarka, *Structuri de cooperare interguvernamentală instituționalizată*, CH Beck Publishing House, Bucharest, 2009, p. 107.

[4] Aldrich, GH. *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia,* American Journal of International Law, 1996, pp. 64-68.

[5] Bassioune, MC, *The Law of the International Criminal Tribunal of the Former Yugoslavia,* New York, Transnational Publications, 1996.

[6] Boelaert-Suominen, *The International Criminal Tribunal for the Former Yugoslavia (ICTY) year 1999: its place in the international legal system, mandate and most notable jurisprudence,* Polish Yearbook of International Law, 2001, pp. 95-155.

[7] Antonio Cassese, *The ICTY: A Living and Vital Reality,* Journal of International Criminal Justice vol.2, 2004, no.2, pp. 585-597.

[8] Ivkovic SK, *Justice by the International Criminal Tribunal for the Former Yugoslavia,* Stamford Journal of International Law, 1997, pp. 255-267.

branch from 1 July 2013. The International Criminal Tribunal for the former Yugoslavia[9] will complete the investigations of the first court cases, including Radovan Karadzic, Ratko Mladic and Goran Hadzic will complete all the procedures on appeal lodged before 1 July 2013, any other notice for appeal submitted after this date will be managed by the International Residual Mechanism.

The International Criminal Tribunal for the former Yugoslavia is a party to the United Nations, being the first International Court of criminal justice, being considered a challenge, until November 1994, being presented and confirmed as the first indictment against Bosnian concentration camp commander[10], the Serb Dragan Nikolic, the prosecutors pointing out that TPIFI is a viable Court. However, most of the new countries that were formed as a result of the break-up of RSFI - especially Serbia and the Serbian entities in Bosnia Herzegovina, have refused to cooperate with this tribunal.[11]

With regard to jurisdiction *ratione personae*, TPIFI Statute provides that it has jurisdiction over the individuals, guilty of serious breaches of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (article 1, article 6 and article 7). They do not discuss anything about a certain property of persons, such as nationality or position occupied, intending to indict the persons responsible for the NATO attacks on Yugoslavia in 1999, the former heads of State and Government of NATO Member States.[12]

TPIFI published in 2004 a list of five successes: the shift from impunity to accountability, establishing the facts by gathering evidence, bringing victims to justice, stressing it with the large number of witnesses heard, the accomplishments in international law by concentrating some concepts of criminal international law, strengthening the rule of law, referring to the promotion of international standards in conducting the prosecution for war crimes.[13]

The Tribunal is made up of Chambers, the Registry and the Office of the Prosecutor,[14] with approximately 900 employees[15], some authors considered that the Assembly of States Parties is part of the structure of the Court.

The Prosecutor is responsible for investigating crimes, gathering evidence, being appointed by the UN Security Council, on the proposal of the UN Secretary General, first Prosecutor being Ramon Escovar Salom (1993-1994), then Carla Del Ponte (1997-2007), which until 2003 was the Prosecutor of the International Tribunal for Rwanda.[16]

The judges are 20 permanent and 3 *ad litem* serving on the Tribunal,[17] the Member States with observer status at the United Nations, they may propose up to two candidates of

[9] L.R. Robinson, *Ensuring Fair and Expeditions International Criminal Trial sat the Tribunal for the Former Yugoslavia*, European Journal of International Law at (2000), vol. 11, no. 3, Oxford University Press.
[10] Kerr R., *International Judicial Intervention: the International Criminal Tribunal for the Former Yugoslavia,* International Relations, 2000, pp. 17-26.
[11] Klip A. and Sluiter G., *Annotated leading cases of international criminal tribunals,* (vol. III), The International Criminal Tribunal for the Former Yugoslavia, 2000-2001, Schoten, Intersentia, 2003.
[12] S. MacArthur, *Lawyers serve indictment on NATO leaders for war crimes,* is listed at the internet address http://www.fantom-powa.net/Flame/lawyers-indict-nato.htm.
[13] Hans Köchler, *Global Justice of Global Revenge?,* International Criminal Justice then the Crossroads, Vienna/New York, Springer, 2003, pp. 166-184.
[14] Lescure K., *International Justice for Former Yugoslavia: the working of the International Criminal Tribunal of The Hague,* The Hague, 1996.
[15] Beatrice Onica – Jarka, op. cit., p. 114.
[16] Mc Donald GK, *Reflections on the contributions of the International Criminal Tribunal for the Former Yugoslavia,* Hastings International and Comparative Law Retrieved, 2001, pp. 155-172.
[17] Shenk MD, *International Criminal Tribunal for the Former Yugoslavia,* The International Lawyer, 1999, pp. 549-554.

different nationalities at the Secretariat-General of the United Nations,[18] passing the list to the UN Security Council, which selects 28-42 nominees by sending proposals to the UN General Assembly which elects 14 judges on this list. They have a mandate of 4-years. On October 19, 2011, Judge Theodor Meron (United States) was elected the new President of TPIFI in a special plenary session; and Carmel Agius (Malta) was elected Vice-Chairman.[19]

Registry (the registry) is responsible for the Tribunal's administration, keeping the records, translation of documents, personnel management and procurement. It is also responsible for the detention unit for the defendants being held during the trial and to legal assistance program for those who do not allow their own defense.

It is currently headed by the Registrar John Hocking of Australia (since May 2009).[20]

In February, the Tribunal has indicted 161 people, completing the procedure regarding 97 of these: 17 being acquitted, 67 convicted, 13 persons have been transferred to the courts of Bosnia and Herzegovina (10), Croatia (2) and Serbia (1)[21]. The defendants were among the soldiers, generals, police commanders, Prime Ministers; Slobodan Milosevic being the first head of State indicted for war crimes.[22] Other defendants of „high-level" were Milan Babic, former President of the Republic of Krajina, Haradinaj, former Prime Minister of Kosovo, etc.[23], Haradinaj was acquitted in April 2008, the first time, and after reopening the case he was acquitted a second time in 2012, 28 November.

Regarding the jurisdiction *ratione temporis*, the TPIFI Status indicates that it has jurisdiction for acts incriminated since 1991, so the judicial period remains open.

The difference between TPIFI and TIPR is that the first was set up in armed conflict (1993), without having a prediction regarding their completion, while the second was set up following the end of the internal armed conflict that has disturbed this country.

Competence *ratione locii* is limited to the territory in which, armed conflict for acts incriminated by the Statute, took place.

Criticisms regarding this International Court referred to the fact that it cannot operate while the war in the former Yugoslavia was still ongoing, Moscow criticizing this tribunal as being costly, inefficient and politically motivated. Slobodan Milosevic argued that it has no legal authority since it was established by the UN Security Council and not by the UN General Assembly.

Also, British euro-parliamentary Daniel Hannan has asked that this Court to be removed, whereas it is anti-democratic and in violation of national sovereignty.[24]

As a response to critics, TPIFI proponents have responded in different publications that it promotes reconciliation, it does not fit into the political requirements desired by some that the Serbian aggression has been one of the most brutal, reflected in reality.[25]

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[18] Vierucci, L., *The First Steps of the International Criminal Tribunal for the Former Yugoslavia,* European Journal of International Law, 1995, pp. 134-143.

[19] Robinson PL, *Ensuring fair and expeditious trials at the International Criminal Tribunal for the Former Yugoslavia,* European Journal of International Law, 2000, pp. 569-589.

[20] David Tolbert, *Reflections on the ICTY Registry,* Journal of International Criminal Justice, vol.2, no.2, 2004, pp. 480-485.

[21] Meltraux G., *Crimes against humanity in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda,* Harvard International Law Journal, 2002, pp. 237-316.

[22] Pilouras, the *International Criminal Tribunal for the Former Yugoslavia and Milosevic's trial,* New York Law School Journal of Human Rights, 2002, p. 515-252.

[23] Roberts K., *The International Criminal Court, the law for the Former Yugoslavia,* Leiden Court of International Law, 2002, pp. 623-663.

[24] Wilson Richard Ashley, *Judging History: the History Record of the International Criminal Tribunal for the Former Yugoslavia,* Human Rights Quarterly, 2005, august, vol. 27, no. 3, p. 908-942.

[25] Carla Del Ponte, 2003, *The role of the International criminal prosecutions in reconstructing divided communities,* public lecture by London School of Economics, p. 76,20 oct. 2003.; T. Meron*, War Crimes in Yugoslavia and the Development of International Law,* American Journal of International Law, vol. 88, January 1994, American Society of International Law Issues.

ANNEX 1

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

161 people under indictment	124 completed processes	- 43 convictions
		- 8 acquittals
		- 25 exonerated from liability
		- 4 transferred to national courts
		- 6 dead during the process
	37 processes in progress	

Soldiers, generals, police commanders, politicians, heads of Government, convicted persons in prison in Scheveninge, 4 km from the Court
1. Slobodan Milosevic, died in prison on March 11, 2006
2. Radovan Karadzic, President of the Srpska Republic
3. Ratko Mladic, Bosnian Serb Commander
4. Croatian General Ante Gotovina
5. Dragan Vasiljkovic, Serbian Paramilitary
6. Naser Oric, Bosnian Army Commander
7. Stojan Zupljanin, Bosnian Serb Commander
8. Dragan Obrenovic, Bosnian Serb Commander
9. Milan Babic, Prime Minister of the Republic of Serbian Krajina
10. Ramush Haradinaj, Kosovo's Prime Minister
11. Biljana Plavsic, President of Srpska Republic
12. Zeljko Raznatovic „Arjan", Serbian Paramilitary Commander (assassinated in 2000)
13. Vojislav Seselj, President of the Serbian Radical Party
14. Goran Hadzic, President of the Republic of Serbian Krajina
15. Milan Lukic, Commander of the Paramilitary Group the White Eagles

MARITIME ACTIVITIES – A SOURCE OF CONFLICTS BETWEEN STATES

Dan Alexandru GUNĂ [*]
Mihai GRIGORE [**]

Abstract: *Nowadays, due to the world economic recession, the reduction of some land resources of raw materials, like rare metals, but also the excessive exploitation of some living resources found in terrestrial oceans, like several species of fish, the value of marine resources has considerably grown. The technological development has been accompanied by a significant growth of the demand for raw materials, among which some rare minerals. The governments of developed states carefully monitor the evolution of the demand and supply of ordinary minerals, but particularly of the rare ones (nickel, titanium, wolfram), intensively used in the high-tech civil and military industry. It is estimated that the demand for such materials shall double in the next 25 years. The European Union has identified a list of 41 materials, among which 14 are irreplaceable for industry. Many of them come from countries like China, Russia, South Africa, Congo and Brazil. Apart from minerals, states have a considerable interest also in the exploitation of oil and natural gas deposits undersea. In these conditions, it is explainable the increasing interest in the exploitation of the resources found in the sea ground, but also the emergence of the disputes between states.*

Keywords: *International law of the sea, natural resources, piracy*

1. The importance of marine resources and their influence upon the relations between states

Under the UN Convention on the Law of the Sea, signed in 1982, the riparian states enjoy sovereignty when it comes to the exploitation of continental shelf resources (which is usually determined according to the rule of the 200 or 350 nautical miles combined with the 2500 meters depth). Out of their interest in exploiting resources, many states are attempting to expand the continental shelf from 200 to 350 miles. For this purpose, by 26th December 2012, the Commission on the Limits of the Continental Shelf had received 65 applications demanding the establishment of the shelf beyond the 200 nautical miles limit.[1] One of the main purposes of the expansion of the continental shelf is the Arctic Ocean. This area has become a real test for the international policy and the relations between the states. The interests of the strong riparian states like USA, Russia, Norway and Denmark collide with the interests of other countries like Japan, China, but also EU. The motivations of the conflict for the Arctic reside in great deposits of minerals, oil and gas which, together with the ice cap melting and the technological process in the mining industry, become accessible to exploitation. All these reasons are also completed by the possibility to open for navigation the Northwest Passage connecting the Pacific Ocean to the Atlantic, allowing for the shortening of the distance between Europe and Asia with about 4000 kilometers.

* Assistant, PhD., Valahia University of Targoviste ,Faculty of Law and Administrative Sciences
** Lecturer PhD Valahia University of Targoviste ,Faculty of Law and Administrative Sciences
[1] For more details see http://www.un.org/Depts/los/clcs_new/commission_submissions.htm.

The interests of states for the richness of oceanic land overcome the areas under the national jurisdiction according to the 1982 Convention. For the purposes of managing the resources in the open area, it has been created International Seabed Authority. Its efficiency depends nonetheless on the financial support of the great powers. According to its official website, the Authority had issued exploitation authorizations to 12 public and private corporations by 2012[2] .

Another phenomenon related to the resources in question is also the competition between developed states for concluding agreements on the exploitation of resources belonging both to the exclusive economic area and the continental shelf of some states not having the technological or financial opportunity to do it. For instance, small island states like Fiji or Papua New Guinea have rich deposits of minerals which big companies fight to exploit. An example is the Canadian company Nautilus Minerals Inc, which received a license for the project „Solwara 1"in Papua New Guinea, for exploiting the oil and gas within the exclusive economic area of this country.

One of the important causes generating the international conflicts related to the establishment of sea borders is *also* the exploitation of maritime resources, both the living ones, like fish, but also the not-living ones, like minerals and oil. The causes of such conflicts are not limited only to the economic side, as they are generated by a complex of factors related to the national safety, sovereignty and political factors. Many times, the issue of energy resources is seen by states as an important aspect of national safety. International relations have witnessed many examples of disputes for small islands, which are uninhabited but contain considerable oil or gas resources or simply military importance for the states involved. An example of such intense dispute is still evolving in the South China Sea. The most disputed area is that of Spratly Islands, as its continental shelf is rich in oil, gas, iron, nickel, gold and silver. There have been many attempts to resolve the dispute, which in 1992 saw several riparian states like the Philippines, Indonesia, Brunei, Malaysia, Singapore and Thailand (but not also China) engaging for a peaceful settlement of the conflict. There have also been concluded bilateral agreements for the settlement of the dispute, such as the 2011 one between China and Vietnam, but the conflict is still lasting.

Moreover, the economic motivation is also encountered in the dispute between Romania and Ukraine for the Snake Island, settled by the International Court of Justice in 2009; oil and gas resources have been discovered in the area ever since the '80s.

Fish resources of seas and oceans, but also the regime on the exploitation and protection represent another conflict area between states. Throughout time, there have been even military conflicts related to fishing. An example is represented by the so-called „cod wars" between Island and Great Britain, during the period 1950-1970. Moreover, the 1995 confrontations between Canada and Spain for the fishing of brill are another example. Many times, when it comes to the protection regime, states – associated in specialized organizations – establish limits between which certain species can be fished. The transgression of these limits has often generated conflicts, an example being that related to the Southern bluefin tuna, a species severely affected by fishing, which opposed Australia and New Zeeland on one side and Japan (a big consumer of the fish) on the other side.

Apart from the disputes for the ocean resources themselves, several disputes between states have also appeared in regard to navigation, more concretely navigation routes. Straits are an instance of such disputed areas.

[2] For a complete list, see http://www.isa.org.jm.

Recently, in the context of the conflict generated by the nuclear agenda of Iran, the latter threatened to close the Strait of Hormuz which connects the Persian Gulf to the Indian Ocean and which is extremely important for the oil supplies of many countries like USA, Japan and EU. The threat from July 2012 came as a response to the oil embargo imposed to Iran by the USA and EU, for determining it to put an end to its nuclear agenda. Although many political observers considered that Iran was bluffing, the USA deployed many military troops in the Persian Gulf area, for countering a potential nuclear operation.

Moreover, the access by means of the channels built by people to ease sea navigation has generated serious conflicts. An example is the Suez Crisis from 1965. The conflict started with the nationalization of the canal by Egypt, after it no longer received financial support from USA and Great Britain to build the Aswan Dam, as a result of getting closer to USSR. After this, according to the Protocol of Sevres, Israel attacked Egypt, offering to France and Great Britain the excuse to get involved and attack the Suez Canal. The UN also intervened in the conflict, deciding on November 4th 1956 to send a peace-keeping mission upheld by the USA. In front of the international community reaction, France and England ended the conflict.

A recent dispute, which is not over yet, has emerged between Canada and USA for the navigation via the Northern passage situated in the Arctic Ocean. Canada declared that the area was under its sovereignty, while USA and EU support the free navigation regime. This maritime route, although it is not yet practicable in safety conditions, will apparently be opened to maritime traffic in the future, due to the accelerate ice melting, by shortening considerably the distance between Europe and Asia.

2. Piracy – a factor affecting the stability climate

Modern piracy is a phenomenon with extremely complex causes related to poverty, revocation of state authority and civil wars affecting certain areas. Although piracy acts are different in terms of location, method or impact, they all have one thing in common: constitute an international political issue. Specialized literature speaks of at leas two reasons:

- maritime commerce, accounting for about 80% of the international one, is affected under various forms, a fact which generates losses for many states, not just for those whose ships are taken over by the pirates;
- safety land issues are strongly connected to maritime safety. Political instability in countries like Somalia or Nigeria, albeit not a direct threat to the safety of Europe or USA, shows that regional conflicts cannot be ignored or settled by taking them out of the international context, if thinking about the emergence of the phenomenon itself and the way it has developed into a frequent practice[3] .

The issue regarding the negative impact exerted by piracy upon the economies of the world states has been debated by several studies. Their assessment is extremely complex, but some direct consequences can still be established with a relative certainty. Thus, according to the study „The Economic Cost of Somali Piracy, 2011" carried out by One Earth Future Foundation[4], the costs in question are the following:

[3] Kerstin Petretto, *Piracy as a Problem of International Politics*, in Piracy and Maritime Security Regional characteristics and political, military, legal and economic implications, Stefan Mair Publ. House, SWP Research Paper, 2011, p.10.
[4] Available at http/www. oceansbeyondpiracy.org/.../economic_cost

- expenses related to ransoms, which amounted to 31 cases and 160 million dollars in 2011;
- expenses related to insurances, which amounted to 635 million dollars, due to the fact that the insurances involved covered the risk of war and kidnappings;
- expenses related to safety equipments and private security companies, amounting to about 1.06 – 1.16 billion dollars;
- expenses generated by the relocation of navigation routes to more safety paths, amounting to about 486-680 billion dollars;
- additional expenses due to the increase of the traveling speed as a measure to avoid pirates, generating more fuel consumption. These costs have been estimated to about 2.7 billion dollars.
- expenses related to the working force. Due to the danger degree, it has become quite difficult to hire sailors, while those accepting the offer demanded bigger salaries. These expenses have been estimated to about 195 million dollars.
- expenses related to the trials and sentences applied to those accused of piracy. The expenses for the judicial procedures made by 20 countries involved in this amounted to 16.4 million dollars.
- expenses generated by the military operations for fighting piracy. Several countries sent ships, militaries and military logistics leading to expenses of 1.27 billion dollars during 2011.

Apart from the direct expenses mentioned above, there is also a negative impact at a macroeconomic level. For instance, regional commerce is affected due to the increase of the expenses for both imports and exports. Kenya – one of the most severely affected states by the consequences of piracy – estimates an increase of expenses generated by imports with about 23.8 million dollars per month, while of those related to exports with 9.8 million dollars per month. The price of food supplies will also have to suffer from the increase of costs. About 40% of the pirates' attacks targets large ships transporting basic food like cereals or rice. The costs increases mentioned before result in creating humanitarian dramas in extremely poor countries relying on international aid[5].

Another field affected by piracy is fishery. For instance, in 2009, the Yemen's prime-minister announced losses of about 150 million dollars.

Piracy generates the reduction of foreign investments, as many companies relocate their business or reduce the amounts of money invested. An example is the diminishment of Egypt's revenues coming from the taxes charged for the transit on Suez Canal. Due to the danger of this route, many of the maritime navigation companies prefer longer but safer routes, a fact which brings them bigger costs and smaller revenues to Egypt.

Apart from the negative economic consequences generated by piracy, there are also some negative consequences of the latter, justifying the intervention of international community. We are taking into account the fact that the phenomenon can spread also towards other states with a precarious political-economic situation. Moreover, pirate groups can enter into collaborations with terrorist groups or with narcotic or weapon smugglers, a fact which generates a real lack of regional safety. The loss of human lives is another aspect which must not be ignored. For instance only the losses reported by the crews of the ships attacked by Somali pirates between 2007-2011 have been of 74 deaths.

Some contemporary piracy cases resemble rather terrorism than classic piracy (pursuing economic targets). During the '90s, but also in 2000, when piracy flourished

[5] Anna Bowden, *The Economic Cost of Maritime Piracy,* One Earth Future Working Paper, 2010, p. 22

around the Strait of Malacca, in the South-East of Asia, reports were showing that pirates were operating from an Indonesian island controlled by the Free Aceh Movement. Some of the pirates were Aceh members, while others were supported by the separatist group. In the South-East of Asia there are also some other violent Islamic groups like Jemaah Islamiyah or Kumpulan Mujahidin Malaysia; Abu Sayyaf in the Philippines, Laskar Jihad in Indonesia. Some of them have been accused of armed attacks against the ships transiting the Strait of Malacca. These attacks were related to the political purposes of organizations, but they were also used as financing source[6].

Due to the severity of piracy phenomenon at an international level, states have started to react by concluding several agreements, both bilateral and multilateral, meant to create a more adequate framework for the cooperation in the field. For instance in 2004, at Tokyo, was concluded the first multilateral agreement against piracy in Asia, namely the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. The agreement was signed by 17 countries, among which China, Japan and Norway. Some of the purposes of the agreement are the strengthening of cooperation by means of the organized exchange of information and the set-up of common institutions. Thus, it was created an information center coordinating several local points which transmit the information related to piracy. The agreement incriminates piracy only when performed at open sea.

The International Maritime Organization adopted the Djibouti Code of Conduct, on 29th January 2009. The Code regards only the area of Aden Gulf and West Indian Ocean. By means of it, states engage to incriminate piracy in internal legislation, to adopt adequate rules for the implementation of jurisdiction, to incriminate, judge and sentence pirates. It is allowed, on the basis of an authorization, to follow ships suspected of piracy also in the territorial waters of signatory states. It must be nonetheless underlined that the document does not have a compulsory legal force.

The issue of Somali piracy has also been discussed by the UN, the Security Council adopting several incrimination resolutions. Among these, Resolution 1816 from 2nd June 2008 allowed states collaborating with the Transitional Federal Government in Somalia to enter the territorial waters of Somalia, for combatting piracy by any means. This possibility has been offered for 6 months, but on the basis of a previous authorization from the Somali Government. Through Resolution 1846 from 2nd December 2008, adopted on the basis of chapter VII of UN Charter, the Security Council extended this possibility with one more year.

The 1982 Convention on the Law of the Sea sanctions piracy acts, by describing them as an international crime as long as they are carried out at open sea. Moreover, the right to follow pirate ships is allowed when the chase starts from the territorial sea and continues in the open one, but not also the other way round. Thus, territorial waters are used as a refugee by pirates. Many times, in order to avoid the chase by foreign military ships, attacks are lunched in the exclusive economic area, while pirate ships take refuge in the territorial sea. Due to the need to respect international sovereignty, many military ships refrain from intervention. A case involving accusations of sovereignty transgression happened in 2008, when a French luxurious yacht was seized by the Somali pirates in the Indian Ocean. After a short while from the payment of ransom by the yacht owners, a French commando started to follow the pirates, using helicopters which launched the attack against the Somali who had arrived at the shore. Somali authorities claimed that five

[6] Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, American University Law Review ,Vol. 59, 2010, p.1458.

civilians had been killed during the raid, a fact denied by the French party, who argued that it was authorized by the Somali government to enter the territory of Somalia for putting an end to piracy acts. The incident generated disapproval from the Somali public opinion, France being accused of having transgressed national sovereignty.

Somali authorities, but also NGO-s, claimed many times that, under the mask of fighting piracy, big countries tolerated and sent ships performing illegal fishery but also dropping off dangerous waste in Somali waters. Illegal fishing ships belong to some states like Italy, France, Spain, Greece, Russia, Great Britain or Japan. In September 1995, the leaders of Somali groups and two big NGO-s submitted a memoir at the UN Secretary General, Boutros Boutros-Ghali, incriminating illegal fishery and dangerous waste drop off. The same memoir was also sent to EU, OAU and Arab League[7].

Taking into account the arguments above, we believe that the maritime piracy phenomenon, even if it is not likely to generate conflicts between two or more states, it is capable to affect the good relations between them, due to the suspicions related to the lack of a decisive involvement of riparian states for fighting piracy, but also due to negative economic implications. The possibility for this phenomenon to expand towards neighboring areas too, but also of the connections which can be created with terrorist groups, are strong reasons for a more determined cooperation in the field. The coordinated interventions of riparian states, doubled by the support of big countries, could partially ameliorate the phenomenon, as piracy has complex causes, regarding living standards or power of state authorities. As a result, military intervention must be doubled by financial and logistic support and counseling provided to authorities.

3. Natural disasters and climatic changes

The world ocean accomplishes several functions affecting human life directly (and the entire planet in fact), for instance: supplies food, maintains the equilibrium necessary to life on earth, provides transportation means between several parts of the globe. Any time these functions are disturbed due to human activity or natural reasons, the resources which humans can obtain are endangered, appearing the premises of a stronger competition between states for them. In these conditions, conflicts between states can emerge quite easy. In general, many of the maritime conflicts are based on the competition for resources, being them alive or not. The delimitation of maritime areas upon which states exert their sovereignty or sovereign rights, such as the exclusive economic area or the continental shelf, is justified by the exploitation of maritime resources.

Climatic changes, like global warming, have a direct impact upon the world ocean and its functions. For instance, a consequence of global warming is also the increase of sea and oceans level, as a result of the accelerated melting of the ice cap. This phenomenon can have many consequences which can generate international disputes. Thus, the establishment of the areas upon which states have sovereignty or exert sovereign rights starts from baselines. Baselines are constituted from the line of the greatest reflux along the coast and, where the case is, the lines uniting the most advanced points towards water of islands, rocks, other terrestrial structures close to the shore and the most advanced

[7] Mohamed Abshir Waldo, *The two Piracies in Somalia: Why the World Ignores the Other*? 2009, p.5 available at http://wardheernews.com/Articles_09/Jan/Waldo/08_The_two_piracies_in_Somalia.html.

permanent installations of ports. The increase of the world ocean level affects these baselines as they will move inside land. Several negative consequences emerge from this:

– the change of the legal regime of some maritime areas, like the exclusive economic area or the continental shelf, into open sea, and the implicit loss of some resources like fish or oil, natural gas and rare materials. According to the UN studies on Food and Agriculture, the majority of fish haul, more exactly 90% of it, comes from the maritime areas under national jurisdiction. The impact of these losses for the states whose economy relies massively on the resources involved can result into a tensioned atmosphere in the area, the multiplication of illegal fishery acts, piracy and so on.

– the change of the legal regime applying to maritime areas can affect not only the loss of resources, but also the naval traffic of the other states. One thing is the right of harmless passage and another one the freedom of navigation. This can provide a greater flexibility to military ships – which can increase their presence in the area – exerting a threat for national safety.

– the change of baselines depends significantly also on the structure of the shore, as when it comes to the countries with a relatively linear shore, in slight declivity, the increase of the ocean level shall trigger a bigger loss than for the countries with „ragged" not-linear shores (for which baselines are obtained by uniting the most advanced points in water, generating a smaller loss)[8]. The states having such coasts situated in low altitude areas, which can experience the situations described before, are Bangladesh and Vietnam. Losses can be registered also when maritime borders are established on the center line between states with opposing shores. A similar situation is between Cuba and USA, which delimited their maritime border by a treaty signed in 1977, which is renewed once at every two years. The USA baseline is established in a low area, on the coasts of Florida, and can be affected by the increase of the ocean level, while the Cuban baseline is higher, being only little affected by this. In the hypothesis in which the coast of Florida gets smaller, there would be necessary to reestablish the border, in order to respect the center line. The effect would be that the access in Gulf of Mexico would take place through Cuban waters.[9] Given the relations between USA and Cuba, this could generate tensions, reason for which the establishment of the maritime border must be done by means of negotiations and take into account the new geographic realities as well as the interests of each state.

The increase of the world ocean level can influence the settlement of some disputes regarding different islands. As a rule, the conflicts related to isles are determined by the fact that if the latter are inhabited they benefit from an exclusive economic area and a continental shelf, and implicitly from their resources. Regarding the impact exerted by the growth of the ocean level, the disputes in question can emerge in the following cases:

– the island disappears for good, being completely flooded and then the dispute ceases in the absence of its object. An example is the small isle New Moore from Bay of Bengal, disputed by India and Bangladesh, which drowned in 2010.

– due to the increase of the sea level, the island can become inappropriate for human life (for instance if its drinking water becomes affected) and, hence, will no longer shelter economic areas representing many times a source of the conflict, determining the latter to be ended.

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[8] Robin Warner, Clive Schofield, *Climate Change and the Oceans: Gauging the Legal and Policy Currents in the Asia Pacific and Beyond*, Ed. Edward Elgar Publishing, 2013, p.136.

[9] Cleo Paskal, *How climate change is pushing the boundaries of security and foreign policy*, Energy, Environment and Development Programme, Edt. The Royal Institute of International Affairs, Chatham House, 2007, p.4, available at http://www.chathamhouse.org/publications/papers/view/108552.

The change of the world ocean level can be considered in some cases a threat to the existence itself of some states. We are speaking about small insular states, for which this can be a real danger. Take the Maldives for instance, where the highest point from the sea level measures 2.4 meters. A similar situation is also in Tuvalu. Although a complete disappearance is less likely in the future, taking into account that it is estimated an increase with about 1 meter of the world ocean level in the next century, there still emerge questions regarding the consequences of the physical disappearance of the national territory. In our opinion, we can speak in this case of the disappearance of an international law subject, as there no longer exists an essential condition of the state – the national territory. The growth of the water level in these situations will severely affect the possibility to live on the islands under discussion, as there will also be affected the drinking water and food supplies.

Due to global warming and, implicitly, the melting of ice cap, new possibilities have emerged in areas once inaccessible, like the Arctic. Here states attempt to gain control over the resources of the continental shelf, but also over some very important navigation routes, such as the North-West channel, which Canada regards as a part of the Canadian territory, a fact challenged by other states such as USA and EU, which claim that the area must have the regime of an international strait, subject to free movement. The route, albeit not easy accessible in the near future, it is estimated to be opened to navigation, a fact which would shorten the distances between Europe and Asia with about some thousands kilometers (between 5.000 and 7.000 kilometers, depending on the comparing route via Suez or Panama Canal). Due to the pollution generated by the maritime traffic, states shall adopt more restrictive measures regarding the standards which they have to observe, a fact which can generate controversies due to the different attitude of states in respect to pollution.

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THE PUBLIC FUNCTION: THE NEED FOR A SINGLE EUROPEAN LEGAL FRAMEWORK

Florin STOICA*

Abstract: *The Europeanization process has been triggered by integrating in the Community of each individual State. This process included one by one, all the areas and mechanisms of a national economy.. In The public administration, this process has been extended due to consequences of the principle of free movement of labor. But for the public administration the Europeanization did not mean a single legal framework, common principles, or the creation of a single administrative space. If Europeanization process there or not? If the European Union there is a smoothing process in all areas, then why should there not a process of legislative harmonization for public office, and public administration? So we tried to respond to this question in this article, also We tried to demonstrate the impact that legislative unification would have on public servants that would mean for ordinary clerk. We started with the specific regulations, traditional and tried to go to the general, to see what needs to agree upon the states.*

Keywords: *The public function, public administration, public function management, the Tribunal, Lisbon Treaty, European official*

I. Introduction

At more than half century after the emergence of the idea of the United Europe, there has not yet been a full unification of the States under the European umbrella. If at the beginning, this unification process had only building national economies to a common market econimică, today also raises the idea of a united Europe at all levels. Our study aims to analyze the most important component, underlying this idea, namely the human resources involved in the public service, provided by the public administration, of the Member States, we will analyze, therefore, the public function.

The society is one of whether and to what extent the public administration system is penetrable by the social environment, and according to it, whether it is comparable with the global society, what similarities and differences are.

Not adapting the administration to the demands of the social environment, may also derive from the incompatibility report between the public administration system and society. Compatibility between the public administration system and the society is ensured also by how this system takes self-adjust its structures and actions to the needs of society, imposing a detailed knowledge of the global social system[1].

The public function in the European Union is the political-administrative system's segment the most marked by socio-cultural needs of a nation and less affected by European integration.

Although there have been attempts, so far, no European treaty has provide the community skills for organizing the public function, EU has no jurisdiction to regulate the

* Florin Stoica, Doctorand, al Universitatii Nicolae Titulescu, Bucuresti, florin_stoica@icloud.com

[1] Ioan Alexandru, Drept Administrativ Comparat, Ediția a II a, Editura Lumina Lex, Bucureşti 2003, pg. 105

public function and no reform or reorganize in any way government and administrative structures in the Member States.

National Public services are affected indirectly by European integration as a result of the fact that the administrative and legal systems of the Member States are obliged to adjust the transposition and application of the Community law requirements. Also, it should be underlined the fact that the Community has no powers to regulate the public function, so long as there are not special regulation in the field.

Augmenting the connections between national, regional and local administrations, boosting cooperation and coordination between these services and, and tosome extent, the EU's increased skills at legislative and executive level gives increased importance to an analyze regarding the public administration, the public function and the public service.

II. Content

Since the founding of the State, as an entity,as a power organized over a population in a certain area, it was necessary a continue adaptation to the economical, political and social life requirements. At the same time, amplifying the atributions of state bodies and authorities, it was necessary to create some servicesthat could make the connection between the citizen and the state, services being know as public. Public services have resulted in public functions, functions that have supposed skills and responsibilities specific to the tasks, that they performed in order to meet the general interest of society.

Given the concerns of European doctrinarians, in the administrative compared law, it can be noted that in every western country there are traditions of the public function, thus it can be observed that the first country to adopt a general status of the civil function is Spain, through the Law from 1852, followed by Luxembourg, through a law from 1872 and Denmark, in 1899. In Italy, the first statute of civil servants was adopted in November 22, 1908 and in the Republic of Ireland's first law on the civil function appears 1922. The Netherlands and Belgium have adopted the first law on civil servants in 1929 and the General regulation of the United Kingdom of Great Britain and Northern Ireland appears in 1931[2]. In Germany there are regulations concerning the public function since the Middle Ages, but Professor Jacques Ziller appreciates that the first general lawregarding the general codification of civil service rules was adopted by the national socialist regime only in 1937, although there was a *Bavarian Code of the Public Function*[3] since the early nineteenth century, namely from 1 July 1806. In Romania, the regulation of the civil service, in the current sense of the term, is performed for the first time in the Organic Regulations. Follow chronologically, Law Cuza's election time, and also those of the 1866 Constitution because only through the Constitution from 1923 to give the importance to adopt a statute of civil servants, achieved by the Law of June 19, 1923, in force until 1940, then the first democratic regulation appears in the Constitution from 1991.

On the issue of civil function, the legal doctrine had and has no single point of view, especially since the rules differ depending on the historical period and the reality of the state to which we refer sometimes; these rules are nothing but a way to impose political views.

[2] Antonie Iorgovan - *Tratat de drept administrativ*, Editura All Beck Bucureşti, 2005, vol I-II, p. 530
[3] Hauptlandespragmatik fur die Dienstverhaltnisse des Staatsdiener

Trying to define public function, we observe the multitude of meanings which it receives, but it seems relevant to us the definition given by the administrative doctrine. Thus, the public function represents all duties and responsibilities established by law, in order to achieve public power prerogatives by the public central administration, the local public administration and the autonomous administrative authorities, definition taken from the Law188 from 1999 regarding the status of public officials[4].

The prerogative of public power is constituted, in this case, in a substantial element in identifying the professional category of the public official[5].

II.1. Legal regulations at each European state

In the European states' legislation there is no standard definition of the civil and public officer, but were identified and analyzed enough similar elements in all these countries to demonstrate that there is a reporting unit basis represented by a set of common standards in thepublic function management. Thus, we identify some of the essential aspects of the civil officer in the European Union:

- It is constituted in a well-defined body in budgetary personnel category;
- Legal basis of the classification is contained in the law, making a delimitation of contractual staff thatis subject to labor law;
- Appointment is made under the law, through the will of the public authorities, the state representative who has the necessary powers in this sense and not in accordance with the agreement of two parties;
- There are special conditions stipulated by law for the release and dismissal of civil officers;
- Work of civil servants is very well regulated, with a constitutional and strategic role;
- The public position stability is a requirement that all public institutions have to respect;
- The obligation of public officials to have no political affiliation;
- Professionalism in exercising public functions.

In each EU Member State we can find general rules regading the relations within the public service. Thus, Denmark, Belgium, France, Germany, Greece, Spain, Italy, Luxembourg, Austria, Portugal, Finland and Sweden have stated in the Constitution the general principles of the organization of the public administration for civil officers. In Great Britain, Prime Minister, who is also the Minister of Public function, has the power to formulate rules and guidelines for the public officers -Home Civil Service, including to set a number of employment conditions for them.

A detailed analysis of the legislation, governing the public function in several Member States of the European Union, shows that this varies from country to country. Thus:

- Austria: Civil Service Code;
- Denmark: Constitution, Civil Service Law;
- Finland: the Constitution, the Public FunctionGeneral Statute, special statutes of the three bodies, the Civil Function Code;
- Germany: the Constitution, the Civil Officers Law;
- Greece: the Constitution, Civil Service Code;
- Ireland: secundary legislation;

[4] Legea nr. 18/1999 privind Statutul functionarilor publici - Republicata si Actualizata 2015

[5] Verginia Vedinas, *Statutul funcționarilor publici. Comentarii, doctrină, legislație, jurisprudență*, Ed. Universul Juridic, Bucureşti, 2009, p. 24.

- Italy: the Constitution, the Civil Service Law, Law No.59 / 127 from 1997 for the reform and simplification of the public administration;
- Luxembourg: Constitution, Civil Service Code;
- Netherlands: Constitution, Civil Service Law, the general rules regarding the public service;
- Spain: Constitution, Civil Service Code;
- Sweden: the Constitution, the Act on public sector employees;
- UK: secondary legislation, the public service Order in council,the Act concerning the Public Service and Public Service Management Code;
- Romania: Constitution, Law no. 18/1999 on the statute of civil servants.

II.2. European regulations concerning the EU civil function

One variant of the definition of the European public function can also be found in Article 1 of the Statute[6], according to which „is an official of the Communities, in the sense of this Statute, any person who was appointed under the terms of this statute, in a permanent function from one Community institutions, through a document issued by an authority vested with the power of appointment by this institution."

Until the Merger Treaty, the Community institutions' staff was submitted to a dual regime, on one hand, to protocols on privileges and immunities applicable to them, and on the other hand, to a conventional system first, and then statutory characteristic of each Communities.

Other advanced functions of government regulations were imposed by the Regulation EEC, ECSC, EAEC, no. 259/68 from 29 February 1968, published in the OJEU no. L 56 from4.03.1968, amended several times. Other notable documents which attempted to European Commission White Paper on administrative reform in March 2000; This document highlighted the principles of public administration at European level, focusing on the services quality, the official's independence, his liability for all acts committed, efficient and transparent public service performed by the European citizens.

For the implementation of the general principles it was adopted in September 13, 2000 the Code of decency in public administration (The Code of Good Administrative Behavior). It was designed primarily as a tool for the European institutions' staff who works directly with the public. Furthermore, the code has as main direction to informcitizens of their right to benefit from quality services, of the conditions that must expect to be treated when interacting with a European institution.

European ideologists believe that the unification of legislative provisions on the European civil service was conducted by Regulation EEC, CECA and C.E.E.A. no. 259 from 29 February 1968, amended several times. The latest and most important change was made by the EC and Euratom Regulation no. 723 from 22 March 2004. This Regulation, as amended, together with other internal texts of the European institutions is known as The Statute, with the subtitle „Rules and regulations applicable to the officials and other agents of the European Communities[7]."

[6] This status consists of four parts: the first part is devoted to her community and has Staffan eleven annexes - the second part is devoted to the regime applicable to other categories of European agents; - The third part includes officials and other applicable regulations of the European Communities; a last part that includes regulations taken jointly by the Community institutions, officials and other community agents.

[7] Constanța Călinoiu, Verginia Vedinaş – „Teoria funcției publice comunitare", Editura Lumina Lex, Bucureşti 1999, p. 12.

II.3. European civil function and the national public function

Based on the Community law general principle of subsidiarity, we find that each Member State, governing the body of its officials, agrees with the demands of the domestic legal system and in terms of European officials, regulating their status lies with the Community institutions. So we can identify at Member State level, a dual system of public service, as follows:

- the officials working at the Community institutions level and that can be designated by the title of European officials, who are subject to supranational legislation, European legislation;
- the officialsthat work in the administration of each state, where they have titles specific to the state where they come from, which is under the national jurisdiction.

A first difference we can notice, regarding the two values of the civil functionconsist in the dispute related to the status of the civil officer, is whether it is or not framed within public law institutions, or in the sphere of private law. But the problem comes when we have a person employed withina public institution, a contractual type, and the public officers' administration procedure is not followed. Personally, we conclude that the source of financing is important, since there are public institutions, even if it isn't framed as a public officer, we emphasize that this that it occupies a public position, is or would be subject to public and not private law. As long as the institution is apublic law type person the contractual staff can be considered as belonging to the sphere of public law.

The Community regulatory framework regarding the public position, it is noted that public officers are part of the European Community public law. This reality can be correlated with the adoption by the European Commission White Paper on administrative reform document that outlined the principles of public administration at European level, focusing on quality service, official's independence, and its liability for all acts committed, efficiency and transparency of public service performed for the European citizens.

Staff assigned to the European Community Institutions has a diverse training, and the activity is concentrated in accordance with the provisions of the legislation specifically adopted. These acts are actually part of European civil law, a relatively new branch in the landscape of Community law, which has acquired autonomy granted to these rules because of its special interest and also because of the importance of legal and regulatory domain for the entire activity of the union. As at national administrations level,the persons working for Community institutions and bodies are either officials or contractual staff, in this case, whether European officials (in the narrow sense of the term) or contractual staff, namely people who carry out work under a contract and not invested with public authority. But in this case, the distinction of Community law contractualfrom de European officials, in the strict sense of the term, is always madetaking into consideration the concrete work of the contractualofficer. It has to be in one of the following situations: either to pursue atemporary activity, regularly occupying a temporary post, but for which the holder is, for a determined period of time, unavailable, or to carry out an auxiliary activity to their current work in which he actives, performing precarious tasks through their nature. The distinction from the national contractual officers[8] is that they are temporary or the significance of their duties is insignificant, in some states, they are dealing with the same problems as officials. The contractual officers in these countries do not differ from the civil officers, but only by

[8] Comisia Europeană (2012a) „Public Finances and Growth-Friendly Expenditure".

how they are enclose on the function, possibly of the department, the sector where they are enclosed or where they operates.

The principle of free movement of labor and the effects of the European social dialogue has resulted, in time,to an extension of the Europeanization process in the public administration. If the services of economic interest have been enacted, in the case of public administration, we are talking here about the states' public administration, that do not constitute in a distinct body as in the case ofNational Corps, or the European one, that strictly target officials within common institutions . Therefore, there is no single government policy, at Europe-wide level, which is still subject to strict national sovereignty; there can be no European policies, because the community has no competence in this area. The Constitutional Treaty draft, the issue was raised at art. III-285, but at the time of adoption of the Lisbon Treaty, the situation was not expressly regulated and contains explicit reference to European civil officers. There are voices,at the doctrine level, claiming that, legally, the integration and the public functionmustn't be correlated, but the reality contradicts it, because the entry into the big European family requires them to adapt to the all sizes of a companies.

Passing under the umbrella of the European Unionsuppose, besides linking legislation,the amendment of the common reality of a state. So transposing every treaty in the national legislation, even if at public administration level there is no legislation that can be considered unique, it appears that highlights three clear directions: principles, working conditions and career Europeanization. In conceptualizing the three directions were taken into account that the European Union is above all a space defined by the rights and freedoms,a movement space, a unique space with common working standards.

A. The principles Europeanization

In analyzing the first direction, starting from the Nice Treaty, which states that the European Union is built on fundamental rights as a fundamental principle of Community law („democracy", „rule of law"), but also from those which arise from the practice of the European Court of Justice, such as „transparency", „efficiency". However, the general principles, common to all Member States, found in art. 41 of the Charter of Fundamental Rights, attached to the Treaty of Nice, where we find the concept of „good governance", this concept actually defines the right to good service in front of the common European institutions, without reference to the national ones, but we can extrapolate. Considering that these can be applied withinthe national one

But, these most important effectsare noted with regard to the provisions governing non-discrimination and equality, as stipulated in art.13 and 141 of the EC Treaty. Article 141, in particular, reflects on the Member States' public services and open „debate on equality ', which has long been governed by national sovereignty. There are few limitations on the ECJ, allow it acting in certain cases that sex may have a requirement and essential for certain jobs, such as guards or prison directors, for certain activities such as the management of grave violations peace or service in some units, where are physically impossible.

B. The public careers Europeanization

Another consequence of the European integration entails the principle of employees freedom of movement, from which derogates the idea of thecareer Europeanization. In art.39 (4) of the Treaty on European Union, is permitted an exemption for the public service. ECJ has interpreted that Article above mentioned within the meaning of the obligation to allow freedom of movement (art. 39 of the EU Treaty), that Member States allow citizens access to their public sectors of other Member States. However some

Member States may restrict the access to these positions and can prohibit to the foreign public officials to enter in their own administrative system, there are areas where citizenship is a selection criterion, for example a job in the domestic intelligence services, of a foreign state, not would meet ECJ claims regarding art.39[9] of the EU Treaty. In extenso, a full liberalization of the public administration in the European countries, involves the adoption of a set of measures, starting withthe insurance and pension systems and ending with the citizen's status. So, liberalization entails also the cession of sovereignty of each state, however there are areas where the liberalization of the public function started timidly, is the case of the exchange of police information through Europol, as well as personnel exchanges, technicians and military, exchanges related to security policy issue. The staff exchanges practice in European affairs ministries between France and Germany may be mentioned in this context; some diplomatic arrangements regarding these exchanges date back to the time of the Elysee Treaty,from 1963. The assumption that civil servant skills are necessarily related to his citizenship is becoming less and less relevant.

But when finalizing European statute, the officials mobility will no longer be a taboo subject, at the time of European citizenship certification, an official will perform his duties with the same rights in any nation under the European state.

C.The working conditions Europeanization

Working conditions are another important item on the public services' Europeanization agenda. At EU level, were established over time, numerous regulations concerning working conditions, of the employees, both for the public sector and those from the private sector. There are unique regulationsregarding working time, health and safety, employee transfers, or vacation time.

Also some regulations,as the Directive 89/391 / EEC on health and safety of work, has limited applicability, which is strictly limited to the specific activities (police, army, etc.), although it provides that its objectives should be pursued as much as possible.

On the other hand, the three directives on parental leave (1996), no full-time work (1997)and fixed-term work (1999) have increased applicability, in terms of working conditions of civil officers and public sector employees of the Member States.

So, through the numerous common rules concerning working conditions, starting from fundamental rights, requirements, obligations and common rights are established, for employees or civil officers from the Member States. Since we can talk about European directives, Member States will have to harmonize their legislation.

Concluding the three directions of Europeanization are:principles, careers and working conditions Europeanization have a direct impact on the civil service law and state civil officer in the Member States.

Administrative cooperation and the process of Europeanization

If it were to count the single European law, we can note that there are several thousand existing legal instruments, and in the domestic states law, over 95% of the regulations are transposed from the European legislation. By transposing EU legislation into the national one, it can be said that a comprehensive process of Europeanization of national legal systems has started. This can be the case of the public,the administrative and financial law. Indirectly,the administrative national traditions, the economic social context, and the international context, influence the common law.

[9] Not to be confused with freedom of public administration from the European Public Institutions

Conclusion

If, for the European civil service, the things are clear, with a rich package of Regulations for national public function, the uncertainty legislative, at the state level, proceed, continuous Regulations, the link with national traditions, sovereignty and its excessive protection, do not tilt towards a single framework,to the concept whichwas the basis of the Community, unity in diversity.As we move towards a legislative and citizenship framework, an European Unification is required at the level of administrative law, national specificity, in terms of public functionit has to disappear because, it will have to benefit of a single framework, of singular provisions in each EU member states. Opening the labor market in the other areas, for the of Member States' citizens, increased labor mobility, the legislation already unique for certain types of activity,are the prerequisites for creating a single body of civil officers, the premises of the public service standardization and by default the public function standardization. The nextregulations will need to have in mind the creation of a supranational law that will need to unify the specific provisions of each public officer either at European, national, regional or local level, fromevery corner of the European Union, so that the fundamental rights to not be violated,even by exception. There are voices that say it is not necessary to create a unique statute in the civil function, because the European Legislation is satisfactory, but they forget to mention the fact that the legislation relates to personnel ascribed to the public European institutions.

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CIRCUMSTANCES WHICH EXCLUDE INTERNATIONAL RESPONSIBILITY

Corina Florența POPESCU *

Abstract: *The scientific analysis aims to establish how these identified responsibilities can be translated within specific scope of legal liability and, last but not least, the material, financial or moralliability. We appreciate that the interest of such a scientific approach is fully justified in the context in which the capacity of subject of international law entails a number of rights, but also international obligations.Through the liabilityof the State which has committed the wrongful act, it is obliged to cease the infringement and resume the fulfillment of the obligation, to give assurances and guarantees of not repeating the infringement and the obligation for compensation for damage.*

Keywords: *infringement, international obligation, causes that removes the unlawful nature of facts, limited character*

The importance of international responsibility and the frequency of cases in practice have not determined the intensity of coding, so in this domain, the number of conventional legal norms is reduced. Thus, the jurisprudence and the doctrine have a special role in this domain. The clarification of the concept of responsibility represents an important issue because, in general, in thespecialty literature, there is no distinctionbetween responsibility and liability.

The legal liability can not be confused with legal responsibility because the legal liability represents a legal relationship imposed from outside the individual, while the responsibility represents the personal act, of reporting according to own conscience to the norms and values of the society. The institution of liability is specific to the society as a whole so that, depending on the nature of the obligations which the State has assumed, but it has infringed it, it occurs a liability under civil, criminal, administrative law. Each law branch knows a specific form of liability, which may lead to the conclusion of the existence of many forms of legal liability in a number equal to the branches of law, or even higher if we consider the specificity of some of them. If the liability would notproduceits effects, the legal norms would have no application.

The legal liability arises from the social one, the specificity consisting of the obligation to observe and enforce legal rules,the sanction for non-compliance interveningt hrough the coercive force of the State.

The liability arises only when an international obligation has been violated. The conduct of a subject of international law may be permitted, prohibited or imposed by international law. The act or omission in the context ofviolation of an international obligation generates responsibility, regardless of qualification or motivation of such conduct under national law. Thus, the principle according to whicha State may not invoke its constitutional provisions ordeficiencies in the motivation of the international failure to fulfill obligations is a basic principle of international law[1].

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[1] ILC Report to the UNGA (A 56/10), 2001, pp. 44 (Cpt. I – General Principles, art. 3).

In the state's liability law, by special circumstances that preclude the unlawful nature of the fact, means those causes whose intervention, despite the presence of the two factors, namely the objective and subjective factor, the unlawful nature of any fact is removed unless otherwise stated, and indirectly the international responsibility is also removed[2]. In the international practice, in the international jurisprudence, as in the legal doctrine, including the works of the International Law Commission, are classified as causes which remove the unlawful nature of the next six causes: consent, self-defense, countermeasures, force majeure, state of danger and state of emergency[3].

Invoking a cause or another can not invalidate or abolish the obligation imposed by international law norms, but it has to justify the unlawful conduct for the failure, as long as subsisting therein, an aspect which envisages that the action of the case is subject to a limit time. When the circumstances that caused the failure cease to exist the fulfillment of the obligations in question must berestarted[4].

Such opinion was in fact expressed by the International Court of Justice, namely in the Gabcikovo-Nagymaros Project case, anoccasionon which the Court stated, regarding the state of emergency invoked by the Hungarian party, that"*thestate of emergency invoked by Hungary - supposing it was established - can not allow the conclusion that (...) it acted in accordance with its obligations under the 1977 Treaty, or the fact that those obligations have ceased to be binding for Hungary. This would allow merely stating that, according to the circumstances, Hungary would not attract international responsibility on it, acting as it has done*"[5].

In the arbitration concerning*Rainbow Warrior*, for example, the Court held that both the treatylaw and the law of the liableStateshould be examined to see whether the treaty in question was still in force and to determine the consequences of its violation, including whether the unlawful nature of theconduct was discarded[6].

Article 26 of the draft of articles on States responsibility for an internationally wrongful act enshrines *expressis verbis* a limit with thecharacter of a general rule, which prohibits the removal of the illegal nature of an act which is not in accordance withan obligationspringing from a general international law peremptory norm (*jus cogens*)[7].

In the situation in which aState validly accepts that another State committed a certain fact which conflicts with the obligation that theState has, as resulting from a treaty or other source of international law, the unlawful nature of such an act is removed for the first State, for example: the transit through the airspace or internal waters of a State or the conducting of official investigations on its territory.

Legitimate-defense can not remove the unlawful nature of any act of a State in any event,except especially the obligations under the unalterable provisions of the international humanitarian law and likewise of some of the human rights[8].

In order for the consent of the State to be valid, the following conditions must be met: the consent should be expressly expressed; it should be able to be attributed to the State; it

[2] D. Popescu, A. Năstase, *op.cit.*, p. 334.
[3] F. Maxim, *State responsibility law for internationally wrongful acts*, Lumina Lex Publishing House, Bucharest, 2012, p.149.
[4] Year book of the International Law Commission, vol. II, Part two, 2001, p.169.
[5] Gabcikovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997, p. 7 şi p. 39, para. 48.
[6] Rainbow Warrior (New Zealand v. France), UNRIAA, vol. XX, p. 217 (1990), pp. 251-252, para. 75.
[7] Yearbook of ILC, *op.cit*, 2001, p.170.
[8] For example, the Geneva Conventions of 1949 and the 1977 Protocols apply unreservedly to all parties in an international armed conflict, the same also applies to the customary rules of the international humanitarian law. See also the Yearbook of ILC, *op.cit.*, 2001, p.178.

has to be transmitted before the occurrence of a crime, and the factshould be committed in the framework and within the limits set by consent[9].

The following conditions must be met for claiming a situation of legitimate defense: an aggressive action, a direct material attack, immediate and unjust; the attack is directed against the State, sovereignty or its legitimate interests; the attack should create a serious hazard; thedefense should be proportional to the seriousness of the danger and the circumstances in which the attack occurred, which highlights the proportionality limit.

According to Article 21 of the ILC project, the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the Charter of the United Nations. The existence of an institution that recognizes the self-defense is an exception to the principle of non-resort to force in solving an international dispute. Article 51 of the UN Charter recognizes a State's inherent right of self-defense against an armed attack, and in art. 2, para. 4, self- defense forms part of the definition of the obligation to refrain from the threat or use of force. For the use of force in case of self-defense to be legitimate and lawful, it must be conducted in accordance with the UN Charter.

The individual inherent right to self-defense, enshrined both by customary and conventional (art. 51 of the UN Charter) way, raises the question of thestart of the exercise of this right. In this regard, State practice has provided examples where States have invoked a so-called „the right toanticipatory self-defense" to respond by using force not only for a current attack, but also for an imminent attack[10]. The right to anticipatory self-defense remains subject to the limit of proportionality.

The common element between self-defense and State of emergency consists of the imperative requirement to remove an immediate and serious threat, as another way for removing the threat is excluded.

In the advisory opinion regarding the*legality of the threat or use of nuclear weapons,* the International Court of Justice provided some important respects on the right to self-defense. Examining whether the use of nuclear weapons represents a violation of the environmental norms, due to long-term radiological effects, the Court stated the following: „*The issue is not whether the treaties on environmental protection applies or not to an armed conflict, but whether the obligations arising from those treaties were designed as total restraint obligations in a military conflict. The Court does not have to examine whether the treaties in question could deprive the States of the right to self-defense under the international law, due to the environmental protection obligations*".

The States should considerthe environmental obligations when assessing what is proportionate and necessary in the achievement of the legitimate military objectives. Thecompliance of theenvironmentalobligationsis an important element to be taken into account when assessing whether a military action was based on the principle of"*necessity and proportionality"*[11].

Basing on the idea of the right to anticipatory self-defense,the international practice aims to extend this concept and the evolution of the concept in order to award to Statesa preventive self-defense right (legitimate preventive defense). The right toanticipatory self-defense has its origins in the incident regarding the CarolinaVessel (USA vs. United Kingdom) from 1837, which projectedan extensive vision of this right, which made the right toanticipatory self-defense to evolve customary. However, asrightly it is presented in

[9] D. Popescu, A. Năstase, *op. cit.*, p. 315; R. Miga Beşteliu, *op. cit.*, p. 361.
[10] I.Gâlea, *The use of force in international law*, Universul Juridic Publishing House, Bucharest, 2009, p.158.
[11] ICJ Reports 1996, p. 226 şi 242.

the Romanian doctrine of international law[12], the States's right to individualself-defense established byconventional way (Article 51 of the UN Charter) was designed and formulated in a more restrictive way than the customary law, and further , its exercise is subject to clear and imperative conditions[13].

Based on the preventive self-defense, the States would be entitled to act unilaterally, without prior authorization, to prevent a possible attack that threatens their national security.

If the invocation of the anticipatory self-defense implies an immediate danger, the preventive self-defense envisages only the possibility of a threat.

In a certain way and subject matter, we consider that the right to self-defense also drew the attention of the EU, so that under the solidarity clause (art. 188R) provides that: „*the Union and its member States act jointly in a spirit of solidarity if a member State is the object of a terrorist attack …the Union shall mobilise all the instruments at its disposal, including the military resources made available by the member State for: (a) toprevent a terrorist threat in the member States's territory,…assist a member State in its territory, at the request of its political authorities in the event of a terrorist attack …*".

The act of a State to infringe its obligation towards another State is not unlawful if it is a measure considered legitimate by international law and is taken in response to the wrongful act committed by the latter State.As shown in the specialty Romanian doctrine[14]the State injured by an internationally wrongful act of another State is the holder of a „new right", namely the right to resort to countermeasures[15].

Countermeasures, consisting of legitimate repressive measures and retaliation, as well as other such measures, are identified by a number of features such as: these must be used only in response to an illegal act of another State, whose unlawful nature is rated according to the general rules of customary international law or conventional law; countermeasures, therefore, are also unlawful acts, but their unlawful characteris removed by the fact that they express the response to the initial unlawful act whose victim is theaggrieved State, which reacted justifiably; the notion of countermeasures precludes the use of force; countermeasures have a unilateral character, meaning that the victim State is the only onethat evaluates the unlawfulness degree of the conduct of the State author of the fact[16].

The characteristic of the countermeasures to exclude force and threat of force separates and distinguishes them from the acts belonging to another level category, respectively self-defense.

Countermeasures should be taken in order to determine the State making the illicit fact to comply with the obligation to cease the unlawful fact and proceed to proper reparation. It follows that the countermeasures are justified and have a lawful nature only as long as the

[12] D.-A. Detesanu, *The right to individual self-defense of states – anticipated self-defense and preventive self-defense. Study on art. 51 of the UN Charter*, in the Romanian Journal of International Law, X-XII/2003, p. 68.
[13] *Ibidem*, p.70
[14] R. Miga- Besteliu, *Countermeasures in contemporary international law*, in the Romanian Journal of International Law, X-XII/ 2003, pp. 26-48.
[15] The term countermeasures was used for the first time in the USA's legal reasoning in the case concerning the Air services between France and the US, resolved by arbitration in 1978, and would later be repeated frequently in the ICJ jurisprudence, for example, in the case concerning the US diplomatic and consular staff in Tehran (1980) and the Military and paramilitary actions in Nicaragua (1986) etc. *Ibidem*, pp.32, 34; Yearbook of ILC, 2001, vol.II, p.325; F.Maxim, *op.cit.*, 2021, pp.167, 169-171.
[16] R.Miga Besteliu, *op.cit.*, 2003, pp. 29-30; E. J. de Aréchoga, International Institutions and the Principles of Intenational Responsibilities, in Max Sørensen (editor) *Manual of Public International Law*, Macmillan, Lodon. Melbourne. Torino- New York, 1968, pp. 541-542.

violation of the international obligation lasts, and they should be taken only against the guilty State[17].

Force majeure[18]is often invoked as a basis for the removal of the unlawful nature of a State's fact. It involves a situation in which a State must act in a manner contrary to the requirements of its international obligations incumbent upon.

We note that the distinction between force majeure and state of danger or emergencylies in the fact that there is no possibility to choose between committing or non-committing the unlawful act[19]; therefore the element of free choicedoes not exist in case of force majeure[20], whereas in the situation of the state of danger or emergency such a possibility may exist, because in the state of dangeror emergencytheState'sunlawful conduct results from a voluntary decision taken as the only way to protect a vital interest or its life or individuals under its care[21].

According to the international practice, to remove the unlawful nature of the fact, force majeure must meet the following conditions:

1) to be irresistible and unpredictable - an unforeseen event beyond the control of the State;
2) to make impossible the conduct of the State in accordance withthe obligation concerned or to create for the State the material impossibilityto carry out the action or inaction, respectively that itsconduct is not consistent with that obligation;
3) the State should not have contributed in any way to the event.

State of danger. The unlawful nature of a State's act contrary to the international obligation of that State is removed if the offender has no other reasonable way, in a state of danger, to save its own life or the lives of other persons that it takes care of.

The state of danger does not apply if it is due to the State's conduct that invokes it or it contributed to its production and so does not apply when the fact is likely to create a comparable or greater danger, which also reveals somewhat a proportionality limit.

Similar to the state of emergency, thestate of danger is also a specific case in which a person whose act is attributed to theState is in a state of danger either as an individual or in touch with people that he takes care of. Unlike force majeure, in this case, a person acting in a state of danger is not acting involuntarily, even if the choice is effectively canceled by the state of danger, which prompted some authors to refer to the state of danger as being one of „*relative impossibility*"[22].

In practice, the state of emergency usually refers tosituations where ships oraircrafts threatened to be destroyed by the bad weather or, due to a situation of mechanical or navigational nature, enter on the territory of a State[23], and in the Rainbow Warriorarbitration the state of danger was based on humanitarian reasons of extreme urgency[24].

The material impossibilitymay be due to some natural events, such as earthquakes, floods or drought, or human actions, such as losing control over a portion of the State territory as a result of an insurrection, oraircrafts of a State which are forced by the weather

[17] F.Maxim, *op.cit.*, 2012, p.170; D.Popescu, F.Maxim, *op.cit.*, 2012, p. 176.
[18] For example, force majeure has been invoked by France in the Rainbow Warrior arbitration (1990 – 82 ILR, p. 499, 551).
[19] M. Shaw, *op. cit.*, 1998, pp. 560-561.
[20] Yearbook of ILC, *op.cit.*, part I, p. 183.
[21] E. J. de Aréchoga, *op.cit.*, 1968, p. 544.
[22] Retrieved from Yearbook of ILC, 2001, p.189.
[23] O.J. Lissitzyn, *The Tritment of Aerial Intruders in Recent Practice and International Law*, AJIL, vol. 47, 1953, p. 588.
[24] Rainbow Warrior (New Zeeland v. France), UNRIAA, vol.XX, p.217, 1990, pp. 254-255, para.78.

or the loss of control of the aircraft forcing it to enterwithout authorizationin the airspace of another State, which also may occur in ships during the harmless passage[25].

The general rule that the international wrongful act is removed[26]was also accepted by international courts such as Lighthouses arbitration (1915), Rainbow Warrior (1990).

The state of emergency regards those situations caused by fortuitous events or other situations that jeopardize the values protected by law, saving them being possible only by committing an unlawful act. In the event of a state of emergency it is possible to choose between *abstention or committing an offense*.The state of emergency intervenes in situations which involve the sovereignty of the State, the operation of its institutions or its internal order.

Retaining the state of emergency as a cause that removes the unlawful nature of the fact and consequently of exemption from liability, ILC uses a restrictive formulation that the state of emergency can be invoked by a State only in the case in which the fact committed by a State was the only way to safeguard an essential interest against a severe and imminent danger, which shows, in the end, also a certain limit.

In the doctrine, the state of emergency is considered as having a special character compared to other circumstances[27], so, unlike the consent or self-defense or countermeasures, it is not dependent on the prior conduct of the harmed State, andregarding the force majeure, the state of emergency does not involve an involuntary or coercive conduct, while compared to the state of danger, the state of emergency is not a danger to the lives of the persons under the care of the State's agents, but is a serious danger either for theState'sinterests or for the international community as a whole. It occurs where an intractable conflict arises between an essential interest and an obligation of the State invoking the state of emergency. These special features make the emergency not to be afrequent cause of excuses for non-performance of an obligation and it is subject to strict limitations as insurance against a possible abuse[28], in other words, insurance limitations against an abuse.

However, the state of emergency was also invoked by States in a number of tribunals, such as the incident of the Carolina Vessel (1937), the Russian Fur Seals (1893) case, Russian Indemnity (1912), Gabcikovo- Nagymaros Project case (1997), Fisheries Jurisdiction case Canada v. EU andSpain (1994).

In conclusion, we emphasize that, while the causes that exclude the unlawfulcharacter of the fact fulfill this role in different situations, the action of these causes issubject to some conditions, as well as to certain limitations, some of them quite severe, and as a result the causes can not invalidate or abolishthe obligation imposed by international law norms, but it is only intended to justify the unlawful conduct as long as the respective cause persists.

[25] Yearbook of ILC, *op.cit.*, 2001, pp.185-186.
[26] I. Brownlie, *Principles of Public International Law*, Oxford University Press, 1999, p. 456.
[27] E. J. de Aréchoga, *op.cit.*, 1968, pp. 542-544.
[28] *Ibidem*, p.43.

EFFECTS OF TRANSFER OF EUROPEAN UNION LAW IN NATIONAL LAW

Emilian CIONGARU *

Abstract: *The mixture of interests, culture and customs presents an extremely interesting process studied by the human being over the time following the feeling of mutual help, material or spiritual, imposed or accepted by the time, the needs, particular interests or fate. In society, the individual harmonizes with the social dimension, but, here again, the existence of a group is related to the existence of another by borrowing from each other values, customs or even norms of cohabitation materialized into legal norms.The reasons for which the existence of a group depends on the existence of another consist in the fact that each group engages into social relations strictly necessary with other group either for commercial, cultural reasons or of other nature, or because such group may not remain outside history and civilization, time and existential space. There is a universal demand for each social group to engage into an economic, political or cultural relation with another social group. Social groupscannot resist solitude and social isolation, and if this has happened along history, the duration thereof was short and isolated.*

Keywords: *transfer of law; society; legal norms; legal order; European culture.*

The concept of transfer of law comes from the sphere of social-cultural preoccupations where it was used in a certain period of time to explain the interrelations among the cultures of an earlier society, even if the words used referred to *diffusion*or*dissemination*.[1]

*Transfer of law*represents more than the cultural contact; transfer of law supposes the interaction between the two cultures, their interweaving and their synthetic effect, and not a simple approach of the two cultural entities. That is whytransfer of law is a complex social process including aspects related to the replacement of some cultural elements, the combination of some elements into new cultural complexes or the total rejection of certain elements.

For this purpose, the European culture represents the result of interactions that occurred between the Mediterranean and the Northern cultures. To maintain and develop as a self-contained entity, a culture needs to communicate with other cultures. That is why, open cultures, which benefited from exchanges of values with other cultural systems, were richer than those which manifested in a relative isolation. .

Starting from the truth that any culture has law as its fundamental dimension, we have come to cultural interactions at legal level and to what is also called transfer of law.

In general, legal systems are in a permanent slower or faster, more superficial or more profound change. The dynamics of legal systemsoriginates either in the game of internal factors, or in the action of the external ones or, most of the times, in the interaction between the two categories of factors. However, the most important innovations in a legal system most often come from foreign elements that were introduced into it.Legal systems maintain and develop only in contact with others by communicating among them.

* Associate Professor Ph.D. – Hyperion University Bucharest; Associateresearcher, Institute of Legal Research „Acad. Andrei Radulescu" of the Romanian Academy.

[1] R.Boudon et all., *Dicționar de sociologie*, Bucharest, Univers Enciclopedic Gold, 2009, p.12.

*Transfer of law*may occur when two national legal systems come into permanent contact without one's exercising a military, political, economic or religious domination over the other one. In this process, each system freely borrows law elements from one another in order to integrate them.

The phenomenon usually occurs in the case when a social group understands that the autochthonous legal solutions prove to be unsatisfactory. In this case, such group may face a foreign solution which, as the case may be, it will adopt by incorporating it into its own legal system or, on the contrary, will reject it. If the law rule is important and refers to fundamental elements of a legal institution and contributes to the transformation of such institution in its entirety, it either confines to the literal takeover of the foreign legal norm, or it operates a synthesis in which elements of the autochthonous law are integrated with elements of the foreign law thus resulting to a new juridical institution.

The fundamental characteristics of this process are the stability of the two national legal systems and, most of the times, their mutual enrichment. This process may go even farther to take over not only an isolated rule or institution but also an entire legal system. This is what is referred to as the reception or transplant[2]of a law.

The main effect of transfer of law is tightly related to the foreign legal element which is being implemented into the autochthonous legal system. The foreign legal element may be accepted or rejected, the operation being a success or a failure.

The success comes in the form of some partial loans, of some syntheses resulted following the fusion between the foreign legal elements with the autochthonous ones and more rarely in the form of reception of a legal system. As for certain legal elements of a smaller dimension, such as institutions in modern history, there are cases of perfect transfer of law. The institution implanted into another legal system is usually subjected to the influence of the latter; it loses certain original characteristics and it will acquire some new ones that come from the particularities of the new legal environment in which it is implemented what will result in a hybrid legal structure, a synthesis of the elements that came into contact.

If the direct effect of transfer of law may be found in the modifications occurring at the level of the legal system implementing certain legal elements, it is not less true that transfer of law also acts indirectly on the human groups and individuals.

Phenomena of*transfer of law*are currently taking place in central and Eastern Europe, in the countries where, after the fall of the totalitarian regimes, the transition towards a democratic political regime and market economy is accompanied by the giving up, to a larger or smaller extent, to the former legal systems and their replacement with modern legal systems compatible with the legal standards from the beginning of the third millennium.

Expansion and development of European Union led to the creation some new ideological models, some new concepts and paradigms among which the concept of europenization, concept that, as a term, came into common language of researchers which addresses the relationship between the European Union and the Member States or the European Union and candidate states.

The most representative definition of europenization is gives of Claudio M. Radaelli, which states that[3]: europeanization consist into a process of development, diffusion and institutionalization of rules, procedures, policy paradigms, styles, „modalities of do some

[2] E.Lein, *Legal Transplants in European Private Law*, in E.Cashin Ritaine, L.Frank, S.Lalani, *Legal Engineering and Comparative Law*, vol. 1, Geneva– Zürich– Bâle, 2008, pp. 69 and the following

[3] C. Radaelli, *The Politics of Europeanisation: Theory and Analysis*, Oxford, University Press, 2003, p.30.

things" , of norms and of formal and informal beliefs, which were first defined and consolidated in the European Union' policy process and then incorporated in the logic of discourse, of political structures and of public policies. With its accession to European Union, the state in question come in a political structure, that far exceeds dimension of any european national state and thus increase the complexity of public policies.

The European Union regulates a number of sectors in a manner that was not known of the new Member States before the beginning the process of accession and of here the new challenges that need to make them face. The capacity of each state of law and of its institutions to influence policy making is influenced by access to economic resources, of economic inequality, of cultural differences.

In terms of passing towards legal monism, it becomes relevant to understand what constitutes the *European Union legal order*, defined in theory as „an organised and structured set of legal rules having its own roots, endowed with bodies and procedures capable to issue and interpret them for being able to assess and ratify, if necessary, the violations caused against such rules"[4].

The concept of*the EUlegal order*is doublepositioned[5]in relation tothe*domestic legalorder*, on the one hand, enjoying theprimacyover the domestic lawof the Member State, theEuropeanUnion rules, being, by reference todomestic legal order, „directlyapplicable" or at least „capable ofdirect effect"[6], so that, related to the type of rule of the European Union, to the category ofsourceof their origin, the EUrules can make responsible only the states, they cangeneraterights and obligationsthat thenationalsof Member States ofthe European Union can bring before national courts, while others may requirefurther actionregardingtheir implementation indomestic legal orderto producelegal effects such as the directive.

Considering theCourt's decisionin the case Van Gend&Loos C. Belastingender Nederlandse Administration (1963), the primacy of EU law of the European Union legal order over the domestic law of the MemberStates, over thedomestic legal orderof those Stateswasfinally decisive in favorof the European Union legal order, the rules of the European Union law producing its effects uniformly in all Member States, since their coming into force and all over the validity period of time, such rules or instructions being an immediate source of rights and obligations for all their addressees, no matter if they are member states or individuals, on condition that the provisions of the European Union rules are liable to be directly applied, to be alleged by those interested to observe certain criteria well-stated by the European Union legislator.

On the other hand, we have mentioned that the European Union law, as a main legal order, is an order complementary to the domestic legal orders of the Member States, although it remains decisive, in terms of consequences and exact understanding of the nature and position held by the legal order on the European Union, the decision of the Community Court of Justice on the case *Costa c. E.N.E.L.* (1964), definitely *ruling on the principle of primacy of the European Union law*[7].

This primacy was fixedbeyond anyrelevance oftime, of themoment whenthe old principle of law lex posterior derogat legi priori would apply, a principle available, strictly admitted and established in terms of domestic law butdisallowedfor reasons ofefficient and

[4] Guy Isaac, *Droit communitaire général,* Paris, Masson, 1983, p. 111.
[5] M.Tutunaru, *European Union Law*, Romanian WritingPublishing House, Craiova, 2012, p.125.
[6] T.A. Winter, *Direct Applicability and Direct Effects,* London, Blackstone Press, 1972, p. 76.
[7] Jean-Victor Louis, *L'ordre juridique communitaire* (6-ème edition), Bruxelles, 1993, p. 164.

reasonable functionality of the legalinteraction between the EuropeanUnionlaw legal order and the domestic law order.

The European Union law represents a set of regulations approved through the treaties concluded by the Member States and through the documents approved by the European Union institutions governing the organization and functioning of the European Union.

The European Union set out *an autonomous law order* which is „the expression of a special perception of *values,* together with a European legal community*"*.[8]

Autonomy consists in the fact that the European Union law is the result *of its own legal sources* and comes off – with the materialization of its basic notions and principles – the basic elements of international law as well as its historical assignation to the law principles of Member States.

Autonomy is the result of the structure and constitutive principles, a distinctive feature for the European Union, of the direct authority and of the primacy of the European Union law.

As any other legal order, the European Union legal order consists in an organized set of rules whose value is the result of the basic legal rules included in treaties. Therefore, we may distinguish the *primary law*, consisting in the rules included in the constituent treaties, from the *private law*, which further includes legal rules issued on the basis of constituent treaties and in compliance with the provisions particularly provided by these treaties.[9]

The legal order of the European Union, *different from the national legal order,* is the result of creating a law system capable to ensure the achievement and observance of the basic objectives of the European Union. This law system does not prevent the development of the state activity, or the existence of the national law systems of Member States, but it integrates these systems into the European Union order, in compliance with its principles.

More exactly, the European Union *law* consists of a set of rules, called the *legal order* of the European Union. These are mainly the constitutive treaties of the Union, to which we can add the directives, regulations, general and individual decisions, recommendations, approvals, resolutions of the European Parliament. We must also add the jurisprudence of the European Union Court of Justice in Luxemburg. We shall not omit the general principles of law, in their quality as unwritten sources, otherwise integrated to the traditional law and the tradition itself.

The European Union law operates beside the domestic law of every Member State; yet we cannot say it integrates into the law of these states, as it is a specific, autonomous law, providing an equable application of the European Union rules; in all Member States it has a direct, progressive effect, having primacy over the national rule, especially due to the systematic jurisdictional control.

The European law represents a new and autonomous legal order as compared to the international legal order also integrated into the legal systems of the member states.

The European legal order imposes by its exigencies a series of sovereign limitations to the signatory states of the treaties for accession to the Union. In these conditions, the exigency of a written law with clear and precise norms whose interpretation may not lead to equivocal situations isgrounded. [10]

At present, at the level of the European Union, the phenomenon of transfer of law manifests through the transplantation of European legal norms into the internal legislation

[8] Manfred A. Dauses, Otto Firedrich University, Bamberg, Germany, Seminar in Bucharest from 8 to 10 April 2002 with the topic, Interstate and European Community Law.
[9] Jean Paul Jacgue, *Droit institutionnel de l'Union Europeenne*, Cours Dalloz, Paris, 2004, p. 493
[10] H.Kelsen, *Doctrina pură a dreptului*, Bucharest, Humanitas, 2000, p. 340.

of the states in process of accession or which are already members of the union. In addition to the legal transplants of national origin, new such process take place in another context, namely the context of the European society as part of a global society which is characterized by a even tighter connection among the national enactment systems.[11]

In the European Union, legal transplants of the European Union directives into the legislative systems of the member states take place. The member states or the states that wish to accede to the European Union are asked to adopt what is called the *European acquis*, namely the European legislative principles and concepts and to incorporate them into their national legislative systems, many times with unhappy consequences because the European legislation has led to the elaboration of secondary laws dictated by arbitrary political ideas or even by unavoidable real needs[12]which risk to undermine the national legal systems naturally developed, and sometimes the European laws do not seem to be created through the seeking of optimal solutions, the legislative powers of the European Union being limited by compromises between the conflicts of interests, the incoherence of transposition and the different definitions of notions without taking into account the previous legislation, thus an ample but fragmented *Europeanacquis* is created which, due to its dimensions, becomes difficult to enforce.The general principles substantiating the process of elaboration of the normative acts are interdependent and complementary; they interweave and conjugate in the enforcement process.[13]

Europeanization and globalization are essentially connected to the society development and the appearance of new social problems which are the consequence of the development of new technologies such as biotechnology, the new forms of communication and others, so that judges have started facing common issues in default of the means to solve them.

The constitution of an European legal culture must not and does not represent a superposition or mixture of national legal cultures, namely just adaptations and compromises more or less accepted by the participants to this harmonization work and, in perspective, unification work of the legal systems, but an achievement (a result) which will be attained progressivelyby means of some principles and rules accepted by conviction by most political and legal actors from Europe, in general, and within each national state, in particular.The European legal culture will be constituted before all by a sustained, continuous and consequent action, and its exercise will have the same value as the result obtained.

In general, we speak of a European construction, including its legal framework, showed over the time representing an original process of formation of a European law which allows a new approach.

The European legal culture substantiates a European legal consciousness having the merit to renew the contours of legal thinking and, in this perspective, the legal norms will lose their rigidity become flexible, adaptable, and dynamic and permanently representing a state of transience giving birth to other norms which are still in the process of making, a dialectic process of quantitative accumulations and passages towards new qualitative stages.

The European construction is also an appeal to imagination and innovation: it is a living lab for the process of formation and enforcement of the European law which avoids reproducing purely and simply some theoretical schemes and adopting some appreciation

[11] I.Craiovan, *Tratat elementar de teoria generală a dreptului*, Bucharest, All Beck, 2001, p. 263.
[12] G.Burdeau, *Droit constitutionnel et institutions politiques*, Paris, Librairie générale de droit et dejurisprudence,1976, p. 6.
[13] N.Popa, *Prelegeri de sociologie juridică*, Bucharest, Bucharest University Printing Shop, 1989, pp. 144–147.

criteria which had their value in the past but they are no longer valid, in other words stagnation, fixity and rigidity must be avoided.

The passage from one level to another will be made from a *coalition of cultures* to a *culture of coalitions*, the European law being by it a promise for the future[14], despite the complexity and some inherent hesitations in any process.

The autonomous character of the *legal order* of the European Union proves to be determining both to ensure the applicability of the European law in the internal legal order of the member states and to establish its role and place within the national law.

The process oftransfer of lawat the level of the European Union does not reduce to a process, in its single meaning, the simple passage from an internal legal culture to a European legal culture; there is a reverse process by which the internal legal culture integrates the elements of the European culture without losing its original characteristics. This double polarity confirms that transfer of law may not be reduced to the circulation of cultural features arbitrarily isolated in space and time, but it is a global process which engages the entire society. The creation of some legislative systems of wide scope is necessary in order to elaborate certain modern economic systems which may cross relatively easily the national frontiers by taking European and global dimensions. This kind of regulations of considerable dimensions have become important legislative paradigms which may and must be transplanted so as not to lose contact with modernity and future, but everything depends on how such borrowed legal constructions are put into practice in the beneficiary country. The change of the internal normative system, via the adoption of new codes – civil, civil procedure, criminal and criminal procedure – which has been modified and *Europeanized* for the harmonization with the European legal order has been made by a genuine process of transfer of law. The autonomy of the European Union legal order does not exclude the collaboration with the national legal systems, a cooperation which is not only useful but also necessary and which is mainly expressed through the participation of the state authorities to the enforcement of the European law.

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[14] A.J.Arnaud, *Pour une pensee juridique europeenne*, Paris, Presses Universitaires de France, 1991, pp. 151 and 166.

REGULATION OF STATE PENSIONS IN THE EU MEMBER STATES

Nicoleta ENACHE [*]
Raluca Stefan ANDREIU [**]

Abstract: *The free movement of people within the European Union has also lead to the increase of the labor force free movement. Thus, people who have worked in more countries of the EU, are likely to have got pension rights from each of them. It is why, both from a social and especially from a practical point of view, the matter addresses this category of the work force. We are trying to clear up, as far as possible, the procedure of granting pensions, the necessary documents and the institutions where the people interested may ask information from, with direct reference to Romania and other few EU member states.*

Keywords: *state pension, free movement of people, labor force free movement, EU member state, European directive*

The establishment of pension rights for migrant workers who have completed periods of insurance in Romania and in other member states of the European Union, the European Economic Area or in Switzerland, through temporary posting/secondment.

As of 1 January 2007, when Romania joined the EU, we apply the provisions of the European Union regulations on social security.

In the relations between member states there were applied the provisions of Regulations (EEC) No. 1408/71 and 574/72, until 30 April 2010, replaced, as from 1 May 2010, by **Regulation (EC) no. 883/2004** of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems and **Regulation (EC) no. 987/2009** of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) no. 883/2004.

In relation to the member states of the **European Economic Area** and in Switzerland there have further been applied the provisions of Regulations (EEC) No 1408/71[1] end 574/72[2].

These European regulations apply to „migrant workers".

Given that Community regulations are directly applicable and binding in their entirety, in case of conflict with the Romanian legislation, the provisions of Community law prevail over the national ones.

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* Ph. D Lecturer Nicoleta Enache, Faculty of Law and Administrative Sciences Valahia University of Târgoviște, Lawyer in the Dâmbovița Bar, e-mail>projure_tgv@yahoo.com.au
** MA Raluca Stefan Andreiu, Faculty of Law and Administrative Sciences Valahia University of Târgoviste, e-mail : andreiu_raluca@yahoo.com

[1] Council Regulation no. 1408/71 / EEC on the application of social security schemes to employed persons,to independent professionals and to members of their families moving within the Community, published in the Official Journal of the European Communities no. L 149 of 5.7.1971, as amended and supplemented.

[2] Council Regulation no. 574/72 / EEC which sets out the modalities for the implementation of Council Regulation no. 1408/71 / EEC on the application of social security schemes to employed persons,to independent professionals and to members of their families moving within the Community, published in the Official Journal of the European Communities no. L 74 of 27.3.1972, as amended and supplemented.

The terms further used in the instructions for applying the Regulations have the following meanings:

a. **„worker" / „insured person"** has, where appropriate, the meaning of the Article 5 of Law no. 19/2000 on public pensions and other social insurance rights, with subsequent amendments;
b. **'independent professional/ self-employed'** is as defined in Article 2 of Government Emergency Ordinance no. 44/2008 on economic activities by authorized individuals, sole proprietorships and family businesses, as well as the one specified by the special laws which apply to professions carrying out business activities, subject to proof of being insured against several risks covered by the social security system;
c. „**migrant worker"** refers to any employee or independent contractor, moving within the Union for the purpose of an activity or possessing a residency and being insured under the social security legislation of one or more member states;
d. **„frontier worker"** refers to any employee or independent professional pursueing on the territory of a member state and residing in another member state to which they return daily or at least once a week;

The rules for determining the law applicable are the rules that determine which social security legislation is applicable at a time to a migrant worker, so it is not subject to either a positive conflict (to be subjected to two social security legislation at a time) or a negative conflict (not subjected to any social security legislation) of laws.

The **general rule** is to ensure, in terms of social security, according to employment law and under the principle of „lex loci laboris", even if the person resides or their employer has its registered office in another member state.

International secondment/posting, in terms of social security, is an exception to the general rule and, therefore, it should be interpreted strictly and subjected to restrictive regulatory conditions.

International secondment/posting means a situation in which a person pursuing employment in a member state for an employer that undergoes substantial activities in that member state and being posted by that employer to another member state in order to carry out a particular activity, remains subject, during this period, to the legislation of the first member state, provided that the anticipated duration of the work does not exceed twenty-four months and they were not sent to replace another posted person.

An independent professional/self-employed with substantial activities in a member state, moving to another member state to carry out a similar activity, continues to be subject, at this time, to the legislation of the first member state, provided that the anticipated duration of the work does not exceed twenty-four months.

Carrying out substantial activities in Romania is proved by financial documents (balance sheet, synthetic and analytical trial balances, commercial contracts underway in Romania, tax decision, register of collecting and payments, invoices and receipts).

Multi-activity refers to a situation in which a migrant worker simultaneously and typically pursues:

- employment in two or more member states;
- independent professional activities in two or more member states;
- employment and / or self-employment in two or more member states.

To distinguish between the situations of posting and multi-activity situations a decisive issue to consider is the duration of the activity in one or more member states (the

activity is performed with either permanent, temporary or ad-hoc). To this end, the competent institution makes an overall assessment of all relevant facts, including those related to work, as it is defined in the employment contact. A significant part of the employment or of independent activities in one member state means a significant proportion of all employed or independent work, without necessarily being the major part of those activities.

A1 portable document only proves that its holder is subject to social security (pension insurance, accidents at work and occupational diseases, health insurance, family benefits) of the sending state (state which the institution that issued the document belongs to); its absence is not likely to prevent professional activities in another member state, in such a case the general rule becomes applicable in the field - that of insurance under the law of the place of work. A1 portable document can not be equated, in legal terms,to a work permit.

Criteria that employers have to meet in order to obtain A 1 portable document for some of their employees

The employer must prove the following conditions:

- be recorded in the Trade Register Office of Romania and have Tax Identification Code – TIC (CIF/CUI) and / or VAT; this condition shall be proved by the certificate of registration issued by the Trade Register;
- perform not only management activities but also substantial activities specific to their professional field, which may be proved by submitting financial documents (balance sheet and synthetic and analytical trial balances);
- the turnover of the employer in Romania should represent at least 25% of the turnover the employer has both in Romania and in the state of employment (the state where the employee is posted);
- the proportion of employees who remain to work in Romania, based on the total number of employees both in the country and in the state of employment should exceed 25% or 50% (depending on the percentage of the age set of the employer and of the number of employees) and the nature of their work in Romania to be specific to the professional domain of the employer;
- the employer posting employees to another member state must provide security to be creditworthy, so that there is certain that they will fulfill their obligations to pay social security contributions for workers seconded to another member state. Please note that this condition shall be demonstrated by submitting the tax certificate and documents which prove the payment of social security contributions and other legal obligations to the general consolidated state budget.

In terms of posted employee, there is also required the fulfillment of certain conditions:

- the employee must normally work in Romania for the employer seconding them to the territory of another member state, a condition established by the employer, by presenting the individual employment contract of the employee concerned;
- the posted worker's activity on the territory of another member state should meet the employer's field of activity in Romania; this condition shall be proven by presenting a copy of the contract / preliminary contract of employment concluded between the Romanian employer and the employer of the member state, showing the purpose of posting in the state of employment;

- the employee should be, immediately prior to the commencement of the employment, under the legislation of the member state where the employer is established. This condition shall be considered satisfied if the employee provides proof of insurance within the social security system in Romania for at least a month, immediately before the start of the seconding employment on the territory of another member state;
- the relation of subordination between the employer in question and the employer has to be kept for the duration of the assignment;
- the international secondment aims the developing of a business activity in the member state of posting, on behalf of the Romanian employer.

Criteria that self-employed workers must meet in order to obtain A 1[3] portable document

Independent worker moving temporarily, as seconded on the territory of another member state must have conducted significant activities in Romania, preceding the application for the form E101.

Elements proving the developing of a significant activity in Romania are:

1. the independent professional/self-employed must be registered with the Trade Register Office of Romania and have TIC and / or VAT;

2. the independent worker should undertake substantial activities, specific to their professional field in Romania and not only management activities that are not specific to their field of activity (coded according to the classification of the national economy - CAEN), which may be proved by producing financial documents (imposing decision, register of collecting and payments), as well as ongoing commercial contracts concluded with natural or legal persons, to be implemented in Romania Romania;

3. the gross income produced by the self-employed worker in Romania should represent at least 25% of their gross income produced both in Romania and in the state of employment in the last 2 years, for those from whose authorization there have passed more than two years since its establishment, for those from whose authorisation have passed less than two years; this condition shall be proved by submitting a document stating the gross income produced by the independent worker in Romania as well as that got in other member states;

4. the posted worker's activity on the territory of another member state should meet the field of the self-employed activity in Romania; this condition shall be proven by presenting a copy of the contract / preliminary contract of employment concluded between the Romanian self- employed and the employer or the self-employed of the member state, showing the purpose of posting in the state of employment;

5.the self-employed worker must have conducted substantial activities in Romania prior to posting for at least 2 consecutive months; which can be proved by submitting financial documents (imposing decision, register of collecting and payments), as well as ongoing commercial contracts concluded with natural or legal persons in Romania to be implemented in Romania

In addition, the self-employed worker must move temporarily, as seconded on the territory of another member state in order to fulfill a particular business.

[3] According to art. 11 para. (3) a) of Regulation (EC) 883/2004, subject to Articles 12 to 16, person pursuing an employment or individual activity in a member state is subject to the law of that member state. The rule is that employees will be due to social contributions in the state where they provide an activity unless set by art. 12 to 16 of the Regulation.

This condition shall be proven by presenting a copy of the contract / preliminary contract of employment concluded between the Romanian self- employed and the employer or the self-employed of the member state, showing the purpose of posting in the state of employment;

Exceptions

Two or more member states, their competent authorities and bodies designated by those authorities may waive exceptions of the regulations determining the applicable legislation, according to European regulations mentioned above, by mutual agreement, in the interest of certain persons or categories of people.

The conditions under which exceptions can be agreed are:

a. The exceptions agreed upon are in the interest of the employee and the employer, or of the self-employed worker respectively;
b. Exceptions are agreed upon at the request of the employee and the employer or the self-employed worker's request respectively;
c. Such agreements are subjective decisions that must take into account the specific situation of the person concerned or the features of the staff for which the exception was agreed upon;
d. Exceptions are agreed upon, in principle, for a period not exceeding 5 years, within this period being included previous posting periods, unless the posted employee or the self-employed worker on the territory of another member state has not conducted a business in the state of reference, between the periods of secondment, for at least 6 consecutive months;
e. The exceptions may be agreed upon in order to prevent unacceptable or unjust situations, and to legalize the situation of a person who has incorrectly been applied the social security legislation of a member state, the agreement also having retroactive effect.

A request by the employer or the person concerned for agreeing to certain exceptions shall be submitted, whenever possible, to the competent authority or body designated by the authority of the member state whose legislation the employee or the self-employed person requests to be imposed to.

After the expiry of the maximum period of posting, mentioned above, the person must get insured within the social security system of the state in which the business operates, under the principle of lex loci laboris.

Posting under bilateral social security scheme, to which Romania is a party

Institution of posting is governed by bilateral agreements on social security concluded by Romania with the Republic of Turkey, Republic of Macedonia, Republic of Korea, Republic of Moldova and Canada. Please note that these bilateral legal instruments are based on the same principles of coordination of social security systems provided by the European regulations in this area.

The conditions of posting are similar to those provided by the Community regulations, the only element which differ being the periods of posting and extending them:

- In relations with Turkey, the duration of posting is 24 months, with possibility of extension up to 60 months;
- In Macedonia, the duration of posting is 24 months, with possibility of extension up to 48 months;

- In the Republic of Korea, the duration of posting is not more than 36 months with the possibility of extension for a further 24 months;
- In the case of Moldova, the duration of posting is 24 months, with the possibility of extension for a further 24 months;
- In Canada, the maximum duration of posting is 36 months, with the possibility of extension for another 24 months.

The prohibition of replacing a posted worker with another one

According to Art. 12 para. (1) of Regulation (EC) no. 883/2004[4], as they were amended by Regulation (EU) no. 465/2012[5] of the European Parliament and of the Council of 22 May 2012 clarified by the Practical Guide to the applicable law of the European Union (EU), European Economic Area and in Switzerland, a continuously updated interpretation document , the person who is employed in a member state by an employer who normally carries out its activities in that member state and who is posted by that employer to another member state to work for the employer, continues to be subject to the legislation of the first member state, provided that the anticipated duration of the work does not exceed 24 months and that he is not sent to replace another posted person.

As set out in the Practical Guide to the applicable law of the European Union (EU), European Economic Area and in Switzerland, the ban on replacing a posted person with another posted person should be judged not only in terms of the posting state, but especially in terms of state temporary employment (the member state where the person was posted).

Thus a posted worker, who has completed the maximum period of posting(24 months) can not be replaced in the Member State of temporary occupation by a worker posted by the same employer or another employer in the same member state or from a different member state.

According to the Practical Guide to the applicable law of the European Union (EU), European Economic Area and in Switzerland, in the view of the competent institution of the member state of posting, thus of the institution issuing the A1 portable document, the legal conditions for issuing A1 portable document pursuant to art. 12 para. (1) of Regulation (EC) no. 883/2004 may seem satisfied when being evaluated. However, if an activity of the employer partner in the member state of temporary employment, was previously performed by a posted worker from any member state, the worker can not be replaced by another posted worker. No matter who the employer of the new posted worker is or the worker's home state.

Accordingly, upon completion / implementation of service contracts with partners in other member states, Romanian employers are advised to consider the people they post are not sent to replace another posted workers (workers who have not been subject to the legislation of social security of the member state of temporary employment).

Competent Institution

National House of Public Pensions acts as the competent institution in terms of determining the law applicable to migrant workers.

National House of Public Pensions acts as liaison body aiming to establish old-age pensions, early retirement, partial early retirement pensions, disability pensions, survivor's pension, the granting of benefits in case of accident and occupational diseases, having tasks

[4] Regulation (EC) no. 883/2004 on the coordination of social security systems

[5] Official Journal of the European Union Corrigendum to Regulation (EU) no. 465/2012 of the European Parliament and of the Council of 22 May 2012 amending Regulation (EC) no. 883/2004 on the coordination of social security systems and Regulation (EC) no. 987/2009 laying down the procedure for implementing Regulation (EC) no. 883/2004

related to determination and payment of pensions in the public pension system in Romania, duties which belong exclusively to territorial/ sector pension houses and pay established vested pension rights of the public pension system in Romania.

The establishment of pension rights

People who have conducted professional activities in Romania and in other member states can apply for pension rights both under the legislation in force in Romania and according to the laws of the other member state concerned.

In Romania, the legal framework in the field of pensions is represented currently by Law no. 263/2010 on the unitary public pension system, with subsequent amendments, in force since 1 January 2011.

The contribution period required by law to obtain pension rights of the public pension system in Romania, for migrant workers, is calculated by summing the insurance periods completed in Romania with those of insurance acquired in other member states where the applicant has conducted professional activities and confirmed as such by the competent authorities of the member states concerned.

Community pension rights are calculated in proportion to the insurance periods completed in each member state concerned, respecting the principle of *pro rata basis.*

When the conditions for retirementare met:

If persons established in other Member States, application for pension rights shall be filed with the social insurance institution of the place of residence (place of permanent residence), which is moving ahead with the competent institution in Romania, being unnecessary for the applicant living abroad to travel to Romania ot to the institution of the member state whose law they were last subject to, if the applicant or decesed supporter,respectively, was not subject to the legislation which is administered by the institution of the place of residence (place of permanent residence).

The **application** shall be accompanied by all documents required by Romanian law to grant pension rights; there will mandatory be presented documents showing periods of activity in Romania (work book or certificates issued under the law, by the former employers of Romania, for periods prior to April 1, 2001).

The proof seniority accomplished by former employees within the social security system in Romania **until 1 April 2001**, the date from which records periods of insurance in the public pension system is **held electronically**, the territorial houses of public pensions and centrally by the National House of Public Pensions, is the work book, social security card or other documents provided by law.

According to legal provisions, if the applicant is not in possession of these documents, it is necessary to refer, **in their own name**, to former employers or archives holders in order to obtain them.

People who are not in possession of the workbook, will request the issuance of certificates of employment from former employers or holders of their archives, certificates which will mandatory include at least:

- A) employer's name;
- B) identification of the person;
- C) the period during which they worked with date of commencement and termination of employment;
- D) reference to the legal basis under which employment occurred;
- E) function, profession or specialty exercised;

- F) tariff wage employment;
- G) the name of permanent bonuses, the percentage or amount awarded;
- H) the period of receiving the bonuses and the basis on which it was granted.

The documents will have registration number and date, the stamp of the issuing unit, and the signature of the employer or the person delegated by the leadership of this unit.

It is necessary to request to the competent institutions of the other member state to send to Romania a certified copy of the original documents mentioned above that are in your possession, to establish pension rights, in accordance with European regulations for the coordination of social security systems.

During the transition to electronic data exchange, communication between the liaison body and the competent authorities in Romania on pensions with those of other countries is ensured through the European liaison forms, agreed under Regulation (EEC) No. 1408/71 and Regulation (EEC) No 574/72, these forms maintaining role and usage.

Principalele formularele standard de legătură în materie de pensii sunt următoarele:
Main standard liaison forms of pension are:

a) **E 202** - Investigation of a claim for an old-age pension
b) **E203** - Investigation of a claim for a survivor's pension
c) **E204 -** Investigation of a claim for an invalidity pension
d) **E205** – Certificate concerning insurance history in.....(Romania)
e) **E207** – Information concerning the insured person's insurance history
f) **E210** – Notification of decision concerning a claim for pension
g) **E211** – Summary of decisions
h) **E213** – Detailed medical report
i) **E001** – Communication form

Once the competent institutions of the member states concerned have communicated all necessary information through standard forms of connection, , they will issue their own decisions on the admission or rejection retirement request, decisions that will be communicated to the person concerned and / or other party / institutions competent.

Note that the applicant need not simultaneously fulfill the conditions for opening pension rights in all the member states concerned, pension rights are granted according to the national legislation.

Review of pension rights

A person already receiving a pension from the public pension system in Romania, but has worked legally in another member state may request the revision of pensions in applying European regulations. For the Community pension calculation are taken into account insurance periods completed in the other member state. After calculating the community pension, this compares with the national pension payment and pension is granted in the amount determined better.

Pension entitlements are due to be received, either in Romania or in the country of domicile (place of permanent residence), in the latter case the person concerned communicating directly or through competent institution for pensions in the country of domicile the bank account details where the amont will be transferred amount by way of pension from the public pension system in Romania.

Export of benefits

In order to ensure export of benefits in the state of domicile (permanent residence), the holder of pension rights either gives the bank details (name as recorded in the bank, bank name, bank address, bank identification code - BIC / SWIFT International Bank Account Number - IBAN) through social insurance institution of the place of permanent residence or completes a statement of transfer abroad of the rights that the public pension system beneficiaries are entittled to and submits it to the territorial pension house, personally or by proxy appointed with special power of attorney to that effect issued by law, accompanied by a document confirming bank details and a copy of the ID certifying the holder's permnent place of residence. Sending the declaration of transfer abroad of basic rights and of the accompanying documents can be made by post to the headquarters of the territorial pension house or by e-mail, scanned, to the official electronic address of territorial pension house, posted by that institution on its website.

Using Life Certificate as administrative verification tool:

To avoid making undue payments to beneficiaries or residents in Romania whose situation has changed, affecting the territorial obligation to pay pension competent pension rights and / or other rights are granted and paid by the territorial offices pension, **life certificate will be used as a tool for administrative review.**

For this purpose it is used a **unique form of life certificate** which constitutes proof on which to continue paying the due nonresidents beneficiaries.

The life certificate will be issued in duplicate and forwarded by the competent Territorial Pension House to resident beneficiaries, bilingual, using, in addition to Romanian, an international language .

A copy of the Life Certificate will remain to the competent Territorial Pension House, accompanied by a proof of informing the non-resident beneficiary (receipt or recommended letter).

Life Certificate Part A is completed by the competent Territorial Pension House, stating the deadline for repayment of Life Certificate by the beneficiary.

Non-resident beneficiary is required to complete Part B of the life certificate, before a competent legal authority of the state of permanent residence and forward it to the competent territorial pension house by the date mentioned in Part A.

Liaison body

National House of Public Pensions acts as liaison body for: establishing retirement pensions, early retirement, partial early retirement, invalidity and survivors' pensions; aid in case of death.

Competent institutions

Pursuant to the Regulations **(EC) no. 883/2004 and 987/2009** and of Regulations (EEC) No. 1408/71 and 574/72 there have been designated as competent institutions:

1. territorial houses of public pensions[6] for old-age pensions, early retirement pensions and early partial disability pensions, survivors' pensions, death benefits and for benefits in cash and in-kind support in the event of occupational diseases and accidents at work;

[6] Art. 138 -Law no. 263-2010, of pensions, updated (Labour Code – CNPP duties) of the territorial/sector houses of public pensions as well as of the National House of Public Pensions.

2. sector houses of public pensions for old-age pensions, early retirement pensions and early partial disability pensions, survivors' pensions, death benefits;
3. specialized units of their own social security systems which are not integrated to the public pension system for providing benefits provided by the legislation under which it operates.

References:

1. Legislation
2. Regulations (EC) no. 883/2004 and 987/2009
3. Regulations (EEC) no. 1408/71 and 574/72
4. Practical Guide on the law applicable in the European Union (EU), European Economic Area and in Switzerland
5. Law no. 263/2010
6. http://www.cnpas.org/portal/media-type/html/language/ro/user/anon/page/integration.psml;jsessionid=2ECDDA92F835C6376DB12E676797CDCA?mode=article&container=eu_integration_ro&article=1

THE JURISDICTIONAL COMPETENCE FOR THE RECOGNITION OF THE FOREIGN JUDGEMENTS COMPLIANT TO REGULATION (EU) NO. 1215/2012

Cosmin DARIESCU *

Summary: *A thorny problem of the Regulation (EU) no. 1215/2012 concerns the determination of the international and territorial jurisdiction in matters related to the recognition as the main issue of a foreign judicial decision issued by a member state of the European Union. Considering the procedure identity existing between solving the recognition requests of the foreign judicial decisions and the one of the applications for refusal of enforcement of the same decisions, to which we also add the provisions of art. 24 paragraph 5 of the regulation, we deduce that for the recognition of foreign judicial decisions, the exclusive international jurisdictional competence belongs to the state on whose territory that recognition is sought. The competent court to decide, as a main issue, on the recognition of a decision given by a Member State of the European Union shall be determined based on the internal jurisdiction provisions of specific to each member state (for Romania by an extensive interpretation of article 1099 Code of Civil Procedure). A possible remedy of this gap in the regulation may be to introduce a new paragraph within art. 36 of the regulation which may give exclusive jurisdiction on the recognition of a foreign judicial decision, claimed as the main issue, to the court of the member state which receives the application, a court from the category notified to the Commission by the Member State addressed enforcing art. 75 letter (a) of the regulation.*

Keywords: Regulation (EU) no. 1215/2012, international jurisdiction, recognition of foreign judicial decisions, European Union, Romania

I. Enforcement of Regulation (EU) no. 1215/2012

The recognition and enforcement of the judicial decisions given in civil and commercial actions submitted and decided after January 10, 2015[1] in courts of the Member States of the European Union, shall be applied in Romania, in accordance with the provisions of the *Regulation (EU) no. 1215/2012 of the European Parliament and Council of 12 December 2012 on the judicial competence, recognition and enforcement of decisions in civil and commercial matters (Brussels I bis),* including subsequent amendments.[2] The judgments given by courts belonging to the Member States of the European Union, in civil and commercial actions instituted before January 10, 2015 are recognized and enforced according to Regulation no. 44/2001 including subsequent amendments (art. 66 para. 2 of the Regulation no. 1215/2012).

* Lecturer PhD at the Faculty of Law of „A.I.Cuza" University of Iasi.

[1] See the *European Judicial Atlas in Civil Matters. Brussels I Regulation (recast),* available on the following web site: https://e-justice.europa.eu/content_recast-350-ro.do (accessed on 1 April 2015).

[2] Until the date when this study was written, the Regulation (EU) no. 1215/2012 was amended by Regulation (EU) no. 542/2014 of the European Parliament and Council of 15 May 2014, amending the Regulation (EU) no. 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice and by the Commission Delegated Regulation (EU) 2015/281 of the of 26 November 2014 replacing Annexes I and II of Regulation (EU) no. 1215/2012. For further details you may visit the website: http://eur-lex.europa.eu/legal-content/RO/LKD/?uri=CELEX:32012R1215 (accessed on 1 April 2015).

The Regulation (EU) no. 1215/2012 is enforced among all Member States of the European Union, including Denmark, which concluded an agreement with the European Union in this respect.[3] The changes of the Danish law necessary to implement the regulation came into force on 1 June 2013.[4]

II. Judicial control on the recognition and enforcement of foreign judicial decisions. The international competence question

According to art. 2 letter a of the Regulation (EU) no. 1215/2012, a judicial decision is a decision given by a court of a Member State, irrespective of the type of the jurisdictional act, also including decrees, orders, ordinances, decisions or writ of executions, as well as decisions on the determination of costs by an officer of the court. There are also included in this notion the provisional and conservatory measures given by a court which, based on the regulation, is competent to judge the cause, summoning the defendant or the measures which, although they have been given without summoning him/her, they have been notified or communicated to him/her before starting the enforcement.

The general rule concerning the recognition and enforcement of the judgments given in a Member State is provided in art. 36 of the respective normative act: they are recognized in other Member States without the need for any special procedure. In other words, the rule is that the judgments given in a Member State are recognized by operation of law (de jure) in the other Member States of the European Union.

Although the recognition of a foreign judgment given in another Member State of the European Union is by operation of law (that is automatic), however, it is subject to the control of the law courts of the state where the said foreign judicial decision has been claimed. Corroborating the provisions of articles 36 paragraph 2 and art. 45 of the regulation, we may notice that the regulation provides two legal procedures related to the recognition and enforcement of a foreign judicial decision given in another Member State. These are: the procedure for an application for refusal to recognize the foreign judicial decision (art. 45 of the regulation) and the procedure for solving the petition to acknowledge the absence of grounds for the refusal of recognition (stated in art. 36 paragraph 2). These two main applications are closely related. Thus, the party, against whom someone claims the foreign judicial decision, has no other means of defense except to refer to the competent court with a petition of refusal of recognition. The party who avails himself/herself of the foreign judgment, in case this has been contested by the counter party, has to submit to the competent court a petition to acknowledge the lack of reasons for the refusal of recognition. In the Romanian legal doctrine it is said that the application regulated by art. 36 para. 2 of the regulation has to be considered as a declaratory judgment action, which any interested party, especially the defendant may submit, independently of submitting a petition of refusal of recognition.[5] The close relation between the two types of petition is emphasized in the regulation by instituting a unique procedure for solving them, procedure described in Section 2, Subsection 2 and in Section 4

[3] *Agreement between the European Community and the Kingdom of Denmark on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* may be consulted on the following web site: http://eur-lex.europa.eu/LexUriServ/ LexUr iServ.do?uri=OJ:L:2013:079:0004:EN:PDF (accessed on 1 April 2015).

[4] For further details see the See the *European Judicial Atlas in Civil Matters. Brussels I Regulation (recast),* available on the following web site: https://e-justice.europa.eu/content_recast-350-ro.do (accessed on 1 April 2015).

[5] Pancescu Flavius George, *Drept procesual civil international*, Hamangiu Publishing House, Bucharest, 2014, p. 254.

of Chapter 6 of the regulation. This procedure, similar to the one for obtaining the enforcement of the judicial decision, is described below.

Both main applications will have as an annex a copy of the judgment, to which there will be added either the certificate stipulated in Annex 1 of the regulation, issued by the foreign court who has given it (for the application of recognition of the foreign judgment, compliant to art. 37 para. 1), or a translation or transliteration of the judgment (for the application of refusal of recognition, in accordance with art. 47 para. 3). The legislation of the Member State addressed settles the modalities for submitting the application. According to art. 47 para. 2, the procedure of recognition or refusal to recognize a foreign judgment (just like the procedure for its enforcement) is regulated by the provisions of the regulation and the legislation of the Member State addressed, legislation which completes all procedural aspects that are not included in the regulation.

A debatable problem of the Regulation (EU) no. 1215/2012 is the determination of the international and territorial jurisdiction in matters related to the recognition of a foreign judicial decision issued by a member state of the European Union as the main issue. When it comes about establishing the international and territorial jurisdiction on the recognition of a foreign judgment, as an incidental question[6] the regulation points to the court that has been referred to settle the main litigation (art. 36 para.3). However, the regulation doesn't state anything on the competent court to solve the main requests concerning the recognition or the refusal of recognition of a foreign judgment. Regarding this matter, the regulation contains only an ambiguous reference in art. 47 para. 1, according to which the application for „refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted." Anyway, this provision may help us establish only the jurisdictional level of the court addressed for recognition as a main issue, but it does not clarify at all the issue of the territorial jurisdiction, as art. 39 para. 2 of Regulation no. 44/2001 did. This article of Regulation no.44 /2001 provided: „The local jurisdiction [on the enforcement-author's note] shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement."[7]

What should be done? How can we find out the court with local jurisdiction that should decide, as a main issue, on the matter of the recognition of a foreign judgment from another Member State of the European Union?

To answer this question, first we need to determine the state whose competent courts may decide upon the applications stipulated by the regulation on the recognition matter (*international jurisdictional competence*) and then to identify the legal principles and provisions which allow determining the correct court able to decide upon these cases (*internal jurisdiction*).

[6] As an incidental question means that during a litigation of private international law taking place before a Romanian court, one of the parties claims a foreign judgment given between the same parties and relevant to solve the case, but the other party is opposed to accept that judgment.

[7] In Regulation no. 44/2001, the procedure of judicial recognition of the foreign decisions was quasi-identical to the one of acknowledgement of the forced enforcement of the same decisions.

III. The international jurisdiction on recognition: enforcement by analogy of art. 24 para. 5 of the Regulation (EU) no. 1215/2012

Jiddu Krishnamurti (1895-1986) said: „If we can really understand the problem, the answer will come out of it, because the answer is not separate from the problem".[8] So, we will discover the rule of international jurisdiction on the recognition of foreign judgments studying the text of the Regulation (EU) no. 1215/2012. And this because it is unimaginable that the European legislator, wanting to edict a regulation which may harmonize the rules of international jurisdiction in the Member States, may not also have taken into account the appointment of the competent courts in the matter of the recognition of foreign judgments. In this case, the European legislator would have been as unwise as someone who tries to fly a plane without a wing.

The only provision of international jurisdiction relevant to solve this problem is the one in art. 24 paragraph 5 of the Regulation (EU) no. 1215/2012. Pursuant to it, the exclusive jurisdiction concerning the enforcement of judicial decisions is given to the courts of the Member State „in which the judgment has been or is to be enforced". We may notice the wording „is to be enforced". This wording is relevant because the recognition of a foreign judgment is a precursory stage to its enforcement.

What other arguments do we have in the text to support the idea that this provision of international jurisdiction on enforcement may also be used to establish the state whose courts are competent to decide on the recognition of a judicial decision given by another Member State of the European Union?

Corroborating art. 36 para. 2 and art. 45 para. 4, both in the regulation, we infer that both the application to acknowledge the lack of reasons for the refusal of recognition (more clearly, the application for recognition) and the application for the refusal of recognition shall be judged in accordance with the procedure described in Section 3, subsection 2 of the regulation ("Refusal of enforcement") which shall be completed, where applicable, by the provisions of Section 4 ("Common provisions"). Therefore, the application for recognition and the one for non-recognition of a foreign judgment shall be judged in accordance with the procedure of refusal of enforcement as very similar in their content to the ones concerning the exequatur.

Considering the procedure identity existing between solving the applications for recognition of foreign judgments and the one for the applications for the refusal of enforcement of the same judgments, to which we also add the provisions of art. 24 paragraph 5 of the regulation, we conclude that *in the matter of recognition of foreign judgments, the exclusive international jurisdiction belongs to the courts of the state in which it is claimed to recognize the foreign judgment.*

Our common sense leads us to the same conclusion. It is logical to suppose that, when someone claims a foreign judgment in a certain state, the international jurisdictional competence over all the applications concerning the recognition of this decision should belong to the courts of that state.

[8] Exley Helen, Întelepciune. 365 de idei intelepte pentru fiecare zi. O carte in dar pentru orice an, Editura Helen Exley Com, Bucharest, 2011, the page dedicated to 5 June.

IV. Actual determination of the court which has the jurisdiction on the recognition of a foreign judgment

How can we actually determine the court that has jurisdiction to decide, as a main issue, on the recognition of a judgment given in a Member State of the European Union? What provisions of material and territorial jurisdiction do we have to use compliant to Regulation (EU) no. 1215/2012?

As we have already shown, Regulation (EU) no. 1215/2012 does not have any provision similar to the one in Art. 39 para. 2 of Regulation no. 44/2001, which gave the territorial jurisdiction on the enforcement of foreign judicial decisions (therefore on the recognition, too) to the court of the domicile of the party against whom enforcement (recognition, respectively) is sought or to the court of the place of enforcement. Moreover, in accordance with art. 47 para. 4 of Regulation no. 1215/2012, the party requiring the refusal to enforce the decision given in another Member State does not have the obligation to have a postal address in the Member State addressed. He/she does not have the obligation to have an authorized representative in the addressed state except for the case when the appointment of such a representative is compulsory, irrespective of the parties' citizenship or domicile. Also, pursuant to art. 56 of Regulation no. 1215/2012, the party who claims, in a Member State, the enforcement of a judicial decision given in another Member State may not be compelled to provide any bond, security or deposit, because he/she is a foreign citizen or does not have his/her domicile or residence in the state addressed. Although the provisions of Regulation no. 1215/2012 refer to the exequatur, because of the above-mentioned procedural identity between enforcement and recognition, they may also encompass the matter of recognition of foreign judgments. So, the party claiming the refusal of recognition of the judgment given in another Member State or the one requiring the acknowledgment of the lack of reasons for refusal of recognition does not need to have his/her domicile in the Member State of the court addressed. This is a natural consequence of the objective mentioned in paragraph 27 of the Preamble to the regulation, according to which „a judgment given in a Member State should be recognized and enforced in another Member State even if it is given against a person not domiciled in a Member State".

The provision in paragraph 2 of art. 47 of the Regulation no. 1215/2012 stipulates that the procedure for refusal of enforcement, as far as it is not covered by this regulation, shall be governed by the law of the Member State addressed. This would mean that in respect with territorial jurisdiction on recognition of a judgment given in another Member State of the European Union, we could also use, for the applications for recognition submitted in Romania, the provisions of art. 1099 Code of Civil Procedure. Are these rules good to fill the gaps of Regulation no. 1215/2012? The paragraph 1 of article 1099 Code of Civil Procedure gives territorial jurisdiction on the application for recognition as a main issue, to the Romanian tribunal where the head office or at the domicile of the party refusing the recognition is situated. Pursuant to paragraph 2 art. 1099 Code of Civil Procedure, when it is impossible to determine the court compliant to paragraph 1 (in other words in case it is impossible to determine the county where party refusing the recognition is domiciled), the jurisdiction belongs to the Tribunal of Bucharest. The third paragraph of art. 1099 Code of Civil Procedure provides for the territorial jurisdiction on recognition as an incidental question, establishing an identical rule as art. 36 para. 3 of Regulation no. 1215/2012.

We have to notice that the provisions of art. 1099 Code of Civil Procedure establish both material and territorial jurisdiction of the Romanian courts concerning the recognition

of foreign judgments, adapting to the requirements of this field the provisions of art. 1072 Code of Civil Procedure.

At a close examination of the provisions of material and territorial jurisdiction mentioned above, we can see that art. 1099 Code of Civil Procedure gives only a partially satisfactory answer to the matter of concrete determination of the court that should have material and territorial jurisdiction to judge, as a main issue, the applications instituted by Regulation (EU) no. 1215/2012, for recognition of foreign judgments. Thus, the applications for recognition of the judgments given in the European Union are subject to the jurisdiction of the tribunal where the domicile (or head office) of the party who is against recognition is situated. If the exact location of the domicile on Romanian territory cannot be determined (situation in which we may also include the case in which the party who is against recognition is not domiciled or doesn't have any head office on Romanian soil[9]), then the applications shall be judged by the Tribunal of Bucharest.

These jurisdiction rules are in agreement with the principle according to which, in civil litigations with an extraneity element, once the international jurisdiction of the courts of a state has been established, the factual determination of the court in charge with solving the litigation shall be carried out in accordance with the internal provisions of material and territorial jurisdiction[10]. They are in accordance, also, with the notification given by Romania pursuant to article 75 letter a of the regulation, according to which the tribunal has the jurisdiction concerning the recognition of a judgment given within the space of the European Union[11].

On the other hand, two objections may be raised against the use of art. 1099 Code of Civil Procedure to determine the Romanian court that has territorial jurisdiction to decide on the recognition of the judgments given in the Member States of the European Union. The first and most important one is that the content of para. 1 of art. 1099 Code of Civil Procedure excludes the applications for refusal of recognition of foreign judgments, instituted by the regulation, considering only the ones concerning the recognition[12]. The second objection, which time will prove to be well-founded or not, is the jurisdictional monopoly of the Tribunal of Bucharest for the recognition of foreign judgments given in a Member State of the European Union, when the party against whom it has been claimed is not domiciled in Romania. Such monopoly, as honorable as it may be, could make difficult or even block the activity of this court. The first objection could be rejected by an extensive interpretation of the provisions of para. 1 of art. 1099 Code of Civil Procedure. Thus, the applications for refusal of recognition and the declarations concerning the judgments recognized by operation of law as well as the applications for main or forced intervention for the recognition are included in the jurisdiction of the tribunal where the domicile of the party who is against the recognition is situated . This opinion about the extensive interpretation of art. 1099 para. 1 Code of Civil Procedure has already been mentioned in the doctrine[13]. In Regulation (EU) no. 1215/2012, the extensive interpretation of art. 1099 para. 1 Code of Civil Procedure may be allowed based on the provisions of art. 47 para. 2.

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[9] Pancescu Flavius George, *Drept procesual civil international*, Hamangiu Publishing House, Bucharest, 2014, p. 227.
[10] Pancescu Flavius George, *op.cit*, p. 112 and Dan Lupascu, Diana Ungureanu, Drept *international privat,* Universul Juridic Publishing House, Bucharest, 2012, p. 302.
[11] According to the *European Judicial Atlas in Civil Matters. Brussels I Regulation (recast)-Romania,* available on the following web site: https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-ro-ro.do?member=1 (accessed on 1 April 2015).
[12] Pancescu Flavius George, *op.cit*, p. 226.
[13] Pancescu Flavius George, *op.cit*, p. 226-227.

Considering the facts presented above, we conclude that Regulation (EU) no. 1215/2012, unlike Regulation (EC) no. 44/2001, has a gap concerning the determination of the court authorized by the law to decide on the main applications on the recognition of a foreign judgment. This gap may be partially completed based on the rules of internal jurisdiction specific to each Member State (in Romania, by an extensive interpretation of art. 1099 Code of Civil Procedure).

It is regrettable that a regulation whose main objective is to edict rules of international jurisdiction that are uniform in all the European Union should neglect both the express regulation of international jurisdiction on the matter of recognition of foreign judgments and defining the criteria for actually determining the court that should have territorial jurisdiction in this field. By resorting to the jurisdiction rules of each Member State in the matter of recognition of foreign judgments, Regulation (EU) no. 1215/2012 fails to entirely unify the provisions of international jurisdiction within the territory of the European Union.

In our opinion, a possible remedy to this gap of the regulation may be to introduce a new paragraph in art. 36 of the regulation with the following meaning: „If the recognition or refusal of recognition of a foreign judgment are claimed, as a main issue, before a court of a Member State, of the category notified to the Commission by the Member State addressed, based on art. 75 letter (a), the said court acquires exclusive jurisdiction to decide on the matter." Such rule of jurisdiction would be in agreement with the provision of art. 24 point 5 and with the one of art. 47, both included in Regulation (EU) no. 1215/2012, provisions which, although created for the enforcement of judgments given in another Member State of the European Union, also apply to the recognition of such judgments.

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4. http://eur-lex.europa.eu/legal-content/RO/LKD/?uri=CELEX:32012R1215.
5. *Law no. 134/2010 Code of Civil Procedure (r2)*, the version republished in the Official Gazette, Part 1 no. 247 of 10 April 2015.

THE RIGHT TO THE RESPECT FOR PRIVATE LIFE AND THE PRINCIPLE OF EQUAL TREATMENT

Radu Răzvan POPESCU *

Abstract: *The right to respect for private life and the right to non-discrimination represent two fundamental rights regulated at the level of the European Union. In time, both in the specialty doctrine but, especially, in practice, there were a series of tensions with respect to the preeminence of either of these rights. The problematic of the right to respect personal character data, as well as discrimination on different criteria, respectively ethnicity, race, handicap, religion or sexual orientation made the object of Directives, without them settling, in the core matter, the conflict between the two rights. The European jurisprudence is the one that offered solutions for these cases, but the member states are those who must find a balance in regulating the two fundamental rights.*

Keywords: *private social life, discrimination, jurisprudence, balance.*

The right to private life is recognized through art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, through art.7 of the European Union Charter of Fundamental Rights and Freedoms, and not lastly, it is regulated in the Constitutions of the EU member states, being a fundamental right which may interact with the principle of equality of treatment, as regulated by Directive 2000/43/CE[1] and Directive 2000/78/CE[2].

The interaction between the two concepts is problematic because the right to private life, as interpreted by the European Court of Human Rights, has become increasingly complex, presupposing a series of controversial relations with the interdiction of discrimination[3].

Difficulties emerge especially due to the different complementary facets presupposed by the right to the respect of private life, respectively:

- On the one hand, the need to preserve a sphere of personal intimacy, which also includes the *right to a private social life* or the individual's right to make and develop private relations with his/her peers[4];
- On the other hand, *the right to the protection of private character data*[5];
- Not lastly, *the right to individual autonomy*[6].

Any of these facets that refers to private life is susceptible of interacting with the interdiction to discriminate, either by limiting the application scope for this interdiction, or by continuing the fight against discrimination through the interdiction to highlight certain aspects pertaining to the private life.

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* Associate Professor, PhD, within the Faculty of Public Administration, National School of Political Studies and Public Administration.

[1] Published in JO L 180, 19 July 2000.

[2] Published in JO L 303, 2 December 2000.

[3] See, F.Sudre, *Le droit au respect de la vie privee au sens de la Convention europeenne des droits de L'homme*, Brussels, Bruylant, 2005, pp. 11-33.

[4] ECHR Decision no. 13710/88, Niemietz versus Germany of 16 December 1992.

[5] ECHR Decision no.28341/95, Rotaru versus Romania of 4 May2000.

[6] ECHR Decision no.2346/02, Pretty versus Great Britain of 29 April 2002.

A. A first conclusive example in which the right to respect of private life enters into conflict with the interdiction to discriminate, as derived from the EU regulations, refers to the application of this interdiction to private affairs, whether we are speaking of a domestic activity or of a family-type enterprise. Thus, for instance, can a family searching for aid to take care of an old female person refuse this job to a person solely on the basis of the person being a male individual? An employer in a family-type enterprise can invoke the right to respect of the private life in recruiting collaborators, without taking into account the principle of equality of treatment consecrated by the EU regulations?

In order to answer these questions we must, first, see that are the possible limitations in the application scope of the interdiction to discriminate imposed by the European law, taking into account the right to respect of private life.

The Court of Justice of the European Union offered an answer, in this sense, by means of its jurisprudence[7], claiming the fact that work in a private environment „is intended (…) to reconcile the principle of equality of treatment with the principle of respect for private life (…) and that this reconciliation is one of the factors which must be taken into consideration in determining the scope of the exception provided for in article 2 (2) of Directive 76/207/CEE". In these conditions, the Court considered that the gender of an employee cannot constitute a determining condition for employment in a private residence.

Thus, from the Court's jurisprudence, the following conclusions can be drawn: on the one hand, the invoking of the right to the respect of private and family life is not enough to exclude domestic activities from the application scope of Directive 76/207/CEE, on the other hand, the arguments referring to private life can be introduced when the gender of a person constitutes a determining condition for a professional activity, given the type of work performed.

It must be noticed the fact that according to art. 3 para. 1 letter a, neither Directive 2000/43/CE, nor Directive 2000/78/CE exclude, as principle, domestic activities from their application scope.

B. The right to the protection of private character data constitutes a second modality by means of which the right to the respect of private life may interfere with the interdiction to discriminate.

The protection of private character data made the object of a regulation at the EU level, respectively through Directive 95/46/CE regarding the protection of individuals in what concerns the processing of the protection of personal character data and the free circulation of this data[8] and of a regulation at the level of the Council of Europe, respectively Convention no. 108 of 28 January 1981[9]. The European Court of Human Rights acknowledged, subsequently, this right as part of the right to the respect of private life (art. 8), through its Decision in the matter Rotaru versus Romania – data of a public nature may reveal the person's private life, if they are systematically memorized in files belonging to the public authorities.

In this case, the examples of potential conflicts are multiple. Thus: can an employer who wishes to adopt a series of measures in order to avoid possible discrimination accusations from the foreign workers in his unit, without breaching his workers' right to private life, to make statistics in its own unit, out of which to derive the ethnic origin of his workers? Also, would the enforcement of certain positive (discrimination) actions to the

[7] See, Decision no.165/82, Commission versus Great Britain, 8 November 1983.
[8] J.O., L.281 of 23 November 1995.
[9] It entered into effect on 1 October 1985.

benefit of persons of the same ethnic origin or the same religion not assume an intrusion in the protection of private character data? Not lastly, is it possible for an employee to not supply his/her employer with certain data regarding his/her medical condition or to refuse to subject himself/herself to a thorough medical check-up, by invoking to the right to the respect of private life?

In order to be able to offer an answer to these questions, we must start from the premise that, in order to fight against discrimination, we must be able to compare specific, individual situations, having access to certain personal character data of the employees. Thus is born the conflict between the two types of rights. This type of interaction went unnoticed throughout the years (in the first decades of regulation in social matters) because the only discriminations considered in the European law were those regarding a person's nationality or gender. Or, even though the information regarding the gender and nationality represent, certainly, personal character data, still, they cannot be considered as *sensitive* data, in the sense of Directive 95/46/CE.

However, for the other discrimination grounds introduced through art. 13 EC (become art. 19 TFEU), considered *sensitive data* and benefiting from the protection system offered by Directive 95/46/CE, respectively the personal character data which indicate the ethnic origin or race, the political opinions, the religious or philosophical convictions, the belonging to a trade union, as well as the data regarding the health state and the sexual life of the individual, a series of questions emerge, regarding the priority due either to the right to private life or to non-discrimination.

We consider that, in reality, the tensions that may occur between the exigencies of non-discrimination on certain criteria and the protection of personal character data are apparent, due to their rather complementary than conflictual nature.

Thus, both Directive 2000/43/EC and Directive 2000/78/EC establish that each member state is free in enforcing the full quality; the principle of equality of treatment should not prevent a member state from maintaining and adopting specific measures to prevent or compensate disadvantages related to the discrimination reasons[10]. If a state opts to grant preferential treatment for certain persons, on the basis of their ethnic origin, for example, the personal data regarding those persons will have to be collected and treated according to the observance of the exigencies required by the right to private life. In the specialty literature[11] it is claimed the existence of a paradox: on the one side, the actual fight against discrimination, on the other side, the collection of statistical data targeting certain sensitive information about workers. We join the opinion formulated by the doctrine[12] and we consider that, in fact, there is no contradiction or conflict between the exigency to protect personal character data and the social policy targeting the fight against discrimination.

The use of statistics to assess the impact of a social policy, of a legal regulation on a certain group of persons, protected on a certain discrimination criterion, is possible, given the fact that the data collected are anonymous and, in this way, they no longer fall under the scope of Directive 95/46/EC or of Convention no. 108.

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[10] Art. 5 of Directive 2000/43/EC and art. 7 of Directive 2000/78/EC.

[11] See P.Simon, *Etude comparative de la collecte de donnees visant a mesurer l"etendueet l"impact de la discrimination aux Etats-Unis, Canada, Australie, Grande-Bretanie et Pays-Bas, Raport a la Commission europeenne,* Luxembourg, 2004, p. 86.

[12] O. De Schutter, *Three Models of Equality and European Anti-Discrimination Law,* Northern Ireland Legal Quarterly, 2006, vol.57, no.1, p.25.

In Great Britain, having as basis a *public interest reason*, by means of the data protection regulations, it was established that the monitoring of the work places, especially through *ethnic monitoring,* represents a legitimate form of sensitive data processing.

In all other cases, data processing must respect the proportionality principle.

The interdiction to discriminate on the basis of handicap represents a special situation in relation to the right to the protection of personal character data. In what concerns employment, we consider that, in order to avoid any form of discrimination on the criterion of the handicap, if the handicap is not visible, it should not be made known to the employer because the labour medicine physician (and/or the family physician), who is bound by professional confidentiality (even with respect to the employer), will be able to evaluate the potential employee in order to verify his/her physical and psychic skills. In this situation, the requirements connected to the protection of personal character data do not enter into conflict with the fight against discrimination but, on the contrary, contribute to its increased efficiency.

According to art. 5 of Directive 2000/78/EC, the employer takes appropriate measures, depending on the needs, in a concrete situation, in order to allow a person with handicap to have access to a job, to advance, to have access to training, provided that these measures do not presuppose a disproportional burden on the employer. This burden is not disproportionate when it is properly compensated through existing measures within the policy targeted by the member states, adopted in favor of persons with handicap. In order for such an obligation to be enforced by the employer, the employee who has a certain handicap will have to give up the protection offered by the right to private life, in order to inform the employer about his/her handicap.

C. The respect of private life also presupposes the right to self-determination of the person or the right to personal autonomy. In this sense, „the right to private life…can be seen as an anti-totalitarian clause, which guarantees that each person establishes himself/herself the life he/she wishes to have, the manner in which he/she will develop his/her personality and own identity and even, to the highest extent possible, the manner in which he/she will be perceived by others"[13], while the right to non-discrimination presupposes to consider illicit certain differentiations based on religion, age, handicap or sexual orientation, referring only to those regulated through Directive 2000/43/EC and Directive 2000/78/EC.

In case it is difficult to imagine it can be contested, in the name of the right to self-determination, the identification of a person according to the male or female gender, the conciliation of the right to personal autonomy with the inclusion of a person in an ethnic group or belonging to a race or having a certain sexual orientation is a much more delicate issue.

In conclusion, the regulation of anti-discriminatory measures at the EU level, on the criterion of race, ethnic origin, religion, sexual orientation, age or handicap, through the two directives, respectively Directive 2000/43/EC and Directive 2000/78/EC, did not always target the avoidance of possible „conflicts" or „tensions" vis-a-vis other fundamental rights. After more than 15 years since the adoption of these directives, it is established, in practice, the existence of numerous conflicts between the right to private life

[13] See J. Ringelheim, O. De Schutter, *The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights,* Brussels, Bruylant, 2009, p.53.

and non-discrimination in work. At present, it is a difficult and extremely delicate task to re-find a balance between these fundamental rights, the task of finding solutions being due to the member states, either through regulations or by means of the courts of law, under the guidance of the Court of Justice of the European Union and of the European Court of Human Rights.

Thus:

- in case of internal conflicts, which target a single person, we are usually talking about the person's option to partially give up the right to the respect of private life, in order to effectively benefit of the right to equality of treatment;
- in case of conflicts opposing several persons or organizations, tensions may occur between the right to equality and other fundamental rights or between different discrimination criteria regulated by law.

If the European Union is able to establish certain (objective) landmarks, by regulating the interdiction to discriminate, when it conflicts with the right to the respect for private or family life, the member states are the ones which will have to create a balance between this right and the principle of equality of treatment.

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THE HISTORICAL CONNECTION BETWEEN LAW, RELIGION AND MORALITY

Mihail NIEMESCH *

Abstract: *Analysing the human history, we can see that initially all peoples, the Babylonians, the Egyptians, even the Romans did not make a clear distinction between legal, religious and moral norms. Law, religion and morality are normative systems closely linked to the idea of justice. Every individual and every society have opinions about the concept of justice. Moreover, there are universal criteria and standards by which we can appreciate what is just and what is unjust.*

Keywords: *law, morality, religion*

1. Aspects regarding the social dimension of law and justice

The idea of justice, as well as the idea of good, is primarily a product of human consciousness, and ultimately of the moral law. Law was formed under the influence of morality and religion. In fact the word *jus*, designating law, was originally a term of the religious sphere, denoting a sacramental formula imposed strongly by law.[1]

Analysing the human history, we can see that initially all peoples, the Babylonians, the Egyptians, even the Romans did not make a clear distinction between legal, religious and moral norms.Highly rational and pragmatic, the Romans made a separation so that the norms of law were designated by the term IUS and the religious by the term FAS.

Man is a social being and feels the need to live in a community where he can develop, reproduce and polish. Yet, the society involves organization and any organizational system requires rules. The functioning of the human society needs rules of conduct. These rules are a necessity and they meet the needs of people. In this regard, G.W.F. Hegel shows that law „although it stems from concept, it does not pass into existence unless it answers the needs"[2].The origin of law can be found in the ancient times of emergence and development of human collectivities when rules and practices were mingled with tradition and habit, and the latter governed the relations of understanding or fighting between tribes. Hence, the validity of very well-known Latin adage: „*Ubi societas, ibi jus"*. In fact, as it is well emphasized in the recent doctrineno form of human association can function properly without establishing some rules of conduct. The role of norm is linked to the organization of the social life on rational bases, and society functions, as E.Durkheim says, as a collective consciousness emanating the rules that govern the existence in common.[3]

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* PhD Reader, Faculty of Law, Titu Maiorescu University

[1] M.Albici, *Despre drept ca fenomen complex al vieții sociale (On Law as a Complex Phenomeon of the Social Life),* Universul Juridic Publishing House, Bucharest, 2015, p.34.

[2] G.W.F. Hegel, *Principiile filosofiei dreptului (The Principles of Law Philosophy)*, IRI Publishing House, Bucharest, 1996, p.207.

[3] M.Albici,*op.cit.,* p.27.

Law is a social product and the legal phenomenon is reflected in our daily work in any field. Without law, its rules and institutions, the modern state cannot rise to the desideratum of „rule of law" in which the fundamental human rights and freedoms are protected. As pointed out by Professor Ion Humă „knowing the norms of law and, at a more comprehensive level, the legal phenomenon is and must be more than the reflection of the legal phenomenality in the individual consciousness, the gnoseological appropriation owner ship; so one can know the law and yet make the non law!From the perspective of the desirable human behavior, the authentic knowledge of law is that which is organically continued in the positive action of achieving the legal normativity".[4]

The great Romanian scholar of European format Dimitrie Cantemir said „Our laws are our source and mother." This adage is a good illustration of the idea that every citizen should study law, should have basic notions about the legal phenomenon because onlythis way the individual can be a good social element who understands and respects the human values that are recognized and protected by the society.

Both law, religion and morality are normative systems closely linked to the idea of*justice*. According to Aristotel, justice is founded on the idea that people should not hurt each other, an idea which has at its basis elements of social pragmatism, elements that find their expression in conventions, customs, and rules. Aristotelconsidered that justice had a sacred role and he described it as „widely regarded as a sovereign of virtues brighter than the morning star". Hence the saying „justice concentrates in it the whole virtue".[5]From Plato's viewpoint, justice should be seenboth in the social sense (regarding the society on its whole) and in the psychological sense (concerning the persons acting in the society).

The concept of justice, fairness or equity has always been of interest to philosophers, religious men and common men. This is because justice and injustice are concepts that affect both society and the individual. Without justice human relations are degenerated and dehumanized.[6]

Every individual and every society have opinions about the concept of justice. Moreover, there are universal criteria and standards by which we can appreciate what is just and what is unjust.

2. Religion and law

Platon claimed thatlaws have a divine origin. They were considered sacred and should therefore be entirely respected. The connection between law and religion is unavoidable in history. Nowhere had law the secular physiognomy that is has in the contemporary world.[7]

On the other hand, the mystic feeling that was at the base of law in immemorial times led to a more or less complete „confusion" between law and religion, which manifested under the form of theocracy, i.e. the direct governing of the society through gods, as in the case of the ancient Egypt, where the pharaoh was considered as a god, or in the case of the

[4] I. Humă, *Teoria generală a dreptului (General Theory of Law)*, The Publishing House of Danubius Academic Foundation, Galaţi, 2000, p.5.
[5] Aristotel, *Etica Nicomahică (Nicomachean Ethics),* V,I, 1129b;1130a, Ştiinţifică şi Enciclopedică Publishing House, Bucharest 1988, pp.106-107.
[6] C. Mihăilă, *Dreptatea din perspectivă teologică. Dumnezeu sursa dreptăţii absolute (Justice from the teological perspective. God as the source of absolute justice),* in journal Dreptate-abordare juridică politică, socială şi teologică, Universitară Publishing House, Bucharest, 2012, p.139.
[7] M. Albici, *op.cit*., p.29.

Jews in the early times when the society was governed by Jehovah, or in the case of monarchy of divine right when the governing people represented divinity.[8]

According to prof. D.Ţop,[9]Christianity was the first religion that did not interfere with law. Giving Cesar what belongs to Cesar and God what belongs to God, the Christian religion did not interfere in the mundane business. But when the Christian church consolidated, religion restarted to interfere with law, the monarchs justifying their authority through the will of God.

As regards religion, Irineu Mihălcescu, former Metropolitan of Moldavia in the interwar period, showed that: „It gives power to the laws. Without the idea of God, as the highest law-maker and judge, from which the human authorities derive their powers, laws would not have any power. The myths of some old peoples considered certain divinities (such as Osiris and Isis in Egypt and Ea in Babylonia etc.) as authors of their oldest laws, and some law-makers stated that they received from gods the laws they gave. Thus, at Jews, Moses received the Tablets of Law from Jehovah on Sinai Mountain, at Indians, Manu received the law from Brahma, at Romans King Numa Pompilius claimed to have been inspired by Egeria in the elaboration of his law. What the idea of divinity represented later for the Roman society is included in Cicero's words: „I do not know if, once with the undermining of the fear of God the faithfulness and social order will not disappear from the society too.", „*Quid leges sine moribus*?" is a Latin saying and indeed healthy morals cannot exist without religion. The modern sovereigns, elected or hereditary, entitle themselves sovereigns by the grace of God and the will of people."[10]

In the civilizations of the ancient Orient, religion dominated all the aspects of daily life. However, none displays the absolute and exclusive character of religion as in the Jews' society. For them, between the forms of the religious, moral and juridical life there was a *unity of substance,* as they have in common the origin and the framework in which they took place, and the aim of the precepts that oriented the human life was also unique: holinessin front of God.[11]

In Bible, in the Old Testament early institutions of law are regulated, such as the interest loan or the labor relations (payment):

- „Do not charge a fellow Israelite interest, whether on money or food or anything else that may earn interest. You may charge a foreigner interest, but not a fellow Israelite, so that the Lord your God may bless you in everything you put your hand to in the land you are entering to possess."[12]
- „Do not take advantage of a hired worker who is poor and needy, whether that worker is a fellow Israelite or a foreigner residing in one of your towns.Pay them their wages each day before sunset, because they are poor and are counting on it. Otherwise they may cry to the Lord against you, and you will be guilty of sin."[13]

[8] D. Ţop, *Dimensiunea istorică a dreptului (The Historical Dimension of Law)*, Tipărire-tehnoredactare SC REFACOS GA SRL, 2002, p. 86.
[9] D. Ţop, *op.cit.*, p. 87.
[10] I. Mihălcescu, *Noţiuni de filozofia religiunii(Notions of the Philosophy of Religion)*, 7th edition, Cugetarea-Georgescu Delafras Publishing House, Bucharest,1941, p. 36.
[11] C. Stroe, N.Culic, *Momente din istoria filosofiei dreptului (Moments in the History of Law Philosophy),*The Publishing House of the Domestic Affairs, Bucharest, 1994, p.28.
[12] Deuteronomy 23- *Bible, Old Testament.*
[13] Deuteronomy 24- *Bible, Old Testament.*

As shown in recent doctrine, the church's influence was manifested over the time on law. Thus, since the late sixth century, the Catholic Church judged religious cases (heresy, blasphemy, etc.), gradually extending its attributions in other cases, such as family law or succession. In the 1300s these norms were brought together in *Corpus iuris Canonici* (which remained in force until 1917).

The religious factor plays also an important role in the systemic construction of law, together with the other factors of law configuration[14].

Therefore, religion and law were, are and must be interconnected, not only because they are normative systems but because ultimately both of them guide man in life in a positive way. Both smooth the path of the virtuous and dig „deep dungeons" to vice and evil.

However, we should mention a black stain on the connection between law and church: the Inquisition courts existing in the Middle Ages, within the Catholic Church, a sad expression of the ecclesiastical abuses. The name *inquisition* comes from the Italian word *inquisitio*, meaning survey, research. As Professor IonCraiovan specifies, instead of evidence provided by witnesses, inquisitors preferred to obtain a confession from the defendant, his recognition of guilt, promising in exchange forgiveness. When these promises remained without effect, they resorted to torture. The same author shows that the penalties included spiritual ones (abjuration, long fasting periods, pilgrimages etc.), humiliating penalties (distinguishing marks), but also a determined time or life imprisonment. The most severe penalty (but not invented the Inquisition), the burning at the stake, was executed by the secular authority.[15]

3. Morality and law

Jus est ars boni et aequi. Nothing of what is connected to law and its institutions is allowed to go beyond the sphere of good, equity and moral. Law cannot be conceived outside the field of individuals' fundamental laws that guarantee the full equality of all people. Besides, it is well known that law was formed in the „melting pot" of morality and religion. In this regard it should be mentioned that the term *jus*, designating law, was originally a religious term meaning a sacred formula used as a rule.

Any society is composed of a set of rules governing the human relationships. The social dynamics is driven by the actions and interests of individuals, but this dynamics, in which all human relationships can be found,is carried out within the limits of law, as well as of other social rules.

Human activity takes place within a normative framework that regulates the human behavior and conduct. The social norms that are at the basis of the social organization also include morality. This is a set of rules of conduct that enable people to determine what is right and wrong, just and unjust.It is true that life offers situations when a legal act is immoral, *summum iuris, summa iniuria.*

In ancient times, morality intermingled with religion and law, most often people considering that rules have their origin in the divine will. Pythagoras claimed that all the

[14] C.R. Butculescu, *Cuantica dreptului – o nouă perspectivă în percepția fenomenelor juridice(The Quantic of Law – A New Perspective in the Perception of the Legal Phenomena)*, in *Justiție, Stat de Drept şi Cultură Juridică (Justice, Lawful State and Juridical Culture)*, Universul Juridic Publishing House, Bucharest, 2011, p. 98.

[15] I. Craiovan, *Filosofia Dreptului sau Dreptul ca Filosofie (Law Philosophy or Law as Philosophy),* Universul Juridic Publishing House, Bucharest 2010, p.77

rules of conduct came from gods, and people who did not respect them, offended the divinity, which punished them.[16]

According to prof. S. Popescu[17] morality is formed of the common ideas about good and bad, which can be retrieved in the individual consciousness and which form the consciousness of a people, at a certain time of its evolution.As well shown in the Romanian doctrine, through natural moral law, which is found in every man, regardless of his level of culture, man distinguishes between good and evil, what to do and what not to do, so through this law God planted in man a set of moral provisions. Thanks to them man is able to know the fundamental moral truths.[18]

Trying to highlight the importance of morality in its interaction with law, Eugeniu Speranția[19]shows that the main and fundamental force of law is its logical validity and its moral obligatoriness.

In the same regard it can be retained Guy Durand's opinion[20]who stated that"morality has always served as a social proto-legislation".

Current legislation uses the term „decent behaviour", which represents the rules of decency and shows to the subject of law what should be done and what is forbidden.

As law and morality have a normative character it is obvious that there are similarities and differences between them.Thus, for instance, on the one hand, both rules of law and moral rules aim at the social relationships between individuals or between individuals and other human collectivities, on the other hand, morality is based on religious precepts or individual or collective commandments, while law is a state creation.

Law and morality interact, although they are distinct normative systems. In this regard, we mention some legal, constitutional, civil and penal provisions:

- art. 26 of Constitution[21]refers to morality;
- provisions of art. 14 in theNew Civil Code[22] regulate good faith and mention that civil obligations should befulfilledin accordance with the public order and the decent behaviour. Trying to show the connection between law and morality, prof. M. Uliescu[23] exemplifies by art. 14 in the New Civil Code and notes: undoubtedly the relationship between morality and law is obvious. The ethical principles and the moral norms can be retrieved most often in juridical norms, precise andrigorous, sometimes even imperative.
- Art. 203 in the Penal Code[24]that incriminates and sanctions the act of „not helping a person in difficulty".

[16] D. Țop, *op.cit.*, p. 80.
[17] S. Popescu, *Teoria generală a dreptului (General Theory of Law)*, Lumina Lex Publishing House, Bucharest, 2000, p. 124.
[18] E. Safta-Romano, *Arhetipuri juridice în Biblie (Juridical Archetypes in Bible),* Polirom Publishing House, Iaşi, 1997, p.13.
[19] E. Speranția, *Introducere în filozofia dreptului (Introduction in Law Philosophy)*, Tipografia Cluj, 1946, p. 389.
[20] G. Durand, *Du rapport entre le droit et l' étique* inThemis, vol. 20, no. 2/1986, p. 285.
[21] Art.26 para.2 in the Constitution of Romania stipulates that the natural person has the right to dispose of himself/herself unless he/she breaks the rights and freedoms of other people, the public order or the decent behaviour.
[22] Art. 14 para.1 in the New Civil Code stipulates that any natural or legal person has to exercise his/her rights and to fulfill his/her obligations in good faith,in accordance with the public order and decent behaviour.
[23] M. Uliescu, *Buna-credință în Noul Cod civil(Good faith in the New Civil Code)* in M. Uliescu (coord.), *Noul Cod civil. Studii şi comentarii, vol. I, Carteal şi Cartea a II-a, (art. 1-534) (The New Civil Code. Studies and Comments, vol. I, Book I and Book II)*, Universul Juridic Publishing House, Bucharest, 2012, p. 92.
[24] Art. 203 para.1 in the New Penal Code establishes that not providing the necessary help or not announcing immediately the authorities when finding a person whose life, corporal integrity or health is endangered and cannot save himself is punished with three-twelve months in prison or fine.

Conclusions

The relationship between law, morality and religion is indissoluble, changing from one era to another, from one people to another. Obviously, law developed in the shadow of the other two above mentioned normative systems, and borrowed from them plenty to create a social system of rules meant to achieve the perfect balance between good and evil, just and unjust, between injury and punishment.

Even now when law has become independent and self-sufficient, the normative acts are grounded in compliance with fundamental moral and religious precepts. Last but not least we should mention that law is strongly influenced by the provisions that protect human rights, a true „modern legal religion".

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REFLECTIONS ON THE SCIENCE OF LEGISLATION, OF LEGISLATIVE TECHNIQUE AND OF CODIFICATION

Georgeta CREȚU *

Abstract: *The author distinguishes between codification and other concepts, such as the science of legislation, legislative technique and legislative policy, differentiations which are of major interest for the proper understanding of the content of the concept of codification in relation to other similar concepts.*

Keywords*: legislation, legislative technique, codification.*

In the current paper we try to make the difference between *the science of legislation* and other similar concepts such as: *legislative technique* and *codification*[1], difference of major interest for the proper understanding of the content of these concepts in relation to other similar concepts. In this regard, we wonder what these concepts mean.

Thus, in the general theory of law[2], *the science of legislation or the science of the elaboration of law* involves „the totality of the methods, techniques, procedures of material or formal expression of the ideas that need normative reflection in appropriate forms"[3].

At the same time, *the science of legislation* is used by the legislative policy for selecting the problems of high priority. In fact, the science of legislation reunites all the data and elements of law-making and establishes the orientation of the regulations. Consequently it must be taken into account in the work of law-making, because in the legal doctrine it is shown that the science of legislation has as object of study the law-making.

Also, *the science of legislation* is the auxiliary legal science, which, based on the research of the legislation data (for instance: juridical sociology, comparative law, history of law) would include *legislative technique* and *legislative policy*[4].

* PhD Reader, Faculty of Law, Stefan cel Mare University, Suceava, email: cretu_georgeta2002@yahoo.com.

[1] Mircea Manolescu, *Idei noi în problema tehnicii juridice (New Ideas in the Issue of the Juridical Technique)*, Bucharest, 1944, p. 47; Al. Popescu, *Logica ştiinței, Epistemologie (The Logic of Science. Epistemology)*, Bucharest, Tip. Oficiul de Librărie, 1942, p. 218.

[2] I. Mrejeru, *Tehnica legislativă (Legislative Technique)*, 1979, p. 157; M.Grigore, *Tehnica normativă (Normative Technique)*, C.H.Beck Publishing House, Bucharest, 2009, p.294; R.P. Vonica, *Introducere generala în drept (General Introduction in Law)*, Lumina Lex Publishing House, Bucharest, 2000, pp. 404-405; N.Popa, *Teoria generală a dreptului (General Theory of Law)*, C.H.Beck Publishing House, Bucharest, 2008, pp.181-182; I.Vida, *Legistica formală* (*Introducere în tehnica şi procedura legislativă*) (*Formal Legistics. Introduction in the Legislative Technique and Procedure*), Lumina Lex Publishing House, Bucharest, 2006, p. 6.

[3] I.Vida, *Legistica formală* (*Introducere în tehnica şi procedura legislativă*) (*Formal Legistics. Introduction in the Legislative Technique and Procedure*), Lumina Lex Publishing House, Bucharest, 2006, p. 4.

[4] *Legislative policy, as a part of the legislative science*, has as object the conceiving of the aims and means of a legislative action meant to modify the positive law, to impulsion the legislative reforms, through distinguishing what is desirable from what is possible. G. Cornu, *Vocabulaire juridique*, 8-éme edition, Presses Universitaires de France, Paris, 2007, p. 483.

The legislative technique[5], *as a part of the science of legislation,* designates the art of law making that has as object the application of the options of the legislative policy and that consists not only of editing the text of law, or more generally, of organizing it (for example formal presentation, plan, titles, sections etc.), but also in choosing and coordinating the ways of formulating the norms of law and the technical methods[6].

In *lato sensu*, *the legislative technique, according to some authors*[7], involves the totality of methods, means, procedures used during the whole legislative activity, both for the elaboration of the content solutions of the regulation and for expressing these solutions in the text of the normative acts.

In this regard, it can be stated that *the legislative technique*[8] would include in its sphere the totality of the methods and procedures used in the activity of elaboration of the projects of laws and of other normative acts, which help to find some appropriate legislative solutions in compliance with the essential requirements and, at the same time, for the way of expressing them in well edited texts or in a complex of methods and procedures meant to ensure an appropriate form to the content (substance) of the legal regulations on the basis of a synthesis of experiences gained in the past by the participants to the social life, experiences filtered from the perspective of the value judgment of the law-maker[9].

Other authors[10] define *the concept of legislative technique* through the inclusion of all principles, methods but also of the procedures used in the process of elaboration of the normative acts.

In *stricto sensu*, the concept of *legislative technique* involves the totality of procedures, operations in the text of the normative acts.

It should be noticed that in this view the legislative technique is reduced to the procedures and artifice through which the content solutions gain practicability, capacity of insertion in the social life and the issues of organization and procedure of the elaboration and issuing of the normative acts are considered to be situated outside the sphere of the formal legislative technique, being designated through the notions of organization and procedure of the law-making[11].

The significance *of the two meanings of the concept of legislative technique* can be given also by the difference made by Jean Dabin[12] between *material technique* that regards the content of the legal regulations and *the proper formal technique* which refers to the specific technical procedures through which is ensured the applicability in the social life of the content solutions of the legal regulation.

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[5] Law no.24 din 2000 regarding the norms of legislative technique (republished in the Official Journal Part I, no.215 in 2010) for the elaboration of the normative acts stipulates that the legislative technique ensures *systematization, unification and coordination of the legislation, as well as the juridical content and form* appropriate for each normative act. In the law cited in art.2 para.2 it can be seen that the norms of legislative technique define the constitutive parts of the normative act, the structure, the form and the way of systematization of its content, the technical procedures regarding the modification, completion, abrogation, publication and republication of the normative acts, as well as the language and the style of the normative act.

[6] G. Cornu, *Vocabulaire juridique,* 8-éme edition, op.cit., p. 483.

[7] Anca Lelia Lorincz, *Aspecte de tehnică legislativă în materie penală (Aspects of Legislative Technique in Penal Matter),* Militară Publishing House, Bucharest, 2001, p.19

[8] I. Mreju, *Tehnica legislativă (Legislative Technique)*, The Publishing House of the Romanian Academy, Bucharest, 1979, p.29.

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[11] A.Naschitz, *Teorie şi tehnică în procesul de creare a dreptului (Theory and Technique in the Process of Law Creation)*, The Publishing House of the Romanian Academy, Bucharest, 1969, p.199.

[12] J.Dabin, *Téorie générale du droit*, Bruxelles, 1953, p.158.

It can be noticed that the authors that chose *the extended meaning of the concept of legislative technique* do not make the difference between *the material technique* and *the formal technique*, while the other authors make such a difference retaining in *the proper legislative technique* only *the formal side of the legislative technique*.

As regards *the role of the legislative technique* in the process of law elaboration, we can differentiate between *a phase of the scientific elaboration* and *a phase of the technical elaboration*.

Regarding the delimitation between these two phases we can notice that one is conventional, as *the genesis of law has to be seen as a unitary and unique process*.

The first phase includes the essence of the regulation, determines the solutions of the future regulation, deriving them from the reality and social requirements[13], while in the second phase these solutions are transposed in the text of the normative act, by applying certain technical procedures[14].

The phase of the elaboration of the texts of law involves an activity of documentation and scientific analysis for the solid knowledge of the economic and social realities that are to be regulated. Moreover, this phase forces the law-maker to make *a scientific investigation* meant to ensure the necessary correspondence between *fact* and *law*. Such an investigation requires a scientific interdisciplinary approach in compliance with *the general principles of law-making of the Romanian law system*. For instance: *the principle of founding the legislative activity on a solid research of reality*[15]*; the principle of correlation of the normative acts within the legislative system*[16]; *the principle of economy of means of expression* and *the principle of accessibility*[17].

The phase of the scientific elaboration of law (or conceptualization) has as a starting point the decision of elaboration of the normative act, as an answer to the social requirements that need a regulation in accordance with the objectives of the legislative policy. The decision of elaboration establishes the objectives or the theme of the future normative act. On this basis, the first moment of the scientific elaboration of a law will be the inventorying of the legislation in force in the matter of the future regulation[18].

Also, the phase of the scientific elaboration of law involves carrying out certain researches that require the knowledge of some scientific data in various fields: criminology,

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[13] Vintilă Dongoroz, *Drept penal (Penal Law)*, Bucharest, 2000, p. 160.

[14] Anca Lelia Lorincz, *Aspecte de tehnică legislativă în materie penală (Aspects of Legislative Technique in Penal Matter)*, Militară Publishing House, Bucharest, 2001, p. 19.

[15] Ibidem, *op.cit*., p. 30.

[16] At the moment of the elaboration of a law, the law-maker has to take into account the existence of other normative acts, first at the level of *juridical institution, of legal branch, at the level of national law and eventually at the level of the European Union law*, to take into account all the implications of a new regulation, the subsequent normative modifications and some possible conflicts of regulations. D. C.Dănişor, I.Dogaru, Gh. Dănişor*, Teoria generală a dreptului (General Theory of Law)*, op.cit., p.202.

[17] Idem, op.cit. pp.27-31.

[18] *Inventorying of the legislation in force* involves also establishing its faults so that the new regulation covers the current legislative gaps or incongruities. The verification, under *the aspect of social efficacy*, of the legislation in force offers the possibility that the new regulation takes over the positive aspects, the solutions that life validated according to the social needs and, at the same time, should replace the solutions that do not correspond anymore to the new social reality. Inventorying of the legislation in force also involves the examination of the legislation of other countries in the matter that will be regulated, by carrying out researches of comparative law, and thus studying more legislations regarding a certain juridical institution and comparing them according to a specific method. For instance, incriminating certain acts, the law-maker has to analyse the efficacy that such a regulation registered on the diminishing of the criminal phenomenon in other countries. See I. Mreju, *Tehnica legislativă (Legislative Technique)*, The Publishing House of the Romanian Academy, Bucharest, 1979, p.28.

sociology, economy etc., to understand the evolution and the trends of the social phenomena and relationships that represent the object of the future regulation[19].

In *the second phase of the elaboration of law*, the law-maker has to provide the appropriateness of the form, of the exterior coating of the law, to its intimate substance, adapting the technical solutions to the content solutions. This phase ends when the act is adopted, after certain procedures within the law-making institution.

From this analysis it results that the notion of *juridical technique* has a larger sphere than the notion of *legislative technique* as the juridical technique refers also to the technique applicable in other juridical fields, for instance, a technique of the interpretation of the juridical norms, a technique of the juridical framing[20] and so on.

The juridical technique includes the totality of the procedures, means, operations through which the requirements of the social life gain a juridical form, are expressed in the content of the juridical norms and are carried out then through the application of these norms and consequently the juridical technique represents the totality of the methods used in the legal field (in the elaboration, accomplishment and application of law).

If we refer to the *methods of the legislative technique* certain more frequent procedures can be derived from the analysis of the legislative doctrine and practice. For instance: *the procedure of indication and the procedure of reference,* which are based on using the norms of indication and the norms of reference (as separate norms), consist in avoiding the repeating of a certain provision within the same normative act, through a simple reference to a norm, within the same normative act or within another normative act, which contains the same provision; *the procedure of the assimilation*, which consists of putting a category of subjects or juridical situations under the regime created for another category. In fact, procedure of the assimilation equals to a reference, but the reference is not made to a text of law but to a juridical regime;

c) Procedures of legislative technique in the matter of penal law are *the presumptions,* which consist of *transforming* a certain probability in certitude; they represent in fact an artifice, in the sense that they connect the sure juridical consequences to certain probable premises, which in most cases correspond to the judgment of probability that was at the base of the legal regulation; d) *definition* is one of the procedures of legislative technique that answer the requirement of establishing as precise as possible the concepts that will represent elements of the juridical norm. We refer here to *the definition of some legal terms* within the content of the legal norm, definition that ensures the understanding and the correct application of the texts of law and we do not refer to the theoretical definition of some institutions, which is the work of the doctrine; e) *the procedure of countering* is used as an element indicating duration, size or length; f) another technical procedure is that of *enumeration* when the law-maker aims at a more efficient determination of the content of the regulation as regards some abstract concept which represent qualitative values; g) another technical procedure used for establishing more precisely the legal provisions is that of *classification.* Consequently, juridical technical procedures are used within the general and individual accomplishment.

As regards the above mentioned, we think that the juridical technique would stay between the science of law on the one hand and the juridical arts on the other hand. It is a

[19] A.Naschitz, *Teorie şi tehnică în procesul de creare a dreptului (Theory and Technique in the Process of Law Creation)*, The Publishing House of the Romanian Academy, Bucharest, 1969, p.200.
[20] Anca Lelia Lorincz, op.cit. p.15.

methodological element that can serve to defining law, being a permanent one, as the juridical technique seems to be the inner life of law.

Unlike the quoted concepts, *the notion of codification* represents a higher systematization of all the normative acts existing in a certain field. in this regard, the codification as *a higher form of systematization* is due to the fact that this operation does not represent a simple unification of some disparate provisions, but involves a processing of these provisions so that to ensure their concentration within a logical, coherent and functional structure[21].

Consequently, codification would be the result of the legislative activity, the adoption of the codes belonging to the competence of the law-making institution. Also, codification means a complex activity of the law-maker, of removing the out-of-date norms, of completing the faults, of introducing some new norms, of logical ordering of the normative material, and of using some modern means of legislative technique[22]. This definition can raise several problems, such as: whether this systematization has a certain scientific framework; whether it has what characterizes the science, whether it has the tendency to overcome the phenomenon and to enter the substantial essence of the matter it encodes as regards the formulations of a normative act, as well as other problems that can derive from the given definition.

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[21] N.Popa, *Teoria generală a dreptului (General Theory of Law)*, Ed.C.H.Beck, Bucharest, 2008, p.181.
[22] N.Popa, op.cit. 1992, p.150.

JURIDICAL DIMENSION OF FREEDOM RELIGIOUS BELIEFS

Oana ŞARAMET *

Abstract: *Freedom, in all its dimensions, is one of the fundamental values of any democratic society, for whose recognition, devotion, protection or guarantee, the human being has fought, with guns or word, over the time. The existence, dignity and the development of human personality are conditioned by the recognition through the fundamental laws of the state, by the fundamental rights and freedoms of the citizens, constitutional devotion of these being conditioned by regulatory compliance specific to documents, pacts and international conventions, such as the Universal Declaration of the Human Rights, from the treaties and the regional conventions, such as the European Convention of the Human Rights or the Charter of fundamental rights of the European Union. The freedom of religious beliefs or the religious freedom, dedicated, at an international level, European and national, usually the size of a complex fundamental freedom, namely freedom of thought, of conscience and religious freedom allows every human being to have, to express, to practice that religion, belief, faith that best represents, from a spiritual point of view, as well as choosing not to have, not to express or not to practice any sort of religious belief or faith. The way in which each and every one of us understand, explain and express how we think about the world, how we explain this reality, including from a religious perspective, is a matter exclusively for each of us and not by any legislative regulation. However, even exercising the freedom of religious beliefs cannot lead to lead, in any way, to this freedom and exercising another fundamental freedom. In a world where history tends to repeat itself, oppressing or even suppressing the followers of these beliefs or faiths taking part, unfortunately, with some consistency, the intelligence and dignity of the human beings should prevail, again, for that hatred and religious discrimination could be eliminated.*

Keywords: *freedom, religious beliefs, faiths, regulations.*

All human beings are born free and equal in dignity and rights, being endowed with reason and conscience and should behave towards one another in the spirit of brotherhood[1]. Therefore, in his first article, the Universal Declaration of Human Rights, recognizes that all human beings are enjoying these rights, rights which, by this act, the Organization of the United Nations did not create, did not invent, but, as it can be seen even in the name of the document, it only states them, defining every human being from the moment of his birth.

This applies to both national texts, and to the international ones that refer to the human rights, appearing as „recognitions" or „statements" of rights which is almost the same[2]. In the same context, wording the rights is contingent and dependent on political decisions; therefore they are in a permanent state of evolution which means that this is not a work of creation, but of recognition of the „right to be human", permanent and previous value to any political act[3].

* Ph.D. Lecturer, *Transilvania* University of Braşov, Faculty of Law

[1] This is the content of the article 1 of the Universal Declaration of Human Rights. This Declaration was adopted by the UN General Assembly on 10 December 1948, by its Resolution 2171 A/III. Romania signed the Declaration on the 14 December 1955, when it became member of United Nation Organization, like it is settled by the Resolution R 955 (X) of the UN General Assembly.

[2] Sudre, Frédéric, *Drept european şi internațional al drepturilor omului*, Polirom Publishing House, Iaşi, 2006, p. 46

[3] Ibid.

Moreover, through the very preamble of the Universal Declaration of the Human Rights, the General Assembly of the UN that state that the adoption and the proclamation of this declaration had as starting point to consider recognition of the inherent human dignity of all members of the human family and their equal and inalienable rights as a foundation of freedom, justice and world peace[4]. It also points the fact that ignoring and despising human rights have lead to barbarian acts which riot the conscience of the mankind, and the building of a world where human beings will enjoy the freedom of the word and that of beliefs and will be freed from fear and misery, and was proclaimed as the highest aspiration of people[5].

However, in order to achieve or, at least, facilitate the achievement of the above mentioned aspirations, in the same preamble is provided the essential necessity that the human rights must be protected by the authority of the law in order for man to be compelled to use rebellion against tyranny and oppression[6].

Therefore, the most important act in the domain of the human rights, recognizes, from its preamble, the necessity that, in the new world order after the Second World War, the human being's rights are recognized and protected by the human rights – genuine „given" of them, unable to talk about „building" them by the power, but possibly by a growing intervention of it[7], especially in the case of some of these rights. In such a context, the human being is able to enjoy including freedom of thought, of conscience and religion[8], freedom that any man is entitled to, as any other right and freedom stated in the Universal Declaration of the Human Rights, without any distinction as, for example, the difference of race, color, sex, language, religion, political opinion or any other opinion, national origin, property, birth or other status[9].

The provision on the freedom of conscience and, consequently, the religious freedom, from the Universal Declaration of the Human Rights is developed, keeping its essence, more precisely in art.18 para (1) – (4) from the International Covenant on Civil and Political Rights[10]. The text of the covenant distinguished, in the four paragraphs, between agreement and: recognition of the right to freedom of thought, conscience and religion as belonging to everyone; identification of the content of this right, content that captures two aspects, i.e. both freedom of every person to have or to adopt a religion or a belief of his/her choice, and freedom to manifest its religion or belief, individually or jointly, both public and private worship and observance through practice and teaching; prohibition to subject to any constraint that might bring the achievement of freedom to have or to adopt a religion or belief of his/her choice; prohibition of submitting the freedom of religious manifestation or beliefs of any restrictions, being enshrined, on an exceptional character, situations in which, however, such restrictions can be imposed, namely for protecting public safety, order and public health or a moral or freedom and fundamental rights. (However, the Covenant's text conditions, imperatively, that any such restrictions should be prescribed by law and have to

[4] Universal Declaration of Human Rights, Preamble, para 1
[5] Universal Declaration of Human Rights, Preamble, para 2
[6] Universal Declaration of Human Rights, Preamble, para 3
[7] Sudre, Frédéric, *op.cit.*, p. 53
[8] According to art 18 form the Universal Declaration of the Human Rights, any person has the right to freedom of thought, conscience and religion, right that includes freedom to change its religion or belief and the freedom to manifest religion or belief, alone or in a community with others, in public or in private, thorough teaching, religious practices, cult or fulfilling rituals.
[9] Art. 2, sentence I from the Universal Declaration of the Human Rights.
[10] This Covenant was adopted and opened for signature by the United Nations General Assembly on December 16th 1966 entered into force on March 1976. Romania has ratified the International Covenant on Civil and Political Rights on October 31st 1974, by Decree no 212 which was published in the Official Gazette of Romania, Part I, no 146 from November 20th 1974.

be imposed only if necessary.); respect the freedom of parents and legal guardians, as appropriate, to ensure the religious and moral education of their children, in conformity with their own convictions, in the way in which the states that take part in this Covenant will commit to this.

The International Covenant on Economic, Social and Cultural Rights[11], through art.13 para 3, highlights, once again, in the context of regulation of the right of every person to education, freedom of parents and, when applicable, of legal guardians, to ensure the religious and moral education of the children, in accordance with their beliefs[12].

Likewise, at a European level we will find regulations on religious freedom in the Convention for Protecting the Human Rights and Fundamental Freedoms[13], known as the European Convention of Human Rights, more precisely in art. 9[14], but also in the Charter of Fundamental Rights of the European Union[15], through art. 10[16].

[11] This Covenant was adopted and opened for signature by the United Nations General Assembly on December 16th 1966, Resolution 2200 A (XXI), entered into force on January 3rd 1976, according to art 27. Romania has ratified the International Covenant on Economic, Social and Cultural Rights on October 31st 1974, by Decree no 212 which was published in the Official Gazette of Romania, Part I, no 146 from November 20th 1974.

[12] By Resolution 36/35 V, the UN General Assembly adopted on November 25th 1981 the Declaration on the Elimination of all forms of intolerance and discrimination based on religion or belief, statement that is based on art 18 from the Universal Declaration for Human Rights, as well as the ones in art 18 form the International Agreement regarding the Civil and Political Rights, statement of which art 1 para 1 we can find the same content as the freedom of thought, conscience and religion as in the provisions of the two acts mentioned, but details the freedom that arise from the enshrined rights by recognition of this complex freedom. Since none of those provisions detailed, explanatory of the content of freedom of thought, conscience and religion did not arise, at any time, that was considered a restrictive interpretation or derogating from an enshrined right by the Universal Declaration of the Human Rights, and more. For example, the declaration mentioned provides the fact that this freedom involves, including recognition, the freedom to teach a religion or belief in places chosen for this purpose, including the freedom to form leaders. For details, see Cloşcă, Ionel; Suceavă, Ion, *Tratat de drepturile omului*, Europa Nova Publishing, Bucharest, 1995, pp. 111-113.

[13] This Convention was signed in Rome on November 4th 1950 and entered in force on September 3rd 1953 being adopted by the Council of Europe. Romania has ratified this Convention by Law no 30 from 1994, published in the Official Gazette, Part I, no 135 from May 31st 1994. The last time the text of this Convention was amended in accordance with the provisions of the Protocol no 14, which Romania had it ratified by Law no 39 from March 17th 2005, published in the Official Gazette, Part I, no 238 form March 22nd 2005, Protocol which entered in force on June 1st 2010. Art. 9 must be corroborated with art 2, sentence II from Protocol no 1- The right to education, according to which the state… will respect the right of parents to ensure this education and this teaching in conformity to their own religious and political beliefs.

[14] This article states that every person has the right to freedom of thought, conscience and religion; this right includes freedom to chance religion or belief and the freedom to manifest religion or belief in an individual or collective way, publicly or privately, through cult, education, practice and fulfilling rituals. Freedom to manifest religion or belief shall not be the subject of any limitations any than those prescribed by law, being necessary measures in a democratic society, for public safety, order, health and public morals or for the protection of rights and freedoms of others.

[15] The Charter of Fundamental Rights of the European Union is, according to art 51 from the Treaty on European Union (one of the two treaties composing the Lisbon Treaty), part of the Treaty of Lisbon from December 13th 2007 amending the Treaty on European Union and the Treaty of Establishing European Community, signed on December 13th 2007, but entered in force on December 1st 2009 and ratified by Romania through Law no 13 from February 7th 2008, published in the Official Gazette, Part I no 107 from February 12th 2008. Provisions of art 10 must corroborate with provisions of art 14 para (3) from the same Charter that recognizes the freedom to establish educational institutions respecting… parents' right to ensure the education and teaching of their children according to their religious, philosophical and pedagogical beliefs, this right must be respected in accordance with the internal laws that govern performance thereof. Also, it needs to corroborate with the provisions of art 24 para (1) and (2) regarding child rights.

[16] This article provides that any person has the right to freedom of thought, conscience and religion. This right involves freedom to change religion or belief and also the freedom to manifest religion or belief individually or collectively, publicly or privately, through cult, education, practice and fulfilling rituals. By para (2) is provided the so-called right to object on reasons of conscience, right recognized in accordance with the internal laws that govern the performance of this right.

International regulations on freedom of thought, conscience and religion will find their reflection in regional documents on other continents, other than Europe, as it is, for example, the Inter-American Convention of Human Rights[17].

The international or regional protection of freedom of thought, conscience and religion extends at a national level too, the states recognizing that, through their own constitutions, this right to all their citizens even though there can be identified some nuances or particularities, without being affected the substance of this freedom enshrined in international and regional documents, relevant in human rights.

Thus, for example, by section 11 of the Constitution[18], Finland recognizes everyone freedom of religion and conscience, freedom that implies the right to have and to practice a religion, the right to express his/her own beliefs and the right to be a member or to refuse to be a member of a religious community. No one may be compelled to be involved in the practice of any religion, against his/her own conscience.

By art 15, the Constitution of Switzerland[19] guarantees freedom of religion and conscience, every person having the right to choose his/her own religion or philosophical beliefs, alone or in a community. Every person has the right to join or take part in religious communities and to follow the religious teachings. This fundamental law highlights the fact that no person can be compelled to join or take part in a religious community, to take part in acts, to take part in religious rituals or to follow religious teachings.

Unlike the two constitutions of the European continent, the constitutional legislature in Brazil[20] chose not to devote one constitutional provision of freedom of thought, conscience and religion, its content being found among several articles. Thus, governing the equality principle, by art 5 sections VII, recognizes the fact that everyone is equal before the law without any discrimination, freedom of conscience and belief being inviolable, ensuring the freedom of exerting the religious cults and guaranteeing, as established by law, the protection of worship places and practiced rituals. Art. 210 para (1) and para (2) first sentence, talking about the basic primary school curricula, provides that it is arranged in such a way to provide a basic education and to respect the cultural and artistic values regional and national, religious education being optional.

In Romania, constitutional regulation on freedom of thought, conscience and religion reflects the international and regional provisions mentioned above, art. 19 from the Constitution[21] keeping its content adopted in 1991 and subsequent to the constitutional revision in 2003.

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[17] This Convention was signed on November 22nd 1966 in San José, Costa Rica, states members of the Organization of the American States, and it is also known like the Pact from San José. By the art 12, this Convention is providing that everyone has the right to freedom of conscience and of religion. This right should cover: the freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions. This Convention has been studied on Site: http://www.hrcr.org/docs/American_Convention/oashr12.html, Accessed on 15.04.2015.

[18] The Constitution of Finland was adopted on June 11th 1999 and last time was amended in 2012. This Constitution has been studied on Site: http://www.servat.unibe.ch/icl/fi00000_.html, Accessed on 15.04.2015.

[19] The Federal Constitution of the Confederation of Switzerland was adopted on April 18th 1999. This Constitution has been studied on Site: http://www.servat.unibe.ch/icl/fi00000_.html, Accessed on 15.04.2015.

[20] The Constitution of Brazil was adopted on October 5th 1998 and last time that was amended was in 1992. This Constitution has been studied on Site: http://www.servat.unibe.ch/icl/fi00000_.html, Accessed on 15.04.2015.

[21] In its initial form, the Constitution of Romania was adopted in the meeting of the Constituent Assembly on November 21st 1991, published in the Official Gazette, Part 1, no 233 from November 21th 1991 and entered in force after its approval by national referendum from October 18-19th 2003, published, under article 152 from the Constitution, in the Official Gazette, Part 1, no 767 from October 31st 2003. The article by which is regulated the freedom of conscience has remained the same, namely art 29, after renumbering the constitutional articles following the approval of review.

Although it was preferred to be used in the naming of this freedom, just the syntagma (collocation) „freedom of conscience", which is, in fact, one of the components of freedom of conscience, thought and religion, the constitutional text reflects, unquestionably, the fact that the legislature had all three components in view, providing that freedom of thought, opinions, and religious beliefs cannot be restricted under any circumstances, according to para (1) of this article, para (2) specifying that freedom of conscience is guaranteed.

Unlike other national regulations, European or national, such as I showed in the ones preceding, our constitutional legislature preferred to identify the freedom of conscience[22] - this freedom having a complex content, incorporates many aspects, more „freedoms", appreciating that these aspects are and must be analyzed only together because there are and can materialize only together and because they configured form a legal point of view one single right, one single freedom[23]. In this regard, form the interpretation of the provisions of art. 29 from the Constitution, appears that freedom of conscience is the freedom of any individual to have and express in particular or in public a certain conception about the world, to share or not a religious belief, to take part in or not in a religious cult, to meet the requirement or not of a ritual of that belief[24].

However, freedom of conscience can be seen[25], from some points of view, as a more limited notion and more restrictive than the freedom of religion because we can perceive consciousness as a sensation particularly profound, personal, and usually differing only in preference or convention. On the other hand, the force of the religious behavior is, often, a problem according to customs or social, not being always very deep, however often being the subject of some conditions and of some events of doctrinal or personal nature which requires that „beyond religion" will require more than „freedom of conscience"[26].

For us it is clear that the existence and performance of this freedom with a three-dimensional content is, in any democratic society that recognizes the inherent dignity of any person and that recognizes through its supreme values, not only the dignity of every person, but also the freedom of developing the human personality, indispensable. To think the world, to raise awareness about it, to perceive, in a religious or secular vision, is inside every human being where the only person can get in is that person. Starting from these allegations, it seems difficult even impossible to go through such a way, take such a step, without performing, even in an unconscious way, unthinkable step by step, but at the same time all three dimensions of freedom of conscience.

However, to avoid any confusion, any interpretation more or less flawed, but also to be in full compliance with the regulations at a national and international level, we appreciate that it would be appropriate that the next change made to the Constitution should include

[22] In the doctrine it is considered that the freedom of conscience is known as the „religious freedom". For details in this regard, see: Iancu, Gheorghe; Iancu,Vlad, „Libertatea conştiinţei şi libertatea de exprimare în Constituţia României", article published in *Human Rights Review* no 2 from 2014, Bucharest, review which is published by the Romanian Institute of Human Rights, ISSN 1220/613X, pp. 19-25, article studied on Site: http://www.irdo.ro/file.php?fisiere_id=778&inline=, Accessed on 15.04.2015. See also Iancu, Gheorghe, *Drept constituţional şi instituţii politice*, C.H. Beck Publishing, Bucharest, 2014, pp. 279-282. These authors state that whatever is called, freedom of conscience implies the right of everyone to be able to choose between religion and being an atheist.

[23] Muraru, Ioan; Tănăsescu, Simina Elena, coordinators, *Constitutia României. Comentariu pe articole*, C.H. Beck Publishing, Bucharest, 2008, p. 283

[24] Ibid.

[25] Dane, Perry, *Constitutional and Religion*, article published in BLACKWELL COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, Dennis Patterson, ed., Blackwell, 2010. This article was studied on Site: SSRN: http://ssrn.com/abstract=1558102, Accessed on 15.04.2015, pp. 125-126.

[26] Idem, p.126

the modification of the name of this freedom with a more comprehensive one, like freedom of conscience and religion or even freedom of thought, conscience and religion[27].

The Constitution does not include any definition to none of the three dimensions of the freedom of conscience[28], but, as regards the religious freedom, Law no 489/2006 on the freedom of religion and cults (denominations) regime[29], by art 2 para (1) provides such a definition which includes the jurisprudence of the European Court of Human Rights. In this regard, it is estimated that religious freedom is the right of everyone to have or to adopt a religion, to manifest individually or collectively, public or private, through practice or specific rituals of the cult, including religious education and the freedom to keep or change the religious belief.

There can be identified, including in this legal text, the two elements that make the freedom of thought, conscience and religion, each being subject to a distinct political regime[30]. Thus, one of the elements is represented by the right to have a conviction that, in turn, takes three aspects[31]: freedom to have or to adopt a belief or religion, aspect that we can identify by way of interpretation or express, as appropriate, and in constitutional provisions, or the law; freedom of not having a belief or religious faith, provisions in art 29 par (1) sentence II from our Constitution revealing, without any doubt, and interpretation in this regard; freedom of the individual to change its belief or religious faith, without any restraint or damage, meaning the Declaration on the elimination of all forms of intolerance or discrimination based on religion or belief[32] states that it is prohibited any distinction, exclusion, restriction or preference based on religious faith or belief[33].

Because we are talking about the freedom of thought, conscience and religion, freedoms that overlap, it is obvious that the right to have a belief is not confined to those of

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[27] By the legislative proposal for the revision of the Constitution of Romania, proposal that has been subject to the constitutional review according to the provisions of art 146 a), second sentence from the Constitution of Romania, Constitutional Court ruling in Decision no 80 from February 16th 2014 on the legislative proposal on the revision of the Constitution , a decision published in the Official Gazette, Part 1, no 246 on April 7th 2014, regarding art 29 no amendment proposed the modification in para (4) thereof that „ There are prohibited any forms, means, acts or actions of religious enmity". By Opinion no 734/2014 – Opinion on the legislative proposal on the revision of the Romanian Constitution, opinion adopted in the European Constitution for Democracy through Law (Venice Commission), in the 98th plenary session in Venice on March 21-22 March 2014, CDL-AD (2014)010, the Commission, in para 70, stated that the intended change only in this general provision is welcomed being more comprehensive interdiction against religious enmity than existing provision that regulates only the behavior of religious cults among them. However, the Commission of Venice points out that care must be taken, anyway, not to abuse in public legitimate disputes. Therefore, the Commission found, from our point of view, that art 29 does not require that the name be changed as long as its content is not modified to affect one of the three dimensions of this freedom – thought, conscience, and religion. This document was studied on Site: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29010-e, Accessed on 15.04.2015.

[28] Thus about the freedom of thought was said that the provisions from art. 9 from ECHR defend, first of all, what is revealed by inside of a human being, and not any public behavior which it is imposed by a certain faith, belief. The protection of this freedom isn't redundant because any person is free to think everything before decides to express its thoughts out loud. (Comis. EDH, February 22st 1995, no 22838/1993, Van den Dungen c/Pays-Bas). The definition of the freedom of conscience is more difficult to be created because a person's conscience arises in its interior, often in association with religious beliefs, faith, or not, in the same way like is happening with the thinking. The freedom of conscience can be expressed by certain attitudes and external manifestations, being situated between freedom of opinion and freedom of worship. See, Bârsan, Corneliu, *Convenția europeană a drepturilor omului. Comentariu pe articole. Vol.I Drepturi şi libertăți*, C.H. Beck Publishing House, Bucharest, 2005, pp. 706-707.

[29] This law was published in the Official Gazette, Part I, no 201 no 201 from March 21st 2014.

[30] Sudre, Frédéric, *op. cit*., p. 343

[31] Idem, p. 344

[32] See Supra-footnote no 12, and also Sudre, Frédéric , *op. cit*., p. 344

[33] In the case of Campbell and Cosans against UK, February 25th 1982, A 48, § 36, ECHR stated that a belief points the opinion that reach a certain level of intensity, seriousness, consistency and importance, distinguished form mere opinions and ideas. This case was studied on Site: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57455, Accessed on 15.04.2015.

religious nature, in this respect ECHR highlighted that this right benefits both believers and atheists, agnostics, skeptics or neutral people[34].

The second element is represented by the individual's right to manifest his/her beliefs[35], art 29 para (2) sentence II from our Constitution specifying the fact that this manifestation must take place in spirit of tolerance and mutual respect, art 2 para (2) from Law no 489/2006, republished, taking provisions of para (4) of art 18 from the International Agreement on Civil and Political Rights, concerning the circumstances and conditions in which a constraint of the performance of freedom to manifest religion may appear.

As for intervention, the states' interference in performing this freedom, we consider that it would not be beneficial or desirable, the free development of the human personality is endangered, reason for which the state must keep its neutrality of which size must not be absolute[36]. For this reason, such as we have seen in the preceding examples, any implication of the state in the performance of this freedom must meet three conditions: it must be prescribed by a text; must pursue a legitimate aim and be necessary in a democratic society[37].

Non-intervention or non-state involvement in the performance of this freedom, must consider also the respect for the parents' rights or the legal guardians, as appropriate, to ensure the education and teaching of minor children in accordance and in harmony with their own religious and philosophical beliefs[38].

Guaranteeing freedom of conscience, including under the aspect of religious freedom, art 29 para (3)-(5) from the Constitution, recognizes the free status of the religious cults, and their ability to organize themselves according to their own statuses, under the law[39]. They are provided and the main coordinates of the relations between cults and states, their autonomy is being recognized, but also the possibility to enjoy its support, including the facilitation of religious assistance in the army, in hospitals, in prisons, in homes and orphanages.

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[34] See Kokkinakis case against Greece, May 25th 1993, § 31. This case was studied on Site: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57827, accessed on 15.04.2015.

[35] An author submits that this aspect of freedom of thought, conscience and religion has in view also the freedom of not manifesting beliefs or faiths, religious or not. Is possible to propagate religious beliefs and tries to persuade others, possibility that represents the corollary of freedom of religion, however, the same author appreciates that it must distinguish between true Christian witness corresponds the true evangelization, on the one hand and on the other hand, the abusive proselytism that represents corruption and slandering. See, in this regard, Renucci, Jean-François, *Tratat de drept European al drepturilor omului*, Hamangiu Publishing, Bucharest, 2009, p.214

[36] Idem, pp.214-215

[37] Idem, p.222

[38] In this regard, Decision no 669 from November 12th 2014, published in the Official Gazette, Part 1, no 59 from January 23rd 2015, the Constitutional Court of Romania ruled and opinion that we can rely on, that the state is not allowed to adopt legislative solutions that can be interpreted as disrespectful to the religious or philosophical beliefs of parents, reasons for which organizing the school's activity must be subordinate to achieving a goal of conciliation in the performance of the functions that they assume in the process of education and in teaching religion with respect for the parents' right to ensure the education in conformity with their own religious belief. As part of the constitutional system of values, freedom of religious conscience is assigned the imperative of tolerance, particularly in relation with human dignity guaranteed by art 1 para (3) form the Constitution, which dominated as a supreme value of the entire system of values free manifestation of options necessarily implies the persons' own initiative in the purpose of attendance of the Religion discipline, and no tacit acquiescence or refusal not express. Expressions of an opinion from the perspective of the constitutional provisions on freedom of conscience and applicable religion from the religious educational system, must always be positive (person chooses to study religion), and not in a negative way (person chooses not to study religion).

[39] This conditions are established by Law no 489/2006, republished, especially those from Chapter II and III, namely art 7-48. According to this regulation, in Romania there are known 18 cults.

Through these provisions it is reinforced, in our opinion, the fact that according to the constitutional provisions in force, the Church is separate from the State which offers it the possibility to develop autonomously[40], Romania doesn't recognize a state religion[41]. Performing the religious freedom implies the existence of the spirit of tolerance and mutual respect, which is why the relations between cults, according to art 29 para (5) from the Constitution, are prohibited any forms, means, acts or actions of religious enmity.

Aristotle said, in his work „Politics", that only by law someone becomes a slave or a free man, by nature people are not being distinguished by nothing[42], or to return to times long gone and undesirable to be raised, by imposing laws of beliefs or religious faiths by the state authority, would deprive the individual of the ability to freely develop their personality, including under the aspect of the spiritual dimension and the democratic character of such a society would be diluted to extinction.

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[40] See, in this regard, Zlătescu Moroianu, Irina, *Applicable religious rules according to the law of the state in Romania,* article published in *Human Rights Review* no 2 from 2014, Bucharest, review which is published by the Romanian Institute of Human Rights, ISSN 1220/613X, pp. 9-12, article studied on Site: http://www.irdo.ro/file.php?fisiere_id=778&inline=, accessed on 15.04.2015.

[41] Unlike Romania, other states recognize, by fundamental laws, the existence of a state religion. Thus, for example, the Constitution of Argentina, by Section 1, Part 1, Chapter 1 states that the Federal Government supports the Roman-Catholic Apostolic religion. The Constitution of Argentina was adopted in August 22nd 1994, This Constitution has been studied on Sitehttp://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html, accessed on 15.04.2015.

[42] Aristotle, *Politcs,* National Publishing House, Bucharest, 1924, p. 24

THE KNOWLEDGE OF THE EFFECTIVE LEGISLATION – A NORM FOR THE EVOLUTION OF THE CONTEMPORARY SOCIETY

Mihai ŞTEFĂNOAIA *

Abstract: *The human traffic represents an extremely serious social phenomenon, which brings serious prejudices to the fundamental rights of men. The human traffic (infringement that is regulated and incriminated by the current Penal Code in the Special Part, Title I – Infringements against the person, Chapter VII – The traffic and the exploitation of the vulnerable persons, article 210) represents one of the modern forms of slavery, together with work exploitation and the traffic of organs. Due to the abolishing of slavery and the incrimination of its practices, this form of human denigration has continued to exist against all forms of rebutment. This sitution may be explained through the theories mentioned above. Still, one of the reasons for which slavery has resisted until nowadays is because it has changed its form, adapting to the new social and political requirements. As a result, the three forms of modern slavery have appeared, among which the human traffic.*

Keywords: *human traffic, law, slavery, protection, legislation.*

The contemporary Romanian society must face, simultaneously, both the destructive effects of the powerful economic and social seisms, which have affected the whole central and eastern European region in the past decades, and the challenges connected to the relaunching of the development process, in accordance to the common objective of the European Construction – a modern, competitive society, with a high degree of social cohesion, which guarantees and protects the rights of all its citizens.

The human traffic is an extremely serious social phenomenon, which brings serious prejudices to the fundamental rights of men. The phenomenon has a long record in countries from Africa, Asia and the two Americas, spreading in the European countries after 1990, after the fall of the comunist regimes and the Balcan crisis. The countries from the south – eastern and central part of Europe represent not only source countries but also trazit ones for the human traffic. In a relatively short period of time, after the 1990s, this region has come to compete with the traditional ones such as, Latin America, South – East Asia or Africa, representing one of the most important sources of women and children who are used for sexual traffic or as labour force in Western Europe.

The evolution of the social and economic context in Romania of the 90s has favoured the appearance of some social cleavabilities and implicitly, of some social levels which are vulnerable to traffic. By the end of the 90s and the beginning of the 2000, the geographical proximity to the conflict zones from the former yugoslavian countries, has also led to an increased incidence of the phenomenon in Romania.

Once with the fact that it has become part of the European Union, it came natural that Romania would become a destination country for the human traffic.

Herefrom, the need of a capable and efficient system to manage the situation of a larger number of persons from other states, who are trafficked on the Romanian territory and who will need assistance and repatriation in the native country. (The National Anti-Traffic Strategy, 2006- 2010, 13th of February 2006, page 4).

The notion of human traffic is defined in many legal norms which regulate its prevention and control, both at national and international level. Against all these, there are still many people who mistake this infringement for prostitution or even proxenetism. That is why we find it compulsory to define all these terms, so as to lower the degree of confusion.

The human traffic is defined, at international level, by the Organization of the United Nations (The Convention from Palermo, 13th of December 2000): „the human traffic represents the recruitement, transportation, sheltering and receiving persons, by means of menacing and other forms of restraint, by kidnapping, racketeering, fraud or power abuse, by using a vulnerable situation, by giving or getting money or other goods with the purpose of having the consent of a person upon another for exploitation. By exploitation we understand prostitution or other forms of sexual exploitation, labour or forced services, slavery or similar practices, servitude or organ prelevation".

At national level, before the new Penal Code had been adopted, in February 2014, the former law no. 678/2001 *for preventing and controlling the human traffic*, defined, in article 12, the infringement of the human traffic as being „the recruitment, transportation, transfer, sheltering of a person, by threat, violence or other means of constraint, by kidnapping, fraud or deceit, authority abuse or taking advantage of the fact that the person cannot defend himself or express his will, or by offering, giving or accepting money or other goods in order to obtain the consent of the person who has authority over another, with the purpose of exploiting that person."

At the same time, *prostitution* was incriminated by the old Penal Code of Romania, which defined this infringement as being „the deed of a person who earns his living or the main means of living by practicing in this respect sexual intercouses with different persons."(art. 328). In tight connection to this, , still in the Penal Code, the term *proxenitism*meant the „urging or encouraging to the practise of prostitution or taking advantage from somebody practicing prostitution" (art. 329, Old Penal Code).

In the current Penal Code there can be found *the infringement of human traffic* regulated and sanctioned in its Special Part, Title I – *Infrinfements against the person,* Chapter VII – *The traffic and the exploitation of the vulnerable persons*, art. 210, and the infringement of *proxenitism* in art. 213 Penal Code, the same title, the same chapter. In return, we no longer find the infringement of *prostitution*, this deed being considered only a contravention after the new Code has been adopted.

As a consequence, although all these three deeds may seem similar in some respects, there are still major differences between them. Firstly, the human traffic involves the existence of a so-called „network", meaning at least three elements: recruitor, seller and exploiter. In the case of prostitution and proxetinism, the recruitor and the exploiter may be one and the same person. In other words, the human traffic becomes part of the organized crime.

In the moment of conceiving the current Penal Code, the legislator had in mind the fact that, in most of the cases, the person practising prostitution has the quality of the victim in the process of the development of the anti-social acts which are done in order to obtain material goods from the human traffic, and, secondly, by prostitution, we understand only abuse and sexual exploitation, whereas the human traffic also implies more types of exploitation and abuse, such as economical, physical, sexual etc.

Last but not least, the traffic is different from prostitution by the fact that, at least in the initial phase of the exploitation, there is no victim's consent. Initially, the existence of the victim's consent represented an essential criterion in order to frame the deed, but, because of the judicial impediments, the current legislation has suffered modifications by

which the consent of the victim is no longer relevant. The practical problems that have occurred especially in the domain of the penal prosecution, are mainly generated by the psychology of the victim (the attachment of the victim to the felon).

Starting from this perception on the human traffic, we can conclude that the expression „*victim of the human traffic"* reffers to any person subjected to the traffic, regardless of age, gender or other things. Consequently, in the category of the victim we may find women, children, men, old people, etc. The *recruiter* represents the person involved in the first stage of the human traffic, in which the victim is closely studied, in order to find all those vulnerable points to be tken advantage of, the initiation of the contact with the victim and gaining her confidence. The *trafficker* represents the person who commits the infringement of the human traffic. He represents in fact the „*linking person",* the one who makes the connection between the recruitors and the exploiters. For a better understanding, the trafficker represents the seller from the economical point of view, , being found in a continuous change between demand and offer, but on a very dangerous market. The *exploiter* represents the last link of this chain, exploiting the victim. We cannot speak about stability among these roles that the felons may have in the criminal network. In other words, the recruiter can become trafficker or exploiter, the trafficker recruiter or exploiter and the exploiter, recruiter or, more rarely, recruiter.

The object of the human traffic

The „flesh" traffic has more variations, according to the following criteria:

a) According to the subjects that are victims of the traffic we can distinguish:
   - traffic of men
   - traffic of women
   - traffic of children;

b) According to the way the will of the victims is expressed:
   - traffic in which the victims have been attracted by expressing their own will;
   - traffic in which the victims have been attracted by means of restraint of any kind;
   - traffic in which the victims have been attracted by deceit.

c) According to the territory between the limits of which the traffic is made:
   - traffic between the regions of the same state (from one region to another);
   - transborder human traffic (from one state to another);

d) According to the purpose for which it is made:
   - traffic with the purpose of slavery;
   - traffic for sexual exploitation;
   - traffic for the pornographic industry;
   - traffic for organ prelevation;
   - traffic for being used in army conflicts.[1]

As a result, the human traffic has as activity object:
   - women and girls for the sex industry;
   - children to be given for adoption;
   - old persons, children with disabilities used for begging;
   - children, for committing felonies (pocket theft, car breaking, etc.);
   - traffic of children for sexual exploitation;
   - men, women and children for forced labour and slavery;

[1] V. Guţuleac *Drepturile omului şi traficul de persoane* în Criminalitatea în R. Moldova: Materialele conferinţei ştiinţifico-practice internaţionale aprilie 2003, Ed. Academiei de Poliţie „Ştefan cel Mare", Chişinău, 2003, pag. 46.

- organs or human tissues or persons for organ prelevation, etc.[2]

Around all these objects of criminal activity, we may distinguish different forms of the human traffic. We are going to present a brief characterization of each of them.

The traffic of women and girls for the sex industry

One of the most widely spread forms of the traffic is represented by the traffic of women and girls who are used for sexual exploitation. This has known an unprecedented growth in the past decade, getting to the point where it affects the mental and physical health of women, it severely diminishes their moral status, which not only that it terribly affects their social position, but also, itshatters the basis of the society – the family. The traffic has grown once with the massive exodus of the labour force towards the developing countries, in a desperate search for a better living. In the present case, the victims are used especially for prostitution, pornography (movies, photos, images with live sexual intercourse that are broadcast on the Internet, etc.) orsex – shows (striptease, different erotic dancing, etc.)

The victims are mainly prostitutes: some of them hope that, by getting to another owner, they will earn more money and, consequently, they accept to be sold or others may not even be asked, in both cases they will get to know a treatment which does not correspond to their will. Much worse is the situation of women and girls who under no means accept to be trafficked or to practise prostitution. These women and girls are recruited under the pretext of being offered a well - paid job across the borders, as, afterwards, to be submitted to cruel sexual exploitation in the brothels from Kosovo, Macedonia, Bosnia, Albania, Greece, Italy, Germany, Sweden, Turkey, etc. lately, there has been noticed an increase in the traffic towards the Arab states: The United Arab Emirates, Kuweit, Siria, etc.

The traffickers use the following routes: Romania – Serbia – Kosovo – Albania – Italy; Romania – Serbia – Macedonia – Greece; Romania – Hungary – Austria – Germany; Romania – Bulgaria – Turkey.[3]

In order to reach their hateful goals, the traffickers make use, in this case, of any means: the victims are kidnapped or deceited, by being promised all that they want (usually to get to proserous countries where they can earn a good living) and then are forced to practise prostitution, being intimidated, maltreated, raped, submitted to sexual perversions or even murdered.

From the victims' confessions[4], it results that the treatment to which they are submitted, can be described as a constant ordeal, which leaves them with untreated marks, terribly shattering their mental and physical health. These women lose, in most of the cases, their mental strength to escape from the captivity of their traffickers or pimps, and even worse, they come to bear a mental instability that makes them become real prostitutes, even trying to recruit other women. The psychological recovery and the social reintegration of the victims of the human traffic with the purpose of social exploitation is very difficult, needing a specific psychological, criminal and medical approach to be developed in stable and adequate conditions.

The traffic of children for sexual exploitation[5]has developed mainly in the past ten years, although it has existed, probably, even in the previous years. Anyway, it represents a very serious threat to our society and it requiers a very serious approach.Victims of the

[2] Octavian Bejan, Gheorghe Butnaru *Traficul de fiinţe umane*, Ed. Pontos, Chişinău, 2002, pag. 26.
[3] *Trafficking in Human Beings in Southeastern Europe*, UNICEF, 2002, pag. 9.
[4] *Ce spun 24 de femei traficate*, Centrul de Analiză şi Investigaţii Sociologice, Politololingve şi Psihologice CIVIS, 2001, pag. 7.
[5] Octavian Bejan, Gheorghe Butnaru, *op. cit.*, pag. 34.

wrong - doers are not only adult women but also minors, even male minors (persons of masculine gender).More than this, among the victims there are more and more often children of both sexes.

From these relevant cases we may find out that the traffickers take under different pretexts(modeling),children of both sexes,between the age of 3-12,from their parents and eventually sell them to some foreign pedophiles for sexual exploitation, pornographic articles, etc.This is due to the increasing of the phenomenon lately, which, actually has come to alarming rates.The researches made prove the fact that the demand comes maninly from the balcanic and scandinavian countries.More than this, taking into consideration all the facts presented here, we may predict a greater increase of the phenomenon due to the ever increasing demand and corruption that dominate the former socialist countries. However, the pedophiles prove themselves to be rich persons with a great political influence.

The traffic of children with the purpose of adoption[6]has greatly developed after the fall of the communist regimes in the countries from Eastern Europe.The networks and the groups of traffickers have occurred at the beginning around orphaneges, speculating, on the one side, multiple requests of citizens from developed countries(especially the USA and Canada) to adopt orphan children from the former communist countries, and on the other side, the difficult procedure and birocracy that could be found in these countries.

The traffickers have willingly offered themselves to help, but in reality by means of corruption and forgery,obtained, illegally, the necessary approvals for the adoption of children, for great sums of money.Eventually, they have spread their activity, getting children from their biological parents who found themselves in great material need and were willing to commit such hateful transactions, that ended in the selling of their children.The negative cosequences of this phenomenon of human traffic can not be well controlled by the legal institutions, often becoming victims of some inhuman treatements of even sexual abuses. Sometimes these children are used both in the sex industry and also for tissue and organ prelevation.

The traffic of old people, children, disabled persons with the purpose of begging[7]meets the demand of some criminal groups oriented to obtain profits by organising begging.We speak about the criminal groups which operate abroad, especially in developed countries where they earn great amounts of money.The victims are deceited by different means, usually by being promised to work abroad and then are forced to practice begging.For the work they make they get a very small amount of money, are capted in miserable conditions and in a continuous mental tesion so that their will can be defeated.The desire of the victims to give up thes activity is rejected, being under permanent constrained to continue practicing begging.In order to accomplish begging, children are mainly preferred but also old people, women and disabled persons.

The traffic of children with the purpose of commiting infringements[8]**.** The traffic we are discussing about in this paper comes to meet a demand from the criminal world so as to accomplish their criminal goals.The demand refers to children who are being traned for criminal activities. The criminals use these children for commiting pocket theft, car theft, etc.They take benefits fromall the financial goods that have earned, whereas the children get, in the best of cases, a very insignificant amount from that or they may not get anything at all. The way in which these activities take place is very convenient to the felons, because

[6] *Idem*, pag. 27.
[7] *Ibidem.*
[8] *Idem*, pag. 28.

they can avoid legal liability: the children do not know the criminals very well, and they cannot give too many details about them, so that finding out their identity becomes more and more difficult. Another problem is that, in case of being found and the children being taken to the police, the criminals may very well continue their activities, making use of other children. The facts described above take place in prosperous foreign countries, where the profits are increased, and the police do not have data about the criminals. As a consequence, other relatives of the wrongdoers who train children for these illegal actions, take advantage of the demands and sell children to them.

The traffic of women, men and children for forced labour or slavery[9]. Even though the Middle Ages have long time dissapeared, and the rights and liberties of men, know, in modern societies, a great and unprecedented concern in history, some manifestations of slavery still exist nowadays. The modern day slavery does not differ too much from the historical one, the single difference representing the illicit practice. By this we understand that the person (the slave) finds himself in the possesionof another person (the owner), who uses him according to his own will (exploiting him) or even administer him, such as giving him away at any time (selling – buying or by giving). The master usually submits the person he owns to various forms of physical and intellectual exploitation. Moreover, the person being under the possesion of the master is deprived of freedom until the end of his life, unless the authorities set him free or he suceeds in freeing himself from slavery or being helped by a third party. In the case of slavery, the traffic takes place only if someone sells a person with this very purpose, or when the master himself gives him away.

The forced labour phenomenon and the traffic done with this purpose, have considerably increased lately, once with the occurrence of a huge numberof cheap labour force coming from ex- communist countries which are in a very poor state. To this there has been added the offer from asian countries, due to the options of illegal migration, as a conseqence to the disecurization of the borders produced in the ex- communist countries.

The traffickers have promptly reacted to this process, and more and more people have become victims of the forced labor. The classcic form of forced laborresides in imposing to a person to execute, for a period of time, different physical or intellectual activities for the benefit of another. This can be done, under different forms and means, more or less obvious. For example: a person who gets to a foreign country by illegal means, is given work, as a result of the illicit trazaction between the traffickers and the master, fact about which that person knows nothing. He works for a period of time without being paid, because the employer promises him to give him the money. At a certain point, the master announces the police about the illegal stay of that person, reason for which he is expelled, without getting any more money. Another way that is used is to offer a person in need the amount of money necessary in order to get to a prosperous country, on condition to work in order to give back the money for as long as it takes. In such cases, the traffickers get the money directly from the boss who hired him, as a result of their prearranged agreement.

The traffic of organs and human tissues or persons with the purpose of their prelevation[10]

The medical sciences have registered some incredible progress in the past century, offering people unexpected hope for the prolongation of their life. Among the great successes one can mention the possibility to replace the sick organs with some healthy

[9] Octavian Bejan, Gheorghe Butnaru, *op. cit.*, pag. 28, 33.
[10] Octavian Bejan, Gheorghe Butnaru, *op. cit.*, pag. 29, 35.

ones, which may come from doners, alive benefactors, or people found in clinical death, when those people's relatives accept this thing, from a profoundly human impulse.

However, getting those healthy organs may become a complicated thing, due to the existing penury. In this search and attempt to save the beloved ones, people are capable of doing many things, including some immoral ones. As a result, there is a great demand for healthy organs and tissues. And, as it was expected, the felons take advantage of these terrible situations. They have answered to the demand of people in need by sending some invitingly offers, but illegal. In this purpose, the traffickers make use of a great range of means. For example: they persuade the people in need to sell their own organs or their children's, thing for which they are given big amounts of money or, they may get involved in illegal adoptions of children whom they will eventually adopt and who may also die, when the prelevation of organs does not leave any chance of living. Even adults may become victims of this, too. In this case they are deceited under various forms (that they are helped to find a very well paid job in a developed country), and then they are submitted to forced surgeries, in many cases even losing their lives. There are, however, cases in which human beings are medically exploited, without any justification or dtrong arguments, in order to perform some medical research.

The traffic is thus manifested, by the following means:

1) the prelevation of the organs inside the borders of the country and eventually, their trading abroad;
2) the selling of people over the borders with the purpose of their organs to be prelevated.

Firstly, the doctors from local hospitals are usedand they perform these operations without the knowledge of the patient or his relatives. In the latter case, the victims are transported abroad, under different pretexts (usually being promised a well paid job), where their organs are prelevated or they are exploited in different ways.

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THE ANALYSIS OF THE ESTATE RESTITUTION PROCESS

Loredana Adelina PĂDURE *

Abstract: *According to the Activity report of ANRP, the total payment securities issued by ANRP in 2014, for the first tranche is 544 922 855 lei, which makes the issue to be of vital importance for the country's economy. The paper addresses the analytical method, examining the activity report of ANRP in recent years, bringing into question the legislative framework in which takes place this difficult process of the return of those who were deprived by pro*[*]*rietății this right during communism.*

Keywords*: Activity report of ANRP restitution of nationalized houses, damages*

Short analysis of the Activity reports of ANPR

According to the activity report of A.N.R.P. for January 2015, the activity of the National Commission for Compensation buildings counted in the analysis of 414 cases analyzed, seven fund obligations in the amount of 3,562,366 lei in compensation issuing 153 decisions issued, amounting to 54,505,305 points and 190 of invalidation decision.

The activity of the Special Committee for restitution of property that belonged to cults and national minorities resulted in 60 decisions issued related to the 60 cases submitted to the Commission.

Payment Securities issued under Law no. No 165/2013 for tranche. I have issued 28 titles payment in the amount of 1,667,310.77 lei, tranche no. II 500 titles were issued for payment in the amount of 8,196,345.81 lei.

According to the Activity report of ANRP in February 2015, the National Commission for Compensation of buildings analyzed 444 cases, issued 19 titles of compensation in the amount of 21,913,450 lei, compensation 177 decisions issued, amounting to 58,014,465 points, 227 invalidation decision.

The ativity of the Special Committee for restitution of property that belonged to cults and national minorities issued 77 decisions pertaining to the 77 cases submitted to the Commission.

Payment Securities issued under Law no. 165/2013: tranche no. I was 20 in the amount of 239,540.53 lei, tranche no. II, 3015, amounting to 54,178,756.58 lei. Under Law no. No 164/2013 tranche. I: Number of units issued payment - 243 in the amount of 4,297,923.76 lei.

Activity petitions and public relations resulted in responses to petitions for the Directorate to coordinate enforcement of the return of lands - 324 for the Directorate to coordinate the implementation of Law No.10 / 2001 to 1443 for the Directorate for implementation of international treaties - 710 Directorate coordinating technical secretariats of the Special Restitution Commission - 34 for the Secretariat and issuing debt service payment - 489.

In 2014, according to the Report ANRP, one of the priorities ANRP it was to amend the regulatory framework for determining and paying compensation due to persons who have abandoned their goods in Quadrilateral, Bessarabia, Northern Bucovina and Herta.

* Lect. univ. Ph.D., Valahia University of Târgovişte

Given that, at the end of 2013, Romania's Constitutional Court declared unconstitutional EO no. 10/2013, enactment providing for the payment of such compensation in installments over a period of ten years, has become finding legislative solutions in accordance with the Constitution, leading to the prompt resolution of claims and compensation for damages based on the actual financial possibilities state.

In June 2014 A.N.R.P. Government submitted the draft law on measures to accelerate and complete the process of settling claims based on Law no. 9/1998 and Law no. 290/1998. The bill was approved by the Executive on 26 June 2014. On 30 September 2014, the bill was adopted by the Senate, and on 25 November the Chamber of Deputies.

The new law, Law no. 164/2014 came into force on December 18, 2014.

According to Law no. 164/2014, payment of compensation is performed in the chronological order of issue, where applicable, the decisions of county committees / Bucharest Commission for enforcing Law no. 290/2003, the order issued by the Head of the PM Chancellery payment or decision issued by ANRP under Law no. 9/1998 in equal annual installments, spread over a period of 5 years from the date of January 1, 2015.

Before dividing into installments by decision of the President ANRP, will be updating the compensation amount with inflation for the period from the issuance of the aforementioned acts, until the entry into force of the law. From 18 December 2014, any enforcement proceedings ANRP on the rights established under Law no. 9/1998 and Law no. Law 290/2003 was suspended until reaching the deadlines to which they are due payment obligations under Titles payment.

A.N.R.P. It is required to validate or invalidate, within 18 months from 1 January 2015 the files relating to decisions issued by county commissions, respectively the Bucharest to Law no. 9/1998 and Law no. 290/2003.

The settlement of compensation files of the National Commission for Compensation buildings (CNCI) in 2014 resulted in a settlement of 2,876 cases, being issued 1,120 decisions for compensation in the amount of 531 147 606 points; 394 titles damages in the amount of 664,871,672 lei; 1,361 decisions for invalidation of decisions and orders by local authorities and other entities vested proposed compensation.

According to Law no. 165/2013, with points awarded compensation decisions will gradually be able to use in lei, from 1 January 2017.

- 1,054 cases established under Law no. 10/2001 and for which C.C.S.D. approved during the period 2006 - 2008, priority claims settlement (files „special case”);
- 1205 Cases established under Law no. 10/2001 and randomly selected for settlement in CCSD meetings in 2006;
- 1,109 cases established under Law no. 10/2001 and work data on the number of registration under Decision CCSD no. 2815/2008 (ANRP dossiers submitted before the entry into force of Government Ordinance no. 81/2007, from number 1 to number 6,200, respectively ANRP dossiers submitted after the entry into force of Government Ordinance no. 81/2007 files number 37,500 number 43,000);
- 265 cases of recovery of demand in rated securities and folders created under art. 31 of Law no. 10/2001, concerning compensation for actions at former companies;
- 584 cases approved C.C.S.D. in 2007-2011, but no decision was issued as compensation accounting;
- 387 cases were identified as nugatory.

The cases were analyzed either on the date of the judgment (from oldest to most recent) or in order CCSD meetings which it was decided by the counselors distribution.

Resumption of compensation payments

According to the obligations assumed by Law no. 165/2013 in 2014 A.N.R.P. unlocked pay compensation established for holders of cases established under land laws and the Law no. 10/2001.

Initially, bonds were issued for records related payment of the first installment approved by CCSD during 2007 - 2011 (before the adoption of Law no. 165/2013).

Subsequently, the titles were issued and payable for the first installment of compensation amount determined by the decisions issued by Law no. CNCI 165/2013 for the period June 2013 - December 2014. The total amount of payment securities issued by ANRP in 2014, the first tranche is 544 922 855 lei.

Subsequently budget rectification which took place at the end, ANRP it made voluntary payments in December in the amount of 19,652,574 lei in cases where there is a judgment ordering payment (Law no. 9/1998 and Law no. 290/2003) or a certificate issued in payment Law no. 247/2005.

Law no. 165/2013

Law on measures to complete restitution in kind or compensation, the assets confiscated during the communist regime in Romania was published in the Official Gazette, a month after the Government assumed responsibility for the new provisions.

The normative act was published in its recently agreed with representatives of the European Court of Human Rights and assumed by the Government in April: „The Romanian Government took responsibility, Wednesday, April 17, on the Draft Law on measures to complete the restitution process, in kind or compensation, real estates abusively taken during the communist regime in Romania", according to the Chamber of Deputies.

Announced by the government since early last year, the law on measures to complete restitution in kind or compensation, the assets confiscated during the communist regime in Romania was launched for public debate by the National Authority for Property Restitution, address of the institution's own mid-March. Later, it followed the whole legislative process in Parliament, was adopted by the government, which assumed responsibility for the new measures and, then promulgated by President Traian Basescu and published in the Official Gazette.

Under the document, new provisions apply and submitted requests within legally unresolved until the entry into force of new rules and cases in restitution of the assets confiscated, pending the entry into force courts of law.

At the same time, the new provisions may benefit people who have the European Court of Human Rights applications where analysis has been suspended under the pilot judgment Maria Atanasiu announced in due and others against Romania.

Cash sums of money in compensation in cases already approved by the Central Commission for the establishment of compensations and amounts determined by court decisions, final and irrevocable, it will do within five years, in equal annual installments starting in January 2014. According to the normative act, an installment amount can not be less than 5,000 lei. According to the document, during the 10 years, pay related maintenance building will be returned to holders of current. Moreover, the new owner will have to pay a monthly rent, the amount of which is determined by Government decision later.

Where, during the 10 years, the building is no longer necessary in the public interest activities, the obligation to maintain the property ceases as the destination.

Compensation on points

On the other hand, if the return of the buildings abusively taken during the communist regime is no longer possible, clearing points is the only remedy equivalent payable. Equally, clearing points, including holders who are granted alienated due rights under the law of restitution.

This new scheme was announced by Victor Ponta, who pointed out, however, that it is one of the principles on which it was drafted enactment. „Where can not be returned in kind, based on a point system similar to the one applicable at the moment by notaries to assess buildings basically are issued all the titles, after which we returned in cash which shall be irrevocable in kind „Ponta stated in March.

A point has a value of 1 leu

In order to capitalize on points, the quoted document states that the National Fund will be set up farmland and other property, managed by Domain Agency Statute. The fund originally agricultural land is not subject to restitution, private state owned, and later can be supplemented by other property owned by the state public institutions owning the proposal.

Land allotted to local committees to complete the restitution process, but forfeited the former owners until January 1, 2016 fall of law and affected national fund recovery points awarded.

The granting of compensation for properties that can not be returned in kind, the issue by the National Commission of a decision clearing the building points taken improperly. Once again this decision, points awarded can be used to purchase the property at public auction National from the National Fund, with effect from 1 January 2016.

Law recently published sets, however, that within 3 years of receiving compensation decisions by points, but not earlier than January 1, 2017, the holder of the evidence that he participated in at least two auctions national property can opt for capitalization and cash points.

Under the new rules, these amounts will be paid by the Ministry of Finance not later than 180 days from issuance. Law no. 165/2013 contains a chapter on measures on speeding-claims. Specifically, the regulations imposed by the legislation established that public bodies are required to resolve restitution claims and issue decisions to accept or reject them as follows:

If the law invested entity does not issue a decision, which finds that the person may appeal within 6 months after the deadlines provided for settling claims. Also, if the institution issues a decision, the person is deemed justified this decision may appeal within 30 days from the date of communication.În both cases, the court will rule on the existence and extent of ownership and may order restitution in kind or granting remedies.

How nationalized properties will be returned?

Restitution law enforcement rules were recently published in the Official Gazette, which is developed for the uniform application of the provisions introduced in the area since May. Specifically, the rules establish the procedure of land restitution in the public and private state and the procedure for recovery of points received in cash compensation decisions.

Under the document, new provisions apply and submitted requests within legally unsettled the entry into force of new rules and cases in restitution of the assets confiscated, pending the entry into force courts of law.

Compensation points

Law no. 165/2013 establishes at the outset how restitution of properties abusively confiscated during the communist regime. Thus, according to the regulations, first „rule" is the return of the property, provided that the owners keep restituted buildings destination for 10 years.However, where the return of the buildings abusively taken during the communist regime is no longer possible, clearing points is only equivalent remedy to be granted. Equally, clearing points, including holders who are granted alienated due rights under the law of restitution.

The granting of compensation for properties that can not be returned in kind, the issue by the National Commission of a decision clearing the building points taken improperly. Once again this decision, points awarded can be used to purchase the property at public auction National from the National Fund, with effect from 1 January 2016. Furthermore, beneficiaries will be required at headquarters ANRE, compensation in cash. This request shall be submitted in person or by proxy with power of attorney in original and shall be accompanied by compensation decision or certificate holder points in the original and the identity card of the applicant. If the request is made as an heir, it is necessary to submit documents that prove it.

Law no. 165/2013 establishes that the holder of the evidence that participated in at least two national real estate auctions can opt for cash recovery points within 3 years of receiving compensation decisions by points, but not earlier than January 1, 2017. According to the rules for applying the Law no. 165/2013, in the decision which establishes quotas clearing holders, ANRP title will issue one payment. Also, where compensation was the decision to set the number of points due to each holder, the instrument shall be issued individually. „The issue of each title payment issue a new certificate holder points, remaining adequately capitalized points", reads the rules.

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THE FOUNDATIONS OF LIBERALISM

Alina-Gabriela MARINESCU *

Abstract: *The liberal political doctrine has emerged in the conditions of some deep transformations happening in the Western European society which determined a new status for individuals, based on freedom, anticlerical and anti-feudal reflexes under the impact of socio-political movements; attempts of releasing from traditional constraints, disapproval for cultural and political monopoly of the Catholic Church, preoccupations for the elimination of religious intolerance towards free thinking and demonstrable truths, encouraging free speech The heralds of the changes that were about to come were the Italian Renaissance and Reformation which maximum intensity was reached in Germany. The Renaissance lays the foundations of a new vision on the human existence, a secular vision, in which the individual is the architect and constructor, empowered with a freedom of will and thought. Rediscovering the force and nobility of the human being, in the efforts of rejecting the medieval order motivated the option regarding the emancipation of individuals by culture. Liberalism as a social and political theory emerges at the end of the 17th century, having as main features: the distinction between state – representing the guarantor of individual freedom, understood more as free initiative in economy – and society, represented by autonomous individuals aiming to achieve their purposes; the limitation of the state powers. The principles for organizing and functioning of the state are inferred from the „natural state" in which the individual becomes the main character due to his specific, unique and unrepeatable qualities, making him a being with a specific identity.*

Keywords*: liberalism, political doctrine, theory, values, principles*

Liberalism as a modern political doctrine has emerged in the urban zone, where due to specific activities (manufactures, industry, commerce) men were used to „cooperate based on contracts", to note that every useful activity generates changeable effects and consider that subordination to state's authority is conditioned. „Power and sovereignty of the people, the original contract, the authority and freedom of Parliaments, freedom" were basic ideas for the promoters of liberalism[1].

As every power, government also was born from and by aggression; this is why the main duty of liberalism is to remove all forms of aggression applied by government. The theoretic sources and the act of birth of liberalism shall be reconstituted by invoking the principles of classic economy, from Stuart to Adam Smith and from those defined by the political work of John Locke to the two *Declarations of Human Rights* (the American one in 1787 and the French one in 1789), as well as different constitutions adopted in accordance with the declarations.

In its initial form we also find the synthesis made by the theoretical effort of some personalities such as François-Marie Arouet Voltaire (1694-1778) and Charles Louis de Secondat Baron de Montesquieu (1689-1755), the ideas of physiocratic school representative such as François Quesnay (1694-1774) and Anne-Robert-Jacques Turgot (1727-1781) and of the British economic-politic representatives such as Adam Smith (1723-1790) and David Ricardo (1772-1832).

* Lecturer PhD, Faculty of Social Sciences, University of Pitesti, alina.marinescu74@yahoo.com

[1] Spencer Herbert, *Individul împotriva statului. Guvernul funcţionează ca un filtru invers: introduce un lucru curat şi iese ceva murder*, with a foreword by Nae Ionescu, Incitatus Publishing-House, Bucharest 2002, pp. 13-14

Their work was preceded by the contributions of the initiators of this ample movement entered into history as the Reformation, which brings to debate the redistribution of the role played by the Church in society, by separating the spiritual power from the temporal one. It is requested to the Church to return to its initial mission in order to support the individual to come out his sins. Debating the role of the Church, as an almighty institution is one of the components of liberalism. Martin Luther and Calvin are among the main defenders of the freedom of conscience – core idea of liberalism.

By teaching the idea of the direct relation of the believers with the teaching of the Holy Scripture and the trust in the individual's capacity to reach all by himself, without intermediary, God's Word, the Reformation encouraged to appreciate free conscience even more than strictly follow the advice offered by religious or laic authorities.

John Locke (1632-1704) clearly stated the fundaments of the liberal doctrine in his work „Two Treatises of Government", namely an „Essay concerning The True Original, Extent, and End of Civil-Government". The essence of Locke's liberal doctrine stated de principia formulations among which we name the statement of the fundamental role of the laws of nature and of the need to comply with them; the formation of the civil society in order to insure the function of the right of each individual to act whenever his person or his goods is in risk and to be satisfied by the penalty applied to the offender; the placement of the right to property within natural rights and placement of the owner and his property at the foundation of the civil society; the apparition of a common judicial system necessary to decide in litigations between individuals and to punish the offenders; the limitation of the Government's power to not go „beyond the borders of common welfare". In this context, government is manifested only „in the virtue of the permanent, enforced laws known by the people" and recognizes the rights and „force of community, from the inside, only in order to guarantee the application of these laws and from the outside, in order to prevent and fix the harms committed by foreigners"[2].

John Locke operates a mutation in the politico-philosophical thinking by placing the natural law in direct relation with the individual's freedom. „*Natural freedom of man* – he says – *consists in living independently by any superior power on this Earth, without depending of the will and legislative authority, without any subordination to other person and in recognizing only the law of nature. Freedom of man in society consists in not considering any other legislative power than the one established by mutual agreement in the Republic and not to tolerate the empire of another will or constraint from any law other than those set by the legislator, according to its mission*"[3].

The separation of powers, the specialization of the public institutions and their cooperation in order to ensure freedom, the obligation of the Government to act for the good of society, the prevention of arbitrary and pleasure, the performing of its attributions by the executive based and in the limits of the law, forms a sphere of issues treated very insistently by the English philosopher.

The legislator cannot alienate its competence, nor can place it in other hands because this power is „derivate from the people in the virtue of a cession and to a special institution which is identified with the object of the cession"[4].

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[2] Châtelet Francois, Pisier Evelyne, *Concepţiile politice ale secolului XX*, translation by Mircea Boari and Cristian Preda, Humanitas Publishing-House, Bucharest, 1994, p. 107
[3] Locke John, *Deuxieme traite de gouvernement civil*, Paris,Vrin, 1969, p. 38
[4] Locke John, *Deuxieme traite de gouvernement civil*, Paris,Vrin, 1969, p. 78

The liberal theory of G.W.F Hegel (1770-1831) recognizes the conflictive feature of production, consumption and distribution, stating the thesis according to which the individual's freedom and free usage by each person of his activity and his inherited or achieved goods as a result of his activity, generates illegalities between individuals and different degrees of opposition, on the one hand between those having the same profession, between the rich ones who want to get even richer, and not least between the rich ones and those who are sinking into poverty.

Hence, the conclusion of the theory's inconsistence that as the civil society is consolidated, the industry is developed and a regulation of the reasonable order is produced in the meaning that it can restore the balance in state. Civil society instead of being a solution for harmony is a danger of disorder, tension and social explosion.

As a consequence, classic liberalism is wrong when it defines freedom as a simple self-determination of the individual in the limits of the natural law and not by reason, on a universal principle. Therefore, the theories of the natural law and state must be abandoned[5].

The Hegelian theory on civil society has contributed to the enlargement of the concept and functions within state. First, Hegel strictly separates civil society from the political one. Secondly, he considers civil society as being the public space where individual, in their double quality as natural persons and moral subjects, pursue and achieve their own welfare within mostly contractual relations. Thirdly, civil society is specific to those societies based on market economy, and not least, civil society has three categories of functions, among which we name the economic and social one (organizing institutions, establishing the practices concerning the production, distribution and consumption of goods), the legal one (recognizes and protects property), the politic one controlling and counterbalancing the authoritarian temptations of the state and the political representation of the individuals or groups' interests[6].

The Hegelian theory considers that there are three types of institutions for the above mentioned three functions: justice, administration and corporations. The administration has a wide spectrum of activities: organizing and enforcing public order, protecting the property, public education, eradicating poverty, protection against the formation of the plebe, conservation of the population's health, enforcing the ethical rules. Corporations were designed as „voluntary organizations in which persons were economic organized and integrated according to their specific interests and are represented in the legislative system"[7].

Their purpose aims the consolidation of the ethical sphere, cultivation of virtues, of professional honor and probity, the protection of the individual against the devastation effects of the modern society's economy, the political education of the modern in individual. For Hegel, communities become people only when they are formed in states.

The two roots of liberalism – Locke's and the Hegelian one – are the philosophic base of the political liberalism which has as key elements the equality and freedom of all, property as a natural right and human rights. Political liberalism aims the relation between the individuals and the state, the freedoms offered and guaranteed for the citizens, the mechanisms of the state in guaranteeing individual freedoms and levers of the state for maintaining public order and avoid freedom excesses that can throw society into anarchy[8].

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[5] Neculau Radu, G.W.Hegel (1770-1831), *Principiile filosofiei dreptului*, in the volume *Dicționar de scrieri politice fundamentale*, coordinated by Laurențiu Ştefan Scarlat, Humanitas Publishing-House, Bucharest, 2000, p. 158

[6] Benewick Robert, *Dicționarul marilor gânditori politici ai secolului XX*, Artemis Publishing-House, Bucharest, 2002, p. 233

[7] Neculau Radu, G.W.Hegel (1770-1831), *Principiile filosofiei dreptului*, in the volume *Dicționar de scrieri politice fundamentale*, coordinated by Laurențiu Ştefan Scarlat, Humanitas Publishing-House, Bucharest, 2000, p 163

[8] Benoit Francis-Paul, *La Democratie liberale*, Paris, PUF, 1978, p. 308

Jeremy Bentham (1748-1832), following Locke adds to the basis of liberalism the principle of utilitarianism (the principle of the greatest happiness), according to which each individual action, including the governmental one, is approved or disapproved „depending on the trend that it appears to increment or to diminish the happiness of those whose interests are at stake"[9].

Regardless of the theories that we follow, intuitive or those stating „the law of nature", „law of reason", „social justice" all are reduced to this principle. To fulfill the principle – greatest happiness for more individuals – it is necessary the intervention of policy through the legislative in order to fix the legal paths that must be followed and the goals of government „to promote the social happiness by penalties and rewards". In this context, enforcing laws must not harm the individual's rights and freedoms, namely the area „of the individual's obligations to himself". The necessity of respecting individual freedoms is motivated by Bentham: „Every man is always willing to pursue his happiness as you are to pursue yours; also there is no man who could have all these opportunities to find out what would contribute the most to this purpose. Because who would know as better as you what pleases you or is causing you pain"[10].

Consequently, choosing the ways, means and goals it is a strictly individual problem and cannot be the object of the legislator and area of investigation for the government. In equal measure, legislation is justified only for the general purposes of the community.

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[10] Bentham Jeremy, *Introduction to the Principles of Morals and Legislation*, J.H.Burns and H.L.A.Hart (ads.) Methuen, Londra, 1982, p. 244

LEGAL ASPECTS OF ELECTRONIC CONTRACTS GOVERNED BY EUROPEAN LAW

Larisa-Antonia CAPISIZU *

Abstract: *This paper presents certain legal aspects of electronic contracts governed by EU law. Before moving to the proper analysis of these issues, a definition of the electronic contract is required. The definition of this concept derives from the peculiarities of two essential elements, namely the conclusion and the execution of electronic contracts. The last part of this article presents the evidence and the form of electronic contracts.*

Keywords: *electronic contracts, internet, ecommerce*

1. The definition of the electronic contract

The contract concludedin electronic form has certain peculiaritiesas opposed to theclassical way to conclude a contract. In order to define the electronic contract, a review of its relevant aspects should be made.

The key factors underlying the logical-legal process of defining the electronic contract are, on the one hand, the ways of concluding such a contract, and on the other hand, the ways of executing the contract.

The object and the parties of the contract are not relevant to the „electronic" nature.[1]Regarding the object of the contract concluded in cyberspace, there are no differences between them and contractsconcluded in „real world", both cases being related to special contracts, such as contracts for services, selling of goods, copyright licenses etc. Nor do the contracting parties differ from the classical contracts. We candistinguish between contracts concluded between professionals, so-called business to business contracts, and contracts with consumers or business to consumer contracts.

The essence of e-commerce is that one of the steps in the contractual relationship is carried out in the network, so either the conclusion or the execution of the contract takes place through electronic means.

The Civil Code from 1864 in article 942 defines the contract as the agreement between two or more persons to establish or to extinguish a legal report between them, and the New Civil Code in article 1166 states that the contract means „the agreement of wills between two or more persons with the intention to establish, modify or extinguish a juridical report".

Therefore, the electronic contract is an agreement of wills between two or more persons to establish, modify or extinguish a legal relationship, agreement expressed by electronic means. According to Law no. 365/2002 on electronic commerce, electronic means designates electronic equipment and cable networks, optic fiber, radio, satellite and others, used to process, store or retransmit information.

So, by using the Internet, contracts can be concluded:

- *On-line* - using services that allow real-time offering and acceptance;
- *Offline* - via email

* Junior Lawyer at Capisizu Sergiu Marin Law Office, Bucharest Bar

[1] Oprea Alina, „Legal aspects of electronic contracts", *Pandectele Române* nr. 6/2005, pp. 177-192

The specialized literature ask the question of terminological accuracy and delimitation between contracts concluded by electronic means, contracts concluded in electronic form and electronic contracts.First, the notion of *contract concluded by electronic means* is very comprehensive involving all those means even if they don't have probative value.The *contract in electronic form* is concluded by electronic means of transmission and processing of information and can be proved by such means.So, the difference between the two types of contracts is given by the evidence.Thus defined the terms, the contract concluded by electronic means is the genus and the contract in electronic form is the species.Moreover, it is considered that the concept of electronic contract is improper because it is specific to distinguishing species of contracts depending on the legal matters they belong to, from this point of view there are civil contracts, commercial contracts, administrative contracts, but the contract in electronic form (and therefore the contract concluded by electronic means) is not a new species of [contract.2]

2. The conclusion and the execution of electronic contracts

The common law concerning the conclusion of contracts requires the existence of four conditions for its valid formation, these being:

- capacity;
- expressed valid consent;
- determinate object;
- licit cause.

Law no. 365/2002 adds new conditions to these essential requirements for validity of contracts and also provides some special rules to common law provisions related to the formation and the expression of consent of the parties.

Chapter 3 of the Law of electronic commerce, in articles 7-10 covers the contracts concluded by electronic means, namely the validity, legal effects and evidence of contracts concluded by electronic means, informing the recipients, contract conclusion by electronic means and conditions regarding information storage and presentation.

The contracts concluded by electronic means cause all the effects the law recognizes for contracts when the conditions required by the law for their validity are met.[3]

The law of electronic commerce, in article 5 and article 8 stipulates a pre-contractual information obligation for the service provider concerning the elements required for the recipient's consent in order to assure its protection against some circumstances which may lead to vitiation of consent.

The obligation of Information refers to elements which allow the recipient to consent to the conclusion of the contract in full awareness, being able to issue an offer to contract corresponding to its economic interests. As with any obligation, not fulfilling the obligation involves a specific penalty that exceeds the overall framework of contract cancellation under the vices of consent by offering the real possibility for such a contract, although „vitiated", still be executed with certain remedies.[4]These elements demonstrate the existence of an additional validity requirement to traditional electronic contract listed in art 1179 from the New Civil Code.

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[2] Bleoancă Alexandru, „*The* contract in electronic form", Hamangiu Publishing House, Bucharest 2010, pp. 15-23
[3] Art. 7 alin. 1 from Law no. 365/2002
[4] Savu Tiberiu Gabriel, „Some considerations on the effects of new regulations of electronictraderegarding the rules on contract formation",*Commercial Law Review*, nr.9/2002, pp. 97-109

The law of electronic commerce, in art. 5, stipulates that the service provider must offer, during the entire duration of his activity, information on[5]:

- Identification data, including references from any regulators or professional bodies to which he belongs;
- Charges for services provided, and whether the price includes delivery costs;
- Any other information according to laws.

In addition to these general information that ought to be made available to any person interested in its work, „the service provider shall be bound to put to the recipient's disposal, before the recipients sends the offer to contract or the acceptance of the firm offer made by the service provider, as least the following information that has to clearly, unambiguously and accessibly expressed:

a) the technical steps to be followed in order to conclude the contract;
b) whether the contract, once signed, is stored or not by the service provider and whether it is accessible or not;
c) the technical means that the service provider puts at the recipient's disposal to identify and correct the errors occurred on the occasion of data input;
d) the language of the contract;
e) the relevant codes of conduct to which the service provider subscribes, as well as information on the way in which these codes can be consulted by electronic means;
f) any other conditions imposed by the legal provisions in force."[6]

The above mentioned provisions state that there is a difference between the information which is subject to pre-contractual information and the information included in the offer to contract, when the transmission to the recipient is prior to the time of issuing the offer.

Informing the recipient has the character of a legal obligation incumbent on the supplier. It occurs whether or not a contract is concluded by electronic means.

Acorrect informationfrom the service provider represents asolidfoundationfor both the actualinternalrepresentation ofthe recipienton the purposeto be achieved, namely the possibility of concludingan electronic contract,and forthe manner of achieving this, meaning the actualconclusion ofacontractby electronic means, along withidentifying a potentialcontractorin the personof the provider or another person, when the provideracts only asan intermediator.[7]

The penalty for infringing the pre-contractual information obligation is relative nullity. The lack of prior information of the recipient leads to the annulment of the contract on the basis of error or willful misconduct by reticence, since the formation of the contract is vitiated by the absence of some elements which, if they had been known by the recipient, would have led to the conclusion of the contract in other conditions. The relative nullity sanction stipulated by art. 21 of the law applies not only in cases where the provider has failed to fulfill or has improperly fulfilled its obligation to inform the recipient, but also when he doesn't offer technical support for the recipient to store the information received[8].

Therefore, the pre-contractual obligation of information contributes to the mechanism of formation of consent. In addition to the advantages of distance contracts, it is necessary

[5] Cîrstea Raluca„The preliminaries to the conclusion of electronic contracts", *http://www. juridice.ro/160267/preliminariile-incheierii-contractului-electronic.html*
[6] Art. 8 alin. 1 fromLaw no. 365/2002
[7] Savu Tiberiu Gabriel, „Some considerations on the effects of new regulations of electronic trade regarding the rules on contract formation", *Commercial Law Review*, no.9/2002, pp. 97-109
[8] Art. 21, lit d), reported at art 8. alin. 4 from Law no. 365/2002

to fulfill further conditions of validity to ensure a higher level of protection of the contracting parties.

Regarding the time and the place of concluding the electronic contract, there are certain peculiarities.

In any type of contract, classical or electronic, it is important to determine the time of concluding the contract for several reasons, such as:

- Natural or legal person's capacity to contract is assessed according to this moment;
- The possibility of revoking the acceptance of the offer until the time of concluding the contract;
- This is also the time when the ownership of the property and the risk of destruction of this good for reasons not attributable to the other party shifts from the seller to the buyer;
- The term of the right to legal action stars flowing from this moment;
- The price of the contract is estimated based on this time, and the law applicable to the legal relationship born from the contract is determined according to the place and time of concluding the contract.[9]

Regarding the conclusion of electronic contracts, art. 9 para. (1) of Law no. 365/2002 stipulates that the contract shall be considered concluded the time the acceptance of the offer has reached the offering party. So, e-commerce law opted for the theory of information concerning the conclusion of contracts.

This provision is suppleness as the parties may agree that another is the moment the contract is considered concluded.[10]

The contract which, by its nature or at the beneficiary's request, requires an immediate execution of the characteristic service, shall be considered as concluded the moment when debtor started the execution, unless the offering party has asked that the acceptance be communicated to him/her beforehand, according to art. 9 para. (2)

The law establishes a legal obligation to confirm the receipt of the offer. Fulfilling the conditions leads to a relative legal presumption of acknowledgment of transmitting the offer, proof to the contrary can be accepted only in exceptional circumstances related to evidence of the legal relationship established by a document in electronic form.

The law establishes two ways of confirming the receipt of the offer or, if applicable, its acceptance by the service provider, in case the recipient sends by electronic means the offer to contract or the acceptance of the firm offer made by the service provider:

- „by sending a receipt proof by electronic mail or any equivalent individual communication means at the address indicated by the recipient, without delay"[art. 9 para. (3), lit. a)];
- „by confirming the receipt of the offer or the acceptance of the offer by an equivalent means as the one used to send the offer or accept the offer, as soon as the offer or acceptance was received by the service supplier, on condition this confirmation may be stored and reproduced by the recipient" [art. 9 para. (3), lit. b)].

Although the Law on electronic commerce law adopted the information system for determining the time the contract is considered concluded, in fact to cases listed in art. 9 para. the receiving system is applicable, in order to avoid the risk of denial or delay from the recipient in reading the e-mail and the risk of uncertainty in determining the time when that information was accessed.[Art. 9 para. (4)] stipulates that the offer or acceptance of the offer as well as the confirmation of the offer receipt or acceptance, made as mentioned in

[9] Sitaru Dragoş-Alexandru,*„International trade law"*, Lumina Lex Publishing House, Bucharest, 2004, p. 531

[10] Cetean-Voiculescu Laura, „Theoretical aspects related to contracts concluded by electronic means",*http://www.uab.ro/reviste_recunoscute/reviste_drept/annales_10_2007/laura_ro.pdf*

paragraph (3) shall be considered as received when the parties to which they address can access them.

Regarding the technical means of transmitting the offer, if it does not happen via e-mail, it is done by simply pressing the OK option attached to the general information that must be submitted by the service provider.

The requirement of confirming the receipt of the offer or the receipt of acceptanceis useful in terms of evidence regarding the time the contract is considered concluded, bringing certainty to the recipient that his acceptance has reached the offering party.

The issues raised by the conclusion and the execution of electronic contracts, and also the issues related to free movement of goods are particularly important, thus being reflected in legislation adopted at European level and implemented by the Member States.

3. The form and the evidence of the electronic contract

Contracts concluded by electronic means, regulated by Chapter III of the Law. 365/2002 on electronic commerce, produce all the effects the law recognizes to traditional contracts, but art. 7 establishes the obligation of proving them according to Law no. 455/2001 on electronic signature.

The evidence of contracts concluded by electronic means is more difficult due to the absence of durable support (paper), but in the event of disputes, they can be used as evidence in court, in compliance with the general rules on the matter, taking into account the provisions of the special law on electronic signatures[11].

Currently, most countries have imposed legal recognition of electronic signatures.On 13 December 1999 the European Parliament and the Council have adopted Directive 1999/93/EC establishing a Community framework for electronic signatures, in order to ensure the proper functioning of the internal market in electronic signatures, establishing a harmonized legal framework and suitable for the use of electronic signature within the European Community.

Article 5para.(1) ofthe Directive establishes equallegal treatment betweena dvanced electronic signature and hand written signatures stipulating thatonly advanced electronic signatures have the same legal effect as hand written signatures in the Member States,being admitted aslegal evidence. Regarding the simple electronic signatures, art. 5 para (2) states that Member States must ensure that these electronic signature are not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that they are not qualified as extended electronic signatures (advanced).

In Romania, Law no. 455/2001 establishes two categories of electronic signatures:

- Electronic signature;
- Extended electronic signature.

The contract that incorporates an extended electronic signature, meaning a signature based on a qualified certificate not suspended or not revoked at that time, and generated using a secure-signature-creation device shall be assimilated, in as much as its requirements and effects are concerned, to a document under private signature

Simple electronic signature has the same legal effects as the classic signature on paper only if it is recognized by the opposite party.

[11] Leceanu Camelia, „Peculiarities of electronic contracts”,*http://www.sfin.ro/ articol_13826/particularitatile_ contractelor_electronice.html#ixzz1tJxPEjoF*

A document in electronic form that incorporates an electronic signature or has an electronic signature attached to or logically associated with it, concerning the requirements and effects, is assimilated with a document under private signature according to art. 5 from Law no. 455/2001. A document in electronic form, acknowledged by the party the respective document is opposed to, shall have the same effects as an authentic document, between those who signed it and those who are representing their rights, according to art. 6 from the same law.

In commercial matters, the simpleagreementofwillsis enough to consider the contract concluded, so the documentit is not required toconclude the contract, not to proof its contents.However, inexceptional situations, whenthe written form ofcontractisrequiredas a condition ofvalidity, only theadvanced electronic signaturecan provethe contract, so it is advisable to usethisextended electronic signature.

From rule that any type of contract can be concluded by electronic means there are some exceptions, among them being the contracts for which the law requires the solemn form, namely the contracts that must be authenticated by the notary.The cases in which the notarial activity is conducted through electronic notary, according to Law no. 589/2004 regarding the legal regime of the electronic notary activity, are very rare.But, assolemncontractsare atypicalto the commercialmatters, the conclusion ofcontracts by electronic meansis growing, being often used ininternational trade.

In considering the aspects regardingthe formandthe evidenceof electronic contracts,the scope of theDirectiveon electronic commercemustbe taken intoaccount.The jurisprudenceof the European Court of Justiceoffers manyexamples of thisandalsoclarifies towhichlegal relationstheDirective applies.

4. Conclusion

The contract concludedin electronic form has certain peculiaritiesas opposed to theclassical way to conclude a contract.Adittional to the validity conditions stipulated by the Civil Code, special laws state certain specific conditions. Contracts concluded by electronic means, regulated by the Law on electronic commerce, produce all the effects that the law recognizes to traditional contracts, but for their evidence it is necessary to respect the Law on electronic signature. Romanian legislation transposes the EU directives regulating this matter.

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THE PROTECTION OF THE PERSON IN A GLOBALIZED WORLD

Traian-Alexandru MIU *

Abstract: *Globalization, a particularly complex phenomenon, supposes the overcoming of the barriers between the different states, which have allowed a rapid transfer of capitals, technologies, information but also „toxins" from one country to the next. First of all, technology was at the basis of the fast spreading of the ideas promoted by globalization. The incontestable progress of the techno-scientific domain has given man extraordinary powers, which have been used, more often than not, to the detriment of his spiritual progress. The fast development of the technology has led to the exchange of personal data. There will be problems the moment we stop protecting the personal and confidential data. This is why we have needed and will need to adopt a legislation protecting the person. We should not deny the fact that science and technique have brought numerous benefits to man, allowing him to extend the horizon of his knowledge about the world he lives in, to profitably use the information acquired and to share it with others. Science and technique need to become, for the hypermodern man, means of dialogue and communion between humanity and divinity, all for the glory of God and the perfection of the human being.*

Keywords: *globalization, technology, data protection, person, spirituality, hyper-modernism.*

The term „globalization" is of Anglo-Saxon origin (*global* = worldwide) and expresses the tendency of the enterprises to develop at the same time internationalization and informatization processes. The increased complexity of the multinational organizations operating in different countries and adopting flexible work patterns already, not simply standardizable according to a unique pattern, will be administrable only if, at the same time, the power and centralization of the information system grow.

Globalization manages to systematically overturn what the „First Modernism" had as its central premise, namely the possibility of living within the boundaries of the national states. It is precisely the fact of going beyond the national boundaries in various domains such as economy, information, ecology, technology, culture that globalization proposes. What it proposes is, at first sight, something familiar, yet, if we manage to see its implications, we shall reach the conclusion that our daily life is essentially changed and we are forced to adapt and provide answers. The barriers between states have been annulled and this has led to a fast transfer of capitals, technologies, information and even „toxins" from one country to the next. „Even things, persons or ideologies that the governments would like to block beyond their countries' boundaries (drugs, illegal immigrants, criticism related to human rights infringements) find their way in. Understood in this way, globalization represents the death of distance; abandonment in transnational forms of life, often unwanted and misunderstood or, starting from Anthony Giddens's definition, action and (co)existence beyond distance (beyond the apparently separate worlds of the national states, religions, regions, continents)."[1]

* Assist. Prof. Dr., Faculty of Theology and Education Sciences, University of Valahia Targoviste.

[1] Ulrich Beck, *Ce este globalizarea? Erori ale globalismului – răspunsuri la globalizare* (What Is Globalization), translation into Romanian: Ida Alexandrescu and Diana Popescu, Ed. Trei, Bucureşti, 2003, p.39

1. Technology in the service of globalization

Certainly, the elimination of the distance permitted one to go anywhere from any point of the globe. The possibility of existence of globalization was due first of all to the modern means of communication and transport, and to the development of technology. Consequently, globalization becomes a daily experience for the whole population of the world. Heroes like Odyssey or Robinson would represent for today's world at the most ridiculous people, despite the fact that today multicultural exchanges are possible, brotherhoods between populations thousands of miles away are a daily routine, and protests against North-Korean nuclear tests are organized everywhere in the world, something hardly imaginable not so long ago.[2] „The innumerable eras of the multiple world regions are compressed in a single global time, governed by norms, and imposing norms. Not just because the modern environments can realize ‹‹virtually›› the simultaneity of some non-simultaneous events, so that each non-simultaneous action, maybe only local or regional, may become part of the world history, but also because the synchronous simultaneity goes into the diachronic non-simultaneity and can produce, in this way, artificial cause-effect chains. This gives birth «to the compact globe from the perspective of time»."[3]

One can easily notice that different events as importance and origin are referred to one temporal axis. For instance, if we take the example of the Frankfurt Stock Exchange, we can note that by the time it opens, the closing values of the Stock Exchanges of Singapore, Hong Kong or Tokyo are already known, just as the increase or decrease tendencies of the European stock exchange values are known at the opening of the Stock Exchange in New-York, on Wall-Street. Actually, you do not even have to be present physically at the headquarters of any of these Stock Exchanges, the internet gives you the chance of buying and selling shares and taking advantage of the differences in the exchange rate, wherever you are. The possibility of interconnection by telecommunications has made the earth, economically, a compact and small area, and brought the financial markets of remote countries closer together. This situation is also facilitated by the diminution of the actual costs of the financial transactions, which have practically become insignificant.[4]

Globalization does nothing else but orient humanity towards two extreme directions: it can make people to see the earth as a prison in which they are imprisoned, or can increase the awareness of the unity of mankind, can make people aware of their mission here and now. Globalization cannot give man and history a final meaning. It is just a product of technological development.[5] „Certainly, it is not by chance that mondialization is happening at the time when man is diving into two infinites: in the small infinite of matter and the great infinite of the celestial sphere."[6]

Being one of the major reasons of globalization, **technology** has made available for the world the mass information and communication means. Technology has made ideas circulate fast and easy from a side to the other of the world.

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[2] E. Altvater, B. Mahnkopf, *Die globale Okonomie am Ende des 20. Jahrhunderts* (The Global Economy at the End of the 20th Century) in *Widerspruch* (Contradiction), *31,* year 16, 1996, pp. 21 and the next, apud Ulrich Beck, *op. cit.*, p. 40.
[3] Ibidem;
[4] Ibidem;
[5] Philipe Moreau Defarger, *La mondialisation*, Press Universitaires de France, Paris, 1997, p. 124-125, apud, † Anastasios Yannoulatos, *Ortodoxia şi Problemele Lumii Contemporane* (The Orthodoxy and the Problems of the Contemporary World), translated into Romanian: PhD stud. Gabriel Mândrilă and Fr. Prof. Dr. Constantin Coman, Ed. Bizantină, Bucureşti, 2003, p. 222.
[6] Ibidem;

The technique has facilitated for man an amplification of his psycho-physical capacities (the television – his eyes, the radio – his ears, the car – his feet etc.), and man managed in this way to go over the natural barriers imposed by time and space. As John Mc. Luhan stated, man is turning into a „super-man" and due to the technical discoveries, he is able to conquer spaces, to easily impose his own ideas and his way of living.[7]

It has been noticed that if the cost of communications diminishes, the new technologies favor production globalization and the globalization of the financial markets. The latter, in turn, plays the role of a stimulus for technological progress, intensifying competition and accelerating the dissemination of the new technologies by means of direct external investments.

Worldwide, the telecommunications network (computers, TVs, telephones etc.) has considerably increased, during the last few years, the capacity of transmitting information. About 30 years ago, there were only 25,000 telecommunications providers worldwide; today, their number has gone beyond 140 million, and it keeps on growing continually. In 1844, S. Morse started the era of instantaneous communication by inventing the telegraph, and in 1960 it was possible to transmit simultaneously 138 conversations via a trans-Atlantic cable. Nowadays, thanks to the optic fiber cables, it is possible to transmit simultaneously 1,500,000 conversations.[8] Yet, the greatest achievement nowadays, in the domain of communications, is the Internet, which has developed rapidly, which is why the number of users at the end of the year 2012 had reached the level of 2.4 billion, according to a study published by Royal Pingdom.[9]

The progresses in the area of telecommunications have led to an impressive increase of the international financial and trading transactions. The circulation from one country to the next of some gigantic capitals is now possible by just a simple click.

The undeniable progresses in the domain of techno-science have given man extraordinary powers, yet they have also led to the appearance of very dangerous self-destructive capacities. For this reason, a very careful consideration of the moral rules is necessary, to avoid an eventual catastrophe caused by the transformation of the technological progress into a curse for man.[10] We need to always have in view the fact that technology can be for man a factor in favor of what is good and of life, just as it can be a real curse when it serves evil. Our conscience, our spiritual state will be the one that will dictate whether science is to serve life or death.

2. Personal data protection in the context of globalization and technological development

The rapid technological development, the easy communication, the fall of the interstate frontiers as the intensity of the globalizing process has grown, inevitably led to the exchange of personal data. Wi-Fi-s, e-mails, search engines and socialization networks

[7] Pr. Drd. Dumitru Vanca, „Reflecţii liturgice şi pastorale într-un univers global şi desacralizat – câteva provocări pentru Biserica Ortodoxă" (Liturgical and Pastoral Reflections in a Global and Desecrated Universe – Several Challenges for the Orthodox Church), in the volume *Biserica în Era Globalizării* (The Church in the Age of Globalization), Ed. Reîntregirea, Alba Iulia, 2003, p. 458.

[8] Pr. Lect. Dr. Teofil Tia, „«Homo economicus», Globalizarea şi Criza Spiritualităţii" (*Homo Economicus*, Globalization and the Spiritual Crisis), in the volume *Biserica în Era Globalizării* (The Church in the Age of Globalization), Ed. Reîntregirea, Alba Iulia, 2003, p.363.

[9] * * * „Internet 2012 in numbers", Posted in Tech blog on January 16th, 2013 by Pingdom. See the web address: http://royal.pingdom.com/2013/01/16/internet-2012-in-numbers/.

[10] Jean-Pierre Lonchamp, *Ştiinţă şi credinţă* (Science and Faith), Romanian translation: Magda Stavinschi, Ed. XXI: Eonul Dogmatic, Bucureşti, 2003, p. 153.

constitute advantages for people's private but also professional life. Yet, if we do not know to protect our personal and confidential data, these facilities created by technology will turn into real dangers. In the context of internet navigation and of accessing different sites, there also occurs the gathering of personal information on the users.

The massive progresses recorded in technology in the context of globalization have led to increasingly significant and complex challenges. The societies are now undertaking a work which involves a new legislative framework, as the existing one often no longer corresponds to the present realities. This has led to a difficult identification of the responsibilities regarding the conformity to the data protection rules.[11]

Identifying responsibilities regarding the conformity to the data protection regulations is a very difficult problem in the context of the present intensive communication on the internet. The communication of data on the internet can make physical distances disappear. For instance, we could take the example of an internet providing company whose headquarters is not in one of the countries of the European Economic Area, which nevertheless subcontracts to other companies located in other states, willing to realize benefits by using the personal information of the persons living in one of the EU member countries. In this case, it is not at all easy to determine who is responsible and if the laws established in the EU can be applied. Thus, for the data protection system to be efficient, it is extremely important that the answers to these tricky questions should be very clear and easily applicable.[12]

2.1. The use of cookies

A cookie can be defined as a text file, more often than not codified, transmitted by a server to a person navigating on a site and then sent back (unchanged) by the one who navigates, whenever he accesses the respective web address. Certain web services, such as the authentication one, require the user, by means of the browser, to transmit a piece of information to the server, information which is then inscribed in the memory of the computer operating the browser.[13]

The purpose declared on the sites that use cookies is a positive one, namely to facilitate the authentication on an automated site if you have previously authenticated yourself, or to memorize the options for the buyer code. In these cases, a cookie cannot be included in the category of informatic viruses or malware and, generally, such cookies are not considered dangerous for the computer. Problems may appear the moment when cookies are used not just by the site accessed, but also by parts of that site administered by 3rd parties, especially those containing advertisements (3rd party cookies).[14]

The moment when advertizing agencies assail you with advertisements, when in order to become more profitable by increasing their sales, they draw your consumer profile based on informatic espionage, gathering data on your habits, needs, desires, then we are dealing with an intrusion in our private life. At the same time, in certain cases, it is not impossible to use cookies to collect personal data also for other purposes than the ones mentioned so far: bank fraud, denigration, manipulation etc.

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[11] Peter Hustinx, „La protection des données à caractère personnel dans un monde numérisé" (Personal Data Protection in a Digitalized World), L'Observateur de Bruxelles, no. 82, Octobre 2010, p. 8;
[12] Ibidem, pp. 8-9;
[13] Felix Tudoriu, „Cookies şi legea română" (Cookies and the Romanian Law), posted on 12 June 2012, see the web address: http://www.juridice.ro/204751/cookies-i-legea-romn.html
[14] Bogdan Manolea, „Legea Cookie-urilor" (The Cookies' Law), posted on 12 October 2011, at 18:53, see the web address: http://legi-internet.ro/blogs/index.php/lege-cookie-uri

Even though the intentions of certain sites are some of the best, no one can guarantee that their electronic databases are unbreakable, seeing that hackers have been able to break into the informatic systems of some world-famous agencies, holding strictly secret data of vital importance such as those of: NASA (USA), Goddard Space Center (GSFC), US Department of the Navy and the Department of Energy (DoE)[15].

2.2. Legislation in force[16]

a. Internal Legislation of Romania

Law no. 677 / 21 November 2001 for the protection of the person regarding the personal data processing and the free circulation of these data.

Law no. 102 / 3 May 2005 for the creation, organization and operation of the National Supervisory Authority for Personal Data Processing.

The Regulations for the Organization and Operation of the National Supervisory Authority for Personal Data Processing (ANSPDCP - Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal) of 11 November 2005, with its subsequent modifications and completions.

The Emergency Ordinance no. 131 / 22 September 2005 for the prorogation of the term foreseen by Art. 19 (1) of Law no. 102/2005 regarding the creation, organization and operation of the National Supervisory Authority for Personal Data Processing.

Law no. 278 / 15 October 2007 concerning the approval of the Emergency Government Ordinance no. 36/2007 for the abrogation of Law no. 476/2003 regarding the approval of the notification tax for personal data processing, which falls under the incidence of Law no. 677/2001 for the protection of the person regarding the personal data processing and the free circulation of these data.

Law no. 682 / 28 November 2001 concerning the ratification of the Convention for the protection of the person from the automated personal data processing, adopted in Strasbourg on 28 January 1981.

Law no. 506 / 17 November 2004 regarding personal data processing and the protection of private life in the sector of electronic communications.

Emergency Ordinance no. 13 / 24 April 2012 for the modification and completion of Law no. 506/2004 for personal data processing and the protection of private life in the sector of electronic communications.

Law no. 82 / 13 June 2012 for retaining the data generated or processed by the providers of public networks of electronic communications and by the providers of electronic communications services for the public, and for the modification and completion of Law no. 506/2004 for personal data processing and the protection of private life in the sector of electronic communications - declared unconstitutional by the Decision no. 440/2014 of the Constitutional Court.

[15] * * * „Hackerul român care a spart serverele NASA nu va fi extrădat în SUA. Ar putea fi în curând un om liber" (The Romanian hacker who broke into NASA servers will not be extradated in the US. He could soon be free), published on 21 January 2014, see the web address: http://stirileprotv.ro/stiri/actualitate/hackerul-roman-care-a-spart-serverele-nasa-nu-va-fi-extradat-in-sua-ar-putea-fi-in-curand-un-om-liber.html:

[16] The data on the legislation in force (both the Romanian and the EU legislation) have been taken over from the site: www.dataprotection.ro, belonging to the National Supervisory Authority for Personal Data Processing (Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal);

Law no. 272 / 29 June 2006 for the completion of Art. 7 in the Law no. 506/2004 concerning personal data processing and the protection of private life in the sector of electronic communications.

Law no. 365 / 7 June 2002 for e-commerce *) – Republication.

Methodological norms / 20 November 2002 for the application of Law no. 365/2002 for e-commerce.

b. EU legislation

DIRECTIVE:

Directive 95/46/CE.

Directive 2002/58/CE.

Directive 2006/24/EC – it was invalidated by the EU Court of Justice in the year 2014.

Directive 31/2000.

DECISIONS:

Decision 2010/87/UE / 5 February 2010 on type contractual clauses for the transfer of personal data to the people empowered by the operator established in third countries based on the Directive 95/46/CE of the European Parliament and of the Council.

Decision 2010/365/UE / 29 June 2010 on the application of the dispositions of the Schengen acquis on the Schengen Information System in the Republic of Bulgaria and in Romania.

Decision of the Commission / 5 February 2010 on type contractual clauses for the transfer of personal data to people empowered by the operator established in third countries on the basis of Directive 95/46/CE of the European Parliament and Council (2010/87/UE).

Decision 2009/371/JAI / 6 April 2009 for the creation of the European Police Office (Europol).

Decision 2008/633/JAI of the Council / 23 June 2008 regarding the access to the Visa Information System (VIS) for consultation by the designated authorities of the member states and by Europol in order to prevent, detect and research the crimes of terrorism and other serious crimes.

Framework decision 2008/977/JAI on the protection of personal data processed in the framework of police and justice cooperation in criminal matters.

Decision of the Commission / 4 March 2008 for the adoption of the SIRENE Manual and of other dispositions of application of the second generation Schengen Information System (SIS II).

Decision 2007/533/JAI / 27 June 2007 for the creation, operation and use of the second generation Schengen Information System.

Decision 2004/915/CE / 27 December 2004 for the modification of the Decision 2001/497/CE on the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries.

Decision 2001/497/CE / 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries on the basis of the Directive 95/46/CE

CONVENTIONS:

Convention / 19 June 1990 of application of the Schengen Agreement / 14 June 1985 regarding the gradual elimination of the controls at the common frontiers, Schengen, 19 June 1990.

Convention on the creation of the European Police Office, on the basis of Art. K.3 of the Treaty regarding the European Union (the Europol Convention).

The Prüm Convention - Schengen III.

REGULATIONS

Regulation (of the European Community) no. 810/2009 of the European Parliament and of the Council for the creation of a Community Code on Visas.

Regulation (CE) no. 767/2008 of the European Parliament and of the Council on the Visa Information System (VIS) and the data exchange among the member states regarding short-term visas.

Regulation (CE) no. 1987/2006 of the European Parliament and of the Council regarding the creation, functioning and use of the second generation Schengen Information System (SIS II).

Regulation (CE) no. 1986/2006 of the European Parliament and of the Council regarding the access to the second generation Schengen Information System (SIS II) of the competent services, in the member states, for issuing vehicle registration certificates.

RECOMMANDATIONS:

Recommendation 2009/387/CE / 12 May 2009 for the application of the principles of respect for private life and data protection in the applications based on identification by radiofrequency.

Recommendation No. R (87) 15 of the Committee of Ministers of the Member States regulating the use of personal data in the police sector.

Law no. 146 / 10 July 2008 for Romania's adhesion to the Treaty between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxemburg, the Kingdom of the Netherlands and the Republic of Austria on the improvement of crossborder cooperation, especially in order to fight terrorism, crossborder criminality and illegal migration, signed at Prüm on 27 May 2005.

Law no. 238 / 10 June 2009 on the regulation of personal data processing by the structures / unities of the Ministry of Administration and Domestic Affairs in the activities of prevention, research and fight against criminality, and of maintaining and assuring public order - REPUBLICATION*).

Order no. 52 / 18 April 2002 on the approval of the Minimal Security Standards in the Activity of Personal Data Processing.

Order no. 75 / 4 June 2002 on the establishment of specific measures and procedures meant to assure a satisfactory protection of the rights of the people whose personal data are processed.

3. Science, technique and person

We have mentioned before the technique as one of the major globalization-generating factors. We can affirm that science and technique have brought mankind numerous benefits only if we think of a few of them, such as: the conquest of the macro-cosmos by man, the thorough exploration of the micro-universe, the diminution of the human suffering caused by diseases, the capacity of extending human life, the appearance of a more civilized life and many others, which are made available by science and technique. Due to science and technique, man has the possibility to extend the boundary of his knowledge on the world in which he lives, can exploit the acquired information and can share it with others, as well. This progress in the knowledge and exploitation of the world cannot be stopped by concerns like the energy crisis which can be glimpsed as a result of the reaching of a maximum in the oil and hydrocarbon resource exploitation, a maximum which would require that the consumption level of such fuels should not increase. The man has

succeeded in finding other energy forms, i.e. the wind, solar, geothermal energy etc. So, the technological progress is not yet in danger of being stopped by any major obstacle.

But it is also equally true that science and the technological development have been at the origin of the disaster caused by the people during the Two World Wars, which were the most destroying, wildest and bloodiest wars of the whole history of mankind. They have led to nuclear arming, severe ecological disasters and pronounced spiritual crisis.[17] This is why we can say that the world's moral evolution is much behind the technological one, and if things do not improve so as to reach an ethical organization of all the technical-scientific progress, then the total decline of mankind shall become reality.

Today, we are witnessing a paradox generated by science: on the one hand, science has turned man into a master of the outer material world but, on the other hand, it has transformed him, in his inner and spiritual life, into a slave of his instincts that have been altered by sin. „By continually feeding his pride that by means of science and technology he is increasingly dominating - like a god - the outer world, today's man has gone so far from the truth, through the illusory utopia of his autonomy, that he has grown more and more possessed by his own bad habits, more and more dehumanized, actually more and more demonised. In this degradation of the laicized man, one can see the consequence and result of an unbalanced conception about God, world and man, a conception poisoned precisely by its characteristic anthropocentrism."[18]

The spiritual crisis has accompanied the scientific progress, becoming deeper and deeper, although in these moments man would have needed spiritual power to remove as much as possible the danger, lest the technique should serve not life, but death. Nowadays technology means, for many people, a means of getting estranged from God, while believing that they gain liberty; actually freedom is lost and man comes under the influence of evil, which limits him up to suffocation. Man's concern for a more comfortable living now proves to be such a selfish desideratum that it makes him forget about the supreme goal he ought to accomplish – the salvation of his soul. The way today's man approaches science, „the way he approaches the world's resources as assets meant for man's fantasy considerably hinder his access to higher meanings of the world and life. Instrumentalization of nature, scientific acts, concern for progress and our way of living in the world bar the way on which man could progress towards a spiritual life in communion his fellows."[19]

Theology has always considered that science has the duty to serve the good. But, for that to come true, the communion with the Creator is necessary, in all act of knowledge, of science or related to understanding life. Everything must be reported to the holy will of God. God has never been against the act of knowledge; He has not placed obstacles in the way of the scientific progress. The command given by God in heaven: „from the tree of knowledge of good and evil you shall not eat" meant His concern for the created being not to be broken apart on the inside, not to suffer duality, not to fall into the gloomy ambiguity of good and evil.

Thus, science and technique have not been given to man for him to get estranged from his Creator, because, if this should happen, he would suffer from a huge spiritual

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[17] Pr. Prof. Dr. Dumitru Popescu, *Hristos, Biserică, Societate* (Christ, Church, Society), Editura Institutului Biblic şi de Misiune al Bisericii Ortodoxe Române, Bucureşti, 1998, p. 38.

[18] Ieromonah Mihail Stanciu, *Sensul creației. Actualitatea cosmologiei Sfantului Maxim Marturisitorul* (The Meaning of Creation. The Topicality of the Cosmology of Saint Maximus the Confessor), Asezamantul Studențesc «Sfântul Apostol Andrei», Slobozia, 2000, pp. 114-115

[19] Diac. Sorin Mihalache, „Exilul spiritului uman în epoca civilizației" (The Human Spirit's Exile in the Age of Civilization), in the weekly *Lumina de duminică* (Sunday Light), 25 oct. 2009, p.15, col. 1.

degradation. Science and technique are meant to be modes of communication and communion between humanity and divinity, all for the glory of God and the perfection of the human being. All that God has created allows man to dialogize and meet with God, helping him progress spiritually and morally. Science, used so, shall always be in the service of life.[20]

4. Instead of conclusions – The hypermodern man and technology

Technology is not bad itself; it is a neuter instrument from a moral perspective. The evil comes from its incorrect use by the man.

The technique, by the quick modes of communication made available to people, has allowed them to interact from a distance, more quickly and more frequently, but most of the times not favouring the creation of a state of communion, but rather accentuating the competition, the fights, up to mutual destruction.[21]

Man is acting today almost exclusively in the material domain, aiming to possess and to store as many material assets as possible. This has inevitably led to the degradation of the soul, to a disregard of it to such an extent that the hypermodern man suffers from a pronounced depersonalization.

The excessive technicization, mechanization of almost all the operations that were once performed by people has, more often than not, dramatic repercussions on the hypermodern man. Beside its undisputed advantages (like: speed, uniformity, perfection, saving power, time and money), mechanization has led to an increase of man's greed to such an extent that the hypermodern man has come to consider himself as all-mighty. This makes man trust machinery and turn it into an idol he is worshipping.

"The multiplication and improvement of the means of rapid information has led to a kind of *information madness*. Then, knowing all that is going on in the world, willy-nilly you actually participate to other people's suffering, you suffer more or fall into a kind of indifference concerning other people's suffering."[22] The fact that you partake of your brother's suffering cannot be wrong, since we have the duty to comfort him in his pain. It is the attitude of indifference, of lack of responsibility, of lack of care for our fellow's problems that is wrong. Has not Jesus Christ, our Savior, extended the boundaries of the concept of „fellow" beyond the people whom we know? There are people in the world whom we do not know, but whom we can help even by the simple gesture of saving a drop of water, which may not mean much for us, but for others may mean the hope of living.

"The speed of locomotion has led to a kind of *speed madness*, which makes the present day man crush the pedestrians only to reach his destination one minute sooner, in contrast with the modest requirements and the calm attitude of the man of yore, who would content himself with a simple carriage."[23]

Today, we can talk about a desensitization of the hypermodern man, increasingly „intoxicated" by energy, speed, size and strong sensations.[24]

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[20] Pr. Prof. Dr. Dumitru Popescu, *op.cit.*, pp. 41-42.
[21] Constantin C. Pavel, *Tragedia omului în cultura modernă* (Man's Tragedy in the Modern Culture), Ed. Anastasia, Bucureşti, 1997, p. 13.
[22] Ibidem, p.18.
[23] Ibidem.
[24] Ibidem.

To conclude, we can say that, even though we are living in a society where communication has attained global dimensions, in which distances have undergone a major contraction due to fast mobility, „people are increasingly lonely, since they are experiencing less and less deeply and directly the personal mystery of their fellow. The excessive technicization, the procedure mania, the formalization of the individual or collective actions of the public area, the concern for interpersonal relation optimization in the educational area or the professional field, all these «objective constraints» deplete the community space of initiatives, of mutual help, of expressions of love for our fellows"[25]. We are no longer talking face to face, the virtual space has replaced the real one, people are growing estranged from one another, at the same time believing that they have acquired - by means of the modern socialization means - the quickest and most concrete form of intimacy.

[25] Diac. Sorin Mihalache, *art. cit.*, p.15, col. 3-4.

STUDY OF DOCTRINE AND JURISPRUDENCE REGARDING LEGAL LIABILITY OF THE ADMINISTRATOR IN CASE OF BREACHING THE OBLIGATION OF ADMINISTERING THE COMPANY

Carmen TODICĂ [*]

Abstract: *From the Companies Law provisions it results that the powers entrusted to the administrator are very broad, as he can perform all operations of management and representation required to achieve the purpose of the company. Specifically, the administrator is able freely to carry out all those activities necessary to fulfill the general duty to manage the company. Based on the provisions of Article 70 of Law 31/1990, our study captures the peculiarities of the administrator's obligation towards the company and types of liability - contractual or tortuous - in case of violation of legal provisions outlining the legal framework of internal management power. Also, the study does not limit to being a mere passing exhaustive review of doctrinal opinions, as ideas are supported by extensive legal practice solutions in terms of penalties in case of violation of the general duty of managing the company.*

Keywords: *management, internal management, legal representation, convening general meeting, contractual liability, tortuous liability, management expertise*

1. The obligation of managing the company

According to art. 70 para. 1 of Law regulating companies no. 31/1990, the manager of the company generally has the obligation of „*doing all operations necessary for the fulfillment of the objects of the company, except restrictions imposed by the articles of association.*" The obligation is resumed by law in regard to the board (art. 142 para. 1) and respectively the directorate (art. 153^1 par. 1) of the joint stock company.[1]

A similar obligation is established by law in the responsibility of the joint stock company directors in the context of delegation of management towaeds them. Thus, according to art. 143^1 „***directors*** *are responsible for taking all measures related to the company's management, within the limits of the company object and subject to the exclusive powers reserved by law or the articles of association to the administration board and general meeting of shareholders*."

To administer a company means to perform all the operations necessary to achieve the social purpose.

[*] Associate Professor, PhD. Faculty of Law, „Titu Maiorescu" University of Bucharest (email: carmentodica_utm@yahoo.com).

[1] According to art. 142 para 1 „*the board of directors is responsible for carrying out all the necessary and useful deeds in order to achieve the object of the company ...* „ and under art. 153^1 para. 1 the directorship „*... carries out the necessary and useful deeds for achieving the object of the company ....*"

2. Peculiarities of liability in case of breaching the obligation

2.1. Liability for the internal management of the company

Firstly, the management of the company includes compliance with internal management operations, required by the activity of the company and thus, achieving the object of the company. The administrator has full decision-making authority for all management operations, except those assigned by law to other organs of the company and those prohibited by the articles of association. Transactions made by the administrator exceeding normal trade limits are not enforceable against the company. The obligations arising from these transactions are incumbent to directors personally, and to the extent that they would result in harming the company shall engage the personal liability of administrators towards it.

In order to prevent any damage or the extent it already occurred, to the liability of administrators, the law allowed in case of joint stock companies, the exercise by shareholders, indirectly, the management control. Thus, the law regulates the procedure to the reach of the minority shareholders of the company, who may request the court to appoint one or more experts to analyze certain operations of the management. According to art. 136 para. 1 „*one or more shareholders representing, individually or together, at least 10% of the share capital may request the court to appoint one or more experts to analyze certain operations of management of the company and prepare a report to be handed in and also officially handed in to the board respectively the directorate or the supervisory board, as well as to the censors and internal auditors of the Company, as appropriate, to be taken into consideration and to propose appropriate measures*."

Management control can be achieved only by neutral experts, independent of both the shareholders and the company. This is the reason why the law requires that the appointment of experts to be made by the court.

Right of of control should be confined to determined management operations analysis and not to the entire management of the company, as it is not necessary for operations that are intended to be controlled precisely enough to be separated from other operations of the company[2]. Moreover, the phrase „management operations" has a complex meaning, and „*that is why the legislature decided that in case of an analysis by the expert appointed to determine which of the management operations to be analyzed the drafting of the report has no meaning since all the management operations of a company are found in the financial statements.*" [3]

In addition, by speaking about „*certain transactions*", even art. 136 para. 1 requires to specify the management operations of the company to be analyzed. Thus, the law imposes the requirement of determination, firstly by request of the shareholder or shareholders and then by the judgment of those „*certain transactions*" which should be examined by the expert or experts appointed, the court invested with expert appointment is not competent to determine the operations to be analysed. This is because the role of expertise is to reveal any management mistakes or fraud, violations of legal provisions allegedly committed by managers and ensure effective control of management without destabilizing the social

[2] *Commercial sentence no. 824/2004 of Bucharest Court, Commercial Section* . In the same sense see also Sentence . no. 318/2004 of Bucharest Court, Commercial Section ("*Formulation of a simple request for audit, generically, without indicating specifically what transactions are subject to the audit process does not justify the admission of the designation of experts request*") *in C. Cucu , MV Gavriş , LP Bădoiu, C. Haranga, Companies Law. Regulatory affairs, doctrine , case law,* All Beck Publishing House , Bucharest, 2001, pp . 291-292 .

[3] *Decision no. Î.C.C.J. 702/21 February 2008 , Commercial section , in B.C. no. 4/2008 p. 41*

activity of the company. Thus, the request may be submitted to the court without mentioning the operation the subject of expertise, and at the same time the holder must submit the considerations for requiring the expertise, because based on their interest and the opportunity to appoint the experts and do the work[4].

In strict accordance with the legal text, in most cases, determining the operations to be analyzed by experts is done by indicating the domain of expertise, the management operation or operations themselves: procurement management, fixed asset management, sales management and invoicing , stock management and so on. At the same time, the text does not exclude the possibility of determining „certain operations of management of the company" by indicating and determining the period of time in which the management operations took place[5], period which must be reasonably, relatively short, so as not to reach a general criticism of the administration or a substitution for the general meeting of shareholders tasks.

Management expertise is not subsidiary but complementary to other means of informing shareholders, meaning that its admissibility is not conditioned to the applicant shareholders' prior fulfillment of all legal provisions of informing about management activity.[6]

The occurrence within the Companies' Law and other legal provisions through which right of individual shareholders control over the management of the company is materialized, respectively the application for issuing copies of the financial documents of the company (art. 117^2), through the possibility to complain to company auditors about the facts it is believed that should be censored (art. 164^1) are not such as to exclude the control exercised pursuant to art. 136 para 1. Therefore, the management control, at the request of shareholders, provided by art. 136 para. 1 has a subsidiary character in relation to that exercised individually by each shareholder individually.[7]

However, often, in practice, the management expertise remains the only information about the economic situation of the company. In so far as it violates the right to information of the shareholder, the manager refusing to provide documents relating to the management of the company, the only legal remaining way in order to obtain information on the serious economic situation that the company is in remains the expertise.[8]

In addition to the different nature of the two forms of control (the individual has a conventional character, and that provided by art. 136 par. 1 has a legal character), their

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[4] *Sentence no. 213/2001 Constanta Court* in *Case law directory 2000-2002 in commercial matters* , Lumina Lex Publishing House, Bucharest, 2004, p . 67

[5] *Idem.* As court of first instance, the Mureş Court, partly accepting the action of the cliamant-shareholder has appointed an expert, under art. 136 , para. 1, to make an analysis of the defendant company management for the period after April 29th 2005 to date. TheMureş Court of Appeal dismissed the defendant's appeal as unfounded, holding that it would be absurd for the court to list all management operations which the company has developed after April 29th 2005, since it considered that all these transactions are required to be analyzed. On appeal , the High Court found that the determination of management operations to be verified by the court expert was made not by indicating concrete operations or categories of operations, but by indicating the period in which these operations were conducted

[6] *Decision no. 161/23rd January 2009 Î.C.C.J.* in The Romanian Journal of Jurisprudence no. 2/2009, p . 215 (with comments by Gh . Buta). The defendant requested the rejection by the court appointing one or three experts to expertise a series of operations in the management of the company, arguing that an expertise is not required, the requested data by applicant can be obtained from both the company and the ORC. The court approved of expertise required, solution otherwise maintained and the appeal court

[7] To the contrary to what stated the *Decision no. 813/9th 2001 of Ploiesti CA, sect. com. and account. adm.*, in the Commercial Law Review no. 3/2004, p . 253. Incorrectly , the court rejected the request made by SIF Transilvania of appointing three experts to analyze the company's operations management of the defendant on the ground that the applicant first had to consult the documentation for information on the company's management and only if that was not enlighted on the management of operations, there would be the possibility of requesting the court, to appoint experts to analyze those operations.

[8] *Decision no. 702/21st February 2008*, in B.C. no. 4/2008, op. cit., p. 41.

consequences are different as well. The shareholder's individual right of control starts from simple research of the company's documents, which gives him the opportunity to denounce to censors the administrators' poor management and the possibility to participate in the action triggering their liability under the terms of art. 155 and art.155[1] of Law no. 31/1990. If the case of control exercised at the request of shareholders holding 10% of the share capital, the experts' report shall be handed over to the bodies entitled thereto, which are free to talk with managers or within the general meeting.

Thus, the experts' report should „officially handed in" (so in a manner likely to provide proof that delivery) the board of directors, respectively the executive board and the supervisory board as well as the censors or internal auditors of the company, to analyze it and to proposed appropriate measures. Board respectively directorate shall include the report, drawn up this way on the agenda of the general meeting of shareholders, then it shall, by virtue of legal competence od deciding on the management to decide to bring an action for damages to the administrator/ management board member or supervisory board guilty of management irregularities, according to art. 155 of the law. If the general meeting decides to sue for damages against the asministrators, their mandate legally ceases (article 155 paragraph 4).[9]

However, tt should be noted that the provisions of art. 136 of the law and, in general, the management expertise are specific to stock companies, and not to other types of company, the legislature making no reference to the provisions of art. 136 when regulating the functioning of partnerships, as done in other situations. Therefore, the other companies covered by Law no. 31/1990, when considering the general meeting of shareholders balance sheet and financial activity of the previous year, each partner can express their opinion and make requests that he feels fit, and if he considers that the board breached the law, is able to appeal that ruling in court.[10]

2.2. Liability for exceeding the company's power of representation

Secondly, the management of the company implies the concluding by the company of legal documents with third parties. These documents can only be concluded by the legal representativerespectively the administrator empowered to represent the company in dealings with third parties.[11] In this respect, art. 701 of the law provides that „*documents of disposition on property of a company is concluded by the legal representatives of the company, pursuant to the powers conferred, as appropriate, by law, articles of association or bylaw there is not needed a genuine proxy to this effect.*"

The power of representation is distinguished by the strength of internal management of the company. Thus, the strength of internal management of the company belongs to any administrator appointed under the law. Instead, the power of representation belongs only to the administrator granted this privilege and commits the company towards third parties,

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[9] According to art. 155 para. 1 *the action for damages against directors, directors or members of the executive board and the supervisory board , for damages caused to the company by them in violation of duties towards the company, belongs to the general meeting.*

[10] *Decision no. 190/21st January 2010 of Î.C.C.J* in B.C. no. 6/2010, p. 27-28 . The applicant's action was dismissed as inadmissible, arguing that a partner can not ask for and accounting expertise for overall analysis for a period of 3 financial years unless the law provides for such a possibility. The only text of Law no. 31/1990 which provides for such a possibility is art. 136, but it refers to limited companies, but the applicant is associated to a limited liability company.

[11] *Decision no. CA 253/2001 of CA Craiova*, in BJ / 2001 Lumina Lex Publishing House , 2003 , pp . 311-312 . The transaction concluded , in which the company was represented by the administrator revoked is void, lacking the company consent, unlawfully represented . In the disposition documents only legally elected governing bodies or those designated may express a valid consent of the company.

documents concluded by the legal representative belong to the company itself. If the sole administrator of the company benefits of plenitude of management power, so inclusively the right to represent the company, being the legal representative in the case of plurality of administrators, the representation power shall belong only to those administrators who have been expressly conferred by the will of members or in default of it, by law.[12] Therefore, not all managers are legal representatives and can validly engage the company in legal documents they conclude, but only those who have been invested in this regard with the power of representation of the company.

Consequently, when an administrator, although he was not vested with power of representing the company, concludes deeds as legal representative, he shall engage his own liability (tortous) towards the company for the damage caused by exceeding the limits of the mandate, mandate which otherwise was limited to internal management of the company. In principle, the legal document signed by the administrator without the right of representation is inapplicable to the company, part of the contract is only the administrator himself. Exceeding his mandate, the administrator who assumed without right the quality of representative of the company, assumes personally the obligations towards third parties.

Even when he was vested with the right to represent the company, the law requires certain legal acts of disposition of particular importance to the assets of the company, to be concluded by the administrator only with the approval of the general meeting of shareholders. In this case, the administrator is responsible towards the company and in the assumption of exceeding legal limits of the powers conferred.

A first legal limitation is in art. 153^{22} of the law, *applicable to the board and the executive board in relations with third parties*. Thus, in the case of the joint stock company, in its own power the management board respectively the directorate may conclude, in its own name and on behalf of the company, only legal documents to acquire or dispose of goods to it, lease, exchange or constitute warranty goods within the comany's assets, whose value does not exceed half of the net book value of assets at the date of concluding of the legal document. For transactions of a higher value, the board/ directorate needs the approval of the general meeting of shareholders. In practice, *the lack of general assembly approval is absolute nullity of the legal document thus concluded, as well as tortous liability of the managing body for the damage caused to the company by exceeding the limits of representation*. The obligation of concluding legal documents of a certain value for the company only with the approval of the general meeting is explicitly enshrined in law, accountability to the company for its non-compliance can only be a tortous one. In this case, *the responsibility lies with the management bodies as collective bodies*, namely the Board of Directors, Executive Board respectively.

A second limitation of the administrator's powers is provided by art. 150 of the law and it *concerns the relationship between the administrator personally and the limited liability company*. Thus, according to art. 150 para.1, for the conclusion of legal documents concerning the *transfer of certain assests , including rental or lease* between the administrator and the company, if the property in question amount to less than 10 % of the

[12] In partnerships (collective partnership company and limited partnership) and limited liability company, *the right to represent the company belongs to each administrator, besides stipulation contrary into the articles of association.* In the joint stock company administered under a unitary system, *the Management Board represents the company towards third parties and in court. Through the articles of association, the president and one or more administrators may be authorized to represent the company, acting together or separately.* In the dual management system of the joint stock company, *Directorate represents the company in relationships with third parties and in court. In the absence of a stipulation to the contrary in the articles of association , members of the directorate represent together the company.*

net asset value of the company, require prior approval of the extraordinary general meeting, *under sanction of nullity*. Moreover, the text has general application to all forms of company. Furthermore, the text also takes into account its executives in the context of delegation of powers, as well as the members of the executive board, the supervisory board from the dual management system of the joint stock company.[13]

Without approval of the extraordinary general meeting, legal deeds of alienation or acquisition of goods, renting or leasing operations are subject to nullity (in this case, the nullity is expressly provided by law). Unlike art. 153^{22}, art. 150 clearly states the sanction - nullity - and expressly provides for the possibility of waiving the requirement of approval by the articles of association. Moreover, if according to art. 153^{22} the liability belongs to the administrative body as a collective body, for damage caused to the company, in the case stipulated by art. 150, liability is a personal one and belongs to the administrator who concluded the act or transaction without the approval of the general meeting. In this case, if the document concluded by the manager of the company himself was declared void for lack of the general meeting of shareholders' approval, the liability of the company's administrators for any benefits they receive from the company is a *civil tortous liability* based legally on the principles of undue payments or of unjust enrichment.

Coming back to the right of representing the company in relations with third parties, it cannot be transmitted to another person unless this faculty has been expressly granted to the representing administrator by the associates. Indeed, the power to represent the company conferred to an administrator must be exercised by the administrator himself, according to the common law principle that stipulates the fact that the trustee must exercise personally the task entrusted him. Exceptionally, the companies' law allows the administrator to transmit the power of representation to another person, whether that was granted expressly by associates (art.71 para.1 of Law no. 31/1990). If the right of representation has been transmitted without such permission, the company shall not be liable to third parties, but may claim from the substituted person for the benefits resulting from the transaction. Unlawfully substituting another person, the administrator in question assumes personally obligations towards third parties. However, the administrator shall employ direct contractual responsibility towards the company in solidarity with the unlawfully substituted person for such damage to the company, pursuant to art. 71 para. 3 of Law no. 31/1990.

Compared to the above mentioned, *the conclusion of a legal deed by the administrator exceeding the mandate limits* (without the power of representation or without the endorsement of the general meeting when the law requires it) or *the unlawful substitution of another person, draw personal liability on behalf of the administrator*, for damages suffered by the company. Conversely, if the administrator concludes those documents on behalf of the company he manages, by virtue of the powers conferred by it (within the mandate granted), a legal deed whose clauses are not respected by the contractor, the company may not sue him for damages suffered, as long as the administrator has demonstrated that he has taken all reasonable claims against the debtor to recover the contractual partner.[14]

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[13] Based on art. 152, art. 153^{2} para. 6, art. 153^{8} para. 3in conjunction with art. 150 of the law.

[14] *Decision no. 4927/21st October 2005 of Î.C.C.J., commercial section*, in Romanian Journal of Business Law no. 2/2006, p. 136-138 . „*If the administrator and manager of a company have entered into an exclusive distribution contract and a service contract whose contractual terms were not met by contractor, and then they were changed from their positions through a general meeting of shareholders, the company can not sue action against them to recover the loss suffered , as long as it has not demonstrated that it has taken all reasonable claims against the debtor to recover the debts towards the contractual debtor.*"

2.3. Liability in case of non-participation in company meetings

Thirdly, the management of the company implies participation in meetings of collegial bodies of the company or company meetings. Through this participation it is ensured the knowledge of all problems in the company's activities and at the same time, it provides the possibility to take the most important decisions.

In this respect, art. 70 para. 2 of Law no. 31/1990 expressly establishes the obligation of administrators „*to take part in all meetings of the company, boards of directors and management bodies similar to them*." By „*governing bodies similar to the board*" one can understand the authorities having its duties irrespective of the name given by the shareholders, but also of collective bodies of administration provided by law for a dual management system of the joint stock company - directorate and supervisory board. In addition to the aforementioned article, art. 153[23] sets the same obligation of participating in general meetings of shareholders in the limited company, stipulating that „*executives and board members or members of the Executive Board and the Supervisory Board are obliged to attend general meetings of shareholders.*" Except the case that they are also shareholders, the persons mentioned have no right to vote, and their presence shall not be taken into account when determining the quorum.

According to the legal texts mentioned, administrators are required to participate, without vote right, at general meetings of shareholders, even when they do not have the quality of associates/shareholders. Moreover, the law expressly prohibits their ability to represent the shareholders in general meetings. Thus, according to art. 125 para. 5 of the Law „*board members, directors or members of the Executive Board and the Supervisory Board respectively... cannot represent the shareholders, under the sanction of nullity, if without their vote it would not have obtained the majority required by law*." As the rule is an imperative one, the penalty can only be the nullity of the decision taken by frauding the law, as well as expressly provides the text analysis. By introducing such a regulation, the legislature's intention was to prevent administrators from influencing the course of deliberations, or from obtaining the required majority in this way[15]. In this regard, it was argued that the company's administrators not only that they are forbidden to participate in the deliberations and the vote, but even their presence in the General Assembly as agents of other shareholders, because they could influence the quorum necessary to function in conditions of legality of the meeting in question.[16] The provision invoked applies to corporate shareholders who may not be represented at general meetings by their administrator.[17]

In practice, art. 125 para. 5 which expressly bans administrators (board members, directors or members of the directorate and supervisory board) to represent the shareholders in general meetings was a subject of controversy since there is no distinction between

[15] In this respect, see *Decision no. 470/13th July 2001 of C.A. Brasov*, in BJ Collection of judicial practice 2001, Lumina Lex Publishing House, Bucharest, 2002 , p.28-29 . („*Failure of proving that without the votes of unlawful representatives could not achieve the required quorum and majority is reflected on the validity of the decision taken. The decision must be considered invalid because it was obtained by frauding the law, even if the role of the null votes would not have affected the decision*").

[16] M. Şcheaua, *Company Law no. 31/1990 , commented and annotated* , Rosetti Publishing House, Bucharest, 2007, p . 266. See also C. Popa *Legal obligation to abstain from deliberations if there is an interest contrary to the company and applicable penalties* in Commercial Law Review no. 5/2003, p . 85

[17] *Decision no. 3993/6th December 2006 of Î.C.C.J.* , commercial section , in B.C. no. 3/2007, 42-43. Since the SC C. SA (majority shareholder of the defendant) was represented at the meeting by its manager ZV, who obtained the majority vote to adopt the decision through his vote, it is obvious the breaching of art. 125 paragraph 5 of the law, the sanction applicable to decision thus adopted is nullity.

shareholders and the non-shareholders administrators. Especially that according to art. 125 para. 1 „*shareholders may participate and vote in the assembly representation, based on proxies for that meeting*." The Supreme Court[18] ruled that the mentioned text clearly reveals the intention of the legislature that administrators to be banned representation in the general assembly of other people, whether they are shareholders or not, in order not to not reach the quorum required for adopting decisions in an unlawful way. Therefore, the interdition of representation aims the company's administrators, without distinguishing between non-shareholders or shareholders.

Also, in case of companies limited by shares, when management is achieved through collective management bodies (board of directors, respectively directorate and supervisory board), their members are obliged to attend their meetings. As regards the joint stock company executives, the law expressly states the obligation to take part in board meetings. Thus, according to Art. 141^1 „*directors ...may be called at any meeting of the board of directors meetings where they are bound to attend*." Those who are simultaneously directors and administrators preserve their right to vote in the council[19], the other directors having no right to vote.

The sanction for failure to participate in general meetings or management bodies may consist *in revoking* the administrator, director or member of the executive board or the supervisory board, by engaging the tortous liability for damages caused to the company pursuant to art. 73 lit. e) „*strict fulfillment of the duties that the law ... imposes*."

3. Conclusions

The obligation (constitutes a task as well) of management (internal management) involves committing physical operations, the implementation of corporate intent embodied in the decisions of the general meeting and check their execution.[20] This way, the administrator is empowered by of the general assembly to execute its decisions. At the same time, however, the execution of these decisions involves the conclusion of legal deeds (conservation, management and disposition) required by the company's activity, and thus achieving the object of its activity. These functions relate to internal management of the company (management) that means the relations of the administrator with the company and associates. Thus, the power of management belongs to any administrator appointed under the law.

In connection with the liability of the administrator for his management, including the consequences of deeds concluded as a representative of the company, it was stated [21] that this is a personal responsibility towards each partner who can claim the administrator proportionally to the stake in the share capital, full repair of the damage suffered from the administrator's guilt. We believe that the solution cannot be justified in the absence of an

[18] *Decision no. 3706/16th November 2007 of Î.C.C.J., commercial section ,* in BJ . *Selection of the 2007 decisions ,* CH Beck Publishing House , p . 474-475. In the present case, the Călăraşi Court upheld the applicant's action SIF Muntenia SA and quashed the 2006 AGA decision of the defendant SC . MTC SA for breaching art. 125 para. 5 of the law. On appeal, the defendant argued that a strict interpretation of the provisions of art. 125 para.5 is wrong given that managers can also be shareholders, the mandate of representation being given to DM , and not to the administrator. The appeal was rejected as unfounded the argument being „ the quality of administrator is the one taken into consideration by the legislature with the condition imposed by the last sentence regarding the majority required by law ."

[19] If the council discusses aspects regarding the directors' activity, the administrator who is simultaneously director is bound, according to art. 144^3 para. 1 not to take part in the deliberations, because he is incompatible with the interest of the company.

[20] S. David, F. Baias, *Liability of the administrator of the companies* in Right Review no. 8/1992, p. 26

[21] D.D. Gerota, *Course on companies,* Bucharest, 1929*,* p. 87.

express text set out in the Companies law. Instead, art. 73 para. 1 of Law no. 31/1990 states that, in case of plurality of administrators, they shall be jointly liable towards the company. Therefore, the administrator shall engage personal liability, directly towards the company for the way he performed the duties of internal management and representation. An action for damages may be imposed only by the company while losses are not compensated by the benefits brought to the company by the administrator.

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ANTI-CRISIS MEASURES AND COLLECTIVE BARGAINING: THE ITALIAN, PORTUGUESE AND SPANISH CASES

Francisco TRILLO*

Abstract: *The financial and economic crisis that began in 2008 changed during 2010-2012 in to an intense crisis of the Euro. The credit risk of government bond yields experienced a sharp rise in peripheral economies during those years to the point of forcing the bailout by the European Union of Greece (May 2010), Ireland (November 2010), Portugal (May 2011), Spain (June 2012) and Cyprus (March 2013). Considering this analytical framework would have involved the implementation of economic policy measures of opposite sign to the ones applied by the EU. However, the crisis has been used by the institutions in Brussels and by political and economic elites to deepen the neoliberal strategy and redefine the field of labor and social relations in southern Europe.*

Keywords: *financial crisis, anti-crisis measures, new economic governance and collective bargaining.*

1. Introduction

The economic policy imposed in the Eurozone from May 2010 presents a high dose of external intervention: the influence of the EU – through the European Council, the Eurogroup and the Commission – in the policies adopted by the governments of the different Member States increases considerably. This intervention is further consolidated by adopting a series of agreements that strengthen the capacity of European institutions to monitor the economic policies of the Member States, and to impose financial sanctions against countries that do not comply with the resolutions adopted.

This external intervention is significantly burdensome in the Memoranda of Understanding signed with the countries that borrow funds from the European Stability Mechanism (ESM), approaching the status of enforcement. In these cases, the ESM bailout mechanism involves strong conditionality in terms of economic policy, similar to the structural adjustment policies imposed by the International Monetary Fund in Latin America during the 1980s and 1990s. Some authors even describe this economic policy as „authoritarian neoliberalism".

Among the economic policies imposed by Member States governments and European institutions to peripheral countries, two of them shape the wage policy framework:

* *Fiscal consolidation should be the priority of any economic policy.* This consolidation is understood as a prerequisite for reducing government bond yields in financial markets, restore the country access to external financing and stabilize the single currency. This approach being followed, and when European economies were still in crisis, governments decide to withdraw fiscal stimulus, setting back –in line with the Maastricht Treaty– the control of public deficit as the top priority. To guarantee such control, public spending gets cut. History repeats once again and, as in the summer of 1931 with the

* Associate Professor Labour Law and Social Security Castilla-La Mancha University (Spain)

German Chancellor Heinrich Brüning or in 1935 with the French government of Pierre Laval, major European governments implement public spending cuts in a recession.

* *The balance of payments deficits reflect differences in competitiveness and should be corrected by reducing wages*. The increase in current account imbalances is conceived, as has been said, as a result of the divergence in competitiveness between economies. At the same time, this divergence is explained by the different growth of unit labor costs. Since in the institutional frame of EMU is not possible to use currency devaluations to regain lost competitiveness, this strategy makes such recovery rest in an „internal devaluation", understood as a reduction in unit labor costs in deficit countries. Wages are thus considered the main adjustment variable of macroeconomic imbalances.

These two pillars of the macroeconomic policy are presented by the Troika as the necessary condition to ensure financial stability, facilitate international financing and increase the competitiveness. All this should lead to a recovery of credit, investment, exports and employment, as well as an increased potential for long-term growth.

We now focus on the first one –austerity measures–, reviewing the changes in European governance through which fiscal consolidation is strengthened.

Austerity policies are imposed under a controversial academic and theoretical foundation: the so-called „expansionary austerity". According to this concept, a drastic reduction in public spending would (supposedly) „clean up" the economy and restore the conditions under which it is possible to re-grow again, since fiscal consolidation stimulates private investment by transmitting to the business sector expectations of price and interest rates stability. This concept is taken up by the IMF and the Troika in the context of the crisis to justify the austerity policies imposed to bailout economies.

In order to institutionalize these austerity measures in the euro zone, governments have driven a significant transformation of economic governance in Europe. In 2010, with the adoption of the Europe 2020 Strategy proposed by the European Commission, starts the European Semester, which is an annual mechanism of macro-economic, budgetary and structural policy coordination. According to this mechanism the EU issues every year a series of recommendations to Member States that have to be taken to a National Reform Programme, which performance will be evaluated by the European Commission. Furthermore, the states have also to submit their plans for sound public finances (Stability or Convergence Programmes). The European Semester is therefore an instrument that will enable the Commission to achieve more effective *ex ante* control of the economic policy in different countries (European Commission, 2011).

To strengthen the surveillance exerted by the European Semester the EU also launched in 2010 the European System of Financial Supervision (ESFS), an institutional architecture of the EU's framework to ensure the supervision of the EU's financial system. The European Systemic Risk Board, an independent body of the EU and part of the ESFS, is in charge of the macro-prudential oversight of the financial system. In order to prevent financial and macroeconomic risks in the EU, these bodies have the mission of monitoring and evaluating the fiscal policy in individual states.

This new European economic governance continues to develop in later years. In 2011 is adopted the so-called Six-Pack, consisting of five Regulations and one Directive trying to strengthen not only fiscal but also macroeconomic supervision of Member States (especially in the countries of the euro area). This attempt to reinforce the economic governance is granted by three instruments.

First, the Six-Pack ensures greater fiscal discipline through the Stability and Growth Pact, with a stricter interpretation of the deviations of public deficit and debt (3% of GDP and 60 % respectively). Second, a mechanism for the prevention and correction of potential macroeconomic imbalances is created, by monitoring different economic indicators (and not only fiscal indicators). If the Commission finds, on the basis of this monitoring, that a country presents relevant imbalances, the EU Council may require this country to put forward a corrective action plan. Third, an automatic procedure for sanctions is introduced for those countries that do not comply with policy recommendations emanating from this EU alert mechanism. As a result, policy recommendations from the EU to Member States cease to be voluntary, as hitherto, and become compulsory.

In 2011, Member States ratify the so-called Euro-Plus Pact (later the Pact for the Euro). This agreement will also help to institutionalize austerity policies in eh EU, even though, as it happens with the Six-Pack, this initiative is not limited to fiscal discipline. The Pact for the Euro articulates mechanisms to ensure the „sustainability" of public finances by monitoring and reforming the pension, health and unemployment systems. In addition, this agreement aims to supervise the growth of unit labor costs in order to link the evolution of (nominal) wages to (real) productivity and, thereby, improve the external competitiveness of the economies of the eurozone. In this sense, the pact has been designed with the intention of promoting more flexible labor markets and to achieve (hypothetical) productivity gains.

Finally, the Fiscal Compact (formally, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union), signed on March 2012, largely reinforces the agreements contained in the Six-Pack: along with the obligation not to exceed a general budget deficit of 3% of the GDP, Member States are due to maintain a structural deficit (ie, regardless of cycle effects) lower than 0.5%. Furthermore, the Fiscal Compact defines a „debt brake" benchmark criterion: the pace of debt reduction should be one-twentieth per year of the difference between the actual debt-to-GDP ratio and the aforementioned 60% limit. In addition, the powers of control and punishment of the European Commission are significantly strengthened, and the rules of fiscal control must be „shielded" by national legislation (preferably in national constitutions) to give binding force to such regulations.

2. Collective bargaining systems in Italy, Portugal and Spain

The most antisocial effect of the crisis on industrial relations has been on Southern European countries. It is too early to affirm that the reforms enacted in 2010-12 will lead to systemic change, but it is sure that they do impact on some very important institutions such as collective bargaining, hence wealth distribution, working and living conditions of worker classes.

Southern European countries have shared some industrial relations commonality such as high collective bargaining coverage rates and national-level social dialogue[1]. Moreover, strikes are much more frequent and class orientations more prevalent in the unions. They are also similar in relation with other features such as union fragmentation and politicisation, gap between large and small companies, high degree of informality on the

[1] For instance, in Italy and in Spain the very important labour market reforms were conducted by Social Dialogue (1997, 2003 and 2006).

labour market, etc. The Italian, Portuguese and Spanish systems are based on the principle of trade union pluralism.

Specifically, on collective bargaining there are more commonalities than differences among Italian, Portuguese and Spanish systems. These collective bargaining systems play an essential function in order to regulate labour relations. In the 80`s of the twenty century, collective bargaining developed a role according to the *favour laboratoris* principle, interpreted in the most traditional way. In this regard, collective agreements were conceived as instruments aimed to improve legal provisions that were considered the *minimum* standard of labour protection. Consequently, collective agreements tended to be more protective than the law. However, since the 1990s and during the first decade of the twenty-first century a significant evolution has been observed. It began with the implementation of special acts on specific issues aimed to introduce more flexibility on labour relationships (external/ internal flexibility).

This new collective bargaining function has presented differences among Italian, Portuguese and Spanish cases. While in Italy this process was based, in that period, on the freedom for the negotiators in order to balance different interests in the bargaining (*flessibilità contrattata*), in Portugal and in Spain the law developed a more intensive role, fixing subjects and limits in which collective agreements could introduce this flexibility. This collective bargaining new function has had as a result allows for collective agreements to establish less favourable conditions than those prescribe by law[2]. So, relations between law and collective bargaining changed in order to put the collective bargaining in the centre of labour regulation sources but maintaining the law a very strong presence.

During the crisis, these relations between law and collective bargaining have been experimenting another evolution in which legal provisions, many times adopted directly by Executive Power emptying the Parliament`s functions, have the capacity to abrogate collective agreement contents by means of the law. In general terms, we can say that there is a process where legal provisions affects collective bargaining efficacy, sometimes hurting constitutional provisions as in the Spanish case (arts. 37.1 CE), hence, they are affecting Trade Union Association Right[3].

2.1. Features of the collective bargaining system of each country before the crisis

To understand the impact of the crisis and, above all the anti-crisis measures on collective bargaining, it is essential to make an overview of the entrepreneurial and industrial relations in Italy, Portugal and Spain prior the crisis. In this regard, the following features must be taken into account:

a) The majority of Italian, Portuguese and Spanish companies are micro-size companies, with less than 10 workers[4]. However, these companies employ less than 50% of workers[5].

[2] In PALMA RAMALHO, „Portuguese labour law and industrial relations during the crisis". Working Paper, nº 54, ILO, Geneva, November 2013, pp. 1-2.

[3] In this regard, it is very interesting to analyse the two complaints directed by Spanish trade unions, CC.OO. and UGT in 2011 and 2012. Case nº 2918 (http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:3056434) and Case nº 2947 (http://www.ilo.org/dyn/normlex/en/f?p=1000:50001:0::NO:50001:P50001_COMPLAINT_FILE_ID:3063806).

[4] In the Italian case: 95% of the companies have less than 10 workers (Source: ISTA. http://www.istat.it/it/archivio/4870; in the Portuguese case: around 95 per cent of the companies have less than 10 workers (Source: National Institute of Statistics). In the Spanish case: 97,8% of the companies have less than 10 workers in 2008. (Source: Spanish Statistical Officehttp://www.ine.es/daco/daco42/dirce/dirce08.pdf).

[5] Maybe Spanish case is the most representative because almost 99% of the companies are small size companies or micro-size companies. http://www.ine.es/inebmenu/mnu_empresas.htm.

b) All of them systems have a long tradition of social dialogue between the Governments and the representatives associations and organizations of the employers and employee, especially at the highest level of representation. The social dialogue consisted of regular consultations in the approval of new legislation on employment and industrial legislation, except in the Italian case, in which social dialogue consisted, the most of the times, in wealth distribution public policies and trade union model[6].

c) There is also a long tradition of collective bargaining and collective agreements, which structure is similar, being the sectoral level (national and regional) that level more frequent. This preference for sectoral level branch agreements is due to the small size of most companies and it has played a significant cohesion and homogenization role in terms of working and living conditions. Specially in the Italian case, in which the national agreement establishes a basis of rights and standards, including minimum wages, for the industry workforce at large. Social partners, at company or territorial level, are being given a further possibility to improve pay and working conditions through the facultative second level. Since the former fix the minimum pay levels, taking into account purchasing power, at company level the rise in pay – as variable remuneration – depends heavily on performance incentives (productivity, profitability, quality, attendance). Since the 1990s, the impact of second-level agreements has been decreasing.

d) Competence to sign collective agreements, at every levels, on behalf of employees is mainly accorded (granted to) with trade unions, except in the company level where worker`s councils are the bodies concerned more frequently. In this regard, there are some differences among the countries, especially in the Italian case where since 1993 Inter-confederal Agreement implemented that 1/3 of the member of worker`s council was reserved for subjects chosen by trade unions[7]. Usually, company agreement is the level in which flexibility is introduced more frequently.

e) On efficacy collective agreements it is possible to apply the result of the bargain to all the workers, despite there are some differences among national systems. So, in Italy[8] and Portugal the general principle is the application only to the worker members of the trade unions or of the employer`s association that signed the agreement (affiliation principle), but in the practice it is also possible to apply the contents of the collective agreement to workers not affiliated[9] (in Italy by a judicial interpretation and in Portugal through administrative extension procedure). However, in Spain the main principle is general application to all the workers, affiliated and non-affiliated –*erga omnes* efficacy- when collective agreements respects the legal provisions on bargaining legitimacy (arts. 87 and 88 *Estatuto de los Trabajadores*). Nevertheless, in the Spanish case, trade unions and employer`s associations could sign collective agreements in which the bodies are not composed respecting legal provisions. In this last case, the contents of collective agreements are applied only to affiliated workers, although individual workers can ask for its application (judicial interpretation).

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[6] In this regard, *vid.*CESE, *EU national economic and social councils and similar institutions.*Brussles, 2011.

[7] Collective bargaining has been depending on social partners' mutual recognition only; agreements are not legally binding and their contents are only formally enforceable by the signatories' affiliates.

[8] In this regard, *vid.*,G. FERRARO, „Trade Union representation in Italy", in C. LA MACCHIA et alt., *Representing employee interests: trade union systems within the EU.* Bomarzo, Albacete, 2013, pp. 171-178.

[9] The exception here is the public sector, where since the late 1990s a law is in existence for the selection of representative unions entitled to bargain (Legislative Decree no. 296/1997 and 165/2001, art. 43). Unions need to pass a threshold of 5 per cent consensus to take part in national collective bargaining, whereas a final agreement is binding if signed by unions representing at least 51 per cent of the relevant workforce. These thresholds are calculated as a weighted average between votes and members.

f) One of the most important features of collective agreement in Italy, Portugal and Spain is related to the collective agreements validity period. This is, in these collective bargaining systems collective agreements stay in force until they are renewed by another one. Sometimes, this provision is introduced by collective agreement (Italy) and in the other cases, Portugal and Spain, this situation is provided by law. This kind of provision provides to the workers a major security about their working and living conditions, but at the same time it have brought a certain poorness collective bargaining dynamics, in terms of contents, over the years.

g) Last but not least, collective bargaining coverage rates of these countries are very high. So, in Italy collective bargaining coverage rate in 2008 was about 80%[10]; in Portugal, between 71 and 80 per cent[11]; and in Spain, depends on the source, coverage rate was in 2008 between 80 and 85 per cent[12] or 74,5 per cent[13]. These coverage rates were due to, in some cases as the Italian and Portuguese, extension mechanisms of collective agreements contents (judicial and administrative extension procedures); while, in the Spanish case the main type of collective agreement provides *erga omnes* efficacy.

3. Main changes on the collective bargaining systems: public and private sector

According to the European Commission and the institutions regulating the financial markets, such as the ECB and the IMF, economic measures aimed to reduce public deficit should be accompanied by governments action to impose in-depth „structural reforms" of Italian, Portuguese and Spanish legislations, which meant carrying out a series of reforms relating to labour relations, the social security system and collective bargaining, with the express aim of creating and/or maintaining jobs. In other words, while State macroeconomic action has tended towards reducing public deficit, and hence the contraction of the public sector, efforts to maintain and create jobs have been restricted to revising the regulation of labour relations and social protection systems. Therefore, two main lines of action have emerged[14].

The first one relates to the „inevitable" nature of austerity measures and public deficit reduction as the only way to exit the crisis and to achieve economic recovery. The political and economic debate has therefore moved away from issues such as changing the production model and the reforms needed in the field of business with a view to strengthening economic activity. Absolving economic and business actors their responsibilities in this way. In this regard, collective bargaining on public sector has been affected by non-application wages clauses (cutting and freezing, depends on the country).

The second line of action, which reflects the first, is closely related to the reforms carried out in labour relations, led by the arguable principle that jobs can only be created or maintained by reducing legal and political employment guarantees and reducing average pay standards and working conditions, setting job creation against robust employment rights. This view, which is nothing new, has not been shown to be correct, either in the

[10] http://www.eurofound.europa.eu/eiro/country/italy_4.htm.
[11] Source: *Livro Verde das RelaçoesLaborais*, ed. Ministério do Trabalho e da Solidariedade Social, 2008, p. 86.
[12] EPA (2008). It is very useful the information elaborated by Comisiones Obreras about collective agreements registration (REGCON). In this regard, vid. Cuadernos de Acción Sindical, La negociación colectiva ras dos años de reforma laboral, July, 2014, pp. 28.
[13] Social Security Survey (2008).
[14] A. BAYLOS y F. TRILLO, „The impact of anti-crisis measures, and the social and employment situation in Spain". European Economic and Social Committee, Brussels, 2011.

current crisis or in previous crisis such as those in the 1980s and 1990s. Nevertheless, during 2009-2013, there has been an intense process of reform, from both qualitative and quantitative points of view, which sees employment rights as the main cause of legislative rigidity and hence job destruction.

Public deficit reduction measures have been introduced progressively since 2010, with particular emphasis on cutting spending within the different public authorities. This does not mean that no decision has been adopted affecting revenue, but the majority of legislative work has focussed on the restructuring of public authorities' staffing costs, reducing public deficit and policies based on reducing social spending and the privatisation of public services within the particular structure of each State.

Having stressed the significance of the public sector in Italy, Portugal and Spain, we would mention the measures aimed at reducing public spending as an anti-crisis strategy. These fall into two stages, but which clearly have the same aims. Many legal provisions, adopting extraordinary measures to reduce the public deficit, introduced a series of actions aimed at controlling the public deficit resulting from the serious economic and financial crisis. The main measures under this regulation were:

- Suspension of the adjustment of pensions, except for minimum pensions and non-contributory pensions.
- Reduction in the wages of public employees by an average of 5%, in Spain, or 10% in Portugal.

In legal terms, the reduction in the wages of public employees led to an ongoing legal debate on the binding nature of the collective agreements of a general scope governing labour relations for workers in public authorities and public companies. For instance, in Spain that situation directly contravened the *Acuerdo Gobierno-Sindicatos para la función pública en el marco del Diálogo Social* (2010-2012) -Government-trade union agreement on public employees in the framework of social dialogue-, which, a few months before, had set salary tables, taking account of the crisis under way, and as a result of this contravention, all of the collective agreements for staff working for the different administrations were affected.

Other measures in public sector regarded:

- The replacement rate for civil servants is fixed at 0%, except for teaching staff, national health system centres and hospitals, armed forces and law-enforcement agencies, for which the replacement rate may be up to 10%.
- Working time increase for public employees. The same is true of certain public bodies in which the working time is set by means of statutory collective bargaining. In this case, there will be a conflict relating to the binding nature of the collective agreement and, ultimately, the right to trade union freedom.

In private sector, many legislative reforms have been adopted since 2010. Significant measures have affected some aspects on collective bargaining. Essentially, collective bargaining is promoted at company level beyond the aspects already regulated and not applied concerning specific aspects of the sectoral agreements on salaries or working time through the conclusion of a company-level agreement for economic, technical or productive reasons. The additional element of the reform is intended to promote the preferential use of company-level agreements over sectoral agreements, except when prohibited by competition rules or by the terms of an agreement. These regulations provided for:

- Priority to be given to the regulation of certain working conditions agreed in the collective agreement at company level, such as the amount of the basic salary and wage supplements; payment or compensation for over-time and specific payment for

shift work; the hours and the distribution of the working day; professional classification; measures for reconciling personal, family and working lives. Prior to the reform, collective sectoral agreements were the preferred level of collective bargaining, and the legislation allowed an interprofessional agreement or a collective sectoral agreement to establish different competition rules or organisation of the contents among different collective bargaining levels.

- The list of issues forming the minimum content of the collective agreement is increased significantly, while at the same time the freedom of the collective parties to decide the content of the text is reduced.
- A restriction of the time period a collective agreement can remain in force after it has expired, by setting a maximum negotiation period according to the time in force of the agreement, establishing an obligatory system of arbitration for times when the negotiation of the collective agreement is in deadlock, which was previously decided by the collective parties who had provided for it during the said collective bargaining. This is intended to restrict the time period during which, once an agreement has elapsed, its provisions can remain in force until a new text is agreed.

4. The impact of the collective bargaining reforms

This section will evaluate how last labour reforms are impacting on the collective bargaining and its consequences in terms of employment relations, working conditions and gender equality. In order to address this point, statistical data on the crisis and the situation of the collective bargaining are presented, not only on those specific subjects regarding strictly collective bargaining right, but also on employment relations and labour rights. So, we intend to stress, in first place, how the anti-crisis measures have affected collective bargaining and after that we will verify certain employment aspects as forms and internal configuration of labour relations related with collective bargaining. At last, we will analyse some important effects regarding the employment area as equality evolution between women and men, youth unemployment and long-term unemployment workers.

In the field of collective bargaining, the impact of the reform policies manifests itself in three big areas: i) in the growing collective bargaining de-centralization; ii) in the non-application of collective agreement as an instrument to achieve internal devaluation, not only through cutting wages, but also modifying *in peius* other rights as, mainly, working time and iii) limit collective agreements validity as a *necessary reform,* originated from the productive context in which there are many and very fast economic changes. All of these policies on collective bargaining are the consequence of those national reform policies, but supported by Understanding Memorandums[15].

The first stressed item, growing collective bargaining de-centralization process, has been the most important action implemented by Italian[16], Portuguese and Spanish Government on collective bargaining. The theoretical hypothesis to implement this policy was based in two fundamental arguments: competitiveness within the national market, as in the Italian case, in

[15] European Trade Union Institute, Benchmarking *Working Europe 2014*. Brussels, 2014, p. 69.

[16] In Italy, on January 22, 2009, a tripartite Framework Agreement for the Reform of Collective Bargaining (FARCB) was signed without CGIL and against the view of this union confederation. The new rules formally safeguarded the two-tier structure, with sectoral agreements continue to set basic protections nationwide. Their duration was set at three years for both the normative and economic parts, whereas they were respectively four and two years. The new system aimed to strengthen and enlarge the second level of collective bargaining, at company or territorial level. Decentralised collective bargaining will last three years (against the previous four) and will cover topics defined by sectoral agreements or legislation and which do not concern those already regulated at other bargaining levels.

which the Fiat employer threatened to the workers and the Italian government with the delocalization of the productive activity due to the high labour costs imposed by national collective agreement; and the second argument was based on external competitiveness. This is, wages devaluation as the only way to be more competitive in international markets, producing as a consequence the national economic recovery. So, collective bargaining de-centralization has been considered as a very important *target.* In this way, statistical data are very representative, especially in the Spanish case in which company level had an impressive growth. In 2011, there were 708 company agreements, in 2012 they increase to 835 and in 2013 company agreements grew again to 1.361[17]. This process, in an Italian, Portuguese and Spanish productive and entrepreneurial context in which more than 90% of the companies are small-size or micro-size, means that there is in progress a severe labour relations individualization process. In spite of the general trend of collective bargaining de-centralization in these systems, in Italy, aware of the risks of chaos, social partners gradually re-established co-operative relations, signing new framework agreements concerning trade unions representativeness and collective bargaining. The agreement of June 28, 2011 – signed by Confindustria and CGIL, CISL and UIL – confirmed the two-tier system and the primacy of the industry-wide level, with the possibility to adopt 'modifying agreements' at company level, but only when permitted by the sectoral agreement. Moreover, such modifications need to be signed by the majority of the works councils (RSUs).

The second item, collective agreement non-application has been related with the internal devaluation goal. Usually, this policy had validity in the previous period of the crisis, at least in the Portuguese and Spanish cases. The aim of this legal provision was based, on one hand, in the economic companies' necessities, even in order to survive, and, on the other hand, as an instrument to maintain employment rates in those cases in which companies were in a critical economic situation. In this way, employers should to bargain cutting wages with collective representation bodies in the company to assure economic survival company and at the same time employment rates. The result of this bargaining process was non-application of the wages provided by sectoral agreement. It is very curious to verify how this method did not like to employers, according to its *rigidity*, and with the crisis and the labour reforms this legal provision was reformed to reinforce unilateral employer decision (*flexibility*). So, nowadays employer is not obligated to bargain this decision with collective representation bodies in the company, but only to develop a consultation process. Moreover, this reformed legal provision provides the possibility to not apply neither working conditions bargained in the company agreement. Once again, Spanish case is the more representative of this trend among three legal systems analysed. In 2012 there were 748 non-application collective agreements, affecting 29.352workers and in 2013, this rate increased to 2.512, affecting 159.550 workers. Those working conditions not applied were strictly related with wages in 1.932 cases, the rest of the cases were related with working time (duration and distribution)[18].

At last but not least, validity collective agreements limitation has been the other convergent aspect among Italy, Portugal and Spanish. The theoretical explanation has been exactly the same respect the point analysed above. This is, collective bargaining systems, based on long time duration and the working conditions preservation until the bodies renewed collective agreement, were too much rigid, hindering productive and economic adaptations in the companies. Moreover, it was argued that this system provoked a poorness

[17] In http://www.empleo.gob.es/estadisticas/cct/CCT13DicAv/cc1/cct_12_2013_top_HTML.htm.
[18] http://www.empleo.gob.es/estadisticas/cct/CCT13DicAv/cc1/cct_12_2013_top_HTML.htm, pp. 29-30.

collective bargaining dynamics because trade unions were only interested in improve salary workers conditions, hindering others topics or experiences. Portugal and Spain are the countries that have provided a legal provision in this regard. In Portugal, the expiry of collective agreements is regulated by the Labour Code that came into force in 2003 and by its revisions in 2006 and in 2009.

The regulation described here is the new general regime of the expiry of collective agreements created by the Labour Code 2009.A collective agreement normally defines the period of its validity, in general one year for the wage tables and two years for the rest. Nonetheless, the agreement does not automatically expire if it is not renegotiated. Thus, an agreement may stay valid for years or even decades, even if it is not renegotiated. If one of the signatory parties wants to end its validity they must notify the other signatory parties that they wish to do so. This process of withdrawal has to follow certain stipulations defined in the Labour Law. The referred notification must include the offer to negotiate a revision of the agreement. The period for renegotiation (which may include conciliation, mediation and arbitration) has a minimum duration of 18 months. If the renegotiation fails to produce a revised agreement one of the signatory parties may notify the Ministry of Employment about this failure. Sixty days after this notification the agreement expires. Having received the notification about the failure of the renegotiation of the agreement, the Ministry of Employment will verify whether all stipulations of the Labour Law with regard to the expiry of collective agreements have been followed. The Ministry invites the parties involved to state their position in relation to the process. After the verification of all facts the Ministry publishes the official announcement of the agreement in its monthly Bulletin of Employment and Labour. If the signatory parties do not sign a new agreement after the expiry and if there are no agreements in place in the sector/company that was covered by the expired agreement, labour relations in the respective sector/company will be regulated by general labour law.

After the effective expiry of a collective agreement the wages and other core terms and conditions such as category (function/occupation), working hours and specific social protection schemes remain in place in individual contracts of the workers who were covered by the agreement before its expiry. In the practice, since the creation of the legal possibility to end the validity of a collective agreement (2003), the Ministry of Employment has published announcements of the cessation of validity in relation to 34 agreements (most of them branch agreements).In all cases the process was triggered by the employers. Arbitration in collective bargaining does not work in Portugal. Since 2009 the Ministry registered only 2 cases of successful arbitration, covering less than 28,000 workers. The legal requirements for the expiry of collective agreements may be considered demanding and the minimum periods may seem to be long, but it is possible for one of the signatory parties to trigger and effectively end the agreement if they wish to do so.

While, in Spain most of the times, collective agreements include a specific regulation about this subject, in which for instants it is possible and usual negotiate different periods of validity for each topic -usually, wage tables- or stipulate expiry notification effects. So, only when collective agreement does not regulate this area, law is applied: Collective agreements will be renewed year after year, if there is not expressly notification by signatory parties" (art. 86.2 *Estatuto de los Trabajadores* after the reform provided by Law 3/2012). During negotiation to renew a collective agreement, the so called *normative part* of collective agreement (working and employment conditions) will be renewed automatically, but *contractual part* will lose its validity from notification date (especially strike clauses). Moreover, signatory parties can achieve partial agreements to modify some renewed contents in order to adapt working and employment conditions after the period of

validity. But, it existed a notification by a signatory part (nowadays this notification was made usually by employers) and one year later to begin negotiations to renew collective agreement there is not an agreement, original collective agreement loses its validity. In this case, it is possible to make an arbitration faced to a national or regional institution, in which are represented the Spanish government, employer`s associations and trade unions. So, it is possible that collective agreement will unapply for the workers and still there are no judicial decisions in this regard. The Spanish government and employer`s associations think that the only way to solve this situation is a working condition individual negotiation.

Before to analyse the main consequences on the labour and employment relations, it is very important to stress how anti-crisis measures impacted on collective bargaining coverage rates decrease[19]. This indicator shows a relevant trend of the current European social model regarding labour relationships. In other words, *new* European labour relations model is based on the individual agreement between employer and employee, at least in those countries in which size-companies is small or even micro-size. This return to the liberalism principles is justified in terms of governance *–new economic governance-* by the European political institutions, especially by the European Commission[20]. Moreover, this poor democratic European situation on labour relationships is causing, among other factors, very large inequality rates within certain European Members States as OECD has informed recently[21].

As a direct consequence of anti-crisis measures, it is observed how in the last four years, there is in progress an intense *precarization labour* relations process due to collective bargaining reforms, among other factors. The relation between certain collective bargaining aspects – as its structure and its validity, above all- and employment relations and working conditions has been a tradition in Italian, Portuguese and Spanish systems. Since 1990s, collective bargaining has been the source in which employment relations and working conditions were regulated. So, it was impossible to understand the working time regulation, for example, without take into account conventional regulation. In this regard, in Spain, it is taking place a marked decrease on full time contracts, substituted by non-voluntary part-time contracts[22]and non-fixed contracts. In general terms, at least in Spain, it means that collective bargaining is losing its effectiveness as an instrument to balance the interests between employers and employees. Sometimes, it is due to employers do not applied to non-fixed workers working conditions provided by collective agreements. Other times, new legal provisions are looking for a reinforcement of unilaterally employers productive organization decisions, impacting on the collective bargaining efficacy. Last labour reforms on collective bargaining, basically, are based in the employer power to not apply collective agreement provisions and in the working conditions regulated by company agreements.

Another significant effect of the anti-crisis measures on collective bargaining and workers interest representation has been, in general terms, the quick rise of unemployment in Italy, Portugal and in Spain. In all these countries, unemployment rates were low prior the crisis (2008) and in this moment these are very high, especially in Portugal and above

[19] So, in Italy collective bargaining rate is 80%; in Portugal, 90% and in Spain collective bargaining rate is decreased to 70% in 2013. Source: *ETUI, Worker participation, 2013.*

[20] A critic of this concept of *economic governance*, in the European Parliament, „Better legislation, subsidiarity and proportionality and smart regulation" (2011/2029(INI)), 14 September 2011.

[21] OECD (2014), *Society at a Glance 2014.OECD social indicators.The crisis and its aftermath,* pp. 109-119.*http://www.oecd.org/els/soc/OECD2014-SocietyAtAGlance2014.pdf.*

[22] In Spain, 62% part-time workers declared to be in this form contract because they did not find a full time job. In F. ROCHA and E. NEGUERUELA, „El mercado de trabajo en España. ¿Hacia una recuperación frágil y socialmente injusta de la crisis? Fundación 1º de mayo.Informe, nº 87, marzo 2014, p. 97.

all in Spain[23]. Despite the process in which employment rates are improving, this recovery seems too much slow and unfair from a social point of view[24].

Strongly connected with previous comments, collective bargaining reforms are impacting on equality between women and men. Statistical data shows similar behaviours among Italy, Portugal and in Spain. It seems that women and men are sharing the antisocial effects of anti-crisis measures on unemployment rates[25]. But, we are not pretty sure that they are also sharing positive effects in terms of employment quality. In other words, at least in Spain, part-time contracts are increasing markedly among women with a high turnover. In the area of youth unemployment, it exists a convergence evolution respect youth in, under 25s, in the three countries, consisting in a very high and worrying unemployment rate. In this regard, Spain presents the worst rate, affecting almost 60% of youth under 25 years[26]. It is also disturbing those rates that indicate long-term unemployment in Italy, Portugal and Spain. Once again, Spain and Portugal present a very high percentage of active population in this situation. Concretely, in Portugal in 2013 it was a 8.5%, representing 4,658,000 workers[27] and in Spain, 53,8%, affecting 3,456,400 workers[28].

These youth unemployment rates, unemployment rates in general terms, are affecting in a very strong way to the representation function of trade unions, including collective bargaining right. Despite in some juridical systems, worker`s concept is conceived in a material meaning, as a category that not regarding only the moment in which workers are integrated in the production, the moment selected by trade unions to represent workers interest has been traditionally that productive moment. In other words, times of trade union representation are workers productive times. So, in a society as the Spanish one, in which there are a combination of factors based on the presence of 6 million of unemployed workers, a very high youth unemployment rate and almost 3.5 million of long-term unemployed, trade union representation, including its main representation mechanism collective bargaining, is in risk. Therefore, it is very possible that anti-crisis measures will produce a systemic change in middle-term[29].

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[23] So, in November 2013, Italy presented a rise of unemployment respect a year ago from 11.3 to 12.7%; in the Portuguese case, unemployment rate has experimented a decrease from 17.00% to 15.5%; and in Spain unemployment rate is in 26.7%. Source: Eurostat. http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08012014-BP/EN/3-08012014-BP-EN.PDF.

[24] In this regard, *vid* for the Spanish case, F. ROCHA and E. NEGUERUELA, „El mercado de trabajo en España. ¿Hacia una recuperación frágil y socialmente injusta de la crisis? Fundación 1º de mayo. Informe, nº 87, marzo 2014. http://www.1mayo.ccoo.es/nova/files/1018/Informe87.pdf.

[25] http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08012014-BP/EN/3-08012014-BP-EN.PDF.

[26] In Italy, this unemployment situation affects to 41.6% (659,000 young workers); in Portugal, 36.8% (150.000 young workers) and; in Spain, this rate affects to 57.7% (983.000 young workers). http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-08012014-BP/EN/3-08012014-BP-EN.PDF.

[27] Source: National Institute of Statistics.

[28] Source: INE. http://www.ine.es/jaxiBD/tabla.do.

[29] *Vid.* F. TRILLO and A. GUAMÁN, „Le syndicalisme en (dans la) crise. Quelques réflexions à partir des réformes du marché du travail en Espagne", in *Savoir/Agir,* numèro 27, 2014, pp. 53-62.

COURT OF COMPETENT JURISDICTION AS FIRST TRIAL CIVIL COURT

Laurențiu Gheorghe CONSTANTIN *

Abstract: *The tribunal is a court of general jurisdiction, meaning when the law does not provide the competent court to provide a settlement for a request brought forward by, this request will be judged in trial court, the law providing that they are in the court jurisdiction in the trial court ,all applications that are not given by law in other courts jurisdiction. The district courts are not court of law anymore as they were governed in the old Code of Civil procedure, according to the new regulation, they settle only application expressly provided by law for competent settlement. The law establishes the jurisdiction of the Court of First Instance, excluding from its competence the applications made by law in „other courts jurisdiction", being about both district courts but also others bodies with jurisdictional activity provided by special laws.*

Keywords*: first instance, common right, court, appeal, second appeal*

The court jurisdiction shall be determined after material and value thus according art95 from the Code of civil procedure, tribunal's judge: In first trial, all application that are not given by law in the competence of another court;As first trial court, the appeals declared against the decisions made by district courts in first trial; As second appeal court, in the cases provided by law; Any other requests made through the law in their jurisdiction.

In those following we will analyze the competent jurisdictions of the court as first trial court, meaning all the application that is not given by law in the jurisdiction of other courts.

According the Code of civil procedure, the tribunal is the first trial court, meaning when the law does not name a competent court to settle a request, this will be judged in first trial by the tribunal, the law providing that they are under the tribunal jurisdiction in first trial, all the application that are not made by law in the jurisdiction of other courts. The District Courts are not courts of general jurisdiction anymore as they were regulated by the old code of civil procedure, according the new provisions; they only settle the requests expressly provided by law for competent settlement.

The text of the law lays down the general competence of the Court of First Instance, excluding from its competence application given by law in the competence of another court being about both district courts but also others bodies with jurisdictional activity provided by special laws. The tribunal judges in first trial the requests evaluated in money whose value are of more than 200,000 lei regardless of the quality of the parties, professionals or not[1].

* Avocat Baroul Bucuresti

[1] *According to Article 2 paragraph 2 of Law No 72/2013, professional is any natural or legal person who operates an enterprise for profit. Civil Code shall also apply to relations between professionals, and to the relationship between them and any other matters of civil law, in Article 3, paragraph 2 shall be defined professionals as all those who operates an enterprise.Operation of an undertaking shall constitute systematic exercise, by one or more persons, of an activity organized which consists of production, managing or handing over of goods or the provision of services, regardless of whether or not has a non-profit-making.*

[2] *According to point 3 of Article 2 of Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions, „enterprise" means any organization, other than a public authority, which is engaged in an economic activity or professional independence, even if that activity is carried on by a single person.According to Articleparagraph 2 of Law No 193/2000 by professional is understood any natural or legal person authorized, which, under the terms of a contract shall be governed by this law, shall act within the framework of its commercial activity,*

This competence, although it is not expressly provided by the code of civil procedure follows from the analysis of the provisions referred to in Article 94 point 1. (j) Which shall require that District courts of first trial „any other claims evaluable in money up to 200.000 lei including, regardless of the quality of the parties, professional or non-professional" with the exception of those judicial incompatibility which are given in District court competence, to be heard in the first instance, regardless of value.

According Article 94 paragraph 1.h) is provided that district courts judge in first instance the applications regarding the obligations to make or not to make invaluable in money, regardless of the contractual or extra contractual nature, with the exception of those given by law in other courts. From the review of this text , does not result that the law has considered that all these categories of demand on the obligations to make or not to make bears not patrimonial liability, But only that it is explicitly provided that these applications regarding the obligation, to make or not make invaluable in cash, regardless of the contractual or extra contractual source, are in the District Court jurisdiction, with the exception of those given by law in the jurisdiction of another court, and neither the fact that the rest of applications, those with patrimonial character, are in the tribunal jurisdiction, meaning that the claims from this category whose object in valuable in money , but the legislator has considered the claims regarding the obligations to do are not to do so far as they are evaluable in cash shall be subject under the value criterion and they are under the district court jurisdiction if they do not exceed the value of 200,000 lei regardless of the parties quality, professional or non-professional, and if the value of the requests exceeds this ceiling, are under the Tribunal jurisdiction.

The Tribunal judge in first instance and the request given in their jurisdiction by certain special law as: Invaluable in money claims regardless of the quality of the parties, professional or non-professional, other than those given to other courts.In this category we illustrate the provisions of Article 63 of Law No 31/1990 relating the companies, so, the requests and the appeals provided by law, in the jurisdiction of the District Court, shall be settled by the court in whose territorial jurisdiction is the company headquarters.

According art.25 from Law no. 26/1990, any natural or legal person injured as effect of the registration or by a reference in the Register of Commerce shall have the right to request cancellation of the damaging registration, in whole or only in respect of certain elements of it, in the case in which the judgment irrevocable have been dismantled in full or in part, or the records modified that have been the basis of registration in respect of which they are requesting the cancellation, if through Court judgment has not been ordered an indication in the Register of Commerce.

The application shall be filled and shall be recorded in the Register of Commerce where was made the registration of the tradesman. Within 3 days of the date of submission, the office of the Register of Commerce shall submit to the Court of First Instance in whose territorial jurisdiction is situated the trader and in case of branches established in another county, Court of First Instance of that state or province.

The Court shall give a ruling on the request by summoning the commercial register and of the trader. The district court settlement of the claim may be appealable only in the second appeal and the time limit for a second appeal flows from ordering, for the Parties present, and of the communication, for missing parts.

According to Article 8 of the Law No 85/2014 on the procedures relating to the prevention of insolvency and insolvency, the court in whose constituency is situated the

business location of the debtor has jurisdiction to settle applications to which they relate the procedure for the prevention of insolvency[2].

Application and causes relating the arrangement with creditors are under the jurisdiction of the syndic judge. In accordance with Article 41 of Law No 85/2014, all procedures in the field of insolvency, with the exception of appeal are under the jurisdiction of the first instance court specialized, in whose constituency the debtor has its registered office/professional at least six months prior to the date of the court referral.

If the Court of First Instance has been created a special situation of insolvency, to it belongs the competence for carrying out procedures provided for in this law. Registered Office/professional of the debtor is the one appearing in the register of commerce, respectively in agricultural companies register or the register associations and foundations. In the event if the headquarters has been changed with less than 6 months after submission of the application for opening insolvency proceedings the head or registered office/professional of the debtor is the one with which it figure at the Register of Commerce, respectively in agricultural companies register or in the Register of associations and foundations before the change.

The Court of First Instance has legally invested with a request to open insolvency proceedings, remains able to settle the cause, irrespective of subsequent changes of the headquarters of the debtor. Everything in this respect are and the provisions of Article 120 of the Code of civil procedure, in such a way that, the applications in insolvency matter or the arrangement with creditors within the exclusive jurisdiction of the Court of First Instance in whose constituency has its headquarters the debtor.

Another category of the application given in the first instance competence are the requests in matter of the right of intellectual property, such as: Law No 255/1998 on the protection of new varieties of plants[3], Law No 129/1992 on the protection and designs[4], Law No 64/1991 patent law[5], Law No 84/1998 relating to trademarks and geographical indications[6].In the case of Article 21 of Law No 33/1994, settlement of expropriation is the responsibility of the county court or of the Court of First Instance in Bucharest in whose lands is situated the property proposed for expropriation[7].The tribunal will be referred to by the expropriator in order to take a decision regarding to expropriation, in case in which it has not been made a counterstatement for the proposal of expropriation or if this remedy at law was rejected. In accordance with Article 26 of Law No 10/2001 on the juridical regime of certain buildings taken over in a abusively manner in the period March 6 1945-December22 1989[8] if the return in nature is not possible, the holder of the property or, as the case may be, the entity invested according to this law with the settlement of notification shall, by decision or, as the case may be, by provision grounds on which it is based.

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[3] *Law No 85/2014 on the procedures relating to the prevention of insolvency and insolvency, published in Official Gazette .no. 466/25.06.2014.*
[4] *Law No 255/1998 on the protection of new varieties of plants, republished in of. no. 230/01.04.2014.*
[5] *Law No 129/1992 on protection designs, republished in Of.G.no. 242/04.04.2014.*
[6] *Law No 64/1991 patent law, republished in Of G.no. 613/19.08.2014.*
[7] *Law No 84/1998 relating to trade marks and geographical indications, republished in Of G.no. 337/08.05.2014.*
[8] *Law No 33/1994 on expropriation in the public interest and republished in Of. G .no. 472/05.07.2011.*
[9] *Law no. 10/ 2001 on the juridical regime of certain buildings abusively taken over during the period March 6 1945 -22 December 1989, republished in Official Gazette no. 798/02.09.2005.*

The term of 60 days, to be granted to the person entitle for compensation others assets or services or to propose to pay damages in the conditions of the special law regarding the establishment arrangement and payment of the charges for buildings abusively taken in those cases in which the measure of clearing is not possible or it is not accepted by the person entitled. The decision, or, as the case may be, the reasons for rejection of the notification or the application for refund in nature may be appealed by the person who pretends to be entitled at the Civil division in whose constituency is situated the head office of the unit owner or, as the case may be, of the entity invested to settle the notification, in term of 30 days from the communication.

The decision of the First Instance Court is subject of appeal, who is under the jurisdiction of the Court of Appeal. According Art 22 from Law no. 544/2001 regarding free access to information of public interest[9], in the case in which a person is considered injured in his rights, as provided by law, this can make a complain to the administrative court division of the Court of First Instance in whose territorial jurisdiction is situated the head office of the authority or of the public institution. The claim shall be done within 30 days from the date of expiry of the period referred to in Article 7^{10}.

Court may oblige the authority or public institution to provide the information of public interest required and to pay damages for emotional distress and/or heritage.

An application for the winding-up of a political party shall be addressed to Bucharest Court by the Ministry.

g) in accordance with Article 269 (2) of Law No 297/2004 on the capital market, the competent court shall settle the application N. C.T.S to initiate proceedings for judicial reorganization and bankruptcy of authorized entities is the tribunal in whose constituency is the office of the said entity.

h) According Art. 39 line 2 from Law no. 248/2005 regarding the condition of free movement of the Romanian citizens abroad in the situation referred to in Article 38 letter (b), the measurement is given, at the request of the competent institution in matters of defense, public order or national security which holds data or information regarding the activity which a person carries out or will be carried out abroad, by the first instance court in whose constituency is domiciled this person, and when this one has the address abroad, by Bucharest Court.

i) according art 286 from OUG no. 34/2006 regarding the assignation of the contract for the public assignment , the concession contract of public works and of the cession contracts of services, the process and claims regarding the award of damages for the restoration of the damages caused in the framework awarding procedure, as well as regarding the execution, vividness, invalidity, termination, unilateral termination or withdrawal of public contracts of acquisition, shall be settled in the first instance to the

[10] *The Law no. 544/2001 on free access to information of public interest, which shall be published in of. G...no. 663/23.10.2001.*

[11] *Article 7 of the Law no. 544/ 2001Public authorities and institutions shall be required to respond in writing to requests for information of public interest within a period of 10 days, or, as the case may be, within 30 working days from registration request, depending on the severity, complexity, work volume documentary and urgency.*
If the time required for the identification and broadcasting information required exceeds 10 days, the response will be communicated to the applicant within 30 days, with the condition to provide this one a notice in writing, of this fact within a period of 10 days.
Refusing to communicate the information required shall be motivated and communicated in term of 5 days from receiving the application.
Request and receiving the information of public interest may be carried out if they are met technical conditions necessary, in electronic format.

administrative court and fiscal of the Court of First Instance in the jurisdiction of which is the head office of the contracting authority.

j) According art. 66 from OUG no. 54/2006 regarding the regime of contracts of concession of the goods public property, the resolution of litigation settlement of disputes arising in connection with assignment, conclusion, execution, amendment and termination of the contract of concession, as well as those of granting compensation shall be carried out in accordance with provisions of the law on administrative litigation No 554/2004.

The action shall be inserted in the justice department in the administrative court of the Court of First Instance in whose jurisdiction is the head office of the provider.

Against the court may appeal to the administrative court of the Court of Appeal, in accordance with the legal provisions.

k) in accordance with Article 4 (4) of Law No 221/2009 concerning convictions with political and administrative measures treated as such, the application shall be imprescriptibly, being exempted from the stamp tax, and the competence of the settlement belongs to court of first instance, civil division, in whose constituency is residing the person concerned.

l) according art 10 from Law 54/2004 according the administrative, litigation concerning acts of administration issued or concluded by local public authorities and county councils, as well as those which relate to taxes and duties, contributions, customs debt, as well as their accessories up to 1,000,000 lei the main issue of the matter trial shall be settled in the courts administrative-fiscal, and, in the case of those concerning acts of administration issued or concluded by public authorities, as well as those which relate to taxes and duties, contributions, customs debt, as well as accessories in excess of 1,000,000 lei is settled in the matter trial the sections of contentious administrative matters.

Administrative and fiscal of courts of appeal, if by a special organic law does not provide otherwise.

In case of individual labor conflicts of the civil workers they shall be settled by the Court of First Instance, the complainant may address the Court from his domicile or that of the defendant's domicile. If the applicant has chosen the court from the defendant domicile, it cannot be invoked the defense of inconvenient teritory

m) According art. 80 from Law no.188/1999 regarding the status of civil workers, if the public worker is dissatisfied with the penalty applied, he can address to the administrative court, requesting cancellation oramendment,as the case may be,of the order or provision of penalties.

n) in accordance with Article 198 of Law No 62/2011 on social dialog, if the employer considers that the strike has been declared or is being carried out with breaking the law, he can address to the Court of first instance in which jurisdiction is the unit in which is declared strike with a request through which is requested the end of the strike.

o) according art 269 from Labor Code, judging labor conflicts is in the District court jurisdiction, established according the law.

Applications relating to the causes mentioned shall be addressed to the competent court in whose constituency the applicant has his domicile or residence or, as the case may be, their headquarters.

If the condition of active (22) joint litigation provided by the procedure of the civil code are fulfilled, the application may be made to court for any of complainants.(23)

In accordance with the provisions of Article 208 of Law No 62/2011, individual employments disputes shall be settled in the court of first instance.

In accordance with Article 210 of Law No 62/2011, applications relating to individual settlement of labor disputes shall be addressed to the labor court of first instance in whose constituency is the residence or the place of work of the applicant.(24)

The residence of the natural person, in order to be able to exercise his rights and freedoms, is where he declares his main residence.

Establishment or change of residence shall not operate only when the occupying who moves to a specific place who did it with the intention to have their main residence.

In the case of Article 200 of Law No 62/2011, the Court shall examine the application in which they request the end of the strike and pronounce by emergency a decision through which, as the case may be:

- rejects the employer application;
- grants the application by his employer and states the end of strike as illegal.

Judgments given by the court shall be subject only of the appeal.

Conclusions:

The analysis shows that, the tribunal is the court of general jurisdiction, meaning when the law does not provide for authority competent to settle a request, this will be judged in the first instance by the Court of First Instance, the law by providing that Court of First Instance shall have the responsibility in the first instance, all applications that are not given by law in other courts. District Courts are not courts of general jurisdiction as there were presented in the old civil code of procedure according to the new regulations, they shall settle only applications expressly provided by law for competent settlement.

The text of the law lays down general competence of the Court of First Instance, excluding from its competence the application given by law in the „jurisdiction of others courts" being abou both district courts but also other entities with jurisdictional activity provided by special laws.

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THE BINDING NATURE OF THE PRELIMINARY PROCEDURE

Nicolae GRĂDINARU *

Abstract: *The preliminary procedure established by certain special laws, namely those procedures that must be met by the parties before we address the court must not be contrary to the fundamental law. The establishment of a judicial administrative procedure is not contrary to the principle laid down in art. 21 of the Constitution, on free access to justice, as long as the administrative jurisdiction body's decision may be appealed before a court. Access to judicial structures and procedural means, including legal remedies, is subject to the rules on jurisdiction and legal proceedings established by law. According to Article 193 of the Code of Civil Procedure, of the court the notification can be made only after fulfillment of a preliminary procedure, if the law expressly provides it. Proof of completion of the preliminary procedure shall be attached to the application of the legal proceedings.*

Keywords: *preliminary procedure; greeting; revocation; succession.*

According to art. 21 of the Constitution, any person may go to court to protect the rights, freedoms and legitimate interests.

No law may restrict the exercise of this right.

Parties have the right to a fair trial and settlement of cases in a reasonable time.

Administrative special jurisdictions are optional and free.

The right to appeal the court is not an absolute right, it may be limited by law to the extent that it does not restrict access to a court of law.

According to Recommendation No. R (86) 12 of the Committee of Ministers of the Member States to limit the number of non-judicial tasks performed by judges and reducing excessive volume of activity, to improve the administration of justice, the interest in ensuring a balanced distribution of cases between courts and the effective use of their human resources. [1]

The recommendation encourages, where appropriate, the friendly conclusion of the dispute, either outside the judicial system either before or during the proceedings.

The preliminary procedure established by certain special laws, namely those procedures that must be met by the parties before they address the court must not be contrary to the fundamental law.

The establishment of a judicial administrative procedure is not contrary to the principle laid down in art. 21 of the Constitution, on free access to justice, as long as the administrative jurisdiction body's decision may be appealed before a court.

Access to judicial structures and procedural means, including legal remedies, is subject to the rules on jurisdiction and legal proceedings established by law.

* Associate Professor PhD "Constantin Brancoveanu", Pitesti.

[1] The preliminary procedure was established according to Recommendation R (86) 12 of the Committee of Ministers of the Member States. Adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies.

Free access to justice is done only in respect of equality of citizens before the law and public authorities, so that any exclusion that would mean violation of equal treatment in law is unconstitutional. [2]

The preliminary procedure provided by the Code of Civil Procedure

Civil Procedure Code and special laws establish some preliminary non-judicial procedure. The preliminary procedure is a condition regarding the civil action against the conditions for exercising the civil action together with other conditions. [3]

According to Article 193 of the Code of Civil Procedure, of the court the notification can be made only after fulfillment of a preliminary procedure, if the law expressly provides it.

Proof of completion of the preliminary procedure shall be attached to the application of the legal proceedings.

The preliminary procedure is another condition regarding the civil action as opposed to the conditions for exercising the civil action provided for by Article 32 of the Code of Civil Procedure namely any application can be made and sustained only if its author:

a) has legal capacity as provided by the law;

b) has locus;

c) makes a claim;

d) establishes an interest.

These provisions apply, as appropriate, also in the case of defense.

The preliminary procedure laid down in Article 193 of the Code of Civil Procedure does not concern judicial administrative proceedings referred to in Article 21 paragraph 4 of the Constitution, namely that the special administrative jurisdictions are optional and free.

The Procedure Code refers to non-judicial preliminary procedures and does not cover a specific form that must have the examiner document leaving to the discretion of the judge whether the conditions of this document are fulfilled according to the special law providing for this procedure.

According to article 200 of the Code of Civil Procedure, the panel of judges which has been assigned to, randomly, the cause shall verify immediately whether the application for summons satisfy the requirements of art. 194-197. From the analysis of this text shows that prior checking procedure is not mandatory at this stage and it can also be made later in the process, thus, the proof that this procedure can be done afterwards.

However, Article 193, paragraph 1 contains a mandatory rule to the effect that, the notification of the court may be made only after completing a prior procedure but without this procedure can only be invoked by the defendant.

Failure to comply with the preliminary procedure can not be invoked by anybody, but only by the defendant in the defense, under penalty of forfeiture, [4] and where, greeting is not mandatory at the first hearing. According to article 201 of the Code of Civil Procedure, the judge, once he established that the legal conditions are met, for the application of

[2] Plenum of the Constitutional Court's Decision No.1 / 1994 on public access to justice for persons in defending the rights, freedoms and legitimate interests, published in M.Of.nr.69 / 16.03.1994.

[3] Law no.134 / 2010 Civil Procedure Code, republished in M.Of.nr.545 / 03.08.2012, as amended by Ordinance No. 4/2013 published in M.Of.nr.68 / 01.31.2013, amended by Law no.2 / 2013 published in M.Of.nr.89 / 02.12.2013. Civil Procedure Code entered into force on 15 February 2013.

[4] Art.208 para 2 of the Code of Civil Procedure Failure of defense within the time prescribed by law shall entail the forfeiture of the defendant's right to evidence and proposes to invoke exceptions, than those of public policy, unless the law provides otherwise.

summons, disposes, by resolution, its communication to the defendant, providing him to take into consideration that is required to submit the greeting, under penalty prescribed by law, which shall be expressly indicated, within 25 days after notice of the summons.

Lack of the procedure may be invoked by a exception background the preliminary procedure being a condition of exercise of the action is preemptory / dirimated because it results in cancellation of the admission of the application of summons, and is relative because it can only be invoked by the defendant in the defense[5] lapse.

Acceptance or rejection of the plea by the court or failure to be resolved is a reason for appeal or recourse, according to art.488 paragraph 1 item 5 „by the decision given the court violated procedural rules breach of which attracts nullity"

Removing the preliminary procedure in relations between professionals.

By establishing the preliminary procedure of conciliation the legislator sought to put into practice the principle of celerity of settlement of disputes between the parties - more prominent in commercial matters - and to relieve the work of the courts. Therefore, the role of the procedural rule criticized is to regulate extrajudicial proceedings to provide the parties an opportunity to understand the potential claims of the applicant, without the involvement of the competent judicial authority. Compared to these major reasons, conditioning the notification of the court on the completion of the conciliation procedure with the opposing party can not be regarded as affecting the access to justice in the sense prohibited by the Constitution of reference, as long as the interested party may apply to the court with the request of summons. [6]

Established to enable settlement of the dispute amicably with the declared aim of avoiding investing with a new court case, the direct conciliation procedure for dispute resolution in commercial matters prescribed by Article 109 paragraph 2 and 720^{1} - 720^{10} of the former Code civil Procedure, it established a special procedure for resolving these types of disputes between the parties and a judgment procedure derogating from the common law, a preliminary procedure was mandatory for traders and the notification of the court without performing this procedure drew dismiss the action as premature introduced. [7] Gradually the preliminary procedure in commercial matters has lost its consistency being omitted from the Code of Civil Procedure, we consider that it was unnecessary as likely to delay the notification of the court, given that future litigants were only attending to tick it without them and to really prefigure the settlement of the dispute amicably.

The parties in such disputes shall apply the Code of Civil Procedure and the Law no.192 / 2006 on mediation.

The Civil Procedure Code does not regulate the procedure of conciliation prior regarding any matter, no longer existing a difference between litigation „of common law" and those „between the professionals". As such, the question arises whether the preliminary procedure in administrative contracts still exists, since the provisions of Article 7 paragraph 6 of the Law no.554 / 2004 on administrative litigation require that, the preliminary complaint where actions concern the administrative contracts signifies conciliation in the

[5] The relative nullity may be invoked only by the interested party and only if the irregularity was not caused by his own deed.
[6] Decision no.335 / 2004 of the Constitutional Court, published in M.Of.nr.955 / 19.10.2004.
[7] Decision No. 83/2005 of the Court of Suceava. Commercial Division.

commercial disputes, the Code of Civil Procedure shall apply accordingly. In this case, the complaint must be made within 6 months will begin:

a) from the date of conclusion of the contract, for disputes relating to the agreement;
b) from the date of the change contract or, where appropriate, from the date of the refusal of the application for amendment made by one party regarding disputes relating to the amendment;
c) from the date of breach of contractual obligations in disputes relating to performance of the contract;
d) from the date of expiry of the contract or, where appropriate, from the date of the occurrence of any other causes which attracts the settlement of contractual obligations in disputes relating to termination;
e) from the date of finding the interpretable nature of a contract, for disputes concerning the interpretation of the contract.

The preliminary complaint in the case of unilateral administrative documents may be introduced, for good reasons, also over the period of 30 days but not later than 6 months from the date of issue of the document. The 6-month is the prescription period.

We believe that the conciliation procedure, since it was not taken over by the new Code of Civil Procedure shall no longer apply in the event of any dispute between professionals and administrative contracts but the provisions of Article 193 of the Code of Civil Procedure and the Law .192 / 2006 on mediation.

However, for the avoidance of doubt, we consider that the intervention of the legislator is required to correlate the provisions of Article 7 paragraph 6 of the Law no. 554/2004 with the new provisions of the Code of Civil Procedure.

Prior procedures in Romanian legislation

The preliminary procedure in the case of voluntary intervention

The doctrine and jurisprudence has held that in the case of an application for voluntary intervention in their own interest in an administrative dispute, the intervener must complete before the application of intervention the preliminary procedure laid down in Article 7 of Law no. 554/2004. [8]

According to Article 62 paragraph 2 of the Code of Civil Procedure, the demand for voluntary intervention can only be made at first instance, before closing the debate on the merits.

According to Article 64 of the Code of Civil Procedure, the court shall notify the parties the application to intervene and copies of the accompanying documents.

After hearing the intervener and the parties, the court will rule on the admissibility of the intervention in principle, by a reasoned.

Conclusion of admission in principle can not be attacked only at the same time with the background.

The Civil Procedure Code provides that the court which was noticed shall communicate the parties the application to intervene and copies of the accompanying documents without the parties to submit the greeting because it is not judged on the merits request but judge it on the admission in principle. Only after admission to the principle of

[8] Dragos Dacian - Administrative Litigation Law. Comments and explanations, Bucharest, All Beck, 2005. p.221. Ovidiu Puie - Administrative Proceedings, vol. I, Bucharest. Legal universe, 2009. p.72.

the voluntary intervention request, the court shall set a deadline for the formulation of defense to the claim for trial of summons with merits on the voluntary action.

This would be the time when the defendant may invoke only by greeting under penalty of forfeiture by litigants of administrative contentious, lack of the preliminary procedure, not when the court decides in principle the application for admission the voluntary intervention.

Taking into account the purpose of the provisions of Article 193 paragraph 2 of the Code of Civil Procedure, the litigants may claim the preliminary procedure and trial procedure of admissibility of the voluntary intervention, when the court disposes hearing of the intervener and the parties, which may invoke the lack of the preliminary procedure, after which the court will rule on the admissibility of regarding principle of intervention by a reasoned conclusion.

We believe that the parties the are not prohibited regarding this phase of the process should not be allowed to cite lack of prior proceedings, because there would be no sense in principle to accept an application for the voluntary intervention and subsequently to be rejected as inadmissible when judged the merits of the applications. Although still 193 paragraph 2 of the Code of Civil Procedure expressly provides that „Failure to comply with the preliminary procedure can not be invoked by anybody, but only by the defendant in the defense, under penalty of forfeiture."

The preliminary procedure in the case of Inheritance debate

According to Article 193 paragraph 3 of the The Civil Procedure Code, at the court notification with the debate of the succession procedure, the applicant shall submit a closure issued by the public notary with regard to the inheritance records check provided by the Civil Code. [9] In this case, failure of the preliminary procedure will be invoked by the court, ex officio, or defendant.

From the analysis of the text it is not practically a preliminary procedure itself but by making by the public notary , records checks relating to succession and provided in order nr.2333 / C / 2013 the release procedure of the conclusion regarding the verification of Inheritance records. [10]

According to art.331 of the Regulations approved by Order nr.2333 / C / 2013 to release the conclusion on the verification of records of inheritance, provided by the Code of Civil Procedure, the public notary properly apply the legal provisions relating to the verification and recording of notary records on succession case .

The public notary verifies the certificate of death, proving the quality of heir or person entitled, and a copy of the application of summons, which will be labeled if or not submitted.

The application shall be recorded in the records of the Board of inheritance and the role of the public notary records office folder. The release of the conclusion rests with the competent public notary under the law to settle the succession procedure.

[9] Law nr.287 Civil Code, published in M.Of.nr.511 / 24.07.2009, the application was made by Law No.71 / 2011 published in M.Of.nr.409 / 10.06.2011, EO No. .79 / 2011 regulating measures necessary for the entry into force of Law nr.287 / 2009, published in M.Of.nr.696 / 30.09.2011 approved by the Law no.60 / 2012 published in M.Of.nr.255 /17.04.2012. Law nr.287 Civil Code republished in M.Of.nr.505 / 15.07.2011 and entered into force on 01.11.2011.

[10] Order nr.2333 / C of 24 July 2013 on the law passed by the public notaries and notary activity no.36 / 1995, published in M.Of.nr.479 / 01.08.2013.

The public notary shall, within 3 working days from the date of filing, an order of the result verified in the Register of inheritance proceedings held by the Chamber and in the national notarial records specified in Art. 163 para. (1) a) -c) of the Law. [11]

In the conclusion mentioned the results of verification shall be entered particulars in the certificate or certificates issued in inheritance registers.

The public notary shall proceed first in the interrogation procedures of inheritance to the Register kept by the Chamber in whose territorial jurisdiction, the deceased had the last home. If, after verification, it appears that the succession is resolved, it will make mention of this in the end, no longer unique to examine the records of the Union provided by art. 163 para. (1) a) -c) of the Law.

If after checking the register kept by the Chamber finds that the succession of the deceased is not pending to any notary, the National notary successions Register record interrogation will be made only if the deceased was last domiciled abroad or residence is not known, but from which the goods remained in Romania.

If after verification it is found that the sequence is the role of a notary, the person concerned will be asked to obtain the conclusion of the public notary who investigates the case.

The application requesting checks with the conclusion issued by the public notary after verifications are recorded in the General notary Register or, where appropriate, in the register of succession.

The analysis of these texts show that attending notary succession procedure is not mandatory to notify the court in case of dispute about the succession debate setting: the succession, inheritance and vocation heirs are entitled to their rights. It is mandatory to prove attached to the application for summons only checks that are performed by the notary public.

These checks are required only when the application for summons is to debate inheritance and no other disputes such as the output of tenancy or cancellation of a certificate of inheritance, when the request is attached to the certificate of inheritance.

These checks made by public notary permit the court to determine whether, was covered the notary procedure and has been completed or not, whether there were prepared wills and their validity if it was accepted inheritance, pure and simple, or under benefit of inventory, or are quitting succession. [12]

Lack of submission as an annex to the application for summons issued by the public notary to the conclusion on verification records of inheritance, may be invoked by the defendant and the court of its own motion. Thus, the defendant may invoke the absence of proof checks made by a notary public, by greeting lapse although paragraph 3 does not provide a time limit within which the right to invoke, the special rule is supplemented by the common law, that the provisions of paragraph 2 and the court of its own motion at any time during the trial. [13]

In this case the court shall suspend judgment process until the applicant will fulfill that obligation. According to Art.242 para 1 of the Code of Civil Procedure, the judge may suspend judgment, pointing in conclusion that certain obligations have not been met.

[11] Article 163 of the Law no.36 / 1995 notaries public, republished in M.Of.nr.72 / 02.04.2013.
[12] M.Tăbârcă - Civil Procedural Law. Ed. Legal universe. 2013. vol.II. p.22.
[13] G.Boroi, Octavia Spineanu-Matei, Delia Narcis Theohari, Andreia consisting Gabriela Răducan, Carmen Negrila, Dumitru Marcel Gavriş, Flavius George Pancescu, Veronica Danila, Marius Eftimie - New Code of Civil Procedure. Ed.Hamangiu. 2013. p.454.

The preliminary procedure established by Law no.554 / 2004

Any persons who consider themselves injured in their right or a legitimate interest by a public authority through an administrative act or failure of an application within the statutory period, it may appeal to the competent administrative contentious, order the recognition of the claimed right or legitimate interest and repair the damage that was caused. Legitimate interest can be both private and public.

It may appeal to the administrative contentious also the injured party in its right or a legitimate interest through an individual administrative act addressed to another legal subject.

The preliminary procedure provided for by art. 7 of Law no.554 / 2004 on administrative contentious[14] provides that, before the administrative court against the person who considers himself injured in their right or a legitimate interest through an individual administrative act must apply issuing authority or superior authority (prior complaint), if any, within 30 days from the date of the document, revoke, in whole or in part thereof. It assimilates unilateral administrative acts and unjustified refusal to address a request regarding a right or legitimate interest or, where applicable, that the applicant does not respond within the statutory period, but in this case the preliminary complaint is not required.

The preliminary complaint is defined in Article 2 paragraph 1 letter j) of Law no.554 / 2004 as being the demand requiring the issuing authority or the superior, as applicable, the review of an administrative act with individual or normative character within the meaning of revocation or amendment. [15]

The expression of the text of the law „should seek authority" means that the preliminary procedure is mandatory and must be made within 30 days of notification of the administrative act.

These provisions shall also apply if the special law provides a legal administrative procedure and did not opt for this part.

Is entitled to make a complaint also the injured party prior to its right or a legitimate interest through an individual administrative act addressed to another subject of law, from the moment he became aware, in any way, of its existence, within the period of 6 months.

From the analysis of these laws it appears that there are two procedures for verifying the legality of unilateral administrative acts, namely, one administrative and one judicial.

In the case of the normative act, the preliminary complaint may be filed at any time. The preliminary complaint if unilateral administrative provisions may be introduced, for good reasons, and over the period of 30 days but not later than 6 months from the date of issue of the document. The term of 6 months, is limitation period.

The preliminary complaint shall be settled within 30 days of filing the application.

In the case of actions brought by the prefect, the Ombudsman, the Public Ministry, the National Agency of Civil Servants or those applying to persons aggrieved by ordinances or provisions of the Ordinance, and in cases „unilateral administrative acts and are treated as unjustified refusal to solve the application regarding a right or legitimate interest or, where applicable, that the applicant does not respond within the statutory period „when invoking illegality of the administrative act is not mandatory preliminary complaint.

[14] Law no.554 / 2004 on administrative, published in M.Of.nr.1154 / 07.12.2004, amended by Law 262/2007 published in M.Of.nr.510 / 30.07.2007, Law No.76 / 2012 for the implementation of the Code of civil Procedure, published in M.Of.nr.365 / 30.05.2012.

[15] Public authority - any organ of state or territorial administrative units acting in a public power, to satisfy a legitimate public interest; are treated as public authorities, private legal persons which, by law, have obtained the status of public utility or are authorized to provide a service in a public power

The preliminary complaint for actions that concern the administrative contracts, the provisions of the Code of Civil Procedure apply. In this case, the complaint must be made within 6 months which shall begin:

a) the date of conclusion of the contract, legal disputes' closing;
b) the date of the change of the contract or, where appropriate, the date of the refusal of the application for amendment made by one party in disputes relating to the amendment;
c) the date of breach of contractual obligations in disputes relating to performance of the contract;
d) the date of expiry of the contract or, where appropriate, the date of the occurrence of any other causes which attracts settle contractual obligations in disputes relating to termination;
e) aware of the interpretable nature of a contract, disputes concerning the interpretation of the contract.

According to article 12 of Law no.554 / 2004, the applicant attaches to the copy of the administrative action that he attacks or as applicable authority which shall communicate its refusal processing the application. If the applicant has not received any response at his request will file the copy of the application, certified by the number and date of registration at the public authority and any document proving the fulfillment of the preliminary procedure, if this approach was required. If the applicant refuses to bring proceedings against the authority to enforce administrative act following the favorable settlement of a prior complaint or request shall file the certified copy after this act.

In the case, the court notifies itself without the preliminary procedure, the court rejects the request.

It can appeal to the court of administrative contentious also those who consider themselves harmed in their right recognized by law, by the failure to settle or the unjustified refusal to resolve of the application. That is, if the application has not been resolved within 30 days of the filing of the petition, the person may appeal to the administrative court in this case the preliminary procedure is not mandatory.

According to Article 2, paragraph 2 of Law no.554 / 2004, assimilating unilateral administrative acts and unjustified refusal to resolve a request regarding a right or legitimate interest or, where applicable, failing to respond to the applicant within legal.

Failure to settle within the legal term an application is failing to respond to the applicant within 30 days of the filing of the petition, unless the law provides otherwise. And unjustified refusal to deal application is explicit expression with excess power will not solve the request of a person. Unjustified refusal is assimilated as lack of enforcement of the administrative act issued as a result of the favorable settlement of the application or, where appropriate, prior complaint.

The competent court

According to article 10 of Law no.554 / 2004, disputes concerning administrative acts issued or concluded by local authorities and county, as well as those relating to taxes, contributions, customs duties and accessories thereof up to 1000 .000 lei in fact shall be settled by administrative and fiscal courts and the administrative acts issued or concluded, the government, and those relating to taxes, contributions, customs duties and accessories thereof more than 1,000,000 lei, shall be settled in substance from polling administrative and fiscal courts of appeal, unless the special organic law, not otherwise specified.

All requests for administrative acts issued by central public authorities which involve considerable amounts of the grant from the European Union, regardless of value, shall be settled in substance from polling administrative and fiscal courts of appeal.

According to article 96 paragraph 1 of the Code of Civil Procedure, the Court of Appeal in the first instance, requests concerning administrative and fiscal.

The appeal against sentences handed down by administrative tribunals of tax departments are judged by administrative and fiscal courts of appeal, and the appeal against the sentences imposed by the administrative section and appellate tax is judged by the Department of Administrative and Fiscal High Court of Cassation and Justice, unless the special organic law provides otherwise.

The applicant may appeal from his residence or that of the defendant. If the applicant opted for the court of the domicile of the defendant may not plead lack of jurisdiction except territorial non-competence.

Conclusions

We can conclude that the preliminary procedure, although it remains mandatory, except for the procedure which invokes its absence has become a public policy exception, absolute, one private orders, relative. Invoking lack preliminary procedure can be done in all cases only welcome, except voluntary intervention can be invoked when the admissibility stage of the application for action. Although the entry into force of NCPC there will be mandatory conciliation proceedings, administrative proceedings prior to the contract remains in force. Finally, the time of the preliminary procedure and does not mean onset time of the administrative process, the preliminary procedure is merely a condition of admissibility of the action in an administrative contentious court.

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REQUEST FOR SUMMONS IN THE CIVIL PROCEDURAL LAW IN THE REGULATION OF THE NEW CIVIL PROCEDURE CODE. ASPECTS REGARDING THE PROCEDURE OF ITS REGULARIZATION IN COMPARATIVE LAW

Ioana-Andra PLEŞA *

Abstract: *The present paper provides a brief overview of the application for summons, namely that of its regularization procedure, in the regulation of the New Code of Civil Procedure, as well as in the comparative law, taking as comparative elements the French and Spanish legislations in the field of civil procedure. This paper highlights both the similarities and differences between the Romanian legislation and the French legislation, respectively the Spanish one. A particularly interesting aspect is that countries with a different history and influences in the past of distinct political regimes have very much in common in terms of legislation.*

Keywords*: Referral to court, writ of summons, request for summons, regularization procedure for summons, request for review.*

1. Overview. Request for summons.

The request for summons is defined in doctrine as: The procedural act used by the interested party to writ of summons in order to invoke the application of the law to a particular case, by setting in motion a civil action, is called the request for summons[1].

As it is natural, behind a referral to court with a request for summons stands the existence of some civil claims. „The request for summons requires a statement of the facts that determine the claim, an analysis of them"[2].

According to Article 200 paragraph 2, when the summons does not meet the above alleged demands, the applicant will be notified in writing about the deficiencies, provided that, within 10 days of receiving notification, he/she shall make the additions or modifications arranged, under penalty of cancellation the request.

According to paragraphs 4-6 against the decision of cancellation, the applicant shall be entitled only to request review, asking, based on arguments, to return on cancellation measure.

The deadline of the request for a review is also an imperative term: 15 days from the date of the closing communication. Failing to respect this deadline, expressly provided by law, the forfeiture occurs.

The request shall be settled by final closing, given in the Council Chamber, summoning the applicant by another panel of the court, which highlights the transparency of justice. The new panel is completely chosen by random distribution, and it may return

* Ph.D. Candidate. University of „Lucian Blaga" Sibiu, Doctoral School, Field of Law,Associated profesor University „1 Decembrie 1918" Alba Iulia. Legal adviser

[1] V. M. Ciobanu, G. Boroi, *Drept procesual civil. Curs selectiv.Teste grilă*, Ediția a III-a, revăzută, Edit. All Beck, Bucureşti, 2005, p. 199.

[2] Ioan Leş, *Tratat de drept procesual civil. Vol. I. Principii şi instituții generale. Judecata în fața primei instanțe,* Edit. Universul Juridic, Bucureşti, 2014, p. 597.

upon annulment measure if it was ordered incorrectly or if irregularities have been removed within the time allowed under paragraph 2, namely 10 days.

This type of closing is a legal remedy with specific features. The closing, through which is solved the review request, is final[3].

Paragraph 7 of this article provides specific consequence of accepting the request, more precisely it refers the case to the panel initially vested.

The referral of the case to the same panel may have both positive and negative consequences. Positive because the panel that dismissed the request as unfounded is forced to judge it. As negative consequence, it may be mentioned the subjectivity of the panel in front of a request initially rejected.

2. The request for summons in the regulation of the French Code of Civil Procedure

Regarding the request for summons, also called contentious claim in the French Code of Civil Procedure, in Article 53, Section I, it is defined as the request by which a person called „plaintiff" takes the initiative of triggering a process, subjecting to judgment his/her claims. In other words, the request for summons is also called application initiating proceedings.

Unless the request is made by voluntary presence of parties before the court, the original application is formed by submitting a conjunct request to the Secretariat of Jurisdiction, or by application or declaration to the Secretariat of Jurisdiction. Therefore, the request can be introduced by the voluntary presence of parties before the judge. This aspect is different from the Romanian legislation.

In the New Code of Civil Procedure, Article 30, paragraph 1, as well as in the previous regulation, it is stated that everyone who has a claim against another person or is pursuing legal reconciliation of a situation is entitled to writ of summons before a qualified court. In article 148 paragraph 1 it is specified that any referral to court must be made in writing.

Referral to court through a written application is a more secure mean than the voluntary presence of parties before the court, because, in this latter situation, some weaknesses may occur.

Under Article 55 of the French Code of Civil Procedure, the writ of summons (tantamount to the request for summons in the Romanian procedure law), is the act initiating proceedings through which the plaintiff, „the one who demands", cites his/her adversary to appear before the judge.

According to Article 56 of the French Code of Civil Procedure, the writ of summons contains, under penalty of nullity, in addition, the prescribed features to documents initiating proceedings: indication of jurisdiction (court) before which the application is brought; the object of the action with a statement of means / reasons of fact and law; a statement indicating the methods appeared in front of the court and the stipulation that, in order to defend himself, the defendant shall be subject to a judgment against him solely, based on the evidence furnished by his opponent.

Also, the request includes an indication of the arguments (reasons) on which it is based. Such reasons are enumerated on a list attached to the writ of summons. Another basic element of the application is represented by the conclusions.

[3] See I. Leş, *Noul Cod de procedură ciilă, Comentariu pe articole*, Editura C.H. Beck, 2011, p. 196.

Generally, these elements can be found in the regulation of the New Romanian Code of Civil Procedure, too, in a presentation wanted to be more detailed, exhaustive.

Article 57 of the French Code of Civil Procedure stipulates that the joint application (*La requête conjointe*) is the common act by which the parties submit to a judge their respective claims, the points on which they disagree, and their respective (specific) means.

This article finds its counterpart in the Romanian procedural law, under the hypothesis of the procedural joint participation. This hypothesis implies that several people have the same complaint, and decide to refer the matter through a joint application. This application includes, among other elements, under penalty of nullity, the following items listed in the following.

For individuals, the surname, first names, profession, address, nationality, date and place of birth of both parties. For corporate entities, called moral people, their form of organization, denomination, the address of their head office and the body which legally represents them.

The application also contains: indication of parts (evidence) on which the request is based on. The application is dated and signed by the parties, containing the conclusions, too.

The nullity of the application in the Romanian Civil Procedure law, is regulated by Article 196 paragraph 1 and intervenes in case of lack of: surname and name, denomination (assuming that it is a legal entity), object of application, reasons of fact and law, signature of the party or of his/her representative. The regulation of the sanction of nullity is more detailed in the Romanian procedure law than in the French civil procedure law. Paragraph 2 of the present article makes it more accurate, providing that the lack of signature may be covered throughout the judgment at first instance.

If the lack of signature is invoked, the applicant missing at that term will have to sign the application no later than the first term that follows, being notified to do so by subpoena. If the applicant is present in court, he will sign the application right in the meeting when the nullity is invoked.

Under Article 58 of the French Code of Civil Procedure, the application or declaration is the act by which the plaintiff goes to law without his adversary having been previously informed. This act contains the same requirements as the application initiating proceedings.

Regarding the relationship between the regulation of referral to the court in civil proceedings, both the French and the Romanian legislations have ideas with value of common principle, the differences being only of hue and not of essence. Both of them are typical regulations of the modern democratic states.

Concerning the regularization procedure of application for summons, the French Code of Civil Procedure does not treat it separately as the New Romanian Code of Civil Procedure provides it.

The only information concerning the shortcomings of the original application in the French Code of Civil Procedure is that under which if the lack of signature is invoked, the plaintiff missing at that term will have to sign the application no later than the first following term, being notified to do so by subpoena. If the applicant is present in court, he will sign the application right in the session when the nullity was invoked.

3. The request for summons in the regulation of the Spanish Code of Civil Procedure

Article 399 of the Spanish Code of Civil Procedure, entitled the claim and its content, establishes that the process begins with a request that shall contain the data and means of compliance of the claimant (*actor*) and of the defendant (*demandado*), as well as his/her

domicile and residence where they may be located. It shall be exposed, numbered and separately, the facts and fundamentals of law and it shall be clearly and precisely stated the demands.

Along with the designation of the application's author, it will be mentioned the surname and name of the prosecutor and of attorney, when they interfere. This aspect is different from the Romanian legislation in the field of civil court referral. In the Romanian civil lawsuit, the intervention of the prosecutor is limited to certain cases provided by law in Article 92.

In the content of the application, the facts will be presented in order with the aim of facilitating the acceptance or rejection of the defendant's appeal. It will be presented the documents, means and instruments, which are brought in relation to facts underlying the claims and, in the end, judgments are drafted if convenient to the trial of the litigation.

In fact, the arguments are similar to the requirement of motivation issue in fact and law of the request for summons in the Romanian Civil Procedural Law.

According to article 403 of the Spanish Code of Civil Procedure regarding the admission and exceptional cases of their rejection, the claims are admitted only under the cases and conditions provided herein.

Therefore, to accept the request is the rule and to reject it is the exception. It shall not be admitted the requests of liability of judges and magistrates, for claims and damages arising from deceit, negligence or undue ignorance, committed in the exercise of their functions as long as the resolution ending the process was not signed.

Also, it shall not be admitted the claims when they are not accompanied by documents that the law expressly requires for their admission, or if conciliations (mediation) were not instituted, or if requests, complaints (previous procedure), which are required in special cases, were not made.

The Romanian legislation, too, does not admit the application that does not include the evidence on which rests each particular of request.

According to article 404 of the Spanish Code of Civil Procedure, the Court Clerk shall examine the claim and issue a decree admitting it, and shall notify the defendant that he/she may appeal the claim within 10 days. The appeal of the claim is equivalent to the answer made in writing by the defendant in the Romanian civil procedural law.

The Court Clerk will send the request to Tribunal to rule on its admission in the fallowing cases: when it is noted the lack of jurisdiction or the jurisdiction of the Tribunal, when the claim presents formal defects, or it is not signed by the claimant. This aspect is different from the Romanian civil procedural stipulations.

Article 412 of the Spanish Code of Civil Procedure stipulates the prohibition of changes in the claim and mentions the admissible amendments. Therefore, the parties cannot subsequently modify the object indicated in the application, appeal and in the counterclaim. This aspect is common to both laws, the object of the request could not be changed.

The above provisions do not prejudice the capacity to make additional requests under the terms stipulated by the present law. It cannot be taken into consideration new requests that, after starting the process, introduce parties or third parties, in contrast with the Romanian civil procedural legislation that admits the request of third parties to intervene in the civil case.

A difference from the regulation of the Romanian civil procedure can be noticed: the writ of summons to court is not subject to the payment of a stamp tax, which is salutary,

because the access to justice should be free and accessible to all persons, without being pecuniary conditioned.

In conclusion, most of the rules of judicial proceedings in the civil procedure regarding the request for summons in France and Spain are similar to those of Romanian civil procedural court proceedings. Of course, the law evolves in the same rhythm with the social evolution. Therefore, as the years pass, new legal situations will appear and they will have to be regulated by law. Nowadays, regarding the civil procedural matter, it can be remarked that we have a legislation that presents many points of connection with the legislation of the European states.

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CONFIDENTIALITY CLAUSE AND LOYALTY OBLIGATION IN THE INDIVIDUAL EMPLOYMENT CONTRACT

Ada HURBEAN[*]

Abstract: *This study presents the employee's legal obligation of loyalty compared to conventional confidentiality obligation, which results from the confidentiality clause of the individual employment contract. The first obligation is a legal one, so, the employee has to comply because of the law, but the second one may exist only if the employer and the employee decide to insert in the contract a confidentiality clause.In fact, the main purpose of this study is to set the bounds to the legal obligation from the conventional obligation, because both of them may have the same content. The relevance of this delimitation can be found in the content of the loyalty obligation of the employee - one of its essential components is confidentiality. All these issues are presented in the context of the legal and conventional content of individual employment contract.*

Keywords: *loyalty obligation, confidentiality obligation, employee*

Preliminary issues

The competition clause and the obligation to inform that are found in the individual employment contract come to illustrate the mixed nature of this contract: legal and conventional. Even if the first clause is an additional one, optional, and the second a legal obligation, expressly provided for by the provisions of the Labour Code, both are or may be part of the contract in question.

In this context, we believe that some clarification must be made about the content of the individual employment contract.

Thus, the current legal literature agreed that this contract consists of a conventional part and a legal part. The legal part contains those provisions or clauses expressly provided by law, specifically the elements found in Articles 17-18 Labour Code, namely the obligation to inform, and the conventional part may contain other clauses, on which the parties have agreed, called additional, optional or specific clauses. Four of the latter are legally regulated in article 20 of the Code, stating that the list (default regulation) is only illustrative and by no means exhaustive. As a result, in the labour relationships, a number of such specific clauses have appeared, from the consciousness clause to that of the restriction of free time.

Returning to the statutory part of the individual employment contract, an important clarification must be done: within the limits prescribed by law, even the mandatory and essential clauses of the individual employment contract may be negotiated, because, in principle, the normative act stipulates a minimum threshold of employee's rights. Moreover, the legal provisions are completed by the applicable collective agreement, a veritable „enactment" in the relation between the parties. For example, the wage clause of the employee is mandatory to be stipulated in the individual employment contract, but its amount is negotiated by the parties, and it may not be set below the minimum wage in the economy at the time and/or below the minimum wage established in the collective labour

[*] Lecturer PhD, Law and Social Sciences Faculty, „1 Decembrie 1918" University of Alba Iulia

agreement applicable in that unit. However, the statutory individual employment contract reveals its importance for the staff of public authorities and institutions and other budgetary units. For instance, the wages of this staff or the length of the leave and the leave allowance related to it are stipulated by legal norms, so that they do not fall under the clauses whose income cannot be negotiated.

Fidelity obligation in the individual employment contract

First of all, it must be mentioned that this obligation is a legal one, expressly provided for by Article 39 paragraph 2 (d) of the Labour Code in regard to the employee. Specifically, the legal text stipulates the loyalty obligation of the employee towards the employer regarding his duties. Furthermore, letter (f) of the above mentioned Article stipulates the employee's obligation to respect the professional secrecy. If the first obligation has a wider coverage – the fidelity, the second has a narrower scope – the professional secrecy.

Thus, the obligation of loyalty is one of the main obligations of the employee, throughout the entire course of the employment contract, obligation arising from the principle of good faith, which must govern the labour relationships. The content of the obligation contains the employee's abstention to perform any act or fact that could damage the interests of the employer, either by competition or by lack of discretion with regard to secret information reported to the employer, technical, economic, managerial, commercial or any other information of this type that he learns depending on the type of his activity and work performed. In this context, the obligation of loyalty comprises, on the one hand, the non-compete clause (i.e. employee's obligation not to compete against his employer during the performance of the contract) and, on the other hand, the confidentiality clause (i.e. employee's obligation not to disclose the secret information of his employer)[1].

In the specialized legal literature it has been shown that[2] the loyalty represents the attachment that the employee should have towards the employer. Namely, his actions must be taken so as not to affect any rights and interests of the employer. Therefore, the obligation is not limited only to the scope of the information that the employee learns during his duty, but also, for example, to the carefully use of the employer's material goods, of any kind. A use with responsibility and not in order to destroy. It, also, assumes a basic discretion with regard to conflicting elements from the unit, public presentation of the relations inside the unit in good faith and moderation[3].

A controversial aspect, in the legal doctrine, is the scope of the loyalty obligation. Thus, in an opinion[4], by the phrase *in the performance of the duties* should be understood that this obligation concerns the execution of the individual employment contract as a whole and the employee's behaviour both within the unit, and outside it, in the performance of his duty or in relation to it. In this view, the legal obligation of loyalty has a permanent character, causing its effects, in some respects, even when the individual employment contract is suspended, and the employee does not fulfil his duties. But it never acts after the cease of the individual employment contract.

[1] I. T. Ştefănescu, *Tratat teoretic şi practic de dreptul muncii*, Ed. Universul Juridic, 2012, pp. 318-319.
[2] C. Gâlcă, *Codul muncii comentat şi adnotat*, Ed. Rosetti Internaţional, 2013, p. 154.
[3] C. Gâlcă, *op. cit.*, p.154.
[4] See I. T. Ştefănescu, *op.cit.*, p. 318; A. Ţiclea, *Codul muncii, ediţia a IV-a revăzută şi adăugită*, Editura Universul Juridic, 2013, pp. 63-64.

An opinion that is contrary to the doctrine[5] refers to the formulation of the legal text, which clearly states that the scope of the loyalty obligation is circumscribed only to the enforcement of duties. Specifically, the employee has this obligation only during his job and in connection with the execution of the incumbent duties under his employment contract. Therefore, such a solution leads to the idea that the employee's misconduct, from this point of view, would not be likely to involve the breach of the loyalty clause, as long as it appears outside his duties. In this context, the employer's denigration, for example, having no direct connection with the execution of duties, may not be a deed of breach of the loyalty obligation, in a strict interpretation of the law.

We believe that a complete overview of the issue in question must also take into account the employee's obligation under Article 39 paragraph 2 (f) regarding *the compliance with the professional secrecy*. So, it is clear that this obligation is part of the loyalty obligation, as it involves the confidentiality, part of the obligation in question. Specifically, the legal text refers to any secret element about the job without a special refer to the concept of professional secrecy, in its strict sense. Therefore, the employee is not entitled to disclose any secret and confidential information he found out in the course of his duties. He may be sanctioned with payment of damages, if necessary. But, in this case, the employer must individualize and inform the employee on the information deemed to be professional secrecy. In the legal literature, it has been shown that, in order to materialize the loyalty obligation, implicitly that of keeping the professional secrecy, it is possible to apply, by analogy, the provisions of Article 21 paragraph 2 Labour Code. By their agreement, the parties may set out some stipulations in the individual employment contract, such as: activities prohibited to the employee, if he carries out an activity for the benefit of third parties, third-party determination, the geographical area in which the employee would be in real competition with the employer[6]. We believe that such a contractual stipulation transforms the legal obligation imposed imperatively by law in a conventional obligation that, by their agreement, the parties can change at any time, and thus the purpose of the law might be diverted. These elements could be incorporated without any problem into a confidentiality clause, which benefits from another legal system. We also believe that differentiation should be made between general legal obligation of professional secrecy provided by the Labour Code and the legal obligations with the same content (secret), found in special laws, which are very specific and narrowly construed[7].

In conclusion, we consider that the loyalty obligation, in its broadest sense, is a legal obligation, imperative, the execution of which is ensured by the principle of good faith governing the labour relationship. It is also ensured by the principle of binding force of contracts, which means that the employee is bound to comply with his obligation under the limits set by law. Moreover, the individual employment contract is a consensual contract, which means that to the employee's loyalty obligation it corresponds the correlative obligation of the employer, provided by Article 40 paragraph 2 (i): to ensure the confidentiality of employees' personal data. Therefore, we believe that the scope of this

[5] In this respect, A. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole. Volumul I,* Ed. C. H. Beck, 2007, p. 200.

[6] Ş. Beligradeanu, *Inadmisibilitatea asumării de către salariat-în dreptul român al muncii a obligației de neconcurență pe durata existenței contractului individual de muncă sau a inserării într-un astfel de contract a clauzei de exclusivitate având caracter relativ ori absolut*, in *Dreptul* nr. 4/2008, p. 90.

[7] See Law no. 182/2002 on the protection of classified information; Government Decision no. 585/2002 implementing national standards for the protection of classified information in Romania; Government Decision no. 781/2002 on duty information.

obligation is limited to the legal formulation, namely to the execution of duties. During the employee's free time it is not applicable. Furthermore, the notion of professional responsibilities should be clearly determined, individualized, when concluding the individual employment contract. However, it must not be omitted the fact that the general legal obligation found in the Labour Code can be completed with the stipulations of some special laws and/or provisions of the applicable collective labour agreement. Nevertheless, everything that exceeds the general or special legal framework belongs to the conventional side, meaning that it may be established by a clause of confidentiality.

Confidentiality clause

According to Article 26 paragraph 1, under the confidentiality clause, the parties agree for the entire length of the individual employment contract and after its cessation, to refrain from disclosing data or information they took knowledge of during the performance of the contract, under conditions laid down in rules of procedure, collective labour agreements or individual employment contracts.

As we have already mentioned, the confidentiality clause is part of the conventional content of the individual employment contract, which means that its insertion in the contract is the result of negotiation and will's agreement of the parties. Thus, being an optional clause, additional to the individual employment contract, in order to operate, it must be clearly delimited from the obligation of loyalty through the delivery of information constituting the substance of the clause[8]. Specifically, the employer must indicate which data or information transmission to third parties is prohibited to the employee, as well as the concrete ways in which the employee can work with the data or information acquired in the course of the contract[9]. Data and information may concern two aspects: the unit's activity, but also the personal situation of the individual working parties or other employees. Thus, the confidentiality obligation arising by setting a confidentiality clause must be respected not only in relation to foreigners, but also in relation to other employees of the employer[10].

Although the legal text refers to the collective employment agreement, we believe that issues related to data and information confidentiality must be included as a principle in the collective employment agreement, because it sets an overall framework for labour relationships. Special obligations of each employee and concrete explanations regarding this issue should be negotiated and inserted individually into the employee's individual employment contract. Following the same legal reasoning, we believe that the inclusion of such a clause concerns other data and information than those already established by the internal regulation, which is an act opposed to all employees in the unit.

Also, we need to distinguish between the confidentiality obligation incident under the form of obligation to respect professional secrecy and the confidentiality clause, namely the written engagement that the employee must take in certain circumstances. According to Law no. 182/2002 on the protection of classified information, the obligation to refrain from

[8] The jurisprudence in field pronounced in the same way – see Cluj Court of Appeal, civil sentence, labour and social security, for minors and family, decision no. 141/2008; Galați Court of Appeal, Department of labour disputes and social insurance, decision no. 328/2008; Alba Iulia Court of Appeal, Department for labour disputes and social insurance, decision no. 1084/2008; Ploieşti Court of Appeal, Department for cases regarding labour disputes and social insurance, decision no. 748/2008.

[9] R. Dimitriu, *Obligația de fidelitate în raporturile de muncă*, Ed. Tribuna Economică, Bucureşti, 2001, pp. 207-217.

[10] O. Tinca, *Unele observații referitoare la clauza de confidențialitate în contractul individual de muncă*, în Revista de drept comercial, nr. 9/2004, pp. 109-112.

disclosing classified information or professional secrecy does not substitute to the confidentiality clause that must be negotiated separately. Confidentiality clause may cover for the employee a broader range of information than that envisaged by the concepts of „classified information" and „professional secrecy".

Towards the legal obligation of the employee to respect the secrecy of classified information, according to Law no. 182/2002, and that of professional secrecy, according to Article 39 paragraph 2 (f) of the Labour Code, the following conclusions result:

- to the extent that the confidentiality clause – in addition to the classified information – would solely relate to information (data) established by the employer for all employees as having the character of professional secrecy, its purpose during the course of duties obligations would not be justified; actually it would be useless;
- such a clause must establish for the employee that is a part in the individual employment contract the additional information (data) to which he is kept under contract not to disclose[11].

Last but not least, from the wording of Article 26 paragraph 1 Labour Code, it results that the insertion of the clause in the contract takes effect for both parties, including the employer. In other words, the clause may be negotiated and inserted in the contract as an obligation of the employee or on the employer's account. In the latter case, it must contain the information and data that exceed those contained in the legal obligation of the employer to ensure the confidentiality of personal information of employees provided by Article 40 paragraph 2 (i). This, we believe, is the reason why the legal text that stipulates the confidentiality clause does not contain, as with the other clauses legally regulated, the express possibility of paying certain additional emoluments, in the case of the employee who assumes such an additional obligation. Therefore, the parties may not stipulate in their agreement the grant of a confidentiality bonus, even if the law does not expressly provide that.

Confidentiality clause is admissible in the individual employment contract, even if the employee's freedom of expression (like that of any other citizen) is guaranteed by Article 30 of the Constitution. Yet, the Fundamental Law establishes, too, that the exercise of constitutional rights and freedoms must be done „without infringing the rights and freedoms of others" (i.e., in this case, those of the employer).

Confidentiality clause may also engender effects after the cessation of the individual employment contract or during its suspension. But, unlike the non-compete clause, that of confidentiality, in order to take effects after the contract's cessation, must necessarily exist before this moment. Indeed, according to Article 26 paragraph 1, the parties agree for „...the entire length of the individual employment contract and after its cessation, to refrain from disclosing data or information..."; therefore, to take effect after the contract's cessation, the clause must exist before, during its existence.

Breach of confidentiality clause by either party shall incur the obligation of the liable party to pay damages (Article 26 paragraph 2). Obviously, although the text does not expressly specify, the damages are due in accordance with the injury that was made (with guilt), in violation of the clause, to the other party.

[11] Of course, the employer cannot propose to the employee, and the employee may not accept the incorporation of a clause of confidentiality of information of public interest in order to ensure free access of persons, according to Law no. 544/2001 on free access to information of public interest (published in the *Official Gazette of Romania*, Part I, no. 663 of 23 November 2001, rectified by corrigendum of 26 February 2002 published in the *Official Gazette of Romania*, Part I, no. 145 of 26 February 2002 amended by Law no. 371/2006, published in the *Official Gazette of Romania*", part I, no. 837 of 11 October 2006 and the Law no. 380/2006, published in the *Official Gazette of Romania*, part I, no. 846 13 October 2006).

If the legal conditions are met, the employee may be simultaneously penalized disciplinary, too. However, the employee's liability for breach of the confidentiality clause does not operate if he discloses information showing that the employer committed illegal acts. Namely, if the employee shares such information in order to eliminate or prevent illegal acts and the disclosure was made in order to inform a competent body on the matter[12].

Finally, we also have to mention that this confidentiality clause must not be confused with the confidentiality agreement, provided by Article 17 paragraph 4 of the Labour Code. Confidentiality contract is incident in the case of the obligation to inform the employee and it may be concluded during the pre-negotiation phase of the individual employment contract, between the person selected for employment and the employer (or prospective employer). Although the content of this contract may be one similar to the confidentiality clause, its legal system is different, it is not governed by the labour laws. It is a civil contract.

The confidentiality contract contains information provided to each other by the parties during the negotiation. The obligation of confidentiality contained in this contract includes both the negotiations' period and that of post negotiation, regardless whether the individual employment contract was concluded or not after these negotiations. Consequently, as the clause of confidentiality, the confidentiality contract, too, may include bilateral obligations. However, the applicable legal regime is different, the main criteria for differentiating being the time of its conclusion and the parties between which this contract is concluded.

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[12] O. Macovei, *Conţinutul contractului individual de muncă*, Ed. Lumina Lex, Bucureşti, 2004, pp. 294-295.

THE NEED TO MAINTAIN ECOLOGICAL BALANCE BY IDENTIFYING NEW MEASURES FOR ENVIRONMENTAL PROTECTION

Daniel-Ştefan PARASCHIV *

Summary: *Violation of the right to a healthy environment has an adverse effect on the conduct of life under suitable conditions so that in the future international organizations and state institutions should have a stronger role in the protection thereof, identifying new measures to prevent ecological imbalances and establishing harsh penalties for acts of irreversible or long-term consequences that can seriously affect the health or even the lives of people.*

Keywords: *environment, protection, prevention, sanctions, ecological balance*

Introduction

Deterioration of natural ecosystems in recent decades and the negative influences of economic development bring environmental issues to the forefront of government concerns, but also of citizens, so that the environment ranks high on the political agenda of most states, its global dimension being acknowledged nationally and internationally.

Raising living standards through economic development, progress in *science and technology*, especially the explosion of *computerization* in almost all spheres of activity, although a positive role, produce negative effects that can significantly affect human rights related to health maintenance and conduct of existence in normal environmental conditions, if not properly managed.

Involving often, massive exploitation by harmful procedures of existing resources in the nature, *the development of industry* often influences negatively the quality of life of the inhabitants of the planet, threatening the very existence of the human being, as it is ignored taking effective measures for *environmental protection*.

Also, the development of agriculture through the use of toxic chemicals for crop protection, as well as obtaining varieties of genetically modified crops without a thorough examination of the negative effects, produce long-term negative consequences of the soil, affecting the quality of products and hence consumer health[1].

One of the serious problems affecting the environment and human health in modern society is *the pollution* in many manifestations: atmospheric (physical and chemical), of soil, water, food, noise, etc., between the living conditions of people and quality of environmental elements there is a close interdependence, confirmed also by the causality relation between nature alteration and vitiation of health[2].

Expanding economic globalization process, mark public and environmental policies of states, enhancing developments in the sense of uniformity and universalization of

* Dr., Camera Notarilor Publici Piteşti

[1] International bodies have not yet managed to promote strong comprehensive regulations and policies, able to contribute to the protection of the environment in the long term, although natural resources are limited, and some major damage can not be repaired.

[2] Popescu, Octavian, *Dreptul la sănătate şi sănătatea acestui drept,* Publishing House IRDO, Bucharest, 2007, p. 40.

objectives and instruments to achieve them[3], leading to the globalization of environmental problems.

The general trend, internationally, is that the environment is protected mainly through agreements with states on banning actions that could affect it, on the prevention of injury, specific to this field: ecological damage is often permanent, damage is irreversible and the cost of repair, in some cases is very high, so that a *subsequent* intervention (after realization of evil) is not usually an effective measure for environmental protection.

Protection of environmental represents a highly technical approach due to the complexity and multiplicity, and the ecological crisis that manifests itself in the world there is an insufficient efficacy of recommendation rules for environmental protection, but also of the forms of legal liability[4].

Also, the wording and implementation of an environmental policy and its institutionalization major influence administrative structures; by its novelty, environmental policy involves some difficulties in the implementation, presenting many specific issues in relation to traditional administrative actions.

The need to preserve environmental factors, coupled with the need for rational exploitation of exhaustible natural resources has led the implementation of new measures to prevent ecological imbalances, one of the basic tools used in achieving its purpose being *legally responsible* for the acts that violate the rules established for environmental protection.

Applying sanctions for environmental aims and achieve other purposes, such as determining the pollutant to promote the technologies and techniques that protect the natural environment, creating an economic balance factor, so that those who pollute not obtain higher returns than units which comply with legal requirements, obtain funds to be used to finance antipollution investments etc.

Although, in general, have not been set standards for criminal sanction of pollution directly, which is punished as a consequence, when the violation occurs in administrative burdens – which means that the environmental damage itself is not punishable by law but failure to comply with certain administrative requirements – environmental criminal law begins to assert itself as an autonomous branch of law, both at international level and state level.

Complying with the principles contained in international treaties to which Romania is a party and EU documents on environmental protection, legal regulations of Romania evolved from a utilitarian approach, of protection of environmental factors directly related to their economic value, usefulness to humans (and only secondarily, indirectly, targeting also protection of nature through recognition of the need for environmental conservation) to the vision that puts before all the intrinsic value of the environment.

In Romania most often they resort to *contravention liability* for preventing or combating violations of statutory environmental requirements, taking into account the need for administrative measures enacted to achieve environmental objectives, and benefits that pose such a form of Quick liability, flexible and often more effective in relation to other legal proceedings, which favors also repair requirement within the shortest possible time of harm to the environment – measures taken, allowing urgent action to stop the negative impact of events on nature.

Environmental protection offenses are set out in the Criminal Code and special laws with criminal provisions – framework regulation in the matter, the Government Emergency

[3] Duțu, Mircea, *Politici publice de mediu,* Publishing House Universul Juridic, Bucharest, 2012, pp. 29 et seq.
[4] Gorunescu, Mirela, *Protecția juridico-penală a mediului*, in the Magazine Dreptul no. 10/2003, p. 159.

Ordinance no. 195/2005, as amended and supplemented, constituting headquarters of responsibility, to special regulations.

Proposed directions for environmental protection

As the overall of objective and subjective elements that constitute the life of man, the environment must be analyzed and stored in a direct relationship with health as an environment which allows and maintains optimal health, while a polluted environment can contribute to serious alteration of human health.

To ensure normal living conditions and good coexistence of man and the environment is necessary to adopt a *comprehensive environment strategy* in the global ecosystem, including all the natural elements, but taking into account the economic, social or political ones existing in each country.

Also, bear in mind that changes in climate on a global scale due to excessive pollution are a „time bomb" whose destructive effects for the environment can have a particularly large scale, contributing to the degradation of living conditions of people.

Ozone depletion effect produces an increase in solar ultraviolet rays, which increase the risk of skin cancer, lower body resistance against infectious diseases etc., as well as various harmful effects on the existing flora and fauna.

In order to prevent negative consequences for the ecological balance is necessary for all countries to work together to eliminate the causes of the alteration of natural living environment, taking into account the results of medical and sociological studies conducted worldwide, according to which the impairment of health of the population depends on the factors of the environment at a rate of 30%, lifestyle 40%, and the remaining 30% is due to biological factors (bacteria, viruses, parasites, fungi).

In order to eliminate such harmful effects, first must be taken measures to improve the „environmental education", whose aim should be to increase awareness of the people to maintain a suitable environment to ensure a normal life for themselves and for other forms of life.

It also requires a more appropriate wording of the regulations on environmental protection and liability for acts that affect it, so as to provide sufficient legal contours to allow judicial control and punishment of the violations of these regulations.

At the same time special attention should be paid to *correlate* environmental rules of national law with international instruments and European Union regulations, particularly with the directives on waste management, taking into account that both the Council of Europe and the Union European show increasingly more concern for the purposes of environmental regulation, in order to prevent its degradation and to punish and to cover damages to persons guilty in all cases of committing acts affecting the ecological balance.

However, states must constantly improve their legislation, according to socio-economic developments, but also those of all aspects of the environment, so as to act with maximum efficiency for its protection.

When developing its national *programs* in the field, Romania should be aligned to international standards and policies, thus integrating in the global politics to solve environmental problems.

Within these programs, particular attention must be paid to the protection of all aspects of the environment, including the availability of access to drinking water by using

environmentally friendly industrial technologies and economic use of natural sources of water, and the other natural resources.

These programs should provide also how it will act to reduce waste and persistent organic pollutants during processing such resources.

In addition to the management of natural resources of the country, to consider other objectives, such as biodiversity conservation, provision of clean sources of electricity generation, better management, by sustainable practices, of forests and agricultural land, counter factors producing destructive effects on soil and unnatural climatic changes, etc.

To maintain ecological balance, with beneficial effects for human health in all regions of the world a very important issue is the management of *waste*, so as not to alter the environment. To this end, the international community, regional organizations and individual countries must find the best measures for optimal management of waste, treating each territory with the same care, to prevent harmful phenomena, such as those generated by exports or abandonment of certain hazardous waste in countries with a more lenient legislation without clear restrictions on the matter (usually economically less developed countries).

Exports of hazardous waste are illegal in many cases, so it is necessary to improve international mechanisms for environmental protection, it is also necessary that all States shall take measures of correlation of legislation with international and European union rules in firm sanctioning of such acts harmful to human health and ecological balance.

Starting from the fact that there are still many *facts* which affect the „environmental health", committed in various forms, sometimes with the complicity of state officials, the abolition of parks, green spaces and forests, to build houses, factories or other places of production using polluting technologies, physical or sound, we believe that more efforts are required from government institutions and local authorities for disposal of severe regulatory and administrative measures in accordance with international and European standards so as to limit such conduct harmful for environmental balance.

In parallel, local communities, NGOs and other civic entities and local residents affected should advocate using all legal means to better respect the environment.

Traditional legal technique – which belongs mainly to „administrative policy" measures, consisting of the imposition of bans and limitations in terms of environmental requirements – must be more commonly used, going from banning generation of polluting products in various media to the prohibition to build in a certain space, so as to avoid damage and destruction of protected areas and species, reaching even to eliminate all polluting activities in residential areas or protected areas.

For a correct and effective application of environmental liability forms it is required accurate delineation of the field of action of each of them, making correlations and complementarities to be taken and their integration, as far as possible in a system of principles so liability to be as complete and appropriate to damages incurred in connection with the environment[5].

In this regard, we believe that it is necessary to confer a stronger role in court proceedings by passing beyond the administrative field, using the most effective methods and specific jurisdiction tools, to achieve the requirements of the rules sanctioning. In this way, it would give substance to unlimited access to justice as a guarantee of the fundamental right to the environment, in addition to administrative approach to

[5] Duțu, Mircea, *Introducere în dreptul penal al mediului (Introduction to Environmental Criminal Law)*, Publhing House Hamangiu, Bucharest, 2013, pp. 103 et.seq., who also uses the term „Damage to the environment" and the concept of „environmental damage".

environmental protection, which would be likely to significantly increase the effectiveness of sanctions, which would better meet the ecological specific.

Moreover, environmental law must not only mean administrative action without a real review of the legality of civil society, and especially of the judiciary bodies.

For a more effective sanctioning of serious facts affecting the environment, we consider it is necessary to increase the role of criminal law, which must include clear criminality, including all serious facts, and be harmonized with the regulations in developed countries, in order to better judicial cooperation in this area.

Development and institutionalization of environmental criminal law should take into account the particularities of ecological illicit, aiming to be engaged also criminal liability of companies (legal persons), for their contribution to environmental damage.

Following investigations we found that due to vast area and diversity of values subscribed to the concept of environment, there are various laws where criminality can not be easily systematized and whose sanctions are not interrelated, depending on the degree of social risk specific to each type of environmentally harmful acts.

However, despite the multitude of criminality there are still some important environmental values that are not protected by means of criminal law, as no legal provisions have been adopted in some areas, or they do not contain criminality to defend those values.

To punish acts that seriously harm these values, we think it would be necessary in the new Criminal Code to be introduced specific rules on sanctioning that serious prejudice to the environment, which can be easily known by the recipients, which would have a more pronounced preventive nature.

Such rules of general-type of crime exist in the legislation of other countries, such as the Spanish Criminal Code, which by Art.325 punishes the damage to the atmosphere, soil, subsoil and surface, sea and ground waters[6].

Border organized crime is an important environmental component, which overlaps with crime in each country, enhancing and intensifying dimensions and consequences, so it is necessary tightening criminal liability for acts that seriously harm the ecological balance on the territory of other states.

Research of majority facts which affect the environment should remain the *responsibility* of state bodies, but also we consider that the facts that make the disaster should be the responsibility of international courts.

In this regard we consider that, taking into account the high number of such facts, it would be more appropriate to establish both national courts to resolve environmental disputes and *specialized international courts*, these more so as the investigation of the facts harmful to the environment presents many peculiarities, which requires highly qualified judicial personnel in order to have the technical capacity to dispose not only sanctions, but also remedies for the environment[7].

We also consider that very serious facts that produce environmental catastrophe should be included in international crimes *stricto sensu*, such as those responsible for their production to be punished by the International Criminal Court.

Achieving a *common policy* on waste management – to no longer exist different approaches, harmful to people in certain areas – requires permanent alignment of states law,

[6] Estrella, Álvaro Mendo, *El delito écologico del articulo 325 del Codigo penal,* Publishing House Tirant lo Blanch, Valencia, 2009, pp. 21 et. seq.

[7] *Paraschiv, Ramona-Gabriela, Mecanisme internaționale de protecție a drepturilor omului*, Publishing House Pro Universitaria, Bucharest, 2014, p. 240.

of environmental administrative practices and procedures to all universal or regional international regulations, to the principles and interpretations resulting from the case-law bodies in these tasks and the Court of Justice of the European Union.

Researching international regulations in the field of cross-border flow of waste with situations faced by states due to illegal trafficking of waste, we think it would require that harmed states, but also those developed that are large waste generators to cooperate for a tougher legislation.

It is also necessary to improve the technical means of action and creating new facilities and technologies, so that waste is recovered/disposed of in an environmentally sound manner, even in the State which produced them, limiting as much possible as it can be their preservation in deposits for long periods, or exporting them.

To achieve these goals, at international and national level, including at European Union level, efforts to establish a uniform regime of waste must be increased, so that no country is affected due to the harmful effects of these products.

Conclusions

In summary, progress on the line to ensure compliance with the fundamental right to a healthy and ecologically balanced environment requires further efforts to ensure adequate conditions of life and maintaining the balance of natural ecosystems. However, it should still be guaranteed the following rights: access to environmental information, participation of public in decision making and access to justice in environmental matters; exercise of this right requires that the ultimate victims or their representatives can sue and seek environmental damages and punishing the guilty, the state having also the obligation to adopt legislative measures necessary for the functioning of the control bodies to ensure the attainment of such a right.

The presence of numerous violations of environmental norms that perpetuate, without intervention by the authorities entitled only in a few cases, requires better organization of such institutions, establishing effective control on how their tasks are completed and introducing new forms of responsibility in their task.

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UNFAIR COMPETITION IN THE INTERNATIONAL MARKET

Ramona-Gabriela PARASCHIV *

Abstract: *The acts of unfair competition existing in the domestic market shall encompass, according to Law no.11/1991, the civil, contravention and even criminal liability of those guilty of having committed them. At the same time, international tools also help fighting the acts of unfair competition registered in the interstate market.*

Keywords: *unfair competition, international market, dumping, subsidies, counter measures*

Introduction

The competition law was defined as the set of regulations designed to ensure, within domestic and international market relations, the existence and the normal exercise of competition between economic agents in their fight to win, extend and preserve their customers[1].

By the constraints it imposes with regard to certain anti-competitive practices or unlawful competition and by the supervision of compliance with these constraints, the competition law protects the free exercise of the economic agents' rights which constitute the essence of trade law and private law in general. It defends, at the same time, the contractual freedom and the extra-contractual freedom of action of economic agents, by prohibiting certain acts harmful to fair competition, which could be concluded on the basis of free will[2].

This branch of law has been relatively recently outlined, representing according to many authors a composite discipline with structural elements from the administrative, civil, civil procedure and commercial law, consisting of regulations that ensure the fairness of economic competition in the market and the fair exercise thereof[3]. It has therefore an interdisciplinary nature, being predominantly influenced by the market economy mechanisms and it is undergoing a structuring process.

As a special law, in relation to the civil or commercial law, the competition law promotes a new public economic order, which is added to the traditional legal order[4].

A particular concern of traders and authorities to establish mandatory rules governing trade activity and competition among economic agents dates back from the medieval period, but competition, in its true meaning, arises along with removing all political, economic and social obstacles out of the way of trade freedom.

Sanctioning unfair commercial acts is not intended only to protect consumers, such sanctions being frequently applied to conducts that are not directed to consumers, but only

* Lecturer Ph.D "Dimitrie Cantemir" Christian University, Bucharest, Romania, e-mail: *ramonaparaschiv@rocketmail.com.*

[1] Căpățână, Octavian, *Dreptul concurenței comerciale. Concurența onestă,* Lumina Lex Publishing House, Bucharest, 1992, pp. 16-19.

[2] Dumitru, Horațiu • David, Sorin, *Principiile fundamentale care guvernează reglementările aplicabile pieței valorilor mobiliare* (partea a III-a), in „Revista de drept comercial", no. 10/ 1996, pp. 56-57.

[3] Mihai, Emilia, *Dreptul concurenței*, All Beck Publishing House, Bucharest, 2004, p. 3.

[4] Malaurie-Vignal, Marie, *Droit de la concurrence et droit des contrats*, in „Recueil Dalloz-Sirey", Chronique, 1995, p. 51

against other economic agents, based on the idea that the eradication of such market conducts is best promoted by a general interdiction of unfair commercial activity[5].

Unfair competition practices are directed against one or more determined economic agents, aiming at eliminating certain rivals in the market, by illegal seizure of their customers.

Basically, violating the rules of deployment of commercial competition game finds an economic justification, so that establishing the unlawful nature of an act restricting competition must be based on the economic reasoning of the competitor - the author of the act and its effects, in order to see if such violation shall be justified or not.

If the general economic benefits of that act (in favour of the market, in general, not only in favour of the author) exceed its negative effects, the act should not be sanctioned, even if it apparently constitutes an infringement of the competition rules.

Practices adversely affecting competition are committed not only by companies, but also by governments or other authorities or public institutions providing support to economic operators or ordering other measures affecting free competition[6].

Dumping

Dumping, within international relations, consists in the delivery of goods to other countries on a lower level than the normal value (well below market prices and below the production costs); the price difference to the real market value, resulting from this export policy is often compensated by obtaining certain export bonuses or subsidies from the State budget, or it shall be subsequently recovered by increasing the prices, following the competition defeat (the normal value is usually established by reference to prices paid by the buyers from the exporting country, within an ordinary commercial operation, for the same product or for a similar product).

Dumping was for the first time defined in Art. VI, Section 2.1. of the General Agreement on Tariffs and Trade of 1947, as an unfair practice consisting in placing a country products in the other country market at a lower price than their normal value, and therefore it is practiced an export price lower than the price practiced during an ordinary commercial operation for similar products (the term of similar product implies a product presenting characteristic features very similar to the dumping suspected product) intended for consumption in the exporting country (the exporting country can be both the product country of origin, but also an intermediate country).

This definition was taken over and simplified in Art.1 par. 2 of the Regulation (EC) no. 1225/2009 of the European Union Council, according to which a product shall be deemed as subject to dumping if its export price in the Union market is lower than the comparable price, practiced in the ordinary commercial operations, for the similar product in the exporting country. Consequently, the dumping object is constituted by any product exported at a lower price than its normal value.

Depending on the object, the period of time it is practiced and the effects produced there are several forms of dumping:

[5] Harland, David, *The legal concept of unfairness and the economic and social environment: fair trade, market law and the consumer interest*, in „Unfair advertising and comparative advertising" (editor E. Balate), Ed. Story-Scientia, Bruxelles, 1988, p. 16

[6] Paraschiv, Ramona-Gabriela, *Dreptul concurenței,* Pro Universitaria Publishing House, Bucharest, 2014, pp. 54 and the foll.

- depending on its object, dumping can be: of goods or services and foreign exchange or social (in the import-export operations, carried out under unfair conditions, the negative phenomenon most frequently encountered is constituted by goods and services dumping);
- based on the period of time it is practiced, dumping can be sporadic, intermittent and continuous;
- depending on the effects it produces, we make the distinction between condemnable and not condemnable dumping.

From the technical point of view, *dumping* is identified and assessed through three basic components:

- normal value of goods;
- export price, which is lower than the normal value;
- dumping margin which reflects the discrepancy between the normal value and the export price.

At the European Union level the standard method of calculating the product normal value that is the subject of dumping is established according to Art. 1 letter A Section 1 of the Council Regulation (EC) no. 1225/2009 and is based on the prices paid by the buyers in the exporting country, for an identical or similar product, within a normal commercial activity. The product similar to the product suspected of dumping is similar in all respects to the product in question or has characteristics closely resembling the product concerned.

In Article 2 letter B Section 8 of the Council Regulation (EC) no.1225/2009 the export price is defined as the price actually paid or payable for the product to be sold for export from the country of production in the European Union market. If there is an association or a compensation agreement between the exporter and the importer, there is no export price or it is doubtful, so that we make use of the price at which the imported products are resold for the first time to an independent buyer. If the products are not to be resold to an independent buyer or they are not resold in the import condition, the export price shall be determined by any other reasonable method.

When calculating the export price certain adjustments are made in order to take into consideration all costs, including the duties and taxes incurred between importation and resale, as well as a profit margin, in order to set a reliable exportation price at the Community border level.

The dumping margin represents the amount by which the normal value exceeds the export price.

In case the dumping margins vary, it can be determined a weighted average dumping margin (Article 2 letter D Section 1 of the Council Regulation (EC) no.1225/2009; Article 2.4.2 of the Antidumping Agreement).

The European Court of Justice has set the dumping margin by comparing the normal value, calculated as the weighted average by types of products, with the weighted average export price on the same types of products.

At the international level there are agreements to fight dumping, such as: the General Agreement on Tariffs and Trade (GATT 1947), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 - the Agreement on dumping practices and others.

Furthermore, at the European Union level there are regulations designed to sanction dumping situations.

Thus, the antidumping procedure is regulated by Art.5-21 of the Regulation (EC) no.1225/2009 and is conducted in several stages:

-submitting to the European Commission of an anti-dumping complaint;

-conducting an investigation;

-setting out the anti-dumping measures.

Anti-dumping measures materialize in setting out definitive anti-dumping duties, also known as customs surcharges.

The duties shall apply to each supplier or to each supplying country separately and they shall be collected by the European Union Member States, in accordance with the exchange rate.

The regulation setting out the duties must indicate:

- the name of the exporters or of the countries in question;
- the product description;
- a summary of the facts;
- essential reasons regarding the determination of dumping or prejudice.

The parties involved shall receive a copy of the „Regulation" to be subsequently published in the Official Journal of the European Union.

The anti-dumping measures shall cease five years following the duty setting out or the date of completion of the most recent review of the dumping and prejudice.

The European Commission, with the approval of the Consultative Committee, may order the suspension of anti-dumping measures for a period of nine months, with the possibility of extension up to a year, when the market conditions have temporarily changed, so that it is unlikely for a prejudice to reoccur.

Subsidies

In Art.1 par.1 of the Agreement on Subsidies and Countervailing Measures of 1994, the subsidy is defined as a financial contribution or any other form of support in order to sustain (support) the incomes or the prices, from public authorities, if this gives an advantage to the beneficiary.

The benefits of subsidies materialize in reducing the price of the subsidized product.

The rules of the European Union regarding subsidies are contained in the Council Regulation (EC) no. 597/2009 from June 11th 2009, regarding the protection against subsidized imports from countries that are not members of the European Commission (the basic Regulation).

Even though dumping and subsidies are two different concepts, the system governing the implementation of measures taken against them, is basically, the same.

In accordance with Art. 3 of the basic Regulation, a subsidy exists when three conditions are cumulatively met:

- there is a financial contribution or any form of income or prices support;
- the financial contribution to come from the public authorities of the country of origin or export;
- the financial contribution to lead to obtaining an advantage over competitors.

The financial contribution of public authorities involves a direct transfer of funds from the public domain (donations, loans or equity participation) or guarantees from public funds for loans.

The Treaty of the Functioning of the European Union prohibits, in principle, through Art. 107 - art. 109, any aid granted by the States or through the States resources, in any form, in case of distorting or threatening to distort competition by favouring certain undertakings or productions and to the extent it affects trade exchanges between Member States. These prohibitions were regulated in our country by GEO no. 117/2006 regarding the national procedures within the State aid field (approved, with its amendments, by Law no. 137/17.V.2007). It is also considered financial contribution when public authorities cancel or do not collect a payable public debt; when an exported product is exempted from duties and taxes.

In case the product is intended for domestic consumption or reduction of duties and taxes is carried out to the extent of the amounts owed by the State to the undertaking, these transactions are not considered to be subsidies, as the problem of prohibiting financial subsidies from public authorities arises in cases where an economic operator must develop an import-export activity of goods.

Subsidies are granted by public authorities, namely by any public body on the territory of the origin or export country. 100% private companies (the State is not the main shareholder) are designed as public bodies only if there is relevant evidence therefore. If the State is the majority shareholder, the company can be considered a public body.

Financial contributions can be granted directly (by a public institution) or indirectly (through a private body), so that the prices of the imported subsidized goods are lower (due to the subsidies received), and their low level causes a prejudice to all the other producers who cannot sell their products at a normal price, thus violating the competition rules.

The existence of a subsidy is set out if the following conditions are met:

- a subsidy grant;
- the subsidy causes a prejudice to an industry belonging to the European union space;
- there is a causal link between the subsidized imports and the prejudice.

A countervailing duty can be enforced for the neutralization of subsidies directly or indirectly granted for the manufacture, production, export or transport of any product of which release for the free circulation on the European Union market causes a prejudice to other competitors.

The procedures of neutralizing the subsidy shall be initiated based on a complaint underlying the investigation that aims at establishing the existence both of the subsidy, as well as of the prejudice.

During the investigation, if it is carried out a determination prior to a subsidy, a prejudice and a causal link between them, the European Commission may undertake provisional measures, in the form of provisional countervailing duties.

The value of the provisional countervailing duty may not exceed the total value of the subsidy and it must be even lower than this value, not exceeding as well, the prejudice undergone by an industry of the Union.

In case a provisional duty has been previously applied, the European Commission shall submit to the European Council a proposal of definitive measures, at least one month before the expiration of this duty, and the Council shall decide (whether a definitive countervailing duty must or not be established) to which extent the provisional duty has to be irrevocably charged.

When the final result of the investigation is negative, the provisional duty shall not be confirmed.

The completion of investigations may lead either to the rejection (unless it is proved that there is a subsidy or when the subsidy has negligible value) of the complaint, or its acceptance (when following the investigation it is established the existence of a subsidy). Furthermore, the investigations are completed by withdrawing the complaint, unless the Commission considers that it is in the interest of the Union to continue the investigation.

In case of finding the subsidy existence, the application can be amicably solved, when the Commission accepts commitments under which the country of origin or export agrees to eliminate or limit the subsidy, or to take some measures regarding its effects elimination.

The commitments have to be voluntary, satisfactory and realistic.

The complaint acceptance, due to the existence of a subsidy causing prejudice, results in setting out measures which shall find their materialization in a definitive countervailing duty.

This duty shall be set out by the Europe Council by means of a „Regulation" which shall be published in the Official Journal of the European Union. The Regulation indicates the names of the exporters or the countries in question, a product description, a summary of the facts and a summary containing the essential considerations regarding the setting out of the subsidy and product; a copy of the regulation shall be submitted to stakeholders.

The value of the definitive countervailing duty may not exceed the total value of the subsidy granted and, in any case, it must not exceed the prejudice undergone by an industry of the European Union.

The definitive duty remains in effect only during the period necessary to compensate the subsidies that bring prejudices.

As a general rule, a definitive countervailing measure shall expire five years after its enforcement or five years after the completion date of the most recent review, which has covered both the subsidy as well as the prejudice - unless the review has determined that the expiration of measures would favour the continuation or the reoccurrence of the subsidy or the prejudice.

Conclusions

Internationally and especially in the European Union market efficient mechanisms were created to fight unfair competition by practicing dumping prices or by granting subsidies from States, so that the competition in terms of the export-import operations to be equitably achieved, eliminating the factors that would bring prejudice to some of the competitors.

Competition is based on the interest of economic agents to obtain advantages against their rivals, aiming at increasing the market share through: prices policy, innovation, increased quality, product diversification, customers loyalty - the beneficial effect being felt, finally, by the consumers as well, who can enjoy the variety and quality of goods and services, bought at a relatively low price. A fair and undistorted competition represents the cornerstone of the market economy.

The international competition policy aims at establishing markets with fair competition, preventing the unfair or anti-competitive practices, which can result in forming monopolies which impose their prices to the detriment of consumers, taking advantage of the lack of a varied offer.

The States cooperation in this field is carried out by the World Trade Organization and the Organization for Economic Cooperation and Development, but also through bilateral or multilateral agreements.

At the level of the European Union, in the context of political, economic and social development, the competition has extended, so that the regulation of the competition boundaries has become a key objective of the European Union policy. The Treaty of Rome setting up the European Economic Community (1957) established as the main objective of the States Parties the establishment of a common market, of an economic and monetary union, in order to promote within all Member States a harmonious, balanced and sustainable development of economic activities, with a high degree of competitiveness.

Competition was defined by the European Commission in the Report on competition from 1971, as being the best stimulus for the economic activity, as it can ensure for undertakings the most extensive freedom of action.

By the Treaty on the European Union (signed in Maastricht on February 7th 1992), competition was included among common principles, the Member States being forced to adopt an economic policy consistent with the rules of the open market economy, based on fair competition, its prevention, restriction or distortion affecting the internal market functioning and creating imbalances in relations between Member States.

Currently, the competition issue is one of the main concerns, being governed by the rules included in Section VII of the Treaty on the Functioning of the European Union, entitled „Common rules on competition, taxation and approximation of laws", aiming at ensuring free, undistorted and practicable competition, so that to avoid affecting the trade relations between the Member States or the general interest of the economic operators and consumers.

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REPRESENTATIVE JUDICIARY SYSTEMS FROM THE ROMANO-GERMANIC LAW FAMILY. A COMPARATIVE LAW EXAMINATION

Steluţa IONESCU [*] **Mihai GRIGORE** [**]
Denisa BARBU [***] **Dan GUNĂ** [****]

Abstract: *In a historical context in which phenomena such as integration and globalization are key, treating a law issue limited to a certain system is likely to be, if not superficial, insufficient by far. And this is because of the increasing interest to analyze the part only in relation to the whole, in its relationship with corresponding institutions and elements of other models of organization. This is what also drove the present approach. Taking full responsibility for an eventual too concise of an examination and driven by the belief that a judicial geography raises, just by the simple selection of models, a problem with a high degree of difficulty, we will proceed, with moderation, with an approach which aims to analyze several representative models of judicial organization belonging to the Romano-Germanic law family.*

Keywords: *justice, judiciary system, judicial organization, judiciary courts*

1. Preliminaries

The formation of large law families is not a spontaneous occurrence, fixed in a precise historical moment, determined or at least determinable. It is the culminant expression of an evolutionary process, centered on a few basic sources, whose purpose was to get into different geographic areas and to model, according to certain rules and principles, the various legal systems. Under this heading, important to be reported are: *the reception of Roman law*, applied in pure form in some countries or adapted in some other countries, in many of them with the same legal force even today; *the reception of French law* (*the result of Napoleonic elaborations*), who would become applicable law in most occupied states, upheld in some of them, even after gaining their independence; *the reception of British law* (*common law*), expanded and maintained especially in former colonies, but not only there.

The traditional demarcation distinguishes between: *the Romano-Germanic law family* and *the Anglo-Saxon law family*. These are joined by *the socialist law systems family* and by *the religious or traditional law systems family*.

The *Romano-Germanic* or continental law systems family, also called *Latin-Continental*[1] includes legal systems of countries like France, Germany, Greece, Italy and Spain. These systems promote a legal order characterized by the primacy of the legislative

[*] University Lecturer Ph.D., Faculty of Law and Administrtative Sciences, University of Valahia Targoviste, Romania
[**] University Lecturer Ph.D., Faculty of Law and Administrtative Sciences, University of Valahia Targoviste, Romania
[***] Assist. Prof. Ph.D., Faculty of Law and Administrtative Sciences, University of Valahia Targoviste, Romania.
[****] Assist. Prof. Ph.D., Faculty of Law and Administrtative Sciences, University of Valahia Targoviste, Romania.

[1] Miguel Reale, *Introducciōn al Derecho,* Ediciones Piramide S.A., Madrid, 1993, p.119. The Romano-Germanic law systems are divided into two categories: on the one hand, *systems with a strong influence by French law* (Belgium, Luxembourg, Netherlands, Portugal, Spain, Venezuela, Puerto Rico), and on the other hand, systems with Germanic influence (Switzerland, Italy, Greece, Russia, China, Brazil); Romania falls in the first category.

process and its creation[2], here the source of law with the highest significance being the law. It should be noted that, *illo tempore*, the Romano-Germanic law system has undergone some significant steps in its evolution: the first is described as *the period of adoption of Constitutions*, specific to the eighteenth century; it was followed by *the period of codifications (civil, commercial codes)*, specific to the nineteenth century; a third step was going to be the adoption of International Treaties, specific to the twentieth century, while at present, the system is going through *the period of globalization,* in all its aspects (spatial, legal, economic)[3].

2. Representative judiciary systems from the Romano-Germanic law family

2.1 The French judiciary system

French law is, undeniably, one of the basic components of the Romano-Germanic system.

Inspiring many of the world's systems, French law goes through three significant stages in its development: *the old law* (from its origins to 1789), *intermediary law* (corresponding to the French Revolution, until the Napoleonic codifications) and *the law that dominates today* (starting from the Empire period).

The first period is characterized by the presence of custom coding and the concern for the harmonization across the entire kingdom[4]. Intermediate law period is one which records profound legislative changes, the normative acts adopted after 1789 having the role of „confirming the breaking of the feudal state mechanism and the creation of a new and modern mechanism, concerning the establishment of capitalist property relations."[5] The third period in the evolution of French law begins with the development and adoption of the great codes, the first being the Civil Code of 1804, a normative act that would institute a new regime in several defining matters of civil law (people, goods, property, obligations, guarantees, succession), some maintained until today in their original form[6]. Later on, it would be joined by the Commercial Code (1806) and the Code of Civil Procedure (1807).

The modern organization of the French judiciary system[7] has its origins in the French Revolution itself; later on, the law of judiciary organization from 1810, considered a „genuine charter of judiciary organization", would mark a new step in this regard. A crucial moment, but for the current operating framework of French justice is the Constitution of 1958, whose spirit would inspire the main laws on criminal procedure (the Code of Criminal Procedure 1959) and civil procedure (the Code of Civil Procedure 1981).

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[2] In this matter, François Terré, *Introduction générale au droit,* 6e Édition, DALLOZ, Paris, 2003, p. 281 and following; Boris Stark, Henri Roland, Laurent Boyer, *Introduction au droit*, 5e EDITION, Litec, Paris, 2002, p. 328 and following.

[3] Developed in Mădălin Irinel Niculeasa, *Modernism şi postmodernism în sistemul juridic român* (Modernism and Postmodernism in the Romanian Judicial System), Editura Juridică FOKUS, 2006, p. 10.

[4] Significant in this regard is the opinion expressed by Charles Dumoulin, who, in the book *Oratio de concordias unione consuetudinum Francie* argued that *„there's nothing more glorious, more useful and more desirable than to reduce all customary laws, in large numbers and often contradictory without cause, to a single law, short, perfectly clear and uniform"* – for details, Vladimir Hanga, *Mari legiuitori ai lumii* (Great World Legislators), Editura Lumina Lex, Bucureşti, 1994, p. 245.

[5] Mihai Bădescu, *Familii şi tipuri de drept,* Editura Lumina Lex, Bucureşti, 2002, p. 29.

[6] However, it shouldn't be absolutized, since the initial text of the Civil Code has permanently constituted the object of disputes between its adepts of conservative orientation and the initiators of a process of adaptation to the new. Starting with 1964, the text has systematically been subject to change, what Cornu called the true „peaceful revolution of contemporary civil law" – Gerard Cornu, *Droit civil I, Introduction, les personnes, les biens,* Editura Moncthréstien, Paris, 1980, in Mihai Bădescu, *Familii....,* p. 38. Similarly, see Henri Capitant; François Terré; Yves Lequette, *Les grands arrêts de la jurisprudence civile,* Tome I, DALLOZ, Paris, 2000, p. 50-51.

[7] For a generous exposition concerning the present organization of French judiciary system, see Jean Vincent, Gabriel Montagnier, André Varinard, *La justice et ses institutions*, DALLOZ, Paris, 1985, p. 180 and following.

Today, the French judiciary organization is subject to a regulation called appropriately the Code of judiciary organization, adopted in 1978[8].

The note that defines the French judiciary system is the coexistence of the two main systems of jurisdiction: the judiciary jurisdiction (courts of law) and the administrative jurisdictions. Both enjoy autonomy, are organized on the principle of hierarchical pyramid, with the Court of Cassation (judiciary jurisdiction) and the Council of State (administrative jurisdiction) at the top of the pyramid. There is no way to control each other among them, much less a form of sub/superordination, the only „contact points" being possible conflicts of competence, whose resolution is referred to a court specially set up called *Tribunal of conflicts*.

The judiciary jurisdiction system includes civil jurisdictions (in narrow sense), criminal jurisdictions, as well as commercial and social ones. Without making a detailed presentation of their competence, we will however bring into attention the names of the main courts of first instance in the French system of common law. They are extremely varied and specialized. It is important to know that they constitute the first tier of the ordinary jurisdiction pyramid, the second being represented by the courts of appeal.

Thus, the common law jurisdiction in civil judiciary jurisdiction is provided by the following categories of courts: *les tribunaux de grande instance* (tribunals of great instance), *les tribunaux d'instance* (tribunals of instance), *les jurisdictions de proximité* (proximity jurisdictions), *les tribunaux de commerce* (commercial tribunals), *les conseils de prud'hommes* (labor tribunals), *les tribunaux paritaires de baux ruraux* (parity tribunals for rural goods or agricultural tribunals) and *les jurisdictions en matière de sécurité sociale* (jurisdictions in the matter of social security).

A first observation is that the criminal courts demand a first distinction, generated by the different nature of their investigating activity in relation to the actual activity of solving criminal cases. Thus, the activity of criminal prosecution or investigation is subject of an investigation conducted by the investigating judge (*juge d'instruction*), whose task is to collect evidence and take the necessary measures concerning the need of bringing to trial or releasing the offender. The jurisdiction of the investigating judge can act as a second instance, case is which the presence of three magistrates from the Court of Appeal is required, and its delivery is made in *chambre d'acusation* (charges room).

The judging itself is entrusted to criminal jurisdictions. In turn, they imply a distinction between: common law jurisdictions and jurisdictions of exception. We will deal with the former.

According to the classification of the facts in *infractions*, *delicts* and *crimes,* the competence to solve the cases is also diversified. Thus: infractions are under the remit of the *police tribunal*, delicts under the *correctional tribunal*, and crimes under the competence of the *court of assizes*[9]. All these are common law courts.

Jurisdictions of exception or specialized concern three trial subjects, two of them known in other systems, the third being original. The *juvenile jurisdiction* (including the juvenile tribunal and the juvenile court of assizes), *military jurisdiction* and *political jurisdiction*. The latter is provided by two courts: the High Court of Justice (*Haute Cour de Justice*) and the Court of Justice of the Republic (*La Cour de Justice de la République*).

[8] The text concerns only the ordinary jurisdictions, the administrative ones being governed by a different regulation, dating from 1973.

[9] Its meaning is dictated by the desire to maintain certain symbols, for the court of assizes wants to be: "the symbol of national sovereignty, of a justice expressing the sentiments of a nation, the symbol of the struggle against arbitrary […]" – Roger Perrot, *Institutiones judiciaires,* Editura Monchrétien, Paris, 1992, p. 160.

These are jurisdictions with specialized personal competence, called upon to judge the crimes of high treason committed by the head of state and government members in the exercise of their public function.

The second tier of judiciary jurisdiction is ensured by the *courts of appeal*, having competence to solve all appeals against solutions given by a court of first instance.

Unlike trial courts, characterized by diversity and specialization, courts of appeal are unique jurisdictions on the appeal way of attack[10].

The supreme court of judiciary jurisdiction in France is the Court of Cassation, a court of judiciary review par excellence, whose competence focuses on the legality of decisions given in appeal or, exceptionally, in last instance by the tribunals. The French supreme court is a veritable *court of cassation*, which inspired its name. In recent years, France has tried to decongest the Supreme Court, the last such intervention being the Law on the Status of Magistrates and the Superior Council of Magistracy of 2001[11]. The Court of Cassation also has competence to rule on a prejudicial matter, it can give opinions on new legal provisions that pose difficulties of interpretation.

Under the competence of the Court is also the *recourse in the interest of the law* and the *recourse for abuse of power*, the first to ensure the jurisprudential unity, the cassation being here one „purely theoretical, purely intellectual", and the second to ensure that enforcement of the principle of separation of powers.

The system of *administrative jurisdiction* is already one of tradition in the French law. The history of the State Council, formerly called *La Haute Assemblée,* dates from the time of Napoleon[12]. The two important functions of this institution are: executive and jurisdictional. We will focus on the latter, although it must be stated from the outset that the nature of this organ was an advisory one.

Concerning its jurisdictional competence, the State Council[13] no longer judges in first and last instance, only exceptionally. The presiding officer of the contentious section has own jurisdictional powers, the action of *referé*[14] in particular, procedural institution that intervenes temporarily and in emergency situations.

Today, the State Council has the nature of a supreme court in administrative matters, which determines a similarity with the Court of Cassation, concerning the judging competence. The difference is that it has broader powers in the recourse for abuse of power.

The courts immediately under the State Council are the *administrative courts of appeal* (7 in number, created in 1987), considered interregional courts. At the basis of the administrative jurisdiction there are *administrative tribunals* (35 in number, created in 1953), common law courts with competence to rule on all cases not entrusted to other courts.

Finally, it should be stressed that the administrative jurisdictions undergo an activity with jurisdictional character, being completely separate, equally from both ordinary jurisdictions and active administration.

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[10] There are more than 30 courts of appeal in France; they are divided into sections and are composed of professional judges, called counselors – for details Ioan Leş, *Organizarea sistemului judiciar în dreptul comparat*, Editura All Beck, Bucureşti, 2005, p. 32 and following.

[11] The text stipulates the possibility of the Court of Cassation to reject recourses addressed to it as „*inadmissible or unfounded on a serious motive for cassation*". After only one year since the adoption of this law the positive effects were already showing.

[12] Roger Perrot, *work cited,* p. 209.

[13] For details concerning the State Council and the administrative jurisdiction, Jean Vincent, Gabriel Montagnier, André Varinard, *La justice et ses institutions*, DALLOZ, Paris, 1985, p. 432 and following.

[14] In Romanian law there is an equivalent legal institution, its name being the *presiding judge's order* (art. 581, 582 of the Code of Civil Procedure).

2.2. The German judiciary system

At the beginning of this section, we showed that some of the judiciary systems constitute starting points for others (like the case of the English system for those in the Anglo-Saxon family or the case of the French system for those in the Romano-Germanic family). As for the German system, the reason for which it appears among the latter is its particular place it occupies in the Romano-Germanic law family.

Through its meanings, the German law is an important element in the legal configuration of Europe and beyond, with it being – as it is acknowledged – the second largest pillar of Romano-Germanic law (along the French one)[15]. As the result of the symbiosis of old customs with Roman law, the German law system is codified, representative in this respect being, at least, the Civil Code (1900) and the German General Commercial Code (1861).

Being a federation – federal states are called *lands* (Länder) – and having autonomy, Germany has bodies corresponding to the three main functions of the state. Therefore, as in the American system, we will have to approach, on the one hand, the judiciary system at federation level and, on the other hand, the judiciary system at state level.

The specific note of the judiciary system in Germany is then there existence of five orders of jurisdiction, making so that at federation level, each subject matter has a corresponding Federal Court.

Each order of jurisdiction has its own judicial courts. We will proceed to a brief description of these, starting with the *ordinary jurisdiction*.

The ordinary jurisdiction aims to resolve civil and criminal claims with contentious nature, as well as those with non-contentious character. Ordinary jurisdictions are divided into two categories: ordinary jurisdictions of first instance and ordinary jurisdictions of appeal.

The first category includes: *cantonal tribunals*, *regional tribunals* and *higher regional tribunals*. Atop the court system is the *Federal Court of Justice*, a court showing similarities with the French Court of Cassation, being organized in several sections.

The main task of the Federal Court of Justice is the *unifying of jurisprudence*, mission performed in specially constituted sections: *Gröser Zivilsenat* (The Great Civil Section), *Gröser Strafsenat* (The Great Criminal Section) and *Gröser Vereinigte Senate* (The Great Combined Sections). The procedural means through which the unification of jurisprudence is done is called the *recourse in review*[16], way of attack aimed exclusively at the legality of the decision and not its merits.

Such a way to filter cases subjected to the supreme court is seen in *common-law* systems, those of continental provenience having difficulties assimilating this procedural institution[17].

Beside the ordinary jurisdiction, the German judiciary system is characterized by the existence of other jurisdictional orders with special character.

The first of these is the *administrative jurisdiction*. Having also a distinct legal framework[18], of recent nature, the administrative jurisdiction has a general character, being

[15] Details on the German law and its influence on other law systems – Mihai Bădescu, *Familii...,* p. 50 and following.

[16] Way of attack with an almost identical configuration to the French *recourse in cassation*. Access to the supreme court with this type of recourse is very restrictive, even more restrictive than in France, access requirements being of both of financial nature and relative to the authorization given by the appeal court – for details, F. Ferrand, *Droit privé allemand,* Dalloz, Paris, 1997, p. 132 and following, in Ioan Leş, *Organizarea sistemului judiciar...,* p. 93.

[17] The issue is not unknown to the Romanian legislator. It is present in original form of O.U.G. no. 138/2000. Present in Anglo-Saxon systems, these forms of "censorship" are aimed at removing possible abuses on the unfounded exercise of ways of attack and therefore, the unnecessary implication of new levels of jurisdiction.

[18] The Code of administrative jurisdiction of March 19th 1991.

called to settle public disputes, excepting financial or tax related ones. Although similar, the three orders of jurisdiction operate on texts with specific notes.

This type of jurisdiction is composed of: administrative tribunals, higher administrative tribunals and, as the highest court, the Federal Administrative Court[19].

A second order of jurisdiction with special character is assured by the *labor jurisdiction*. This brings together: labor tribunals, regional labor tribunals and, at the top, the Federal Labor Court.

A similar situation is encountered in the case of *social jurisdiction*. Here there are: social contentious tribunals, regional social contentious tribunals and the Federal Court of Social Contentious, with issues that are similar to those analyzed earlier.

In similar terms there is the *financial jurisdiction* order. The specific note here is that there are only two levels of jurisdiction in this matter: the tribunals of finance and the Federal Finance Court.

We have shown, each time, that the top-level court assumes the role of unifying the jurisprudence. For Germany, however, this situation is not so simple. Because each type of jurisdiction has its own supreme court, the issue of uniform jurisprudence in Germany is likely to be delicate. In the absence of a common supreme court, a joint Senate of the Supreme Courts of the Federation had to be created in 1968 (that still operates today).

This body therefore assumed the task of ensuring that the law is uniformly applied at the level of the entire German legal system.

2.3. The Spanish judiciary system.

The current administrative organization of Spain[20] is very well reflected in the organization of the judiciary system. The division of the country in: *municipalities*, *districts*, *provinces* and *communities* attracts a repartition of judging activities and courts, only recently established[21], by *Law no. 6/1985 on the organization of the judiciary power*.

The principle that dominates the Spanish judiciary system is that of the unity of the jurisdictional function[22], which makes so that there aren't any specialized jurisdictions, such as those existing in other legal systems in Europe (France, Italy), nor specialized judges. However, nothing opposes that courts have judging sections for special matters or for judges to specialize in one of these.

Overall, the judiciary organization of the territory of Spain[23] has a configuration structured on several levels.

At the base of the system operate, in each judiciary district, *the courts of first instance and investigation*, with competence in both civil and criminal matters. Where these do not exist, there are *peace courts*, which have limited competence in both matters.

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[19] Like any supreme court, one of the important functions of the Federal Administrative Court is to ensure unity in the application of the law, obviously on conflicts of administrative nature.

[20] The law system would stand under the influence of this territorial division, the reception of the Napoleon Code in this country being late, given the circumstances of the *reconquista* and the fact that several languages were spoken in the provinces. This has led to a delay in the codification process, customary law in codified form (fueros), referred to herein as *foral law,* persisting until the late nineteenth century – for details, Victor Dan Zlătescu, *Panorama marilor sisteme contemporane de drept,* Editura Continent XXI, Bucureşti, p.61 and following.

[21] Spain benefits from a more recent such regulation, for civil procedure matter, the Code of civil procedure in force today being adopted by Law 1/2000 (*Ley de enjuiciamiento civil*).

[22] Provisions of art. 117(5) of the Constitution.

[23] From the works this part of the analysis was based upon: Victor Moreno Catena (coordinador), *Manual de organizacion judicial,* Editura TIRANT LO BLANCH, Valencia, 2003; Vicente Gimeno Sendra, *Introducción al derecho procesal*, Editura COLEX, Madrid, 2003.

The second level of the system is ensured by provincial courts, known *Audiencias Provinciales*, competent for trial on appeal.

As was natural, at the Autonomous Communities level there are *Superior Tribunals of Justice*, each having three sections (civil and criminal section, administrative section and social sections).

At national level in particular, the jurisdiction in the Spanish judiciary system is achieved through two courts: the *Audiencia Nacional* and the *Supreme Tribunal*[24]. Each has its own competence, established by law. What distinguishes them is that the *Audiencia Nacional* has no competence in civil matters, while having extended competence in criminal cases.

The Supreme Tribunal acts as the supreme jurisdictional body in all matters, being divided into sections, five in number, called *Salas*. They are suggestively called, relative to their competence: the Civil Section, the Criminal Section, the Administrative Contentious Section, the Social Section and Military Section[25].

The Supreme Tribunal has competence to decide, in first instance, on cases involving officials, the recourse in cassation, the review applications and other extraordinary way of attack provided by law[26].

2.4. The Italian judiciary system

Italy is a democratic republic where justice enjoys constitutional stipulation[27]. The judicial system in Italy is subject to a regulation[28] which lasted for more than half a century.

The courts are organized in a hierarchical pyramid, the supreme court being called *Court of Cassation*. The system has a common structure for the two matters: civil and criminal, but also specific notes.

Thus, for example, only for civil cases, the judgement in first instance in cases for which the law sets a certain value limit is provided by the *judges of peace*.

But at the basis of the judiciary system is the *tribunal,* considered ordinary court in both civil and criminal matters.

A specialized court, located on the same hierarchical level, is the *juvenile tribunal*, which has competence in all cases (civil and criminal) concerning the legal status of minors.

In Italy, only for serious criminal cases[29], there is also the *Court of Assizes,* at the level of the tribunal. Its composition is different from that found in Anglo-Saxon systems.

As such, it has two magistrates, one from the court of appeal (who is also president), and another from the tribunal, to which six jurors (called popular judges) are added. The *Court of Assizes* also exists at the level of the Court of Appeal, this time the composing magistrates coming from the Court of Cassation and the Court of Appeal.

The *Court of Appeal* is a court of judiciary review, judging all appeals against decisions of the tribunal of first instance. The court also judges in first instance, but only

[24] Both courts are situated in Madrid, the capital of the country.
[25] The latter has an exceptional competence in Spanish law, the Constitution, through art. 117 (5), limiting the military jurisdiction to the military and in case of siege.
[26] Outside the judiciary system, two bodies with jurisdictional activity operate in Spain, the Constitutional Tribunal and the Court of Auditors.
[27] The Constitution of 1947 dedicates an entire title to the Magistrature.
[28] Law no. 12/1941 (*Ordinamiento giudiziario*). Small procedure matters are regulated at different moments: the Code of Civil Procedure in 1942 and the Code of Criminal Procedure in 1989.
[29] Cases classified as such have as object: the infractions for which the law provides imprisonment for life or imprisonment of up to 24 years, delicts against the state – for details Ioan Leş, *Organizarea sistemului judiciar...,* p. 110 and following.

the causes assigned in its competence by law, in which case the panel is composed of three career judges.

In administrative matter, the Italian system does not share the French or German configuration. In principle, the fundamental law has instituted the prohibition for organizing special courts outside the judiciary system, so that the judiciary function of the state regarding the legality of the administration acts is held by the courts.

The supreme body of the Italian judiciary system is, as shown above, the *Supreme Court of Cassation*, jurisdiction with general competence in Italy. The nature of this court does not differ greatly from the one of equivalent courts in other systems, its primary role being to ensure the uniform application of law, the unity of national objective law. The main procedural way for addressing this court is the *recourse in cassation,* a selective, non-devolutionary way of attack, exercise of which is conditioned by the meeting of certain requirements and only intended to verify the legality of solutions. Along the same lines and with the same meaning, the way of attack of the *recourse in the interest of the law* also operates in the Italian judiciary system, which is also under the exclusive jurisdiction of the Supreme Court.

Instead of conclusions

The panel of aspects proposed for analysis in the present study reveals, with prevalence, the multitude of common elements shared today by the judiciary systems of the law systems under examination. The few points of differentiation are only arguments that prove a necessary specificity, proper to each of them, which is only natural and to be appreciated.

Even if the analysis has not fixated this as its objective, it should be emphasized that, in the current context of recent judiciary reform[30], Romania proposed a substantive amendment to its judiciary system, and some interventions in its layout or its functionality are nothing more than institutions or norms inspired by the European judiciary environment, to which it belongs.

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[30] Process mainly focused on the New Codes of Procedure, Civil (Law no. 134/2010, in effect since 2013) and Criminal (Law no. 135/2010, in effect since 2014).

REFLECTIONS ABOUT THE ROLE OF WOMEN IN THE KNOWLEDGE SOCIETY

María del Mar Moreno MOZOS [*]

***Abstract**: Currently, the dissemination of new technologies and the creation of the world wide web seems to have opened up new horizons in the space of public knowledge. In this sense, it is possible to propose a question relative to whether we now have paths available to us which allow equal and universal access to knowledge, providing a genuine and shared opportunity. In this work I seek to analyze womens equal access to information as a vital element in the success of this new and innovative mode of transfering knowledge. This equality should be the core of an authentic knowledge society, being the impulse for humane and sustainable development.*

***Keywords**: Knowledge society, equal access for women.*

1. Introduction

In the last few years there has been a proliferation of the use of terms referring to modifications that have been tried out in the fields of education, technology and employment. The preferred employee, in the context of the academic and corporate fields, is in the `knowledge economy´. Their significance centres around changes which have been tried out in the field of education, on a preferential basis, in technological and economic areas intimately related with new technologies, and in the management of knowledge and employment.

In the present day, the knowledge economy is developing at an acelerated rate, giving way to novel and original products, services and management chanels in large organizations. Through this process, the industrial society which so characterized the XX century is moving towards a knowledge society which is coming to characterize the present century.

This dynamic process creates fundemental change in every aspect of our lives, I would go so far as to call this a revolution with the most extensive worldwide repercusions that the wolrd has ever experienced. The gradual and sucessful development of this process, one which is set to create beneficial effects for all comunities, demands a wider discussion and moves towards harmonization in those sectors involved. Among these the imersion of women must be included.

2. The differentiation of the sexes and the cognitive gap

On a theoretical level, men and women enjoy the same rights in regards to knowledge. However there may to be room to ask ourselves if this is true in practice; which is to say, do knowledge societies contribute to promoting equality between the sexes? One of the legal effects of the implementation of new information technologies in the sphere of learning is focused on the idea that when they are functioning fully, it is possible for everyone to gain access to an open education; this is to say that, with these new technologies, above all the

[*] Universidad de Castilla La Mancha, Facultad de Derecho y Ciencias Sociales

internet, information will be accessible to any individual, without any type of restriction. This will facilitate both qualitative and quantitative training processes which can reach any part of the world, overcoming problems created by lack of material and economic resources[1].

The process of development of new technologies applied to knowledge has shown that that virtuality has remained a mere utopia because access to the internet is still limited for certain sections of the population. As a result of this, instead of fostering a democratisation of education, it has facilitated technical discrimination in regards to groups and individuals who, for economic and social reasons, do not have access to these new technologies.

Knowledge societies will cease to be societies of the equal utilisation of knowledge if they exclude, quantitatively and qualitatively, a relevant sector of the global populous. In this sense, illiteracy, material scarcity, the lack of infrastructure and technological ability, fundamental sexual discrimination or linguistic obstacles, all constitute elements which hinder the inclusion of women into a universal information society. This hinders bringing them up to speed with a minimum level of knowledge required to take part in new knowledge societies. In addition, and principally in developing countries, traditions and socio-cultures exist which limit womens access to development areas in those same societies[2].

In light of this situation, it is possible to lay out the question of how we will achieve the right way of restoring equality between men and women in terms of knowledge. A first step on the path towards achieving this equality revolves around giving women access to not just a general education, but also providing learning focused towards managing new technologies[3]; through this, it is possible to provide women with an excellent means of achieving economic autonomy, which will in turn allow them to engage in a wide range of professions without leaving the home. In this way, the family home would shift to being a space of personal development for women, rebounding in additional benefits for all members of the nuclear family. In addition to this, from a communal perspective, women's access to new technologies, especially in developing countries, has made possible the decision to carry out corporative initiatives which allow women to help bring about an end to social isolation. This benefits not only these women themselves, but also provides solidarity for other women who suffer from even lower levels of integration.

3. Perspectives on the integration of women into the knowledge society

The cultural and social changes necessary in order to make possible the elimination of sexual discrimination must also come together with a reflection, on the part of men, founded on a strong desire to eradicate the fabric of sexist behaviour. Together with the vital role of the intervention of men in resolving this problem, it is also possible to include the necessity for women to re-enforce their own autonomy by using further technical education to stand out from the crowd, thus allowing them to work from home[4]. In this way, teleworking represents an important tool which will contribute towards helping woman, in families where both

[1] About women's access to new technologies, *vid*. www. mujeresenred.net

[2] The fourth world women's conference, organised by the United Nations in Beijing, in 1995, constituted a decisive element so that society and institutions would become more conscious of the role of women in the universal knowledge economy and the new technologies involved, principally in developing countries: *http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20S.pdf*

[3] *Vid*. González, A. y Reid, J.W., *Políticas para la igualdad de oportunidades de la mujer*, „Revista Española de Educación Comparada", 2*,* 1996, pp. 117-135.

[4] *Vid. Aprender y formarse para trabajar en la sociedad del conocimiento*; document redacted by the international office of emplyment, Geneva 2002, p. 96 y ss.

parents are forced to seek work, not to have to give up the opportunity of employment in order to care for the family. In this sense, in developed countries, the correct access of women to areas of the knowledge society would help in solving important problems which come up in the world of labour, such as the deficit of qualified personal or the imbalances provoked by the an inability to reconcile work and family life.

The change in men's attitudes in this process presents a challenge, in the first place in the context of the family. Furthermore, this change should constitute an aim in the educational process from the earliest stages of education, one which corresponds to modes of communication which help in consolidating roles carried out in the home and school.

In terms of learning to operate new technologies, programs developed by public entities are primarily focused on those groups which, for either reasons of either age or personal choice, do not tend to enter into regular higher education. Among those groups we can highlight young people, as well as adults, with a lack of knowledge, who come from rural environments. This is especially true in the case of women.

In regards to teleworking, regardless of the advantages previously mentioned, this area can also attract certain insecurities if it once again produces the same capitalist directives in the welfare state, presenting the man as a priority in the economic structure with a view of the woman as keeper of the home and an irrelevant economic contributor. Women accept this kind of work as a form of employment which allows them to reconcile economic and domestic needs, independently of the actual work conditions, and this can sometimes generate social and professional isolation. In addition to this, difficulties in dividing work and family time can sometimes arise, with it being necessary to correctly manage the time given over to each activity if one doesn´t want to mix up the two and, without question, end up working longer hours than at an on-site job.

In order to overcome the difficulties which I have previously laid out, I believe it is necessary to carry out a change in society which leads to the effective defence of a co-responsibility between men and women in the domestic environment. A failure to do so will lead to women working longer hours than if they were to engage in on-site work, and she will remain tied to the home. In addition to this, it will be necessary to encourage the use of new technologies as an innovative way to organize labour, and not as a way of recreating the traditional roles of employment in a sexist and discriminatory manner. This change will need to be accompanied by a modification of how we conceive of companies and institutions which will have to set out this modality of work in an equal and fair way for both sexes, and for any type of position.

All in all, the common progress and benefits to be taken from the knowledge society, and effectively complying with the demands of democratic systems of governance, are intimately connected with a universal and favourable guarantee of access, for both men and women, in that society.

4. Conclusive considerations

In todays knowledge society, human capital forms the most important and prioritised structural element, ranking higher than all other factors. As a result of this, knowledge has become a strategic priority for achieving excellence in a globalized process[5].

[5] *Vid.* Resolution of the council of Europe about social and human capital in the knowledge society, on the 15th of July 2003. Offical European Union newspaper, 27th of July 2003.

In this area, the full incorporation of women into this new generation of wealth constitutes one of the archetypes of the new age; without their inclusion excellence cannot be reached, as this would be to disregard half of all societies potential.

In this new age we have been imersed into, characterised by a technological revolution without presedent, with liberalised and globalised economic systems, we must come to terms with the new reality; we will be on the path to success in overcoming the conflict surrounding womens roles, with the recognition of their rights to equality and the generation of a new generalised consensus about the demands for their full inclusion in the knowledge society.

In this way, societies which, for diverse reasons, marginalise the funcion of women, will be infringing their fundemental rights and driving the entire social grouping of both women and men towards failiure.

On the other hand, together with the sucess of the company, we need to achieve sucess in maintaining the system in the long term, and in this second aspect the role of women becomes once again indespensable as the birth rate represents a decisive element in avoiding ageing societies which hinder proper development, sucess and models of sustainability.

In the current century we are bearing witness to an opening up of the debate surrounding the defense of womens rights and womens full incorporation, as a key and indespensable strategic element, towards the attainment of an effective knowledge society.

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ASPECTS CONCERNING THE POSTPONING OF THE APPLICATION OF THE PENALTY

Lavinia-Mihaela VLĂDILĂ *

Abstract: *The New Criminal Code brought important modifications in the area of criminal sanctions, but also in their means of individualization. One of these modifications is represented by the introduction among the means of individualizing the main penalty by imprisonment or fine, of their postponing, together with the waiving at the application of the penalty and its replacement with the license supervision. Previously, the Criminal Code of 1969 also stated 3 means of individualization, but of the service of the penalty or fine, namely: the conditional suspension, license supervision and penalty service at the workplace. Among them, as we can see, the new Criminal Code has taken only the license supervision, by improving its conditions for application and adding for the first time other two means, the waiver of the penalty, perhaps to cover the legislative gap determined by the removal from the Criminal Code of the norms regarding the absence of a social danger of the offence (former Art 18[1] of the Criminal Code of 1969) and the postponement of the penalty, to which we shall pay a special attention in this article. Due to the complexity of the regulation, the article shall approach only matters referring to the legal nature of the institution and the conditions, under which it can be applied, followed by another article completing the analysis with the rest of the legal provisions.*

Keywords: *individualization of the penalties, postponing the penalties, imprisonment*

1. Introduction

Chapter 5 of Title III of the new Criminal Code states the means of individualization of the penalties from all perspectives, meaning the statement of the general criteria for individualization, of the mitigating and aggravating circumstances, as well 4 means of individualization of the application and service of the penalty by fine and imprisonment (waiver to the service of the penalty, postponing the penalty, licensed supervision and the parole).

The postponement of the penalty is a legal institution inserted by the new Criminal Code (NCC), inexistent in the previous criminal regulations; it is stated by Art 83-90 NCC.

By relation to this means of individualization, the postponement is different than the waiver to the service of the penalty by that in the case of the waiver, the court deciding the case does not establish any kind of penalty, while for the postponement, for the person who has committed an offence is punished either by imprisonment, or by fine[1], but its effective application by the court and its service is postponed. Moreover, unlike the waiver, where the court does not state any kind of obligations or supervision measures, for the postponement of the application of the penalty, the offender's behavior is supervised during a supervision term[2].

Also, unlike the license supervision, where the penalty is already applied, only its service being suspended, in this case, the penalty is only established, not applied by the court, so that in the case in which the offender shall successfully conclude his licensed

* Lecturer PhD, Faculty of Law and Administrative Sciences, „Valahia" University of Târgovişte

[1] The court shall go through the process of individualizing the penalty according to Art 74 NCC, according to Constantin Mitrache, Cristian Mitrache, *Drept penal român. Parteagenerală*, UniversulJuridic Publ.-house, Bucharest, 2014, p. 468

[2] Traian Dima, *Drept penal. Parteagenerală*, 3rd Ed. revised and amended, Hamangiu Publ.-house, Bucharest, 2014, p. 599

supervision period, the penalty is never applied, while in the case of the licensed supervision, if the offender shall successfully conclude the term of supervision, then the penalty ordered shall no longer be served[3].

The final one of the means for individualization of the penalty is the parole, which interferes when the person has already been convicted; the penalty by imprisonment or life imprisonment has been applied, and due to the progresses made for the reeducation during the service of the penalty and of the fact that he served a certain period of the penalty, according to the criminal law, the convicted person is placed in freedom.

The postponement of the application of the penalty must not be mistaken with the postponement of the service of imprisonment or life imprisonment, which is a measure connected to its service, stated by the new Code of Criminal Procedure, in its Art 589-591[4].

This means of individualizing the penalty is enlisted in the line of the influences from the Anglo-Saxon law in the Romanian law, having its origin in the probation system promoted by this law system, in the wish of supporting the reeducation of the offender outside the penitentiary, with the support of the probation service, established in our country since 2001[5].

Under the above-mentioned conditions, we consider that nowadays, the new Criminal Code establishes a staging of the way in which main penalties are being applied, namely:

- The court ascertains that a person has committed a crime (an offence), whose social danger and effects are minimal, thus, according to the criminal law, shall order *the waiver of the establishment of the penalty* by imprisonment or by fine;
- The court ascertains that a person has committed an offence, whose social danger is minimal, but a bit more serious than for the previous case and this is why, according to law, *shall establish a penalty* by fine or by imprisonment for up to 2 years, *but whose application is postponed*;
- The court ascertains that a person has committed an offence, whose social danger is almost medium and this is why it consider necessary not only the establishment of a penalty by imprisonment, but also its application, without being served within a penitentiary; in this case, *it shall order the licensed supervision of the penalty by imprisonment for maximum 3 years*;
- The court ascertains that an offence committed by a person is serious enough or very serious and then *establishes, applies and orders for service the penalty by imprisonment or life imprisonment*; though, even in this case, the law offers for the convicted one the possibility to be *on parole*, if the requirements stated are fulfilled;

The chain of the individualization of the application and service of main penalties, when the court ascertains that an offence has been committed and there are no causes removing the criminal feature of the action, would be, in short, the following one:

[3] George Antoniu (coord.), *Explicațiipreliminare ale noului Cod penal*, Vol. II, Art. 53-187, UniversulJuridic Publ.-house, Bucharest, 2011, p. 169

[4] The postponement of the service of the penalty shall be ordered only in the case of imprisonment or life imprisonment, thus in the case of the penalties depriving of freedom, when it is ascertained that the convicted person suffers from a disease which cannot be treated in the medical network of the National Administration of Penitentiaries and which makes impossible the immediate service of the penalty, or when a convicted person is pregnant or has a child under the age of 1 year, the service of the two penalties being postponed until the termination of the cause which determined it.

[5] Constantin Mitrache, Cristian Mitrache, *op. cit*., p. 468

The court does not establish a main penalty	The court establishes, but does not apply the fine, regardless of its amount, or the penalty of imprisonment for maximum 2 years	The court establishes, applies, but does not entrust for the effective service the penalty of imprisonment for maximum 3 years	The court establishes, applies and orders the service of the penalty of imprisonment or of life imprisonment
In this case, the court orders the waiver of the service of the penalty	In this case, the court orders the postponement of the application of the penalty	In this case, the court orders the suspension of the service of the penalty under supervision	In this case, another court has the possibility, according to the law, to order the licensed supervision

As a *legal nature*, this institution is a means of individualizing the application of the penalty of imprisonment or fine, without reaching to the deprivation of freedom of the perpetrator or to the payment of the fine, having much more beneficial effects for the perpetrator, both criminally, as well as socially and personally than other forms of the application of the penalty, except the waiver of its application.

The establishment of its legal nature is important, especially from the perspective of the effects this measure has when it is successfully concluded.

Therefore, when the court orders the postponement of the application of the penalty, because is necessary, as we have seen, to firstly establish a penalty, either of fine, or of imprisonment, it means that the court ascertains that the action committed is an offence, that it has been committed by the perpetrator, finding fulfilled all its constitutive elements (typicality aspects), as resulted from the incrimination norm. Nevertheless, though the action is an offence, the criminal responsibility does not come to its conclusion, being „suspended" for two years, namely for the duration of the licensed supervision.

Because of the place where the legislator itself placed it, namely in the chapter referring to the individualization of the penalty, this means has never been considered a general cause of removing the criminal liability or of the service of the penalty.

It is though between these two, because: in most cases, the removal of the criminal liability assumes that no penalty is being applied, though the action is an offence, but this will not be happening again, being subjected to certain conditions (as the case of conditioned pre-conviction amnesty), but also of a condition regarding the time, namely conditioned by the fulfillment of certain measures and/or obligations within a certain period of time. This aspect is (might be) present for the collective conditioned pardoning, which is a cause for removing the service of the penalty, and which states, among the conditions, that for a certain period of time, established by the pardoning law, the pardoned person stop committing any other offence, in order to fully enjoy its benefits.

On the other hand, through the definitive effects it generates, the measure of postponing the application of the penalty is very much similar with the institution of rehabilitation, the person not being convicted[6] and thus the offence not being enlisted in his

[6] MihailUdroiu, *op. cit.*, p. 351

criminal certificate, without generating effects over the civil obligations ordered by the decision or over the safety measures[7].

This is why we wonder if the postponing of the service of the penalty is a true measure of individualization of the penalty or it can be catalogued as a means of removing the criminal liability?

2. The analysis of the content of the postponement of the penalty

2.1. *The conditions of the postponement of the penalty*

According to Art 83 of the new Criminal Code, for the order of this measure must be cumulatively fulfilled certain conditions, among them some positive and some negative, some of them referring to the penalty, while others to the perpetrator's person[8].

A. *The conditions referring to the penalty* are two, among which one is positive, and one is negative, as following:

- The court to have established a penalty, including that for a concurrence of offences, of fine, regardless of its amount, or of imprisonment for maximum 2 years, including. It is possible the application of the postponement even when the court has established for a concurrence both the penalty of fine, as well as that of imprisonment, cumulatively, according to Art 39 Para 1 Let d). According to Art 83 Para 3, the postponement of the penalty of imprisonment determines the postponement of the application of the fine, which accompanies the penalty of imprisonment, when it has been ordered as a consequence of the commission of an offence aiming a patrimonial purpose[9].
- The penalty stated by the law for the offence committed to be of maximum 7 years. For instance, the court cannot state this measure for the offences of bodily harm (Art 194 NCC), ill treatment applied to minors (Art 197 NCC), harming the fetus (Art 202 Para 1-2 NCC), illegal deprivation of freedom (Art 205 NCC), rape (Art 218 NCC) or robbery (Art 233 NCC) and others, because in these cases the penalty stated by the law is of 7 years or more.

B. *The conditions referring the perpetrator* are also two, of which one is positive and one negative. These are:

- The offender must not have previously been convicted to imprisonment, either of licensed supervision, or with service, except the cases in which the offence for which the person has previously been convicted was amnestied, is no longer stated by the criminal law, or rehabilitation (de jure) has interfered or the term for rehabilitation has been fulfilled (for the judicial rehabilitation). In this case, it does not matter what was the form of guilt (intent, negligence, praeter-intention).

The condition is fulfilled when the perpetrator has previously been convicted to the penalty of fine, or when was ordered the waiver or postponement of the application of the penalty, with the condition that these to not have been revoked or canceled[10]. In the same meaning, must be mentioned Art 9 Para 2 of the Law No 187/2012 for the application of the new Criminal Code, according to which the offences committed during minority, for which were applied penalties based on the previous Criminal Code, are not impediments for

[7] According to Art 90 Para 2 NCC
[8] Ilie Pascu, VasileDobronoiu (coord.) *et al.*, *Noul Cod penalcomentat. Parteageneralǎ*, 2nd Ed. revised and amended, UniversulJuridic Publ.-house, Bucharest, 2014, p. 501
[9] Acording to Art 62 NCC
[10] MihailUdroiu, *Drept penal. Parteageneralǎ*, 2nd Ed., C.H. Beck Publ.-house, Bucharest, 2015, p. 338

ordering the postponement of the application of the penalty for an offence committed subsequently which shall be trialed according to the new Criminal Code.

Also, considering Art 114 corroborated with Art 133 NCC, as well as the interpretation *per a contrario* of Art 83 Para 1 Let b) of the NCC, results that the person who has committed during his minority an offence being sanctioned with an educatory measure, even after he became a major, may subsequently benefit, if he shall commit a new offence, of the postponement of the penalty[11].

- The perpetrator must have expressly manifested his agreement to perform community service without remuneration.

According to Prof. Constantin Mitrache and Cristian Mitrache the agreement is necessary for all cases, even when, because of the health conditions, medically proved, the person cannot perform any kind of work, because is medically unfit; this is because, according to the authors, this agreement states the will of the perpetrator to reform himself by performing a certain activity, even if subsequently the measure shall not be ordered by the court, because it has a facultative feature nor shall it be performed[12]. Nevertheless, in our opinion, this agreement is expressed in a formal way, because, given the incapacity of such person to work, he recognizes from the beginning the fact that he will not be able to satisfy the agreement, which raises question marks on its utility (especially from the perspective of the fact that the application of this obligation is facultative), as well as on its constitutionality, seen from the perspective of Art 34 of the Constitution (right to protection of health), but also from that of Art 42 (prohibition of forced labor).

If the person cannot perform certain labors, the expression of the agreement is all the more necessary, because in the case shall be necessary proves regarding the nature of the illness, which must be corroborated with the information provided by the probation service, which shall be consulted by the court regarding the specific possibilities of performing the community service within the institutions of the community[13]. Under these conditions, the court shall have to choose among the possibilities for labor of the perpetrator, the ones which he can effectively perform within the community, considering the data received from the probation service.

The existence of the agreement for performing a free community service is necessary for the fulfilment of the international obligations[14] assumed by Romania regarding the compliance with the option to work of every person and not imposing any person to forced or compulsory labor or to slavery[15].

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[11] *Ibidem*

[12] Constantin Mitrache, Cristian Mitrache, *op. cit.*, p. 470; see also Art 85 Para 2 Let b) NCC

[13] According to Art 85 Para 3 NCC

[14] Romania has ratified until present day and must comply with the engagements assumed by the: Geneva Convention of 25 September 1926 regarding slavery, ratified by the Decree No 988/1931 (Official Bulletin, No 76/1 April 1931); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 7 September 1956 by a Conference of Plenipotentiaries of the United Nations, entered into force on 30 April 1975 and ratified by Decree No 375/1957 (Official Bulletin No 33/9 December 1957); Convention No 105/25 June 1957 of the International Labor Organization concerning Forced or Compulsory Labor, ratified by Law No 140/1998 (Official Gazette No 249/6 July 1998); European Convention of Human Rights (especially its Art 4) and the Charter of Fundamental Rights of the European Union (especially its Art 5 – published in the Official Journal C 303/14 December 2007). For the compliance with these conventions, beside the provisions of the Constitution prohibiting forced labor (Art 42), we must add those of the NCC on the incrimination of slavery (Art 209) and subjection to forced labor (Art 212), the offences being incriminated also by the previous Criminal Code, as well as by the Law No 678/2001 on the prevention and combat of trafficking in human beings (Official Gazette No 783/11 December 2001).

[15] Traian Dima, *op. cit.*, p. 601

From our perspective, this condition is subjected to critics. Starting from the way in which it has been stated the non-payment of the criminal fine, as consequence of the absence of incomes of the convicted person, the adoption of the same system of thinking would have seemed reasonable in this case, than the statement of a mandatory condition for expressing the consent, we might say *a priori*, but the introduction only as optional of the obligation to work[16]; we appreciate that it would have been preferably that, at least for the cases in which the person proves to be medically unfit (for instance, he has a handicap) to no longer ask for the consent to work, for as long as it is obvious that such consent is unreal and delivered without the possibility of its performance, only formally; also, depending on the handicap the person is suffering from, another possibility would be that of enlarging the area of the possibilities to work, by concluding conventions with institutions from different economic and social branches, namely the performance of a labor not directly within the community, but also indirectly, for other legal persons, even of private law, which unfold their activity in that community, thus offering a real possibility to perform this measure and not transforming it into something fictitious and useless. In other words, to be verified through the imposition of this condition the real wish to generally work, according to the personal skills of the perpetrator, and not only the wish to do community service. After all, the notion of community may be interpreted in its wide meaning, and this is why we consider that it would be desirable that the community service be considered as any labor performed for a company, authority, institution, freelancer who performs at least a part of his activity within that community. The purpose of this condition is the idea to offer a superior meaning to the life of the perpetrator and to make his useful for the community in which he lives, by removing him from his criminality environment and orientating him towards good, by placing him in a group which could set him on a positive road, by personal example.

As in the present the free community service assumes only what it is insured by the City Hall, the possibilities remain extremely limited.

Also in correlation with this condition, it must be noted that its imposition determines the impossibility to order the postponement of the penalty of a legal person[17], which by itself, cannot perform community service, though it could perform or insure, from our perspective, services within the community. Such means of regulation, beside the fact that it is discriminatory, because a legal person, also from the perspective of the offence it committed, could benefit from the possibility of having postponed the penalty, is useless for the community. Using such privilege, obviously to the extent to which the law shall allow/allows it, the judge could transform the activity of the legal person from „against the community" in „the favor of the community".

C. The third condition is represented by *the appreciation of the court that the immediate application of a penalty is not necessary*, but though is necessary the supervision of the perpetrator's behavior for a certain period. The appreciation of the court is made by considering certain objective criteria, imposed by the very NCC, namely: the perpetrator's person, the behavior he had prior to the commission of the offence, the efforts laid by the perpetrator to remove or diminish the consequences of his offence, his possibilities for reformation. For the most objective analysis of these criteria, the court could request an evaluation from the probation service[18].

[16] According to Art 54 NCC
[17] Mihail Udroiu, *op. cit.*, p. 337; Gheorghe Ivan, Mari-Claudia Ivan, *Drept penal. Parteagenerală conform noului Cod penal*, C. H. Beck Publ.-house, Bucharest, 2013, p. 225
[18] MihailUdroiu, *op. cit.*, p. 339

2.2.*Special cases in which the postponement of the penalty may be ordered*

The special part of the NCC, as well as certain special laws, state the possibility for certain offences to be applied this means of individualization, without fulfilling the requirements stated by the law, except the one regarding the relative consent for the performance of free community service[19]. Before their presentation, we want to state that for the first two situations shall be mandatorily ordered the postponement of the penalty, while in the last case the application of this measure is optional. These situations are:

- For the commission of the offence of dissertation of family. According to Art 378 Para 5 NCC, if until the remaining definitive of the decision for conviction, the defendant fulfils the obligations he previously neglected, and which have led to the commission of the offence, then the court may order the postponement of the penalty, or the licensed supervision, where appropriate. Despite the legal provisions mentioned, we consider that the defendant shall have to fulfil his obligations not until the remaining definitive of the decision for conviction, but until the definitive trial of the case, because at the moment when the final judgment is ruled, the court must clearly know if it is possible the application of the measure or not, not being able to relate the ruling of the judgment to a future condition referring to the defendant;
- For the commission of the offence of prohibiting the access to general mandatory education. Also in this case, if until the remaining definitive of the decision of conviction, the defendant insures the resumption of attending the classes by the minor, the court may order either the postponement of the penalty, or its licensed supervision, where appropriate[20]. As for the previous situation, until the moment in which the defendant shall insure the resumption of attending the classes by the minor which he previously had prohibited, cannot be the moment of the remaining definitive of the decision of conviction, but possible the moment of the ruling of the decision, specifically, the moment of the final hearing in front of the court invested with solving the case as a final resort;
- The final situation is stated by Art 20 of the Law No 143/2000 on illicit drug traffic and consumption control[21], according to which the court may order the postponement of the penalty, if until the moment of ruling the decision, the defendant accused of committing the offence stated by Art 4 of the Law No 143/2000 complies with the protocol of the consumers and the drug addicts integrated assistance program. In this case, because the measure is conditionally applied, non-compliance with the program ordered by the court and assumed by the defendant, shall lead to the cancelation of the postponed of the penalty, according to Art 88 NCC.

3. Conclusions

The introduction into the new Criminal Code of this institution has generated the alignment of our criminal regulation with the western ones and offered the judge the possibility to find other means of applying the main penalties of fine and imprisonment, when the offence committed by the perpetrator does not have a high level of social danger.

[19] *Ibidem*
[20] According to Art 380 Para 3 NCC
[21] Law No 143/2000 on the prevention and combat of illicit trafficking and consumption of drugs was republished in the Official Gazette No 163/6 March 2014 and again modified by Law No 51/2014 published in the Official Gazette No 322/5 May 2014.

Though, the regulation, as we have seen during this article, is not without critics, being opened to improvements.

A first question refers to its legal nature, if it is truly a means of individualization of the penalty or, seen from the perspective of the fact that no penalty shall be applied, thus the constraint report shall not be concluded, may be catalogued as (or maybe simultaneously be) a means of removing the criminal liability?

On the other hand, its application only for the natural person creates an unjustified discrimination for the legal person, which may also fulfil the conditions of this measure, if the one regarding free community service may, at least, be interpreted as a service provided for the community or in the benefit of the community.

Finally, its imposition as a *sine qua non* condition of the necessity of the agreement for performing the community service, without being mandatory, prejudices the international obligations assumed by Romania through the international and European treaties, also violates the Constitution, because a consent imposed as mandatory condition cannot be valid (every defendant would naturally want to benefit of a slight sanction from the criminal law, but as the situation is stated by Art 83 NCC, the consent seems more like a constraint in order to benefit from the favorable statements of the Criminal Code). It was also possible for this condition to be eliminated, and the consent to be voluntarily expressed, not imposed by a legal condition, especially since the obligation for community service is optional.

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SOCIAL POLICIES OF THE EUROPEAN UNION AND THE LEGAL FRAMEWORK

Ioana PANAGOREȚ [*]
Maria-Luiza HRESTIC[**]

Abstract: *The Community involvement at a social level was quite restricted until 1973, this mainly coming down to the coordination of social security for migrant workers. Starting with 1974, the economic climate has deteriorated, and thus the percentage of unemployed rose, and, under their pressure, it was adopted the social action program which targeted to create new jobs, improve living and working conditions, involvement of social partners in the Community decision as well as the participation of workers in the managerial act. In this period were adopted legislative acts in the field of labor law, some directives on health and safety at work, the main instrument of social policy being the European Social Fund, whose costs have continuously increased, with the rising of unemployment. Therefore, the expenditures were redirected from sectoral issues to the rather burning problems of unemployment, particularly on long-term and especially for retraining. The 1993 White Paper on „Growth, competitiveness and employment „and the 1994 White Paper regarding „ Social Policy „ discussed the need for a balance between social protection and competitiveness of the European Union economy.*

Keywords: *policies,social, legislation, protection, mechanisms.*

Introduction

The concern for social issues at Community level is started with the Treaty of Rome (1957), and social policy instruments were established early with the creation of the European Social Fund in 1958. The Community involvement at a social level was quite restricted until 1973, this mainly coming down to the coordination of social security for migrant workers. Starting with 1974, the economic climate has deteriorated, and thus the percentage of unemployed rose, and, under their pressure, it was adopted the social action program which targeted to create new jobs, improve living and working conditions, involvement of social partners in the Community decision as well as the participation of workers in the managerial act. In this period were adopted legislative acts in the field of labor law, some directives on health and safety at work, the main instrument of social policy being the European Social Fund, whose costs have continuously increased, with the rising of unemployment. Therefore, the expenditures were redirected from sectoral issues to the rather burning problems of unemployment, particularly on long-term and especially for retraining.

From a programmatic point of view, the social policy begins in 1989 with the adoption of the *Community Charter of the Fundamental Social Rights of Workers*, known as the *Social Charter*.

The Social Charter was drawn up after consultation with stakeholders (representatives of employers, employees, self-employed, farmers, etc.) and reflects the concern for the social dimension of EU policies in the context of building the single European market. *The*

[*] Assist. Prof. Ph.D., *„Valahia" University of Târgovişte, România*
[**] Assist. Prof. Ph.D., *„Valahia" University of Târgovişte, România*

Charter was signed in December 1989 by 11 Member States (except the UK, which signed in 1998) and emphasized their role and responsibilities towards the implementation and enforcement of fundamental social rights: freedom of movement for workers, employment and wages, improved conditions of work and life, social protection, freedom of association and collective bargaining, vocational training, equal treatment for men and women, protection of health and safety at work, protection of children, adolescents, the elderly and persons with disabilities and information, participation and consultation on matters directly affecting them.

In **1990**, the Maastricht Treaty (ratified in 1992) states that the primary social objective of the Union is reaching a high level of employment of the labor force and social protection, equality between women and men, increasing standards of living and quality of life. A year later, in 1991, the *Social Protocol (Social Policy Protocol)* was adopted, which was annexed to the Maastricht Treaty and which substantiates the objectives of the social policy foreshadowed by the *Social Charter*.

In order to elaborate the *White Paper* in 1994, the next stage in programming the social policy was fulfilled, this being represented by the *Green Paper*, a document which launched a broad consultation process on social policies, a process in which EU institutions, Member States and various public organizations have been involved, alongside with representatives of employers and trade unions. Directions of discussion of these consultations were aimed at:

- priorities common to all Member States in the areas of the labor market, vocational training and social protection;
- improving the employment situation;
- accelerating the progress in creating a system of production based on quality;
- stimulating solidarity and social integration;
- combating poverty and social exclusion;
- single market and free movement of persons;
- promoting equal opportunities for men and women;
- supporting social dialogue;
- economic and social cohesion.

Social Policy Priorities at the Beginning of the Millennium

Following the consultation process initiated by the *Green Paper*, the *White Paper* establishes the action lines of the Community social policy until the year 2000, when they will be redrawn in the *Social Policy Agenda*. Thus, according to it, the main priority was the creation of new jobs closely related to the formation of an educated labor force, encouraging high standards of work and founding of an European labor market, creating equal opportunities for women and men, social policy and protection, public health, social partnerships, international cooperation and effectiveness of the implementation of European legislation. By means of the *Social Policy Agenda* adopted in 2000, as a result of the „*Lisbon Strategy*" and developed in 2000, during the Portuguese Presidency, the framework and the development priorities of the social policy until 2005 are outlined, and the challenges to be answered by the *Social Agenda* are given by the employment rate of the labor force, increasing importance of information technology and the small number of those who have skills in the field, developing a knowledge economy, the social situation, the European Union enlargement process and the internationalization of the social policy.

Taking into account the priorities identified, the European employment strategy is structured around *four pillars*, each representing a field of action whose development contributes to a better employment of the labor force at Community level:

1) *employability* - a new culture within employment of labor force which refers to the ability of becoming employed and helps combat youth unemployment and long-term unemployment;
2) *entrepreneurship* - promotes the creation of new jobs by stimulating fostering local development;
3) *adaptability* -targets the modernization of work organization and promoting flexible employment contracts;
4) *ensuring equal opportunities* - mainly refers to special measures for women aimed at reconciling personal and professional life.

Thus, the reformed social model, centered on quality, is based on the principle of strengthening the role of the social policy as a productive factor, i.e. integrating the social policy within the economic policy and the employment policy.

For the implementation of the European Social Model, the modalities used are the most varied and correspond to the complexity of the social policy, forming a broad range of approaches which include strategic, financial, legislative and analytical elements, as well as methods for dialogue and coordination. They act jointly and, together, ensure the internal cohesion of the social policy.

The functioning of this strategy is structured in several stages, and refers to: the establishment of certain „Employment Guidelines"; development of „National Action Plans" for each individual Member State; development, by the Commission and the Council, of a „Joint Employment Report", which is based on the national action plans; the Council tracing specific recommendations based on the Commission proposals for each Member State.

This strategy presents the EU objective for 10 years, i.e. by 2010 - Community transformation of the economy into the most competitive knowledge-based economy - and describes the strategy developed for its achievement, which reflects nearly all economic, social and environmental aspects of the European Union. Therefore, the *Social Policy Agenda* takes over those objectives and strategy elements related to the social policy and converts them into a 5-year action program, which represents the framework of the current social policy. This framework has as basic principle the strengthening of the social policy role as a productive factor and, additionally, the *Agenda* reflects the transformation and this policy transition from an approach based on minimizing the negative social consequences, arisen with the structural change, to one centered on quality, modernization of the social system and investment in people.

For the period 2000-2005, the social policy priorities at the beginning of the millennium impose the structuring on specific objectives and action measures which are concrete and appropriate for the identified situations and which crystalize in several directions.

The high rate of labor employment and the quality of work which have common guidelines considering the following:

- creation and promotion of new jobs in order to increase the overall employment rate to 70% and the employment rate among women to 60%;
- better employment, reasonable salaries and work organization tailored to both specific business needs and the needs of individuals;
- anticipating and managing change, as well as adapting to the new working environment due to technological development;

- promoting continuous learning, new forms of work organization and raising chances of employability for people with disabilities;
- promoting labor mobility by implementing free movement of labor, eliminating geographical barriers, by developing mechanisms which facilitate mobility.

Improving the quality of the social policy itself is represented by measures directed on various fields of social life and is closely related to the manner in which it interferes with work. Lines of action taken in this respect are:

- modernizing and improving social protection (safe income, secure pensions and the creation of a sustainable pension system, developing an efficient health system);
- promoting social inclusion - which aims at preventing and eradicating poverty and promoting participation of all people in the economic and social life;
- promoting gender equality by supporting women's participation in economic, scientific, social, political and civic life;
- strengthening and combating discrimination of fundamental rights, by ensuring development and respect of fundamental social rights.

Promoting quality in industrial relations is perhaps the priority field with the highest level of novelty and concerns:

- consolidation of social dialogue;
- successful adaptation to new technologies
- promoting competitiveness and solidarity.

In addition to these lines of action which correspond to specific priorities, are added two other lines of social policy development, lines corresponding to its extra-community dimension, namely the preparation for EU enlargement and promoting international cooperation.

All these priorities reflect the needs which the European society is facing today, and are considered to be benchmarks of the new social policy, being supplemented by special instruments and lines of action taken in order to achieve them.

The Main Institutional Actors on the Stage of the European Union Social Policy

In the process of decision making and implementation of the EU social policy, the main institutional actors involved as well as the European agencies and partners who support them are represented by:

- The European Commission, which is responsible for preparing and ensuring the implementation of social policies, through the *Directorate General (DG) for Employment Social Affairs and Inclusion*, which serves to initiate and finalize new legislation in this field and to ensure that measures thus adopted will be implemented by Member States.
- The European Parliament is involved in the decision-making process by the *Committee on Employment and Social Affairs*, whose responsibilities take into account various aspects of the employment policy and of the social policy.
- The EU Council is the equivalent of a council of ministers at European level which meets several times a year, in order to coordinate social policies of the Member States.
- The Economic and Social Committee (ESC) which has an advisory role in the decision process and issues opinions, at the request of the European Commission, opinions which have an informative character only. ESC constitutes the connection with civil society, various economic and social organizations on the territories of the Member States being represented within it.

The Employment Committee (of labor) was established in 2000 (replacing the *Committee for Employment and Labour Market*), it has an advisory role and is actively involved in developing the European strategy for employment of labor force (*European Employment Strategy*), and promoting coordination between Member States on policies related to employment and labor market.

European Monitoring Centre on Racism and Xenophobia, based in Vienna, was established in 1997 (started operation in 1998) and supports decision making by providing data and information on the state of racism, xenophobia, Islamophobia and anti-Semitism at Community level and elaboration of studies and strategies for action in the field.

European Foundation for the Improvement of Living and Working Conditions was established in 1975 and is based in Dublin. Its activity is oriented in two directions: (1) research management and (2) information and communication. The *Foundation* also supports decision making by providing data on the improvement of living and working conditions in Europe. European Agency for Safety and Health at Work, based in Bilbao, was established in 1996 in order to collect, disseminate and facilitate the exchange of information and best practices in this domain. Its role in the decision-making process is to provide data on health and safety at work, data on the basis of which are substantiated the European Commission proposals and initiatives in this direction.

Together with these community bodies, a role in shaping the social policy framework have the Employment Committee, the European Monitoring Centre on Racism and Xenophobia, the European Foundation for the Improvement of Living and Working Conditions and the social partners, represented by the *European Trade Union Confederation*, the *Union of Employers in the European Community* and the *European Centre for Public Enterprise*. All of them are involved in the process of social dialogue and represent the employees, the employers and the Professional Services.

The Legislative Framework

By the *Treaty of Rome* (1957), which reflects the starting point of the social policy, it has been established the legal basis of the social policy and then strengthened by the *Single European Act* (1986/1987) and reinforced in the *Treaty of Maastricht* (1992) and the *Treaty of Amsterdam* (*Treaty of the European Union* 1997).

The Treaty of Rome refers to this subject in its several articles on the free movement of workers and the freedom of their installation in the context of the common market establishment. In addition, the *Single European Act* continued this line through a series of articles on health and safety at work, the dialogue with social partners and economic and social cohesion. At this moment, the general legal framework of the social policy is given by *Articles 2* and *13* of the *European Community Treaty* and *Article 2* of the *European Union Treaty*, which continues the previous initiatives by adding provisions on combating discrimination (gender, racial discrimination, ethnic, religious, based on disability, age or sexual orientation).

Thus, *Article 2* of the *EC Treaty* stipulates to have, along with a harmonious, balanced and sustainable economic development, a high level of employment and social protection, equality between women and men, increasing standards of living and quality of life, while *Article 13* refers to the adoption of appropriate measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Also,in the *European Community Treaty*, the social policy is addressed separately in *Title VIII*

(Articles 125-130) which refers to employment and *Title XI* (Articles 136-145) which refers explicitly to social policy, education, professional training and youth.

Article 2 of the European Union Treaty, establishes the European Union objectives, assumes these regulations and mentions promoting economic and social progress through high levels of employment, strengthening the rights and interests of individuals (by introducing European citizenship) and the free movement of persons.

Together with these legal provisions there exists a series of directives and regulations on the European Social Fund (ESF), working conditions, employment and unemployment, social security.

Conclusions

Solving the above mentioned priorities represents the major challenge of the social policy at the beginning of this millennium and requires both structuring on specific objectives and adopting concrete measures which are appropriate for the identified situations. The 1993 White Paper on 'Growth, competitiveness and employment „and the 1994 White Paper on „Social Policy „ called into question the need for a balance between social protection and competitiveness of the European Union economy.

In the interim evaluation of the *Social Policy Agenda*, conducted in 2003, there was a quite visible change of the political and economic situation at Community level, as compared to the year 2000, when the *Agenda* was lauched. Thus, in 2003, Europe is characterized by a lasting slowdown economic progress, resulting from the slowdown in creating new jobs and increasing unemployment, fact which raises new challenges for the social policy of the next period (2003- 2005) and for achieving the objectives set in 2000. The problematic issues which were identified during this evaluation evolve around the *demographic trends of the aging of population and labor force from the community space*, still existing *gender inequalities*, *change of the nature of the family, technological changes, social disparities and poverty*. To all these one may add the challenge generated by the enlargement of the European Union to 28 states. One of the main challenges posed by the enlargement of the European Union in the social field refers to the discrimination of ethnic minorities and, in particular, of Roma (which requires the creation of joint solutions at EU level), to which is added the potential of labor migration from the new Member States and the way it will affect the Community social landscape. However, it is possible that this migration effect is not lengthy, but one on short term, and the migratory phenomenon may also occur in reverse, due to former migrant workers who might choose to return to their home country once its integration into the EU.

Analyzing the social policy at EU level, it is worth mentioning the tendency to accentuate the „corporate social responsibility" role, i.e. acceptance of a company to justify its decisions in front of the stakeholders. Emerged in the community political landscape in the early 90s, this new economic- social concept results in the formation of socially responsible companies, which take into account the impact of their actions on the community and on the environment in which they operate, on employees and consumers, and which choose to balance the economic profit with the needs of the stakeholders. Considering combined approach of the economic, social and environmental protection sectors, promoting this new kind of social responsibility is one of the EU's concerns. The social policy in the following years, will evolve around the few elements presented, adding the continuing concern for improving the quality of industrial relations, increasing the number and quality of jobs, developing flexibility and security in the context of a changing

working environment, upgrading social protection, promoting gender equality, combating poverty and, not least, the discrimination and social exclusion.

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A FEW CONSIDERATIONS ON FINDING AND EXTINGUISHING BUDGETARY DEBT TITLES RESULTING FROM CERTAIN IRREGULARITIES IN OBTAINING AND USING EU FUNDS

Rada POSTOLACHE *

Abstract. *The process of obtaining and using the amounts of money assigned from the non-refundable funds of the European Union, in order to implement operational programmes, must abide by the requirements instituted by the special legal regulations, but also the requirements integrated in the contracts/agreements for the financing of the projects approved by the programmes in question. If these requirements are transgressed, then the provisions of the special law – Government Emergency Ordinance (G.E.O.) No. 66/2011 – shall be enforced, imposing the finding of the transgressions committed when obtaining and using the EU funds, but also the recovery of the debts due to the budget, according to the procedures and methods instituted by the regulation. These aspects shall be discussed within the current analysis, aiming to establish the specific elements and using the norms of special law as main documentary support.*

Keywords: *recovery of budgetary debts; non-refundable financial aid; debt title; controlling paper.*

1. Introduction

Romania's operational programmes[1]are financially supported mainly by the financial *non-refundable*aid provided by the European Union from its budget, completed by the non-refundable funds provided by some international donors and the resources from the national budget, provided within the legal limits.

Obtaining and using the amounts coming from these funds must be done by observing some complex procedures, containing a mixture of financial regulations with a substantial content[2]. The *irregularities* in obtaining and using these funds are nonetheless unitarily subject to the G.E.O. No. 66/2011 on the prevention, acknowledgment and sanctioning the irregularities emerging in obtaining and usingthe EU funds and/or national public funds corresponding to them[3], which contains a complex procedure, with the following specific

* Reader Dr. at „Valahia" University of Târgoviște, Faculty of Law and Administrative Sciences

[1] For the period 2014-2020, we have the following: the Competitiveness Operational Programme; the Human Capital Operational Programme; the Large Infrastructure Operational Programme (transports, environment); the Disadvantaged Person AidOperational Programme; the Technical Assistance Operational Programme; the Regional Operational Programme; the Administrative Capacity Operational Program; the National Rural Development Programme (PNDR)

[2] The basic European legal framework for EU funds is represented by the Regulation (EU) No. 1303/2013 of the European Parliament and of the Council, the OJ No. 347 from 20th December 2012, available at: http://www.poscce.research.ro/uploads/programare-2014-2020/1_regulamentul_1303_2013_general.pdf. The Regulation in question contains common and general provisions regarding: the European Regional Development Fund (FEDR), the European Social Fund (FSE), the Cohesion Fund (FC), the European Agricultural Fund for Rural Development (FEADR) and the European Maritimeand Fisheries Fund (FEPAM).
According to article 2 of the G.E.O. No. 66/2011: „(2) The European funds are subject to the legal norms common to public funds, except for the case when European norms provide otherwise". (3) The amounts of money coming from the budgets of other international public donors are assimilated to the EU funds and are subject to the same legal regime.

[3] Official Gazette, Part I, No. 461 from 30th June 2011.

features: finding irregularities; completion of European funds –methods; jurisdiction on the acts of control concluded.

2. Finding the irregularities in obtaining and using EU funds and establishing the debts due to the budget as a result of these

2.1. Irregularity – definition and requirements. The current study shall be limited to the finding of the European budgetary debt titles generated by irregularities – transgressions, not including also the debt titles resulting from a fraud, nor the administrative measures for the enforcement of budgetary corrections.

According to the G.E.O. No. 66/2011 article 2 paragraph (1) letter a), an irregularity signifies: „any *transgression* from legality, regularity and conformity, in relation to the national and/or European provisions, but also to the provisions of the contracts or other commitments legally concluded on the basis of these provisions, resulting from an action or inaction of the beneficiary or the competent authority for the management of EU funds, which caused prejudices or which can cause prejudices to the budget of the European Union/budgets of international public donors and/or national public funds, as a result of an amount of money which *was unworthily paid*".

According to the legal text, an irregularity must meet the following *conditions*:

a) it must result from *an action/inaction* which *caused prejudices* or which can cause prejudices to the budget of the European Union/budgets of international public donors and/or corresponding national public funds, as a result of an amount of money which was unworthily paid; the irregularity is limited to the *transgression*, but it does not also include the fraud, which the law defines differently[4];

b) it must concern: *the legality, regularity and conformity* of the actions/inactions in obtaining and using EU public/national funds, according to the national and/or European incident provisions;

According to the special law, EU funds signify „the amounts of money coming from the non-refundable financial aid offered to Romania from the general budget of the European Union and/or from the budgets administered by the European Union or on its behalf". The national public funds *corresponding* to the EU funds have the meaning of „amounts of money coming from the general consolidated budget, used for: insuring the co-financing, paying the pre-financing, replacing European funds should the latter be unavailable or temporarily stopped, completing the European funds for finishing certain projects, as well as any other expense legally regulated for this purpose [article 2 paragraph (1) letter c)-d) of the G.E.O. No. 66/2011]. In the absence of this connection ("corresponding to"), the national public funds go out of the incidence the G.E.O. No. 66/2011, being subject in terms of the transgressions related to their use to some other national financial regulations, mainly Law No. 94/1992 on the organization and functioning of the Court of Accounts.

2.2. Finding theirregularities and establishing the amounts to give back. The competence to find irregularities. The finding of irregularities is understood as a control activity – investigation/verification in order to establish the existence of an irregularity. The activity related to the finding of irregularities and establishment of the budgetary debt

[4]Fraud – „the transgression committed in relation to obtaining or using the European funds and/or national public funds corresponding to them, incriminated by the Criminal Code or by other special laws" [article 2 paragraph (1) letter b) of the G.E.O. No. 66/2011].

titles/financial corrections is carried out by the authorities having competence in the *management* of European funds[5], by organized control *structures* within them and, by exception, by control *teams* organized for this purpose by them. The provisions of the special law point out that the control structures/teams are others than those exerting the internal control/audit[6]at the authority administering EU funds.

According to article 20 paragraph (4) of the G.E.O. No. 66/2011, the activities aimed to findirregularities and establish the budgetary debt titles can be *delegated* by the authorities competent in the management of EU funds to the *intermediary organisms* functioning within a public institution.

The activity related to the finding of irregularities is also exerted by the Minister of Public Finances, but in a limitative manner, only for those situations clearly regulated by the special law [article 20 paragraph (2) letter d) of the G.E.O. No. 66/2011].

Structures checked. Can be subject to verification „the beneficiary of the European funds aid, any implementation structure, any legal or natural person who is in a contractual relation within the projects/programmes financed by the EU funds and/or national public funds corresponding to them, including the beneficiaries natural or legal persons entitled to receive only on the basis of a payment application subsidies or aid financed by the EU funds and/or national public funds corresponding to them within the common agricultural policy and from the National Rural Development Programme".

The legal text quoted above concerns *all those* committing *transgressions* in obtaining and using non-refundable EU funds, not being limited only to the *beneficiaries* of these funds, including „any legal or natural person of public or private law who, for the purposes of the related European regulations and the documents of the programme involved, is a direct or indirect *party* of the legal act on the financing from EU funds and/or national funds corresponding to them/from funds coming from other international public donors or, as the case may be, the natural or legal person entitled to receive only on the basis of a *payment application*subsidies or aids financed by the instruments financing the common agricultural policy, in accordance with the national legal and/or community provisions in force".

2.3. Procedural aspects. Notification of the control structures/teams. The implementation of the control activity attributed to these entities is based on the following:

a) the findings with financial implications or potential financial implications notified to the control structures/teams by the authority responsible for the funds management; according to the special law, the findings with financial implications or potential financial implications signify „expenses which were paid/reimbursed to beneficiaries by the authorities administering EU funds and which are considered completely or partially non-eligible, depending on the case".

These findings *precede* the activity for finding the transgressions in obtaining and using EU funds, analyzed in the present work, with which they do not overlap; they are

[5] According to the special law, the authorities competent for the management of EU funds include the *management* authorities within the programmes financed by structural and investment instruments, in the way the instruments are nominated by the special law; see for that purpose the provisions of article 2 paragraph (1) letter e) of the G.E.O. No. 66/2011. For more details on the management of European funds from an institutional perspective, see:Adina Dornean, *Gestiunea fondurilor structurale europene*, Ed. C.H. Beck, Bucureşti, 2013.

[6] According to article 4 of the special law, „The public entities which have the quality of authorities competent in the management of European funds or beneficiaries of the programmes completely or partially financed from European funds and/or public national funds corresponding to them, have the duty to organize and to exert the activity of internal control, preventive control, identification and management of risks and the internal audit enforcement in accordance with the provisions of national and community legislation in force, but also the International audit standards".

performed by the entities of internal or external audit or control referred to by the special law, which are supposedly *others* than the control structures/teams which are authorized to acknowledge the transgressions analyzed. The special law makes reference to the findings with financial implications of the following entities: the representatives of the European Union/international public donor, the Fight Against Fraud Department (DLAF), the Audit Authority within the Romanian Court of Accounts, the National Regulatory and Monitoring Authority for Public Procurement(ANRMAP), the certification authority, the internal control/audit structures of the authority for the management of EU funds.

The acts of these entities, containing findings with financial implications or potential financial implications shall be *registered* by the entity responsible for the management of funds; they shall be *notified* to the control structures/teams, which shall start organizing and exerting their activity related to the finding of irregularities and establishment of the amounts of money to reimburse, also called strategically *investigation*.

b)the complaints communicated to the control structures/teams by the authority for the management of EU funds, which the latter received directly or by means of other state institutions and which concern the programmes which it administers; for ruling on them, the control structures/teams perform check-ups, being bound by law to notify the entity making the complaint on the results obtained.

Should some irregularities be noticed, *capable to lead to potential frauds*, the competent control structures have the duty to *notify* the DLAF immediately about it and to *continue* their check-up activity and that for drafting the act containing the irregularities found, establishing the debt titles and their recovery, *independently from the criminal inquiry*, with the according enforcement of the special law provisions (the suspension of the enforcement of the financing act provisions, the suspension of the payment/reimbursement of the amounts of money demanded by the beneficiary, according to the distinctions made by law)[7].

Proportionality. Any action forfindingan irregularity and quantifying the budgetary debt titles resulting from it must be performed by enforcing the *proportionality principle*, ruling that the action in question must take into account *the nature and gravityof the irregularity* found, but also its dimension and financial implications (article 17).

Controlling papers. The investigation/check-up activity is done by drafting the following controlling papers:the report acknowledging the irregularities and establishing the debts due to the budget, which must be approved by the leadership of the entity to which the control structure/team belongs; the note acknowledging irregularities and establishing the financial corrections, the study of which exceeds the purposes of the current work [article 21 paragraph (13)].

G.E.O. No. 66/2011 qualifies controlling papers as *administrative legal acts*, for the purposes of the Law on the contentious-administrative field No. 554/2004, but also as *debt titles* which must be notified to the debtor within three working days from the day they are issued. The qualification of controlling papers has its own relevance, as there must not be obtained any other documents regarding the payment duties acknowledged, so that the controlling papers are defined in relation to those within the common financial law.

According to article 45 paragraph (4), „Should the existence of a budgetary debt title depend on the existence of a criminal deed and, respectively, of a fraud, about which the DLAF/the National Integrity Agency (ANI) were notified, the competent authorities provided for by the special law (article 20) *suspend* by law the issue of the debt title until

[7] See for that matter the provisions of article 8 paragraph 2) of the G.E.O. No. 66/2011.

the final decision of the court on the criminal or non-criminal character of the incriminated deed, rule on the enforcement of the insurance measures provided for by article 40 paragraph (1), with the according enforcement of the provisions of article 8 paragraph (2) – the suspension of the enforcement of the legal financing act provisions, the suspension of the payment/reimbursement of the amounts of money demanded by the beneficiary, according to the distinctions made by law.

The authorities competent to administer the funds verified shall list the debt titles resulting from the irregularities in obtaining and using the EU/national funds corresponding to them in the *Debtors Register*. Moreover, their leadership is bound to *monitor on a quarterly basis all the irregularities* and to order the measures which must be taken for improving the management and financial control systems, for preventing their re-emergence in the future (article 37).

The period for exerting the activity aimed at finding irregularities. According to article 26 of the special law, except for the cases in which the rules established by the international public donor provide otherwise, the activity for findingthe irregularities analyzed here and the conclusion of the corresponding controlling papers shall be done during the monitoring period of the project (it does not abide by the durability/sustainability requirements provided for by the enforceable regulations) or at the end of the monitoring period (it is noticed that that the indicators/objectives of the projects financed from EU and/or national public funds corresponding to them have not be completely accomplished or have been partially accomplished).

The finding activity must take place within the statute of limitations term for establishing a budgetary debt title, which is of 5 years and starts from the 1st of January of the year following the end of the programme, officially communicated by the European Commission/the international public donor, by means of the final closure statement, except for the case in which the norms of the European Union or the international public donor provide for a bigger term.

Resuming the control activity. The activity for verifying and finding budgetary debt titles does not have a definitive character; it can be resumed by the same or by another control structure, according to the conditions of the special law, if until the statute of limitations term ends emerge other additional data which were unknown when the initial check-ups were performed or estimation errors which influence the results. In these conditions, a new report for finding irregularities and establishing the budgetary debt titles can be issued, for potential differences which are necessary to cover the prejudice totally (article 31).

3. Recovering the budgetary debts from the irregularities found

3.1. Conditions. The activity of recovering the budgetary debts resulting from irregularities signifies „exerting the administrative function by the competent authorities (…) with a view to extinguish debts" [article 2 paragraph (1) letter k) of the G.E.O. No. 66/2011]. According to the special law, the recovery conditions are: the existence of an enforceable title; the certain, liquid and demandable character of the budgetary debt title.

According to article 43 of the G.E.O. No. 66/2011, *the report acknowledging* the irregularities and establishing the budgetary debt represents an enforceable title, starting from the moment when the budgetary debt is due, as a result of the payment term provided by the report expiring. Moreover, it is considered an enforceable title also the definitive and

irrevocable judicial decision, being of interest if it contains the duty of the debtor to pay its debt to the affected budget.

Just like in common law, the debt which the title expresses must be certain and unconditioned; in a fixed amount of money, expressed in lei or the currency established by the legal financing act; demandable when is issued the report finding the irregularities and establishing the budgetary debt.

The control structures organized *outside the authority* with competences for administering EU funds *have the duty to transmit the debt titles* which they issued and approved to the authority competent to administer EU funds and operating the management of the programme for which the title has been issued within at most 3 working days since the title is issued.

3.2. The recovery competence. First of all, the special law prioritizes the duty of the authorities competent to administer EU funds to recover the budgetary debts particularized by debt titles, binding them nonetheless to resort to easy accessible methods, when that is possible, which they clearly mention: cashing, deduction from next payments/reimbursement and/or execution of bank guarantees, in order not to defer debts to the enforcement bodies.

When the budgetary debts resulting from irregularities cannot be recovered by the methods mentioned above, their extinguishment shall be carried out by *the competent fiscal bodies*, on the basis of the enforceable titles which they contain, notified to these bodies. The latter shall act in a limitative manner, according to the G.E.O. No. 66/2011: will enforce the insurance methods instituted within the control exerted; will carry out the procedure for the forced execution of the debtor's assets and incomes; will order compensation, as a manner to extinguish the existing debt titles, according to the provisions of the G.O. No. 92/2003 on the Civil Procedure Code, according to the case.

3.3. Recovery methods. Article 38 of G.E.O. No. 66/2011 points out the following methods to extinguish (recover) budgetary debts: cashing, deduction from next payments/reimbursement; execution of bank guarantees; compensation; forced execution; annulment; statute of limitations; other methods. These are briefly regulated, being additionally subject to the provisions of common law.

a) Cashing. It shall be performed from the account indicated by the debt title/income accounts of the budgets in which was done the reimbursement of expenses. In the form it is stated, the legal text regards a method based on forced execution, by means of which the amounts of money are directly taken from these accounts, being recovered on the basis of the report drafted by the authority competent to administer EU funds, which made the reimbursement of expenses, sent to the State Treasury at which are opened the budgetary income accounts, without the debtor's consent. Since law says no more about the matter, we are not speaking of a seizure, but of a *legal authorization* of the entities entitled to perform the recovery to order taking the due amounts of money from the accounts mentioned, even if the owner is another entity – here the debtor of the debts individualized in the control act. The operation is possible, the more the debt title is an enforceable title.

The cashing can take place only after the expiry of the term established by the debt title, that is within 30 days from the moment the debt title is notified, when the payment duties become due.

The established debt title carries interests, the act by means of which the interest is calculated being a debt title too. The accessories become *income of the same budget* in which is also paid the debt title resulting from irregularities.

It can be deducted that cashing cannot be confounded with payment – considered by the lawmaker as the first method to recover a debt, by means of its willing execution by the debtor.

b) Deduction from next payments/reimbursements. It is done only within the same financial program/instrument/fond/ facility, except for the cases provided for by law. The deduction means to withhold or subtract the debt titles established during the control from the amounts of money allocated to subsequent payments/reimbursements, during the project implementation. It does not mean a *compensation* of mutual debts, which law regulates as a distinct manner, nor a deduction by percentages (definitive or temporary)[8].

c) The execution of bank guarantees made by the debtor according to the provisions of the financing contract/agreement within which was issued the debt title. It can be noticed that the lawmaker has chosen to use bank guarantees, which are easy to valorize, given that credit institutions issue only personal guarantees, particularly in the form of the letter of guarantee, which is an autonomous non-conditioned act.

d)Compensation. G.E.O. No. 66/2011 contains the expression „compensation from other funds" [article 2 paragraph (1) letter m)], clearly instituting the competence of the National Fiscal Administration Agency, according to the Government Ordinance No. 92/2003 on the Fiscal Procedure Code, given the connection of the particularized debt title to the financial, implicitly fiscal, field[9].

e) Forced execution. Just like compensation, forced execution belongs to the competence of the fiscal body, being subject to the Government Ordinance No. 92/2003 on the Fiscal Procedure Code.

f) Annulment. „The debt title can be annulled by the issuing authority. The annulment of the debt title triggers the according annulment of the subsequent acts". In the absence of other provisions, the conditions and content of annulment can be subject to common law enforceable to legal administrative acts.

g) Statute of limitations. The special law is brief. It refers only to a statute of limitations term of the right to find the existence of a budgetary debt, integrated to the finding activity. In this context it must be taken into account the statute of limitations of the right to demand to the execution of the enforceable title, by taking into account the provisions of the Fiscal Procedure Code. This is of 5 years and starts to elapse from the moment the control activity ends.

h) Other methods provided for by law. We include here also those related methods instituted by the Fiscal Procedure Code, which are not nominated by the special law, belonging to the competence of fiscal bodies.

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[8] Understood as a „reduction of the amounts of money declared by the European Union/international public donor, corresponding to some projects financed by structural instruments, out of the funds corresponding to the Instrument for Pre-Accession Assistance and the European Fisheries Fund, with the amounts which constitute a percentage quota established as a result of the finding within an audit report elaborated by the Audit Authority or by the European Commission/European Court of Accounts of some irregularities within the system [article 2 paragraph (1) letter o1].

[9] For more deatils on compensation within common law, see Rada Postolache, *Drept financiar*, C.H. Beck Publ. House, Bucharest, 2014, p. 211-215.

4. Conclusions and proposals with a view to the future law

The special law points out that the finding of irregularities is a typical control – investigation/check-up activity, aimed to discover the transgressions from the legality, regularity and conformity in obtaining and using non-refundable EU funds, providing it with its own legal regime.

This activity is organized and distinctly exerted by the internal/external activities of control or audit of the authority administering EU funds, on the basis of a special procedure, regulated by the G.E.O. No. 66/2011.

It starts on the basis of the papers containing findings with *financial implications* or with potential financial implications, but also of the complaints regarding the management of the EU funds, with the obvious final objective of completing the EU funds obtained and used by the structures verified.

Aiming to be operative, the special law qualifies the controlling papers concluded as debt titles – enforceable titles, providing them with direct legal effects, so that they can be verified fast by the authority responsible for the funds management and by the fiscal entities in addition.

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THE INDUSTRIALIZATION OF THE JUSTICE IN THE SOCIETYOF KNOWLEDGE IN MEXICO

Lic. Alma Rosa García CERVANTES *

Abstract: *Before the economic development that the society has had since the industrial revolution until our days; events that have brought as a consequence technological advances and the access to information through different means of the knowledge,beenthem accessibleand fast; then we can think on an efficient impartation of justice in Mexico. Even though this is not like that, because the judicial activity and in particular those partitioned in the collegiate tribunals of circuit and the Judges in the district of the eighteenth circuit, confirm then that the excessive increase of processes in judicial agreements and also the sentences, produced them in large quantity -- as the production of any products whose target is in a certain market, not having then as an objective, the solution of the litigation though the reasoning of the law and the essential partitioningof the judge in the impartation of the same.*

Keywords: *Industrialization, Justice Administration, Collegiate Tribunals of Circuit and District Tribunals*

I. Conceptual Elements

The word industrialization as a derivation of Industry,[1]Can bring with it, also connotations of progress, rationalization, advance or modernization for a country; aspects that in our point of view, we do not fully agree; because it is true, that there is a transformation in the society from an economy mainly agricultural to one industrial, by introducing machines for the secondary production.[2]It has always shown and historically been proved, that in these processes, the factor of rationalization is not integrated (assuming it literary), being this antagonist, that there is mechanism but it is not rationalized.

The Industrialization arrives with the industrial revolution on the XVIII century, and it is spread around the world in different speeds; as it was visualized by*Charles Chaplin* in*Tiempos modernos (Modern Times)*, in the route of the humanity in search of the happiness, as per the mechanized work of the labor force, that did not have conscience of the time nor of the space, with only the purpose of getting the desired production.

So the transit of the societies in industrialized processes that goes form electronic machines, in constant change of the production and the advances and development of the information tools and the knowledge, representative signs of modernity.

In such a way, the importance that nowadays has the usage of Information Technologies and Communication (TIC) in any filed of the production life but, without

* Student of the master in law at the, Universidad Autónoma del Estado de Morelos, almarosacervantes@hotmail.com

[1]The word Industry comes for the Latin, form with the prefix indu – in the inside and the root of the verb truo (construct,stack, organize, manufacture) (with the suffix of quality – ia) It is presently used for the human activities used for the appropriation and transformation of the natural materials, in order to get and transform natural materials to produce goods transformed for consumption. Etymology of Chile, in: http://etimologias.dechile.net/?industria (date of consult 22th de March de 2015).

[2] Borja Rodrigo, Enciclopedia de la Política, Fondo de Cultura Económica, México, 2000, p. 543.

leaving aside the administration of justice,[3] in the search of the opening of channels to get services, as well as to improve the quality and opportunity of the information; this within a new extension of the man as established by Mcluhan.[4]

It is considered as per Lyotard, that nowadays the knowledge suffers of transformations through two main functions: The research in terms of the object of study of the respondent by the society (the genetic that has to be a theoretical paradigm of the cybernetic) and the acquisition, classification, possibilities of disposition and exploitation of the knowledge been now merchandized, as privileges of the States – Nations regarding the production and diffusion of the same.[5]

Now, how are aspects of justice integrated to the dynamic, aforementioned? When it is important to emphasize that for „Justice" it should be understood the organ and the judicial function in the said State of Law that Carl Schmitt referred as „Bourges".[6]Would seem incorrect or even fallacious to move the law to an economic term, referring it as a transformation process of raw material into merchandize for it commercialization.

Situation that leads us to the analysis when in various occasions we claimed guilty the judicial apparatus of selling sentences and therefore of being corrupt. It is proverbial this accusation rotting since the freedmen performed this profession, just reserved for the aristocracy of the*equites,* that did not billed for defense.[7]Maybe this freedmen inherited the Greek logographers' experts in rhetoric, that that way taxed the services as sophists of oratory pieces.

This term, evolution, however does not pretend to take again such an old theme but, to comprehend the phenomenon seen since the economy, first and then analyzed in sociology. For example Max Weber- and philosophy[8]with Walter Benjamin,[9] or Edmund Husserl,[10]just to mention two, and that Lyotard also considers to think for post modernity. I refer to the*standardization* that in the case of the cinemas and television correspond to this

[3] It can be thought in these times, that one wants to ease the activity of an archivist inside a tribunal in the handing and concentration of the information, would be the implementation of the code bar, substituting this the bunch of sheets of several tomes that integrate one file in any tribunal of a said judicial matter. The bars and the spaces of the codes would represent small chains of the characters that would allow recognize easily and in a globally unique, not ambiguous, all and each of the related data of the parts of the litigation, the diverse stages of the process actuations till the sentence, in a mechanized way, as if it were any products in the market. However Would we fulfilling that old precept of the acquisition of the knowledge that can not be dissociated for the spirit formation?, well it is seen that the archivist of the tribunal is handing best the organization of the files in a mechanized fashion; but, what can be said of a judge, that has to solve a litigation through the reasoning of a sentence, This bar code would not have the same use as a true tool for the solution of a controversy.

[4] It is located in our physical bodies in the center of our nervous system enhanced with the help of electronic means; we initiate a dynamic in which all the categories aforementioned, that are mere extensions of our bodies, including the cities, can be translated in information systems. This way the presence of wheel man, machine man, gun man in the human being is extends and can be included in a serial of servomechanisms. Marshall Macluhan, *Comprender los Medios de Comunicacion de las extensiones del Ser Humano*, (understanding the means of communications of the extensions of the human being, in: http://cedoc.infd.edu.ar/upload/McLuhan_Marshall_Comprende_losmediosde_comunicación.pdf, (Date of consultation 25th March 2015).

[5] Lyotar, Jean- Francois, La Condition Pots modern Inform about the knowledge, in: https://centrito.files.wordpress.com/2011/06/5-lyotard.pdf, (date of consultation 29 de Marzo 2015).

[6] Before the critic of the function of the Bourges State in the law, reflection taken from Schmitt, Carl, Theory of the Costitution theory, Teoría de la Constitución, ALIANZA EDITORIAL,México, 2001.

[7] Friedlander, Ludwing Henrich, The Roman society La Sociedad Romana: History of the traditions in Rome since Augusto till the Antoninos,Historia de las Costumbres en Roma desde Augusto hasta los Antoninos, Fondo de Cultura Económica, México, 2006, pp 38-75.

[8] Weber, Max, Economy and society, Economía y Sociedad, in: http://www.biblioteca.org.ar/libros/131823oon, (date of consult 2 de Abril 2015).

[9] Referring to a reflex from Walter Benjamin in his book Uninterrupted speeches Discursos Intemrrumpidos I, TAURUS, Buenos Aires, 1989.

[10] Husserl, Edmund Gustav,The crisis of the European Silences and the transcendental phenomenology. La Crisis de las Ciencias Europeas y la Fenomenología Trascendental, Fondo de Cultura Económica, México, 1997.

slogan. Rudolf von Ihering observedthis tendency in crating „slogans", when referring in regards to the fashion in this book,the end of the law. *El Fin en el Derecho*.[11]

There is a uniformity of the behavior and the kind of human been, projected in the clothes, the cars, the language and linguistic turns, the food and, as observed in Mexico, the way ofcarpeting and fix the historical centers. Is this part of the democracy to make humans unidimentional? To take back the expression of Herbert Marcuse?[12]

If the „democracy" budget of a State of Law having as main premise the law as „rational thing", as „system", exactly as noted by Tocqueville in hisThe democracy in America *La Democracia en América*,[13]where the judicial apparatus, independent, of the codes, laws, rules, circulars, jurisprudences and others, that uses, day after day, has an organization extremely complex, where the finished product is a sentence, being it of first or second instance in administrative matter of electoral, not mentioning telecommunications or similar, has as an end to solve the conflicts.

It becomes interesting that these sentences always quote a thesis, or jurisprudences that in many cases do not have to do with the issue to be solved. Likewise, show many similarities one with the others, even the budget of each case is different to the others, although produced in bulk. Then, Can it be considered that as per the heavy work load that these judicial authorities develop in the production of various actuations, and in particular the sentences, we are getting similar to a process of mechanization and merchandising of the same?

II. Integration of the judicial Power in Mexico

Mexico,in concordance to the article 40 of the political constitution of the United States of Mexico is formed as a representative republic, democrat, federal, having free states with sovereign in all related to their internal regime, but united by a federation. In terms of the Federal Judicial power, this is integrated as per the article1° of the organic law of the judicial power of the federation by: I. The Supreme Court of Justice of the Nation II. The Electoral Power. The Collegiate tribunals of the circuit. IV the Unitary Tribunals of the Circuit; V. The Courts of District; VI the Council of the Federal judicial organization VII the Federal Court of the citizen and VII. The Tribunals of the Sates and the Federal District in the cases provided in the article 107, Fraction XII, of the Political Constitution of the United States of Mexico and the other that by law should act to provide support to the Federal Justice.

In its jurisdictional scope, the judicial Power of the Federation is formed by 32 circuits in the national territory; of them 217 are collegiate Tribunals, 87 Unitary Tribunals, 380 District Tribunals, 32Colegiate tribunals of auxiliary Circuits, 10 Unitary Tribunals of circuit and 41 Tribunals of auxiliary districts.

It is important to point out that this research, for study reasons, with an objective of demonstration, will be in a very particular form, the observation of the judicial authorities in specific, as it is the case of the figure of the Collegiate Tribunals of circuit and the Courts of District monitoring its performance in the administration of law in the country.

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[11] Due to his birth, pertinence and development, the law pursues inthe end and therefore can move as changes occur in the interest across the time and the space, it is not, in a transcendental order, Von Ihering, Rudolf, Tribunal de Justicia del Distrito Federal, México, 2013.

[12] Marcuse, Hebert, The unidimensional Man El Hombre Unidimensional: Essay of the ideology of the industrial advanced society in http://www.enxarxa.com/biblioteca/MARCUSE%20El%20Hombre%20Unidimensional.pdf, (Date of Consult 5th April 2015).

[13] Tocqueville, Alexis , The democracy in America. La Democracia en América, en: http://info5.juridicas.unam.mx/libros/libro.htm?l=464.

As per the Organic Law of the Judicial Power of the Federation, article 33, the Collegiate Tribunals of the circuit are formed of 3 judges, one of them being the president. Besides that, they have a secretary of agreements and the number of secretaries, actuaries and employees that the Budget permit. They can be specialized in one matter: (Penal, administrative, civil, mercantile or labor) or know of all of them.

Attributions of the collegiate Tribunals of the circuit are, in agreement to what is said by the 37th by the referred law: thetrials of habeas Corpus direct against final sentences, lauds or against resolutions that make an end to the trial for violations made on them or during the procedure; the resourcesthat come out from warrants and resolutions that pronounce the District judges, Unitary Tribunals of Circuit of the Superior of the Tribunal in charge, the resource of complain, the resource of revision against sentences pronounced in the constitutional hearing by the District Judges, Unitary Tribunals of Circuit by the superior of the tribunal in charge, and when it is in reclamation of an agreement of extradition decreed by the executive power, from a foreign country, or in the cases in which the plenary of the Supreme Court of Justice having executed its faculty, expressed in the sixth paragraph of the 94th article of the Political Constitution; the resources of revision that the laws against definitive resolutions of the tribunals of the contentious-federal administrative and of the Federal District.; the conflicts of competence that comes between Circuit Unitary Tribunals and the District Judges of their jurisdiction in trials of habeas corpus; the impairments and the excuses in terms of habeas corpus that occur between the district judges , and in any matter between the judges in the circuit tribunals and the resources of claims; and any other issues entrusted by the law or the law or general agreements issues by the Supreme Court.

Moreover, the district courts are composed of a judge and the number of secretaries, clerks and employees that according to Article 42 of the Organic Law of Judicial Power of the Federation appoints the budget. They are known as courts of first instance of the Judicial Power of the Federation and routed to act as judges of first instance in Federal Ordinaries through concurrent jurisdiction.

Thesecourtsmay specializein certain areassuch ascriminal, administrative, civiland laboror meetthem all. In these courts jurisdiction known for federal crimes; extradition procedures, except asprovided incertain internationaltreaties;authorizationsto interveneany private communication; disputesarisingin connection with theenforcement of federallawsinadministrative, civiland labormatters andresolveindirect habeas corpus in criminal, administrative, civiland labormatters.

III. Analysis ofJudicialActivityof the Collegiate Circuit CourtsandDistrict Courtsof theEighteenth JudicialCircuit

Mexico, which according to the last censuspresented by the Instituteof Statistics, Geographyand History in 2010 had 112 million 336 thousand and 538 inhabitants[14] and remainuntil this year 2015 a total 122.3 million in habitants,[15] it is a countrythat does not have-according to projections of the Judicial Power of the Federationin 2007-a Federal Judgeper each

[14] INEGI, Population in:Http://cuentame.inegi.org.mx/poblacion/habitantes.aspx?tema=P,(Date of Consultation April 5, 2015).
[15] According to World Bank figures , in : http://datos.bancomundial.org/indicador/SP.POP.TOTL(Date of Consultation April 5, 2015).

hundred thousand inhabitants;[16] which implies understanding that the MexicanFederalJusticesystemis saturated,to theworkloadsfor staffwho workin it areexcessiveand thatresults in thatas designated bythejudiciary itself, thequality of judgmentsdrop.[17]

With the above,beingevenapproximate instatisticsissued by theCouncil of theFederalJudiciarythrough itssystem,JudicialStatistics andPlanning; the reality isthat in thedemand forlegalservices that thecitizenshiprequires, the failure to havethe right amount ofstaffattention tothemby theadministration of justice,is animportant factorto havea high rate ofsaturation of the system, andcause of delaysin service;but above all, the extensive work because de hours that work are extensive.

As referenceand sample, we will taketheactivity developed by theEighteenth JudicialCircuit, based in the city ofCuernavaca, inMorelosState; being one of thesmallestinlandcircuits, because only represents 2%of the totalpopulationof the countrywith only1.777 millionpeopledemandingjustice administration; score 5and 8Collegiate CourtsDistrict Courts, 3 CourtsCollegiateCircuit 1Assistant District Judge.

Overworkis demonstratedby virtue ofhisworkloadin just2014, was10775affairsduring thatyear, accordingto statisticsthe FirstCourtmet2l20affairs,2240Second, theThirdin2076, the Fourth with2207while thefifthwith2132issues; it is clear thatthe figuresneverbrokenthe treatmentof variousmatters handledin court.

With regard to judicial template 285 there is a number 57 corresponding to auxiliary per court; 57 secretaries of total circuit (considering that these officials not only made the draft judgment but also procedures on different topics) and 65 actuaries develop communication activity procedural evenly on the judicial circuit.[18]

Overwork is demonstrated by virtue of his work load in just 2014, was 10775 affairs during that year, according to statistics the First Court met 2l20 affairs, 2240 Second, the Third in 2076, the Fourth with 2207 while the fifth with 2132 issues; it is clear that the figures never broken the treatment of various matters are handled in court.[19]

However, following the behaviorof the annualperiod during2014, theinitial work is given,(determined by the matters pending) ina range between1410issues, with initial processes of affairsin the year of9628for the 5courts(except3auxiliary courts); the interesting thingis, when expendituresbehaviorrangesfrom8361which is lower; however,that work isin agreement, according tothe figuresin an almostimmediate result, but should be understoodasexhaustingtheloadstoan almostmechanizedprosecution.We find impressive as the figures may vary on the same statistics presented, and as a clear example is the concept of 11038, which refers to workload in the same year.

[16] Council of the Federal Judiciary Judicial Power of the Federation of Judicial Branches of Mexico and Europe , Comparative in : http://www.dgepj.cjf.gob.mx/Indicadores/CDLPJME.pdf , (Date of Consultation 6 April 2015).
[17] Idem.
[18] Directorate General for Justice Statistics , in: http://www.dgepj.cjf.gob.mx/Indicadores/acuerd_nal_ini.asp?ano=2014&torid=4&nivel=1&indicador=0&anio=2014&tor=4&niv=1&ind=&mostrar=1, (Date of Consultation April 8, 2015).
[19] Directorate General for Justice Statistics , Judicial Template Trbunal Eighth Circuit Tenth Collegiate en:http://www.dgepj.cjf.gob.mx/Indicadores/acuerd_nal_ini.asp?ano=2014&torid=4&nivel=1&indicador=&anio=2014&tor=4&niv=1&ind=&mostrar=1, (Accessed April 10, 2015).

Period ()	Starting work load	admisions	Work load	discharges
2014	1410	9628	11038	8361

Table prepared by the General Direction of Statistics of the Judicial Power of the Federation in: http://www.dgepj.cjf.gob.mx/Indicadores/Indicadorano/movest/gengraphdina.asp (Date of consults 9th of April 2015).

The aspect thatcauses the need to verify the undeniable,to investigate the undeniable Industrialization in the procurement of the Justice in Mexicofrom thefederal level,is determinedby the reason of*Productivity,*[20]factorthat signals theFederalJudiciary andthat accordingto statistics,is the exampleof resolution,in days,of indirecthabeas corpus aresolution range,whose valuetendsto make90-110days or so,differenttimeon a motionfor revisionthat goes from44 to33 days, without consideringotherjudicial andwithan outflow of sentences of 6908performancesannually.[21]

With the abovewe realizethat officialsperform workinveryimmediate times, andwhere we mightthink,thatmuchis questioned,scrupulousand reasonedinterpretation of the law needed, replaced bythe rubbingof aconsiderablenumber ofjurisprudencethat is integratedto the letter of sentence,

Furthermore,theintegrationofthe District Courtsin theEighteenth Judicial Circuit with mixed competence (to meet various aforementionedmaterials) integrates 8judgesthat correspond to eachcourt thathas jurisdiction overthis territorywith headquarters inthe City ofCuernavacaMorelos,with an average of36assistantsper judge, with thetotal of 65ministersand 32actuariesfairly shared,judgedby8officersand 20supportingin draftingagreements andjudgments as well asfor eachtrial ingeneralprocesses.

Inthese courts, it is confirmed, that it is more noticeable the work loadduringthe course ofthe administration of justicefor 2014, theinitial stockwas already verylargewith4086issues withoutdetermining whichof them would requiregreaterattention fromtheofficials;their workloadis shocking to 27801 un finished issues, being those aspects of discharges lessby21205; although it shouldconsidered that the humanaspectratioof intellectual weariness of an official , as showninthefollowing figure:

[20]Understood as the capacity or the nature or industy to produce.
[21]Productivity Collegiate Courts of the Eighteenth Judicial Circuit in: http://www.dgepj.cjf.gob.mx/Indicadores/acuerd_nal_ini.asp?ano=2014&torid=4&nivel=5&indicador=&anio=2014&tor=4&niv=5&ind=&mostrar=1,(Date of consults of April 12, 2015).

Period ()	Starting work load	Admissions	Work Load	Discharges
2014	4086	23715	27801	21205

Graph prepared for the General Direction of Statistics of the Federal Judicial Power in: http://www.dgepj.cjf.gob.mx/Indicadores/IndicadoresPorOrgano/movest/gengraphdina.asp (date of consult 20th April 2015)

With regards to productivity developed by these district courts in the Tenth Judicial Circuit, it is established within the page of the Judiciary Power, that a length of 104 days is the average for affairs in respect of indirect habeas corpus, 229.67 days for autos of constitutional terms at the end of an instruction, 99.64 days for the closure of an instruction of criminal sentence in regards to administrative and federal civil processes is averaging 366.21 days. Considering that statement discharges are in around 16,768 annually at eight courts in the judicial circuit.

We come to understandthatwe are talking abouthigh productivitydueto mechanicaltime and workreflectedin hours /days;which would beworth noting.Will it be within theseaforementionedstandards, integratedas partof the weights of the judicialreasoning thatshould be appliedin the intellectual workthat an officerbelongingto thesejudicial authoritiesexecuteshis proceduralwork?

The issue is worrying, considering only that the case of judicial authorities observed in federal matters, and that even having the highest budget allocation from the Federation, they have situations affecting the effective administration of justice. The problem is exacerbated and worsens trial courts in 32 states, where there is great disagreement on the part of citizens as well as litigants for not applying in many cases speedy and neither a prompt justice.

IV. Conclusion

The industrial revolution not only has generated goods in large quantities, but a mass of workers, by adapting their function, generated productivity. That mass, translated into records, constitutes the workload that refers to the justification to produce, also mass judgments, which are finished products, capable of tuning from the other instances.

However, like any industry, it requiresinvestment, but also a profit. „JudicialCities" are constructed with all the needed logistics: paper, desks, nurseries and similar issues. Without assuming the payment of the human resources. This industrycan not producea specific product foreach concrete case; unless there arepolitical and economic reasons.

Therefore, the democratic „system" of the bourgeoisstatelaw, as an industry of the justice, homogenizes the concrete cases to preserve peace, liberty and property.Thisis implicit inthe samelegalistic"system".

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THE PUBLIC ADMINISTRATOR – LEGAL NATURE OF THE MANAGEMENT CONTRACT

Ivan Vasile IVANOFF[*]

Abstract: *The public administrator is a new institution introduced by the Romanian law together with the publication of Law No. 286/2006 on the amendment and completion of Law No. 215/2001, whereas the management contract on the basis of which the administrator performs his activity is not defined either by law or legal literature, there being several specialized opinions qualifying it as a working contract or as a legal relation with a civil nature. The present article attempts to acknowledge the opinion according to which the management contract concluded between the public administrator and the executive public authority of the territorial-administrative division is a contractual-administrative one.*

Keywords: *public administrator, management contract, public authority, administrative-territorial division, appointment criteria and procedures.*

Relatively recent in the context of the post-revolutionary period, the function of public administrator has been introduced by Law No. 286/2006 on the amendment and completion of Law No. 215/2001.

The entire chapter VIII of Law No. 215/2001 regarding public local administration acknowledges the legal regime of the public administrator function.

Apparently convincing, the regulations contained by the law above refer to the legal nature applying to the function, namely that of management contract.

What this assertion does not imply is easier to be answered than what the function of public administrator actually does!

Let's start by seeing first what the function of public administrator does not involve.

It does not involve:

- a constitutional law relation – typical to the elected public servants, like the mayor, president of a county council and so on, carrying out their activity on the basis of a representation mandate – between the public law person [the administrative territorial division – ATD] and the person elected for the function;
- a working relation between the employer of the public administrator [mayor, president of the county council] and the public administrator;
- an administrative act between the president of the institution/public authority involved and the public administrator, the latter not having the statute of a public servant and his appointment act not being an authority administrative act under the condition of swearing an oath.

  What does the public administrator function involve from the perspective of the legal relation?
- the existence of a management contract cannot lead to the qualification of the contract as possible, **civil**, **economic or administrative**.

[*] Lecturer doctor at "Valahia" University of Targoviste, Faculty of Law and Public Administration

From the perspective of civil law, the following opinion exists: „*In terms of the legal nature, we are speaking about a* ***civil contractproviding public services****, with the following typical features*:

- *is a named contract, accordingly regulated by special provisions, namely the Government Decision No. 527/2009;*
- *is a bilateral contract, the parties of which are the public authority under which the public service functions and the person who will fill in the job of manager or deputy manager;*
- *from a synallagmatic perspective, the interdependence of parties' rights and duties within the management contract is obvious;*
- *from a commutative perspective, the parties' rights and duties are known ever since the conclusion of the management contract;*
- *by onerous title, [the public administrator – author's note], the coordinating or deputy manager shall be paid according to the legal provisions applying to institutions subject to the public budget;*
- *is a contract with subsequent enforcement, as the coordinating or deputy manager shall take action on the basis of performance indicators, which are subject to the annex of the management contract.*[1]"

Trying to follow the line of the legal regulations invoked, we can refer to the Government Decision No. 527/2009, which was regulating the insurance of public services management of the ministers and other bodies of the public central administration within ATDs.

Yet, the normative act mentioned above cannot also apply to the public administrators of ATD-s, as this function corresponds to an administrative-territorial unit, while between the ATDs and the Government there is no subordination relation to allow the Government to regulate the activity of an ATD; on the other hand, the normative act in question has no more legal ground, as the G.E.O. No. 37/2009, on the basis of which was adopted the decision in question has been rejected by the Romanian Parliament!

It is also interesting to note that the function of public administrator has been created within „villages and towns", and within „counties"[2]. In this context, the public administrator does not belong, in our opinion, to the specialized structure of the local/countycouncil, as they are only local public/countyauthorities, while the public administrator belongs to the ATD, as a legal person of public law, as a secretary of the ATD.

We consider an omission the fact that article 77 of Law No. 215/2001 does not also include the public administrator function among the other functions listed by law in the „town hall" concept, as a local organizational structure.

Another opinion expressed within the civil law field, more precisely one related to **commercial law**, is the one provided by article 1 of Law No. 66/1993 on the management contract law. According to it:

„The management contract is the agreement by means of which a legal person performing an economic activity as an owner entrusts to a manager the organisation, management and administration of his activity, on the basis of some quantifiable objectives and performance criteria, in exchange of a payment".

Even at a brief analysis of the definition above it clearly results that the interpretation in question cannot be assigned to the management contract related to the public administrator, as the „employer" – as a part of the contract – is a legal person carrying out an economic activity as an owner, while not the same can be told about an ATD (which is a

[1] Opinion expressed by an unknown author athttp://consultjuridic.blogspot.ro/2014/04/contractul-de-management.html
[2] See articles 112 and 113 of Law No. 215/2001

public law person), not to mention that the object of the contract cannot be the organisation and management of his activity!

Is the management contract an **administrative one**? Let's revise some the latter's features:

- one of the parties of the contract must necessarily be an authority of the public administration;
- the object of the contract is the accomplishment of a public interest;
- the legal inequality of the parties – given that one of the parties must be a public authority, that public interest has priority over the private one and that the freedom of will of the authority is limited by law, we are consequently speaking about a management contract;

In order for an act to be considered an administrative contract, some **conditions** must be met:

- „there must be an agreement of will between an authority of the public administration and a private entity;
- the agreement of will must be aimed at creating legal obligations on the provision of some services in the exchange of a payment;
- the performance must be the consequence of a public service functioning;
- the parties, by means of a clear clause, the form of the contract, type of collaboration or any other manifestation of will, must agree on being subject to the public law regime;
- the inequality of the parties of the contract;
- the extensive interpretation of the contract in favour of the administration, the private person having the duty to sacrifice his own interests, for accomplishing the public interest of the administration, but under the reserve of the right to receive amendments;
- the right of the administrative authority to take measures which must be unilaterally enforced, as that persons preserves, together with his quality of contractual party, also that of state authority, of public power, so that it is no longer necessary to resort to justice for obtaining the enforcement or termination of the contract;
- the enforcement of the unpredictability theory, according to which the private person appears as a collaborator of the public administration, which, in its turn must uphold the private person[3]."

Going on with the analysis of this opinion, let's see the **legal regime enforceable to administrative contracts**:

- It is considered that these contracts are subject both to administrative law rules and civil law ones.
- Regarding the **administrative law rules**, which constitute the administrative legal regime enforceable to the contracts in question, the following conditions should be reminded:

1. the written form which these contracts must have;

2. the contracts are concluded *intuitu personae,* which means that they can be transmitted to other persons only if law allows it;

3. the competence to settle the disputes emerging between the contracting parties belongs to common law courts, but more and more authors, us included, argue that disputes should be settled by administrative contentious courts.

The civil law rules enforceable to the management contract are those mentioned by the civil law literature, pointed out before.

[3] See*Achizitii publice*, Ivanoff Ivan Vasile, Valahia University Press, Targoviste, 2011, pg.11

When defining administrative contracts[4]it is also allowed the possibility to „*provide by means of special laws also some other categories of administrative contracts subject to the authority of contentious administrative courts*". In this context, we consider Law No. 215/2001 [albeit an organic one] to be a special law according to the contentious administrative legislation, as this legal ground is the only one which regulates the legal structure of the public administrator.

In our opinion, it is necessary that future laws contain a special legal regulation, just as in the field of cultural institutions functions a special law of the cultural management contract regulating all the aspects in the field in details[5].In addition to this, it should also be mentioned the absence of a qualification regarding the legal nature of the cultural management contract, which starts abruptly by establishing the parties, the length and the object, without making any mention to the category to which it belongs.

Other additional arguments in favour of the legal nature of the management contract of the public administrator as being one belonging to administrative contracts are the following:

- the creation of the public administrator function exclusively concerns the will of the local deliberating authority [local/county council];
- the legal character of the creation of such function is exclusively upheld by Law No. 215/2001;
- the appointment and release from function are made by the mayor/president of the county/council;
- the specific criteria, procedures and attributes are established by the public deliberating authority [local/districtcouncil];

All these aspects concern the will and competence of some public authorities and are based on authority administrative acts;

The management contract intervenes only after these **compulsory** administrative procedures have been complied with, while the **norm** upholding the existence of such contract is **permissive** and allows the public authority, if it wishes, to delegate the accomplishment of the some coordination attributes to a specialized structure or to some public services with a local/county interest.

The same permissive norm is also encountered when the mayor/president of the county council delegates the attribute of main manager of credits towards the public administrator.

From the last considerations above, it can be noticed on the one hand the consensual character of some regulations, but also the overlapping of these consensual regulations of some legal aspects with the will of the parties; nonetheless, the will of the parties is in fact the definition of the administrative contract (consensual clauses and above them legal clauses).

Starting from the establishment of the legal nature of the management contract of the public administrator, we can make some assessments on the latter's statute and his relation with public authorities.

As we have already seen, the essential element of the public administrator function is represented by the general interest, just as it happens with any other public service.

If the general interest of the ATD imposes the creation of this function, then it shall appear, while if the public interest requests it, it shall disappear.

If when the public administrator function is created some clear administrative procedures must be observed, involving both deliberative and executive authorities, when the contracts is terminated, law contains no procedure for the matter.

[4] See article 2 paragraph 1. letter c) of Law No. nr.554/2004
[5] See G.E.O. No. 189/2008

In this case, we consider that it intervenes the argument regarding the symmetry of legal acts (*mutuus consesus mutuus disensus*), so that it is necessary a simultaneous and convergent involvement of public authorities. The issue regards the importance of the management contract and its clauses, in dialogue with administrative acts.

If the rule is clear when the contract is constituted, the administrative act being the one creating the ground for the function to exist and establishing the rule of the game, when the management contract ceases before the term commonly agreed by the parties by means of an administrative act, which would be the legal solution?

In fact, in this case it must be analysed the force of the contract in relation to the force of the current administrative act. To be more specific, what happens if by a decision of the local/county council the public administrator function is taken out of the organisational chart before the term established by the contract? Is this possible? Which would be the legal consequences?

If we accept the legal nature of the management contract as an administrative one, the administrative act constituting the ground of the contract and establishing the criteria, procedures and specific attributions, then we could accept the idea that this ground should disappear, more precisely that the public administrator function should disappear from the organisational chart.

In this case, the management contract would no longer have a ground to exist.

If we were to make an analysis from the perspective of the agreement of will on which any contract is based, then it can be noticed that the parties/or a party to the management contract do not want/does not want to the termination of the contract before the due term.

Which would be the legal solution? In our opinion, we must always go back to the principles level and make any kind of legal analysis from this perspective. The principle upholding the existence of this function and its exertion is only the general interest. If the general interest requires a certain conduct, then the public administration serving this general interest must act in consequence.

In other words, should an exception happen, this would be legal only if the general interest requires this situation, otherwise any other legal action would be arbitrary and censured by the contentious court, the only one which would rule in this case.

This type of reasoning starts from the statute of the function discussed and the particular role which has been assigned to it by the lawmaker.

As it has already been mentioned, the public administrator belongs to the territorial-administrative division and serves in fact two public authorities, even if the management contract is concluded only between two parties [mayor /president of the county council and public administrator]. Inside the ATD there is also the local/county council as a deliberative authority upholding by means of the council acts the ground of the contract and establishing the rule of the game. As a consequence, the attitude of the public administrator must also be consistent with this reality. Beyond public functions and authorities, the general interest is the one providing essence to the public administrator function, as it expresses the will of the citizens for whom public authorities function and act.

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LEGISLATIVE EVENTS. ABROGATION AND DEROGATION

Mihai GRIGORE[*] **Steluța IONESCU**[**]
Dan GUNĂ[***] **Denisa BARBU**[****]

Abstract: *The current study is aimed to present the features of two of the events or legislative interventions to which normative acts are subject after being adopted and published: abrogation and derogation. Abrogation represents a normative technique procedure consisting in the removal or abolishment of the provisions contained by a normative act, which are contrary to a new regulation of the same level or a superior one, for the purpose of cleaning legislation, eliminating legislative lack of correspondences and avoiding legal parallelism. The present work deals with the types of abrogation, its formal and contextual conditions as well as its other features, from the perspective of legislative technique. Derogation represents a necessity within the legislative practice and a normative technique procedure, which expresses a deviation from the legislation in force, particularized for a certain case, being used only when a legislative solution within a document, with general applicability, turns out not to be compatible with a certain situation created within its enforcement field. The present analysis studies the features of derogation, but also the distinction between derogatory norms and the norms including exceptions or special norms.*

Keywords: *abrogation, derogation, normative act, legislative technique, law-making.*

After the entry into force of a normative act[1], during its existence can intervene, according to Article 58 paragraph (1) of Law no. 24/2000 *regarding the law-making technique rules for drafting normative acts*, republished[2], with subsequent modifications and completions[3], various legislative events, such as: *modification, completion, abrogation, republication suspending or other similar* [4].

Therefore, after adoption and publication of normative acts in the Official Journal of Romania, Part I, these may be modified, supplemented, suspended, abrogated, republished, rectified etc., all these legislative interventions are known as *legislative events*[5].

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[*] Senior Lecturer, PhD in Law, Faculty of Law and Administrative Sciences, „Valahia" University of Targoviste, Romania
[***] Assistant Lecturer, PhD in Law, Faculty of Law and Administrative Sciences, „Valahia" University of Targoviste, Romania.
[**] Senior Lecturer, PhD in Law, Faculty of Law and Administrative Sciences, „Valahia" University of Targoviste, Romania.
[****] Assistant Lecturer, PhD in Law, Faculty of Law and Administrative Sciences, „Valahia" University of Targoviste, Romania.

[1] *At the date of the entry in force of the law* it is considered that law is known by all the citizens and and nobody can invoke in his interest that he did not know it (*nemo censetur ignorarem legem*). Practically, it is established a legal assumption of knowing the law (M. Niemesch, *Teoria generală a dreptului*, „Hamangiu" Publishing House, Bucharest, 2014, p. 85).

[2] Law no. 24/2000 *regarding the law-making technique rules for drafting normative acts* it was republished in the Official Journal of Romania, Part I, no. 260/21 April 2010.

[3] Law no. 29/2011 for modification and completion of Law no. 24/2000 regarding the law-making technique rules for drafting normative acts (published in the Official Journal of Romania, Part I, no. 182/15 March 2011).

[4] In well justified situations, by exception from the provisions of Article 58 (1) of Law no. 24/2000, republished, the normative acts of special importance and complexity may be modified, completed or, by case, abrogated by the issuing authority and the period between the date of publication in the Official Journal of Romania, Part I, and the date set for their entry in force, provided that the interventions proposed to enter into force at the same date with the normative act, affected by legislative event. (Article 58, paragraph 2 of Law no. 24/2000, republished).

[5] M. Grigore, *Teoria generală a dreptului*, second edition, revised and enlarged, PIM Publishing House, Iassy, 2012, pp. 144-145.

According to Article 58 paragraph (3) of Law no. 24/2000, legislative events may be ordered by subsequent normative acts of the same or higher level, the exclusive object of which is that event, but also by other subsequent normative acts which mainly regulate a certain number of topics, and, as a related step, order such events in order to ensure the correlation of the two interfering normative acts.

Our study will deal with presentation particularities two of these events or legislative interventions which are subject to the normative acts, namely*, abrogation normative acts* and *derogation*[6].

1. Abrogation

The provisions included in a normative act, *which are contrary to a new regulation of the same or a superior level* must be *abrogated*, according to the provisions of article 62 paragraph (1) of Law No. 24/2000[7].

At a legislative level, abrogation has a particular role in the harmonization of legislation, with the following *functions*[8]:

a) removes the conflictual texts between the new act and the former regulation;

b) removes the potential parallelism within legislation;

c) removes discrepancies and the lack of correlation;

d) helps the legislative archive to get rid of some acts which have become outdated, as there is no requirement for their enforcement, as a result of the changes intervening in the society.

Abrogation is the cause of stopping of the action of the rule of law as a result of the entry into a role of a new rule [9].

Depending on the way it is expressed, abrogation can be *clear (explicit)* or *tacit (implicit).*

Clear (explicit) abrogation is the one expressed by text and consists in stating the acts or the provisions of the normative acts which shall cease to be enforced (will no longer be in force).

Tacit (implicit) abrogation is typical to the activity for the legislation enforcement and is represented by the reasoning which is made when two texts (acts) exist in the same field, the latter determining the former one to go out of use *(Lex posterior derogat priori*[10]*).*

Some normative acts, after mentioning the acts which are abrogated, also include the expression „as well as any contrary provision", which includes those provisions not identified textually that are contrary to the solutions proposed by the new regulations and must no longer be in force. Although that currently this abrogation procedure cannot be left out, being an intermediary stage between clear abrogation and the tacit one, it is advisable to be enforced as little as possible, as only an explicit abrogation can make a clear distinction between the active legislation and that which must be considered as out of force.

When speaking of a good legislation, there is the interest that an abrogation is explicitly expressed by a text. For this reason, when a new normative act is drafted, it must be well studied the legislation from the field involved and discovered all the texts

[6] See in this sense M. Grigore, *Tehnica normativă,* C.H. BECK Publishing House, Bucharest, 2009, pp. 235-244, pp. 245-247; I. Boghirnea, *Teoria generală a dreptului*, third edition, revised and updated, „Sitech" Publishing House, Craiova, 2013, pp. 139-141.

[7] The word „abrogate" has Latin origins (*abrogo*, *-are*), meaning to suppress a law, an official provision.

[8] I. Mrejeru, *Tehnica legislativă*, Academy Publishing House, Bucharest, 1979, p. 126.

[9] E. Ciongaru, *Teoria generală a dreptului*, Scrisul Românesc Publishing House, Craiova, 2011, p. 46.

[10] This principle is based on the idea that a subsequent act, expressing a new will, denies the previous will, so that the old text becomes impossible to apply, as a result of the existence within the same field of a new text, a new decision.

which could be in conflict with the next regulation, which will be mentioned in the bill for being abrogated.

Depending on its content and scope, abrogation can be *total* or *partial.*

Total abrogation intervenes when the new regulation covers the whole scope of one or several acts, providing solutions for all the issues they involve.

As a rule, total abrogation is determined by a legislative intervention promoting a new regulation replacing the existing one. When it comes to outdated legal norms, their abrogation is made without there being necessary to institute new regulations, as they are no longer demanded in practice as a matter of fact. We must note that, according to some authors, even if a normative act falls into disuse and its violation produces no effect, thus giving birth to serious questions regarding its validity and role, desuetude cannot be considered as a means of abrogation[11].

Partial abrogation is applied only to some provisions within one or several acts, instead of which new legislative solutions are promoted. When dealing with a partial abrogation, it must be paid attention to not affecting the *functionality of an act* and rendering it subsequently unenforceable, by making some provisions to become out of force. In other words, abrogation must not operate upon an act as a functional „amputation", by placing it totally out of use. If the adoption of a new regulation creates such situations, as a result of the solutions proposed, the act affected by the new regulation shall be totally abrogated and, depending on the case, replaced with a new according regulation or included by integration in the new regulation.

Law No. 24/2000, republished, provides at paragraph 2 of article 64 that, when it comes to some partial abrogations emerging subsequently, the last of them shall refer to the whole normative act, and not only to the texts still in force.

Partial abrogations are assimilated to the changes of normative acts, the normative act partially abrogated resting in force by means of its non-abrogated provisions[12].

The abrogation of a provision or a normative act has a definitive character. It is not admitted that, with the abrogation of a previous abrogation act is re-put to force the initial normative act (the exception is represented by the provisions of Government Ordinances which foresaw abrogation norms and were rejected by the Parliament).

If a norm of an inferior level, but having the same object, was not clearly abrogated by the normative act of a superior level, then this duty belongs to the authority which issued the act first[13].

The formal and contextual conditions of abrogation. Abrogation can be ordered, as a rule, by means of a distinct provision at the end of a normative act regulating a certain issue, if it affects previous normative provisions, which are connected to the last regulation.

During the procedures for systematizing and unifying legislation, distinct abrogation normative acts can be elaborated and adopted, having the exclusive objective that of abrogating several normative acts.

With a view to abrogation, the normative provisions concerned must be clearly determined, starting with laws and then with the other normative acts, by mentioning all their identification data[14].

[11] A. F. Măgureanu, *Principiile ramurilor de drept*, „Universul Juridic" Publishing House, Bucharest, 2011, p. 49.
[12] Art. 64 par. (5) of Law No. 24/2000, republished.
[13] Art. 64 par. (4) of Law No. 24/2000, republished.
[14] Art. 65 of Law No. 24/2000, republished.

The normative acts which are to be totally or partially abrogated are mentioned *chronologically* in the text. If the elaborated act is a bill replacing several categories of acts in terms of regulation, the order in which the abrogated acts are presented shall have to reflect also the hierarchy of acts[15].

Abrogations focused on outdated normative acts have their own features. For this purpose, it must be pointed out that the act abrogating outdated normative acts does not bring new replacing regulations at a legislative scale. It only makes the abrogation, by means of an acknowledgement formula from which it results that the act involved is no longer in use.

Abrogation is in principle made by means of an act of the same level with the abrogated regulation, so that a decision is replaced with another decision, of the same body. Abrogations by means of superior acts can also be made, particularly when the new regulation (of a superior level) takes over as objective the regulations contained by the acts(s) of an inferior level.

In principle, an abrogation enters in force (operates) at the same time with the new regulation, as the basic function of an abrogation is that to clearly replace a former regulation with a new one, resolving like this a potential contradictory state between two or more acts.

When an abrogation enters in force before the new regulation, this is capable to create a potential *legislative gap*, as it culminates with taking the former regulation out of use before the entry in force of the new one. The entrance in force of the abrogation after the entry in force of the new regulation is also not recommended, as it leads to a contradictory temporality between the new and the former regulation which usually contains different legislative solutions.

If the provisions of the new regulation enter in force at different dates, the abrogation shall adapt to this situation, by establishing terms for the ceasing to enforce the provisions replaced in concordance with the terms for the entry in force of the replacing provisions.

The abrogation of acts passed for enforcing the law. Given the relation between the basic act and the one under enforcement, it must be mentioned that the abrogation of the basic act leads in principle also to the removal from use of the act under enforcement, as the latter does not have a purely independent position, its legislative motivation being determined by the basic act. In other words, the act under enforcement no longer „survives", once the basic act is taken out of use[16].

According to the legislative practice adopted so far, the abrogation of acts under enforcement is done as it follows:

a) if a new law is adopted, then by means of it shall be abrogated both the law to be replaced and the decisions of the Government decisions issued on the latter's basis and for its enforcement;

b) when a new decision of the Government is adopted, the abrogation shall be limited to the replaced decision(s)[17].

[15] If one normative act abrogates, for instance, laws, Government Ordinances and Decisions, laws will be mentioned first, then the ordinances and the decisions.

[16] I. Mrejeru, *quoted works,* p. 130.

[17] The acts under enforcement issued by ministers, both in the case specified at letter a) and b) are not explicitly abrogated by the new law and, respectively, the new Government Decision. Their abrogation is left to the issuing bodies, which must examine their acts and abrogate them, if they no longer have a legal ground.

A particular issue is that of the *abrogation in terms of the incidence between general norms and the special ones*. As it is known, when a new regulation is elaborated, it is necessary to examine the legislation in force within the field which shall be regarded by the future regulation. The legislation which will be selected for being examined must refer to both the general norms within the field concerned and those constituting *special norms*. During the examination, in terms of the content of the new solutions which shall be promoted, it will also be assessed the opportunity of the regulations with special character to remain in force, by taking into account that a new regulation promotes almost always a new conception at a legislative level.

The potential conflict between a new regulation with a general character (which is usually fully applied) and a special norm brings into debate *the relation between the general* and *special law*. In principle, it is known that *the special law derogates from the general one*, as it resolves a certain hypothesis *sui generis*. As a rule, the special law is subsequent to the general one and, in this case, it expresses the lawmaker's intention to resolve in another manner a certain situation entering the enforcement field of the general law.

A doubt is created when the general law (previous to the special one) is replaced with a new law with the same general character in terms of enforcement, but which promotes a new perspective. In this situation, when it comes to the law enforcement, a question emerges regarding the lawmaker's intention with the special law, whether he will abrogate it or not. This question intervenes due to the regular use of the expression „as well as any contrary provision" within the text referring to the abrogation.

For putting an end to this doubt, it is recommended that, when a new law with general character is elaborated, the following should be done:

1. When it is considered that the particularization of certain situations by means of a special law is no longer necessary in relation to the new conception adopted, the special law must be explicitly abrogated by the new one with a general character.
2. When are continued to be maintained the features provided for by the special law, one of the following two solutions can be adopted:
    a) the provisions of the special law shall be integrated in the new one, under the form of some exceptional provisions, while the special law shall be explicitly abrogated.
    b) if the special law regards a larger range of issues and does not seem appropriate to integrate it in the new law, then, in order to mark clearly the intention of continuing to maintain the provisions of the special law, it is necessary that the new law makes a specification for this matter; from a textual perspective, such mentions can be made, according to the case, as it follows: „the provisions of the present law shall not be applied when…" or „are exempted from the enforcement of the present law…" (will follow briefly the hypotheses which are the object of special regulation).

The abrogation of modifying or completion acts. From the perspective of the legislative function, the modifying or completion acts do not have an independent position inside law, nor a completion one, *being integrated in the content of the acts which they modify or complete*. The assimilation of modifying or completion acts is particularly obvious when the acts modified or completed are republished, case in which these texts lose their individual character completely and can acquire other article numbers depending on their succession in the content of the act modified or completed.

Starting from the premise that the text of modifying or completion acts is absorbed and integrated in the content of the basic ones, it can be drew the conclusion that their

abrogation shall take place together with the basic act and that no explicit abrogation is required for them. Out of practical reasons and for upholding the activity on keeping the track of active legislation, it is recommended that, when a modified or completed act is abrogated, the text expressing the abrogation *should also evoke the modifying or completion act*[18]. By invoking inside the text also the modifying or completion act, it is provided a warning that these acts are abrogated and will be taken out of the active legislation.

All that it has been previously mentioned is valid when the modifying or completion acts are *pure and simple* [19]. When a modifying or completion act also contains other provisions (except those regarding modification and completion), its abrogation must be made explicitly, as its content was not completely absorbed by the content of the basic act. The abrogation of such acts must be made, of course, after a previous exam of the appropriateness to abrogate the provisions with an independent character.

The abrogation of outdated normative acts. Within the process of rationalizing and perfecting legislation, it is created the need to free legislation from the *inactive background of normative acts* which, although were not explicitly abrogated, have become *outdated*, have no demand for being applied and are overcome by the organization and functioning of the economic-social mechanism. For taking them clearly out of the record of active legislation, such acts, after a solid analysis, are declared abrogated. Declaring outdated acts abrogated is made by independent abrogation acts, which are limited to this content.

Regarding the abrogation of temporary acts, these cannot be subject to abrogation as they cease to be out of force after the end of the period during which they were in force.

Termination is another specific modality of ending the effects of the norm of law that operates for the juridical norms at term or exceptional, so that the rule of law ends its effect when the term is reached or disappear the exceptional case for which it was elaborated.[20]

Ways in which the various situations of abrogation are expressed textually. The abrogation aimed to take out of use a regulation which is replaced by a new one by means of a text must observe the principle regarding *the simultaneity of the entrance in force of the new regulation with the abrogation of the norm replaced*. The transgression of the principle according to which the abrogation must operate at the same time with the entry in force of the new regulation can lead, depending on the previous or subsequent character of abrogation, to the following consequences:

a) when abrogation takes place before the entry in force of the new regulation, *a legislative gap* appears;

b) when abrogation takes place after the entry in force of the new regulation, *a conflict of texts* appears, represented by the co-existence of both the former regulation which was not taken out of use and the new one, which has entered in force.

In order to accomplish the principle regarding the simultaneity of the entrance in force of the new regulation with the abrogation of the former one, at a textual level is used the expression „*it is being abrogated at the same date…*" which follows the phrase providing for the entry in force of the new regulation[21].

When the new regulation enters in force at the publication date, it is not necessary to make any mention regarding the date of abrogation, as the latter operates by law together

[18] For this purpose, the following formula could be used „Article… At the moment of the present law is abrogated Law No… on… in the form it was modified and completed by Law No. … on…".

[19] *Pure and simple modifying or completion acts* are those acts which do not contain other provisions, except for the modifying and completion ones".

[20] M. Niemesch, *op.cit,* p. 88.

[21] The expression above is used when the new regulation enters in force at a date subsequent to publication.

with the publication of the text; it is used only the simplified expression „It is being abrogated…".

The normative acts which will cease to be enforced as a result of the entry in force of the new regulations are quoted in the abrogation text in chronological order, with the following specifications:

- the type of act (law, Government Ordinance, Government Decision), with the order number and the adoption year;
- the whole title of the act;
- the number of the Official Gazette in which it was published and its date; if the act which is to be abrogated (or the text of the act which will be abrogated) has been previously modified or completed, this will be mentioned too, by using the expression „the way it was modified/completed by….", followed by the indication of the modifying/completion act.

When by means of a normative act are also abrogated acts of an inferior level, the abrogated acts shall be mentioned in their hierarchical order.

Regarding *partial abrogation*, the abrogation provisions shall quote the texts considered (by indicating the number of the article and the paragraph), by relating them to the acts to which they belong. If such texts were modified, completed or republished before, this mention will also be added.

As a rule, an abrogation text includes besides the mention of the acts or the provisions which are abrogated also the expression „as well as any contrary provision", appearing in the final part of the text. This is an additional precaution measure which the lawmaker takes if an omission could take place on the explicit mention of all the provisions which will be abrogated.

The acts declaring the abrogation of outdated normative acts include usually one article containing the expression „It is established that are and remain abrogated…", followed by the quotation of the acts considered. The mention of the acts which are to be declared as abrogated can also be made within an annex to the act involved, depending on their number.

2. Derogation

When law is enforced, certain situations with specific features emerge, demanding a deviation from the legal provisions and a resolution to be made by other solutions than the ones provided by law.

The basic trait of derogation[22] consists in the fact that it expresses a deviation from a regulation in force, different from a case to another

Derogation involves the pre-existence of a normative act promoting legislative solutions with a general enforcement in a certain field. The derogatory norm, which is expressed either by an *ad hoc* act or within an act containing also other regulations creates at the legislative level an exceptional situation for resolving a case differently, which could be resolved according to the general provisions of the act issued in that field, had there not been for the derogatory norm. As a rule, derogation refers to specific case files which are not likely to repeat throughout law enforcement[23].

[22] To derogate comes from the Latin term *derogo*, *-are* and means to remove a provision from a law.
[23] I. Mrejeru, *quoted works,* p. 151.

Derogation represents a necessity within the legislative practice, being used when a legislative solution within an act with general applicability turns out not to be compatible with a certain situation emerging within the scope of that act.

Although it promotes another solution for the case file involved, the derogation norm does not bring any amendment to the act from which the derogation is made. The text of this act remains unaffected and continues to be enforced as it is (of course, except for the case for which derogation was constituted).

Referring to the distinction between derogation and modification, J. Byvoet considers that „within legislation, only the texts partially and formally modifying a previous text are called changes that are only those which bring a textual change. Consequently, the texts derogating from a previous text are not modifications"[24].

Derogation, although it is not the same with modification, can constitute in certain case a clue regarding the appropriateness of modifying the text of the normative act from which the derogation is made. It is the case of repeated and quite frequent derogations from the provisions of a certain normative act. Such derogations lead to the conclusion that the normative act in question does not fully answer to the requirements within its scope, creating therefore the necessity to reconsider the solutions which must be adapted to all hypotheses, from the perspective of the social demand.

The distinction between derogatory norms, norms referring to exceptional circumstances and special norms. Derogation presupposes the existence of two acts: an act making the derogation and an act previous to the first one, from which the derogation is made. Although throughout its enforcement the derogatory norm creates an exceptional situation from the general norm (the act from which the derogation is made), it must not be confounded with exception norms. *Exception norms* constitute particularized hypotheses, regulated inside the same act, being different from the rest of the provisions because they constitute exceptions from the general rules instituted by the act. It should be mentioned that the exceptions constituting hypotheses within the scope of the normative act have a permanent and repetitive character. Having this repetitive character throughout the enforcement, exception norms, although are instituted after the basic act, must be introduced in the content of the latter, by completing or amending the texts, being part of its case files. As a consequence, exception norms must have a common body with the whole regulation, not being recommended for them to have an independent position, so that they have to be expressed by means of a separate act.

From a textual perspective, exception norms are expressed inside the content of the act which they involve by means of the expression „as an exception from the provisions of article…", followed by the text expressing the exception norm.

Special norms are regulations constituted by independent acts, regarding certain special circumstances for which are promoted legislative solutions which are different from the regulation with general character within the field involved. Special norms are different from derogatory norms due to the fact that, although they are expressed by means of independent acts, they have a permanent and repetitive character throughout enforcement. At the same time, they are broader and apply to all the hypotheses entering their scope.

It results from above that the necessity to make some distinctions between derogation, exception norms and special norms consists in their functionality in terms of the enforcement of legal norms, their effects being different.

[24] J. Byvoet, *Legistique formelle (Technique législative): règles, formules*, UGA Publishing House, Heule (Belgium), 1971p. 62.

Whenever a derogatory norm shall be instituted, the normative act involving it shall contain the expression „by derogation from…", followed by the specification of the regulation from which the derogation is made.

The use of the formula above is absolutely necessary, being aimed, besides determining the nature of the norm (of derogation), also at avoiding an apparent contradictory state between two texts which, although are part of the same field, promote different solutions.

Finally, according to article 63, thesis II of Law No. 24/2000 (republished), derogation can be made only by means of a normative act which has at least the same level of the basic regulation.

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PERSPECTIVEOF SIMPLIFICATIONOF THE RIGHT OVER THE PRINCIPLES OFENACTMENT

Maria-Irina GRIGORE-RĂDULESCU*

Abstract: *Considered a main direction of action in the Strategy concerning the better ruling 2014-2020, the simplification of the legislation has the role to contributeto the understanding of the legal normsby all its addressees, correlatedto the exigencies necessary for the elaboration of the projects of normative actsimposed by the disposals of Lawno. 24/2000 concerning the norms of legislative techniquefor the elaboration of normative acts, republished, with further amendments and completions, and implicitly, of the principles of enactmentinstituted by this law.*

Keywords: *simplification, principles, enactment, law, legislation.*

M. Djuvara stated that the enactment activityincluded two important moments, respectively determining the existence of social situationsthat entail legal ruling and determining by the legislator of the juridical ideal of conductaccording to such socialsituations[1].

Considering this issue, another author stated that „*drafting laws is not only an art, but, equally, a science or more exactly a techniqueand, in addition, a difficult technique. The frequency of critics in this fieldproves this difficulty. Such critics, existing in all countries, are both related to quantity, and quality of legislation*"[2].

Pursuant to the interpretation of the disposals oflaw no. 24/2000[3] concerning the norms of legislative techniquefor the elaboration of normative acts, republished, with further amendments and completion and the analysis of the opinions expressed in specialised literature, we consider the principles of enactment as being the following[4]: principle of scientific founding of the activity of elaboration ofjuridical norms; principle of providing for a natural relation between dynamics and statics of law (principle of balance); principle of correlation of thesystem of normative acts and theprinciple ofaccessibility and economy of meansin the elaboration of normative acts.

The principle of scientific foundationof the activity of elaboration of juridical norms

The ruling of social relationsin a permanent evolutive processimposes to the bodies with enactment competence the obligation of documentation, knowledge and understandingof social relations, in agreement with the disposals of art. 6 of Law no. 24/2000, republished, according to which the solutions included in the project of a normative actmust be substantially underlined, considering the social interest, the legislative policy of Romanian state and the conditions of correlating the entire system of normative acts, as well as of

* Associate professor PhD, Faculty of Law and Administrative Science, Ecological University of Bucharest.

[1] M. Djuvara, *General theory of law. Rational law, sources and positive law,*Ed. All, Bucharest, 1995, p. 563.

[2] J.-C.Piris, „Union européenne: comment rédigerunelegislation de qualité dans 20 langues et pour 25 Etatsmembres", in *Revue du droit public*, no.2/2005, p.476.

[3] Law no. 24/2000 was published in the Official Gazette no. 139 dated 31 March 2000 and republished in the Official Gazette no. 777 dated 25 august 2004. Subsequently, it was amended by law no. 173/2007, published in the Official Gazette no. 406 dated 18 June 2007 and by Law no. 194/2007, published in the Official Gazette no. 453 dated 4 July 2007.

[4] N. Popa, *General theory of law,* 3rd edition, Ed. C. H. Beck, Bucharest, 2008,pp. 205-213; C. Voicu, *General theory of law,*Ed. Universul Juridic, Bucharest, 2008,pp. 179-185; I. Craiovan, *Treaty ofgeneral theory of law,* 2nd edition reviewed and completed, Ed. Universul Juridic, Bucharest, 2009,pp. 226-228; M.-I. Grigore-Rădulescu, *General theory of law*, 2nd edition reviewed and completed, Ed. Universul Juridic, Bucharest, 2014, pp. 156-162.

harmonisation of union legislation with the international treatiesadopted by Romania. It results that the principle of scientific foundationof the activity of elaboration of juridical norms represents thequintessenceof all the other principles[5].

In the elaboration of a project of normative actfully corresponding to the need of ruling, the point of leaving must be the present and perspective socialchallenges, as well as the sufficiency of applicable legislation.

Art. 6 par. (4) of Law no. 24/2000, republished, introducedbyLaw no. 194/2007 stipulates that the normative acts with impact on the social, economic and environmental field, on consolidated general budgetand on the legislation in forceare elaboratedbased on some documentsof public policiesapproved by Parliament or Government, with the types and structure defined by Government.

Also, by disposals of art. 61 it is introduced the institution of preliminary evaluation of impactof the new ruling, which, according to the legal definition included in par. (1) of the article mentioned, represents a range of activities and procedures performed with a view to providea proper substantiation of legislative initiatives. It involves the identification and analysisof economic,social, environment, legislative and budgetary effectsproduced by the ruling proposed[6].

Insisting on the importance of the principle analysed, the legislator states, in par. (2) ofarticle 61, that the preliminary evaluation of the impact of the projects of normative actsis deemed to be a manner of substantiation for the legislative solutions proposedand must be achieved before theadoption of normative acts.

The substantiation of the new rulingmust consider both the evaluation of the impact of specific legislation in forceupon the elaboration of the project of normative act, and the evaluation of the impact of public policiesimplemented by the project of normativeact.

Law no. 24/2000, republished, rules other obligations as well incumbent upon the initiators of projects of normative acts. Thus, according to art. 19 par. (1) the elaboration of projects of normative acts will be preceded, depending on their importance and complexity, by a documentation activity andscientific analysis, for sound knowing of economic-social relationsfollowing to be ruled, of the history of legislation in this field, as well as of some similar rulings from foreign legislation, mainly of the countries of European Union.

The initiators of projects of normative acts may require, for legislative documentation, addition information from the Legislative Counciland other authoritiesor institutions with attributionsof information in such field [art. 19 par. (2)].

Par. (3of art. 19, introducedpursuant to amendment of law no. 24/2000, republished, by law no. 194/2007, stipulates that the results of the studies of researchand the references to additional sources of information relevant for the debates of the projects of normative acts must be included in the instrument of presentation and motivationof the project of normative act.

In the activity of documentation for the substantiation of the project of normative actone will examine the practice ofConstitutional Courtin this field, the practice of courts[7],

[5] M.-I. Grigore-Rădulescu,*quoted work*, p. 156.

[6] S. Popescu, C. Cioară, „Simplification of legislation –essential condition of improving the drafting quality of normative acts", in the*Annals of "Constantin Brâncuşi" Universit of Târgu Jiu*, SeriesLegal Science, no. 2/2012, p. 8.

[7] For developments related to judicial practiceand judicial precedentsee, I. Grigore-Rădulescu, „About jurisprudenceand judicial precedent from the perspective of the sources of law", in*RomanianPandectsno. 2/2014*, pp. 62-80.

as well as the legal doctrine in the field[8], as obligation of the initiators of projectsof normative acts in consulting the sources mentioned.

The principle of providing a natural report between the dynamics and statics of law (principle of balance)

Analysing the principle of scientific substantiation of the activity of elaboration of normative acts, by referring to the disposals of art. 19 par. (1) of Law no. 24/2000, republished, we show that the activity of substantiation and scientific analysis is necessary for sound knowing of economic-social realitiesto be ruled, of the history of legislation in this field, as well as of some similar rulingsfrom foreign legislation, mainly of the countries of European Union. Thus, based on the interpretation of these legal disposals, we consider that, by referring to the history of the legislation in the field, one considers the statics of law[9], and by reference to the knowledge of economic-social realitiesand legislation of other states, it is targeted the dynamics of law[10], being necessary to determine an optimum relationbetween conservation andchangein terms of juridical norms[11].

Providing a balance between the two sides of lawinvolves maintaining some rulings that assure stability and originality, as well as adopting new rulings in agreement with the internal, international[12]and unionsocialconditions, being noticed that law may go from one society to another, generating diffusion and tradition[13].

Principle of correlating thesystem of normative acts

This principle substantiates the close correlation that must existbetween normative acts component of the legislation system (legislative system[14]), for this the juridical doctrineanalysing two perspectives of manifestationof correlation of thesystem of normative acts[15]:

- internal correlation of normative acts, namely articulating it within the system ofinternal legislation;
- external correlation ofnormative acts, namely the harmonisation of internal legislation with the European union law and the international law.

In conformityto the disposals of art. 4 of Law no. 24/2000, republished, with further amendments and completions, the normative acts are elaborated depending on their hierarchy, their category and public authority competent to adopt it, the categories of normative acts and normsof competenceconcerning their adoptionbeing set forth by the Constitution of Romania, republished, and by other laws.

The normative acts given in the execution of laws, ordinances or decisions of Government are issuedwithin the limits and according to thenorms that order it.

The disposals of this article, by which the legislator institutesa ranking levelof normative acts, are completed by those of art. 12 of the same law, according to which, the normative actmust organically integratein the system of legislation[16].

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[8] As example, see the analysis of theSources ofLaw of civil proceedings, in M. Fodor, *Civil processual law*, Ed. Universul Juridic, Bucharest, 2014, pp. 38-68.

[9] Staticsrepresents the range of normative acts and juridical institutions ruledlong time agoand which require to be maintained (C. Voicu, *quoted work,* p. 182).

[10] Dynamicsrepresents the totality of normative actsruling new fields ofsocial reality (C. Voicu, *quoted work,* p. 182).

[11] I. Craiovan, *quoted work,* p. 227.

[12] For the correlation between internaljuridical order and international juridical ordersee,C.F. Popescu, M.-I. Grigore-Rădulescu, *Juridical protection of human rights*, Ed. Universul Juridic, Bucharest, 2014, pp. 38-40; C.F. Popescu, *Common law in public international law*, Ed. Universul Juridic, Bucharest, 2012, pp. 155-200.

[13] N. Popa, *quoted work,* p. 207.

[14] N. Popa, *quoted work,* p. 208.

[15] C. Voicu, *quoted work,* p. 205; M.-I. Grigore-Rădulescu, *quoted work*, p. 159.

[16] See, in this respect, I. Craiovan, *quoted work,* pp. 226-227.

Besides the rule of integrating the projectin the range of legislation, the law institutes as well the rule of uniquenessin the field, therefore, according to art. 13 par. (1) and (2), the ruling of the same leveland having the same object are, usually, included in a sole normative act, and a normative actmay include as well rulings from other related fieldsonly to the extent they are indispensable for achieving thescope followedby this act.

In order to avoid parallelism in the enactment process, in art.15 the following rules are stipulated:

- it is forbidden the institution of the same rulingsin several articles or paragraphsof the same normativeact or in two or several normative acts, to outline some legislative connections using the norm of reference;
- in case of some parallelismsthese will be removed either by abolition, or by concentrating the material in unique regulations, being subject to the process ofconcentration in unique regulations and regulationsfrom the same field dispersed in the legislation in force;
- in a normative actissued based on and in the execution of another normative actof superior level one does not use the reproduction of somedisposals from superior act, being recommendable only the indication of the texts of reference. In such casesthe taking over of some normsin the inferior act may be done only for the developmentor detailing of the solutionsfrom the basic act.

Law no. 24/2000, republished, institutes, in art. 14, a range of rulesalso related to the special and derogatory rulings. Thus, a ruling from the same fieldand levelmay be included in another normative act, if it has a special character opposite to the act including the general ruling in the field, the special character being determineddepending on its object, circumstantiated on certain categories of situationsand specificity of the legislative solutions instituted.

The ruling is derogatory if the legislative solutions concerning a particular determined situation include different normsopposite to frame-ruling in the field, the latter maintaining the general obligatory naturefor all the other cases.

In order to provide for the perspective of external correlation, in art. 21 it is stipulated that the legislative solutions forecast by the new rulingconsider boththe rulings in the field of European Union, providing compatibilityto theseand the disposals of the international treatiesadopted by Romania.

If the case, the law is ruling the possibility ofdrafting some proposals of amendment and completion of these internal normative actswith disposals not in accordance to those of international acts adopted by Romania or do not provide compatibility to the law of European Union.

The principle of accessibility and economy of means in the elaboration of normative acts represent aguaranteeof understanding the contents of normative acts by all their addressees, since it imposes to the legislator the useof a languageand clear, accurate, non-equivocal terminology, the juridical doctrine dealing withsynthesizing theessential conditions for the elaboration of thisprinciple[17].

A first condition is represented by the selectionof the external form of ruling[18]. As stated, by art. 4 of Law no. 24/2000, republished, with further amendments and completions, the legislator institutes a level of rankingof normative acts, depending on their

[17] N. Popa, *quoted work,* pp. 208-213; C. Voicu, *quoted work,* pp. 184-185.
[18] M.-I. Grigore-Rădulescu, *quoted work*, p. 160.

ranking, their category and public authority competent to adopt it, according to the constitutional disposals and other legal rulings in force.

The second condition is consideredthe selection of the manner ofjuridical ruling[19], targeting methodsby which the legislatorimposes to lawful subjectsthe conduct stipulated by the juridical normand it is, mainly, conditioned by the social relations targeted andnature of protected values. Thus, according to art. 7 of Law no. 24/2000, republished, with subsequent amendments and completions, the projects of laws, the legislative proposals and the other projects of normative acts are drafted in the prescriptive form specific to juridical norms.

By the manner of expression, the normative actmust provide to its disposalsan obligatory nature.

The disposals included in the normative actmay be, if any, imperative, suppletive, permissive,alternative, derogatory, facultative, transitory, temporary, of recommendation or other similar; such situationsmust expressly resultfrom drafting the norms.

The legislative textmust be clearly, fluentlyand intelligibly formulated, without syntactic difficulties and obscure or equivocal passages. No terms with affective signification are used.

The form andaesthetics of expressionmust not prejudice the juridical style, the accuracy and clarity of the disposals, reason for which, for instance, in private law permissive norms are usually used, whereas in public law are usually used imperative norms.

A last condition targets the selection of the procedures of conceptualisation and selection of the language of norm, respectively the construction of norm, determining the kind of conduct, style and juridical language.

In terms of construction of the norm, art. 33 of Law no. 24/2000, republished, with subsequent amendments and completions, the legislator stipulates that, for providing a logical succession of forecast legislative solutions and performance of an internal harmonyof normative act,the drafting of the project text must be precededby drafting a plan of grouping ideasdepending on the connections and natural reportbetween them, within the general conception of ruling.

With respect to determining the kind of conduct, in art. 36 of lawconcerning the norms of legislative techniquefor the elaboration of normative acts, it is stipulated that the text of articlesmust have a dispositive character, must present the norm institutedwithout explanations and justifications, the verbs being used on present tense, affirmative form, to outline the imperative nature of such disposal.

The use of some explanations by interpretative norms is allowed only to the extent thatthey are strictly necessary for understanding the text, not being allowedtheir presentation by the use ofparentheses.

According to art. 37 of the law mentioned, if for determining the conduct it is necessary the reference to another normative act, this is done by stating the juridical category of it, its number, title and date of publication of this act or only of the juridical category and number, if as such any confusion is eliminated.

The reference to an international treatymust include both the full name of itand the deed of ratification or approval.

As for the style and language usedin expressing the legislative solutions, the law stipulates the following rules:

[19]I. Craiovan, *quoted work*, p. 227.

- the normative acts must be drafted in a juridical language and style specifically normative, accurate, sober, clear andexpress, including any equivocal, with strict observance of the grammar and orthography rules [art. 34 par. (1)];
- it is forbidden the use of neologisms, if there is a wide spread synonym in Romanian. If it is necessary the use of foreign terms and expressions, it will be attached, if any, the Romanian equivalent [art. 34 par. (2)];
- the specialised terms may be usedonly if consecrated in the field of activity to which the ruling refers [art. 34 par. (3)];
- the drafting of texts is done by using wordsin their current signification in modern Romanian language, avoiding the regionalisms. Drafting is subordinated to easy comprehension of the textby its addressees [art. 34 par. (4)];
- in the normative language, the same notionsare expressed only by the same terms [art. 35 par. (1)];
- if a notion or a term is not consecrated or may have different significations, the signification of it in the context is determined by the normative actthat institutes it, in the general disposals or in an annex designated for suchvocabulary, and becomes obligatory for the normative acts in the same field [art. 35 par. (2)];
- the expression by abbreviations of some names or termsmay be done only by explanation in the text, on the first use [art. 35 par. (3)].

The simplification of law appears, correlatedto the principles of enactment, as a guarantor of observing it, since, as determined in the doctrine, the equality towards law ruled by art. 16 par. (1) of Constitution could not be effective if the citizens do not hold enough knowledge of the norms applicable to itor proper means to providethe appropriation of such norms[20].

In the Strategy concerning a better ruling in 2014-2020, the simplification of active background of legislation is deemed a main direction of action, objective proposed to be reached by systematising and unifying the legislation, as well as by reducingthebureaucracyfor the business environment[21]; it results, thus, that the simplification of legislation is performed on two bases, qualitative and quantitative. As technical operationsof performance,the following have been considered[22]: continuous legislative reclamation, elaboration and adoption ofnew normative acts, using mainly the institution of republishing, the consolidation of the texts of normative acts, codification, use of legislative databases.

Relying on the doctrine debates[23]and legal rulings in the field, we consider that simplification represents a manner of providingintelligibility oflaw, so the legal norms are understood by all addressees, providing to the system of normative actscoherence, accuracy and avoidingparallelisms.

We conclude that the simplification of law, in general, and of legislation, in particular, represents the fundamental premise of elaboration, enforcement, accessibility and efficiency of legal rulings, providing, as well, a high level ofcitizen democracy and juridical civilization.

[20] S. Popescu, C. Cioară, *quoted work*, p. 8.
[21] *Strategy concerning a better ruling 2014-2020*, pp. 17-19.
[22] For details, see, S. Popescu, C. Cioară, *quoted work*, pp. 9-14.
[23] M. Duțu, *Law: between theoretical hypothesesand avatars of globalisation*, Collection coordinatedby univ. prof. PhD. O. Predescu, Ed. Universul Juridic and Ed. Academiei, Bucharest, 2014, pp. 251-259; M. Duțu, „Smartregulation. Simplification of legislation and of administrative action", editorial published in*Romanian Pandect no. 12/2014*.

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14. * * *Strategy concerning a better ruling 2014-2020.*

THE ANALYSIS OF LEGISLATION WITH REGARD TO THE SITUATIONS IN WHICH THE PEOPLE'S ADVOCATE HAS THE QUALITY OF SEISIN SUBJECT IN THE COURT PROCEEDINGS

Florina MITROFAN*

Abstract: *The significance that the institution of the People's Advocate presents, is of great interest to the whole society. It is the reason for which to this judicial institution is devoted a series of regulations contained both in the fundamental law of the state - the Constitution of Romania, as well as in other normative acts. This paper puts forth to analyze the cases and the conditions under which the People's Advocate may notify the Constitutional Court as well as certain categories of courts, due to his capacity as a guarantor of defending fundamental rights and liberties of natural persons against abuses of the public administration.*

Keywords: *The People's Advocate, the administrative-contentious court, the appeal in the interests of the law.*

The institution of the People's Advocate was established for the first time in our country's legislation in 1991 by Article 55 of the Constitution[1]. It stands for a public institution of Swedish origin, named *ombudsman*, which appeared at the beginning of the last century and which currently „has emigrated" in most countries of the world, being well established in various ways and with different names, in many constitutions[2].

The People's Advocate, as a matter of fact, is an independent person who is appointed, usually by the Parliament for the supervision of administration in its relation with the citizen[3].

The People's Advocate does not substitute itself to competent bodies in order to grant a right or to resolve a conflict of interests, having the task to identify and prevent the phenomena which represent abuses of public administration against citizens, abuses which consist of infringements of the rights and fundamental liberties.

His powers are established by Law No.35/1997 in regard with the organization and functioning of the People's Advocate[4].

The *Ombudsman's* institution is organized and functions in Romania under the People's Advocate name.The Romanian Constituent has opted for the name of the People's Advocate, as it is the name expressing clearly and, in particular, for everyones to understand the role and judicial significance of the institution. Based on the states' practical experience where the

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[1] * Ph. D. Lecturer, University of Piteşti
Following the revision of the Constitution, by renumbering the texts in order of republication Article 55 became Article 58.

[2] M. Constantinescu, I. Muraru, I. Deleanu, F. Vasilescu, A. Iorgovan, I. Vida, *„Constituția României- comentată şi adnotată"*, Autonomous Official Gazette, Bucharest, 1992, p.130.

[3] M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *„Constituția României revizuită- comentarii şi explicații"*, All Beck Publishing House, Bucharest, 2004, pp.115-116.

[4] Published in Romanian Official Gazette, Part I, no. 844 from September 15, 2004, republished in Romanian Official Gazette, no. 277 from April 15, 2014.

ombudsman operates, it results that the efficiency of the institution consists in the person's qualities who is designated for this position and their way of working[5].

Both constitutional provisions as well as the legal provisions use two expressions, namely: the institution of the People's Advocate and the People's Advocate. The first expression regards the public authority, an autonomous and independent authority (Article 2 para.(1) of the law), and the second one the institution's head. That is why identifying the meanings results sometimes from the context of the regulations[6].

Having in mind the common elements that define this institution, which has also become traditional in other countries, others than the countries of origin, we will keep in mind that the argument for being the People's Advocate, is the fight against the phenomena that generate an infringement on citizens' rights and liberties, so that his work is neither parallel to, and nor in contradiction with the courts, the Public Ministry or other public authorities competent to solve a dispute concerning a right or a citizen's interest[7].

The People's Advocate. exercises his powers ex officio or at the request of the persons aggrieved in their rights and liberties, within the limits of the law, and in accordance with Article 59 para.(1) of the Constitution.

The Constitution's provisions establish both the officialty, as well as the obligation of the People's Advocate to act at the request of the one whose right or liberty has been injured. Therefore, the People's Advocate shall act on its own initiative or when he is addressed. We strongly emphasize, however, that its role being that of a parliamentary prosecutor, he does not take the place of a competent body, but only exercises, within the limits of the law, the monitoring of the activity of this body, in connection with the defense of citizens' rights and liberties and acts in order to ensure compliance with them[8].

For the purpose mentioned above, Article 59 para. (2) of the Constitution settles the public authorities' obligation to grant it assistance, being necessary for carrying out its tasks, which means that a public authority cannot refuse the collaboration with it, but, further more is required to provide the necessary support in the exercise of its powers, by providing the necessary information, by solving its notifications, etc.

From those stated above it follows that the above provisions of the Constitution set forth the procedural aspects by which the People's Advocate exercises his jurisdiction, and of course, with the public authories' support, which were placed under the obligation to ensure this support.

Law No. 35/1997 on the organization and functioning of the People's Advocate governs situations in which the People's Advocate cannot take initiative in matters relating to the powers which it carries out. The fact that the institution of the People's Advocate is regulated in Chapter IV, Title II of the Constitution, and not in the title with the reference to public authorities, denotes the independence of this institution from any public authority, without being able to substitute to them.

As regards the responsibilities of the People's Advocate in his capacity as guarantor of the exercise of fundamental rights by natural persons, and not as a defender of them in front of justice, they are to be found in the Constitution and in the Law No. 35/1997.

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[5] I. Muraru in *„ Constituția României-Comentariu pe articole"*, Coordinators: I. Muraru., E.S. Tănăsescu, C. H. Beck Publishing House, Bucharest, 2008, p. 572; I. Muraru, *„Avocatul Poporului- instituție de tip ombudsman",* Publishing House All Beck, Bucharest, 2004, pp.26-27; M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *op. cit.*, p.116.

[6] I. Muraru., E.S. Tănăsescu, *op. cit.*, p.572.

[7] M. Constantinescu, I. Muraru, I. Deleanu, F. Vasilescu, A. Iorgovan, I. Vida, *op.cit.*, p.131.

[8] *Ibidem*, pp.131-132.

This paper has in mind to analyze the cases which concern the competence of the People's Advocate in the matters of constitutional contentious, administrative contentious, and of the appeal in the interests of the law, as the seisin subject of the Constitutional Court and the courts which are competent to settle the applications in reference to administrative contentious, as well as their applications for appeal in the interest of the law, in its capacity as guarantor of the rights and liberties of natural persons against abuses of the public administration.

There have been numerous talks in doctrine on the inclusion of the People's Advocate within the subjects which may notify the Constitutional Court both in respect of unconstitutionality laws, before their promulgation, and with the exception of unconstitutionality of laws and ordinance.

The investing set forth by the revision law of the Constitution concerning the People's Advocate right to notify the Constitutional Court (it is understood, at the citizens' address) with aspects of unconstitutionality of the laws in force, appears not as a „defeat" of the Constituant Meeting's option, but as a development of this options, a reinforcement of the constitutional guarantees on citizens' rights and liberties.

Since not all citizens, may notify the Constitutional Court directly, but a public authority, which filters citizens petitions, it means that we are not in the presence of a popular action. The People's Advocate action is not equivalent, judicially–technic speaking, with the action of the ordinary people[9].

The idea of People's Advocate intervention in the control of constitutionality was expressed in 2002 when Law No. 35/1997 was completed with Article 18 ind.1, by Law No. 181/2002 for the modification and addition of Law No. 35/1997 on the organization and functioning of the People's Advocate.

This legislative addition has proved to be an inspired one, and through it has strengthened the position of the People's Advocate and of course, it has added an effective means to achieve it function of protecting the human rights[10].

According to Article 146 (a) of the Constitution, the Constitutional Court „pronounces over the constitutionality of the laws, before promulgation, upon notification….., of the People's Advocate...".

The objection of unconstitutionality concerns the law as a judicial act of the Parliament, that means in a restricted sense.

From the comparative analysis of the provisions of the initial article and of the one result after the review, it is clear that, in addition to the subjects which could notify the Constitutional Court, in the framework of checking in advance (a priori) was added another subject, namely: The People's Advocate.

The Parliament has opined that the People's Advocate, through its direct connection with the civil society, with the people, is in the position to signal the Constitutional Court regarding the situations in which a law passed by the Parliament, but which was not promulgated yet by the President of Romania, is contrary to the Constitution[11].

With regard to the possibility of the People's Advocate to notify the Constitutional Court with the exception of unconstitutionality, the Constitution in Article 146 letter (d)

[9] See: A.Iorgovan, ,,*Din nou despre revizuirea Constituţiei (teze şi antiteze*)" in Public Law Magazine, no. 2/2004 pp. 45-46; I.Vida, ,,*Antinomii intraconstituţionale*" in Romanian Pandects, no. 1/2004, pp.182-196.
[10] I. Muraru, E.S. Tănăsescu, *op. cit.,* p.584.
[11] *Ibidem*, p.1397; M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *op. cit.*, p.322.

mentions among the seisin subjects, the People's Advocate, as well as its ability to address directly to the contentious constitutional court.

But nothing stops it to invoke the exception of unconstitutionality also in front of the courts (in the case when it is listed as the seisin subject in the process of administrative court), whereas having gained the quality of a part, and with all the procedure consequences which the parties have in the process, the court is required to apply a legal treatment equal for all parties, including the People's Advocate, when it is a part in the proceedings, even if the action which it introduces does not tend to put to use a personal right, but one of another person.

This direct way of addressing the Constitutional Court by the People's Advocate is distinguished from those in which Constitutional Court is addressed by the court or arbitration court.

At the same time the addressing of the Constitutional Court with the exception of unconstitutionality by the People's Advocate does not require involvement of the People's Advocate in the process which takes place in front of the court, as part of, or together with the part.

The procedural provisions relating to trial of unconstitutionality exception shall apply in a similar way and with regard to the People's Advocate, but in its situation, the addressing to has the value of closure of the court or arbitration court[12].

The decision is the final act by which the Constitutional Court shall take a decision on a plea concerning the unconstitutionality, which shall be final and binding.

In order to set forth clear legal enforcement of Constitutional Court decisions and to remove in the future unacceptable practices of some courts, the new constitutional text establishes that these are generally binding[13].

Another statutory provision governing the People's Advocate quality as a seisin subject of the contentious court, is Article 1 of Law No. 554/2004 of administrative contentiuous court.

With respect to Article 1, we notice an enlargement of the area of the subjects which may address the court, an option which can give more guarranties to those who were injured in their rights or legitimate interests[14]. Assigning these type of competences has led to consolidating the institution of the People's Advocate.

In the field literature, prior to the entry into force of the above mentioned Act, were brought arguments in supporting mentioning in the law of the administrative contentious of the People's Advocate as the seisin subject of the administrative contentiuous court[15].

Article 3 para.(1) of Law No. 554/2004 of the administrative contentiuous stipulates that the seisin subject can be also the People's Advocate. This, according to its organic law, can address the competent court from the applicant's house, when, after inspection, it is of the opinion that the illegality of the act or the refusal of the administrative authority to achieve its legal prerogatives may be removed only by justice.

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[12] I. Muraru, E. S. Tănăsescu, *„Drept constituțional şi instituții politice",* Edition 13, vol. II, C.H. Beck Publishing House, Bucharest, 2009, p.268.

[13] M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, *op. cit.*, p.325.

[14] R. A. Lazăr, *„Considerații asupra Proiectului Legii contenciosului administrativ"*, in Public Law Magazine, no. 3/2004, p.68.

[15] See: A. Iorgovan, *„Tratat de drept administrativ"*, vol.II, 3rd Edition, All Beck Publishing House, Bucharest, 2001, p.584; A. Iorgovan, *„Comentariu privind unele puncte de vedere referitoare la proiectul Legii contenciosului administrativ"*, in Public Law Magazine, no. 3/2004, p. 84; V. Vedinaş, *„Sinteza observațiilor şi propunerilor formulate de diferite autorități publice şi de specialişti asupra Proiectului de Lege a contenciosului administrativ*", in Public Law Magazine, no. 3/2004, p.91.

The People's Advocate acts as the seisin subject after previously was referred to by a claimant and based on it, carried out its own checking, and as a result there were suspicious related to the violation by the administrative authority, of a right of the plaintiff.

Also, the legal basis of the right of the action is to be found in the very provision of Article 58 of the Constitution and in Article 1 para. (1) of Law No. 35/1997 on the organization and fuctioning of People's Advocate institution, according to which the institution is aimed at protection of the rights and liberties of natural persons in their relations with the public authorities.

By the texts of laws set out, it appears that the People's Advocate has a dual procedural quality: it can be the holder of the action in the subjective contencious court or, as the case may be, holder of the action in the objective contentious court.

The People's Advocate may refer the matter to the contencious court, whether, following the carried out checks, according to its organic law, considers that the act's illegality or the administrative authority denial to fulfill its duties may be removed only by justice and, if the following conditions are met:

- the matter was referred to in advance by a natural person harmed in his/her rights and liberties by an act of the administrative authority;
- it exhausted, without a favorable outcome, the specific means of its activity, respectively it has performed the work referred to in Article 23 and the following of Law No. 35/1997 on the organization and functioning of the People's Advocate institution.

And in this situation appear difference, as the plaintiff endorses the formulated action or not, in the sense that, with the assumption that the plaintiff doesn't endorse the formulated action of the first trial term, the competent court shall cancel the plantiff's request and, in the case in which he endorses the action, he will acquire active procedural quality, becoming a complainant, and he will be quoted in this quality, attaching the obligation to pay the stamp tax under the conditions laid down in O. U. G. (Emergency Government Ordinance) No 83/2013 on judicial stamp taxes[16].

Also, the aggrieved party, which became complainant, would be exempted from the prior complaint referred to in the provisions of Article 7 of Law No. 554/2004. The reason for having such an approach can be found in the fact that, the steps taken by the People's Advocate in the interests of the aggrieved party, that the administrative authority to modify, cancel the act considered to be illegal or harmful, with all the consequences resulting from here, such as rendering remedies, they have been initiated by the People's Advocate.

In the situation presented above, the active role of the People's Advocate shall cease.

As regards the aggrieved natural person, this must meet the requirements laid down by the Code of Civil Procedure for the introduction of the action, namely to have the exercise and use capacity. The lack of procedural and use ability attracts the absolute nullity of procedural document, and lack of ability to exercise attracts only relative nullity of the procedural act. The considerations presented are based on the provisions of Article 28 para.(1) of Law no. 554/2004 stating that the provisions of law shall be completed with the provisions of the Code of Civil Procedure.

The problem of legitimate interests, as a basis of the action in administrative contentiuos court, represents a transposition in law of Article 21 of the Constitution of

[16] Published in the Official Gazette of Romania, Part I, no. 392 of 29 June 2013. According to Article 30 of the Emergency Ordinance of the Government no. 83/2013, "are exempt from tax stamp legal actions and claims, including the legal remedies formulated, according to the law, ... , The People's Advocate, etc. , irrespective of the quality of their controversial tycoons, when they have as their object public revenue".

Romania, with respect to free access to justice, which entered at the time of the revision of Constitution in 2003.

Unlike in court subjective actions, the objective actions in court introduced by the People's Advocate are actions in its own name and mainly affects public interest defense and the law order that should exist in the public administration.

At the same time, between subjective and objective contentiuous action in court, there are differences, in the sense that, the People's Advocate procedurally initiates in the case in which it is addressed by an injured natural person, and in the objective contentious case this operates when it is addressed to either by an aggrieved natural person, or when it takes notice ex officio or as a result of the exercised control, in accordance with the provisions of the law, on the activity of the administrative authority.

The object of the objective contentiuous is always an administrative act with a legislative character that affect the rights and liberties of the citizens.

As regards the competent authority to resolve the action in administrative contentious court, the provisions of Article 10 of Law No. 554/2004 are unequivocal, by attributing the competence of settlement to the tribunal or the court of appeal, in the light of the criteria expressly provided in the provisions referred to[17] .

With regard to the stages of appeal, Law No. 554/2004 provides in Article 20 para.(1) that: „The judgment delivered in the first instance can be challenged with an appeal, within 15 days of the day on which they were notified", and Article 21 of the same law provides the possibility of carrying out their review in the situations referred to in the Code of Civil Procedure, to which is added another reason, on ruling final and irrevocable judgments by breaking the priority of community law.

We believe that, in a future regulation should be removed the term „irrevocable", and Article 20, „the appeal" and Article 21, „extraordinary stages of appeal", should be grouped together in a single article, whose marginal name should be „stages of appeal".

The arguments put forward in support of this proposal are those that, on the one hand, the new Code of Civil Procedure may not cover the notion of „irrevocable decision", but only of the „final judgment", and, on the other hand, the second appeal (recourse) is settled in Title II, Chapter III, entitled „extraordinary stages of appeal", the provisions of Article 456 of the New Code of Civil Procedure, in addition to listing the stages of the appeal, establishing that the second appeal (recourse) is an extraordinary stage of appeal, the appeal being the only stage of ordinary appeal.

A different situation in which the People's Advocate acquires the seisin subject quality of the Court, is the one provided in Article 514 in the New Code of Civil Procedure[18], which widens the number of persons that may refer to the High Court of Cassation and Justice to decide on the law matters which have been rsettled differently by the courts.

The extension of the active procedural legitimacy at the level of People's Advocate is assessed as being an innovative, beneficial and rational solution, comparable to a wider

[17] Article 10 of no. 554/2004 of Administrative Contentious has the next content: „(1) Disputes regarding administrative acts issued or concluded by local and county authorities, as well as those relating to taxes, contributions, customs duties and accessories up to 1,000,000 lei shall be resolved in administrative and tax courts and those concerning administrative acts issued or concluded by the government, and those relating to taxes, contributions, customs duties and accessories thereof greater than 1,000,000 lei shall be settled in the administrative section and fiscal courts of appeal, where special organic law provides otherwise. ..."

[18] Law no.134/2010, published in Romanian Official Gazette, Part I, no. 485 from July 15, 2010, republished in Romanian Official Gazette, Part I, no. 545 from August 3, 2012.

vision of active procedural legitimacy in this respect promoted by some foreign legislation, and we mention here the Spanish model, frequently invoked in the field literature[19].

Moreover, the reference of People's Advocate as a subject that may refer to the High Court of Cassation and Justice, and, therefore, the acquisition of active procedural quality in the matter of appealing in the interests of the law, contributes to ensure the implementation of an uniform case law, constituting, at the same time, the means of fundamental rights protection and liberties of the citizens.

The provisions of the New Code of Penal Procedure expand the number of subjects that may refer to the High Court of Cassation and Justice, in the case of appealing the interests of the law, giving the seisin subject quality of this court, to the People's Advocate.

Article 541 in the New Code of Civil Procedure as well as Article 471 in the New Code of Penal Procedure[20] prescribe the obligation (and not the possibility) of the People's Advocate to request the High Court of Cassation and Justice to give a ruling on the issues of law which have been resolved differently by the courts.

As regards procedural aspects relating to the appeal in the interests of the law, the legal provisions referred to above, shall expressly govern rules concerning the forming of the panel of judges, the preparation and the conduct of the trial as well as the topics that can hold the appeal in the interests of the law in front of the panel of judges.

In both contents (civil and criminal procedure) one of the conditions for exercising an appeal in the interests of the law is that there is a practice which is not unitary, comprising contradictory solutions, on matters of law which have received a different resolution from the courts of law.

Another admissibility condition refers to the category of judgments by which they have been solved in different ways the problems of law, both by the Code of Civil Procedure as well as the New Code of Penal Procedure making reference to final court decisions, while providing for their obligation of endorsement to the request expressed, and therefore the obligation of seisin subjects to make proof that the problems of law which are the subject of judgement, they have been resolved in a different way by final court decisions, under the penalty of rejection as being inadmissible of the demand.

From the above it comes out that the decisions which may be the object of an appeal in the interest of law, can only be judgments of the court, the law does not distinguish with respect to the level of court, and not decisions of other bodies with jurisdictional powers.

Article 471 para.(2) of the New Code of Penal Procedure governs the components which the appeal in the interests of the law should contain, as well as making it compulsory to mention in the application the case-law of the Constitutional Court, of the High Court of Cassation and Justice, the European Court of Human Rights or, as the case may be, of the Court of Justice of the European Union, opinions expressed in relevant doctrine, as well as the solution as it is proposed to be pronounced in the appeal in the interests of the law.

The decision is the act of disinvestment of the High Court of Cassation and Justice, a decision that, shall be taken only in the interest of the law, with no effects on decisions of the Court examined and with regard to the position of the parties of the processes that have generated heterogeneous practice.

The solving of the problems of law judged is mandatory for the law court at the date of publication in the Official Gazette of Romania, Part I.

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[19] V. Belegante in *„Noul Cod de procedură civilă-comentat şi adnotat"*, vol. I., art.1-526, Coordinators: V. M. Ciobanu, M. Nicolae, Universul Juridic Publishing House, Bucharest, 2013, p.1202.

[20] Law no.135/2010, published in Romanian Official Gazette, Part I, no. 486 from July 15, 2010.

The constitutional contentiuous Court, through numerous decisions, repeatedly statuted the accordance with the Constitution regarding the compulsory character of the solution given by the High Court of Cassation and Justice towards matters of law in solving the appeal in the interest of the law[21].

The specification of People's Advocate as the seisin subject of constitutional contentiuos court, the administrative court and the High Court of Cassation and Justice in the assumptions referred to in the texts of law analyzed above lead to consolidating the People's Advocate, in his capacity as guarantor of the defense fundamental rights and liberties of natural persons, and implicitly to the strengthening of the rule-of-law state.

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15. Law no.554/2004, published in the Official Gazette of Romania, Part I, no. 1154 of 7th December 2004.
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[21] Decision no. 600 from April 14, 2009 of Romanian Constitutional Court, published in Romanian Official Gazette, no. 317 from May 14, 2010; Decision no. 360 from March 25, 2009 of Romanian Constitutional Court, published in Romanian Official Gazette, no. 317 from May 14, 2010; Decision no. 1027 from July 14, 2011 of Romanian Constitutional Court, published in Romanian Official Gazette, no. 895 from December 16, 2011; Decision no. 1338 from October 11, 2011 of Romanian Constitutional Court, published in Romanian Official Gazette, no. 895 from December 16, 2011;Decision no. 1027 of Romanian Consttitutional Court from July 14, 2011, published in Romanian Official Gazette, no.703 from October 5, 2011.

ASPECTS OF NOVELTY IN REGULATING UNFAIR COMPETITION

Manuela Nita *

Abstract: *Pillar base regarding the regulation of unfair competition is represented by Law No. 11/1991. Compared to the initial form, over time, Law no. 11 supported changes, but the evolution of the market of the competition between companies demands new regulatory requirements. The changes in national legislation have accelerated the adjustement of the competition rules to their requirements. Also, the practice of the courts and of the competition authority has proved a slowly route of actions against unfair competition, which does not give the efficiency to an economy which wants to develop. Also forms of violation of fair competition acquire new elements, not covered by legislation in force, some of them being placed to the limit between loyal and disloyal, and it is therefore necessary the intervention of legislature. In the present study we will analyze from a critical point of view, if necessary, the innovations to the Law no.11 / 1991.*

Keywords: *unfair competition, companies, unfair practices, honest, good faith*

1. Introductory

The legislative package modifying the competition law have been long expected, but at this point we can discuss about relatively new regulations in the field of unfair competition. The other modifications are still in draft stage of public debate, but are expected by both of theoreticians and practitioners of law.

Regarding unfair competition regulation, it has undergone repeated changes (which we are almost used as a legislator practice) starting with Government Ordinance no. 12/2014[1] which required a small correction, because then, to be approved with amendments by Law 117/2015[2]. As subsidiary legislation, the Competition Council also issued Order no. 561/2014 for the implementation of the Regulation regarding the procedure of finding and penalizing unfair competition practices, i order to complete the entire legislative effort in regulating unfair competition. It follows to appear in the near future judicial practice of the Competition Council in order to identify the problems raised by legislative interventions.

In the European law, unfair competition was regulated for the first time under the Paris Convention for the Protection of Industrial Property of 20 March 1883[3], which enshrines in principle citizens' right to effective protection against unfair competition (Article 10 bis[4]) .

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* Ph.D. Lecturer Manuela Niță – Valahia University of Târgoviște, Faculty of Law and Administrative Sciences

[1] O.G. no. 12/2014 was published in the Official Gazette no. 586/2014 and is effective as of August 9, 2014

[2] Law no. 117 of 21 May 2015 approving Government Ordinance no. 12/2014 for amending and supplementing Law no. 11/1991 regarding unfair competition and other acts in the field of competition was published in the Official Gazette no. 355 of May 22, 2015

[3] The Convention is revised successively, the last revision being in Stockholm on 14 July 1967 and amended on 2 October 1979. Romania ratified the Convention by the Law of 13.03.1924

[4] Article 10 bis of the Paris Convention for the Protection of Industrial Property provides that:

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

Also, the Community has adopted Directive 2005/29 / EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, transposed into national law by Law no. 363/2007 against unfair practices of traders with customers and harmonization of regulations with European legislation on consumer protection[5].

We should note that there is no regulations for unfair competition between companies to EU level, being left to the level of each Member State.

In principle, based on the freedom of competition, any enterprise is able to attract customers, even its competitors customers, provided they do so through legal means.

2. Innovative elements in the current legislation

We understand from art. 2, paragraph 1 of Law no. 11/1991 regarding unfair competition, that it represents unfair competition, all manifestations of businesses called commercial practices which are contrary to fair practices and general principle of good faith and which cause or may cause damage to any market participants.

From both Article 1 and the definition stated above, we can observe that the legislator emphasizes the general principle of good faith, found in the Constitution, even if the good faith was also invoked in the previous form but not in principle.

In general, practice legislature is to indicate what is unfair, what is contrary to fair practices, which is sanctioned by law, following that by logical inference to assume that what is not prohibited is allowed.

In this case, the legislature defines several concepts, notions among which is fair competition, although as noted above it was also defined the unfair competition. So it is fair competition situation of rivalry market, in which each company is trying to obtain simultaneous sales, profit and / or market share, by offering the best combination of pricing practice, quality and related services with respect to fair practices and the general principle of good faith (Article 1^1 pts. a).

Also it was aimed to point out those illicit's elements, dropping the phrase „act or fact contrary ...", resorting to the concept of commercial practices, expressly defined as any behavior, action, omission or commercial communication, including advertising and marketing, used by a company in direct connection with the promotion, sale or supply of a product (Article 1^1 pts. b).

Unfair competition is reffering to the ethics of trader, his professional conduct as such, while the competition field it reffers to the market and is interested in the public order of the market economy. Agreements, excess of dominant position, merger, state aid are related to the market economy, while the acts of unfair competition are related to the field of ethics trader[6].

Ethics trader has two main connotations: good faith and fair practices.

Good faith is a value which drives norms and rules of moral conduct which outlines a behavior compatible with legal normality.

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l. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

[5] Published in the Official Gazette, Part I no. 899 of 28/12/2007

[6] Domestic and European competition law, Gheorghe Gheorghiu, Manuela Nita, ed. Legal Universe, Bucharest, 2011, p. 40

Civil Code promotes the traditional view that good faith is presumed, so its reflection is that one who claims to have acted in bad faith must prove adequate, according to the maxim „bona fides praesumitur" (burden of proof lies on the one who accuses good faith) .

Another novelty brought by legal text is reffering to defining the fair usage, which so far is inferred indirectly from which means „contrary to fair usage". Thus, by usage honest means a set of generally accepted practices or rules that apply to trade between businesses in order to prevent abuse against their legitimate rights.

Fair practices is dividing the practices into two categories: practices considered healthy practices in trade and those which even if effective practices that can not be validated as being healthy for legal normality.

Besides to what is represented by normative regulations, there are categories of practices, technical regulations, approaches made with reasonable efficiency. Not all of these practices could be considered fair.

2.1. Criminalization of the acts of unfair competition

According to the law, breaching the obligations prescribed, by committing acts of unfair competition, it has three gradations of wrongful[7]: criminal, contraventional, civil, offenses for which the law does not list proper offenses, only regulates civil action in unfair competition[8].

Due to the operating principle of legality of incrimination to criminal law and contraventional administrative law, principle stipulating that no crime / offense does not exist if an act is not laid down specifically by law, both offenses and contraventions are those exhaustively laid down by law.

As regards the civil illicit, given its ordinary characters, makes that everything which is not criminal, disciplinary or contraventional illegal to be civil illicit. In other words what is not crime, offense or other illegal act with special treatment and that the legislature has qualified it with a degree of social danger above the deviation of behavior, has no legal nomination.

a) the criminal illicit

Article 5 of the Law has undergone several changes over time, initially being pointed two facts as criminal illicit, then seven facts[9], and finally in 2012[10] six acts being considered as criminal offense:

1. making use of a sign, emblem or special designations or packaging likely to cause confusion with those legitimately employed by another trader;
2. use for commercial purposes of the results of certain experiments or of other secret information related thereto, transmitted to the competent authorities for the purpose of obtaining the authorisations for selling pharmaceutical products and chemical products meant for agricultural purposes, which contain new chemical products
3. disclosure, purchase and use of the commercial secret by third parties, without the consent of the legitimate holder, as a result of a commercial or industrial espionage action, if this affected the interests or business of a legal person;

[7] See in this respect Octavian Capatana, Commercial competition law. Unfair competition in domestic and international markets, ed. Lumina Lex, Bucharest, 1994, p 19; Adriana Almasan, (Un) Fair Competition, Romanian Magazine of competition no. 1-2 / 2004, p.8 and following

[8] According to art. 3 of Law no. 11/1991: breach of the obligation to art. 1 entail the civil, administrative or criminal liability under this law.

[9] Art. 5 was modified by Art. I, Section 5 of Law 298/2001

[10] Through Law no. 187 of 24 October 2012 implementing Law no. 286/2009 on the Criminal Code

4. disclosure or use of commercial secrets by persons pertaining to public authorities, as well as by persons empowered by the legitimate holders of such secrets to represent them before public authorities, if this affected the interests or business of a legal person;
5. The use by a person referred to in Art. 175 para. (1) of the Criminal Code of the trade secrets which he becomes aware in the exercise of their duties, if this affected the interests or business of a legal person;
6. manufacturing in any manner, importation, exportation, storage, selling or offering for sale goods or services bearing deceptive indications regarding elements specified by legislature[11], for the purpose of misleading other traders and consumers

b) the contraventional illicit

In order to underline the social danger degree associated with some deviant behaviors from normal competitive environment, the legislature have understood to present in the content of an article, through by two distinct paragraphs, acts that constitute offenses based on principle of incrimination under which an act is not a contravention unless required by law.

The provisions of art. 4 of Law no. 11/1991 as amended, established by paragraph 1 that constitute offenses, to the extent that they are not committed under such conditions as to be considered offenses under criminal law, the culpable violation of the following provisions:

- Denigrating a competitor or its products / services, performed by communication or spread by a company or representative / employee of allegation about the activities of a competitor or about its products, liable to harm his interests;
- attracting customers of an enterprise by a current or former employee / his representative or by any other person through the use of trade secrets, for which the company has taken reasonable measures to ensure their protection and the disclosure of which may harm the interests of that undertaking .

Paragraph 3 establish other four acts committed with guilt by natural or legal persons:

- Provide information inaccurate, incomplete or misleading or incomplete documents or failure to provide information and documents required under art. 34;
- Providing information, documents, records and books in incomplete form during inspections;
- Unjustified refusal of businesses to submit to an inspection carried out pursuant to Art. 34;
- Failure to comply with measures imposed by the Competition Council according to Art. 31.

From the offenses listed above should be remarked the involvement of the Competition Council relative to unfair competition, which can issue the following decisions:

1. Termination of unfair competition practices during complaint settlement
2. Prohibition of unfair competition practices
3. Application of fines if competition practice is a contravention

Art. 2, para 2, as amended by Ordinance 12/2004, establishes the unfair competition practices, identifying two specific, qualified as an offense, and an unfair practice left to the discretion of the authority, the legislature setting out the general terms of framing the practice: any other commercial practices which are contrary to fair practices and the general

[11] patents, patents on plant varieties, trademarks, geographical indications, industrial designs, topographies of semiconductor products, other types of intellectual property, such as the appearance of the company, the design shop windows and the fashion of staff, advertising means and like, origin and characteristics of goods and on behalf of the manufacturer or trader

principle of good faith and that cause or may cause damage to any market participants. Related to the last one, the Council may decide first two decisions discussed above.

Law no. 117/2005 brings as new element the ground rules of procedure for the resolution of complaints regarding a possible practice of unfair competition, based on which the Competition Council will develop a regulation in this regard.

The complaint signatory must prove the accused unfair competition practice, a legitimate interest and risk of injury. At the request of the authority, they are required to disclose all necessary information and documents of the case, so to be declared complete.

The Competition Council will appreciate taking into account mainly the seriousness, the circumstances in which it was committed and the importance of the economic sector in which the act produced in the national economy and, according to the conclusions will communicate to authors a reasoned reply through which will appreciate that the effects of unfair competition practices are minor or complaint is unfounded or it will penalize the unfair competition practices.

If the practice is minor or unfounded, the Council will communicate the response within 30 days. In the other cases the term is 60 days from the date when the notification is complete.

Competition Council's decision through which are finding and, where appropriate, be sanctioned unfair competition practices and which have become final, have a probatory character regarding the commission of an unfair competition practices. They are communicated immediately but no later than 5 days after issuance, to natural and legal persons concerned, who are required to comply with the measures ordered immediately.

Also another important element of the legislation is brought by the qualifications of decisions taken by the Competition Council through which are imposed sanctions, uncontested, as enforceable[12].

Law 117/2015 allows anyone who has a legitimate interest to directly address the competent courts for termination and prohibition of unfair competition practices, for covering economic and moral damages suffered as a result of unfair competition practices, without the need of any formal completion before the Competition Council. In this way the people affected by unfair competition practice can turn to direct action in court.

The competent court is the local court where the deed or in whose jurisdiction is the headquarters of the defendant; without a permanent adress the competent court is the one of the address's defendant.

If there is a risk of imminent damage, the competent courts may, in urgent procedure, where it finds, prima facie, the existence of unfair trade practices, termination of it or their prohibition to the case till the dossier is terminated. After the decision becomes final, Competition Council shall, upon request of the person who made the request for summons, publish on its webpage a statement, which must contain premises and other identification data of the enterprise, the practice of unfair competition committed and measures ordered by the court or the court may order the publication of the judgment, wholly or partly, in a newspaper of general circulation.

Moreover, to protect the legitimate interests of the holder of a trade secret, the court may order measures to prohibit the industrial and / or commercial exploitation of products resulting from the unlawful appropriation of trade secrets or destruction of these products.

The prohibition ceases when the information protected became public.

[12] Article 3^3 paragraph 3 of Law 11/1991

Also as a novelty, in order to enforce public policy combating unfair competition, to give efficiency to the measures taken by texts adopted, the Inter Council was created to combat unfair competition, as non-permanent body, with the following composition:

- Ministry of Public Finance;
- National competition authority;
- Authority responsible for the protection of rights in broadcasting;
- National Authority for Consumer Protection;
- Authority responsible for the protection of industrial property;
- Authority responsible for the protection of copyright and related rights.

Being a inter-ministerial council, in order to be functional it will be coordinated by the Ministry of Public Finance. The role of the Competition Council will be to provide the secretariat of the interinstitutional Council's work in the field combating unfair competition, as provided by par. (1).

Each year, the insterinstitutional Council in the field combating unfair competition Inter will issue a report on the implementation of legislation on combating unfair competition, which will be submitted to the Government through the Ministry of Finance.

Conclusions

Instability of legislation regarding framing a fact as an offense or contravention produces incoherence in policy applied by Competition Council in order to combat unfair competition but also difficulties in establishing a unified practice of the courts regarding committing such acts.

It is true that the law of unfair competition is completed by special regulations in the field of misleading and comparative advertising, to combat unfair practices in broadcasting, protection of industrial property rights in the trademarks and geographical indications, to industrial designs, patents inventions and the protection of topographies of semiconductor products. All this requires a sustained effort in enforcement, given their multitude. The purpose of creating flexibility of law does not mean to ignore a phenomenon or not regulating dangerous facts for the market.

The Competition Council has numerous responsibilities as autonomous authority in market regulation and supervision, and the procedure established by the new regulation can not say that take off some activities, even if it was established interministerial committee.

Raising fines amount for contravention, the legal classification of the facts as offense or a crime, the decisions they may be adopted by Competition Council and qualify the decisions taken by the Competition Council imposing sanctions, uncontested right enforceable, we hope it will have a beneficial effect on the market and will substantially reduce unfair competition rules.

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PARTICULARITIES OF THE VIRTUAL GOODWILL. THE CLIENTELE FROM THE CYBER-SPACE

Mădălina Irena VOICULESCU*

Abstract: *The development of the internet aroused and continues to arouse the interest of attorneys and law professionals, as they search for solutions, mostly practical ones, to apply traditional legal notions and concepts to virtual realities, such as the e-commerce. Going side by side with the substantial reality, the internet has created a virtual universe, ignoring concepts such as „border" or „teritory". Nevertheless, the internet offers the background of many economic activities, and also the opportunity of very fast operations which are identical or similar to the traditional ones but insufficiently regulated by the law. Some authors talk about the internet law, as a distinct branch, while others consider the notions and the relations we can find within the cyber-space as a mere extent of the intelectual property law. As the problems created by this new kind of reality are complex and topical, and also taking into consideration the fact that law is meant to explain the fast-changing reality and to offer practical solutions, we find the law should open to this domain. As a consequence, there are some questions we should answer: Is it possible for traders to have a trade fund (goodwill)? Can we expand the rules appliable to clientele, intelectual property, brand or trademark to the electronic commerce?*

Keywords*: domain name, website, cyber-clientele*

Any professional trader who wants to make himself known on the internet must, first of all, create a *website* which can be found by a *domain name*. In other words, a *domain name* represents the adress of a web site. In technical terms, the domain name represents an unique string of characters assigned to an IP adress (Internet Protocol) corresponding to a computer (server) permanently connected to the internet. The listing of the domain names is the responsability of ICANN (Internet Corporation for Assignet Names and Numbers), the succesor of an American private company named NSI – (Network Solutions Inc), a non-benefit international institution, created in 1998, during an agreement between Europe and America. A domain name consists of three levels which are decripted right to left, as follows: the first level (the extension) represents the domain and usually consists of three letters (e.g com, net, org, biz) or two letters indicating the national networks (e.g. ro, us, uk, fr), or more letters (e.g info, name, mobi); the second level, also known as the subdomain, indicates the entity and most of the times represents the name of the professional; the third level reffers to the servers, which have a logical name (e.g. www – World Wide Web, the most common). The domain name cannot have more than 67 characters, without taking into consideration the extensions. All the extensions are managed by a TLD (Top Level Domain), for Romania ROTLD (Romania Top Level Domain). The domain name is unique, and so the visitors can connect to a particular website and have acces to the information and files the website provides[1].

* Ph.D. Titu Maiorescu University from Bucharest

[1] Bocsa, M. I. Concluding International Trade Agreements by electronic means. Universul juridic, 2010 pp. 115-116.

A legal definition of a domain name was proposed by the French professor G. Loiseau: „the mark under which a company (business) develops, on the internet, a virtual activity, and to which the clients can adress in order to obtain goods, services or information on the activity the company unfolds"[2]. This definitions clearly shows the fact that the domain name represents a *new distinctive mark*. Nevertheless, there is still some uncertainty regarding its legal nature, the main dificulty consisting in determining its effects. Unlike the trademark, which takes effect only on the teritory it is listed for, the domain name actually has a worldwide effect, much more so because it has some specific and clear protection criteria. All these being said, some authors say that: „the domain name becomes an international trademark which affects the trademarks"[3].

The website concept (the word site in English is a synonim for location, spot, place) is used to describe a number of multimedia web pages containing texts, static images, animation, etc, on a certain topic, which can be accessed by anyone and which are connected by hyperlinks. The website is maintained usually by a webmaster and consists in some webpages. The initial page (the homepage) is the page used to acces the other secondary pages. Technically speaking, a website can contain any type of static information, chatrooms (forums), products, goods, services, ads, online forms, videos, digital sounds, static and animated images, special effects, dynamic menus and much more. The theme of a website can consist in: a blog, a catalogue, a portal, a webstore, a bank, a virtual university, a library, a magazine, an encyclopedia and so on. Nowadays, one pays more and more attention to the content of a website and to the design, and their creators or owners have the same right as any other type of author (copyright).

The trade fund (goodwill) comprises the goods a professional trader requires in order to develop or unfold the activities its business implies. The extent of the notion varies as far as the elements are concerned, as the number or the type of elements may differ from one trader to another. Nevertheless, any trader, no matter the kind of business it unfolds, has two types of elements present within what we call goodwill: *corporeal* and *incorporeal* goods. Once the electronic commerce started to develop, a virtual store (webstore) should only require a domain, an e-mail and a website. Consequently, a virtual goodwill does not imply or need corporeal elements, in principle. As far as the *incorporeal* elements are concerned, even if a professional trader decides to use the internet in order to promote and develop its business, it shall definitely have a *firm (sign, name).* We should nevertheless notice two special and new elements, the domain name and the website which become, by nature, incorporeal elements, indispensable to this type of trade.

Regarding the *domain name*, it is registered or listed by special institutions, based on the principle „first come, first served", by an electronic and automatic processing which verifies whether the domain name is available or not. Once the payment is done, the domain becomes active and it offers its owner the exclusive right to use it. The Romanian domain registry .ro is managed by RNC – The National Computer Network for Research and Technological Development within ICI – The National Institute for Information Research and Development.[4] As the electronic commerce no longer implies the existence of a location, or a physical office, or a place where the professional trade can receive/ meet its client, the domain name practically replaced the physical adress.[5] The legal nature of the

[2] Loiseau, G.. Nom de domaine et Internet: turbulences d'un nouveau signe distinctif. D. Chronique. Nr.5/1999, p. 245.
[3] Schaming, B. Internet ou l'emergence de la marque mondiale de fait. PA 9 mars 2001. Nr.49, p.14.
[4] www.rnc.ro
[5] Streanc, A.C. Internet trademark-domain name interface, Romanian Revue on Industrial Property no.5/2002.

domain name is still uncertain and its legal status is not regulated by special laws, but by the terms of the agreement between the the person which applies for a domain name and the institution authorised to offer it. Some institutions specialized in listing domain names act based on a mandate (warrant) from their clients, others prefer to register the domain names themselves and then give the clients the right to use it. In this case the institution/society remains the owner of the virtual adress, and as such it may decide to deny the acces to the client. In return, the client may give it away to some other trader, and get a better price. The institutions authorized to register the domain names renew, on demand, the registration agreement, before the term expires. Otherwise, the right to use the domain name may be lost, and this situation may have really serios consequences. Professional traders which do not preserve their right to use the domain name may suffer as far as their activity is concerned, they may lose clients and the business they unfold on the internet. We can therefore conclude that the stability and the development of goodwill are determined by the renewal of the registration agreement/contract, as it grants the trader access to the website, an important element that turns casual clients into loyal clients. This is the very reason why the French doctrine proposed the uptaking of the domain name into a *virtual location*, which could allow the professional trader to have the certainty of the agreement renewal, regarding the registration of the domain name, just as a tenancy contract. This would offer the trader a certain legal security and protection. Practically speaking, the domain name is indirectly protected by action for unfair competition or by the legal regulations on trademarks, so it has no specific status which could really protect it. There are also opinions against such an uptaking or assimilation.[6]

On the other hand, due to the lack of communication between the trademark registration system and the system which lists the domain names, many problems may occur, most of the times as a consequence of registering a domain name similar to a trademark previously registered by another professional trader or company. There are no clear norms regarding the prevention or the solving of conflicts between trademark owners and domain name owners.[7] All these factors being given, a new activity/ phenomenon appeared and developed, namely the cybersquating, consisting in maliciously registering a domain name, used by another professional trader as a commercial name or trademark, in order to stop the latter from creating a website under the same name.[8] The authors of this operation (cybersquating) then demand significant amounts of money from the trademark owner who wants to preserve the name and use the website.

The domain name represents, at the same time, a sign which attracts the clients and a way to promote oneself. Often enough, professional traders choose their trademark or their commercial name as a domain name. In this situation, the legal protection of the domain name is insured by the legal instruments (tools) which protect the trademark. On the other hand, the protection of a domain name which is neither a trademark, nor a commercial name, is more difficult, meaninng the owner has to justify his right on this name, he has to prove he had previously used it and the risk of confusion.[9]

The doctrine unanimously aknowledges the fact that, being a personalized electronic adress, the domain name is a part of the trade fund (goodwill) as an element which attracts

[6] Levis, M. Site internet: de l'incorporel au virtuel. AJDJ, 2001 p. 1073.
[7] Predoiu, C., Sandru, A.M. Internet Commerce. Economic and legal research, Law Revue no.10/2000, p. 383.
[8] Revue de droit de l'informatique et des telecommunications. 1997. nr.4, p.72.
[9] Loiseau, G. Nom de domaine et Internet: turbulences d'un nouveau signe distinctif. D 1999 Chronique. Nr.5, p. 247.

clients. Different opinions appear while trying to define it; the French authors define it as „the name of a business (company) functioning on the internet, the virtual location (webstore) to which the clientele adresses in order to obtain goods or services from the trader or to get information on its activity".[10] This point of view is based on AFNIC Statute (The French Association for Registering Domain Names), and this statute clearly allows, as a derogation, in art.no 31 and 32, the possibility granted to the owner of a trade fund (goodwilll) to transfer or cede the domain name, provided he presents or shows a copy of the contract by which he transfers his goodwill; as a consequence, one cannot give away the name of the company or the trademark without also transfering the goodwill. In other words, just as the comapny name and the trademark identify the trader within the real world, the domain name identifies the trader within the virtual universe, on the internet. We consider the domain name an unique element, distinctive for the electronic commerce, and it should not be mistaken for the company name or the trademark; this is the very reason why is requires special regulations.

Regarding the *web site-ului*, each of its elements (the graphics, the text , the music) can be protected by copyright. The website itself, as a whole, may become the object of intelectual property laws, as a right, for it represents a complex, original work, created for the professional trader by specialized designers.

The French doctrine considered the *aesthetics and the design of the webpage or webstore*, the *graphic art*, an element of the virtual goodwill.[11] More specifically, it is an element situated somewhere between particular logos and signs and industrial designs.

Moreover, there are some points of view[12] which state the *logistics management* is also a part of the goodwill, at least in the cases where the agreement perfected through the internet is prelonged by substantial benefits: stock management, maintenance services after the sale. Logistics management is, in fact, the know-how, and it is very important for the success of the business, and for this reason it has to be included within the goodwill.

Due to its strategic nature, one has to ask whether the *clientele file* should be a part of the virtual or electronic trade fund (virtual goodwill), as its central element.[13] This file contains precise, specific information on clientele consumption habits, and this information can offer an image on the clients' financial resources, so it is of real value in order to increase business rentability and succes.

As far as the *clientele* is concerned, it is traditionally considered the key element, the essential and indispensable component of goodwill, as it directly reflects in the professional trader's turnover. Without the clientele, we cannot talk about a trade fund (goodwill), we only have isolated, disparate elements. Without the clientele, the trader could not trade anything. The clientele has to be *real, certain and belonging* to the professional trader using the cyber-space.

In order to consider a cyber-trader owner of a goodwill, we should first of all check the existence of a clientele and then determine whether this clientele personally and directly belongs to the professional trader that uses the internet.

Within the electronic commerce, the existence of the clients is beyond any doubt and it can easily be proven, much easier than within the traditional commerce (trade), because of

[10] Loiseau, G. Nom de domaine et Internet: turbulences d'un nouveau signe distinctif. D 1999 Chronique. Nr.5, p. 246.
[11] Vivant, M. Droit de l'informatique et des resseaux. Lamy. nr. 2583/2004.
[12] Moneger, J. Emergence et evolution de la notion de fonds de commerce. AJDI 2001, p.1046.
[13] Ronzano, A. Le fonds de commerce electronique. Creda. Litec, 2004 p. 218.

the internet tools, accessable to anyone. All the websites, regardless the object, have special statistiscal instruments (counters) which permanently shows the number of clients visiting the website.

The problem which occurs is if and to what extent these visitors represent the trader's own clients; can they be considered just a potential, occasional or auxiliary clientele? Taking into consideration the most popular opinion among the authors, the concept is approached in an abstract manner, independently of the real life consumers, and the financial aspect seems to be of the essence. As an example, prof. Fintescu emphasizes the business relations with the clientele which are undoubtably of great financial significance to the trader.[14] Thus, we define the clientele by the economic value of probable or possible relations with people having contact with a certain trade fund (goodwill). Once defined, the clientele can be analyzed as a global opportunity for future and repeatable contracts with the consumers. Following the same line of thinking, it was said that this concept equals the image or representation of the financial benefits the profossional trader, the owner of the goodwill, can obtain by selling or rendering his services to certain people who need or want them, people who are in reality and not by law attached to its establishment or business.[15] These arguments, considering the economic criteria used to define the clientele, can be very well transferred to an electronic goodwill. In fact the trader makes considerable investment in order to have a competitive website, to maintain and update it as often as needed or possible. As a consequence, the risk the cyber-traders face should be considered an argument for the aknowdedgement of the trader's own clientele.

Moreover, there are some professional traders who unfold an economic activity in real life, in a traditional manner, before developing it through the internet. Having both a physical location or site and an electronic adress may lead to the conclusion that the internet may be seen as an extension of the physical business, which already has its own clientele. On the other hand, we can draw a parallel between a business specialized in traditional mail trade and a business which relies on the internet. A company using the traditional mail in order to sell its products distributes a physical catalogue, while the latter shows its virtual catalogue on the internet. For both types of trade, the order may be placed by phone or by sending a purchase order. All these being given, as long as there is no doubt about the existence of a clientele in the first case (a company that uses the traditional mail), why should we deny this right to a company using the internet for self-development? Could this be a contradiction? Going further, the dificulties one faces in aknowledging a clientele loyal to a trader dependent to another, for instance a store situated inside a gas station or inside a mall, are non-existent in the case of a company using the internet. For example, if a client may enter the gas station and buy something without pumping gas, the website remains accessable, no matter the provider. The cyber-traders face no constraint or limitation in using their goodwill because of the internet providers, and so they do not depend on the internet providers; on the contrary, their website may be visited by anyone, anytime, any given day or time. Taking into consideration the economic criteria, the website of such a trader is clearly different from the website of its internet provider, and this allows the distinction between the clients. All these being said and sustained, we can easily find a

[14] Finţescu, I. N. Commercial Law Treaty. Vol.I. Bucureşti, 1929 p.167.
[15] Laederich, F. J. Fonds de commerce n.34 – Repertoire de droit commercial. Vol.III. 1989 Ed.2 Paris.

proper, personal clientele of the professional trader, a so-called *electronic clientele*,[16] just as we can find a virtual, electronic goodwill, and they both benefit the cyber-trader.

We should also state the following: the European[17] and the national[18] law covering this domain have the main purpose to increase people's confidence in the electronic commerce, and this goal is untouchable unless we aknowledge the existence of the *electronic goodwill (trade fund)*. Let us not forget, any trader wants to create and get aknowledgement for its own clientele, as a result of its efforts and investment. What would be the reason for a trader to use the internet if he cannot get its clientele aknowledged or use its goodwill (trade fund) as a credit instrument?

Nevertheless, there are authors claiming the opposite.[19] They say that, within the electronic commerce, due to the volatile nature of people using the internet, the essential element is the commercial venue (achalandage). As a consequence, to consider the clientele a constitutive and essential element of the virtual goodwill would be improper, since it connot be attributed to the trader.

Up to now, there is no legal regulation, European or national, not even a bill, to aknowledge and regulate the electronic goodwill (trade fund), and so the specialists and the courts are left with the task to explain and face this complex problem.

In conclusion, there is no doubt, in our opinion, on the fact that goodwill, as a legal concept an a key-element in unfolding a business, may be applied on the electronic commerce, considering all the particularities. Within this new frame, the domain name is, unquestionably, the distinctive, essential and indispensable element. Within the virtual space, it plays the main role; without it, the trader could not make himself known or get in touch with the clients. So, it is easy to mistake the domain name for the company name or the trademark, as a „commercial name within the virtual universe" [20]. Accordingly, the website is the mirror image of the physical goodwil. For these reasons we may not leave the cyberspace outside the legal regulations.

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[17] Directive no 2000/31/CE of Parliament and Council on certain legal aspects concerning information societies services, especially electronic commerce. http://eur-lex.europa.eu.

[18] Law. no. 365/2002 on electronic commerce, republished in M. O. nr.959/29.11.2006.

[19] Tchunkam, J. D. Droit des activites economiques et du commerce electronique. L'Harmattan. Paris,2011 p.203; Verbiest, Th., Le Borne, M.Le fonds de commerce virtuel: une realite juridique?. Journal des tribunaux nr. 6044 du 23 fevrier 2002, pp.145-150.

[20] Verbiest, Th., Wery, E. Le droit de l'internet et de la societe de l'information. Larcier. Bruxelles. Nr.809/2001, p.414.

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10. Loiseau, G. op. cit. p. 246.
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17. Directive no 2000/31/CE of Parliament and Council on certain legal aspects concerning information societies services, especially electronic commerce. http://eur-lex.europa.eu.
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FROM AUTHORITY LAW (RATIONE IMPERII) TO REASON LAW (IMPERIO RATIONE). ABOUT THE POSSIBILITY OF A EUROPEAN CIVIL CODE

Rafael SÁNCHEZ DOMINGO *

Abstract: *During the Enlightenment there came the first attempts to introduce rationalism in Law. The Napoleonic Code of 1804 is the result of an important tradition that France offers to Europe, as it firstly refers to the individual and makes all the civil law change around this point. As a matter of fact, Positivism transcended Natural Law. The legal activity is improved and it aims at being codified in the 19th century as a movement based on the existence of a Rational Law.*

Keywords: *Law, Civil, Coding, Rationalism, Unification.*

I. Introduction

After the fall of the Western Roman Empire (AD 476) and the beginning of the Middle Age, Roman law was still practised in the old Roman territory and it had great influence in the law of the invader peoples. The original meaning of the *Ius Civile* turned into the traditional legislation assumed by the first Roman clans, gathered in a political community. It was made of some principles firstly set by the religious jurisprudence and then by the secular one.

During a long period of time, there was no more Right in Rome than the costume, the territorial law, the city rules or even the corporations and trades rules. In terms of law, it was a very particular time. Between the end of the 11th century and the beginning of the 12th, Roman law was assumed, and during the 12th century, the annotators from Bologna studied it through gloss and exegesis, following the scholastic way of syllogisms, distinctions and subdivisions. The Civil law started then to be identified with the Roman law, till the point that the Justinian's code written in the 12th century was called the *Corpus Iuris Civilis.* But the Justinian Code had many public texts which were already out of time and could not be applied to the new politic society. Therefore, annotators were interested in private rules and institutions, starting the idea of the Civil Law as a Private Law. However, the Civil Law was the law of cives (citizens) and as Fernández Domingo says: „*it is obvious that" everything „, until the arrival of administrative law -paradigma a public-law called, is, is civil law; Law par excellence, unique from Roman Law „* [1].

García de Enterría explains the meaning of the legal language in the Revolution quoting Fernand Bruno: „*during the Old Regime the language of lawyers was disqualified from the perspective of the noble and elegant language and the founder of the French Academy had imposed on it the duty to purge the language of the impurities of the chicane, the muddled language and garrulous of shysters and lawsuits „*[2]. In 1789, the legal and

* Burgos University

[1] Fernández Domingo, J.I., *Orígenes medievales del Derecho civil. El universo de las formas. Lo jurídico y lo metajurídico*, Colecc. Jurídica General, Madrid 2013, p. 223.

[2] Brunot, F., *Histoire de la langue Française des origins à nos jouus*, t. X. *La Langue classique dns la tourmente*, 2ª parte. París 1968, pp. 864 y ss.

administrative language was far from being the image of purity or courtesy. It was rather discredited in relation to literary language and censored because of its dark and pain style, plenty of archaisms. These archaisms did not regard only to juridical terms, eliminated by the Revolution when it abrogated the complex system of „privileges", but also to syntactic and lexical constructions. Because of that, and despite the predominance of lawyers in their Assemblies and Committees, revolutionary men wildly rejected this old language[3]. Against this regicide style that abolished the meaning of the new laws plenty of freedom, Mirabeau encouraged to write these new laws in a „*intelligible to put according to the enlightened citizens about their rights, linking them everything that can remind the sensations that have served to bring out freedom*"[4].

However, as P. Cappellini says about the term „*Code"* included in Dictionaries, „*Today is a valuable aid in measuring the root structuring much of the political-legal language that we still familiar and their methods formation and performance. In particular, the remarkable amount of specific words and neologisms that maintain their significant but suffer a total or partial symptomatic change its meaning, shows us directly wide circulation of those words-ideas that often anticipates even provisions in historical and etymological dictionaries*"[5].

The philosophy of the rationalist Natural law proclaimed that a group of laws had to be organized in a simple and rational way, eliminating complexity, and that the wish of the Prince was to ensure everything to enact them[6]. The governors, who were busy controlling territories, mixed the Roman law and the Customary Law and thought of „*"the imposition of a single legal code for all territories a way to unify"* [7]. Therefore, when Frederick the Great became king, decided to have a Code written in German and based on „*the natural reason and people's character*" where „*romano law do so only n would include coincide with those*" [8]. The natural school of Law advocated the formulation of law of a universal character founded in the very nature of man himself. The foundation of its proposal is the person and social ethics, in harmony with nature, even above theological or authoritarian considerations, though when specifying values of a universal character, the experts had to recur to history, so as to analyze which the accepted values were, „*and it is at this turn of history where we delve once more into the study of Roman Law*"[9]. The prevailing positivist current embraced rational and ideal law, which was offered as a new but different „*universum ius*", and as J.A. Alejandre García states" *which manifests itself in written law, that means the positivization of that doctrine, unknown to the prevailing institutions, up until then, which were common law institutions, and opposed to the existence of a natural law of theological inspiration and origin and scholastic method*"[10]. And it is precisely the value attributed to man, as the bearer of reason and the recognised faculty of the legislator,

[3] García de Enterría, E.*, La lengua de los derechos. La formación del Derecho Público europeo tras la Revolución Francesa*, Madrid 1995, pp. 34-35.
[4] García de Enterría, E., *La lengua de los derechos..,* p. 35.
[5] Cappellini, P., „Códigos", en *El Estado Moderno en Europa. Instituciones y derecho,* (ed. de Fioravanti, M.,), Colección Estructuras y Procesos. Serie Derecho, Roma-Bari, 2002, pp. 103-104.
[6] Stein, P.S., *El Derecho romano en la historia de Europa. Historia de una cultura jurídica,* (Título original de la versión inglesa: *Römisches Recht und Europa. Die Geschichte einer Rechtskultur*), Madrid 2001, p. 153.
[7] *Ibidem,* p. 153.
[8] *Ibidem*, p. 156.
[9] Fernández de Buján, A., *Derecho público romano y recepción del Derecho romano en Europa*, Civitas, Madrid 1999, p. 225.
[10] Alejandre García, J. A., *Temas de Historia del Derecho: Derecho del Constitucionalismo y de la Codificación,* I, Seville 1980, p. 19.

as it is his task to transform that reason into written law, equal for all, which constitutes the basis of positivism and of a tendency to set down positive law in codification; an ideology that was welcomed in the French School of Exegesis[11].

The pressure towards the unification of law underwent a modern period in time and sunk to the depths of history[12]. This movement of compilation -codification- was not unknown in other realms, since it saw itself drawn into the great intellectual movement of the Enlightenment, but the Napoleonic Code was the achievement of a wish, „*that all customs* [customary law] *be written in French*"[13].

In addition, the Trenta-Ventôse Law of year XII set out the civil laws in one single corpus, under the title of *Civil Code of the French*. Later, the law of 15 September 1807 indicated that „*Napoleonic Code*" should replace the title of „*Civil Code of the French*". The Ordinance of King Louis XVIII, of 30 August 1816, in its new edition, called the statute the Civil Code and finally, in accordance with the decree of 27 March 1852, it was ordered that the Civil Code be entitled the Napoleonic Code[14] once again. Having been appointed First Consul, with all sorts of powers and prerogatives, Bonaparte planned to give France its Civil Code. Four members sat on the commission that composed it: Tronchet, president of the Court of Cassation; Bigot Du Prèmenau, Government Commissary of the Court; Portalis, Government Commissary of the Court of Arrests; and Malleville, a judge of the Court de Cassation[15].

However it must be acknowledged that previously, in the era of the „*solemn declarations*" correction was easy, as the effectiveness of such rights came from one „supra-regulation" of higher merit than ordinary positive Law, natural Law as an abstract assertion; the Constitution or the Solemn Declarations were comparable to it in so far as they brought them together and placed them in one particular national system. This was the case of the French Declaration, which sought to have a supralegal value, that is, of higher value than the ordinary Laws, which elevated it to a limitation on the legislator[16].

With respect to Spain, during the Ancien Regime, the memory of the Romans, of the golden age of the Roman Empire, served to highlight the important beginnings of Spain in the monarchical era, up until Tarquin and Lucretia, the grand imperial expansion, the great architectural works of civil engineering, the famous emperors born on the Peninsula: Trajan and Hadrian[17], although without forgetting Augustus, recognised in the Iberian Peninsula for his political values and his stature as a brave military man. A unique Spanish historian, P. Mariana, reflects his successful military campaigns[18]. Bermejo Cabrero recalls the work of Saavedra Fajardo praising the merits of Augustus in Hispanic historiography[19]. The work of these rulers remains outstanding, especially Trajan, in his activities in the field of administration of justice.

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[11] *Ibidem*, p. 20.
[12] Cappellini, P., „Códigos...," p. 106.
[13] Cappellini, P., „Códigos...," pp. 106-107, refers to Comminnes, Ph., *Mémoires de Philippe de Comminnes*, in Laurent, F., *Principi di diritto civile*, translation by G. Trono, Napoli 1879, vol. I, p. 8.
[14] Vid. *Code Civil*, París, Petit Cods Dalloz 1954.
[15] Planiol, M., *Traité èlementaire de droit civil*, 5th ed., París 1908, t. I, p. 27. *Cit.* Monroy López, J. de , „El Código Civil de Napoleón y los Derecho Humanos", in *Revista de Derecho Privado*, new era, year V, no. 13-14 (2006), p. 91.
[16] García de Enterría, E., *La lengua de los derechos…,* p. 77.
[17] Bermejo Cabrero, J. L., *De Roma Antigua a los inicios del Constitucionalismo*, U.C.M. Madrid, 2014, p. 209.
[18] Mariana, J. de, *Historia General de España*, BAE, t. XXX, Madrid 1950, pp. 87-88. Cit. Bermejo Cabrero, J.L., *De Roma Antigua...,* p. 210.
[19] Saavedra Fajardo, D., *Idea de un Príncipe político-cristiano representada en cien empresas*, vol. III, Madrid, 1958, pp. 93 and ff.

It was in 1812 that the beginnings of Constitutional government were brought about in Spain and the same author refers to „*the preliminary Passage of the Constitution of 1812* [which] *allows no doubt, there is nothing in the text beyond historical tradition translated into its fundamental laws*"[20]. The constitution under discussion followed the dictates of the primitive historic constitution with the necessary changes for its use in practice, „*hence, it is not surprising that, in the broad deployment of arguments in favour of and against the establishment of the constitutional regime, historical ideas from long ago would be used with Romans and Goths as the initial points of reference*"[21]. For Bermejo Cabrero, if Roman tradition is kept in mind, various levels of consideration may be distinguished, such as the passages and references of writers that that can serve to illustrate or to lend theoretical support to the reasoning upheld in the speeches of the *Cortes* [Spanish lower chamber] or its published papers. For example, Cicero is quoted, through his works *De republica*, *De legibus* or his *Discursos forenses*, as well as Roman historians, such as Tacitus, Titus Livius, etc [22]. Even the political axioms of a constitutional slant became a means of maintaining Roman legal culture in the Hispanic constitutional imaginary, such as for example „*Salus populi, suprema lex esto*", already known in the time of Cicero[23]. The linguistic perspective of Philosophy has founded interesting theories in the field of the social sciences in which the Law is developed, thus for example, the theories of the discourse of truth as a guarantee in the context of deliberative democracy[24]. Since then, there have been proposals to modernize legal language, that cannot do without the weight of dogmatics and tradition in the preparation of legal culture, „*since without reflecting those* [dogmatics and tradition] *it is impossible to justify this* [legal culture]"[25]. The jurists knew that the definition of the principles of natural law should revolve around notions that are more concrete than the subjectivism of philosophical treatises, which led them to re-enunciate Roman principles[26].

II. The influence of European Civil Law

The authors of the Code Civil, written in 1804, combined a sense of balance and clarity of expression, while the radical turbulence of the Revolution was progressively dying down.

The first attempts to introduce rationalism in the field of law are attributed to Domat, in France, a lawyer of civil law of the second half of the 17th century[27]. He placed the elements of Private Law contained in the Codex Justinianus in rational order, as this author

[20] Argüelles, A. de, *Discurso preliminar a la Constitución de 1812*, Madrid 1981, Centro de Estudios Constitucionales, p. 67. Cit. Bermejo Cabrero, J.L., *De Roma Antigua...,* p. 239.
[21] Bermejo CABRERO, J.L., *De Roma Antigua...,* p. 243.
[22] *Ibidem*, p. 243.
[23] La salud del pueblo es la ley suprema. *Ibidem*, p. 244. Cfr. Castro Sáenz, A., *Cicerón y la jurisprudencia romana. Un estudio de historia jurídica*, Tirant, monografías, nº 723, Valencia 2010.
[24] Alañón Olmedo, F., Henríquez Salido, M. do C., Otero Seivane, J., *El latín en la jurisprudencia actua*l. Prologue by Xiol Ríos, A., Aranzadi, Navarra 2001, In the prologue, Xiol Ríos quotes Habermans, Apel on the theory of guaranteeing discourse, he quotes Austin on the theory of language acts and Gadamer hermeneutics, p. 21.
[25] Alañón Olmedo, F., Henríquez Salido, M. do C., Otero Seivane, J., *El latín...*, p. 23.
[26] Cannata, C.A., *Historia de la ciencia jurídica europea*, (trad. Laura Gutiérrez-Massón), Tecnos, Madrid 1996, p. 178.
[27] Domat, *Les loix civiles Dans leur ordre natural*. Paris 1689.

noted pre-Christian notions in Roman Law, „*the consequence of a civilization in decline and deserving to be abandoned, together with other concepts that were entirely reasonable and constitutive of written reason in legal matters*"[28]. With this author, the Romanesque tradition underwent a first rational purge. As of that moment, casuistic law, the analytical doctrine of jurists, would be respectful towards the authorities. The intention was to offer a legal system characterized by its rationality, disassociated from religious connotations and that integrates the person at the centre of legal regulation. Such an idea is consubstantial with humanism in forming the *ius commune*, which would serve as a bridge to the rationalist iusnaturalism and would be the basis and the premise of the new orders[29].

The code from the early 19th century incorporates and is the result of a magnificent tradition that is evident in France in five impressive philosophical meditations: the first emerged following the invasion of the Gauls by the Roman Empire and because of the influence of the Stoic philosopher Marcus Aurelius; the West's most ancient Christian philosophy, that is, the theology and theological teachings of Saint Hilary of Poitiers, which cover Stoicism, considering it, in itself, a pagan expression of Christianity; the second constitutes the maximum splendour of Père Abelard and Héloïse and their translations in renaissance humanism along with Michel de Montaigne; the third stage was formulated through the modern philosophy of René Descartes and the philosophical equilibrium of Blas Pascal; the fourth period situated itself in the proclamation of human rights of the Enlightenment; finally, the Napoleonic Code and its additions of 26 June 1889, 17 July 1970, and the contemporary ones of 29 July 1994 constitute the fifth period[30.]

It so happens that reference in the first place to the person means civil law revolve around this concept, which was described by Marcus Aurelius, in such a way as to link the person with society. One of the meditations included in Book V is the following: 14. „*That which doth not hurt the city itself; cannot hurt any citizen. This rule thou must remember to apply and make use of upon every conceit and apprehension of wrong. If the whole city be not hurt by this, neither am I certainly*".

Hence, it can be said that when the Napoleonic Code was drafted, these meditations were more than understood in the 'Coûtumes d'Orléans'. However, „*the broad meaning of code, in the sense of a compilation of law that integrates texts, norms, sources, etc, can be indistinctly attributed to works that are profoundly different between each other and that the code was therefore a word that had yet to be completely done*"[31.] Let us not forgot that the 18th century implies a change in the study of Law, at a time at which the transition from the modern to the contemporary era took place, as a consequence, among other factors, of the triumph of the American and the French Revolutions. The concept of the person changes as P. Duran states „*the classical definition of the person as individual substance of national nature, which refers to a philosophical and metaphysical approach to the person*

[28] Tomás y Valiente, F., *Manual de Historia del Derecho Español*, Madrid 1990, p. 479.

[29] Durán y Lalaguna, P., „La génesis de la codificación en Francia. Sobre la escuela de la exégesis", in *El Ius Commune y la formación de las instituciones de Derecho Público*, (Coord. Alejandro González-Varas Ibáñez), Tirant Monografías, nº 795, Valencia 2012, p. 245. Cfr. Sánchez Domingo, R., *El Derecho común en Castilla. Comentario a la Lex Gallus de Alonso de Cartagena*, Colecc. Fuentes de Historia del Derecho castellano, nº 1, Burgos 2002, pp. 191-219.

[30] Monroy López, J. de J., „El Código Civil de Napoleón…", p. 82.

[31] Cappellini, P., „Códigos...", p. 107, note 10. This author states in a well-cited article that Petronio, U., „Una categoría storiografica da rivedere", in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 13 (1984), p. 705-717, warned of the tensions it described, due to its clarity and simplicity, rather than from the word „*Code*", in the word „*Code fréderic*".

as a creature, is substituted by a consideration of the person in rationalist categories, which appear incompatible with dependency. The person is conceived of as an autonomous and rational being, who would lose the condition of creature, in so far as his rationality is underscored"[32]. Hence, it was possible to lay the foundations of a system that accepted that all people are equal and have the same rights, from which it may be assumed that the change in the conceptualization of the person entails a change in the conceptualization of the institutions and rights, which is transformed into a change in the organization of society, „*that moves from an arrangement in accordance with trades associations and social strata to organization around the State, which initially opted for the liberal arguments of the 18th century, to apply afterwards the lessons of the industrial revolution and later on of social demands*"[33]. As C.A. Cannata affirms, „*the theory of the law of reason is the form that the doctrine of natural law assumed in the 17th century and in the Enlightenment, the 18th century, and which postulated the existence of a social ethic in accordance with nature and which is converted into a law -natural law- that enters into conflict with positive law*"[34]. At this time, legislative activity was valued and the aspirations towards codification claimed elements common to different conceptualizations of the law of reason, because the conviction was cherished of the existence of a rational law complying with nature and dedicated to the happiness of mankind and it justified the efforts initiated to discover it, in the same way as fixing its content and promulgating it as valid law[35].

Throughout most of the 18th century, ministers, philosophers and some educated men sought to improve the type of social organization that was in existence, maintaining its fundamental principles, with the aim of achieving a rationalized and progressive social strata and an appropriate Law for that purpose. To do so, they felt that it should be rational, impartial and should emanate from sovereign authority, the absolute monarch[36]. The Law, in order to be rational, had to navigate along the channels that the most educated minds would counsel from the superiority of their knowledge. The Law had to be uniform in so far as it would refer to its territorial validity, although legal differences were respected between people due to their belonging to different social strata. Likewise, it was held as indisputable dogma that all rules created „*ex novo"* had to be promulgated by the sovereign; the way of doing so had to consist in surrounding oneself by good ministers and advisers, by educated and efficient men. However, only the will of the sovereign was capable of transforming the opinion proposed by a minister or the consensus of the Council into an imperative regulation. However, Tomas y Valiente affirmed that „*the Law created during the 18th century was on more than one occasion of doubtful rationale. It did not always have uniform validity in all of Spain and, although it was always promulgated in the name of the king, he did not intervene in the preparation of many norms*". However a problem emerged, which was that the Law that was drafted tended to be in accordance with the model outlined by philosophers and enlightened ministers.

Hence, Codification sought to place the rights of man above autocratic and absolute behaviour. The „*secularization of legislation*" became necessary, which involved a change in the heritage of the axiological scale that up until then had been taking place, without

[32] Durán y Lalaguna, P., „La génesis de la codificación...", p. 244.
[33] *Ibidem*, p. 244. The author in footnote. 8, cites the work of DÍAZ. E., *Estado de Derecho y sociedad democrática*, Taurus, Madrid 1981.
[34] Cannata, C.A., *Historia de la ciencia...,* p. 173.
[35] *Ibidem*, p. 176.
[36] Tomás y Valiente, F., *Manual de Historia del Derecho Español*, Madrid 1990, p. 384.

which all attempts at introducing an institutional code were destined to remain on the wayside, since „*when diversity reigns in the spirits, so too does it reign in laws*"[37] and in the same way as law is an expression of society, legislative secularization was considered the cornerstone for the new code, because the improvement of the Ancien Regime, despite the all-embracing power of the monarchs, was a regime of differences[38].

III. Foundations of European Law

As Torrent Ruiz affirmed, „*this community of legal principles, to which the founding Treaties appeal, appear to impact on a recurrent movement in the history of European jurisprudence, which is rediscovered in Roman law and the Romanesque tradition*[39]*, demanding a new mode of study of historical-juridical subject matter and especially Roman law, which on the basis of the codes had been reduced to an essentially historic function, prior to learning, and in a certain way ancillary with regard to other matters (particularly civil law)*"[40]. Nevertheless, no one denied the profound Romanesque roots of the grand European codes, which were presented as an end product, and superior to the *ratio scripta*[41]*,* a Law of reason reformulated by the European Legal Science of the 18th and 19th Centuries, midway between *ius naturale* and pandectics. No one did so, because the grand modern codes of the Central and Western European states, positioned within the tendency towards legal rationalism, would emerge as a product of the union of Natural Law and political planning of the Enlightenment, as a means of achieving in the ultimate instance, a society that would coexist through peaceful means, thanks to rational and ideological organisation. But the fact must not be eluded that the constitutional value of the Napoleonic Code came to surpass the value, even of the European constitutions currently in force. This took place within a political framework that tended to exalt the authentic sense of common law, as well as magnifying the transcendence of agreements between the monarch and the political representatives of the people, while corroborating the absence of normativity in the constitutional text, admitting that the supremacy of the civil code was essentially born because „*in it and only in it did the social and economic relations organised around the key value of property find a foundation*"[42].

As professor A. Masferrer stated, the French influence in the Spanish codifying movement is undoubtable and to that end three fields may be distinguished: „*1) the inspiration from the same modern idea of the Code, a field in which the French Codes enjoyed an undeniable authority up until the mid-19th century; 2) inspiration of a structural type that could be followed in greater or lesser measure by other European Codes, among them the Spanish Code; and, 3) the strictly substantial influence, which permits the discovery of the extent to which the notions, principles and institutions of the Spanish*

[37] Cappellini, P., „Códigos...", p. 115.
[38] *Ibidem*, p. 116.
[39] Crifó, G., „Prospecttive romanistiche per l'Europa unita", in Michel, J., *Droit Romaní et identité européenne*, Brussels 1994, pp. 125 and ff. Torrent Ruiz, A., „Fundamentos del Derecho europeo (Derecho romano-ciencia del Derecho-Derecho europeo)", in *AFDUC*, 11 (2007), p. 947.
[40] Torrent RUIZ, A., „Fundamentos del Derecho….", p. 947.
[41] Casavola, F., „Diritto romano e diritto europeo", in *Labeo* 90 (1994), p. 163. *Cit.* Torrent Ruiz, A., „Fundamentos del Derecho….", p. 947.
[42] Rodotâ, S., „Un codice per la Europa? Diritti nazionali, diritto europeo, diritto global", in *Codici. Una reflessiones di fine milenio. Atti del Convegno internazionale*, Florence, 26-28 October 2000 (P. Capellani and B. Sordi Eds.), Milano 2002, pp. 13-68.

Codes were inspired by those of the French model"[43]. The author goes on to question whether these fields constituted an autochthonous legacy or whether they were the result of the evolution of some institutions deriving from the *ius commune*, of a supranational scope, valid and integrating the *iura propia* of diverse European territories[44].

The publication of the codes, in fact, implied a nationalization of the internal rights of each country, adding regulations derived from a multi-secular legal experience, plus the particular nationalist stamps of all kinds: legal, political, cultural, ideological[45], etc. Soemthing that appears clear in the Spanish Civil Code of 1889, which inspired in the French Code, that was born under the tutelage of political laws, meant a consolidation of traditional Castilian law. This text was heavily criticized from the perspective of its legal technique, because of its imperfect system, as it was not a code written by technocrats, but rather by practitioners and working lawyers, who knew how to write them with a technique that was simple and accessible to all. In Spain, the Civil Code was not brought to fruition with the role of symbol, myth, and a means of comprehending the law. There is no doubt that our Civil Code came to instil a certain order in the earlier legislative confusion, even though it could not overcome the essential goal of codification that aspired to bring legislative unity to the nation. Yet, if it was unable to satisfy the technical and the systematic demands that is writers might have expected, it undoubtedly meant great progress in Spanish legal life. It must not be forgotten that the Justinian *Corpus iuris civilis* is a constitutive element of the linguistic, expressive and argumentative patrimony of European legal culture and after two centuries of codes „*that have come to such a point of exhaustion, even the actual idea of codification is questioned and the unifying aspiration of the EU obliges us to propose an adaptation of the teaching of all legal matters to these new approaches*"[46].

Our Civil Code is the main heir of a legal dogma that was transferred from common law to modern law precisely through codified texts and its articles embody dogmas, figures, techniques and concepts, the fruits of tradition and of the doctrine that constitute the common *acquis* of jurists. To that end, the abandonment of the code would mean the deterioration of that body of knowledge, essential for the harmonious development of private law and even law in general, which could really happen with the decline of the codification of private law.

What is clear is that positive law born of the codes suffered the risk of subsumption into pure pragmatism that went so far as proposing, as from World War II, the convenience of having no codes at all. But behind this conflict, privacy, for example, was enshrined in article 9 of the French Civil Code: „*everyone has the right to respect for his private life"* and based on this privacy, the French Court of Cassation drafted principles and listed the rights to image and the types of protection.

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[43] Masferrer, A., „La Codificación española y sus influencias extranjeras. Una revisión al alcance del influjo francés", in *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular*, (Aniceto Masferrer, ed.), Thomson Reuters Aranzadi, Navarra 2014, p. 37.

[44] Masferrer, A., „La Codificación española...", p. 37. Cfr.Masferrer, A., „The Napoleonic Code pénal and the Codification of Criminal Law in Spain" in, *Le Code penal. Les metamorphoses d´un modèle 1810-1820. Actes du colloque international Lille/Gand*, 16-18 December 2012. Texts compiled and presented by ABOUCAVA Ch., and MARTINAGE, R., Centre d'Histoire Judiciaire, 2012, pp. 65-98.

[45] Cfr. Tarello, G., *Le ideologie della codificazione del secolo XVII*, I, Genova 1967.

[46] Montaban, D., „El Derecho romano después de Europa. La historia jurídica para la formación del jurista y ciudadano europeo", in *Cuadernos del Instituto Antonio de Nebrija*, 9 (2006), p. 365.

But above all, and as an epilogue, a reflection must be made on the foundation of what European legal culture has meant and to do so a „*historical reconstruction*" is needed. The jurist must be considered as a man of science, a solid humanist, aware of what there may be in this project in terms of separation of empiricism as against a globalized world, which is what is observed at present in the different national legal orders, which implies an added difficulty to arrive at the intended homogenization and finally the unification of European law[47]. Although we arrive at the paradox of the modern pro-European approaches, that in the face of the slightly open code-based system, the function of which seems close to ending, there exists an aspiration, on the part of a large group to return to an open system that will surpass the prevailing perspective of the 19th and a large part of the 20th centuries, that nothing exists on the fringes of the law and that this factor is all that needs be taken into account to rationalize social facts and resolution of conflicts[48]. To that end, it is reaffirmed that Roman Law be constituted as a useful tool for criticizing positive law and even community regulations, and not only useful for their criticism, but also for contributing to their preparation and planning, setting out from the presumed common principles of European legal science.

47 TORRENT RUIZ, A., *Fundamentos del Derecho Europeo. Ciencia del derecho: derecho romano-ius commune-derecho europeo*, Madrid 2007, p. 132.
48 *Ibidem,* p. 60.

ADMINISTRATIVE CULTURE AND INNOVATION IN ROMANIA OF THE 21st CENTURY

Mihaela V. CARAUSAN*

***Abstract**: The 21st Century order requires new actions of public administration. In order to accomplish its mission Romanian public administration needs to develop an administrative culture, but in a high-tech era it should pay more attention to innovation. Innovation should be seen as an inner part of public administration and government reforms. Nowadays citizens' access to information is set by different boundaries, the sky is not the limit because „the cloud" is for everybody. The administrative culture requires a reorientation of government activity by providing qualitative services for all citizens. Civil servants must adapt their work and attitude to the new role of government „services for all". In our study we will pay attention to the role of innovation and administrative culture in designing a public administration ready to act in a multicultural environment. We will identify few recommendation for public administrators in order to answer to the new era requirements.*

***Keywords**: administrative values, multicultural environment, third party country citizens, integration process.*

1. Introduction

The need for a broad cultural perspective and research similarities and differences, government structures and administrative, legal and administrative institutions are the result not only of the practical needs but also of the theoretical ones.

The importance of developing a qualitative administration and institutional system have become the key issues in the EU integration process. Often, the quality of administration is associated with the development of governmental and administrative structures. However, the development of administrative capacity and institutional system building include not only the development of structures or raising the professionalism of administration, but also the process of enculturation, defined by the guiding principles of citizens – public administration relations.

The poor quality of administration is considered an important indicator of economic and political crises. Also, the high degree of corruption registered in administration is one of the hindering factors of a professional, stable and impartial public administration. The growing demand for a professional qualitative administration has become a challenge for those who impart administration. However, to achieve effective and efficient changes we should not stop to study only the skills and competencies, but also the behaviours, values and norms which provide the answer to the administrative authorities from citizens.

* Associate professor, PhD, National University of Political Studies and Public Administration, Faculty of Public Administration, Bucharest.

2. Administrative culture

Until now, Romanian public administration studies have focused more on understanding its role and functions in the democratic states. By doing this we lost the citizens who are their beneficiaries. The gap between administration and society leads on legitimacy, identity and efficiency crises. The „D" Plan – Debate, Democracy and Dialogue – announced by the German Chancellor Angela Merkel (2006) should be a starting point for Romanian public administration to reconnect with citizens.

To ensure reconnection, one of the public administration objectives should be the institutionalisation of the causal link between the administrative structures and culture. The institutional architecture of Romanian public administration is in constant change, the adaptation and European integration processes require an administrative culture oriented to citizens' needs.

In an area which promotes the free movement of people and services, among others, public administration has to adapt its establishments to a multicultural environment. The administrative system must be ready to act and react to the new requirements, which are not anymore only the expression of the national citizen's needs. That it is why, administrative culture should approach more the multicultural issues. Public administration institutions are not acting, daily, in a multicultural environment that is why this is a test of the 21st Century.

By taking this into account, public administration should not just pursue the reconnection with citizens, but also to establish new relationships with third party country citizens who have other necessities. They are coming from a different cultural environment and for this administrators have to design different cultural policies.

With these changes in the national, European and international order citizen wants to relate to something simple, a body of values, something that is not bureaucratic. Values are not followed by their own nature, they are not myths, nor feelings of possession, and neither subjects or predicates of value judgments. Values are the subject of desire. Desire includes values as its correlative object. We could not however say, that desire covers only the things, the human beings and their concrete actions or those determined qualities for which they are coveted. Nowadays, citizen's desire, in relation with public administration is „to be put first" and not to be seen only as the beneficiary, but the one who creates this system, the one who set the limits, the decision maker, and the one who makes the system to works „better". In this respect, participatory institutions are a requirement in the new framework. The idea is not new and has not to be perceived as a simple communication problem. It's about developing a set of values and attitudes, which will help as to act as a multicultural nation.

If civilization is culture integrated into an organized system of work, living and thinking, the strength and permanence of a civilization depends on whether a given society ... creates its organizational systems and relevant institutions, by which it transforms the cultural realities, in specifics of civilization. Because, in the end, civilization is only the society which assimilated and integrated (...) the needed cultural values or, from another point of view, it is culture permeated in all cells of social life (Tanase, 1977). In this sense, we can say that no one should claim cultural equalization only equalized opportunities for each person and community.

At the end of any reform is a certain normative outset, objectives that are pursued. Any political regime, democratic or authoritarian, will pretend framework values such as order, authority, organization etc.

The human beings through values as the subject of desire are trying to accomplish:

- the self-interest, each one of us aim to survive and therefore all those values that will help us in this effort are accepted as inner values;
- a „better" of us, better job, family relations etc., we want to be so called „perfect", but because we cannot determine the standards of perfectibility we tend to find models to follow. To get this „ideal state" we impose self-values that we have not considered important, but they are inoculated indirectly by the „model".
- the upper level of Abraham Maslow's pyramid. The transition from one stage to another makes us to adopt values depending on where we are in the hierarchy of needs.

In a similar way to the natural selection, certain ideas of socio-political development and improvement are verified by social practice, giving them their valid universally recognized status. We note that the same natural selection system also applies to administrative culture. The administrative culture requires a reorientation of government activity by providing quality services for all of us, citizens or not. This ideal cannot be achieved only by defining the desired values, values that at one time were perceived as principles, such as: rule of law, separation of powers, decentralization, proportionality etc. The administrative values are simple means and have a pure perseveration sense. Nobody seeks administrative values for themselves, as some purposes, but only to ensure the framework that will helps to achieve the substantial existence.

According to this we understand why, increasingly more often, we ask the public administrators to build the administrative reforms on cultural pillars. This objective cannot be achieved without promoting corresponding values: openness, participation, accountability, efficiency, consistency, coherence etc.

To achieve effective and efficient changes at the cultural level reformers should not stop only at skills and competencies, they should advance to behaviours, values and norms which ensure the answer of the administrative authorities to citizens.

The administrative culture requires a reorientation of government activity by providing qualitative services for all citizens. Civil servants must adapt their work and attitude to the new role of government „services for all". The purpose of modern government is, as we know, to meet the growing demand of citizens for qualitative public services. This objective cannot be achieved by still promoting classical principles such as transparency of decision-making or legal redress. Data protection, access to information on new technologies, on-line participation in the decision-making process are only few of the requirements of the 21st Century.

The human behaviour is under change, civic media is more and more present. The self-realization trajectory can lead to unexpected change of behaviour to which public administration has to respond. The new public administration reform has to create measures for new innovation as ELI-NP (Extreme Light Infrastructure – Nuclear Physics), for a changing and multicultural environment, for European Union integration, for an unsatisfactory performance, for external stakeholders etc. For all this new issues administration has to promote a call for innovation.

3. Administrative innovation

Administrative innovation is the main component of organizational innovation and it refers to a new management system, administrative process, and staff development program (Subramanian and Nilakanta, 1996). Administrative innovation potentially promotes work redesign and work systems, skills enhancement, management systems, and changes in incentives (Yamin et al., 1997). Also, administrative innovation is defined as new

procedures, policies and organizational forms. It explicitly helps public administrators to deal with the turbulence of external environments and is a significant driver of long-term performance in a dynamic period. Likewise, administrative innovation is the innovative operation with respect to planning, organization, personnel, leadership, management, and service (Liao et al., 2008). It influences and improves responsibilities, accountability, and information flows (Armbruster et al., 2008). The greater the administrative innovation is, the more likely that administrative institution will achieve higher performance. (Ussahawanitchakit, 2012)

Technical innovation is another component of administrative innovation and it is defined as an adoption of new ideas pertaining to new products or services, and an introduction of new elements in the public services. Thus, technical innovation is the important driver in explaining public administration efficiency and performance. Moreover, technical innovation affects the routines, processes and operations of public administration (n.a.). (Armbruster et al., 2008) It changes and applies new procedures and processes that initiate new products or services within the public organization in the volatile environments that influence the speed and flexibility of public administration.

The new technologies are outstandingly related to process activities that meet external users, citizens and third party. Public organisation with greater technical innovation seem to be more open, more active in the changing environments.

Access to information about government action is crucial, and governments should actively support, encourage and reward networking to share knowledge and ideas. New means and/or processes for sharing ideas and knowledge across traditional boundaries (across departments, other government orders/jurisdictions with other agencies) should be developed. Knowledge management through the exchange of information and experience is central to promoting excellence in government. (Alberti and Klareskov, 2006) Governments need to improve their image by fighting insularity and by being seen to adapt outside good practices to inspire inquisitiveness. In other words, governments need to work hard to create a positive image in the media (at all levels) despite the fact that it is a difficult endeavour given the propensity of the media to highlight only negative events. (UN, 2005:11)

Based on the „Report of the preparatory committee for the United Nations Conference on Human Settlements" (UN, 1995) we can draw a development line for innovation that have: to demonstrates a tangible impact in improving people's quality of life; to build effective partnerships between the public, private and civil society sectors; to be socially, economically and environmentally sustainable.

Innovation in governance is an incorporation of new and existing elements or a significant change or departure from the traditional way of doing things. Different types of administrative innovations were identified as being: the institutional innovations, which focus on the renewal of established institutions and/or the creation of new institutions; the organizational innovation, including the introduction of new working procedures or management techniques in public administration; the process innovation, which focuses on the improvement of the quality of public service delivery; and the conceptual innovation, which focuses on the introduction of new forms of governance (e.g., interactive policy-making, engaged governance, people's budget reforms, horizontal networks). (UN, 2005:6)

4. Instead of Conclusion

For maximizing the utilization of resources and capacities to create administrative values as well as encourage a more open/participatory culture in the government, administrators have to improve their image and services in order to regain people's trust and restore legitimacy.

Public affairs require innovative institutional mechanisms, processes and policies. Because of this public administration cannot remain in its old self, it needs revitalisation in order to be more proactive, efficient, accountable and citizen – oriented. To accomplish all these desiderates public administration must introduce innovation in its organizational structure, practices, capacities, and also to learn how to mobilize, organise and use human, information, technology and financial resources for service delivery to remote, disadvantaged and challenged people.

Innovation can boost the pride of civil servants working in the public sector, as well as encourage a culture of continuous improvement. Each innovation can create the opportunity for a series of innovations leading to a favourable environment for positive change.

Even so, innovation is not an end in itself, but a means to improve public administration by enhancing the quality of life of all citizens, a complementary mechanisms to reinforce the democratic governance but not as a substitute for existing institutions. Each organization in the public sector should know how much innovation they needs and must learn how to balance stability, continuity and innovation.

In order to encourage innovation in public administration it is very important to visualize the change in order to simplify administration in the face of complexity.

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AN AGENDA SETTING, PRIMING AND FRAMING FOR IMPLEMENTING THE RIGHT OF ACCESS TO INFORMATION ON CLIMATE CHANGE

Marisol ANGLÉS HERNÁNDEZ[*]
Ana María CASTRO MÉNDEZ [**]

Abstract: *We are living in a time period in which variations in climatic conditions extend for decades or longer periods, we are undoubtedly at the phenomenon of climate change. While States agree to take drastic measures as to stop emitting greenhouse gases, and thus decrease in a long period of time the fatal consequences (disasters) causing this phenomenon, the public must take adaptation, resilience and information measures, these actions incumbent upon the State; on the one hand legislate on measures of resilience and adaptation to climate change and secondly, to spread among citizens, using the mass media to reach equally to all people. One of the most effective in getting the message across to the public ways, is used in political campaigns, through agenda setting, priming and framing, this agenda can impact on citizens as company policy on voters in order to guarantee the right of access to information about environmental risks and help build more resilient to climate change societies.*

Keywords: *Climate change, Disasters, Mass media, Right of access to information, Agenda seeting, priming, framing.*

Introduction

Climate change is a phenomenon with unique features, already is global in nature, so it involves complex interactions among natural, social, economic and political processes at the global level. According to the Intergovernmental Panel on Climate Change (IPCC), the global warming is a clear manifesto (IPCC, 2007). The global average temperature of the Earth's surface has increased since the industrial revolution, especially during the last fifty years. The collected scientific evidence leads to the conclusion with high level of confidence that has many of the observed changes in the climate system significant character. As well as, to human activities, primarily the burning of fossil fuels and deforestation, are which are causing these changes. The climate system depends on the balance of several external and internal factors. The external include solar radiation or orbit cycles, while some internal factors are the chemical composition of the atmosphere or the cycles of water and carbon (SEMARNAT, 2013).

In recent decades has identified a significant increase in the concentration of greenhouse gases (GHGs) which alter the atmospheric chemical composition. This concentration has reached 400 parts per million, standing 40% above the average values recorded in the last five hundred years. This has resulted in an increase in average global temperatures, which could reach more than 4 ° C by the end of the century. If so, the

[*] PhD in Law/full-time Research professor, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, marisol_angles@yahoo.com.mx
[**] PhD student in Law, Universidad Autónoma del Estado de Morelos, México, cafecarioca@hotmail.com

company would face very serious environmental, economic and social consequences. That is why it is crucial to take immediate action to mitigate the worsening and the impacts of climate change now. Among the potential impact of an increase in the average surface temperature above 2 ° C or 3 ° C above pre-industrial levels, are the changes in the frequency of extreme weather events such as droughts and heat waves . They could change the oceanic patterns, which in turn would increase the intensity of hurricanes (SEMARNAT, 2013: 10-11).

When changes in average climatic conditions extend for decades or longer periods, we speak of the phenomenon of climate change. Current trends in climate and its variability show that the earth is undergoing a process of this type, since there has been an increase in heavy precipitation events, glacier retreat, reduced sea ice and heat waves (IPCC, 2001). The impacts are expected from the increase of temperature on the planet, sea level rise and movement of agroclimatic bands are shown in Table 1:

Cuadro 1. Latin America and the Caribbean:
main physical projected impacts the región to an increase in temperature 2º C

1. Loss of soil moisture, changing patterns of temperature and precipitation, affecting agricultural productivity and areas with a high ecological value.
2. Increase in sea level and temperature of the ocean surface, which It will affect marine and coastal areas. Rising sea levels involves a increased pressure on freshwater reservoirs in coastal areas, effect great relevance to the Caribbean islands, mostly. Also, the increased level of affect ocean salinity in coastal areas where the mangroves. by Furthermore, the observed increase in ocean temperature will accelerate the process of bleaching of coral reefs, which will result in significant losses of biodiversity. Moreover, rising sea levels will affect infrastructure port and urban areas near the coast.
3. Increased intensity and frequency of extreme weather events. despite the difficulty of establishing a clear relationship between the incidence of events extreme weather and global warming, there is evidence that the recent increase in the number of hurricanes and their intensity are due in part to warming of ocean surface. Therefore, it is expected that these events are occur more frequently.
4. Increased exposure to tropical diseases associated with increased temperature and alterations in precipitation patterns. The effects of climate change on human health are related to the increased incidence cases of malaria, dengue, cholera and heat stress.
5. Rapid retreat of Andean glaciers. It is expected that climate change is still more pronounced in mountainous areas of high elevation. The effects of change climate are already noticeable in the glaciers of the region of the Andes, which have eroded significantly. It is expected that these changes have implications for regulation the hydrological cycle and provision of water for hydropower and for the human consumption.
6. Impacts on watersheds. Global warming increase the amplitude and frequency of extreme rainfall, affecting the hydrological regime basins in the region. Also, the low stability of the hydrological regime will impact on hydropower production.
7. Extension of adverse effects on biodiversity and stability ecosystems. It is expected that climate change alters species and ecosystems natural, changing biodiversity, ecosystem composition and distribution space. Also, it is expected that, in addition to deforestation, change reduce climate resilience of the Amazon rainforest reducing its capacity to carbon sequestration.

Source: CEPAL, 2009; CEPAL, 2010; Vergara et al., 2013 e IPCC, 2013.

In this regard, for America and the Caribbean (ECLAC), Economic Commission estimates that between 1972 and 2011, the total amounts of affected by disasters were approximately 150,000 billion at 2000 prices, which correspond to damage while 63,000 million relates to losses. Most of these disasters have to do with events -meteorológico or climatic hydrologic- and geophysical origin, earthquakes mainly responsible for 309.742 deaths and about 30 million people affected (ECLAC, 2015: 397).

However, focusing the analysis on Latin America and the Caribbean, ECLAC (2014) has listed him as highly vulnerable to climate change because, inter alia, its geography, population distribution, its dependence on natural resources, agricultural activities, biodiversity, forests, but especially by the poor ability to allocate additional resources adaptation processes, as well as a number of social and demographic characteristics that determine the high percentage of people living in social vulnerability, so the percentage of socio-natural disasters is very high. It should highlight the close relationship between poor communities and natural affectations, it is estimated that about "98 percent of people who die or are affected by natural phenomena belong to developing countries" (UNDP, 2014).

Therefore, from the Framework UN Convention on Climate Change public participation and access to information drives because they are fundamental tools for developing and implementing effective policies that allow combat climate change and adapt to its effects .

So in this analysis started from the data and scientific studies showing that the destruction and effects of natural phenomena on the population and infrastructure are a result of increased vulnerability. Under this premise, we question: Are governments have identified vulnerability as the trigger factor of the negative impacts caused in the context of climate change so that warranted legislate on special measures to reduce it? If so, what would be the technique and suitable means of communication to reach the entire population, including the most vulnerable, the instruments of adaptation to climate change to be developed? All this in order to guarantee the right of access to information about environmental risks and help build more resilient to climate change societies.

1. Social-natural disasters and climate change

Since mankind exist, disasters have been accompanied, meaning disaster: the damage situation triggered as a result of the manifestation of a natural or man-made phenomenon socio-natural origin, which, finding themselves vulnerable conditions in a population, causes intense, severe and widespread in the stability and living conditions of the affected community (ECLAC, 2005).

Therefore, Blaikie et al. (1996) argues that extreme events are only one of the factors that cause disasters, and its combination with the characteristics of natural, social, political and economic what ultimately determines the occurrence of the same medium. In the same vein, Cardona (2001) argues that disasters must be understood as unresolved problems of development, since they are not events of nature per se, but situations resulting from the relationship between the natural and the organization and structure society.

For its part, the International Strategy for Disaster Reduction United Nations (UNISDR, 2002) notes that the increase in human and material loss product lives disaster vulnerability is due to induced patterns chosen development; as deforestation, biodiversity loss, declining water quality and desertification, among others, which contribute to increasing existing risk conditions.

However, to refer to the vulnerability, it should refer to risk, which consists of two basic elements: the threat and vulnerability. The first, which is the external risk factor is represented by "the probability of exceeding a level of occurrence of an event with a certain intensity, in a specific place and for a given exposure time" (Cardona, 2001); The second factor is the internal risk and corresponds to "the conditions determined by factors or physical, social, economic and environmental processes, which increase the susceptibility of a community to the impact of hazards" (UNISDR, 2004).

Returning vulnerability, Chardon (1997) elaborates on the so-called sociocultural factors involved in it, dividiéndoles into three categories: (a) knowledge, (b) perception and (c) behavior. It comes in the first case, the operation of information systems and communication in case of exposure to natural hazards; the second category refers to the perception of risk, which varies from person to person, depending on their values, personality, past experiences, degree of exposure to danger, and social, economic and cultural level; Finally, the behavior relates to the attitude to take concrete measures in case of exposure to natural hazards, and analyzed in three key stages: before (technical prevention and preparedness of populations), during (population behavior and institutions for the emergency period) and after (behavior in the period of post-emergence).

Most of disasters can be avoided through prevention and mitigation. To this end, it is essential that development strategies consider the risk from the preliminary assessment. So the impact studies should always include risk analysis and consider measures for disaster reduction; and emphasize the protection of critical infrastructure, ie reconcile the analysis of environmental impact studies and socio-natural risks shown in Table 2 (Chaparro and Matthias, 2005: 30), that in order to build societies and resilient infrastructure.

Cuadro 2. Environmental impacts studies and socio-natural risk analysis

Environmental impactos studies	Socio-natural risk analysis
Analyze the effects of human activity	Analyze the effects of nature on human activity
Consider quantitative and qualitative aspects of natural resources	Consider aspects of the protection of human and social capital life
Basically oriented to slow effects and continuous	Basically oriented to sudden impacts caused by nature
Are mainly made regarding specific programs and projects	Are performed on activities nature and society considered dangerous
Analyze vulnerabilities of the physical environment natural	Analyze vulnerabilities of the social environment and the built physical medium
Their methodology reflects a conception deterministic	Their methodology reflects a conception probabilistic
The existence of legislation is assumed preset, which provides the framework for projects	Involves identifying threats and failures which may affect human activity or projects
Usually do not consider risk analysis and external threats for projects	Usually do not consider the study of internal aspects of projects
Focus on the study of preventive measures and give less importance to monitor the impacts	Focus on hazard monitoring , emergency response and reconstruction activities

Source: Cárdenas, Camilo (2001).

In this regard it should be noted that in Mexico, the General Law on Climate Change, Article 30 provides that the departments and agencies of the centralized and parastatal federal government, the states and municipalities, within their competence, shall implement adaptation actions as part of it, should use the information contained in the atlas of risk for the development of urban development plans, building codes and zoning of the states and municipalities. For its part, the General Law of Ecological Equilibrium and Environmental Protection, provides in Article 23, section X, the authorities of the Federation, the States, the Federal District and the municipalities, in the sphere of competence, shall to avoid human settlements in areas where populations are exposed to disaster risk adverse impacts of climate change. Complementary to the General Civil Protection Act, considered as a felony, Article 84, building, construction, completion of infrastructure and human settlements that are carried out in an area without developing a risk analysis and, where appropriate, to define measures for its reduction, taking into consideration the applicable regulations and municipal Atlas, State and National and without authorization from the appropriate authority.

2. The right to information as reducing the social vulnerability to climate change

The right wing information access is a human, inalienable, inherent right of all people, which aims to enable them to seek and receive information of all kinds, either orally, in writing or by any other means. Its main feature is that it is an instrumental right that serves as the exercise of other rights budget as an instrument of control of public authorities. (Abramovich, 2000).

The recognition of this right be described as gender and the right of access to environmental information as the species. The legal basis of this right is found in the Universal Declaration of Human Rights, adopted on December 10, 1948[1]; the American Convention on Human Rights, signed on November 22, 1969[2]; in the International Covenant on Civil and Political Rights, signed on December 19, 1966, which relates the same content of the Convention; The United Nations Conference on the Human Environment, held in June 1972, the principle of 19, based on education and information and its relation to vulnerable groups, states:

[...] "It is necessary that both youth and adults pay due attention to the less privileged population sector to broaden the basis for an informed public opinion [...] It is also essential that mass media avoid contributing to the deterioration of human environment and spread, however, educational information about the need to protect and improve it, so that man [sic] can develop in all aspects".

[1] Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom not be bothered to hold opinions to investigate and receive information and ideas through any media and regardless of frontiers".

[2] Article 13: "Everyone has the right to freedom of expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print or art, or through any other media of his choice including information on materials and activities that pose a danger in their communities, and the opportunity to participate in the processes decision-making. States shall facilitate and encourage public awareness and participation by making information available to everyone. Effective access to judicial and administrative proceedings shall be provided between these compensation for damage and relevant resources.

And from an environmental perspective, the Rio Declaration on Environment and Development, adopted in 1992, develops access rights, which fall into three: a) the right of access to information, to guarantee citizens and obligation of States ; b) right of access as a way to facilitate citizen participation in decision making and, c) as a right of access to judicial and administrative procedures, recognizing the repair of the damage, as we read in Principle 10:

The best way to deal with environmental issues is with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities.

So the right-wing environmental information access is a fundamental instrument for governance, advocacy, education and responsible social participation. The latter is done knowingly environmental aspects, deterioration, fragility, interrelation and impact suffered by the environment from our actions; and the negative effects it can have on our lives and ecosystems. From this scenario can propel conscious actions to identify risks and, accordingly, make decisions designed to reduce or eliminate them; make-oriented sustainable development planning and to encourage all sectors of society to participate in environmental protection and preservation (Angles, 2012: 3) in order to reduce vulnerability.

Note that in this study we will focus on the right of access enabled or active transparency, ie the collection and dissemination of information by the authorities (Razquín & Ruiz, 2007), for which we refer in the following sections related to the importance of getting the relevant information to the public to influence their understanding of climate change and vulnerability in order to make decisions to reduce risk.

Note that some European legislation such as Spanish Law 27/2006 of 18 July, by which the rights of access to information, public participation and access to justice in environmental matters are regulated, establishing obligations to the authorities in the dissemination and information as widely and consistently; which implies organize and update the information in its possession for active dissemination through ICT and telecommunications, primarily, and to ensure that environmental information progressively becomes available in electronic databases easily accessible to the public through public telecommunications networks and links to email addresses. States are also required to maintain an updated catalog of standards and relevant judgments and spread immediately imminent threat to human health or the environment, as well as preventive measures.

In this regard, the General Law on Climate Change Mexico proposed as part of national adaptation policy: reducing the vulnerability of society and ecosystems from the effects of climate change; strengthen resilience and resistance of natural and human systems, among others, risks and minimize damage. To this end, we propose that the different levels of government carry out actions and programs for comprehensive risk management. However, the law is silent as to the mechanisms to make known to the general public the content of adaptation programs and strategies that should come to contain risk reduction. Nor is there any reference in this Act to boost and guarantee the right of access to information about climate risks.

In this sense, we consider that it is crucial to clearly establish this relationship and rely on information technology to reach the most vulnerable populations available information on climate change and risk reduction.

3. Information technology in climate risk reduction

From the perspective of climate change, the preliminary report on the implementation of the Rio Principle 10 and the application of the Guidelines Bali, 2014 identified the following gaps in the full implementation of the right of the public to environmental information: 1. The ignorance of the Right of Access to Information and guarantees; 2. Deficiencies in the production and dissemination of reliable information; 3. Insufficient management of technological tools by public officials; 4. Inadequate management of technological tools from the public; 5. Technical complexity and language information and, 6. Ambiguity in the minimum content of the environmental information, among others (UNEP, 2014).

Given this scenario, it is clear that we must make use of new technologies and new approaches to dissemination of relevant climate information. In this line, the Information and Communication Technologies (ICT) -combination of devices and services that obtain, transmit and display data and information electronically, such as personal computers (PCs) and peripherals, networking and telecommunications devices and broadband data-centers- offer a unique opportunity to improve the creation, management, exchange and application of knowledge and relevant information in relation to climate change opportunity.

In Mexico's media were used to disseminate information: television, radio and internet, these three media has the greatest penetrating power is television, then reaches all backgrounds; However, the advantage of radio is reaching the most vulnerable communities and the internet is more restricted because reaches intellectuals and those with the technology to access information more fully. (INEGI, 2012). While the National Survey of Science and Technology of 2015 shows that just over half of the surveyed population (52.9%) did not have internet access; but paradoxically, after television, the internet is the means by which the respondents have access to science-related (UNAM, 2015) news.

According to Castells (1996), the technology applied to citizen participation (e-participation) runs from the formulation of policy in the electronic media, which should be linked to the administration and civil society. Areas where it is necessary to increase knowledge about the use of ICT and communication between people. (Grönlund 2001).

4. Social forms of communication on climate change

One method that has proved very useful to politicians and their campaigns to communicate with the population transversely, has been the agenda setting, priming and framing. From the constructionist theory, agenda setting, priming and framing contribute, each in his own sphere, understanding of media and its impact. According to Van Gorp (2007), agenda setting studies the importance of an issue by the audience influenced by the revealed and the media; priming focuses on the highlights show how influence the approach that has the public when deciding or voting, and framing gives emphasis to the interactive process by which social reality is created. Meanwhile, Kinder (2007) relates the three theories referring to the media bombardment carried out on political issues that are subject citizens, which influences the way in which citizens construct and give meaning to the political events (framing), in how they decide what is important in politics (agenda setting) and how to evaluate the policies and legitimized by the political authorities (priming).

It is on this basis that we propose campaigns to promote this strategy for sustainable development and awareness of the problems associated with climate change, adaptation to processes and reducing social vulnerability. Given that the media has a capacity of very large penetration and can reach even the most vulnerable, we consider the application of the theories of setting, primming and framing agenda, although they were created mainly for political campaigns, they may guide you to fix the climate change information as follows:

1. Agenda setting. Whereas the media have the ability to guide the audience to the topics that while special and more attention (Mc Combs, 1996); organizing the three-point agenda is proposed: 1. What the media say, in this case the effects of climate change by geographical area, would help to raise awareness about the risks of exposure with emphasis on vulnerable areas; 2. What we tell the public agenda, this is to inform people so they know who to contact for access to more data on climate adaptation and 3. The agenda emergency, ie communicate what should people do if an emergency by a derivative of climate change event occurs.
2. Priming ensures the relevancy of certain elements of the news for argumentatively support a particular interpretation of facts. So it would be important to convey examples of places adapted to the effects of climate change in order to take them as case studies to replicate, rather than disseminate information about devastation, death or loss.
3. The effect "framing". According to Entman (1993) by the framing of events means defining the problem situation and establish focal ideas that guide interpretation, identify causative agents and predict or evaluate effects and consequences. Also advancing ethical and moral judgments and reach justify actions to the problems identified. Therefore, the frame must consider the environment and adapt to an urban context, semi rural and local or community, the latter could even require use a specific language or dialect, by region.

5. Conclusions

The guarantee of the right of access to information on the effects and risks of the company related to climate change is an imperative of national states. Not enough to impose legislative, creating agencies and design public policies to prevent the effects of climate change are unknown to most of the population.

In the absence of a national communication strategy and information on the phenomenon of climate change, its impacts on ecosystems and society and social vulnerability, intends to take the example and commitment that gives political campaigns, and thus 1. Organize an agenda setting in which it was planned: a) What will communicate in the media on climate change adaptation and risk prevention; b) What will tell the public agency to citizens seeking further information on climate change impacts and adaptation measures and prevention that can be implemented, and c) emergency information, ie, the urgent measures; 2. Plan the effect of this agenda, priming, ie to highlight the places that have implemented measures to adapt to climate change and its benefits; rather than highlighting negative effects of this natural phenomenon and 3. The framing or framing, this is the way to be getting information transverse to the different social strata, with emphasis on vulnerable populations, but differentially in terms of people context (cultural and religious issues, to name a few).

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