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CONTENTS

SOME CONSIDERATIONS REGARDING BREXIT AND COMMON MARKET. TOWARDS A REFUNDATION OF EU AFTER BREXIT PROCESS?

Eva DOMÍNGUEZ PÉREZ*

Abstract: *The article deals with the main issues that will probably arise afther Brexit process regarding EU common market and Intellectual Property Rights. In the first part of this contribution the author deals with the Brexit process itself, and also with the main possibilities which could be the commercial frame within EU and United Kingdom afther the Brexit process has reached its end. The second part pretends to show the main legal consecuences that could arise in the field of Intellectual Property Rights once Brexit ends.*

Keywords: *Brexit, Common market, withdrawn EU, refundation, Intellectual Property Rights.*

I. Introduction: Brexit background. Withdrawn EU Process. Common Market implications.

1. Withdrawn EU Process.

As it is known, since 2007 (Treaty of Lisbon), the EU Treaty offers a Member State an explicit legal basis to leave the EU (Article 50 TEU). Pursuant to Article 50(2) TEU, the UK can start the exit procedure by giving notice to the European Council, and the exit agreement will be concluded on behalf of the EU by the Council, acting upon a qualified majority and after having obtained the consent of the European Parliament.

The agreement must set out the arrangements for the UK's exit, on one hand, and take account of the framework for the UK's future relationship with the EU, on the other hand. The UK cannot participate in the relevant discussions or decisions of the European Council or Council. The EU Treaties cease to apply to the UK from the date of entry into force of the exit agreement or, if there is no such agreement, 2 years after the date of notice under Article 50 TEU, unless the European Council, in agreement with the UK, unanimously decides to extend this period.

Due to the fact that the exit procedure has never been called for, the way forward is full of uncertainties. Apart from Article 50 TEU, no further provisions or guidelines apply. This uncertainties rise out in all the legal issues which are related to EU Law: no single subject will be out of suffering certain Brexit effect or impact, though is clear that some "subjetcs" will be specially "damaged" by the Brexit process.

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This could be the case of Intellectual Property Rights. Intellectual Property is an important asset of any business: Obtaining and maintaining adequate intellectual property protection at national, European and international level, are key elements of a long term business strategy. In this scientific Paper, we provide an overview of the impact that Brexit will have on EU Market and specially in Intellectual Property Rights, and also the main challenges caused by Brexit in the field of Intellectual Property Rights, according to a cronological metodology.

Anyway, all the issues dealing with Intellectuall Property Rights will be dealt within the Common Market: Brexit is not an issue that could be dealt with isolated from the European Union and specialley isolated from the future of the European Union. This idea has been deeply recently assumed by the European Institutions throught the enactment of the Paper from Comission "Refundation of European Union"[1].

Brexit process, as said before, will take some time to be finished; at the moment of the writting of this Paper, the first Agreement Round rises with the result of UK goberment and EU Institutions have reached an agreement dealing with rights of EU citizens living in UK, finantial issues, and the issues dealing with North Ireland Border (8th December 2017). The second Round Agreement was scheduled for mid December 2017, and it has dealt with security issues and Trade matters. At the time of writting this Paper, no releveants agreeements have been already achieved, being a great number of issues –if not most of them-, opened for new discussions and future agreements.

2. Brexit consecuences relating to EU Regulations, EU Directives and the CJEU.

2.1. One of the most important issues that has to be clarified dealing with the post-Brexit is which law will be apliyed in UK. European law will continue to apply to the UK. It is important to distinguish between *Regulations and Directives*: On the one hand, EU Regulations are directly applicable to all EU Member States without the need for national legislation. On the other hand, Directives must be implemented into national law before they take effect. In the UK, Directives are implemented by Statutory Instruments or Acts of Parliament. After Brexit, Regulations will cease to be applicable, as they only have effect throughout the EU of which the UK will no longer be a Member.

Those Directives that have already been implemented into UK law by primary legislation are likely to remain in effect unless the UK Parliament decides to repeal or amend the national laws that transposed them. The position of those Directives that have been implemented by secondary legislation is unclear; some commentators consider that these Directives will survive, while others consider that Directives will fall when the empowering legislation, namely the European Communities Act 1972, is repealed[2].

[1]. "White Paper on the the future of Europe", COM (2017) 2025 final, 1.3.2017.

[2]. "The Impact of Brexit on Intellectual Property", CIPA, 11th october, 2017, page 2.www.cipa.org.uk./policy-and-mnews/briefing-papers

2.2. It is the Government's position that, upon leaving the EU*, the Court of Justice of the European Union* (CJEU, which includes the General Court) would cease to have jurisdiction over UK matters and so cease to be binding authority.

But it is said that, in practice however, their decisions may still indirectly influence the UK courts[3]. This will probably occur in the scope of trademarks: In relation to trade marks, the law as it now applies in the UK under the Trade Marks Act 1994, which follows the EU Trade Mark Directive, has been largely developed by decisions of the CJEU. Whether the UK courts will see fit to depart from decisions of the CJEU in the future remains to be seen. The same to some extent applies to the Law of Designs.

II. Cronological evolution of Brexit Process: possible EU scenaries regarding Trade Agreements and Commercial issues.

1. The date to take into account (*first stage*) dealing with the start of Brexit process is *23rd June 2016 (UK Brexit Referendum),* though the formal starting of withdrawall process (art. 50 EUT) was only applied in 2017.

2. *A second stage* within the Brexit Process started on the 2nd of February 2017, when UK goberment enacted the Document "The United Kingdom´s exit from and new partnership with the European Union"[4]. The Document contains *detailled Rules* about how UK should leave EU, according to the way the Prime Ministry announced in the Parliament last 17th June 2017.

The "way out" from EU would be done according to the *12 Principles* which were pointed out by the Prime Ministry, Principles which are also mentioned in the Document. Some of these Principles are diretly related to Trade issues, specially Principles 8 and 9:

Principle 1: "Providing certainty and clarity: We will provide certainty wherever we can as we approach the negotiations".

Principle 2: "Taking control of our own laws: We will take control of our own statute book and brong an end to the jurisdiction of the Court of Justice of teh European Union in the UK".

Principle 3: "Strengthening the Union: We will secure a deal that Works fo the entire UK for Scotland, Wales, Northen Ireland and all parts of England. We remain fully committed to the Belfast Agreement and its successors".

Principle 4: "Protecting our strong and historic ties with Ireland and mantainning of the Coomon Travle Area, whilst protecting the integrity of our innmigration system and which protects our strong ties with Ireland".

[3]. As has been pointed out (CIPA, page 2), for example, the Boards of Appeal (BoA) of the EPO will continue to follow the CJEU rulings on the Biotech Directive and the UK Courts may continue to pay attention to the BoA decisions. In the past, the CJEU's interpretation of the Biotech Directive has caused some concern, in particular with regards to the patentability of stem cells. The UK courts may wish to diverge from CJEU precedent, but may be cautious as to do so as it would move away from the position of other EPO contracting states. Further, if the UPC goes ahead, the UPC will be bound by the CJEU's decisions on the Biotech Directive and SPCs. Whether or not the UK courts will be thereby bound will depend upon its relationship with the UPC.

[4] Presented to Parliament by the Prime Minister by Command of Her Majesty, February 2017.

Principle 5: “Controlling immigration: We will have control over the number of nationals coming to the UK”.

Principle 6: “Securing rights for EU nationals in the UK, and UK nationals in the EU: We want to secure the status of EU citizens who are already living in the UK, and that of UK Nationals in otehr Member States, as early as we can”.

Principle 7: “Protecting workers’ rights: We will protect and enhance existing worker’s rights”.

Principle 8: “Ensuring free trade with European Markets: We will forge a new strategic partnership with the EU, including a wide reaching, bold and ambitious free trade agreement, and will seek a mutually beneficial new customs agreement with the European Union”.

Principle 9: “Securing new trade agreements with other countries. We will forge ambitious free trade relationship across the world”

Principle 10: “Ensuring the UK remains the best place for science and innovation: We will remain at the vanguard of science and innovation and will seek continued close collaboration with our European Partners”.

Principle 11: “Cooperation in the fight aginst the crime and terrorism: We will continue to work with the EU to preserve European security, to fight terrorism, and to uphold justice across Europe”.

Principle 12: “Delivering a smooth, orderly and exit from the EU: We will seek a phased process of implementation, in which both the UK and the EU institutions and the remaining EU Member States prepare for the new arrangements that will exist between us”.

Afther Reading these Principles, and specially principles 8 and 9, its seems quite clear which are the new stages that UK pretends to take: UK will have to deeply negociate to achieve trade agreements, on the one hand, and UK will try to achieve as a goal a kind of “Trade hiperglobalization”, on the other hand.

The Document ends with *a Final Conclussion (*“The Goverment has made clear that we will honour teh choice thet teh peope of the UK made on the 23rd June 2016; that the UK will leave the EU. We will seek an ambitious future relationship with the EU wich Works for all the people of the UK and which allows the UK to fulfills its aspirations for a truly global UK”), and *two Anexes*.

The first Anex (A) is referred to some different international agrements (and also some mechanims to resolve international disputes) which could be an example for the future relation EU-UK (for example, the EU and Canada Comprehensive Economic Trade Agreement, CETA; EU-Switzerland bilateral Arrangements; North America Free Trade Agreement, NAFTA; Mercosur; New Zleand-Korea Free Trade Agreement; World Trade Organization, WTO). *The second Anex (B)* deals with the Brexit influence in the relation UK and Ireland (North Ireland).

3. *A third stage* starts with the 2017 White Paper of the Commission already mentioned above.

After the UK goverment enacted the Bill on 13 July 2017, about the withdrawall of UK from EU -which was designed to ensure that the UK exits from EU will be developed “with certanty, continuity and control”, the Commission drafted the “White Paper on the Future of Europe” [5].

The mentioned Document, which deals with the Future of Europe, proppposses some Reflections and posible scenarios for a 27 Member States Europe in 2025[6]. This 30 pages Document contains a *deep analysis of the current situación in Europe, dealing with finantial, social, comercial, and military issues, and the reasons why Europe has been involved in deep structural changes which have affected the daily life of all european citizens*. But the Comission Document deals also, which I consider to be of the most importance for the purpose of this scientif contribution, with *the possible and potential scenarios which could occur within EU*. From this point of view, the Commision considers 5 possible EU scenarios afther Brexit, which are firsty mentioned in the White Paper, and afterwords exhaustively developed in the Annexes to the White Paper[7]. Anyway, the Commision states that these 5 possible scenarios are not detailled action plannes which have a binding effect, but are only suggestions scenarios which pretend to stimulate reflection and debate and which could guide the construction of the new EU before 2025.

Though the Commision has taken into consideration most of the aspects and perspectives dealing with EU, the Document shows the great importance that issues dealing with social, economic, defence and security, and commercial aspects have from the EU perspective.

According to the aim of this scientific contribution –the impact the Brexit will have into the EU Commerce and Intellectual Property Rights within EU Common Market-, we should now give a quick overview about how would be the EU Market according to each possible scenario. According with Annex 2 to the Commision White Paper, *the first scenario* could be a “stand by” situation, which means that the single market would be specially reinforced, particulary the energy and the digita áreas. The EU-27 would have to achieve progressive comercial agreements in order to fulfill it aims.

The second scenario would imply that EU-27 would only reinforce the single EU market, which means that EU will not be any more interested in reinforce other cooperation areas (as immigration o security). This potential scenario would imply that all issues related to external EU policy, or migration issues should be dealt with within a bilateral agreement which would have to be signed and developed ad hoc for every specific situation.

The third potential scenario could be that which would imply that those EU Member Staes which would like to cooperate each other and reinforce cooperation in some specific ares, could do so. This scenario is not a fully new one, because this situation has been already occured in EU dealing with the Shengen Area, which only involves those Member States which wished to do so. According to this situation, commerce would be reinforce and EU-27 would have to achieve new progressive comercial agreements.

[5] COM (2017) 2025 final, 1.3.2017.
[6] COM (2017) 2025 final, 1.3.2017.
[7] Annex 2, COM (2017) 2025 final, 1.3.2017, “Annex to the Comission White Paper in the future of Europe. Reflexions and scenarios for a 27 Europe in 2025”.

The fourth potential scenario would imply that some áreas – as Health issues or Labor issues- will not been related to EU competence, but to every Member State. However, Commerce issues woul still be a UE competence.

And finally, according to *the fith potential scenario*, a reinforcement of EU competences would occur, which would means that a new EU structure would arise to some extent: the 27 EU Member States would deeply cooperate each other, and also a strong armonization of Law would be needed. Commercial issues would remain and be dealt with only at an EU level.

III. The Exit Scenarios regarding UK: Brexit and the impact in Intellectual Property Rights.

1. General considerations:

As mentioned above, there are a number of Brexit scenarios[8]. At one end of the spectrum, the UK would follow Norway's example and remain closely integrated with the EU. Under this "Norway model", the UK would become a member of the European Economic Area (EEA) and the European Free Trade Association (EFTA). The UK would have access to the EU single market, remain subject to the EU principles of free movement of goods, people, services and capital, and continue to make budgetary contributions to Brussels. The UK would also remain subject to most EU legislation and to the Court of Justice of the European Union (CJEU) jurisprudence, via the EFTA Court. However, the UK would have much less influence over any new EU legislation[9].

At the other end of the spectrum is the "World Trade Organisation (WTO) model". This would see the UK break from the EU completely to rely on WTO rules. However, these rules would only govern future trade between the UK and other countries. In all other respects, the UK would become a sovereign island able to makes its own policies on matters currently regulated by the EU, such as immigration. The UK would no longer be subject to EU legislation or CJEU judgments.

Which model is going to be choosen will be a matter for negotiation between the UK, the EU and any other affected parties, including the current members of the EEA (Norway, Iceland and Liechtenstein). At the current moment, UK goverment is placed at the second negotiation round (Agreements dealing with border an was achieved in December 2017), which seems to be long and very intense.

2. How will impact the comercial agreements in Intellectual Property Rights? Which will be the impact of the Brexit relating to Intellectual Property Rights?

In general terms, we could admit that the closer the post-Brexit relationship between the UK and EU, the lesser the impact on IP rights. However, some consequences for IP will follow regardless of the nature of the future relationship between the UK and EU, issues which will be developed in this Chapter.

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[8]. See Traub, F./Clay, A., How would a Brexit Affect IP Rights?, page 1.
[9]. See Traub, F./Clay, A., How would a Brexit Affect IP Rights?, page 1.

So, the question arises: *How will Brexit impact in the existing Intellectual Property Right?*

There is no immediate risk of loss of existing IP rights in the UK. They remain valid inthe UK throughout the two-year transition period during which the Brexit negotiations will take place. After this transition period, and depending on the outcome of the negotiations, the following considerations should be taken into account.

A. Copyright Law

Taken into account that the UK is a member of a important number of international treaties and agreements, UK copyrights (music, films, bokks and photo) are protected around the world and will continue so afther Brexit process takes place.

As known, the EU has adopted several Directives in the field of copyright law, requiring coherent implementation under EU Member State law and thus ensuring a certain level of convergence as far as substantive protection requirements and the interpretation thereof (by established case law of the EU Court of Justice) are concerned. We could then see in this aspect a negative consecuence coming from Brexit, which is that the high uniformity level achieved in Copyright Law could not be aimed anymore: Copyright Law will have different interpretation within UK and EU Member States.

With respect to databases, these are generally protected at national level by copyright legislation and/or specific sui generis legislation. It is well known that both protective regimes are based on EU Harmonisation Directives. Although the UK is not expected to adopt radically different copyright or database protection laws after Brexit, businesses should note that there will be more room for differing interpretations and over time perhaps an alignment of the UK protection regime with the US copyright system as well, unless the UK decided to join the EEA[10].

B. Trade secrets ('knowhow')

In the EU, unlike other jurisdictions such as the US, trade secrets are not protected as such by intellectual property legislation. Trade Secrets are not considered to be 'intellectual property rights' in the strict sense, capable of being 'owned' by a person or entity.

In order to meet the growing business demand for adequate and harmonised protection of trade secrets in the European Union, and to ensure an equal degree of protection for trade secrets in the different EU Member States, a Trade Secrets Directive was adopted in May 2016, yet to be implemented in many Member States' national legislation by June 2018. The Directive introduces a common definition of trade secrets, as well as different means by which victims of the misappropriation of trade secrets may obtain redress[11].

It has yet to be seen whether the UK will voluntarily implement the Trade Secrets Directive in its national legislation before Brexit takes effect. Anyway, it seems thata the unified protection and redress mechanisms will be lost for the UK after Brexit, unless the UK decides to join the EEA.

[10]. See "What might change Intellectual Property", Loyens/Loeff, pages 4 and 5.
[11]. See "What might change Intellectual Property", Loyens/Loeff, pages 4 and 5.

C. Patents

The UK's participation in the existing European patent system would be *unaffected by a Brexit.* The system is governed by the European Patent Convention and is independent of the EU. Indeed, non-EU members, including Norway, Switzerland and Turkey, are signatories to the Convention and participate in the system. Following a Brexit, UK and non-UK patentees would, as they can now, be able to make a central application to the European Patent Office (EPO) designating the UK and obtain national UK patent rights.

However, most EU states are in the process of implementing a new EU-wide patent with its own dedicated court system. This new *Unitary Patent (*planned for 2017) will be obtained through the EPO in a manner identical to that used for existing EPC patent applications: a single application will be filed at the EPO, designating all EU states. Within a month after grant by the EPO, the patent owner has the option to file a request for unitary effect, which will lead to his patent then becoming a single Unitary Patent in all the EU member states which have signed up to the new patent system and have ratified the relevant agreements as of the date the request is filed[12].

The new Unitary Patent will have its own court – known as *the Unified Patent Court* – which will deal with validity and infringement. The new court will have multiple branches throughout Europe, each of which will be able to grant a Europe-wide injunction against a patent infringer as a result of a single set of legal proceedings in a single court. Equally, the new court will also have powers to centrally revoke a unitary patent across all the countries it has effect in[13].

It was initially envisaged that the new system will, subject only to any UK vote for a Brexit, came into effect whenever in 2017. However, 13 EU member states must first ratify the Unified Patent Court Agreement, including the UK, France and Germany. France has already ratified, but the UK and Germany have yet to do so pending clarification on matters such as court technology and judicial appointments.

Regardless of whether the Norway or the WTO model was chosen, a Brexit would impact on this system as it is underpinned by EU legal measures. The Unitary Patent regime is an EU initiative and participation is contingent upon being a member of the EU. Afther Brexit, the UK would no longer be eligible to participate absent further legislative measures (Although in 28th November 2017 UK goverment confirmed its intention to continue with the arrangements to ratify United Patents Court Ageement): the chosen seat for the satellite court of the Unified Patent Court for chemical and pharmaceutical patents will also have to be renegotiated. This seat is currently based in London, and will now have to be relocated to another EU Member State[14].

So, it seems that afther Brexit, introduction of the new regime would inevitably be delayed as the underlying legal framework would have to be amended.

However, the opportunity to apply for *"Supplementary Protection Certificates" ("SPCs")* will change afther the Brexit process. SPCs allow for the term of patent rights

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12. See "What might change Intellectual Property", Loyens/Loeff, pages 3 and 4.
13. See "The impact of Brexit on Intellectual Property", CIPA, pages 7 and 8.
14. See Traub, F./Clay, A., "How would a Brexit Affect IP Rights?", page 1.

to be extended for certain medicinal and plant-protection products. As they are "EU creations", they will no longer be available in the UK after Brexit, unless the UK government adopts equivalent national legislation during the transition period, or decides to join the EEA (in which case the SPC protection regime remains applicable to the UK).

D. Trademarks

EU trade marks (previously known as community trade marks) would be impacted by Brexit, regardless of whether the Norway or the WTO model was chosen.

As it is known, the EU trade mark regime is established by EU legislation and EU Trade Marks (EUTMs) give protection in every member state of the EU. In the event of a Brexit, existing EUTMs would cease to cover the UK, and Trade mark proprietors wanting continued trade mark protection in the UK would have to obtain a national UK trade mark in addition to their EUTM.

It is quite unclear exactly what would happen about this issue. Presumably, transitional arrangements would be put in place allowing EUTM owners to convert their EUTM rights in the UK to a national right whilst retaining priority. The current system already allows the conversion of EUTMs into national rights and transitional arrangements are likely to follow a similar route. However, even if this occur, this would probably involves a fee, which could be substantial for large portfolios[15].

But, as a second posibility, the UK could also pass legislation to simply recognise the effect of EUTMs registered at the time of a Brexit, thereby postponing the need to convert to when the trade mark would be due for renewal.

Whatever mechanism could be adopted, what is certain is that the UK Intellectual Property Office will face an unprecedented increase in workload. This could mean delays for EUTM owners in obtaining their successor UK rights[16].

New EUTMs filings post-Brexit would not cover the UK. An applicant would have to apply for a separate UK national trade mark. That would mean that an applicant would incur increased trade mark protection and maintenance costs as a result of having to make two separate applications to achieve the same geographical coverage as a EUTM currently offers. EUTM application fees might need to be adjusted to reflect the reduced scope of EUTM protection.

But Brexit would also have other negatives consequences for EUTMs: *On the one hand,* Pan-European injunctions based on EUTM rights would no longer cover the UK. In respect of new applications for injunctions post-Brexit, the EUTM owner would need to bring two sets of proceedings where an infringement is occurring in one or more EU member states and in the UK. One set of proceedings would be needed before a EUTM court for a pan-European injunction to prohibit the infringement in the EU member state(s). Another set of proceedings would be needed before the UK courts in respect of the UK infringement. This will result in increased litigation costs.

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[15]. See Traub, F./Clay, A., " How would a Brexit Affect IP Rights?", page 2.

[16]. See Saez, C., "EU Commission Position Paper on IP and brexit: Trademarks, Designs", www.ip-watch.org/2017/09/12/eucommision-position-paper-ip.brexit.covers-trademark-desing-gis/

On the other hand, the UK would fall outside the scope of existing pan-European injunctions. A EUTM owner would need to bring proceedings before the UK courts seeking a fresh injunction to prohibit a UK infringement which was previously covered by the Europe-wide injunction (or seek an extension of the pan-European injunction to cover the UK). This would, again, result in increased cost.

E. Design.

For (registered or unregistered) designs, the same reasoning applies as for trademarks. As it is known, EU designs coexist with national design rights in the different EU Member States (also the result of an EU Harmonisation Directive).

A formal exit from the EU implies that transitional measures will have to be taken to ensure continuing protection in the UK of existing *EU-registered design rights.*

Deealing with *unregisted desings*, some protection will be lost, as the current equivalent UK law provides for a more limited level of protection than the equivalent EU law. If the UK were finally, and as a consecuence of negotiation, to decide to join the EEA, the Designs Harmonisation Directive will remain applicable to the UK, in which case national divergence is expected to be limited[17].

It would imply, in other words, that designers in the UK would be set to lose a strong and inexpensive IP right to defend their designs against copying[18].

3. Pararell imports and exhaustation of rights

As known, the principle of exhaustion of rights provides that where goods have been placed on the market in the EEA by the proprietor of a trade mark or registered design, or with his consent, the proprietor cannot rely on those rights to prevent further dealings with his goods (unless there are legitimate reasons to do so). And the grounds of this rule is that exhaustion of rights exists to promote free trade in the EEA.

As negotiations dealing with commerce issues are at the current moment still not finished, there could be some possiblities. If the UK exited the EU using the Norway model, exhaustion of rights would be unaffected as the existing exhaustion rules apply within the EEA.

If the WTO model was adopted, there would be no exhaustion rules. This means, for example, that trade mark or design rights in force in EU member states could be used to prevent goods first sold in the UK from being imported into, and resold in, the EU. Similarly, trade mark or design rights in the UK could be used to prevent goods first sold in the EU from being imported into, and resold in, the UK. Parallel trade in and out of the UK could decline. This could result in distinct UK and EU markets and price differentials[19].

So, as said before, the position may change during any transitional period and, thereafter, following the UK's exit depending on the precise arrangement reached. If the UK, afhter leaving the EU, does not join any other Agreement (e.g. EEA or EFTA), as the existing rules on exhaustion of rights will cease to apply, this would be a

[17] See "What might change Intellectual Property", Loyens/Loeff, page 3.
[18]. See Traub, F./Clay, A., " How would a Brexit Affect IP Rights?", page 2.
[19]. See Traub, F./Clay, A., " How would a Brexit Affect IP Rights?", page 2.

complex area in which some Intellectual Property Rights Associations are already working with stakeholders to achieve clarification on this issue. There is a possibility that this could lead to a more advantageous regime for rights holders[20].

This matter was a significantly complicated by the Irish border problem, namely whether the border between Northern Ireland and the Republic was going to be a soft or hard border with inspection of all commercial traffic after UK exit, but as mentioned before, on decembre 2017 an agreement about ths issue was already achieved (soft border).

4. European Digital Single Market

A goal for 2020 within the European Digital Agenda is to increase the EU digital commece (e-commerce) within the EU Member States. Fron this point of view, there is areal risk that the UK will be shutt off from operating in the European Single maeket. The goal behind the single digital market was to promote common data protection laws, provide better access to productis and services at reduced costs, and generally increase adoption and acceptance of digital services. Afther Brexit, there will be differences in the attitudes of different European countries towards the use of social and digital media marketing[21].

IV. Final Conclussions:

1. According to the new era which will be a reality in the next future, EU Institutions have a taken some measures in order to have a general overview about how the EU could be afther Brexit, which will be the issues that will have to be dealt with, and ho will be the EU goals be achieved. To what extend EU will be different form the current EU, is something we will have to check afther Brexit process and at the end of 2025.
2. Though some minor impacts are expected in several Property Rights within Intellectual Property Rights, Brexit will impact to some extend into these rights. How much negative consecuences will be produced is something which can not be pointed out at the present moment, but a question of how will UK and the EU negotiate within the commercial agreements that will probably be achieved.

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REFLECTIONS ON PERMANENT SOVEREIGNTY OVER THE WEALTH AND NATURAL RESOURCES OF STATES IN THE LIGHT OF UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

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Abstract: *This study aims at explaining the concept of permanent sovereignty over wealth and natural resources which has been on the rise, being a good subject of the United Nations General Assembly (UN) resolutions. Regarding the natural course of things, we emphasize that the two benefits, namely economic and technical assistance, should not be subject to conditions that conflict with the receiving state's arrangements. This is because the main issue is to accentuate the economic development of the developing countries and to ensure their economic independence. To this end, it is necessary to strengthen the inalienable sovereignty of these states on their resources and natural wealth, which is likely to strengthen the economic independence of these countries.*

Keywords: *sovereignty, wealth, natural resources, resolutions*

With the collapse of the colonialist system, the emergence of the right to self-determination of peoples and nations was inevitable, and the basic constituent of this right is permanent sovereignty over the richness and natural resources of peoples and nations.

The concept of permanent sovereignty over wealth and natural resources[1] has been on the rise, being a good subject of the United Nations General Assembly (UN) resolutions. Thus, starting with the first two resolutions in the field of the UN General Assembly, the first concerning the establishment of the Commission on Permanent Sovereignty over the natural wealth and resources of peoples and nations[2], and the second resolution proclaims that the right of permanent sovereignty of each state of free disposal of wealth and natural resources must be respected[3]. Other resolutions followed, including the most important and comprehensive resolution, which is a true status of wealth and natural resources[4]. Another resolution is relative to the role of the UN as regards permanent sovereignty over the riches and natural resources of peoples

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[1] The concept of permanent sovereignty over wealth and natural resources stems from the draft articles adopted in 1955 in the Third UN General Assembly Committee as part of human rights conventions, i.e. the right to self-determination, which further states that peoples can freely dispose of their natural resources and resources without prejudice to the obligations arising from international economic cooperation based on the principle of mutual benefit and on public international law. After that it is to be remembered that under no circumstances can a man be deprived of his own means of existence.

[2] 1314 (XIII) of 12th December 1958.

[3] 1515 (XV) of 15th December 1960.

[4] 1803 (XVII) of 12th December 1962.

and nations[5], and another resolution is devoted to capitalizing on the richness and natural resources of states[6].

The body set up under United Nations General Assembly Resolution 1314 (XIII) of 12 December 1958 in accordance with strict rules, namely the Commission on permanent sovereignty over wealth and natural resources, after proper training, carried out a thorough inspection of the state of permanent sovereignty over the riches and natural resources of peoples and nations, elements which, as we have shown above, have the quality of the basic constituent of the right to self-determination. At the same time, some attention should be paid to the rights and obligations of States under public international law as well as to the importance of encouraging international cooperation to the benefit of developing countries' economic development.

However, this course of action must be based on the recognition of the inalienable right of all states to freely dispose and how they believe in their natural resources and riches, in accordance with their national interests and the mention of the economic independence of the states. It is normal for developed countries to assist developing countries in all ways, such as: multiple cooperation, economic and technical assistance, support for the training of staff in various advanced areas or new fields, staff returning to their home country or even with some advanced technology offerings. Such aids would be conducive to activities that, due to the climate, can not be carried out at the right time, or even never. Also, due to shortcomings, illnesses, hurtful insects, lack of drinking water, food, and the like, it may eventually end up wreaking wars, such as the one in Libya where so many innocent people and children are victims, or leave their country, coming to other countries, who do not receive them with open arms or do not receive them at all.

Cooperation in various fields and especially in the framework of economic and financial agreements between developed and developing countries according to the rules of public international law must be based on the principles of equality and the right of peoples and nations to self-determination.

For a natural course of things, we emphasize that the two benefits, namely economic and technical assistance, should not be subject to conditions that conflict with the receiving state's arrangements. This is because the main issue is to accentuate the economic development of the developing countries and to ensure their economic independence. To this end, it is necessary to strengthen the inalienable sovereignty of these states on their resources and natural wealth, which is likely to strengthen the economic independence of these countries.

In Resolution 1803 (VII) devoted to permanent sovereignty over wealth and natural resources, it is stated that „the right of peoples and nations to permanent sovereignty over their natural resources and riches must be exercised in the interest of their national development and the good state of the people of the state interested". It is clear from the content of the above resolution that the exploitation, development and acquisition of such resources as well as the importation of foreign capital required for such operations must be carried out in accordance with the necessary rules and

[5] 2158 (XVI) of 25th November 1966.
[6] 626 (VII) of 2nd December 1952.

conditions in certain cases, as: the authorization, restriction or prohibition of such activities. However, in activities where the authorization is approved, the imported capital and the benefits resulted from that capital will be governed appropriately by rules of national law in force and by public international law.

The resulting profit has to be divided in proportionally agreed amounts in each case between investors and the recipient state, taking into account that no damage will be incurred for any reason as to the sovereignty of the state over its natural wealth and resources[7].

The fourth paragraph of Resolution 1803 (VII) also refers to the situations of nationalization, expropriation and requisition, and it is stated that such operations will be based on reasons or grounds of public utility, security or national interests that are considered as entering into purely individual sphere or as private interests, both domestic and foreign. In such cases, the landlord will receive an approximate compensation in accordance with the rules in force in the State making use of such measures in the exercise of his sovereignty and in accordance with public international law. In any case, however, when the issue of compensation gives rise to a controversy, the national jurisdiction of the State applying for such measures will be complete. However, it is stated in the Resolution that, based on the agreement of the sovereign state and other interested parties, the settlement of the dispute must be subject to international arbitration or adjudication[8].

The free and beneficial exercise of the sovereignty of peoples and nations on their natural resources must be based on mutual respect and equality in their rights and obligations, which also corresponds spiritually to the UN Charter.

Resolution 1803 (XVII) also provides for several forms of international cooperation to foster the economic development of developing countries, namely: public or private capital investment, exchanges of goods and services, technical assistance or exchanges of information which will be in such a way as to favor the independence of their national development on the basis of respect for the sovereignty of states over their wealth and natural resources.

At the same time, UN General Assembly Resolution 1803 (XVII) draws attention to the fact that the violation of the sovereignty of peoples and nations on their wealth and natural resources is contrary to the spirit and principles of the United Nations Charter and obstructs the development of international cooperation and the maintenance of international peace and security. The foreign investment agreements to which states have freely become parties or those concluded between sovereign states must be respected in good faith and states and international organizations must strictly and permanently respect the sovereignty of peoples and nations on their wealth and resources in accordance with the UN Charter and the principles enshrined in this UN General Assembly Resolution.

Another resolution on the issue of permanent sovereignty over natural resources is resolution no. 2158 of November 25, 1966, which states that the Organization of

[7] I. Brownlie, Principles of Public international law, 1962, pp. 431-44.

[8] K. Gess, Permanent Sovereignty Over Natural Resources: An analytical review of the United Nations declaration and its genesis, 13 International and Comparative Law Quarterly, 1964, pp. 398-449.

Nations should help all developing countries to fully exercise their permanent sovereignty over natural resources and resources and help achieve value of these resources, so that even thereafter the states themselves can do this, and thus be able to choose how their natural resources will be exploited and marketed. At the same time, this resolution recognizes the right of all states, and in particular developing countries, to ensure increased participation in the management of businesses wholly or partly owned by foreign capital and to have a greater share of the benefits and the benefits of such exploitation on a fair basis, taking into account the needs and objectives of the peoples concerned in terms of development as well as mutually acceptable contractual practices, and commits the countries of origin of these capital to refrain from any action that might impede the exercise of this inalienable right.

At the end of this presentation, we deeply regret that the regime of foreign firms operating in Romania on the invaluable resources of our country is far from the requirements and lessons embodied in the United Nations documents many years ago. Thus, foreign companies that act by plundering the green gold on the mountains of Romania leave behind an unforgettable sight that afflicts the hearts of Romanians everywhere. Likewise, the golden gold is extracted wildly from the land of Romania (Roşia Montană) and takes the way of foreign countries. But the actions do not stop there, the copper is also being extracted, and the Black Sea is also disturbed by the underground riches, namely oil and natural gas, and who knows what this country's land – Romania hides.

And there is something else, if the resolutions show that the benefits are divided on an equal footing, in Romania's practice the benefits are divided on an equal footing, in Romania's practice the benefits for our country are at the lowest level or nonexistent, and not at all the issue of participation in the management of foreign enterprises whose operation is wholly or partly carried out by foreign-owned firms, or to share the benefits and benefits on a fair basis, and many other such advantages. Moreover, sometimes foreign firms cut into protected parks or private properties.

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4. UN General Assembly Resolution 1314 (XIII) of 12th December 1958;
5. UN General Assembly Resolution 1515 (XV) of 15th December 1960;
6. UN General Assembly Resolution 1803 (XVII) of 12th December 1962;
7. UN General Assembly Resolution 2158 (XVI) of 25th November 1966.

CONSTITUTIONAL JUSTICE IN ROMANIA EVOLUTION AND PERSPECTIVES

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Abstract: *The supremacy of Constitution is a reality also due to the role of the Constitutional Court, as defined in article 142 paragraph (1) of the Constitution. The Constitutional Court's powers contribute essentially to the achievement of the lawful state and, therefore, a historical analysis of the evolution of this important constitutional institution is likely to highlight the legitimacy of the constitutionality control of the laws in Romania,but also its perspectives. In our analysis, we are debating for the concept of constitutional justice, regarded from a historical point of view, which includes the main attribution of a constitutional court, namely that of controlling the constitutionality of the laws. From this perspective, we point out the main evolution moments of the constitutionality control of the laws in Romania, analyzing briefly the particularities of the constitutional regulations during the evolution of constitutional justice in our country. At the same time, we emphasize the contemporary features of the control of constitutionality of the laws in Romania, and we argue that guaranteeing the supremacy of the Constitution, through constitutionality control, must be seen in the broad sense and in terms of the attributions of the courts in this field. We believe that the role of the Constitutional Court must be amplified by new powers, including through future revisions of the Fundamental Law, as this creates new guarantees regarding the reality of the principle of separation and balance of powers in the state, and obviously the guaranteeing of the supremacy of the Basic Law.*
Keywords: *Constitutional justice, control of constitutionality of the laws, historical stages of the control of constitutionality of the laws in Romania, contemporary features of constitutional justice, new proposals for ferenda law.*

I. Significance and features of the constitutional justice

The supremacy of Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the control of constitutionality of laws, represent the main guarantee of the supremacy of Constitution, as expressly stipulated in the Fundamental Law of Romania.

Professor Ion Deleanu appreciated that "the constitutional justice can be considered, in addition to many others, a paradigm of this century."[1] The birth and evolution of constitutional justice is determined by a number of factors to which the doctrine refers, among which we mention: the man, as a citizen, becomes a cardinal axiological reference of the civil and political society, while the fundamental rights and freedoms only represent a simple theoretical discourse, but a a normative reality; it is

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[1] Ion Deleanu, *Constitutional justice*, Lumina Lex Publishing House, Bucharest, 1995, p.5.

done a reconsideration of democracy in the sense that the protection of the minority becomes a major requirement of the lawful state and, at the same time, a counterpart to the principle of majority; "the parliamentary sovereignty" is subjected to the supremacy of the law and, in particular, to Constitution, therefore the law is no longer an infallible act of Parliament, yet is it conditioned by the norms and values of the Constitution; and not the least, the reconsideration of the role and place of the constitutions in the sense of their qualification, especially as "fundamental foundations of the governed ones and not of the governors, as a dynamic act, in a continuous modeling and act of society".[2]

The term "constitutional justice" or "constitutional jurisdiction" are controversial in the literature in specialty, the control of constitutionality of laws being preferred in particular. However, the notion of "constitutional justice" appears in Kelsen's work as "the jurisdictional guarantee of Constitution"[3]. Eisenmann also considers it to be "that form of justice or, more precisely, the jurisdiction that pertains to constitutional laws", without which the Constitution would be but a mere "political program, only binding morally". The same author makes the distinction between constitutional justice and constitutional jurisdiction. The "Constitutional justice" is the form through which the distribution of prerogatives between ordinary legislation and constitutional law is guaranteed, and the "constitutional jurisdiction" refers to the authority through which the constitutional[4] justice is achieved.

In Romanian literature, the notion of "constitutional justice" has come about mainly due to the contribution made by Professor Ion Deleanu[5] in this field. Without a thorough analysis of this concept, we consider that the constitutional justice is a legal category of special significance whose constitutional constituents are as follows:

a) designates all the institutions and procedures through which the Constitution supremacy is achieved.

b) a state body competent to carry it out with the duties provided by the Constitution and the law;

(c) a set of technical means and forms of implementation with specific and exclusive features;

d) the purpose of the constitutional justice is to ensure the supremacy of Constitution.

There is no identity between the concepts of constitutional justice and, respectively, the constitutionality control of laws. The latter one is only a part of the first.

In the sense of the above definition, the general features of the constitutional justice can be identified:

- it is a genuine jurisdiction but having some peculiarities over other forms of jurisdiction having in view this one’s purpose;
- it may use common procedural rules, but also the own procedural rules consecrated in the Constitution, laws and regulations determined by the nature of the constitutional litigation;

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[2] For developments see Ion Deleanu, Quoted works, p. 5, 6.

[3] Hans Kelsen, *La garantie jurisdictionnelle de la Constituion*, în Revue de Droit publique, 1928, p.197 and the nexts.

[4] For development see Ch. Eisenmann, *La Justice constitutionnelle de la Haute Cour Constitutionnelle d’Autriche*, Paris, 1928, reed. PUAM et Economica, 1986.

[5] For developments see Ion Deleanu, quoted works. p. 9-126.

- can be done by a specialized state body (political, judicial, or dual-nature), or by the common law courts;
- it is an exclusive justice because it has the monopoly of the constitutional litigation.
- it is not always concentrated because the common law courts may have perspectives in the area of constitutional litigation:
- the independence of the constitutional justice consists in the existence of a "constitutional statute" of the body implementing this type of jurisdiction, consisting in the independent statutory and administrative autonomy vis-à-vis of any public authority; the verification of its own competence, the prevalence of abuses of constitutional justice over any other judicial decisions: the independence and immovability of the judges and, in some cases, their designation using criteria other than those relating to the recruitment, appointment and promotion of career magistrates;

The control of constitutionality of the laws is the main form of constitutional justice and is a basis for democracy guaranteeing the establishment of a democratic government that respects the supremacy of the law and Constitution.

George Alexianu considered that legality is an attribute of the modern state. The idea of legality in author's conception is formulated as follows: all the state organs operate on the basis of a lawful order established by the legislator, which one must be respected.

The same author, referring to the supremacy of Constitution, fully affirmed and in relation to today's realities: "When the modern state organizes its new appearance, the first idea that concerns it is to stop the administrative abuse, hence the invcention of the constitutions and by judicial means the establishing of the legality control. Once this abuse is established appears a new one, a more serious one, that of the Parliament. Then are invented the supremacy of Constitution and various systems for guaranteeing it. The idea of legality thus gains a strong strengthening leverage"[6].

An important aspect is also to define the notion of control of the constitutionality of laws. In the legal doctrine[7] was emphasized that the issue of this attribution must be included in the principle of legality. Legality is a fundamental principle of organizing and operating the social and political system. This principle has several coordinates: the existence of a hierarchical legal system on top of which is the Constitution. Therefore, the ordinary law must comply to Constitution in order to fulfill the condition of legality; the state bodies must carry out their duties in strict compliance with the observance of the competences established by the laws; the elaboration of the normative acts should be done by competent bodies, after a predetermined procedure in compliance with the provisions of the higher normative acts with legal force and with the observance of the law and Constitution by all state bodies.

[6] George Alexianu, *Constitutional Law*, Schools' House Publisher, Bucharest, 1930, p. 71.

[7] On this meaning see Ion Deleanu, *Constitutional institutions and procedures*, C.H..Beck Publishing House, Bucharest, 2006, p.810; I.Muraru, E.S. Tănăsescu, *Constitutional law and political institutions*, Vol. II, C.H.Beck Publishing House, Bucharest, 2014, p.191; Marius Andreescu, Andra Puran, *Constitutional law. General theory of the State*, Second edition, C.H. Beck Publishing House, Bucharest, 2017, p.p. 205-206.

In the doctrine, the constitutionality control of the laws was defined as: "The organized activity for verifying the conformity of the law with the constitution, and from the point of view of the constitutional law it contains rules regarding the authorities competent to make this verification, the procedure to follow and the measures that can be taken after this procedure[8] has been completed."

The analysis of the definition shows the complex significance of the constitutionality control of the laws. This is an institution of the constitutional law, which is the set of legal norms relating to the organization and functioning of the authority competent to exercise the control, as well as the set of legal rules having a procedural nature that regulate which ones may be disposed by a constitutional court.

At the same time, it is also an organized activity guaranteeing the supremacy of Constitution by verifying the conformity of the norms contained in the laws and other normative acts with the constitutional regulations.

In essence, the control of the laws' constitutionality requires the verification of laws' compliance as a legal act of the Parliament, but also of other categories of normative acts with the norms contained in the Constitution. The compliance must exist both formally (the competence of the issuing body and the elaboration procedure) as well as from the material point of view (the competence of the norm in the ordinary law must be in line with the constitutional norm).

II. The emergence and evolution of the constitutionality control of the laws in Romania

The necessity of the constitutionality control of the laws is in fact the expression of the need to guarantee the supremacy of the Constitution in relation to the activity of the parliament.

In our country, the control of the constitutionality of laws has developed marked by the national particularities and the successive application of the two models presented above.

Thus, Cuza's statute established in article 12, that the state and constitutional laws are placed under the protection of the weighing body. Therefore, this Chamber of Parliament could verify the conformity of a law with the Constitution.

The 1866 Constitution did not regulate the control of constitutionality of the laws.

However, the provisions of Article 93 of the Constitution, according to which the Lord "sanctions and promulgates the laws" and that, he "may refuse his sanction." Consequently, the head of state could refuse to promulgate a law if he considered it unconstitutional. Obviously, it is not a genuine control of constitutionality of the laws, but it is a precursor to such verification. As long as the 1866 Constitution was in force, the head of state never made use of this procedure.

The control of constitutionality of the laws done by a judging court rather than by a specialized institution, different from the judiciary power, has also been accepted on the European continent. The constitutional history mentions a Romanian priority in this

[8] I. Muraru, E.S. Tănăsescu, quoted works, p.191.

case. Thus, during the period 1911-1912, the Ilfov Tribunal and then the High Court of Cassation and Justice had the right to verify the constitutional conformity of the laws in the litigation known as the "trams affair" in Bucharest.

Interestingly, the reasoning used by Ilfov Tribunal and by the High Court of Cassation and Justice in motivation of the possibility to carry out the Constitutionality control on a pretorian basis. In essence, the recitals were the following: (1) The court did not of its own motion take the jurisdiction to rule on the constitutionality of a law and to annul it, since such a procedure would have constituted an interference of the judicial power into the powers of the legislature. As a consequence, the court assumed this competence because it was asked to verify the constitutionality of a law; 2) On the basis of the attributions that are given, the judiciary power has as its main mission the interpretation and application of all laws, whether ordinary or constitutional.

If a law invoked is contrary to the Constitution, the court can not refuse to settle the case; 3) There is no provision in the 1866 Constitution which specifically prohibits the right of the judiciary power to check whether a law is in conformity with the Constitution. The provisions of Article 77 of the Constitution are being invoked, according to which a judge, according to the oath, is obliged to apply the laws and the Constitution of the country; 4) unlike ordinary laws, the Constitution is permanent and can only be revised exceptionally. Being the law with supreme power, the Constitution is imposed by its own authority and therefore the judge is obliged to apply it with priority, including in case where the law on which the litigation is settled is contrary to the Constitution[9].

The decisions of Ilfov Tribunal and the High Court of Cassation and Justice were well received by the experts of the time. Here's a short comment: "This decision was a great satisfaction for all people of law. It is a great step forward in advancing this country towards progress, because it consecrates the principle that the Constitution of this state, its foundation, the palace of our rights and freedoms, must not be despised by anyone. We are proud that it has been given to our justice the privilege to show even to the justice of the Western countries the true way of progress in the matter of public law."[10]

For the first time, the constitutionality control of the laws was regulated by the Romanian Constitution in 1923, by article 103, adopting the American model. "Only the Court of Cassation in unified sections has the right to judge the constitutionality of the laws and to declare inappropriate those that are contrary to the Constitution. The judgment on the unconstitutionality of laws is limited to the case alone."

Consequently, the control of constitutionality of the laws was the exclusive competence of the Court of Cassation in unified sections. It could be exercised only by way of the exception of unconstitutionality invoked during the trial of the litigation. At the same time, the pronounced ruling had legal effects only between the parties in the trial and had the power of a rex judecata only in the case solved.

Also, the constitutionality of laws is judged after the litigation has passed all levels of jurisdiction. This procedure was an extraordinary way to appeal a judgment. The provisions of article 29 of the Law of the Court of Cassation stipulated only one

[9] See the „Judicial Courier", No. 32, on April 29th, 1912, pp. 373-376.
[10] N. D. Comşa, *The notifications in the „Judicial Courier*", No.32, on April 29th, 1912, p. 378.

exception when the applicant accepted the suspension of the trial of the case matter so that for the Cassation Court to decide in advance on the constitutionality of the law whose application was required.

At the same time, through these constitutional regulations, the transition from the "diffuse" judicial control, assumed by all courts, to a "concentrated" judicial control, assigned to a single court, namely the Court of Cassation, was made in unified sections. Also, the decision given in that procedure has effects only on the case and between the parties in litigation, and could not have legal effects *"erga omnes*".

The constitutionality control of the laws was governed identically by the Romanian Constitution in 1938, by the provisions of article 75.

In the post-war period, the constitutionality control of the laws was practically no longer regulated. The provisions of article 24 letter j) of the 1952 Constitution stated that the supreme representative body, the Grand National Assembly, has in its competence "the general control over the implementation of the Constitution", which included the right to examine the law's compliance with Constitution.

Similarly, the provisions of Article 43 (point 5) of the Constitution adopted in 1965 established the competence of the Grand National Assembly to exercise general control over the implementation of Constitution, but these provisions regulated more specifically the competence of the supreme representative body in respect of the constitutionality control of laws: "Only the Grand National Assembly decides on the constitutionality of the laws ".

The constituent lawmaker of the post-war period of the totalitarian state renounces the American model, as well as to the principle of separation of the powers in the state and entrusts the constitutionality control to a political body.

The Romanian Constitution in 1991, that restores the values of democracy and of the lawful state, regulates initially the constitutionality of laws in Article 140-145, according to the European model, the competence being entrusted to the Constitutional Court, this one being constituted as an independent public authority.

III. Realities and perspectives of constitutional justice in România

In Romania, the constitutional justice is carried out by the Constitutional Court. The core of the matter are the provisions of article 142-147 of Constitution and those contained in the Law no. 47/1992 on the organization and functioning of the Constitutional Court[11]. However, as we shall see below, the constitutional justice is not an exclusive attribute of the Constitutional Court, being only its most important component the constitutionality control of laws, to which are added the exclusive competencies conferred by Constitution and special laws.

The constitutional provisions through which the Constitutional Court of Romania became a reality were accepted after extensive parliamentary debates during the discussion of the Constitution draft. It is useful for our scientific approach to succinctly mention the maturity of these parliamentary talks, as a result of which the

[11] Republished in the Official Gazette no. 807 on December 3rd, 2010.

Constitutional Court has become a reality. The Parliamentary Committee on the Drafting of the Basic Law has made Title IV to be consecrated to the "Constitutional Council" under the influence of the French constitutional system.

The debates in the constituent assembly can be systematized, as shown in the literature in speciality, into four great ideas: "namely, a) the elimination of the institution, without any variant; b) the abolition of the constitutional council, with the entrusting of its controlling mission to the courts; c) entrusting a constitutional review to a commission; d) acceptance of the control of the laws' constitutionality, exercised by a distinct authority, council, court or constitutional court".[12]

Finally, the Constituent Assembly decided to create a specialized judicial body, namely the Constitutional Court. The essence of the reasoning behind this decision was as follows: "The Constituent Assembly has decided to institutionalize this form of control of constitutionality of the laws. Such control is inherent to the lawful state and democracy. In the post-war period, all the European states that have adopted constitutions have entrusted the control of constitutionality of the laws, not to the courts, but to a special and specialized body, so that the model offered in the project is a European model. By its makeup and its attributions, the Constitutional Court is not a "superpower", nor is it expensive – in relation to other institutions - through its nine members. Entrusting the control of constitutionality of the laws of the Supreme Court of Justice would result in the transformation of the jurisdictional body into a political body, the overordination of the judicial authority, the stimulation of arbitrariness on its part, the return to a form of desuet control, long time outdated in most of the democratic countries world "[13].

The judicial control is an important way of guaranteeing the supremacy of the fundamental law, because by the nature of the attributions of the courts, it interprets and enforces the law, which also implies the obligation to analyze the conformity of judicial acts subjected to the judicial control with the constitutional norms. The courts therefore have competences in ther matter of constitutional justice. We are considering not only the general obligation of the judge to observe and apply the constitutional norms or the powers conferred by the law to notify the constitutional court with an exception of unconstitutionality but in particular the possibility to censure a legal act in terms of constitutionality.

The recent doctrine and jurisprudence in the matter examines the jurisdiction of the courts to verify certain legal acts in terms of compliance with the constitutional rules. An unconstitutional legal act is an act issued with excess power.

The unconstitutionality of a legal act can be ascertained by a court if the following conditions are met cumulatively:

1. the court to exercise its powers within the limits of competence provided by law;
2. the legal act may be individual or normative, may be mandatory or optional;
3. that in the case does not exist the exclusive jurisdiction of the Constitutional Court to rule on the constitutionality of the legal act;

[12] I. Muraru, E. S. Tănăsescu (coordinators), *România Constitution. Comments on the article*, C.H.Beck Publishing House, Bucharest, 2008, p. 1370.
[13] Ibid, p. 1373.

4. the settlement of the case depends on the legal act that is criticized for nonconformity;

5. there is a reasonable, sufficient and pertinent reasoning of the court regarding the unconstitutionality of the legal act.

In case of the cumulative fulfillment of these conditions, the limits of the courts' attributions are not exceeded, but, on the contrary, the principle of supremacy of the Constitution is applied and efficiency is given to the role of the judge to apply and interpret the law correctly. Such a solution is also justified in relation to the role of the judge in the lawful state: to interpret and enforce the law.

The accomplishment of this constitutional mission, which is particularly important and difficult at the same time, requires the judge to apply the law in accordance with the principle of the supremacy of Constitution, therefore to control the constitutionality of the legal acts that form the subject of the litigation brought to justice or that is applied to the settlement of the case. The application of legal acts shall be carried out by the judge taking into account their legal force and observing the principle of the supremacy of Constitution. In this respect, worth mentioning the provisions of Article 4 paragraph (1) of Law no. 303/2004 obliging the magistrates that through their entire activity to ensure the supremacy of the law.

Another issue is to know what solutions the courts can issue, in compliance with the above conditions, when they ascertain the unconstitutionality of a legal act. There may be two situations: *In a first hypothesis*, the courts may be directly invested in verifying the legality of a legal act, as is case for the administrative litigation. In this case, the courts can determine by decision the absolute nullity of the legal acts on the grounds of unconstitutionality. *The other situation* concerns the hypothesis that the courts are not directly invested with verifying the legal act criticized for unconstitutionality, but that legal act applies to the settlement of the case brought to the court. In this case, the courts can no longer dispose the annulment of the unconstitutional legal act, but they will no longer apply it for the settlement of the case.

IV. Some conclusions

In our opinion, it is necessary that the role of the Constitutional Court as guarantor of the Fundamental Law to be amplified by new powers in order to limit the excess power of state authorities. We disagree with what has been stated in the literature in speciality that a possible improvement of the constitutional justice could be achieved by reducing the powers of the constitutional[14] litigation court. It is true that the Constitutional Court has made some controversial decisions regarding the observance of the limits of exercising its attributions in its charge, according to Constitution, by assuming the role of a positive legislator.[15] Reducing the powers of the Constitutional

[14] Genoveva Vrabie, *The juridical nature of the Constitutional Courts and their place within the public authorities system*, in the Journal of Public Law no.1/2010 p. 33.

[15] We are referring for exemplifying to the Decision no.356/2007, published in the Official Gazette no.322 on May 14th 2007 and to the Decision no. 98/2008 published in the Official Gazette no. 140 on February 22nd, 2008.

Court for this reason is not a legal solution. Of course, reducing the powers of a state authority has as consequence the elimination of the risk of misconduct of those attributions. Not in this way it is achieved within a lawful state the improvement of the activity of a state authority, but by seeking legal solutions for better performing of the duties that prove to be necessary to the state and social system.

Proportionality is a fundamental principle of the law explicitly consecrated in the constitutional, legislative regulations and international legal instruments. It is based on the values of the rational justice and equity and expresses the existence of a balanced or appropriate relationship between actions, situations and phenomena, being a criterion for limiting the measures disposed by the state authorities to what is necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess power of state authorities. Proportionality is a basic principle of the European Union law being explicitly consecrated in the provisions of Article 5 of the Treaty on the European Union.[16]

We consider that the express regulation of this principle only in the content of the provisions of Article 53 of Constitution, with applying on the restriction of the exercise of some rights, is insufficient to give full meaning to the significance and importance of the principle for the lawful state.

It is useful, in a future revision of the fundamental law that, at article 1 of the Constitution to be added a new paragraph stipulating that *"The exercise of state power must be proportionate and non-discriminatory"*. This new constitutional regulation would constitute as a genuine constitutional obligation for all state authorities, to exercise their powers in such a way that the measures adopted be within the limits of discretionary power recognized by law. At the same time it is created the possibility for the Constitutional Court to sanction the excess of power in the activity of the Parliament and Government, by the constitutionality control of the laws and ordinances, using as a criterion the principle of proportionality.

In the attributions of the Constitutional Court may also be included the one to rule on the constitutionality of administrative acts exempted from the legality control of the administrative litigation courts. This category of administrative acts, to which Article 126 paragraph 6 of the Constitution refers to and the provisions of Law no. 544/2004 of the administrative litigation, are of great importance for the entire social and state system. Consequently, a constitutional review is necessary because, in its absence the discretionary power of the issuing administrative authority is unlimited with the consequence of the possibility of an excessive restriction on the exercise of the fundamental rights and freedoms or with the violation of some important constitutional values. For the same reasons, our Constitutional Court should be able to pronounce on the constitutionality and the decrees of the President for establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in the appeal procedure in the interest of the law that are binding on the courts. In the absence of any verification of legality or constitutionality, the practice has shown that in many

[16] For developments see Marius Andreescu, *Proportionality, principile of European Union law*, in the Judicial Courier no. 10/2010, pg. 593-598.

situations the Supreme Court has exceeded its duty to interpret the law, and through such decisions has amended or supplemented the normative acts by acting as a true legislator, violating the principle of separation of powers in the state[17]. In these circumstances, in order to avoid the excess power of the Supreme Court, we consider that it is necessary to assign to the Constitutional Court the power to rule on the constitutionality of the decisions of the High Court of Cassation and Justice adopted in the appeal procedure in the interest of the law.

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[17] For developments see Andreescu Marius*, Constitutionality of appeal in the interest in the name of the law and other decisions pronounced*, in the Judicial Courier no. 1 /2011, pg.32-36.

LEGAL REGIME OF BEARER SHARES

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Abstract: *The Romanian Parliament was seized in 2017 and 2018 with several legislative proposals which aim either to amend the Law 31/1990, in the sense of banning bearer shares, or to amend legislation on public procurement, in these sense of excluding participation to public procurement procedure of an economic operator which issues bearer shares. The authors of the legislative proposals mainly assert the fact that issuance of bearer shares enables concealment of shareholders' identity, use of some companies for money laundering, financing some terrorist activities, violation of the legislation on the conflict of interest, etc. This paper analyses the legal regime of the shares issued by trading companies, focusing mainly on bearer shares. In addition, it is our intention to start from legislative solutions adopted by other states and identify methods which should eliminate and/or minimise the risks generated by issuers of bearer shares.*

Keywords: *bearer shares, shareholders' identity, national law, comparative law, prevention of money laundering, combat of money laundering*

I. Preliminary aspects

The Romanian Parliament was seized in 2017 and 2018 with several legislative proposals which aim either to amend the Law 31/1990[1], in the sense of banning bearer shares, or to amend legislation on public procurement, in these sense of excluding participation to public procurement procedure of an economic operator which issues bearer shares.

The statement of reasons of the legislative proposals promoted[2] mentions that the Member States of the European Union and NATO have adopted measures to make the owners of share capitals transparent in order to avoid money laundering, conflicts of interest. In addition, the initiators stated that the difficulty relating to identification of the owners of bearer shares and implicitly the last owner of the company which issued such instrument represent a gap intensely exploited in the activity focused on concealing or disguising the real owner of the entities used in connection with money laundering schemes. The initiators provided as arguments the Recommendations of the financial action task force – FATF, which recommend the Member States to take

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[1]Company Law 31/1990 – Republished – 15 February 2013 – normative act amended by Art. 18, point 1 of Title IV Law 76/2012 for enforcement of Law no. 134/2010 on Civil Procedure Code, published in the Official Gazette under no. 365 of 30 May 2012.

[2] The legislative proposal on amendment and supplement of Company Law 31/1900 initiated by a parliamentary group of the National Liberal Party (Law 487/2017) or legislative proposals under the same title initiated by a parliamentary group of the Save Romania Union (Law 19/2018). The proposal to amend the law 31/1990 was also submitted by the legislative initiative of the citizens published in the Official Gazette no. 846/25 October 2017.

suitable actions in order to prevent use of such companies for money laundering and to prove that such actions are effective.

The legislative initiatives mentioned have chiefly proposed amendment of article 8 letter f), article 91 (1), article 99[1], and repeal of article 92 (4) and article 99 of Company Law. The essence of the amendments consists in the fact that, in trading companies, the share capital is represented by shares issued by companies which may only be nominative. The nominative shares may be issued in a material form, on paper support, or in a dematerialised form, and are registered in the Shareholders' Register. The initiators have proposed terms in relation to which companies issuing bearer shares are forced to convert them into nominative shares and penalties of contravention or criminal nature.

In other legislative proposals, the initiators have proposed exclusion from public procurement procedures of companies issuing bearer shares. The solutions proposed are in contradiction with the fundamental principles governing public procurement[3] (the non-discrimination and equality principles) and also in contradiction with the European norm. In this case, it is the principle of the priority of the European law consecrated by the C.J.U.E.[4] and the Romanian Constitution in article 148 (2) that shall apply.

The legislative initiatives abovementioned were obviously rejected on the account of the fact that in the criterion invoked by the initiators, namely the type of action, there is no situation of exclusion mentioned in the national regulation and the European regulation.

The discussions held on the legislative initiatives to which we have referred have determined us to proceed to an analysis of the internal norms, norms of the European Union, regulations of other states, the issue being of interest not only for the juridical doctrine but also for the Romanian society, in general.

II. Brief background of regulation in national law

The *Condica de Comerciu* adopted in 1840 regulated in Title III "*On Partnerships*", article 18, three types of trading partnerships "*The Code of laws knows three types of merchant's partnerships, namely: general partnership, sleeping partnerships and public limited partnership.*"

According to article 33,"*The capital of the public limited partnership is divided into deeds and subdivided into coupons of a certain amounts",* article 34"*The deed is*

[3]Article 49 of 98/2016 - "The contracting authorities shall treat the economic operators equally and non-discriminatorily and shall act in a transparent and proportional manner".
Article 53 of Law 98/2016 – All and any economic operator is entitled to participate to the award procedure in capacity of tenderer or candidate, individually or jointly (with other economic operators), inclusively in forms of temporary association constituted with the view to participating to the award procedure, in accordance with the requirements of the current law.
Article 57 of Law 98/2016, which transposes Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 *regarding public procurement and repeal of Directive 2004/18/EC,* which sets the cases when the contracting authority may exclude or the Member States may demand such authorities to exclude an economic operator from a public procurement procedure.
[4] Court of Justice of the European Union

in writing form and mentions the giver and the taker. On this occasion, the ownership of the deed is moved from hand to hand", article 35 *"The ownership over the deeds is instituted by registration of the partnership in the registers; on this occasion, the property is moved by formal registration of the sale in the same registers against the signature of the seller and the buyer."*

This means that the shares were issued in a material form, their transfer from one person to another was by simple handover (the act was passed from hand to hand); however, the public limited partnership may decide to register the shares in a log (the registers of the partnership) and the ownership is transferred against the signature of the assignor and the assignee (under the signature of the person who transfers the act or his/her bailiff).

The Romanian Commercial Code of 1887[5] largely regulated the form of the articles of incorporation and the legal regime applicable to shares. According to article 90, the memorandum of association or the bylaws of public limited companies and the joint stock companies should indicate:

a) the amount of the capital subscribed and the capital paid-in;

b) the associates and their address or the number and the nominal value of the shares, whether they are nominative or bearer shares, whether the nominative shares may be converted into bearer shares and vice versa; the due date and the amounts representing payments to be settled by the associates or shareholders.

In the section "*On Shares*" the Romanian Commercial Code laid down the following:

- Shares shall have equal value and they grant owners equal value unless the articles of incorporation do not provide otherwise; the shareholders' right to vote in all general assemblies shall be observed at all times (article 166, (1) and (2)).
- The deeds of the nominative shares or the bearer shares shall include: name of the company, date of the articles of incorporation and date of the company's establishment, place of publication, amount representing share capital, number and total amount of shares, duration of company. These securities shall be torn from a counterfoil log and shall bear the signature of two administrators or the sole administrator.
- The owners of the nominative shares are recognised by registering them in the register, according to article 142, and the shares may be assigned based on a statement made in the same register by the assignor or transferee or their agents, according to article 171.
- The shares not paid in full are always nominative.
- The subscriptors and various assignors are responsible for total payment of shares even through such shares will be abalienated.
- The ownership of property over the bearer shares is transferred by simple handover of the title.

[5] See Romanian Commercial Code annotated, edition supervised by Florin Ciutacu, Sigma Publishing House, pages 110, 116-117.

- The bearer shares may be turned into nominative shares except the case when the shares have not been paid in full.

In 1941 the Law no. 242/1941[6] regarding change of bearer shares into nominative shares was adopted. The regulation mainly laid down that the shares of companies established and based in the country may only be nominative whereas the bearer shares of the companies abovementioned may be rightfully turned into nominative shares. The share owners of any kind shall submit the bearer shares with a view to have them changed into nominative shares by the times set forth in these regulations.

According to article 4 of law 242/1941, "The company shall turn the bearer shares into nominative shares and shall provide mentions both in the security submitted and in the shareholders' register regarding: surname, given name, the regime of the pledgee shareholders". The Board of Administration was compelled to change the nominative shares into bearer shares within 30 days from submission, under the penalty of a fine ranging from 50,000 lei to 100,000 lei applicable to the members of such Board.

The bearer shares not submitted within the times provided in the law were transferred to the property of the state which was to be registered as shareholder of the company through the Ministry of National Economy.

Law 31/1990 regulates in a traditional manner the status of the joint stock companies and the partnerships limited by shares.

According to article 8 of Law 31/1990, the articles of incorporation shall also indicate the number and the nominal value of the shares as well as their type (nominative or bearer shares).

In accordance with article 91 of Law 31/1990:

(1) In joint stock companies, the share capital is represented by the shares issued by the company, which, according to how they are conveyed, they may be nominative or bearer shares;

(2) The type of shares shall be stipulated in the articles of incorporation; otherwise, they will be nominative. The nominative shares may be issued in a material form, on paper support, or in a dematerialised form, in which case they shall be registered in the shareholders' register;

(3)The shares issued by a joint stock company as a consequence of a subscription by public offer of securities, defined as such in the Government Emergency Ordinance no. 28/2002, are subjected to regulations applicable to the official markets on which such share are traded.[7]

In accordance with article 92 of Law 31/1990:

(1) Shares may not be issued for an amount lower than the nominal value;

(2) Shares not paid in full are always nominative;

(3) The share capital may not be increased and no new shares may be issued until the shares previously issued have not been paid in full;

(4) The nominative shares may be converted into bearer shares and vice-versa based on the resolution of the extraordinary general assembly of shareholders reached in compliance with provisions of article 115;

[6] Published in the Official Gazette 71 of 25 March 1941.

[7]Repealed by Article 1, point 40) of Law no. 441/2006 on 01 December 2006.

(5) New cumulative securities may be issued for several shares when the latter are issued in a material form.

In accordance with article 93 (2) of Law 31/1990:

Shares shall comprise:

a) name and duration of company;

b) date of the articles of incorporation, Trade Registry number under which the company was registered, Tax identification number and the number of the Official Gazette of România, Part IV, where the publication was made;

c) share capital, number of shares and their order number, nominal value of shares and payments made;

d) advantages granted to founders.

In accordance with article 97 of Law 31/1990:

In case the company has not issued or released shares in a material form, the company, ex officio or upon request of shareholders, shall release a certificate to each and every shareholder which includes the information provided at article 93 (2) and (3) and also the number, category and nominal value of the shares owned by the shareholder, the position under which such shareholder is registered in the shareholders' register and, where appropriate, the order number of the shares.

In accordance with article 98 of Law 31/1990:

(1) The ownership right over the nominative shares issued in a material form is transferred by statement made in the shareholder book and by a mention made on the title, signed by the assignor and the assignee or their agents. The ownership right over the nominative shares issued in a dematerialised form is transferred by statement made in the shareholder book by the assignor and the assignee or their agents. The articles of incorporation may lay down other forms of transfer of such right of ownership;

(2) The ownership right over the shares issued in a dematerialised form and traded on a regulated market or within an alternative trade system is conveyed in accordance with provisions of the legislation on the stock market;

(3) The subscriptors and the subsequent assignors are jointly responsible for payment of shares within 3 years effective the date when the mention on transfer was made in the shareholders' register.

In accordance with article 99 of Law 31/1990:

The ownership right over the bearer shares is conveyed by simple handover.

There are special laws which operated derogations from the provision of common law applicable to certain companies which may issue only nominative shares.

By way of example, we mention:

a) companies which operate on the stock market[8]: financial investment services companies[9], TRADER companies[10], investment management companies -

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[8] See Adrian Țuțuianu*, Stock Market. Legal Regime applicable to Participants*, Hamangiu Publishing House, 2007, pages 237 and following.

[9] Article 6 of Law 297/2004 - SSIF are legal persons constituted under the form of joint stock companies issuing nominative shares.

[10] Despite the fact that the requirement on issuing nominative shares is not expressly provided in Law 279/2004, CNVM – National Securities Commission regulation no. 32/2006, article 35 leads us to this very conclusion.

S.A.I.[11], investment companies[12], financial investment companies - S.I.F.;[13] (Law 297/2004 regarding stock market).

b) insurance companies – according to article 20 (15) of Law 237/2015[14] regarding certification and surveillance of the insurance and reinsurance companies *"the companies issue only nominative shares, and the actions or operations by which the shareholders' identity is not disclosed to the Financial Supervisory Authority ASF shall be null and void"*.

c) credit institutions – according to article 12 (2) of Government Emergency Ordinance 99/2006 regarding credit institutions and suitability of capital structure "The share capital of a credit institution, Romanian legal person, shall be subscribed in full and in cash upon subscription, including for share capital increases, the contributions in kind being also allowed. The shares or the stock of a credit institution, Romanian legal person, may only be nominative…"

III. Aspects of compared law

3.1 Preliminary aspects on legal regime of shares

The Regulations of the European Union, Member States or third states, are based on the Recommendations of the Financial Action Task Force (FATF).[15] This intergouvernemental body elaborated a number of 40 Recommendations and 8 Special Recommendations which were recognised by the International Monetary Fund and the World Bank as national standards on combating money laundering and terrorism financing. The recommendations made started from the realisation that more and more legal persons are used in order to conceal the real owner and their control over illicit earnings and that independent professionals are widely used for consultancy and support in laundering funds resulting from shares. The 40 Recommendations create a comprehensive framework to combat money laundering and terrorism financing. The recommendations require that the states should adopt measures to identify clients and check their identity using as source clear documents or independent trustworthy information.

The measures to identify the clients concern identification of the real owner/beneficiary and taking reasonable measures to check their identity so that the

[11] According to article 51 (1) letter f) of Law 297/2004 on certification, the investment management company (SAI) shall provide structure of shareholders, shareholders, proof of identity and integrity of significant shareholders.

[12] Article 92 (1) of Law 297/2004 – an investment company shall issue nominative acts paid in full upon subscription.

[13] CNVM (Stock Regulation 15/2004) stipulates at article 219 (1) that "closed-end investment companies which publicly attract financial resources from a natural or legal person, issues nominative shares in a dematerialised form visible by registration in the account of an equal assessment."

[14] Published in the Official Gazette, Part I no. 800 of 28 October 2015.

[15] FATF is an intergovernmental body which sets standards and develops and promotes policies on combat against money laundering and terrorism financing. It currently has 33 members: 31 countries and governments and two international organisations; and more than 20 observers: 5 regional FATF bodies and over 15 other international organisations or bodies. A list of all members and observers is available at http://www.fatf-gafi.org/Members.en.htm

financial institution may recognise who this real owner/beneficiary is. For legal persons and related arrangements, they should include taking, by financial institutions, those reasonable measures to help them understand the control and ownership structure of the client. The recommendations define the notion of real beneficiary as the natural person(s) who is/are owner(s) or hold(s) control of a client and/or the person on behalf of whom the transaction is carried out. Additionally, it includes the persons who have actual control over a legal person or a legal arrangement.

The FATF recommendation also regulates the aspects regarding transparency and real beneficiary of legal persons. The countries have to take measures to prevent use of legal persons for money laundering and terrorism fighting. The countries have to make sure that there is appropriate, accurate and in due-time information which competent authorities may obtain and access in real time with regard to the real beneficiary and the person controlling legal persons. In particular, the countries which have legal persons which may issue bearer shares or mandates of bearer shares, or which allow shareholders or managers appointed, have to take efficient measures to ensure that they are no longer used abusively for money laundering or terrorism financing. The countries have to take measures to facilitate the access to information on the real beneficiary or the controlling person by the financial institutions or DNFBPs[16] to which requirements in recommendations 10 and 22 apply.[17]

3.2 Regulation of the European Union

The regulations of the European Union have transposed the FATF recommendations by Directive (EU) 2015/849 of the European Parliament and the Council of 2 May 2015 regarding use of the financial system with a view to money laundering or terrorism financing, amending the EU Regulation no. 648/2012 of the European Parliament and the Council and to repeal Directive 2005/60/EC of the European Parliament and the Council and Directive 2006/70/EC of the Commission.

The European regulation starts from the findings that money laundering, terrorism financing and organised crime continue to be essential issues which should be approached at the EU level, as they are facilitated by the free movement of capitals and the freedom to provide financial services implied by the integrated financial area of the Union.

The directive defines the real beneficiary at article 3 point 6) as "*all and any natural person(s) who own(s) or control(s) of last resort the client and/or the natural person(s) on behalf of whom a transaction or an activity is carried out and which include(s) at least:*

a) In case of corporate entities: The natural person(s) who own(s) or hold(s) control of last resort over a legal entity by direct or indirect exercise of the ownership right over a sufficient percentage of shares or rights of vote or by sharing in such entity's own capital, including by holding bearer shares, or by exercise of control through means other than a company listed on a regulated market to which apply requirements on disclosure of information in accordance with the Union law or some

[16] DESIGNATED NON-FINANCIAL BUSINESSES OR PROFESSIONS (DNFBP)

[17] The 40 Recommendations of FATF, point E. *The Transparency and the Real Beneficiary of the Legal Persons and Arrangements*, point 24) transparency and real beneficiary of legal persons, page 11.

equivalent international standards which ensure accurate transparency of the information regarding the exercise of the ownership right. Holding 25% plus one shares, or sharing of a natural person in a client's own capitals in a percentage of over 25%, is an indicator of a direct exercise of the ownership right. Holding 25% plus one shares or sharing in a client's own capitals in a percentage of over 25% by a corporate entity under the control of a (some) natural person(s), or by several corporate entities under the control of the same natural person(s), is an indicator of an indirect exercise of the ownership right. This applies without causing prejudice to the member states' right to decide that a low percentage may constitute an indicator of ownership or control. Control through other means may be defined, among others, in accordance with criteria stated in article 22 (1) - (5) of Directive 2014/34/EU of the European Parliament and the Council on the harmonisation of the laws of Member States relating to equipment and protective systems intended for use in potentially explosive atmospheres..

In the event that, after consideration of all possible means and providing that there are no grounds for suspicion, no person is identified in accordance with the first indent or in case there are any doubts that the person(s) identified is (are) the real beneficiary(ies), the natural person(s) who hold a top management position(s), the entities are compelled to keep records of the measures taken in order to identify the real beneficiaries in accordance with the first indent and this point;

b) In case of fiduciaries:

- *The founder;*
- *Trustee (trustees);*
- *The protector, if any;*
- *The beneficiaries or, in case the person who benefits from the legal construction or the legal entity have not been identified, the category of persons of whom main interest is constituted or functions the legal construction or the legal entity;*
- *Any other natural person who exercises control of last resort over a fiduciary, by direct or indirect exercise of the ownership right or by other means;*

c) In case of legal entities such as foundations and other legal fiduciary-like constructions, the natural person(s) who hold(s) positions equivalent or similar to the ones mentioned at letter b).

Another important community regulation in relation to the theme approached is the Recommendation EC 2157/2001 of 8 November 2001 regarding the status of the European company. Without providing details which lie beyond the theme, we note that a European company has to be established as a joint stock company, as this is the best form in terms of financing and managing the needs of a company which operates in line with European requirements. The European company is therefore a joint stock company of which share capital may not be lower than €120,000 euro. In case the legislation of a Member State provides for a higher subscribed capital for a company which carries out certain activities, the head office law (*Lex rei sitae*) applies to European companies. The aspects on the share capital, the legal regime of shares, bonds or other types of securities are regulated by the law of the Member State where the European company concerned is registered.

The Directive 2007/36/EC of the European Parliament and the Council of 11 July 2007 regarding exercise of certain rights by shareholders within listed companies is also of certain relevance to our theme.

This regulates the right of the shareholders to attend the general assembly and to vote in line with the shares owned and sets a date of reference for companies which have issued bearer shares and another date of reference for companies which have issued nominative shares providing that a single date of reference applies to each company which issued both types of shares.

3.3 Legal regime of bearer shares in the EU member states

At European level there are states which have banned bearer shares, among which we enumerate:

A. Belgium

The owner of bearer shares has to be converted them into dematerialised shares or register them in the shareholders' register, by 31 December 2013. Effective 1 January 2014, the bearer shares which were not converted by the owners will be, by operation of law, through shares in a dematerialised form or registered in the shareholders' register. Unless the owner reclaims them by 1 January 2015, the issuer shall sell them on a regulated market (if accepted for trade on a regulated market) or in a public auction (if not accepted for trade on a regulated market).

Unless the owner of the shares requests reimbursement of the payment for the bearer shares from the deposit fund by 31 December 2025, these transactions will become property of the Belgium state by 1 January 2026.

If the issuer of the shares decides not to purchase such bearer shares, they will be assigned to the Belgian state. The Belgian state may transfer these shares by virtue of a contract for transfer of such shares. The last amendment of the law refers to the criminal fine which may be applied to an issuer who failed to organise a public sale of the shares, according to article 11 of the law abovementioned.

B. Czech Republic

The law of 1 January 2014 introduced a series of amendments to the company law and imposed a series of new obligations applicable to companies. The law sets forth that effective the same date, the joint stock companies should create their own website and post specific information. The limited liability companies were free to choose on creation of such website. This mandatory information has to be easily accessible and preferably posted on the first page.

By virtue of Law no. 134/2013 Coli regarding increase of transparency of joint stock companies (Transparency Law), the bearer shares issued by the Czech companies are automatically registered in the shareholders' register effective 1 January 2014. The companies with bearer shares which will be automatically registered in the shareholders' register shall request their owners to convert such shares by 30 March 2014. Upon such request, the shareholders shall convert the shares by 30 June 2014. Unless they act on it, they shall no longer be allowed to exercise their rights relating to such shares and shall not be entitled to dividends.

The Czech companies established prior to 1 January 2014 may opt for compliance with provisions of this law or may apply provisions of the Commercial Code which are not contrary to the mandatory provisions of Law no. 134/2013 Coli.

C. Great Britain[18]

The law provides that the companies should keep records of the majority shareholders in a register named "PSC Book". This will ensure transparency of the English companies and will enable deterrence, identification and sanction of the companies which surreptitiously carry out illegal activities. Enhanced transparency will also ensure a suitable behaviour on the market.

Another provision of the law refers to elimination of the bearer shares which will facilitate disruption of illegal activities and ensure compatibility with the international standards. This will contribute to better transparency among those who own and control companies in Great Britain and facilitate counteraction of certain illegal activities which involve executives of such companies.

D. France

In France, a clear distinction was traditionally made between:

a) Bearer shares - securities VII represented by a material document, share or bond which incorporate the shareholder or bondholder's rights. The recipient of the security is considered to be the owner; the ownership is transferred by mere handling of property.

b) Nominative securities in which case the rights of the holders resulted from the documents.

In 1980 the distinction between bearer securities and nominative securities ceased to be relevant because over 90% of the shareholders and over 50% of the bondholders admitted that the bearer securities held were not materialised and registered in the SICOVAM account. SICOVAM became Euroclear France[19] - body authorised to facilitate movement of securities.

The decision to eliminate materialised securities was determined by:

[18] Great Britain is a member of the European Union. In March 2017, the United Kingdom invoked article 50 to start leaving the European Union. The actual withdrawal is scheduled to take place in March 2019 and will be followed by a transition period until December 2020. *Brexit* – "The withdrawal from the European Union is the legal and political process by which a Member State of the European Union ceases to be a member. The Member States have the right to withdraw from the Union, pursuant to article 50 of Treaty on European Union (TEU) of 2007, which lays down that: "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". "No Member state has ever withdrawn from the EU (or EEC)".

[19] SICOVAM was created in 1949 to facilitate movement of securities. In 2001, the body changed its name to Euroclear. Euroclear ensures compensation of securities between holders of securities accounts. In this regard, it opens current accounts with certified financial intermediaries (providers of investment services, banks, financial institutions) and issuing companies which become its affiliates.

- complications relating to management of such securities;
- high costs incurred by investment institutions and financial institutions which provide securities services;
- the need to have information on the property assets of the French citizens in order to calculate taxes on large fortunes.

As of 1984, all securities issued on the French territory and subjected to French legislation, irrespective of their form - nominative or bearer -, whether they are listed or not, are no longer issued in a material form. They are materialised through a registration in the account opened with the issuer (nominative securities) or an intermediary affiliated to SICOVAM (bearer securities). [20]

The French Commercial Code provides that the securities issued by the joint stock companies take the form of bearer securities or nominative securities. These securities have to be registered in the account in the name of the owner, regardless of their form.

In conclusion, due to their dematerialisation, securities have no material support, which questions the notion of bearer security itself. In order to identify the holders of bearer securities, the French Commercial Code sets forth that the company is entitled to request EUROCLEAR, at any time and for a price, the name, nationality and address of securities holders which confer an immediate or on-term right to vote in the General Assembly of the Shareholders, and also the number of securities held by each of them, and, where appropriate, the restrictions of which securities may be affected.

In case the securities of the company were accepted on a regulated market and the owner's domicile is not on French territory, any intermediary may be registered in the account of such owner. Upon opening the account, the intermediary is therefore compelled to declare his/her capacity of intermediary who owns securities on behalf of another person.

Securities registered in the account will be moved by a simple transfer from an account to another account, based on an order issued by the assignor. Regardless of whether the assignment takes place on a regulated market or outside the market, the transfer shall be operated on the date of registration in the buyer's account. [21]

In terms of legal regime, the French Commercial Code distinguishes as follows:[22]

a) Companies which are not listed on a regulated market shall issue nominative shares. By way of exception, bearer shares may be issued as of 2004, provided that the articles of incorporation of the company (for equity) or the issuance contract (for debt securities) stipulates for such type of issuance.

b) The company of which shares are negotiated on a regulated market may issue nominative shares or bearer shares. The state may require the nominative form for the entire equity of the company or only for part of this equity. [23] Additionally, the nominative form or deposit in a blocked account may be imposed for shares held by persons who benefit from privileged information.

[20] Phillippe Merre, *Droit commercial des sociétés commerciales*, 10ème édition, Ed. Dalloz, 2005. pp. 336, 342.
[21] Phillippe Merre, *cited works*, pages 338-339.
[22] Phillippe Merre, *cited works*, pages 338-339.
[23] The company may grant its loyal shareholders double voting rights.

As for nominative securities, there is also a distinction between:[24]

a) Pure nominative securities – the holder ensures management of his/her securities and exercises his/her rights in a direct manner.

b) Administered nominative securities – the shareholder empowers an intermediary (provider of investment services, bank, financial firm) to administer his/her account opened with the issuer.

E. Portugal

Pursuant to article 46 of National Securities Commission, "Securities are dematerialised or materialised according to whether they are registered in registers or on paper"; in this code, the latter are also designated by securities.

The joint stock companies may opt for issuance of materialised or dematerialised shares. The principle of unitary form is applied, which means that the shares which form part of the same issue have to be issued in the same form of representation.[25]

The materialised shares are shares on paper. They have to contain the order number, the sum of rights relating to the security, and, where appropriate, the global nominal value and identification of the holder on the nominative securities.

The dematerialised securities were introduced in Portugal in 1991. Their representation is exclusively by registrations in accounts. They may be nominative and bearer shares.

With regard to transfer of materialised shares, there is distinction between[26]:

a) Materialised bearer shares, which are conveyed by handover of the security to the buyer (traditio) or the shareholder indicated on the share. If the securities have already been deposited with the same entity of custody, the transfer shall take place by registration in the account after such registration was requested.

b) Materialised nominative shares are conveyed by declaring the transfer noted on the security in favour of the acquirer, followed by registration with the issuer or the representing financial intermediary. In case the securities are deposited with an entity of custody, the depositary declares thereon, in accordance with the instructions of the conveyor. If the securities are not deposited, the declaration is given by the conveyor who also requests a registration in the company.

c) Transfer of non-materialised shares – by registration of the buyer.

IV. Bearer shares as regulated by Law 31/1990

4.1. Preliminary aspects

Law 31/1990 regulates the legal regime of bearer shares in Chapter IV Joint Stock Companies, Section I On Shares.

By virtue of article 91 (1)*"In the joint stock company, the share capital is represented by shares issued by the company which, according to how they are*

[24] Phillippe Merre, *cited works*, p. 338.
[25] Antonio Pereira de Almeida, *Trading Companies*, 4th edition, Coimbra Publishing House, 2006, pages 602-604.
[26] Idem 20, pages 611-615

conveyed, they may be nominative or bearer shares", whereas in accordance to article 92 (2)"*The shares not paid in full are always nominative."*

Moreover, provisions of article 92 also make reference to the legal regime of the bearer shares. Paragraph (2) sets forth that the shares not paid in full are nominative while paragraph 4 provides for the possibility to convert the nominative shares into bearer shares and vice versa, according to the resolution of the extraordinary general assembly meeting of the shareholders. As per article 93 (2), the bearer shares shall include the following elements:

a) name and duration of company;

b) date of the articles of incorporation, Trade Registry number under which the company was registered, Tax identification number and the number of the Official Gazette of România, Part IV, where the publication was made;

c) share capital, number of shares and their order number, nominal value of shares and payments made;

d) advantages granted to founders.

The shares shall bear the signature of two members of the Board of Administration, members of the Board of Directors or, where appropriate, the signature of the administrators respectively the sole managing director.

Without providing details which exceed our theme, the legal characteristics of the bearer shares are the ones identified in the doctrine[27] for any type of shares issued by joint stock companies, i.e.:

a) Shares are fractions of the share capital and have a certain nominal value;
b) Shares are equal fractions of the share capital;
c) Share are indivisible;
d) Shares are negotiable securities;
e) Shares are generically determined fungible assets;
f) Shares consumptible assets;
g) Shares are productive assets;
h) Shares are tangible assets;
i) Shares are securities.

4.2. Particularities of the bearer shares

1. The bearer shares have to be paid upon subscription[28]. This is indicated by requirements of article 99 (2) of Law 31/1990 according to which shares unpaid in full

[27]For further comments see: St. D. Cărpenaru, *Treaty on Romanian Commercial Law*, 5th edition, Universul Juridic Publishing House, Bucharest, 2016, p. 323-325, C Duțescu, *Sale Contract for Shares as Regulated by the New Civil Code,* C.H. Beck Publishing House, Bucharest, 2012, p. 19-42, M. N. Costin, *Corporate Securities as Variety of Securities, with focus on shares,* R.D.C., no. 3 of 1998, p. 48 and foll, Gh. Piperea, *Commercial Law, volume II*, C. H. Beck Publishing House, Bucharest, 2009, p. 132 and foll., St. D. Cărpenaru, S. David, C.Predoiu, Gh. Piperea, *Corporate Law. Comments on Articles*, C.H. Beck Publishing House, Bucharest, 2009, p. 346 and foll, A. Țuțuianu, *cited works*, pages 93-97, Ioan Schianu, Titus Prescure, *Corporate Law. Analyses. Comments on Articles*, 2nd edition, Hamangiu Publishing House, Bucharest, 2009, pages 246-265, A. Țuțuianu, *Seminar Writing Book*, Ed. Prouniversitaria, Bucharest, 2014, p. 198-203, p. 206

[28]In this respect, see Cristina Cucu, Marilena Veronica Gauris, Cătălin Gabriel Bădoiu,Cristian Haraga, *Company Law no. 31/1990*, Hamangiu Publishing House, Bucharest, 2007, p. 164

are always nominative. The ownership right is conveyed by mere unrestrictive handling over of property.

2. The ownership right over the bearer shares is transferred by mere traditio, in accordance with article 99 of Law 31/1990. The possession of the bearer shares stands for legitimisation[29]. Handling over or traditio of a legal act will be proven by any means of evidence, including testimony.[30] The opposability of the tradition to the issuing company will be ensured only upon provision of the securities by the owner.[31]

3. The bearer shares are classified in the doctrine as actual movable property[32], respectively intangible[33] or tangible [34] assets.

In the traditional view, the bearer shares are securities of which owner is not mentioned therein. This eliminates the hypothesis according to which bearer shares should be in a dematerialised form.[35]

4. According to interpretation of the requirements in article 91 (1) of Law 31/1990, the bearer shares may only be issued in a material form[36]. In addition, they may be nominative or bearer shares, according to how they are conveyed. The nominative shares may be issued in a material form, on paper support, or in a dematerialised form, in which case they are registered in the shareholders' register.[37] This means that the bearer shares may only be issued in a material form.

The conclusion is also supported by requirements of article 123 (1) of Law 31/1990 according to which *"In general shareholders' assemblies, the shareholders which own bearer shares are entitled to vote providing that they submitted such shares with the venues stated in the articles of incorporation or the convening notice, minimum 5 days prior to the assembly meeting."* This legal requirement enhances the characteristic of tangible asset for bearer shares.

The doctrine[38] has issued the opinion according to which provisions of article 91 of Law 31/1990 may not sufficiently sustain the theory of "materiality" in case of bearer shares. The author opts for a modern interpretation of the concept of traditio, which should also include the conveyance of some immaterial goods. [39]

Furthermore, there were arguments that nothing may prevent issuing bearer shares in a dematerialised form providing that there is a body concealing the identity of their

[29]Cristina Cucu and others, *cited works*, p. 176, Vasile Nemeş, *Commercial Law*, 3rd edition revised and completed, Hamangiu Publishing House, Bucharest, 2018, p. 230
[30]Ioan Schianu, Titus Prescure, *cited works*, p. 264
[31]Ioan Schianu, Titus Prescure, *cited works*, p. 264
[32]Gh. Piperea, *Trading Companies, Stock Market and Community Acquis*, All. Beck Publishing House, Bucharest, 2005, p. 260
[33]C. Duțescu, *Shareholders' Rights*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2007, p. 46
[34]Idem 34, p. 45-46
[35]I.L.Georgescu, *Romanian Commercial Law*, vol. II, All Beck Publishing House, Bucharest, 2002, p. 490
[36] C. Duțescu, *Sale Contract for Shares as Regulated by the New Civil Code*, cited works, p. 47
[37] Cristian Gheorghe, *Romanian Commercial Law*, C.H. Beck Publishing House, Bucharest, 2013, p. 343 and foll.
St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, *Company Law. Comments on Articles*, C.H. Beck Publishing House, Bucharest, 2009, p. 312-313
[38]C. Duțescu, *Sale Contract for Shares as Regulated by the New Civil Code*, cited works, p. 47
[39]Francisc Deak, *Civil Law Treaty. Special Contracts*, 3rd edition, Universul Juridic Publishing House, Bucharest, 2001, p. 152

holders in relation to the company and other shareholders, but which also allows identification of holders and their movement at any given time. In such cases the ownership is transferred in accordance with article 98 of Law 31/1990.

This means that bearer shares may be issued in a dematerialised form by registration in the account. Prior to the general assembly meeting, the company may receive within the legal timeframe, in a special electronic account, the bearer shares with voting rights attached.[40] The main nature of such shares, which is to enable the shareholder to keep his/her identity confidential to third parties, including to the company, until general assembly meeting, is therefore diluted until it disappears.[41]

5. It is a question of whether bearer shares may be traded on a market regulated by C.N.V.M/National Securities Commission. A first opinion was that shares may not be traded on such markets with reference to the provisions regulating the property right over bearer shares by mere tradition and also for reasons which concern investors' protection and transparency of the transaction. These are fundamental principles governing the regulated markets[42]. The contrary opinion may be supported by the argument that legislation on securities does not distinguish between nominative shares and bearer shares and also the circumstance that no express norm imposes *de lege lata* the nominative nature of the shares traded on the stock market [43]. The same author concludes that if one accepts the theory of issuing bearer shares in a dematerialised form, no other legal impediment will hinder acceptance of such shares for trade, the ownership right over dematerialised bearer shares being transferred in compliance with requirements of article 145 of Law 297/2004 in the central system of the depositary.[44]

6. The criticism of the current regulation and the proposals for amending Law 31/1990, i.e. to eliminate bearer shares, mainly take account of the lack of transparency in terms of company shareholders. This statement may not be supported as in the current legislation there are mechanisms to allow identification of shareholders within the company which issues bearer shares. In this respect, the following regulations are in force:

a) article 123 (1) of 31/1990*"In general shareholders' assemblies, the shareholders which own bearer shares are entitled to vote providing that they submitted such shares with the venues stated in the articles of incorporation or the convening notice, minimum 5 days prior to the assembly meeting. The technical secretary, appointed in accordance with article 129 (5), shall acknowledge in a report the submission of the shares on time. The shares submitted shall be kept until after the general assembly meeting, but no longer than 5 days of such meeting."*[45]

The analysis of these requirements indicates that the owners of the bearer shares will continue to be unknown to third parties and the company itself throughout the

[40] C. Duțescu, *Sale Contract for Shares as Regulated by the New Civil Code*, C.H. Beck Publishing House, Bucharest, 2012, p. 46
[41] Idem 39, p. 47-48
[42] A. Țuțuianu, *cited works*, pages 100-101
[43] Idem 39, p. 49-50, Shares listed on over the counter market R.A.S.D.A.Q. may only be issued in a dematerialised form. The bearer shares are tradable on a limited segment of the stock market.
[44] Idem 39, p. 49-50
[45] As amended by Article I, point 14 of Emergency Ordinance no. 82/2007 to amend and supplement Law no. 31/1990 regarding trading companies and other relating normative acts

financial year. However, they shall be disclosed upon any ordinary or extraordinary assembly meeting of the shareholders.

We mention that according to requirements of article 123 (2) of Law 31/1990, the Board of Administration, respectively the Board of Directors, will set a reference date for the shareholders entitled to be notified and to vote within a general assembly meeting. The same date will be valid if the general assembly meeting is convened again, due to lack of quorum. The reference date set will be subsequent to the convening notice and will not exceed 60 days prior to the date on which the first general assembly meeting is convened the firs time.

b) the identity of the shareholders may be also disclosed upon payment of dividends or other monetary rights. Pursuant to article 123 (3) *"shareholders entitled to collect dividends or other monetary rights or to exercise any other rights are the shareholders registered in the company registers or in the records provided by the private independent shareholders' register, in line with the reference date."*.

c) the agents of the natural or legal persons may disclose the identity of the owners of the bearer shares whom they represent, respectively their identity may be established based on the very content of the representation power of attorney. In this respect, requirements of the article 125 (1), (2), (3) set forth as follows:"*(1) The shareholders may attend and cast their vote in the general assembly by representation, based on the power of attorney granted to them for such general assembly; (2) The shareholders who are not in the position to exercise their rights, as well as the legal persons, may be represented by their legal agents who, in their turn, may authorise other people to represent them in such general assembly. (3) The powers of attorney shall be submitted in original, 48 hours before the assembly or inside the timeline stated in the articles of incorporation, under the sanction of losing their right to cast the vote in that particular assembly. The powers of attorney will be kept in the company. The minutes of the meeting will acknowledge this aspect."*

7. In the doctrine there is a controversy on issuing both nominative and bearer shares which should coexist. A first opinion states that a company will not have the right to issue nominative and bearer shares which coexist.[46] Another view claims that the coexistence of these two types of shares is possible. The argument is that, by virtue of civil law, unless the law forbids it, the law allows it. In addition, the law allows coexistence of ordinary and preferred shares with priority dividend and without voting rights.[47]

As far as we are concerned, we consider that the joint stock company may issue either nominative or bearer shares; however, the company might issue ordinary bearer shares and preferred bearer shares with priority dividend and without voting rights.

8. Conversion of bearer shares. According to article 92 (4) of Law 31/1990, nominative shares may be converted into bearer shares and vice versa in line with the resolution of the extraordinary general assembly meeting made in compliance with requirements of article 115 of the law. The nominative shares may be converted into bearer shares unless the shares have been paid in full, according to article 92 (2) which sets forth that shares paid in full are nominative shares.

[46]Ioan Schianu, Titus Prescure, *cited works*, p. 277

[47] Sorin David in St.D.Cărpenaru and others, *cited works*, p. 313, Smaranda Angheni, *Commercial Law. Trading Professionals*, C.H. Beck Publishing House, 2013, page 151, R Țicleanu, *Legal Regime of Preferred Shares*, R.D.C. no. 3/2000, p. 72 and foll.

V. The law on prevention and combat of money laundering and terrorism financing, and to amend and supplement some normative acts – bill[48]

The Romanian Government has recently approved a bill which transposes in the legislation the Directive (EU) 2015/849 of the a European Parliament and the Council of 2 May 2015 regarding use of the financial system with a view to laundering money and terrorism financing, to amend the EU Regulation no. 648/2012 of the European Parliament and Council and to repeal Directive 2005/60/CE of the European Parliament and Council and Directive 2006/70/EC of the Commission. This normative act approaches the issue of bearer shares. In the statement of reasons of the normative act it is stated that the bearer shares raise more and more often the issue of the ownership which lacks transparency, whereas it is essential to know the shareholders at all times in order to implement the measures to prevent and combat money laundering, the fight against terrorism and the terrorism financing, to prevent and combat tax evasion.

It is shown that in relation to assessment of the Romanian legislative and institutional framework conducted upon the Global Forum for Transparency and Exchange of Information for Fiscal Purposes[49], it was outlined that the Romanian legislation does not enable at all times to know the identity of the holders of bearer shares; the recommendation is that the relevant legal requirements should be reviewed.

The main requirements of the bill with incidence on our theme are:

1. Creation of a Registry of Real Beneficiaries of Trading Companies which will include the identity of the real beneficiaries of the following categories of entities: European companies, European corporate entities, corporate credit organisations, groups of economic interest and European groups of economic interest with main head offices in România. By way of exception, the real beneficiaries of the companies of which shares are traded on a regulated market are registered in the Registry of the Real Beneficiaries kept in the central depositary;

2. Compelling joint stock companies and partnerships limited by shares which issue bearer shares to convert the bearer shares[50] into nominative shares, within 18 months from the date the law entered into force, and to file the updated articles of incorporation with the Trade Registry Office. In the event that the requirement abovementioned has not been met within 18 months, the joint stock companies or partnerships limited by shares shall enter into dissolution. This is a situation of dissolution punishment of the companies which comes to complete the ones regulated

[48] The Romanian government adopted the bill on prevention and combat of money laundering and terrorism financing, and to amend and supplement some normative acts on 31 May 2018

[49] Law 328/2013 to approve participation of România to the Global Forum for Transparency and Exchange of Information for Fiscal Purposes, published in the Official Gazette of România, Part I, no. 762 of 9 December 2013

[50] Upon adoption of the bill, the number of companies issuing bearer shares is 483 of a total number of 9,187 joint stock companies registered at the end of 2017, respectively 5.27% of total joint stock companies. In addition, 106 joint stock companies with bearer shares of 483 are under bankruptcy, dissolution, liquidation procedure or have temporarily ceased their activity.

by article 237 of Law 31/1990[51]. All persons concerned and the National Office of the Trade Registry have active legal standing and may request the dissolution sanction. The request for dissolution shall be settled by the Tribunal/the Specialised Tribunal with jurisdiction in the area of the company. The reason for dissolution may be removed prior to communication of the substance conclusions; the court may grant a term to this end. In this case, the requirements of article 237 (4), point 13 of Law 31/1990 shall apply. The judgment of the Tribunal may be appealed within 30 days from date of publication in the Official Gazette Part IV.[52]

3. The companies registered with the Trade Registry by the date the law comes into force shall make through legal representative a statement on the identity of the real beneficiaries. This statement will be filed with the Register of the Real Beneficiaries of the Companies kept by the Trade Registry Office.

The administrator of the company who has representation rights shall comply with this obligation. Failure to comply with this obligation shall be penalised with a civil fine ranging from 5,000 to 10,000 lei by the bodies with auditing prerogatives within the Ministry of Public Finances, National Agency for Fiscal Administration and their territorial units as well as the agents of the National Office for Prevention and Control of Money Laundering.

The bill adopted by the Government and entered into parliamentary procedure proposes a radical solution towards the elimination of the bearer shares, sacrificing therefore a tradition which goes back more than 178 years ago. We believe that another solution would have also been possible so as to allow survival of such types of shares, following the French or the Portuguese model presented above[53], solution which would have compelled the issuers of bearer shares to deposit them with the financial authority or professional intermediaries and to register the transactions with bearer shares with the Electronic Registers accessible to competent authorities. The same line is followed by the OECD report in 2001 entitled”Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes”[54] which recommends jurisdictions to allow bearer shares but in restrictive conditions.

The real owner of the shares may also be concealed upon issuance of nominative shares which may be registered”offshore”,”prêt nom” or”by fake agents”.

In addition, excessive is also the solution to dissolve the joint stock company which decides to convert within 18 months from entering into force of the law, the solution adopted by the Belgian lawmaker[55] being, in our opinion, preferable as it gives priority to safeguarding the company. Consideration may also be given to a new case of the shareholders’ withdrawal from the joint stock company[56] providing that a shareholder decides not to vote in favour of such conversion.

[51] With regard to the reasons of the dissolution sanction, see Stanciu D. Cărpenaru, *cited works*, pages 276-277.
[52] For more details, see Stanciu D. Cărpenaru, *cited works*, pages 276-277.
[53] See Chapter III. Aspects of Compared Law, 3.3 Legal regime of shares in the EU Member States
[54] *Using Corporate Entities for Illicit Purpose*s available on www.oecd.org
[55] Chapter III - Belgium
[56] With regard to withdrawal of shareholders see St.D. Cărpenaru*, cited works*, p. 177, V. Nemeş, *cited works*, p., 174 and foll.

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19. C.N.V.M./National Securities Commission no. 15/2004 entered into force on 1.07.2005 and published in the C.N.V.M. Bulletin and the C.N.V.M. website (www.cnvmr.ro).
20. Directive (EU) 2015/849 of the European Parliament and the Council of 2 May 2015 regarding prevention of using financial system with a view to money laundering and terrorism financing, to amend EU Regulation no. 648/2012 of the European Parliament and the Council and to repeal Directive 2005/60/EC of the Parliament and the Council and Directive 2006/70/EC of the Commission.
21. Directive 2014/34/EU of the European Parliament and the Council regarding harmonisation of the laws of Member States relating to equipment and protective systems intended for use in potentially explosive atmospheres (recast)
22. Directive 2007/36/CE of the European Parliament and the Council of 11 July 2007 regarding exercise of certain rights of the shareholders within trading companies listed on the stock market
23. Company Law 31/1990 – Republication – normative act amended by Article 18, point 1 Title IV of Law 76/2012 to enforce Law no. 134/2010 regarding Civil Procedure Code, published in the Official Gazette number 365 of 30 May 2012
24. Law 328/2013 to approve participation of România to the Global Forum for Transparency and Exchange of Information for Fiscal Purposes, published in the Official Gazette, Part I no. 762 of 9 December 2013
25. Law 98/2016 regarding public procurement, published in the Official Gazette no. 390 of 23 May 2016
26. Law no. 297/2004 regarding stock market published in the Official Gazette, Part I no. 571/29.06.2004

27. Law no. 242/1941 for conversion of bearer shares into nominative shares, published in the Official Gazette no. 71 of 25 March 1941
28. Law 237/2015 regarding certification and surveillance of the insurance and reinsurance activities, published in the Official Gazette, Part I no. 800 of 28 October 2015.
29. Emergency Ordinance no. 82/2007 to amend and supplement Company Law no. 31/1990 and other relating normative acts
30. Emergency Ordinance no. 99/2006 regarding credit institutions and suitability of capital structure

MUTUALITY, AS A GUARANTEE MECHANISM OF THE SOCIAL SECURITY TO MEXICAN SPORTS WORKER

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Abstract: *The present study aims to analyze that the right to social security is a platform and mechanism to guarantee the right to health of the professional athlete in Mexico, through the prevention of work risks; since, being special workers, it entails a series of elements that do not make insurance in traditional life insurance systems: seeking as a proposal a complementary system such as the Mutuality, which from its commercial nature, is an alternative or possible solution to provide protection to sports workers in relation to the fundamental right to health.*
Keywords:*Human Rights, Fundamental Rights, Guarantees, Social Security, Mutuality, Sports Worker, Right to Health.*

I. Conceptual Premises

Several states have had a paradigmatic change thanks to the integration of standards in their constitutional systems related to human rights; Mexico is not the exception, because it has brought to our country a series of structural changes to the Mexican constitutional system based on the fact that, the guarantees recognized in our maximum order within its dogmatic part would be considered today human rights.

Then a catalog of fundamental rights to the Constitution was integrated; by means of which not only must they be located as ideals, but the need to establish a series of mechanisms that serve to guarantee their application is recorded.

In virtue of the above, we understand that by establishing concepts such as human rights, fundamental rights and individual guarantees we must start from a series of legal and philosophical differences between one and another concept and, in this way, be able to identify the nature corresponding to each one of them, as discussed below.

Human Rights are conceptualized as those norms that consecrate basic liberties and prerogatives of people...are based on human dignity, and also constitute limits against the

arbitrary or irrational use of power.[1] Its characteristics are traced because they are universal, indivisible and have, in addition to their progressive character; specifying

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[1] Organization of the United Nations, Vienna Declaration and Program of Action, at: http://www.ordenjuridico.gob.mx/TratInt/Derechos%20Humanos/INST%2033.pdf, (Date of Consultation May 13, 2018).

essential characteristics for the present analysis, which according to criteria of the National Human Rights Commission are the following:

"We must not forget that they are interdependent or interrelated, because they are linked to each other in such a way that the satisfaction or the affectation to some of them necessarily impacts other rights; that is, once a certain level or standard has been reached, the protection provided by this right must be extended; and in its work, scope and dimensions; as well as its transversality, since each legal asset that they protect includes and impacts multiple instruments, areas and problems."[2]

However, when this set of prerogatives based on the idea of dignity, whose affective realization is essential for the integral development of the person,[3] according to Tapia Vega, are positivized in normative constitutional texts or international conventions will be called fundamental rights.[4]

Therefore, by promoting human rights in Mexico, the recognition in the strict doctrinal theoretical sense of fundamental rights is given; However, in the 1st constitutional text it is established: In the United Mexican States, all persons shall enjoy the human rights recognized in this Constitution and in the international treaties of which the Mexican State is a part...observing then, that in its wording The Political Constitution of the United Mexican States integrated the words of English origin human rights and not fundamental rights in a correct theoretical manner.[5]

There is a classification of fundamental rights according to criteria of nature and origin pedagogically integrated by different generations, thanks to the historical moment in which they were recognized in several states; however, it is important to specify, in agreement with Tapia Vega, that its importance lies in human dignity as the principle and purpose to be achieved and not in the fact that some have a greater or lesser hierarchy over others.[6]

Being necessary in the present analysis, only to limit ourselves to the Economic, Social and Cultural Rights (ESCR) recognized as the human rights related to the basic social and economic conditions necessary for a life in dignity and freedom, considering such basic issues as work, education, food, water, housing, an adequate environment and culture;[7] in a concrete way, social security and health.

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[2] CNDH, Human Right to Social Security, at: http://www.cndh.org.mx/sites/all/doc/cartillas/2015-2016/14-DH_Seguridad_social.pdf(Date of Consultation May 13, 2018).

[3] Cfr. Sitio Internet, en: https://www.es.amnesty.org/en-que-estamos/temas/derechos-humanos/,(Fecha de Consulta 13 de Mayo 2018).

[4] Tapia Vega, Ricardo y Moreno Castillo, María Asunción (coordinadores), *Hacia el Ámbito del Derecho Empresarial*, Vol. 5, Ed. Eternos Malabares UAEM-UCA, México, p. 25.

[5]The nomenclature used to designate the rights that concern us is very varied. Frequently it has been called - and they are called - human rights human rights, rights of the human person...However, it is that the practice has already coined this terminology so there is no problem in using it...It is also spoken of natural rights, a term that refers to its foundation in human nature, and fundamental rights, meaning that they affect the most basic and endearing dimensions of the human being.Sánchez ARCILLA, José, *Historia de los Derechos Fundamentales en sus Textos*, Dikinson, S.L, Madrid, 2013, p. 33.

[6] Tapia Vega, Ricardo y Moreno Castillo, María Asunción (coordinadores), *Hacia el Ámbito del Derecho Empresarial*, Ediciones UCA-UAEM, México, p.25.

[7] Introducción a los DESC, en: https: //www.escr-net.org/es/derechos, (Fecha de Consulta 14 de Mayo 2018).

Then, after anchoring ourselves in the analysis of fundamental rights such as social security and health, important characteristics such as its transversality and interdependence are presented within the international framework as national, as we will see below.

The right to social security is recognized in various international legal instruments; as in the case of the Universal Declaration of Human Rights, which in Article 22 states*: "every person, as a member of society, has the right to social security, and to obtain, through national effort and international cooperation, taking into account the organization and resources of each State, the satisfaction of economic, social and cultural rights, indispensable to their dignity and to the free development of their personality."*[8]

However, the aspect of interdependence between the right to security and the right to health, existing even when article 25 of the aforementioned international declaration states: "*Every person has the right to an adequate standard of living that assures him, as well as to his family, health and well-being, and especially food, clothing, housing, medical care and necessary social services; It also has the right to insurance in case of unemployment, illness, disability, widowhood, old age or others."*

The right to social security is also recognized in conventions such as: The Convention on the Elimination of All Forms of Discrimination against Women,[9] the Convention on the Rights of the Child also enshrines this right in its article 26.1, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families article 27.[10]

However, with regard to international soft law, the International Covenant on Economic, Social and Cultural Rights enshrines the right to social security in article 9 stating: The States Parties to the present Covenant recognize the right of everyone to security social, including social security.[11]

With regard to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador, refers in Article 9.

[8]Every person, as a member of society, has the right to social security, and to obtain, through national effort and international cooperation, taking into account the organization and resources of each State, the satisfaction of economic, social and cultural rights, indispensable to their dignity and to the free development of their personality.

[9] Organización de las Naciones Unidas, Convención sobre la eliminación de todas las formas de discriminación contra la mujer, artículo 11. Ginebra, Suiza, ONU, Asamblea General, 1981, disponible en: http://www.un.org/ womenwatch/daw/cedaw/text/sconvention.htm Adoptado el 18 de diciembre de 1929, ratificado por México el 23 de marzo de 1981, entró en vigor el 3 de septiembre de 1981, 12 de mayo 1981 publicado en DOF, entró en vigor en nuestro país el 3 de septiembre de 1981.

[10] Organización de las Naciones Unidas, Convención Internacional sobre la Protección de los Derechos de todos los Trabajadores Migratorios y de sus Familiares, Artículo 27, ONU, Asamblea General, disponible en: http://www. ohchr.org/SP/ProfessionalInterest/Pages/CMW.aspx Adoptado el 18 de diciembre de 1990, ratificado por México el 8 de marzo de 1999, 13 de agosto de 1999 publicado en DOF, entró en vigor en nuestro país el 1 de julio 2003.

[11]La declaración fue aprobada y proclamada en la sesión plenaria 183 de Asamblea General de las Naciones Unidas, el 10 de diciembre de 1948, en: http://www.cinu.mx/DeclaracionUniversalDeDerechosHumanos.pdf,(Fecha de Consulta 13 de Mayo 2018).

"Everyone has the right to social security to protect against the consequences of old age and disability that physically or mentally disabled to obtain the means to lead a dignified and decent life. In case of death of the beneficiary, the social security benefits will be applied to his dependents. In the case of people who are working, the right to social security will cover at least medical care and subsidy or retirement in cases of work accidents or occupational disease and, in the case of women, leave paid for maternity before and after the birth."[12]

Not forgetting the International Labor Organization which promotes the conclusion of treaties related to labor matters and social security that are called agreements.

Our country has signed and ratified some of these instruments, we can mention the following: Convention Number 155 on Workers' Health and Safety[13], Agreement Number 161 on Health Services in the Workplace[14], Convention Number 102 on social security (minimum standard).[15]

On the other hand, regarding the matter of health law in hard law, is the Universal Declaration of Human Rights in Article 25.1 determines health as a component of the right to the right standard of living, so it relates to other that affect its conservation and therefore must be insured, such as food, clothing, housing, medical assistance and social services necessary and safe for illness and disability.

While from soft law we have the International Covenant on Economic, Social and Cultural Rights in Article 12, it provides "*the right of every person to enjoy the highest possible level of physical and mental health"*, that is, to achieve well-being physical, mental and social in the best situation, for which the State must attend to risk situations already detected, among others, the reduction of stillbirth, of infant mortality, the healthy development of children, the hygiene of work and of the environment, prevention, treatment and control of epidemic, endemic, professional and other diseases, and conditions of assistance and medical services in case of illness, a situation that refers to the fragility of groups such as children and the care of the disease.[16]

[12] Adoptado y firmado por nuestro país, el 27 de febrero de 1967, ratificado el 22 de abril de 1968, entró en vigor internacionalmente el 27 de febrero de 1970, publicado en el DOF el 26 de octubre de 1968 y entró en vigor para México el 27 de febrero de 1970, disponible en: http://proteo2.sre.gob.mx/tratados/muestratratado_nva.sre?id_tratado=262&depositario=0 (Fecha de consulta: 13 de Mayo de 2018).

[13] Adopted on June 22, 1981, ratified by Mexico on February 1, 1984, international entry into force 11 August 1983, published in the DOF on March 6, 1984 and entered into force in our country on February 1, 1985, available in: http://www.ilo.org/dyn/normlex/es/f% 3Fp%3DNORMLEXPUB:12100:0:NO: P12100_ILO_CODE:C155, (Fecha de Consulta 14 de Mayo 2018).

[14] Adopted on June 26, 1985, ratified by Mexico on February 17, 1987, entry into force on February 17, 1988, published in the DOF on April 13, 1987 and entered into force in our country on February 17, 1987. 1988,in:http://www.ilo.org/dyn/normlex/es/f?p=-NORMLEXPUB:12100:NO:12100:P12100_ILO_CODE:C161:NO (fecha de Consulta 14 de Mayo 2018).

[15] Adopted on June 23, 1992, ratified by Mexico on June 8, 1995, international entry into force June 8, 1995, published in the DOF on November 24, 1993 and entered into force in our country on June 8, 1995, available in:http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C173:NO, (Fecha de Consulta 14 de Mayo 2018).

[16] Lugo Garfias, María Elena, Derecho Humano a la Salud, en: http://appweb.cndh.org.mx/biblioteca/archivos/pdfs/lib_DerSaludMexico.pdf,(Fecha de Consulta 14 de Mayo 2018).

In addition to the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), it establishes in Article 10.1 that "*Everyone has the right to health, understood as the enjoyment of the highest level of physical, mental and social well-being, a right that, in order to be effective, must be recognized as a public good*".

In the case of Mexico, it is provided for in article 4 of the Political Constitution of the United Mexican States; considered a human right and is established as a right to health protection, which is specified through health services, whose bases and modalities are reserved to the law. The modality for the provision of the health service is mixed;[17] seen as a teleological element, the destination of the good is a public use or service, a good for the use of beneficiaries and public institutions of social security or with its own resources, a good for use in social services, a good for use in private services or others.[18]

Then ithave a direct relationship with the provisions of fraction XXIX of Article 123 of the Political Constitution of the United States of Mexico, stating: the Social Security Law is of public utility, and it will include disability, old-age and life insurance., involuntary cessation of work, diseases and accidents, daycare services and any other aimed at the protection and welfare of workers, peasants, non-salaried workers and other social sectors and their families.

Specifying that the health of all Mexicans is recognized and guaranteed by the State through social protection, not only because of being a worker; but from a broad sense of protection to the person.

It is then appropriate to study the Guarantees conceptually, based on the reflection provided by the Legal Encyclopedia of the Institute of Legal Research of the UNAM, stating the following: "*in the constituent congress the rights of man and of guarantees were indistinctly discussed. Individual the academic doctrine has concluded while the rights of man are general and abstract ideas, the guarantees are individualized and concrete.*"[19]

In this regard, a constitutional guarantee deviates from a fundamental right by not having a series of implicit mechanisms for compliance; as Ferrajoli points out in the following way: *guarantees are the obligations that derive from those rights...they can be negative guarantees (they are the abstentions on the part of the state and of the individuals) and the positive ones (obligations to act positively).*[20]

For Tapia Vega means that, for the realization of fundamental rights requires the praxis of certain tools aimed at reducing the structural distance between normativity and effectiveness, and therefore, aimed at enabling maximum effectiveness of these

[17]Article 10.2 of the Protocol of San Salvador establishes the commitment for the States Parties to recognize the right to health as a public good, which in the case of Mexico has not occurred, according to the modalities provided since the criteria of universality and free of charge attend to the socioeconomic status of the user.

[18]Lugo Garfias, María Elena, Derecho Humano a la Salud, en: http://appweb.cndh.org.mx/biblioteca/archivos/pdfs/lib_DerSaludMexico.pdf(Fecha de Consulta 14 de Mayo 2018).

[19] Instituto de investigaciones jurídicas de la UNAM, *Enciclopedia jurídica,* t. IV, México, p. 195.

[20] Cfr. Carbonell, Miguel, *Los Derechos Fundamentales en México*, Porrúa, México, 2015, p.6.

prerogatives in coherence with its fundamental stipulation. These tweets have been called guarantees.[21]

In such a way that the guarantees are the means to safeguard the right, to make it effective and are intended to repair those that have occurred to the fundamental principles, values or provisions.[22]

Even when Rojas Caballero establishes the following:

"In a strict technical-legal sense constitutional guarantees are understood as the set of procedural instruments, established by the fundamental norm, in order to establish the constitutional order when it is transgressed by a body of political authority. The Mexican constitution, contemplates as "Constitutional Guarantees" in this procedural meaning, the amparo trial (articles 103 and 107), the constitutional controversies (Article 105), unconstitutionality actions (105, fr. II), and even impeachment and official responsibility (articles 108 and 111 to 113). "[23]

However, given the changes in the constitutional system, the recognition of primary guarantees that, according to Amnesty International criteria, States are obliged to carry out said rights by adopting legislative, administrative, budgetary, and judicial and other measures is integrated and recognized. Nature to be fully effective these rights can perform this obligation progressively. And consequently the integration of a catalog of fundamental rights to the Constitution where not only ideals are recognized, but also the integration of a series of mechanisms that serve to guarantee their application, based on what is mentioned in the third paragraph of article 1 constitutional that the letter says:

"All authorities, in their areas of competence, are obligated to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity. Consequently, the State must prevent, investigate, penalize and rectify violations to Human Rights, according to the law. "[24]

Therefore, when the provision of health is legally envisaged as an obligation by a public entity, it corresponds to who should specify it the right that attributes duties to the person over itself and rights to demand, with respect to the benefits that correspond to it. In this last case, the social security of the people is visualized, who know the legal dispositions and the consequences of the same, that is to say, to accede to the necessary conditions to safeguard the health and to receive the protection of the same, as well as the obligation of provide it to whom it corresponds.[25]

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[21] Cfr. Tapia Vega, Ricardo, *El matrimonio igualitario en México, una perspectiva de Derechos Humanos*, Oliva Gómez, Eduardo, Tapia Vega, Ricardo, et al (Coordinadores), Temas Selectos Hacia el Ámbito del Derecho Familiar, Vol.4, Ed. Eternos Malabares- UAEM-UNED, México, 2017, p.18.

[22] Cfr. Fix Zamudio, Héctor, *Breves Reflexiones sobre el Concepto y Contenido del Derecho Procesal Constitucional*, Ferrer, Mac-Gregor, Eduardo (Coordinadores), *Derecho Procesal Constitucional*, 4° Ed., Porrúa, México, 2010, p. 283.

[23] Rojas, Caballero, Ariel Alberto, *Las Garantías Individuales en México, su interpretación por el poder judicial de la federación*, 2ª. Ed, Porrúa, México, 2000, p. 58.

[24] As stated in the third paragraph of article 1 of the Political Constitution of the United Mexican States: All authorities, within the scope of their competences, have the obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity. Consequently, the State must prevent, investigate, punish and repair violations of human rights, in the terms established by law.

[25] Norbert Lösing, "Estado de Derecho, *Seguridad Jurídica y Desarrollo Económico",* Anuario Iberoamericano de Justicia Constitucional, Madrid, núm. 6, 2002, p. 280.

Then social security can be recognized as the measures established by the State to guarantee each person their right to a dignified income and appropriate protection for health, to social security should contribute, employers, workers and the State.[26]

For this reason, think about a figure of a commercial nature such as the mutual society which is proposed with this study, be the mechanism of social security guarantee for sports workers before their fundamental right to health.

II. The Mutuality, Social Security Guarantee Mechanism of the Sports Worker

Man is a gregarious animal, because according to Cervantes Ahumada, living in a society feels the need for mutual protection, that is, reciprocal help within the members of the community to solve the problems that most deeply affect to its members. To impart mutual help, men form associations; for expenses of burial of a member of the company or in case of illness and unemployment.[27]

That is why the importance of mutuality, since it is generated as Kropotkin points out, by an inclination held by men to mutual aid that has its origin so remote and is deeply intertwined with all the past development of humanity; that can be presented from periods of peace and well-being; or, in the calamities that have plagued humanity.[28]

From a legal perspective, the mutuality is conceptualized as the set of people who act voluntarily to constitute a fund of economic aid, through periodic contributions in cash, by way of spontaneous collaboration, whose purpose is the assistance to its members in case of diseases, accidents and other natural risks; help that can be extended to their families when they are not self-sufficient.[29]

Its origins date back to the 12th and 13th centuries, thanks to the fact that social welfare acquired in the Christian West an already complex configuration, in which the main features of a "modern" assistance policy can be read; However, during the period of industrial development, efforts were made by the working population to organize themselves in a rational manner.[30]

In the case of Mexico, derived from the Spanish influence in the colony, the aid institutions played an important role at the time, being the precursors of the associative form of support, either for religious or social purposes;[31] therefore, the mutuality was given an artisanal conception.[32]

[26] Cfr. Ángel Guillermo Ruíz Moreno, *Nuevo derecho de la seguridad social*, 14 ed. México, Porrúa, 2015, pp. 36-39.
[27] Cervantes Ahumada, Raúl, *Derecho Mercantil*, Porrúa, México, 2013, p.124.
[28]Kropotkin, Pietro, *El apoyo Mutuo: Un Factor en la Evolución*, en: http: //cdigital.dgb.uanl.mx/la/1020025477/1020025477.PDF, (fecha de consulta 20 de Septiembre de 2018).
[29] Diccionario Jurídico Mexicano, Porrúa, Tomo IV, México, 2011, p.981.
[30] Castel, Robert, *La Metamorfosis de la Cuestión Social: Una Crónica de a salariado*, en: https://catedracoi2.files.wordpress.com/2013/05/ social.pdf (fecha de Consulta 13 de Mayo de 2018).
[31] Gante García, Gerardo, *Antecedentes Históricos y Análisis Actual de las Sociedades Cooperativas*, UNAM, México, 1997, p20.
[32]According to García Cantú, the first record was given to the mutual relief society of the headgear industry, while Sordo Cedeño analyzed that an example of organization and operation at the end of the 19th century was the Socorro Mutuo de Sastres society. organizations responded to a social protection system in the face of shocks caused by insecurity at work, excessive exploitation, unemployment, misery and lack of labor regulation,GarcíaCantú, Gastón, *El Socialismoen México*, Siglo IX, ERA, México, 2013, p.78.

Its juridical recognition can be glimpsed in the federal constitution of the year of 1857 where it is established in its 9th constitutional article: *"the right to peacefully associate or assembly for any licit purpose cannot be restricted. Only citizens of the Republic may take part in the political affairs of the country. No armed meeting has the right to deliberate."*

For the foregoing, when recognizing the guarantee of association in the mutuality, it legitimates mainly the relationship of the subjects as at the same time it organizes the respective entities, because it pretends with its organization, to tend towards a defense against profit.[33]

However, the 20th century represents a crucial stage for the history of our country; reigning then, in the spirit of the constituent of 1917 the establishment of Popular Insurance Funds, which are based on three reasons: The first the objective difficulties of forcing the State or employers to establish a social insurance system...It is preferred to leave the popular impulse the foundation of the institutions closest to mutualism...more widespread forms of social security...should not be excluded from the advanced catalog of protection of the excluded.[34]

Although it can be specified by events such as the world crisis, the latent coming of a second world war and European models of social security; a change is generated in the Mexican social security system establishing a normative scaffolding that manages to integrate the new social security structure based on social insurance.[35]

With the above, the traditional social security trend was overturned because the popular insurance funds were replaced by a Social Security Law; leaving pending the effective application of figures such as mutuality; which still in force lacks a lack of legal regulation for its correct application, product of legal backlog in private insurance regulations.[36]

Locating the mutuality, in order of mercantile character as it was the General Law of Institutions and Mutual Societies, whose nature was product of the organization of economic and financial character of a nationalist state constituted through a mixed economy; therefore, it would not be entirely wrong to think that by recognizing and giving legal certainty to this institution, an insurance system with social overtones would be seen for those who did not have the status of workers even after the Law of the Mexican Institute of Social Security.[37]

[33] Cabanellas, Guillermo, Diccionario de Derecho Usual, Buenos Aires, Helianto, 1976, t. III, p. 414.

[34] Moctezuma, Barragán, Javier, Artículo 123, en: https://archivos.juridicas.unam.mx/www/bjv/libros/1/127/5.pdf, (Fecha de Consulta 15 de Mayo 2018).

[35] Fraction XXIX of article 123 constitutional in the year of 1929, that to the letter says: It is of public utility the Law of the Social Security, and it will include insurance of disability, of oldness, of life, of involuntary cessation of work, of diseases and accidents, daycare services and any other aimed at the protection and welfare of workers, peasants, non-salaried workers and other social sectors and their families.

[36] Con Lázaro Cárdenas se dio origen en el año de 1835 la Ley General de Instituciones y Sociedades Mutualistas, la cual remite a la institución a la esfera y competencia del seguro de carácter privado, así como la Ley de Instituciones de Seguros y Fianzas de 2013.

[37] Still reformed in the year of 1929 the fraction XXIX of the article 123 constitutional with the appearance later of the Law of Mexican Institute of the Social Security, was implicit tendency in the programs of the cardenista government to adapt the system of social insurance in the hands of the societies mutualistas Maybe it could have been created as a bunch of good intentions as history has shown.

Interesting features were integrated with the aforementioned order, for example: The corporate purpose was limited to the operation of insurance, the insurance operations they practiced would not produce profit or utility for society or its partners, and should only charge what is necessary to cover expenses general problems arising from its management and to establish the necessary reserves in order to meet its commitments to the insured.[38]

Other aspects of the aforementioned law allowed the creation of mutual societies that were not subject to the legal regime of insurance institutions, even if only to operate in the fields of death, benefits in accidents, illnesses and compensation for damages with the exception of hedges of catastrophic nature, or of high risks for amounts or accumulations with the condition that their members do not issue policies or contracts.[39]

However, given the paradigmatic change that society has undergone as a result of diverse changes with globalization and neoliberalism; the economic-financial factor has been the determinant to impact and redirect both public policy and the Mexican legal system.

Because it brought as a consequence important reforms to diverse legal systems in the Mexican State, as it is the case of the current General Law of Institutions and Sureties promulgated in the year of 2013; Although it grants recognition to the mutual society,[40] it does not establish technical rules of application nor a financial vision with social meaning.

A discretional criterion for its integration is left in the content of said law; that unfortunately is not protected in the protection of its constitution, respect for the will of association of those who intend to integrate it; since the authorization to organize and operate as an Institution or Mutual Society will not take effect, without requiring any declaration of authority, when the condition of obtaining the approval of its bylaws and the favorable opinion to initiate it is not met. its operations in accordance with the provisions of article 47 of this Law[41.]

With the law object of comment the figure of the policy is a requirement in its constitution leaving behind the nature for the constitution of this type of companies for example for the automobile branch.

It is important to point out that the mutual society from a legal historical perspective has gone through a series of stages: First, its first organizations were constituted outside the protection and legal certainty; second, that once the mutuality

[38] Fracciones I, II Y III de la Ley General de Instituciones y Sociedades Mutualistas.

[39]Although the Law does not establish an express way in which its character of social denomination is indicated, but does not prohibit in its moment to other classes of institutions the use of the word mutualista, as it was used by other types of companies.

[40]This Law is of public interest and its purpose is to regulate the organization, operation and operation of Insurance Institutions, Guarantee Institutions and Mutual Insurance Companies; the activities and operations that they may carry out, as well as those of the insurance and surety agents, and other participants in the insurance and surety activities foreseen in this order, in protection of the interests of the public user of these financial services. National insurance institutions and national bail institutions shall be governed by their special laws and, in the absence of these or as they are not foreseen, by what the present order establishes.

[41] Párrafo Segundo del artículo 12 de la Ley de Seguros y de Fianza.

was regulated, a series of clear technical bases for its organization and functioning were not recognized by the legal order; and third, mutual societies nowadays need to be seen as a direct solution to the serious problem of social security that is not reached by entire sectors of society that are affected by the lack of it[42].

So vulnerable sector in Mexico for the lack of social security is the professional athlete who from an early age, with the illusion of fulfilling their dreams is subject to a series of very intense training, with a very strict rigidity in their discipline to be consolidated a high performance athlete; and when finally recognized professionally, their situation is subject to being prone to suffer injuries, depression, illnesses, which disable them and cause them to be unable to continue, much less continue with their activity or, although it will be transferred many times without their consent to another club with the modifications to their working conditions to which they were subject. Considering that his life as a professional is very short (he does not exceed 10 years as a professional).

Well, although the law of the Federal Labor Law recognizes in the Sixth Title, Chapter X, professional sportsmen, it does not manage to protect this type of worker, because far from the fact that there is a definition properly of sportsman and professional sport, it exists in the practice of sports with imposition of excessive work days, training exceeding those agreed and sometimes the payment of salary is not punctual[43].

Added to this, the issue of health and specifically, the risks linked to the same sport activity, becomes a constant in front of problems faced by these workers; every time considering that this type of workers emerges from the sport from a business and profit aspect; Due to their special characteristics, they are not subject to a social security contribution.[44] What allows us to understand with the development of the present analysis integrate the following.

III. Conclusions

First. With the paradigmatic change that our constitutional system has had in terms of fundamental rights, it is necessary to raise the importance of the integration of guarantees that allow achieving the effectiveness and fulfillment of these rights.

Second. It is important to integrate with this study that thanks to characteristics such as interdependence and transversality in fundamental rights; in the specific case,

[42]The problem that prevails and not only because of the unclear recognition of the law, is the result that CONDUSEF applies criteria such as the following: It should be noted that, unlike insurance institutions, mutual societies can only operate certain types of insurance. Insurance (life, accidents, illnesses and damages), and they must not be for profit for society or its members. The foregoing implies that they must charge only what is necessary to cover the general expenses that their management causes, and to constitute the necessary economic reserves in order to be able to fulfill their commitments to their members, in case of a loss. Thus, the difference between mutual societies and mutual societies is that the former operate within the formality and the latter do not, as they do not have registration or permission to operate.

[43]The concept of professional athlete is not defined by the General Law of Physical Culture and Sport; only in fraction VII, of article 5, which establishes the figure of sport of performance which indicates the following: The sport that promotes, encourages and stimulates that all people can improve their level of amateur sportsmanship, being able to be integrated to the high performance sport, or in its case, suitably subject to a labor relation by the practice of the sport.

[44] Trillo García, Andrés Ramón, La Seguridad Social de los Deportistas, LEX NOVA, Pamplona, 2015, p 20.

the right to social security as the right to health; a greater impact is achieved thanks to a scaffolding of international legal instruments with the intention of providing social protection to certain vulnerable groups; concrete case, professional athletes.

Third. Discuss the necessary implementation of a social security guarantee mechanism to make effective fundamental rights such as the right to health of the professional athlete, we can recognize it in figures such as mutuality; A legal institution of commercial law that emerged from the colonial tradition aims to provide social protection to sectors that do not have a social insurance as in the case of the professional athlete.

Fourth. For this reason, it will be necessary to integrate a necessary constitutional amendment to provisions related to social security and secondarily to statutory insurance laws, for the purpose of recognizing a complementary system that achieves an effective social protection, thanks to the implementation of figures of a mercantile nature for social purposes such as mutual societies.

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CONSIDERATIONS ON THE CHATTEL MORTGAGE

Livia MOCANU*

Abstract: *By unifying the regulations in the field of security interests in movable property, the Romanian Civil Code brings a new vision, with a significant impact on the credits market. The new perspective of the Romanian lawmaker has led to the abrogation of Title IV of Law No. 99/1999 on the security interests in movable property, while from a terminological point of view the latter were renamed "chattel mortgages".*
Keywords: *debt, security interest, chattel mortgage.*

1. Introduction

If according to the former regulations [art. 1746 paragraph (1) of the 1864 Civil Code] a mortgage involved only immovable assets, according to the new regulations, the mortgage right can be constituted for both immovable and movable assets. Thus, according to article 2343 of the Romanian Civil Code: "A mortgage represents a real right on the movable or immovable assets involved in the enforcement of a duty".

This new perspective of the Romanian lawmaker has led to the abrogation of the former regulation included in Title VI of the Law No. 99/1999 on the security interests in movable property[1] which, when it entered in force, constituted an important progress in the field of obligations guarantees[2]. This aspect is also pointed out by the fact that the new regulation partially maintains some provisions included in the abrogated normative act.

The source of this topic is represented by the Romanian Civil Code[3], Book V – *On obligations*, Title XI *Privileges and security interests*, Chapter III *Mortgage,* Section 3 – a. *Chattel mortgage,* articles 2387 – 2479.

2. Constituting the mortgage

According to article 2387 of the Civil Code: "The chattel mortgage is constituted when the mortgage contract is concluded, but it produces effects from the moment when the guaranteed obligation is born and the mortgagor acquires rights on the

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[1] Title VI of Law No. 99/1999 published in the Romanian Official Gazette, part I, No. 236 from 27th May 2009, abrogated by Law No. 71/2011, published in the Romanian Official Gazette, part I, No. 409 from 10th June 2011, with the subsequent amendments and additions brought by G.E.O. No. 79/2011 on the regulation of some measures necessary for the entry in force of Law No. 287/2009 on the Civil Code, published in the Romanian Official Gazette, part I, No. 696 from 30th September 2011
[2] Julian Teves, *Contractul de garanţie reală mobiliară,* in Revista Juridica magazine No. 8/2000, pp. 289 – 290.
[3] Law No. 287/2009 on the Civil Code published in the Romanian Official Gazette, part I, No. 511 from 24th July 2009, modified by Law No. 71/2011, published in the Romanian Official Gazette, part I, No. 409 from 10th June 2011, with the subsequent amendments and additions.

mortgaged movable assets". Just like in the former regulations (art. 13 Title VI of Law No. 99/1999), the chattel mortgage is constituted at the conclusion of the mortgage contract. Art. 2387 of the Civil Code allows the person constituting the mortgage to acquire the rights provided by the security, after the creation. According to the law, the effects of the chattel mortgage shall take place only after the guaranteed obligation is created and the mortgagor acquires rights on the mortgaged movable assets.

According to art. 164 of Law No. 71/2011, the chattel mortgage can be constituted on behalf of the creditor of the real estate obligation or of a third party whom he nominates. If the beneficiary of the chattel mortgage is a third person, then he will be entitled to the rights of the real estate creditor and will also have to comply with his obligations. At the same time, the conventional chattel mortgage can be constituted both on behalf of a single beneficiary and on behalf of several simultaneous ones. If there are more beneficiaries of the same chattel mortgage, they will get the same rank, either through the simultaneous registration of the mortgage in the publicity registers or through the appointment of an agent. The agent will be entitled to exert all the rights of the real estate creditors who appointed him. He will also be entitled to insure alone the conclusion of the chattel mortgage or its maintenance and modification, while at the same time he will be responsible for his activity before the beneficiaries of the mortgage.

Art. 2388 of the Civil Code provides for the form of the mortgage contract, by establishing, just like the former regulations [art. 14 par. (2) Title VI of Law No. 99/1999] that the contract will have to be concluded either in an authentic form or under private signature, else will be considered void. As a result, the mortgage contract is a solemn one, its written form (authentic document or under private signature) being demanded *ad validitatem*[4].

The mortgage contract has the following legal features:

- is a unilateral contract, as it gives raise to duties only for the debtor;
- is an accessory contract, being concluded for guaranteeing that the main obligation taken by the debtor is fulfilled;
- is a solemn contract, concluded in the written form provided for by the law.
- represents an enforceable title. According to article 2431 of the Civil Code, the mortgage contracts validly concluded are enforceable titles, according to the law. Consequently, the chattel mortgage contract is an enforceable title as long as it is invested with the enforceable formula. Unlike the former regulation[5], where law provided the quality of enforceable title to the contract of security interest in movable property, without the compliance with any previous formality, the Civil Code conditions the quality of enforceable title on the enforceable formula.

The parties of the contract are, as a rule, the mortgagor and the creditor. The identification of the two parties within the contract is provided by art. 2372 par. (2) of the Civil Code, the contract becoming void in its absence. The mortgagor can be both

[4] Stanciu D. Cărpenaru, *Drept comercial român,* IV Edition, ALLBECK Publ. House, Bucharest, 2002, p. 493.

[5] Art. 17 of Title VI of Law No. 99/1999. For this matter, see Livia Mocanu, *Garanțiile reale mobiliare,* AllBeck Publ. House, Bucharest, 2004, pp. 63 – 64.

the debtor and a third party. According to the provisions of art. 163 of Law No. 71/2011, when the mortgage is constituted by a third party, he shall have the rights and duties of the mortgage debtor, without being subject to the legal regime of personal securities.

As the mortgage contract is a provision legal act, the mortgagor must have full power of exercise in order to constitute the security (article 2365 of the Civil Code).

Regarding the object of the chattel mortgage, article 2389 of the Civil Code contains an exemplificative list; thus, letter l) of the article mentions that the object of the mortgage can be constituted by any other movable assets, both tangible and intangible. The object of the security interest in movable property was regulated at art. 6 par. (5) Title VI of Law No. 99/1999[6].

A special regulation concerns the mortgage on financial instruments, which shall have to respect the rules typical to the market where these are commercialized, while the mortgage having as object the social shares and parts of a society will have to respect the rules provided by the Law of companies No. 31/1990 and by the other special laws (art. 2390 of the Civil Code). Consequently, as a result of the *intuitu personae* character of the limited liability companies, it is kept the requirement to exist an approval from all the associates in order to constitute a security interest in the social parts.

The law contains the clear requirement for the asset subject to mortgage to be described. Thus, according to art. 2391 par. (1) of the Civil Code, the mortgage contract must contain a description precise enough of the mortgaged asset. At the second paragraph of the same article, the lawmaker defines the expression "*a description precise enough*". For the purposes of the law, the description of the mortgaged asset is precise enough, even if the asset is not individualized, when it allows for that asset to be reasonably identified. The law provides for several ways in which the description can be made. As such, according to art. 2391 par. (3) of the Civil Code, the description can be made as it follows:

- by making a list of the movable assets pledged;
- by determining the category to which the assets above belong;
- by indicating the quantity;
- by establishing a determination formula and
- by any other way which reasonably allows for the identification of the mortgaged movable asset.

If the mortgage involves universality, the contract must describe the latter's nature and content [art. 2391 par. (4) of the Civil Code].

Unlike the former regulation, art. 2391 par. (5) of the Civil Code does not allow for the stipulation according to which the mortgage secures "all the movable assets" or "all the present and future movable assets". This kind of provision in the contract does not represent a description precise enough, as required by the provisions of art. 2391 par. (1) of the Civil Code.

[6] For more details, see Gabriel Boroi, Dana Boroi, *Garanția reală mobiliară reglementată de titlul VI al Legii nr. 99/1999,* in Revista Juridica magazine No. 4/2000, pp. 130 – 131.

When the mortgage includes a bank account, the latter must be distinctively individualized in the mortgage contract, as stated by the final paragraph of art. 2391 of the Civil Code.

Article 2392 of the Civil Code maintains the content of article 12 Title VI of Law No. 99/1999, according to which the security interest in movable property is extended by right towards the fruits and products[7] but also towards all the assets received by the mortgagor according to an administration or provision act concluded on the mortgaged asset, including towards the asset which replaces the latter or includes its value. The rank of the new born mortgage shall be determined according to the conditions of art. 2412 of the Civil Code.

3. The publicity of chattel mortgages

The chattel mortgage must be publicized, in principle by registering it in the Electronic Archive for Security Interests in Movable Property (AEGRM). Thus, according to art. 2413 par. (1) of the Civil Code, "The registration of the operations regarding chattel mortgages and of the operations assimilated to these, but also of any other rights provided for by the law, shall be done only in the Electronic Archive for Security Interests in Movable Property, if the law does not state otherwise". According to the provisions of art. 177 of Law No. 71/2011, the security approvals registered at the Electronic Archive for Security Interests in Movable Property prior to the entry in force of the Civil Code will continue to have the same effects. After the entry in force of the Civil Code and until the adoption of the regulation for the organization and functioning of the Archive, the registration of the chattel mortgages and of the operations assimilated to them is done by appropriately using the available forms.

According to the Gov. Ordinance No 89/2000[8], the Electronic Archive for Security Interests in Movable Property constitutes a publicity and evidence system of the priority of chattel mortgages, structured on persons and assets. Chattel mortgages, real estate pledges, as well as any other operations assimilated to these, for which the law provides for the duty to be registered in the Archive for publicity purposes, are registered in the Archive by accordingly filling in the approval forms related to the chattel mortgage. Thus, any mortgage creditor or representative of the latter who, with the aim of obtaining a priority rank, wants to make public the existence of a mortgage upon an asset, must fill in, according to the provisions of the Civil Code, a mortgage approval form on paper or electronic support (TED document) and to file it/send it to an authorized operator/agent of the Archive.

[7] The fruits of an asset are the goods which it periodically generates, without its substance being consumed. They are grouped into natural fruits (are produced without human intervention), industrial fruits (are produced with human intervention) and civil fruits (are the equivalent in money or even in other goods of the use of an asset, like rents, rental, interests and so on). The products are the benefits obtained from an asset, but by consuming its substance.

[8] G.O. No. 82/2006 on some measures for authorizing operators and making the registrations in the Electronic Archive for Security Interests in Movable Property, completed by Law No. 202/2015 published in the Romanian Official Gazette, part I, No. 539 from 20th July 2015.

The role of the Archive is to protect the creditors who constituted chattel mortgages registered in the Archive. The registration in the Archive grants to the creditor of the mortgage the right to recover the debt, by executing the asset secured by the debtor, before the mortgage creditors come, the latter having a lower priority when it comes to claiming the asset secured. According to the current regulations, the registration in the Electronic Archive for Security Interests in Movable Property does not represent a duty for the parties, letting them the possibility to decide if they want to enforce this possibility.

Just like in the former regulations, the registration in the Archive does not give validity to a mortgage affected by nullity (art. 2414 of the Civil Code). Therefore, the chattel mortgage which is completely void will not be validated by its registration in the Archive. If in reality there is no chattel mortgage contract or the content of the mortgage approvals has no justification in the clauses of the mortgage contract, then the registration in the Archive shall not have any effect[9]. In order to register the mortgage approvals in the Archive, the access to that is limited, so that only the authorized operators and their agents can make this registration. G.O. No. 89/2000 establishes the conditions in which the persons interested can obtain the operator authorization[10].

Unlike the chattel mortgage, which is set up by complying with the publicity forms (art. 2377 of the Civil Code), the registration in the Archive of the chattel mortgage represents the opposability *erga omnes* of this right [art. 2409 par. (3) of the Civil Code].

When there are inconsistencies between the information contained by the approval file issued by the Electronic Archive for Security Interests in Movable Property and those contained by the mortgage contract, the law says that in the relations between the third parties and between parties and third parties, the information contained by the approval file shall have priority (art. 2416 of the Civil Code). As a result, should there be any inconsistency between the information contained by the approval file and those contained by the mortgage contract, the provisions of the contract shall have priority in the relation between the parties themselves.

When we speak of a mortgage on accounts, the publicity formalities are considered met when they security interest is registered in the Archive or when the mortgage creditor gets control over the account. According to art. 2410 par. (2) of the Civil Code: "a mortgage creditor gets control over an account if:

a) the mortgage creditor is the credit institution itself where the account is opened;

b) the mortgagor, credit institution and mortgage creditor agree in written that the credit institution, without asking for the permission of the mortgagor, shall follow the instructions according to which the creditor owns the amounts from the account; or

c) the mortgage creditor becomes owner of the account.

[9] See the Regulation for the organization and functioning of the Archive for Security Interests in Movable Property, approved by the G.D. No. 802/1999, published in the Romanian Official Gazette, part I, No. 499 from 15th October 1999, with the subsequent amendments and additions.

[10] For more details on the criteria for authorizing the archive operators, see the Instructions of the Ministry of Justice No. 3128/C/28 October 2003 on the criteria authorizing the archive operators, published in the Romanian Official Gazette, part I, No. 780 of 6th November 2003.

Therefore, the control over the account can be obtained in one of the ways briefly mentioned before. According to art. 176 of Law No. 71/2011, the control over the account is acquired also when the creditor becomes co-owner of the account.

In the cases from letters a) and c) above, there will be control over the account even if the mortgagor maintains his right of using the amounts from the account.

The publicity of the mortgage related to financial instruments also benefits from a special regulation. As such, according to art. 2411 of the Civil Code, the publicity of a mortgage related to financial instruments which, according to the rules of the market where they are commercialized, can be transferred with a simple registration in the related publicity registers, is done according to the rules applying to that market.

By referring to art. 2392 of the Civil Code, according to which a mortgage is expanded also to the products of the secured asset, art. 2412 of the Civil Code states that the rank of the mortgages recently constituted through this expansion is maintained only if the initial description of the asset covers the type of the resulting products or, on the contrary, if the creditor registers in the Archive a modifying approval, within 15 days from the moment when the mortgagor obtained those products.

According to art. 2417 of the Civil Code, the creditor is bound to notify the mortgagor a copy of the mortgage approval within 24 hours from the moment it is registered. If he fails to comply with this duty, then he will be liable for the prejudices caused to the mortgagor.

The entire communication related to the mortgage contract shall be sent at the address indicated in the mortgage approval, irrespective of the fact that the parties changed that address in reality. When there is a change of address mentioned in the approval, the interested party must communicate this change to the other party too and to register it in the Archive (art. 2418 of the Civil Code).

According to art. 2419 of the Civil Code, the creditor is bound to apply for the deletion of the mortgage from the Electronic Archive for Security Interests in Movable Property within 10 days from the moment when the guaranteed obligation is paid. If he fails to do that, he will have to bear the damages caused directly or indirectly to the mortgagor and the debtor. For this matter, the lawmaker has established a minimum amount of the damages, which cannot be lower than the equivalent in lei of 500 euros. This represents a legal criminal cause, which establishes a minimum prejudice, while the prejudiced part can prove the existence of a bigger prejudice than the one established by the law.

4. Concluding a chattel mortgage

According to art. 2409 of the Civil Code, a mortgage is concluded if all the following conditions are met:

- it is concluded in an authentic form or under private signature;
- the guaranteed obligations are created (art. 2387 of the Civil Code);
- the mortgagor acquired rights over the pledged asset (art. 2387 of the Civil Code);
- the formalities required by law for insuring publicity were met.

As shown before, it is possible to conclude a mortgage contract also when the obligations guaranteed with the security involved are not born yet. Naturally, the mortgage will have effects only when the guaranteed obligation will be born. At the same time, it is possible to conclude a mortgage contract over some assets in relation to which the mortgagor does not have rights yet. In this case too, the mortgage will generate effects only from the moment when the mortgagor will acquire rights over the assets subject to the mortgage. The concluded mortgage is opposable *erga omnes.*

5. The effects of the chattel mortgage contract

According to law, a mortgage creditor has the following rights:
- the right to check the mortgaged assed;
- the right to obtain the products and fruits of the mortgaged asset;
- the right to consider that the obligation guaranteed has reached its deadline and to move to foreclosure.

The right to check the asset is regulated by art. 2394 of the Civil Code, which maintains the provision of the former regulations, particularly art. 11 par. (2) letter a) of Title VI of Law No. 99/1999. According to law, the creditor of a mortgage has the right to inspect the mortgaged asset, with the duty of not affecting the activity of the person owning the asset.

Regarding to the right of the creditor to obtain the products of the mortgaged asset, art. 2395 of the Civil Code borrows the content of art. 16 par. (2) Title VI of Law No. 99/1999, which says that this right is conditioned by establishing in a detailed way the proportion and the way in which the debt secured will be reduced after such right is exerted.

Art. 2396 of the Civil Code regulates the anticipated payment request, its text being common to that of the former art. 1 par. (2) letter b) Title VI of Law No. 99/1999. Thus, according to the legal text, the anticipated request to pay the debt can be made if it is noticed that, for reasons of which the debtor is guilty, it becomes impossible or difficult to enforce the mortgage. All these situations must be clearly regulated by the mortgage contract, in order to be able to declare the anticipated deadline of the debt payment. At the same time, according to the second paragraph of art. 2396, the creditor can exert such right only if he has strong reasons to suspect that the mortgaged asset is about to be endangered or that there is the possibility for the enforcement of the obligation to be prevented. Similar to chattel mortgage [art. 2386 par. (2) of the Civil Code], are sanctioned with nullity those clauses requiring the debtor the anticipated payment of the secured obligation or the payment of any other obligation, when another security is constituted on the same asset [art. 2396 par. (3) of the Civil Code]. In agreement with the provisions of art. 173 of Law No. 71/2011, if the constitution of a new security affects the rank of the existing mortgage, the creditor must give his approval for the constitution of the new guarantee.

Art. 2397 of the Civil Code provides for the obligation of the creditor to issue statements regarding the mortgage. Thus, according to law, while the mortgage contract is being enforced, the mortgagor has the right to ask in written to the creditor of the mortgage to issue:

- a statement regarding the remaining amount of the debt secured with the mortgage;
- the confirmation or modification of the list of the assets which, in the debtor's view, are the object of the mortgage;
- the confirmation of modification of the debt value which, in the debtor's opinion, is still secured with the mortgage at a certain date.

The creditor is bound to send to the debtor, within 15 days upon receiving the request, the following:

- a written statement indicating the remaining amount to be secured with the mortgage;
- the confirmation or modification of the debtor's statement regarding the assets secured and the remaining amount;
- a statement according to which he is no longer the owner of the mortgage, indicating the name and address of his successor enjoying this right.

The debtor is entitled to obtain these statements freely, every 6 months, while if he needs additional clarifications, he will have to bear the occasional costs generated [art. 2397 par. (3) and (4) of the Civil Code].

6. The extinguishment of the chattel mortgage

A chattel mortgage will be extinguished in the cases provided as example by the second paragraph of art. 2428 of the Civil Code, as its creation is strictly related to the conclusion of the mortgage contract.

Thus, a chattel mortgage is extinguished for one of the following causes:

a) the extinguishment of the main obligation through any of the ways provided for by the law;
b) the event conditioning the secured obligation to take place failed to happen or the event conditioning the extinguishment of the obligation took place;
c) the event conditioning the mortgage to be born failed to happen or the event conditioning the extinguishment of the mortgage took place;
d) the creditor obtained the secured asset;
e) the creditor gave up on the mortgage, clearly or tacitly;
f) in any other cases provided for by the law.

Therefore, a chattel mortgage is extinguished in principle when the main obligation is extinguished; we are referring to the obligation which secured the mortgage, irrespective of the way in which it was extinguished (payment, compensation, merger of rights, giving up on the debt, unexpected impossibility to pay the debt). At the same time, the abolition of the main obligation also triggers the abolition of the chattel mortgage, on the basis of the principle *accesorium sequitur principale.*

The cases in which chattel mortgages are extinguished represent also cases in which real estate mortgages can be extinguished.

For the cases provided by letters a) and b) above, the mortgage shall not be extinguished if the parties agree that it shall be used for guaranteeing another determined or determinable obligation, without damaging nonetheless the rights previously acquired by other persons [art. 2428 par. (3) of the Civil Code].

As mentioned before, the creditor of the mortgage is bound, within 10 days from when the guaranteed obligation is paid, to request for the deletion of the mortgage from the Electronic Archive for Security Interests in Movable Property (art. 2419 of the Civil Code).

7. Conclusions

The institution of the chattel mortgage regulated by the current Civil Code is nothing else but the take over and improvement, under a new name, of the institution of security interests in movable property (without dispossession), regulated by Title VI of Law No. 99/1999.

According to the new vision of the lawmaker, a more efficient system has resulted in the field of conventional security interests in movable property, there being only one security interest in movable property without dispossession – the chattel mortgage – and one with dispossession – pledge.

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A COUPLE OF THEORETICAL BUT MOSTLY PRACTICAL ASPECTS REGARDING THE SALE-PURCHASE AGREEMENT

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Abstract: *The sale contract is, without a doubt, the most frequently used contract for transferring property, which must take a solemn form only when its object is represented by immovable assets or by an inheritance opened and not liquidated yet. The presence of the notary public when this contract is concluded constitutes a guarantee that the seller transmits the property right or a part of it upon his immovable assets or the right upon an opened inheritance, by observing the related legal provisions in the field. As a rule, the sale contract is a consensual one, so that it is enough for one party to express his will in order for the contract to be validly constituted. For this reason, we consider that it is useful for the civil law subjects to know the legal provisions applying to this kind of contract. From the multitude of aspects involved by a sale, the present work will be debating only a few of them, which seem to raise some difficulties related to their understanding and application: the sanction applying when the special incapacities to sell and buy are not respected; the distinction between the unilateral promise to sell and buy; the bilateral promise to sell and buy and the option agreement.*

Keywords: *unilateral promise to sell or buy, bilateral promise to sell, option agreement, incapacity to sell and to buy.*

1. General considerations on the sale-purchase agreement

Sale is undoubtedly a civil legal act, therefore a manifestation of one's will, made with the intent of having legal effects, namely to create, modify or extinguish a concrete civil legal relation[1]. The contract analysed here is regulated by the current Civil Code under the name "The Sale Contract", at Chapter I of Title IX, called "Various Special Contracts"; here, article 1650 ("Definition") mentions the following: *(1) Sale is the contract by means of which the seller transmits or commits to transmit*

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[1] For the traditional definition of the civil legal act, see for example: Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil,* VII edition revised and updated by Marian Nicolae and Petrică Truşcă, Universul Juridic Publ. House, Bucharest, 2001, p. 127; A. Cojocaru, *Drept civil. Partea generală,* Lumina Lex Publ. House, 2000, p. 156; S. Neculaescu, *Actul juridic civil,* in S. Neculaescu, L. Mocanu, I. Genoiu, Gh. Gheorghiu, A. Țuțuianu, "Instituții de drept civil. Curs selectiv pentru licență", III edition revised and updated Universul Juridic Publ. House, Bucharest, 2016, p. 29; I. Dogaru, S. Cercel, *Drept civil. Partea generală,* C.H. Beck Publ. House, Bucharest, 2007, p. 88.

the property of an asset to the buyer, in exchange for a price which the buyer commits to pay. (2) Through sale, a derived right from the property one or from any other right can also be transmitted".

Starting from the text of the Civil Code in force, we consider that the name itself of the contract can be questioned, as it reflects only the purpose pursued when it is concluded by one of the parties – the seller – who enters the contract in order to obtain a price for the assets whose property is transmitting or for the right transmitted, according to the case. Therefore, the convention concluded is a sale for the seller. But since a sale is bilateral legal act (which, in order to be validly constituted, involves that the two parties – the seller and the buyer –express their will) and, at the same time, a synallagmatic contract[2] (as both the contracting parties commit to certain obligations), one cannot ignore the purpose aimed when the sale is concluded by the other party – the buyer – who enters the contract in order to obtain an asset or a right as an owner, for which he pays a price. Therefore, the contract concluded is *a purchase* one for the buyer. For these reasons, we consider that it would be more suitable to name the agreement discussed a *sale-purchase* one, given that the name of the legal acts is in general given according to their cause[3]; the cause is that validity essential general and fundamental condition which represents the objective, the purpose considered by the parties when concluding a legal act. More precisely, in order to name a legal act, it must be considered its immediate cause – *causa proxima* – which is the purpose of the obligation, an abstract and invariable element within any category of legal acts. So when it comes to synallagmatic contracts, which also include the sale contract, *causa proxima* means to take into account and represent the counter-performance: one party commits to certain duties aware of the fact that the other party does the same in its turn. As such, the seller commits to transmit the property right over the asset sold or another right – in other words he sells something – only because the other contracting party (the buyer) commits to pay a price for that asset or right, therefore because he buys something.

Continuing with the logic above, it must be said that sale is a consensual agreement –by onerous title in theory, commutative, synallgmatic, transferring property and having various forms – which, like any other legal act, must meet all the validity conditions provided by the law, in order for it to be considered validly concluded; these regard capacity, consent, object and cause. If the object of the sale is represented by an immovable asset or by an inheritance, naturally an opened and not liquidated one – then the manifestation of the parties' will is no longer enough in order to validly conclude the contract, as it must be done in an authentic form[4].

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[2] For the classification of contracts, see also: B. Pătraşcu, I. Genoiu, *Diferite categorii de contracte,* in M. Uliescu (coord.), "Noul Cod civil. Studii şi comentarii", III volume, part I, Universul Juridic Publ. House, Bucharest, 2014, p. 53 and the following; E. Chelaru, *Drept civil, Partea generală,* C.H. Beck Publ. House, Bucharest, 2014, p. 100 and the following; G. Boroi, C. Al. Anghelescu, *Curs de drept civil. Partea generală,* 2nd edition revised and updated*,* Hamangiu Publ. House, Bucharest, 2012, p. 110 and the next ones.

[3] For the cause of the civil legal act, see for instance: Gh. Beleiu, *quoted works,* p. 165 and the next ones.

[4] For the sale of an inheritance, see also B. Pătraşcu, I. Genoiu, *Câteva aspecte de interes în legătură cu vânzarea moştenirii,* in "Studii şi cercetări juridice", no. 4/2016, pp. 503-517, Academiei Publ. House, Bucharest.

We will continue by analysing a few aspects which are of interest for only two of the validity conditions mentioned above: the capacity requested by law to enter a contract and the parties' consent. These aspects are the following: the sanction applicable when some special incapacities to sell and buy are not respected, the distinction between the unilateral promise to sell and that to buy, the bilateral promise to sell-buy and the option agreement; the first one in the list above regards the capacity of the parties, while the others their consent.

2. The sanction applicable when some special incapacities to sell and buy are not respected

According to the provisions of art. 1652 pf the Civil Code, are entitled to conclude sale contracts, personally or through representation[5], all the persons who are not forbidden by law, the rule in the field being capacity, while incapacity is only the exception.

Sale is a disposition act[6], whose parties need to have full power of exercise in order to conclude it, personally and on their own. That does not mean that the incapable persons (under 14 years old or under court restriction), as well as the ones with limited power of exercise (between 14-18 years old) cannot conclude sale contracts. They can show up as parties of such contract, but only represented or assisted, according to the law. Therefore, the persons deprived of power of exercise, either due to their age or because they are under a court restriction, as a result of their alienation or mental illness, can conclude disposition acts, including sale contracts, but only through their legal representative, who can be a parent, tutor or caretaker (art. 43 of the Civil Code). Those who have a limited power of exercise can conclude sale contracts, on their own, but not alone – thus, only assisted by their legal protector, and also with the approval of the tutelage authority (art. 41 of the Civil Code)

The sale acts concluded by not taking into account the incapacities previously mentioned (we are talking about "general" incapacities, therefore related to the power of exercise of natural persons) are annullable, therefore risking nullity, more precisely that form of the nullity of the civil legal act which intervenes for not taking into account a legal norm protecting a *particular interest*, when the civil legal act is concluded. In this case, in which someone has no special quality, but is deprived of power of exercise or has a restricted capacity, and concludes a sale contract alone or assisted by his legal heir, but without the authorisation of the tutelage court, the interest protected by the related legal norms (articles 41 and 43 of the Civil Code) cannot be qualified otherwise than a private particular one. As a result, the annulment of such act, whose conclusion caused a prejudice or not, can be invoked by resorting to art. 46

[5] We are referring to both the legal representation that operates according to the law when it comes to the persons who cannot enter a contract and those with a limited power of exercise, but also to the conventional representation, based on the mandate contract.

[6] Provision acts are considered to be those civil legal acts causing an asset or right to exit a patrimony or an asset to be burdened with a real duty. See Gh. Beleiu, *quoted works,* p. 133, A. Cojocaru, *quoted works,* p. 166.

paragraphs (2) and (3) of the Civil Code, by the legal representative of the person deprived of power of exercise, by the minor who turned 14 years old, by his legal protector or by the prosecutor, according to the distinctions made by the Civil Code. In turn, the potential annulment of a sale for incapacity or for a restricted capacity of exercise can be opposed in defence, according to art. 44 paragraph (2) of the Civil Code, even by the person deprived of power of exercise.

We believe that it is not useless to mention that the person deprived of power of exercise or with a limited power of exercise cannot be bound to restitution, according to art. 47 of the Civil Code, unless he became rich (due to the profit made) and that the person under age becoming off age can confirm the sale which he made while being under age, just as he can confirm, after his tutor is no longer responsible for him, the act concluded by the tutor without respecting the requirements of the law in the field of capacity (art. 48 of the Civil Code).

The same sanction of relative nullity also applies when we are speaking of *special incapacities related to sale*[7] (regarding this time the power of use of the natural person[8], and not the power of exercise), regulated by legal norms protecting a particular interest. We are talking about the provisions of art. 1654 paragraph (1) letters a) and b) of the Civil Code, which forbid the purchase, directly or through interposed persons, even via auction, to the mandatories, parents, tutor, curator and interim administrator of the seller. Therefore, mandatories are forbidden to purchase the assets with the sale of which are in charge, less for the case in which the mandate contract clearly mentions this type of purchase, in other words when the mandator clearly approved the conclusion of the contract with himself or when the mandate contract was drafted in such way that it excluded the possibility of a conflict of interests between the mandator-seller and the mandatory-buyer. As such, the contract with oneself[9] must not be considered annullable *de plano* if the mandator does not clearly permit to the mandatory to conclude the contract with himself; in this case, the will of the mandator having the form of a special power of attorney must be investigated, in other words interpreted. If the power of attorney shows that it was excluded any conflict of interests between the mandator and the mandatory, the sale contract through which the mandatory himself buys the asset for the sale of which

[7] For more details regarding the special incapacities provided by the law in the sales field, see for instance: L. Stângu, ”Contractul de vânzare”, in M. Uliescu (coord.), *Noul Cod civil. Studii şi comentarii*, III volume, II part, Universul Juridic Publ. House, Bucharest, 2015, p. 27 and the following.; Fl. Moțiu, *Contracte speciale,* VI edition revised and updated, Universul Juridic Publ. House, Bucharest, 2015, p. 42 and the following; L. Stănciulescu, *Curs de drept civil. Contracte,* 2nd edition revised and updated, Hamangiu Publ. House, Bucharest, 2014, p. 40 and the following; L. Mocanu, ”Contractul de vânzare”, in S. Neculaescu, L. Mocanu, I. Genoiu, Gh. Gheorghiu, A. Țuțuianu, *quoted works,* pp. 340-341 and others.

[8] The power of use represents the general abstract skill of a natural person, of having civil rights and duties, while the power of exercise represents the skill of the natural person to exert subjective civil rights and to commit to civil obligations, by concluding legal civil acts. See for this matter also I. Genoiu, *Drept civil. Partea generală, Persoanele,* 2nd edition, C.H. Beck Publ. House, Bucharest, 2016, p. 49 and the following. In fact, the Civil Code (article 37) defines the power of exercise as “*the skill of a person to conclude legal civil acts on his own*”.

[9] For more details, see for instance: Fr. Deak, *Tratat de drept civil. Contracte speciale,* Universul Juridic Publ. House, Bucharest, 2001, pp. 321-322; A. Cojocaru, *Contracte civile,* Lumina Lex Publ. House, Bucharest, 2008, p. 143.

was empowered must not be annulled. For instance, we would not speak of distinct interests if the special power of attorney related to the sale provides for all the clauses of the contract, including the price for which the asset should be sold[10] and makes the mention that the mandatory can sell the asset to whomever considers, by getting the aforementioned price.

Moreover, when the buyer of the asset sold by the represented or protected person is precisely his parent, tutor or curator, we can discuss of a private interest and the sanction enforced for transgressing the legal norm which protects is the relative nullity. In this case, there is an obvious conflict of interests between the parties of the sale contract: the representative/protector of the incapable seller or with a restricted power of exercise should seek to obtain for the latter a very convenient price, in the exchange for the transmitted asset or right; but since he is also directly interested in buying that asset or acquiring that right, he seeks to pay a price as low as possible, so that the interests of the seller risk to be considerably neglected.

In all the other cases of special incapacities regulated by the Civil Code (articles 1653 and 1654 paragraph 3), the sanction which is applied for concluding a sale by ignoring such incapacities is the absolute nullity of the contract, since the interest protected by these legal norms is a *general community related* one, namely the prestige of certain legal professions[11] (judge, prosecutor, court clerk, attorney, notary public and so on) or of the notary public quality.

Thus, according to art. 1653 of the Civil Code, judges, prosecutors, court clerks, executors, attorneys, notaries public, legal counsellors and insolvency practitioners are forbidden to buy litigious rights[12] which are under the jurisdiction of the court where they perform their activity, directly or through interposed persons, with the exceptions provided by paragraph (2) of the same article[13]; the sanction for not respecting this interdiction is the fact that the sale contract becomes completely void.

According to article 1654 paragraph (1) letter c) of the Civil Code, public servants, syndic judges, insolvency practitioners, executors and other such persons who could influence the conditions of the sale which they are intermediating or which is based on the assets which they administer or whose administration supervise, are not allowed to buy.

[10] From the provisions of art. 226 paragraph (1) of the Regulation No. 36/1995 on the enforcement of the Law on notaries public and their activity, the following result: ”*If a mandate for the conclusion of sale contract is authenticated and the buyer or his spouse has precisely the quality of the seller's mandatory, the notary public shall ask the parties to include in the mandate all the clauses of the contract, including the price*”.

[11] See Gh. Gheorghiu, ”Contractul de vânzare”, 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. 1737.

[12] It is deemed a litigious right, according to art. 1653 paragraph (3) of the Civil Code that right having an existence or length which caused the start of a lawsuit that hasn't ended yet”.

[13] The following actions are exempted from the interdiction discussed: a) purchasing the hereditary right or the shares from the inheritance right from the co-heirs or co-owners; b) the purchase of a litigious right so as to feed a debt which was born before the right became litigious; c) the purchase made for defending the rights of the person owning the asset in regard to which there is a litigious right.

3. The distinction between the unilateral promise to sell and to buy, the bilateral promise to sell and to buy and the option agreement

Before the conclusion of the sale contract, therefore in the pre-contractual phase, the parties can conclude pre-contracts, like the unilateral promise to sell, the unilateral promise to buy, the bilateral promise to sell or the option agreement.

All these are conventions and therefore contracts, but must not be mistaken with the sale itself, as their effect is not to transmit the property right (in other words, they do not transfer the property, nor do they generate any obligation to give, corresponding to a real right). They only generate a debt duty and a correlative obligation to do something.

The unilateral promise to sell represents a contract by means of which the promissory person commits to sell an asset (hence, we can speak of an obligation to do something) in front of the beneficiary of his promise, who accepts the promise and reserves the right to subsequently give his agreement for buying the asset[14]. Since the will of the promissory persons meets that of the beneficiary of the promise, we can speak of a bilateral legal act, of a contract, so that there is no risk for the unilateral promise to sell to be mistaken with the offer to enter a contract, which is an act completely unilateral, involving only the will of the tenderer. Between the two parties of the unilateral promise to sell, only one takes a commitment – the promissory person – his duty being that of doing something: the future conclusion of the contract – a fact which makes so that we can speak of a unilateral contract. The beneficiary of the promise only reserves the future right to give his agreement when the sale is concluded.

If the promissory person fails to comply with his duty – that of concluding a future sale contract – then several courses of action open for the beneficiary of the promise. Thus, depending on his interests, the latter can demand: the enforcement of the obligation or the termination of the convention, with damages being paid, if the asset is still in the patrimony of the promissory person; if it's not anymore, then he can only ask for damages. Consequently, according to article 1669 paragraph (3) of the Civil Code, corroborated with art. 1669 paragraphs (1) and (2) of the Civil Code, within 6 months from the moment when the contract had to be concluded, the beneficiary of the promise can request to the court to give a sentence replacing the contract, if all the other validity conditions are met.

The unilateral promise to buy is similar to the sale related one from the perspective of their legal nature, being a unilateral contract, subject to the provisions of article 1669 of the Civil Code mentioned before. On the basis of the unilateral promise to buy, the promissory person commits to buy an asset, if the beneficiary of the promise decides to sell it. Therefore, the person committing to a duty to do something (to buy) is the promissory person, while the beneficiary of the promise only has a debt right, being up to him to decide afterwards whether he sells the asset.

If the object of the unilateral promise to buy is an asset individually determined and the creditor of the promise alienates it before the promise is respected or institutes

[14] Fl. Moțiu, *quoted works* p. 29.

a real right upon it, then the obligation to do of the promissory person is considered extinguished, according to article 1669 paragraph (4) of the Civil Code.

The bilateral promise to sell represents that contract according to which the promissory person commits to sell, while the beneficiary of the promise commits to buy a certain asset, at a determined price. Thus, on the basis of this synallagmatic pre-contract, in our opinion improperly named "provisory contract" by the legal literature, both parties commit to do something, namely to conclude a future sale contract[15]. As with the unilateral promises discussed before, the bilateral promise to sell does not involve either the transmission of a property right, therefore it does not transmit property, this legal character being typical only to the sale contract. As already mentioned, the parties of the promise to sell only commit to the duty of doing something and not to give something.

It must be mentioned that the provisions of article 1669 of the Civil Code mentioned before apply to the bilateral promise to sell in the first place, so that if the asset can no longer be found in the patrimony of the promissory-seller and there is no legal impediment, the court can be called to give a sentence to replace the contract. But if one of the parties does not comply with their duty to conclude the sale contract, out of their own guilt, the other party can demand for the rescission of the promise and, eventually, the payment of some damages.

It is not useless to show that, when it comes to the form of the promises to sell and buy, analysed here, the law does not contain certain kind of restrictions, so that in order for these to be validly concluded, the simple manifestation of the parties' will is enough, even if these promises precede the constitution of a sale contract including a movable asset, for which the Civil Code requires an authentic contractual form in order to be valid. It is not forbidden either the promise to sell or buy an asset which, when the agreement of wills was concluded, did not belong to the future seller; this is due to the fact that promises, irrespective of their nature, do not have the effect of transmitting the property of an asset, as shown before, but also to the fact that the Civil Code – through the provisions of article 1683 – allows to sell someone else's asset[16].

The promise to conclude a contract having as object the property right over an immovable asset or another right related to it, *can be registered* in the real estate register, according to art. 906 of the Civil Code, if the promissory person is inscribed in the real estate register as the owner of the right being the object of the promise and the pre-contract includes the term within which the contract must be concluded, else the registration is rejected. The registration can be done within the term stipulated in the pre-contract for being enforced, but not later than 6 months from the expiry of the contract.

The option agreement is a legal institution which the Civil Code in force regulates as a novelty element (art. 1278) and which has given rise to several controversies

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[15] See also: I. Zinveliu, *Contracte civile. Instrumente de satisfacere a intereselor cetățenilor,* Dacia Publ. House, Cluj-Napoca, 1978, p. 49 and the next ones; T. Prescure, A. Ciurea, *Contracte civile,* Hamangiu Publ. House, Bucharest, 2007, p. 34 and the next ones.; V. Barbu, I. Genoiu, C. Cernat, *Drept civil. Contracte speciale,* C.H. Beck Publ. House, Bucharest, 2009, pp. 14-15.

[16] According to art. 1683 par. (1) of the Civil Code: "*If when the contract related to an individual determined asset is concluded, that asset belongs to a third party, the contract is valid, while the seller is bound to insure the transmission of the property right from his owner towards the seller*".

related mainly to its legal nature and the effects which it generates. According to the legal text: " *(1) When the parties agree that one of them can remain bound to his own statement of will, which the other one can accept of refuse, that statement is considered an irrevocable offer and produces the effects provide by article 1191. (2) If the parties established no term for the acceptance of the offer, this can be established by the court through a presidential ordinance, by summoning the parties. (3) The option agreement must contain all the elements of the contract which the parties aim to conclude, so that it can be concluded with the simple acceptance from the beneficiary of the option. (4) The contract is concluded through the expression of the option, meaning that the beneficiary accepts the statement of the other party's will, according to the conditions of the agreement. (5) Both the option agreement and the acceptance statement must be concluded in the form provided for by the law for the contract which the parties aim to conclude.*"

Starting from the legal provisions above, which in our option do not insure the clearest regulation of the legal institution in cause (the option agreement), the following should be stated:

A) Although according the legal text mentioned before the option agreement is similar to an irrevocable offer to enter a contract[17], we consider that it does not represent a unilateral legal act, like the offer to enter a contract, while on the contrary, it is a bilateral legal act, where two wills are manifested: that of the bidder[18] and that of the beneficiary of the agreement. This results from both the legal name of the legal institution discussed – "agreement" – which undoubtedly involves two wills, but also from the text of article 1278 of the Civil Code, which speaks about "parties" in several occasions..

B) A bilateral legal act – if taking into account the number of the parties which conclude it – the option agreement is a unilateral contract (given the number of the parties committing to a duty or, in other words, the mutuality and the inter-dependence of duties), just like the unilateral promise to sell, as it is only the bidder who commits to sell, while the beneficiary of the pact only reserves the right to accept or refuse this offer to enter the contract.

C) The similarities between the option agreement and the unilateral promise to sell are obvious, both having the same legal nature, that of unilateral agreements. Nevertheless, these two civil law institutions, which present a general interest for the field of contracts and a particular interest for the sale contract, cannot be confounded from the perspective of the effects which they generate, at least for the following reasons:

- in the case of the option agreement, it is not necessary to subsequently conclude a sale contract, as it happens in the presence of the unilateral promise to sell, because the simple acceptance of the offer to enter the contract from the beneficiary of the pact

[17] Since it is clearly qualified by the Civil Code as a legal irrevocable act, the option agreement can only be ended if the person taking the duty shows a contrary will. As for the aspects involved by the offer to enter a contract, see for instance I.-F. Popa, "Considerații generale cu privire la obligațiile civile", in L. Pop, I.-F. Popa, St.I. Vidu, *Curs de drept civil. Obligațiile,* Universul Juridic Publ. House, Bucharest, 2015, p. 66 and the next ones.

[18] We are using this terminology as a result of the recommendation made by The National Union of Notaries Public from Romania (UNNPR) in *Codul civil al României. Îndrumar notarial,* Monitorul Oficial Publ. House, Bucharest, 2012, p. 496.

is synonymous to the conclusion of the sale contract. Taking this into account, a similarity can be noticed between the option agreement and the offer to enter the contract, both being based on the same mechanism: the contract is considered to be concluded only when the acceptance of the offer encounters the offer to enter the contract. Nevertheless, we can still talk of an ambiguous character of the legal nature. As shown before, the option agreement is an agreement of wills, a contract; but at the same time it also has the value of a unilateral act and of an irrevocable offer;

- unlike the unilateral promise to sell, the option agreement must contain all the elements of the future contract, so that it becomes possible for the simple acceptance coming from the beneficiary of the agreement to generate the conclusion of the contract itself;

- if the Civil Code provides for no formal requirements when it comes to the unilateral promise to sell, by considering it a consensual act, the option agreement – as well as the acceptance of the offer – must take the form provided for by the law for the contract which the parties aim to conclude. Therefore, if the parties aim to conclude a sale contract regarding an immovable asset, for which the law demands the authentic form out of *ad validitatem* reasons, the option agreement and the acceptance of the offer must be done in an authentic form, as only together constitute a sale contract;

- when it comes to the unilateral promise to sell, the person promising the sale can alienate the asset which was the object of his promise, as it is not legally bound to any inalienability clause, while he will only have to pay damages as legal consequences, only if the beneficiary of the promise proves that a prejudice has been caused. When it comes to the option agreement, the Civil Code – art. 1668 paragraph (1) – mentions the following: *"(…) between the date when the option agreement is concluded and the option is expressed, or the term to express the option has expired, according to the case, no one can dispose of the asset which constitutes the object of the agreement"*;

- if the tenderer does not respect the right of the beneficiary of the agreement, the latter can only demand damages, but cannot also resort to the provisions of art. 1669 of the Civil Code, according to which the court can be demanded to give a sentence replacing the contract;

- the option agreement *must* be registered in the real estate book, on the basis of art. 1668 paragraph (2) of the Civil Code, only if its object are tabular rights, while it will be deleted by default, according to art. 1668 paragraph (3) of the Civil Code, if until the expiry of the option term no statement according to which the option was expressed was registered, accompanied by the proof of being notified to the other party[19];

- another's asset can only be the object of a unilateral promise to sell, but not also of the option agreement.

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[19] The National Union of Notaries Public from Romania (UNNPR) recommends that the option agreement contains the tenderer's clear consent for the property right to be registered, when the offer is accepted, in other words when the property right is transmitted from the seller to the buyer. In this way, would be avoided the consequences generated by the refusal of the seller for the property right of the buyer to be registered in the real estate register and no action related to the tabular inscription would be needed. For more details regarding this, see for instance C. Bîrsan, *Drept civil. Drepturi reale principale în reglementarea noului Cod civil,* Hamangiu, Publ. House, Bucharest, 2015, p. 472-473.

Conclusions

A requirement of any regulation is, without a doubt, the clarity of the normative provisions. This involves on the one hand the use of a proper terminology, by respecting the acknowledged meanings of the terms used, even when a specialized language is involved but, in fact, especially on this occasion. On the other hand, the clarity of the message of the legal texts also resides in the clear delimitation of similar legal institutions. In other words, we believe that the way in which a legal provision is expressed must render the typical features of the institution regarded and, as a consequence, what makes it different as to the other legal institutions. When it comes to the sale contract, several distinctions could be noticed between this one and what is generically named *pre-contract of sale* (or promise to sell), with all its forms. At the same time, similarities could also be noticed, which in some cases bring the legal institutions analysed closer, up to the point where some are confused with the others. This risk could be nevertheless diminished by formulating proper definitions. And, as pointed before, there is still room for improvement at this chapter. For instance, it has already been given the example of art. 1650 paragraph (1) of the Civil Code, which defines sale as "(…) *the contract by means of which the seller transmits or commits to transmit the property of an asset to the buyer, in exchange for a price* (…)". A potential question would be this one: is the definition quoted before common to both the sale and the promise to sell? Or the distinction between the transmission of the property right and the obligation to transmit such right wants to particularize, for the second case, only the exceptional cases (as it happens with the assets in kind), in which the property right is transmitted not exactly at the moment and through the conclusion of the contract, but at a subsequent date – in the given example, when the assets generically determined are individualized. In order to get an answer for the first case, there is an already well motivated answer[20], which is also uphold by the compared law argument of the common regulation at the basis of the sale and promise to sell brought by the French law. Even so, we don't see in this the most adequate resolution, as the common definition given to different institutions can only be, to a certain extent, if not confuse than less clarifying regarding the typical features of each of the notions defined. Finally, in order to identify the typical features of some institutions, we also believe that scientific debates are useful. And from this point of view, we are also counting on the useful purpose of the present work.

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[20] L. Stângu, *quoted works,* p. 15.

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THE COOPERATION AND THE COMMUNICATION WITHIN THE PROCEDURES CONCERNING THE INSOLVENCY OF THE GROUP OF COMPANIES IN ACCORDANCE WITH THE REGULATION (EU) NO. 848/ 2015 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20TH OF MAY 2015

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Abstract: *Globalization is a phenomenon with multiple cross-border valences. The opening of markets as a result of globalization generates legal relationships with a foreign element that produce effects in cross-border insolvency. The EU internal market comprises an area without internal frontiers in which the free movement of persons, services and capital requires legal cooperation. The proper functioning of the single market requires the existence and efficient functioning of cross-border insolvency procedures. The Regulation (EC) no. 848/2015 on insolvency procedures is a basic legal instrument for unifying EU insolvency law. It is a reassessment and improvement of Regulation (EU) no. 1346/2000 in this field and brings as a novelty the regulations on the cross-border insolvency of the group of companies. The cooperation and the communication in insolvency procedures of members of a group of companies are efficient legal means of achieving such a procedure with foreign elements. The variety of forms of communication and cooperation in this procedure includes: the cooperation and the communication between insolvency practitioners; the cooperation and the communication between courts; the cooperation and the communication between insolvency practitioners and courts.*

Keywords: *globalization; the single market; cross-border insolvency; group of companies; cooperation and communication.*

I. The globalization, the internal market of the European Union and the cross-border insolvency

1. Globalization – a phenomenon with cross-border valences

Globalization is a phenomenon with multiple cross-border valences[1]. The process of globalization consists of interconnecting the world on a global level in all the

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[1] **V. Găină, A. M. Găină,** *The legal regime of the cross-borders insolvency under economic globalization*, Iulian Boldea (coordinator), Communication, Context, Interdisciplinarity**,** Studies and Articles, Volume III, Section: Law, „Petru Maior" University Press, Tg. Mureş, 2014, p.66; **V. Găină, Al-M. Găină, A. M. Găină,** *The coordination of the procedure of cross-border insolvency of the group of companies in the conditions of globalization*, Iulian Boldea (coordinator), Debates on globalization. Approaching national identity through intercultural dialogue, Studies and articles, Social Sciences and Management, Arhipelag XXI Press, 2015, p.68.

segments of social life and implies the international movement of ideas and information, goods and services, capital and labor by bringing face to face the national community with the international community[2].

The dynamics[3] of the globalization process is given by the phenomenon of the universalization of commercial practices determined by technological innovation and neoliberal ideology on the background of increasing competition on international markets[4].

Globalization has been determined and influenced by economic, political and social vectors[5], such as: the expansion of the market economy on the background of neoliberal ideology; the economic liberalization from countries with developed economies to countries with developing economies; the research, the innovation and the technological progress; the growing competition on international markets.

Globalization is a dynamic process[6] of opening up the world markets and of shaping the single market as a result of spreading and deepening cross-border links across different segments of the social organization.

Within these international relations, through the free movement of goods and persons legal relationships are born with an element of foreign business and conflicts of jurisdiction being necessary to determine the competent court and the law applicable to general litigations arising from such legal relations.

Globalization is the new vision of the world in which the world "as a whole means more than the sum of the parts while the parties tend to imitate the whole"[7].

2. The internal market of the European Union and the cross-border insolvency

In accordance with the principles underpinning its constitution, the European Union is founded on the values of respect for human dignity, democracy and equality, and on the respect for human rights[8], and it aims to promote peace, its values and the well-being of its people[9] and provides its citizens an area of freedom, justice, without internal borders[10].

The European Union establishes an internal market and proceeds for the sustainable development of Europe based on an equitable economic growth with a high level of competitiveness[11].

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[2] **J.E. Stiglitz**, *Mecanismele globalizării*, Ed. Polirom, Bucureşti, 2008, p. 19; **R. Gilpin**, *Economia mondială a secolului XXI. Provocarea capitalismului global*, Ed. Polirom, Bucureşti, 2004, p.28; **I. Bari**, *Globalizarea economiei*, Ed. Economică, Bucureşti, 2005, p.27.

[3] **V. Găină, A. M. Găină**, *Globalization of the financial markets and the cross-border insolvency of the credit institutions*, Iulian Boldea, Dumitru-Mircea Buda (Editors), Convergent discourses. Exploring the Context of Communications, Ed. Arhipelag, XXI Press, Tîrgu Mureş, 2016, p. 143.

[4] **A. M. Găină**, *Globalizarea şi crizele financiare*, Ed. Prouniversitaria, Bucureşti, 2012, p.11; **A. M. Găină**, *Comerț international*, Ed. Universitaria, Craiova, 2014, p.39.

[5] **C. Munteanu, A. Horobăț**, *Finanțe transnaționale*, Ed. All-Beck, Bucureşti, 2003, p.61; **R. Gilpin**, *op.cit.*, 2004, p.36; **Guillermo de la Dehesa**, *Învingători şi învinşi în globalizare*, Ed. Historia, Bucureşti, 2007, p.9; **A. M. Găină**, *op.cit.*, 2014, p.39.

[6] **A. M. Găină**, *op.cit.*, 2014, p.39.

[7] **D. Marin, C. Socol, M. Marinaş**, *Economie europeană. O prezentare sinoptică*, Ed. Economică, Bucureşti, 2004, p.23

[8] Article 2, paragraph 1 of the consolidated version of the Treaty on European Union (2016 / C / 2002).

[9] Article 3, paragraph 1 of the consolidated version of the Treaty on European Union (2016 / C / 2002).

[10] Article 3, paragraph 2 of the consolidated version of the Treaty on European Union (2016 / C / 2002).

[11] Article 3, paragraph 3 of the consolidated version of the Treaty on European Union (2016 / C / 2002).

The internal market comprises an area without internal borders in which the free movement of goods, persons, services and capital is ensured in accordance with the disposals of the Treaties[12].

The free movement of goods, persons, services and capital on the territory of the states and on the internal market area generates a multitude of legal relations with foreign elements[13], being necessary the judicial cooperation in civil matters. Companies activities often have cross-border valences and require regulation in European Union law, and the insolvency of such companies may undermine the proper functioning of the internal market[14].

The proper functioning of the internal market requires the existence and functioning of efficient[15] cross-border insolvency procedures and to prevent the temptation to transfer assets or judicial procedures from one member state to another in an attempt to obtain a more favorable legal situation to the detriment of creditors, on the account of this judicial tourism[16].

II. The regulation (EU) No. 848/2015 of the European Parliament and of the Council of 20th may 2015 concerning the insolvency procedures

1. The need and the evolution of a EU regulation in the field of insolvency

The need for adoption of some regulations at EU level in the field of insolvency was determined by the differences between the national substantive law systems on insolvency.

The first major step in unifying the law of insolvency at EU level was through the adoption of Council Regulation (EC) no. 1346/2000 of 29th May 2000 concerning the procedures on insolvency.

The reasons that determined the adoption of Regulation (EC) no.1346/2000 were the following: the development of a framework for the proper functioning of the internal market in the context of the activity of the companies with more and more often cross-border effects; to ensure a real and effective framework for cross-border insolvency procedures at community level; the prevention of judicial tourism with harmful consequences for creditors as a result of the parties' temptation to transfer assets or judicial procedures from one member state to another in an attempt to obtain a better legal status.

According to the art. 47 of Regulation (EC) no. 1346/2000, it took effect on 31st of May 2002 and for the assessment of the impact of its application and its eventual

[12] Article 26, paragraph 2 of the consolidated version of the Treaty on European Union (2016 / C / 2002).

[13] **I. P. Filipescu, A.I. Filipescu**, *Tratat de drept internațional privat*, Ed. Universul Juridic, Bucureşti, 2005, p.422; **O.Ungureanu, C. Jugastru, A. Circa**, *Manual de drept internațional privat*, Ed. Hamangiu, Bucureşti, 2008, p.235.

[14] Point (4) of the Preamble to Regulation (EU) no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings (recast).

[15] Point (3) of the Preamble to Regulation (EU) no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings (recast).

[16] Point (5) of the Preamble to Regulation (EU) No. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings (recast).

adoption it was provided in art. 46 that no later than 1st of June 2012 and every five years thereafter, the Commission will present to the European Parliament, the Council and the Economic and Social Committee a report on the application of that Regulation.

In the year 2015, the European Commission concluded in its evaluation report on the application of Regulation no. 1346/2000 that it works generally well, but that it would be desirable to improve the application of some of its disposals to improve the effective management of cross-border insolvency procedures, and that a reformation of this Regulation would be necessary in the interests of transparency.

Following the proposals of the European Commission and the European Economic and Social Committee approval, the European Parliament and the Council of the European Union adopted Regulation (EU) no. 848/2015 of 20th of May 2015, thus making the second major step in the uniformity of insolvency law in the European Union, which has substantially improved the regulation, in particular with regard to the groups of companies.

The Regulation (EC) no. 1346/2000 has been revoked, and the Regulation (EU) no. 848/2015 applies from 26th of June 2017 with certain exceptions.

2. The purpose of the Regulation (EU) no. 848/2015

The stated purpose[17] of the Regulation (EU) no. 848/2015 is to improve the effective administration of cross-border insolvency procedures in general, with special reference[18] to the regulation of the coordination of insolvency procedures relating to the same debtor or to several companies belonging to the same group. The Regulation (EU) no. 848/2015 is not an unitary regulation of the insolvency procedure at european level because the legal systems of the EU member states have particularities.

However, the Regulation (EU) no. 848/2015 regulates in terms of insolvency the relations of private international law with a foreign element located in a state which is a member of the European Union.

By purpose[19], the procedures are to safeguard the viable debtor, to adjust the debt, to reorganize the activity and to liquidate the activity.

3. The application field

The Regulation (EU) no. 848/2015 applies[20] to public collective procedures, including the temporarily ones, which are based on insolvency law and where, for the purposes of safeguarding, adjusting, reorganizing or liquidating, there is a situation such as: the assets of a debtor are wholly or partly unavailable and an insolvency practitioneris designated; the assets and activity of a debtor are subject to control or supervision by a court; there is a suspension of individual enforcement accorded by the court or by the effect of the law to allow negotiations between the debtor and its

[17] Point (1) of the Preamble to Regulation (EU) No. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings (recast).
[18] Point (6) of the Preamble to Regulation (EU) No. 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[19] **M. Comşa**, *Regulamentul privind procedurile de insolvență. Jurisprudența Curții de Justiție a Uniunii Europene*, Ed. Universul Juridic, Bucureşti, 2017, p.283.
[20] Article 1, paragraph 1 of the Regulation no. 848/2015.

creditors to provide that the procedure in which the suspension was proceded provides appropriate measures to protect the creditor and unless an agreement is reached that precedes one of the above-mentioned situations.

Unlike the stipulations of the Regulation no. 1340/2000, which were applicable only to bankruptcy, the stipulations of the Regulation no. 848/2015 are applicable both to reorganization[21] procedures and to bankruptcy procedures as well as to the procedure for the preventive concordance.

If through the art. 1 regarding the application field of the Regulation no. 1340/2000 was stipulated that its provisions are applicable if a liquidator has been appointed, which can be appointed and has competence only in the bankruptcy procedure, through the art. 1 regarding the application field of the Regulation no. 848/2015 is stated that its provisions are applicable to legal situations in which an insolvency practitioner has been appointed, this could be an ad-hoc mandatary, administrator-settlement, judicial administrator or liquidator. So we are in a wide application field, meaning both for insolvency preventive procedures and for insolvency procedures.

In the very content of the art. 1 (1) of the Regulation (EU) no. 848/2015 it is stated that it applies to public collective procedures for the purpose of safeguarding, adjusting debts, reorganizing or liquidating the debtor's property. If the respective procedures are passed in Annex A to the Regulation (EU) no. 848/2015, than those procedures are applicable to them[22].

The Regulation (EU) no. 848/2015 does not apply[23] to the preventive insolvency procedures or to the insolvency relating to: insurance companies; credit institutions; investment companies and other companies; institutions and companies to the extent that they make the subject of the Directive no. 24/2001/EC[24]; collective investment undertakings. In that regard, the Regulation no. 848/2015 maintains the same prohibitions on the application of the Regulation no. 1346/2000.

III. The cooperation and the communication in the procedure of the cross-border insolvency of the members of a group of companies

1. What is the group of companies?

In the Regulation no. 1346/2000 there were no provisions regarding the group of companies, stating in the legal literature[25] that they are an economic reality and that until then there was no[26] legal regulation applicable to relations with the EU member

[21] **M. Comşa**, *Regulamentul privind procedurile de insolvență. Jurisprudența Curții de Justiție a Uniunii Europene*, Ed. Universul Juridic, Bucureşti, 2017, p.281.
[22] Point (9) of the Preamble to Regulation (EU) No. 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).
[23] Article 1 (2) of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.
[24] Directive no. 24/2001 / EC on the reorganization and liquidation of credit institutions.
[25] **Ph. Merle**, *Droit Commercial, Societes Commerciales*, 15 Dalloz, Paris, 2011, p.809.
[26] **R. Bufan., A. Deli-Diaconescu, F. Moțiu**, coordonatori şi colaboratorii, *Tratat practic de insolvență*, Ed. Hamangiu, Bucureşti, 2014, p.836.

states. In the Law no.85/ 2014 on insolvency and insolvency prevention procedures in the art. 5 (35), however, is provided that ”the group of companies means two or more companies interconnected by control and (or) the holding of qualified holdings”.

The difference[27] of the group of companies against other structures is qualified participation[28] and control[29] that can be taken together or separately. However, such regulation is only applicable to internal insolvency proceedings.

Diferențierea grupului de societăți față de alte structuri sunt participarea calificată şi controlulcare pot fi luate împreună sau separat. Asemenea reglementare este însă aplicabilă doar procedurilor interne de insolvență.

By the provisions of the art. 2, paragraph 13 of the Regulation (EC) no. 848/2015 is specified that "the group of companies" means a parent company with all their subsidiary undertakings. However, at the same art. 2, but at paragraph 13 it is stated that "parenting" means a company which controls either directly or indirectly one or more subsidiary undertakings. Similarly, any undertaking producing consolidated financial statements in accordance with the Directive no.34/2013 / EU of the European Parliament and of the Council shall be treated as parent undertakings.

There is no identity[30] between the groups of companies and economic interest groups[31], as there are structural differences and legal treatment.

2. The need and the forms of cooperation in the procedure of the insolvency group

The cooperation and the communication in the procedure of the insolvency of the members of a group of companies are required by the provisions of the Regulation (EU) no. 848/2015 for reasons relating to the effective and efficient operation of that procedure.

The forms[32] of cooperation and communication in insolvency of the members of the group of companies are: the cooperation and the communication between insolvency practitioners[33]; the cooperation and the communication between

[27] **V. Găină, Al. M. Găină, A. M. Găină**, *The corss-border insolvency of the group of companies in the context of economic globalization*, I. Boldea coord., Globalisation and National Identitiy. Studies on the Strategies of Intercultural Dialogue, Ed. Arhipeleag XXI, TG. Mureş, 2015, p.49.

[28] Qualified participation consists of the 20% to 50% capital fraction that a person holds in another company (Article 5, paragraph 41 of Law No. 85/2014).

[29] A person is considered to have control and may directly or indirectly influence or determine the financial and operating policy or decisions at the level of the corporate bodies when: 40% of the voting rights are held and there is no one with a higher percentage holding the majority of the voting rights in the general meeting of that company; when it has the power to appoint or revoke the majority of the members of the management bodies (art.5, item 9 of the Law no.85 / 2014).

[30] **M. Comşa**, *Regulamentul privind procedurile de insolvență. Jurisprudența Curții de Justiție a Uniunii Europene*, Ed. Universul Juridic, Bucureşti, 2017, p.330.

[31] The economic interest group is an association between two or more natural or legal persons, established for a specified period, in order to facilitate or develop the economic activity of its members, as well as to improve the results of the respective activity. (art.118 of the Law no.16 / 2003).

[32] **M. Comşa**, *Regulamentul privind procedurile de insolvență. Jurisprudența Curții de Justiție a Uniunii Europene*, Ed. Universul Juridic, Bucureşti, 2017, p.316.

[33] Art. 56 of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency proceedings.

courts[34]; the cooperation and the communication between insolvency practitioners and courts[35].

3. The cooperation and the communication between insolvency practitioners

The insolvency practitioners who are appointed for two or more members of a group of companies are required to cooperate with each other to facilitate the effective administration of the procedure if there is no incompatibility or conflict of interest. Cooperation may take place in any form, including by completion of agreements or protocols.

The object[36] of the communication and the cooperation between insolvency practitioners consists in: the communication of relevant information for the other procedure under the condition of the protection of the confidential information; the analysisof the possible opportunities for coordination of the management and supervision of the activity of the members of the group that are involved in the insolvency procedure and, as far as possible, the coordination, the administration and the supervision; the analysis of possible reorganization of the group of members affected by the insolvency procedure and the existence of such a possibility to coordinate the proposal and negotiate a coordinated reorganization plan.

Designated practitioners may agree to assign additional duties to a designated insolvency practitioner in a procedure.

Also, designated insolvency practitioners may agree to share certain tasks among themselves. Both the award of additional tasks and the division of certain tasks should be allowed by the rules applicable to each of the procedures.

4. The cooperation and the communication between courts

When insolvency procedures concern two or more companies belonging to a group, the court which has opened such a procedure shall be jointly and severally liable with any other court having a request for the opening of proceedings to another company in the same group or which has opened such a procedure[37].

The courts may appoint, as appropriate, an independent person or an independent body to act in accordance with their instructions. Courts and the person acting on their behalf may communicate directly or request information or assistance directly and mutually.

The means[38] by which the cooperation can be implemented are: the coordination with regard to the appointment of insolvency practitioners; the communication of

[34] Art. 57 of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.
[35] Art. 58 of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.
[36] Art. 56 (2) of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.
[37] Art. 57 (1) of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.
[38] Art. 57 (3) of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.

informations by any appropriate means; the coordination of the management and supervision of the assets and activities of the group companies; the coordination of the holding of court hearings; the coordination of the protocols approval.

5. The cooperation and the communication between insolvency practitioners and courts

The insolvency practitioner[39] who has been appointed in an insolvency procedure involving a member of a group is requesting or communicating informations and cooperating with any court that is in the process of insolvency of another member company of the same group.

The way in which information or cooperation of practitioners is requested or communicated with court consists in the following: the cooperation with any court which has a request for opening a procedure concerning another company in the same group or which has opened such a procedure; the communication with any other court that has an insolvency procedure in progress for another company in the group; the request of informations on the procedure concerning the other member company of the group or assistance with the procedure in which it is designated.

The communication and the cooperation should be timely to facilitate the effective management of procedures and not to induce any incompatibility or conflict of interest.

6. The competencies of the insolvency practitioner in the procedure concerning the members of a group of companies

6.1. Categories of competencies

An insolvency practitioner appointed in an open procedure concerning a member company of a group may be heard in any open proceedings in respect of any other member company of the same group. He may request the suspension of any measure relating to the recovery of assets in the open procedure in respect of any other member company of the same group. Suspension may be requested under certain conditions[40]: to propose a reorganization plan for all or some of the member companies of the group in respect of which the procedure was opened and to have a reasonable chance of success; the suspension to be necessary to ensure the implementation of the reorganization plan; the reorganization plan to be for the benefit of the creditors in the procedure for which the suspension is requested; the two procedures, the one in which the practitioner was appointed and the one in which he requests the suspension, are not subject to coordination. The insolvency practitioner may also request the opening of a group coordination procedure.

[39] Art. 58 of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.

[40] Art. 60 (b) of the Regulation no. 848/2015 of the European Parliament and of the Council of 20th May 2015 on insolvency procedures.

6.2. The settlement of the request to suspend any measures

The court which has opened a procedure for a member of the group may suspend any measure of total or partial asset recovery if it considers that the conditions for suspension are met.

In order to resolve the suspension request, the court shall hear the insolvency practitioner appointed in the proceedings for which the suspension is requested because he/she knows best the situation in the proceedings.

The period for which the court orders the suspension may not exceed 3 months. The suspension may be extended if appropriate, but the total of the suspension, namely the initial period plus the extension, may not exceed 6 months.

By the suspension decision, the court may require the insolvent practitioner who requested the suspension to take any appropriate measure available under national law to safeguard the interests of creditors in the proceedings.

7. The costs of the cooperation and the communication in the procedure involving members of a group of companies

The cooperation and the communication in the proceedings involving members of a group of companies may lead to costs related to travel, correspondence, drafting of documents, legal aid and others, for the insolvent practitioner.

The costs of the cooperation and of the communication in such a procedure shall be considered[41] as costs and expenses for the procedure.

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LIFERS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: SOME REASONS FOR CONCERN AND DISAPPOINTMENT

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Abstract: *Lifer´s human rights are still far from being properly acknowledged by the European Court of Human Rights (ECtHR). Recent Grand Chamber judgments such as Vinter and others v. United Kingdom (2013), Murray v. The Netherlands (2016) and Hutchinson v. United Kingdom (2017) bring in some contradictions and inconsistencies that feature a rather poor and hypocritical defense of human dignity. Here is an attempt to explain some of these problems that call for a much more committed approach by the ECtHR in relation to those who might spend the rest of their life in prison.*

Keywords: *European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR), lifers, life sentences, human dignity, right to hope, criminal dangerousness, public protection, re-socialization.*

I. Introduction

In the past few years and according to some scholars[1], a trend aimed at the better protection of lifer´s human rights has been identified in Europe. Recent Grand Chamber decisions such as *Vinter and others v. the United Kingdom*, *Murray v. The Netherlands* and *Hutchinson v. the United Kindom*, among others[2], have been cheered and deemed as a basis for the application of new and stronger safeguards to those who might spend the rest of their lives behind bars.

It seems that a realm of human dignity in need of protection has been revealed and apparently taken care of: a realm that defines what we are as individuals and therefore exists despite the endless horror that our deeds might sometimes entail. This core of

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[1] Van Zyl Smit, D. / Weatherby, P. / Creighton, S. "Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to be done?", *Human Rights Law Review*, 2014, 14, 59-84.

[2] The root of this trend could be found in *Kafkaris* but the significant step was taken in *Vinter* and in the judgments that followed [see, among others, *Kafkaris v. Cyprus*, February 12th of 2008 (Application no. 21906/04); *Vinter and others v. The United Kingdom*, July 13th of 2013 (Applications nos. 66069/09, 130/10 and 3896/10); *Murray v. The Netherlands*, April 26th of 2016 (Application no. 10511/10); *Hutchinson v. The United Kingdom*, January 17th of 2017 (Application no. 57592/08)].

human dignity is reflected in the so called "right to hope" that belongs to all convicted criminals including lifers[3].

Lifers should know at the onset of their sentence that they have a realistic chance to regain freedom and return to society once part of their conviction is completed. Such right belongs to all kinds of convicted detainees, but should be addressed even more carefully when dealing with people convicted to life imprisonment, since this punishment may actually lead them to die in prison.

This right to hope defines their humanity as it acknowledges the person´s intrinsic capability to change, a feature that cannot be erased by the gravity of his/her crimes. The denial of this prerogative is regarded as degrading and hence contrary to article 3 of ECtHR[4]. In order to guarantee the protection of this right, the Criminal Justice System of member States must foresee a procedure of revision of all life sentences that could actually lead to the lifer´s early release.

No matter how welcome these developments might be, particularly from a humanitarian perspective, there seems to be lip service, contradictions and traps in the reasoning of the ECtHR. These circumstances not only jeopardize the protection of lifers' fundamental rights but they also reveal a rather hypocritical and poor conception of both human dignity and the obligations of the States as to the individuals under their custody.

This article aims to analysing these critical points and suggests the ECtHR to engage more thoroughly in the rights of people who mightremain in prison for the rest of their life.

II. Is the usefulness of life imprisonment more important than the breach of human dignity?

The prohibition of article 3 of the ECHR ("*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*") is not only ranked as one of the

[3] References to such a right can be found in many Gran Chamber´s judgments (see, among many others, *Vinter and others v. The United Kingdom* § 54, 62, 63, 64, 69…), and in some soft law instruments [see, for example, the *Explanatory Memorandum accompanying the Recommendation 2003(22)* (on conditional release) adopted by the Committee of Ministers of the Council of Europe, on 24 September 2003, which states in respect of paragraph 4: "Life-sentence prisoners should not be deprived of the hope to be granted release either" (available on line: https://rm.coe.int/16800ccb5d -last visit on May, 20th, 2018). See also Van Zyl Smit, D. / Weatherby, P. / Creighton, S. "Whole Life…op. cit., p. 66.; Landa Gorostiza, J.M., "Prisión perpetua y de muy larga duración tras la LO 1/2015: ¿derecho a la esperanza? Con especial consideración del terrorismo y del TEDH", *Revista Electrónica de Ciencia Penal y Criminología* RECPC 17-20(2015)–http://criminet.ugr.es/recpc–ISSN 1695-0194, pp. 8-13.

[4] As Judge Power-Forde put it in her concurring opinion in *Vinter and others v. The United Kingdom* (see separate opinions p. 54): <<…*what tipped the balance for me in voting with the majority was the Court's confirmation, in this judgment, that Article 3 encompasses what might be described as "the right to hope"… The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading*>>.

most important provisions of the Convention but it is also stated "in absolute and unqualified terms"[5]. Therefore there is "no room for limitations by law on this provision"[6]. It should follow that there is no justification for torture nor for inhuman or degrading treatments or punishment, not even war[7].

However, the ECtHR has not been entirely consistent with these principles since it has repeated, at least over the last ten years, that perpetual incarceration of a human being (imprisonment that could only end with his death) does not breach the Convention as long as the sentence is reducible, the prisoner is deemed to be dangerous and the public is correspondently in need of protection against him/her[8]. It could be argued that that perpetual deprivation of personal freedom is in itself contrary to human dignity since freedom is precisely an essential part of what defines us as humans[9]. But still the ECtHR does not hesitate to affirm that the apparent usefulness and reviewable nature of such punishment makes it compatible with article 3 of the ECHR.

At least three flaws could be pointed out in this reasoning.

First of all, the wording of the ECtHR is either wrong or hypocritical. Perpetual deprivation of personal freedom does breach article 3 of the ECHR because it itself amounts to deprivation of human dignity. The Court could argue that the protection of society is more important than the inmate´s dignity, thereby legitimizing life imprisonment, but this does not change the inhuman nature of the punishment itself. So despite the grandiloquence with which the Court quotes article 3 of the ECRH and the absolute terms in which the latter is stated within the Convention[10], there is actually

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[5] See Reidi A., *The prohibition of torture: A guide to the implementation of Article 3 of the European Convention of Human Right*. Council of Europe. Germany, 2003, pp. 19 y 20; see *Tomasi v. France*, August, 27th of 1992 (Application no. 12850/87); *Ireland v. United Kingdom*, January 18th of 1978 (Application no. 5310/71).

[6] See Reidi A., *The prohibition of torture…op cit.,* 19 y 20.

[7] *Ibidem* p. 20.

[8] The Gran Chamber has argued that the <<… ***imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention*** *…At the same time, however, the Court has also held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3…In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release….* ***It follows that a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full***>> (see *Kafkaris v. Cyprus*, § 97 and 98). Moreover it has <<*emphasise that* ***no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society****… The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State's positive obligation to protect the public; States may fulfil that obligation by* ***continuing to detain such life sentenced prisoners for as long as they remain dangerous***>> (see *Vinter and others v. The United Kindom*, § 108; emphasis added). The exact same augments are present in *Murray v. The Netherlands* § 99.

[9] See Lascuraín Sánchez, J. A. / Pérez Manzano, M./ Alcácer Guirao, R., Arroyo Zapatero, L./ De León Villalba, J./ Martínez Garay, L. "Dictamen sobre la constitucionalidad de la prisión permanente revisable" en, Arroyo Zapatero, L., Lascuraín Sánchez, J. A., Pérez Manzano, M. (eds.) *Against Life Sentence*, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2016, p. 29; Ríos Martín, J.C., *La prisión perpetua en España: Razones de su ilegimitidad ética y de su inconstitucionalidad*, Tercera Prensa, San Sebastián 2013, pp.103-113.

[10] The Grand Chamber has made it very clear since a long time. Just as an example one could quote *Kafkaris v. Cyprus* judgement, § 95: <<*Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour*>>.

room for an exception to this provision. And such exception is not war or a similar extreme circumstance, but the threat that a single individual, serving a life sentence, might pose to society.

Secondly, the importance given to the inmate´s dangerousness might be overestimated, and this circumstance weakens the legitimacy of imprisonment. In fact, according to the Court´s reasoning, once part of the sentence is served, the deprivation of personal freedom is only based on the prisoner´s alleged probability of reoffending.

A considerable amount of empirical evidence shows that nowadays it is still very difficult to anticipate criminal and violence behavior[11] and that risk assessment should be taken very carefully, particularly when it is used to support judicial decisions such as release on parole[12]. The progress achieved by the research conducted over the last 40 years is deemed to be modest[13]. Some studies show that the amount of false positives is sometimes above 50%[14]. This means that, according to some surveys, among all the individuals of a sample group that were considered likely or highly likely to reoffend, more than half did not.

One might wonder, how can the ECtHR repeatedly justify, in such strong and unequivocal terms, no less than the effective life imprisonment of a human being on the basis of his/her dangerousness when prediction of reoffending is so difficult and can be so inaccurate?

Thirdly, one can point out the unfairness of perpetual incarceration (aimed at the avoidance of reoffending) in cases in which State authorities lack the means or the will to offer adequate treatment and rehabilitation programs for those prisoners considered dangerous [15].

[11] Martínez Garay, L., "Conceptual errors in violence risk assessments", *Revista Española de Investigación Criminológica*, Artículo 3, nº 14 (2016), pp. 1-31.

[12] See Martínez Garay, L. /Montes Suay, F., "Using risk assessment tools in criminal law: some necessary cautions", *InDret*, 2/2018, p. 35.

[13] As Skeem and Monahan put it, "*The violence risk assessment field may be reaching a point of diminishing returns in instrument development….specific structured techniques seem to account for very little of the variance in predictive accuracy. If we are approaching a ceiling in this domain, there clearly are miles to go on the risk reduction front. We hope that forensic psychology shifts more of its fruitful attention from predicting violence to understanding its causes and preventing its (re)occurrence*". See Skeem, Jennifer L./ Monahan, Jonh, "Current Directions in Violence Risk Assessment" *University of Virginia School of Law Public Law and Legal Theory Research Paper Series No. 2011-13*, p. 12.

[14] See Martínez Garay, L., "The uncertainty of risk assessment in criminal law: consequences for the concept, legitimacy and limits of security measures", *InDret* 2/2014, pp. 7-14.

[15] We can find examples of such situations in some of the cases analysed by the ECtHR. As will be explained later, James Clifton Murray spent 34 years in prison before he was released. Previous to his liberation, he had been denied Government pardon for thirteen times. The reason for the denial was that he was still likely to reoffend as he was suffering from a mental disorder for which he had not received any treatment whatsoever (see Grand Chamber *Murray vs. The Netherlands*, April 26th of 2016, Application no. 10511/10, §116-127). A similar situation was observed in the case of *James, Wells and Lee v. The United Kingdom* [final decision February 11th of 2013 (Applications numbers 25119/09, 57715/09 and 57877/09)].

The lack of adequate and individualised re-socialization[16] programs in European prisons is far from being exceptional considering the *country* and *annual* reports issued by the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (ECPT)[17].

In the 25th General Report that covered the activities carried out from January the 1st until December the 31st, 2015[18], the ECPT confirms the extremely harsh conditions of imprisonment to which people serving life sentences are subjected in several European countries (such as Armenia, Azerbaijan, Bulgaria, Georgia, Latvia, Moldova, Romania, the Russian Federation and Turkey)[19]. The report indicates that lifers in these countries are often segregated from other prisoners and subjected to "draconian" security measures, such as cell isolation during 23 hours a day. Moreover, no labor activity or educational programs that correlate with low risk of reoffending after release are offered to individuals serving life sentences under those conditions.

The situation in other countries from different European latitudes might be considered similar. In Spain, reviewable permanent imprisonment was first introduced in 2015 by virtue of the Organic Law 1/2015 of March, 30th[20]. Today, when more than three years have gone by, still no specific re-socialization program for lifers has been foreseen nor provided[21]. It is also important to highlight the fact that only a minority of Spanish prisoners receive treatments that are considered to decrease the risk of their reoffending (such as detoxification programs) and have a correspondent positive impact on early release decisions[22]. This circumstance partly explains why, over the last 18 years, less than 20% of Spanish prisoners were granted parole before the entire completion of their sentences[23].

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[16] In this article the term "re-socialization" is used instead of "rehabilitation" following a recent tendency that can be found in some judgements of the ECtHR. As Judge Pinto de Albuquerque argues: <<*For the purpose of terminological clarity, it must be stated that resocialization is the correct word in penal and prison law to designate the primary purpose of imprisonment; it refers to the social reintegration of the prisoner who is capable of leading a crime-free life after release. Rehabilitation has a moralistic and paternalistic connotation, deriving from the wrong assumption that the State is responsible for the prisoner's "moral reform" and his or her "conversion" to the majority's social values*>> (See *Murray v. The Netherlands*, Separate opinions, p. 52).

[17] See Rodríguez Yagüe, C., "Los estándares internacionales sobre la cadena perpetua del Comité Europeo para la prevención de la tortura y las penas o tratos inhumanos y degradantes", *Revista de Derecho Penal y Criminología*, 3ª Época, nº 17 (enero de 2017), pp. 244-259.

[18] The report is available on line: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680696a9d (last visit on May, 19th, 2018).

[19] See Lascuraín Sánchez, J. A. / Pérez Manzano, M./ Alcácer Guirao, R., Arroyo Zapatero, L./ De León Villalba, J./ Martínez Garay, L. "Dictamen…op.cit., pp. 41 y 42.

[20] Previous to this moment in the current democracy, life imprisonment was last foreseen by the Spanish Criminal Code of 1870.

[21] Id, pp. 35-37.

[22] See Tebar Vilches, B., "La aplicación de la libertad condicional en España", *Revista de Derecho Penal y Criminología*, 2ª Época, nº 18 (2006), pp. 283-315.

[23] See Gil Gil, A./ Lacruz López, J.M./ Melendo Pardos, M./ Núñez Fernández, J., *Consecuencias Jurídicas del Delito: Regulación y datos de la respuesta a la infracción penal en España*. Dykinson, Madrid, 2018, pp. 305-306. According to the official data published by the Spanish Government in relation to year 2016, only 14,5% of the prisoners were granted parole: http://www.interior.gob.es/documents/642317/1204854/Anuario+Estadistico+2016.pdf/6c02fffa-93c4-4838-b1d5-a882971c2cdc (last visited on May the 22nd, 2018).

III. The delusive protection of the so called "right to hope" in *Murray v. The Netherlands*[24]

According to the ECtHR, for a life sentence to be in accordance with article 3 of the ECHR and preserve the prisoner´s right to hope, it should be *de iure* and *de facto* reducible[25].

The *de iure* reducibility refers to formal requirements that the legal system of the member State should meet in relation to the review of life sentences. A synthesis of all these requirements can be found in the partially concurring opinion of Judge Pinto de Albuquerque in *Murray v. The Netherlands*. This Judge refers to five binding relevant principles (see *Murray v. The Netherlands*, Separate opinions, p. 62) which represent a significant and positive departure from what was required in *Kafkaris v. Cyprus* in the year 2008:

<<(1) *the principle of legality ("rules having a sufficient degree of clarity and certainty", "conditions laid down in domestic legislation"); (2) the principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria", which include resocialisation (special prevention), deterrence (general prevention) and retribution; (3) the principle of assessment within a pre-established time frame and, in the case of life prisoners, "not later than 25 years after the imposition of the sentence and thereafter a periodic review"*[26]*; (4) the principle of fair procedural guarantees, which include at least the*

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[24] Grand Chamber *Murray v. The Netherlands*, April 26th of 2016 (Application no. 10511/10).

[25] As the Grand Chamber put it in *Kafkaris v. Cyprus*: <<*It is enough for the purposes of Article 3 that a life sentence is* de jure *and* de facto *reducible*>> (§ 98).

[26] It is important to highlight that this time frame-work requirement is not binding, despite Judge Pinto de Albuquerque´s partly concurring opinion. I will come back to this matter later on but for the time being, it should be noted that the Grand Chamber has not stated any clear obligation on the part of the member States as it regards to the time in which the review of life sentence should take place. In the paragraph 99 of the Grand Chamber decision referred to by Judge Pinto de Albuquerque, it is stated: <<*It further observed in that case that the comparative and international law materials before it showed clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter*>>. So the Grand Chamber, taking in to account the comparative and international law materials, just recommends the 25 year period followed by further periodical reviews, but I don´t think it imposes any obligations on the member States. The same exact reasoning can be found in *Hutchinson v.The United Kingdom*, § 69. In fact the ECtHR found no violation of article 3 in cases in which the life sentence had to be reviewed for the first time after 30 years of imprisonment [see *Bodein vs. France* (Application no. 40014/10), December 13th, of 2015)]. Moreover, the Gran Chamber has argued that <<…*Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. As the Court has stated, it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court*>> (See *Vinter and others v. The United Kingdom*, § 105).

In England and Wales life sentences with whole life orders can be imposed without no time framework review. Such practice has been considered in accordance with the Convention, since technically the prisoner can trigger the review of his sentence at "any time" (*Hutchinson v. The United Kingdom*, § 69). The stand point of the Gran Chamber regarding this matter is certainly unsatisfactory in terms of the lifer´s legal security, since the very Court concedes that: <<*In light of the very serious nature of the crimes committed by persons in this category though,* ***it has to be expected that their period of detention will be lengthy***>> (*Hutchinson v. The United Kingdom*, § 67; emphasis added).

obligation to give reasons for decisions not to release or to recall a prisoner; (5) the principle of judicial review.>>

Furthermore, for a life sentence to be *de facto* reducible, prisoners should be provided with the necessary means to meet all requirements for the release when their sentence is reviewed. Otherwise they could not have a realistic prospect of release. The State should promote the re-socialization of the prisoners, since the progress he could make in this regard is crucial for early release: one should bear in mind that, according to the ECtHR, the State can keep under detention life sentenced prisoners <<*for as long as they remain dangerous*>> (see *Vinter and others v. The United Kindom*, § 108).

For the right to hope to be properly addressed, it seems obvious that all necessary means for re-socialization should be provided since the onset of the sentence[27]. The ECtHR tirelessly and profusely refers to the positive obligations of the State to favour/foster prisoners´ re-socialization and grounds this duty on an overwhelming amount of soft law dispositions and some Constitutional Courts judgments[28]. Hope refers to the future and, as such, it can only be granted when a realistic prospect of release is offered to the lifer as soon as he/she is convicted.

Despite all this reasoning, the only case in which the Grand Chamber has decided on a *de facto* reducibility of a life sentence regarded a prisoner that had already served 34 years of his conviction. In *Murray v. The Netherlands*, the Court confirmed a breach of article 3 of ECHR on the ground that in 34 years of imprisonment the applicant had never received the treatment he needed to deal with his criminal dangerousness (*Murray v. The Netherlands* § 117 and 118). That circumstance rendered his sentence *de facto* irreducible, as he had never had the chance to meet the requirements for early release (*Murray v. The Netherlands* § 125 and 127).

Is this only a case of degrading punishment because the right to hope was violated? I do not think so. Murray´s hope was broken long before the Grand Chamber issued its decision; it was broken as soon as, once sentenced to life imprisonment, he was not provided with the treatment he needed to deal with his dangerousness and to make a progress towards his re-socialization. Moreover, this is not only a case of degrading punishment but also of an inhuman one, since the lack of hope for release unnecessarily intensifies the inevitable suffering inherent to a life sentence[29].

In addition, this might also be a case of an arbitrary and hence illegal detention[30]. Murray´s incarceration might have become arbitrary and hence contrary to article 5(1)

[27] That's how the positive obligation of the State should be understood. It´s not as if the State should ensure prisoner´s re-socialization but the State must provide them with the means they need to achieve this objective (see Judge Pinto de Albuquerque partly concurring opinion in Murray v. The Netherlands –Separate opinions pp. 52-62; See also Van Zyl Smit, D. / Weatherby, P. / Creighton, S. "Whole Life…op. cit., p.66-67).

[28] See Judge Pinto de Albuquerque partially concurring opinion in Murray v. The Netherlands (Separte opinions, pp. 52-62); Van Zyl Smit, D. / Weatherby, P. / Creighton, S. "Whole Life..., pp. 65-71 also referring to jurisprudence of the German Federal Constitutional Court quoted by the ECtHR.

[29] Ríos Martín, J.C., *La prisión perpetua…*op.cit.pp. 115-117.

[30] Judge Pinto de Albuquerque somehow suggests this possibility in his partly concurring opinion in *Murray* (see *Murray v. The Netherlands*, Separate opinions, p.57), but he does not explicitly make this claim.

of the ECHR[31] since he remained in prison after the first review of his sentence took place. Release was then denied because Murray was considered to be still dangerous but he had not received any treatment for that. So the system somehow assured his detention since the only means to avoid it was never available for him.

A breach of article 5 (1) of the ECHR was found in *James, Wells and Lee v. The United Kingdom* (§220-222), in which the relevant circumstances (detention of the prisoner made unavoidable because of the lack of adequate treatment) were very similar to those described in *Murray*. However, James Murray was never considered to have been illegally detained. This claim had been declared inadmissible by the Chamber and therefore the Grand Chamber could not examined it (*Murray v. The Netherlands* § 86).

IV. The trap of re-socialization: "Taunting a donkey with a carrot to make it walk?"

As I mentioned before, the ECtHR tirelessly refers to the States' positive obligation in the matter of prisoner´s re-socialization and grounds this duty on an overwhelming amount of soft law dispositions and some Constitutional Courts judgments[32]. This rationale raises some concerns that I would like to address. First of all, the existence of such positive obligation should be out of discussion since re-socialization is the lifers´ only chance for early release. Therefore, the non-fulfillment of this duty leads to a possible breach of articles 3 and 5(1) of the ECHR at least in relation to life sentences.

Taking this into account and in light of the ECtHR´s grandiloquent and repetitive speech on re-socialization, one would expect a stronger and more consistent approach from the Court when it comes to set the time framework review of life sentences. It seems to me insufficient to assert, as the Grand Chamber does, that <<…*It further observed in that case that the comparative and international law materials before it showed clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter*>> (see, among others, *Murray v. The Netherlands*, § 99). The time framework for the review should not be a matter of recommendation but, as the Judge Pinto de Albuquerque puts it, <<*a binding relevant principle*>>. But it is not yet binding[33].

Furthermore, the Court should reconsider the 25 year period and explore the possibility of establishing shorter terms, otherwise the Court´s insistence on the positive

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[31] According to article 5 (1) of the ECHR: <<*Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court…*>>. As the ECtHR asserted in *Wells and others v. The United Kingdom* (§191 and 194), <<*compliance with national law is not sufficient in order for a deprivation of liberty to be considered "lawful". Article 5 § 1 also requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness…. a concern may arise in the case of persons who, having served the punishment element of their sentences, are in detention solely because of the risk they pose to the public if there are no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, aimed at reducing the danger they present and at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences*>>.

[32] See above note 26.

[33] See above note 24.

State obligation in relation to re-socialization becomes a mere formality. There is vast empirical evidence showing that the damaging effects of incarceration become irreversible after a while, and render the prisoner unfit for his return to society. Some experts consider that these consequences take place after 15 to 20 years of imprisonment[34].

However, this Court´s re-socialization "endeavor" could also be read in a different way, as the Court does not ignore the effects of long term incarceration shown by empirical studies[35]. So despite its humanitarian appearance, this policy could also be management oriented. The internal security of prisons does benefit from this re-socialization approach, as the inmate´s involvement in constructive activities correlates with lower levels of prison violence[36]. In addition, prisoners might be more prone to comply with the rules when they "believe" they have a goal to fight for: the early release.

Furthermore, it is undeniable that the re-socialization approach does at least mitigate the negative effects of incarceration. Therefore, I think that the Court´s insistence on this matter is necessary and has to be welcomed. Nevertheless, a more consistent standpoint is called for in order to avoid what seems to be a cruel paradox from the lifers' perspective: confirmation of a positive State obligation towards re-socialization but unclear and unrealistic policy of life sentence´s time framework review.

V. Conclusions

Some of the ECtHR Grand Chamber´s latest judgments regarding life sentences give rise to concern and disappointment. Although a significant improvement can be observed since *Kafkaris* in 2008, particularly in terms of the strengthening of formal safeguards, the decisions in *Vinter*, *Murray* and *Hutchinson* still feature certain problematic aspects and call for a for a much more committed approach on by the ECtHR in relation to those who might spend the rest of their life in prison.

In light of the short overview of the relevant case law and of its critical points, we might drive some conclusions:

I. It is at least surprising how easily the ECtHR justifies effective life imprisonment and, hence, the breach of human dignity on the basis of an alleged lifer´s dangerousness. The Court logic is questionable by reason of its very wording as it disguises what the Court is actually doing, which is to create an exception to the provision of article 3 ECHR, which theoretically has no legal basis in the Convention. Moreover, it raises doubts as to legitimacy and fairness if one takes into account the inaccuracy of violence risk assessments and the lifers´ conditions of imprisonment in many European countries.

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[34] See, among others, Haney, C., "The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment", *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities*. January 30–31, 2002 U.S. Department of Health and Human Services The Urban Institute, pp. 4-12.

[35] See partially concurring opinion of Judge Pinto de Albuquerque in *Murray v. The Netherlands* (Separate opinions, p. 55).

[36] *Ibidem*.

II. The ECtHR should take a stronger position on possible complaints that call for a review of a *de facto* reducibility since the onset of the life sentence and as soon as no realistic prospect of release is offered to the lifer. That would be the only way to properly address the right to hope and to avoid degrading and inhuman punishment. Moreover, the Court should always explore the possibility to find an arbitrary detention contrary to article 5 (1) of the ECHR in every case in which early release is denied and adequate re-socialization treatments are not available or not offered to the prisoner.

III. On the one hand, there is the weak and unrealistic position of the Court in relation to life sentence´s time framework review; on the other, the Court´s grandiloquent insistence on the State positive obligation toward prisoner´s re-socialization. From lifers´ perspective, these circumstances seem to create a cruel paradox that should be addressed.

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UNION REGULATIONS REGARDING THE PRECAUTIONARY ORDINANCE OF FREEZING BANK ACCOUNTS IN ORDER TO RECOVER CROSS BORDER DEBTS IN CIVLL AND COMMERCIAL MATTERS

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Abstract: *The issue regarding the need to set up a unitary union procedure of freezing bank accounts was discussed by the European Commission for the first time on 24 October 2006, by the "Green card on the increase of the efficiency of the enforcement the judgments in the European Union: attachment of bank account". Actually, the Commission considered as advisable the adoption of a legal instrument of the European Union, binding and directly applicable at the level of law systems of all Member States, that should establish a procedure allowing the efficient and rapid freezing of the funds existing in the bank accounts, in the crossborder cases, in order to prevent the disappearance of the assets before the execution of a debt. In such context, we present and analyse the provisions of the (EU) Regulation no. 655/2014 to establish a procedure for the European precautionary ordinance of freezing bank accounts in order to facilitate the cross border recovery of debts in civil and commercial matters.*

Keywords: *crossborder character, debts, bank accounts, precautionary ordinance, debt recovery.*

1. Introduction

We consider that, at the level of each Member State of the European Union, national procedures are regulated, in cross border-related cases, when the creditor is trying to freeze several bank accounts situated in different Member States, in order to obtain some precautionary measures, such as ordinances of freezing bank accounts, but the conditions to decide such measures and the efficiency of their execution vary from a state to another.

Therefore, the adoption of a legal instrument of the Union, binding and directly applicable, seems necessary and advisable, in order to establish a new procedure in the cross border cases, meant to allow the rapid and efficient freezing of the funds existing in the bank accounts.

First, we have to mention that the provisions of this regulation apply to *cases with an exclusive cross border character*. Thus, it is considered that there is a cross border case when:

- the court analysing the request to issue a precautionary ordinance is situated in a Member State, and the bank account targeted by the precautionary ordinance is held in another Member State;

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- the creditor is domiciled in a Member State, and the court and the bank account that has to be frozen, are in another Member State.

Actually, *a creditor*[1] should be able to obtain a precautionary measure in the guise of an European precautionary ordinance of freezing bank accounts (hereinafter named "precautionary ordinance" or "ordinance") to prevent the transfer of the withdrawal of the funds owned by his debtor[2] in a bank account held in a Member State, if there is the risk that, without such a measure, the subsequent execution of his debt against the debtor be prevented or hindered considerably.

The freezing of the funds held in the debtor's account should have result in preventing the use of the funds both to the debtor and to the persons authorised by him/her to make payments by means of such account, for example by a scheduled payment order od by direct debit or by using a credit card.

This union regulation practically identifies *the categories of debtors* to whom the provisions of the union regulation are to be applied, also by mentioning that its provisions do not apply to the debtor against whom the insolvency procedures were started.

Moreover, the provisions of this regulation are not incident to all *credit institutions*, but to those whose activity consists in receiving deposits or other reimbursable funds from the public and awarding credits on their own. Per a contrario, this regulation applies, for example, to institutions which offer financing for exportation and investments projects or for projects in the developing countries, or to institutions which offer services concerning the financial markets, and does not apply to the accounts held in central banks or by them when they act in their capacity of monetary authorities or to the accounts that cannot be frozen by a national ordinance equivalent to a precautionary ordinance or that cannot be the object of an attachment in accordance with the law of the Member State where such account is held.

What kind of claims can be the object of a freeze? Analysing the contents of the union provision, we apprehend that the precautionary ordinance can be requested to stand guarantee for:

- already exigible debts,
- debts that have not become exigible yet, but which derive from transaction or an event that has already taken place and their quantum can be established,
- debts related to delictual and quasi-delictual liability,
- debts deriving from civil action in compensation or in restitution occured following an act which is the object of a criminal procedure.

[1] „creditor" means a natural person domiciled in a member State or a legal person situated in a Member State or any other entity situated in a Member State, which has the capacity to sue or be sued in accordance with the law of a Member State and requests or has already obtained a precautionary ordinance related to a debt; see in this regard art. 4 pct.6 of (EU) Regulation 655/2014 to set up a procedure for the European precautionary ordinance to freeze bank accounts in order to facilitate the cross border recovery of the debts in civil and commercial matters

[2] „debtor" means a legal or natural person or any other entity which has the capacity to sue or be sued in accordance with the law of a Member State, against whom the creditor is trying to obtain or has already obtained a precautionary ordinance concerning a debt, see in this regard art. 4 pct.7 (EU) Regulation 655/2014 to set up a procedure for the European precautionary ordinance to freeze bank accounts in order to facilitate the cross border recovery of the debts in civil and commercial matters

When is a creditor at liberty to request the starting of a procedure to issue a precautionary ordinance? We think that such a procedure can be started:

- before starting the procedures on the merits,
- anytime during such a judiciary procedure,
- when the creditor has already obtained a judgment, a judicial transaction or an authentic deed imposing the debtor to pay the debt to the creditor.

This regulation brings up the *principle of the adequate balance between the debtor's and the creditor's interests*. Thus, the creditor's liability should be contained for any damage caused to the debtor by the precautionary ordinance, due to his fault. In this regard, the test is in the debtor's charge, but, regarding the above-mentioned liability reasons, the regulation recommends the union co-lawmaker to adopt a subsequent harmonious regulation by which to set up a relative presumption of guilt of the creditor.

In order to guarantee the usefulness of this legal instrument awarded to the creditor in his/her demarches to recover debts from his/her debtor in cross border cases, the latter shall not be informed regarding the creditor's request and shall neither be heard before the issue of the ordinance, nor notified regarding the ordinance before its enforcement.

Considering the absence of a preliminary hearing of the debtor, this regulation provides specific securities to prevent the abusive use of the ordinance and to protect the debtor's rights.

Such a security is the possibility of the court to request to the creditor to submit a security to make sure that the debtor can be compensated for any damage caused to him/her by the precautionary ordinance. According to the national law, this security has the form of a financial security or of an alternative one, such as a bank security or a mortgage.

Actually, in the cases when the creditor has not obtained a judgment, a judicial transaction or an authentic deed yet, imposing the debtor to pay the debt to the creditor, the delivery of a security should be the rule, while in case the creditor has already obtained a judgment, a judicial transaction or an authentic deed, the delivery of the security should be at the appreciation of the court of law.

II. Theoretical aspects regarding the procedure to obtain the union precautionary ordinance

The cross border character of the case. The precautionary ordinance is a legal deed which is at the creditor's disposal, as an alternative to the precautionary measures provided in the national procedural law.

Thus, the union ordinance awards the creditor the freeze of the bank accounts held in a bank[3] on the debtor's name or on a third party's name, on behalf of the debtor, in a Member State, by which to prevent the endangerment of a subsequent execution of

[3] „bank" means a credit institution, such as defined in article 4 para. (1) point 1 of (EU) Regulation no. 575/2013 of the European Parliament and the Council (1), including branches, in the meaning of article 4 para. (1) point 17 of the above regulation, belonging to the credit institutions whose headquarters are situated within the Union or, in accordance with article 47 of Directive 2013/36/EU of the European Parliament and the Council outside the Union, in case such branches are situated within the Union

his/her debt through the transfer or the withdrawal of the funds, until the concurrence of the quantum, specified in the ordinance.

Article 3 of this Regulation establishes the incidence of its provisions within the cross border limit of the civil or commercial case. A case has a cross border character when the bank account or the bank accounts that are to be frozen by the precautionary ordinance are held in a member State, other than:

(a) the Member State of the court notified by the request to issue the precautionary ordinance;

(b) the Member State in which the creditor has the domicile.

The relevant moment for the establishment of the cross border character of a case is the date of submission of the request to issue the precautionary ordinance at the competent institution to issue it.

Incident debts in cross border cases. As for the categories of debts[4] that can generate the starting of the procedure to set up a precautionary ordinance, we mention that pecuniary debts in civil and commercial matters apply.

These are exception from application:

- debts of a debtor regarding to which they opened bankruptcy procedures, liquidation procedures of insolvent companies or of another legal persons, amicable agreements or other similar procedures;
- debts deriving from tax, customs or administrative issues;
- debts deriving from the state liability its acts or its omissions in the exercise of public (”*acta jure imperii*”);
- debts deriving from ownership rights coming from a legal matrimonial regime or from a relationship considered as having effects similar to marriage by the law applying to such relationship;
- debts deriving from wills and successions, including the maintenance obligations as a result of a death.

The creditor can obtain a precautionary ordinance in the following situations:

a. before the starting, by the creditor, of the procedure on the merits, in a Member State, against the debtor or any time during the procedure until the pronunciation of the decision or the approval or conclusion of a real estate transaction. In a situation like that, the competence to issue a precautionary ordinance belongs to the courts from the Member State which have the authority to pronounce decisions on the merits in accordance with the applicable regulations in matters of competence.

b. after the creditor obtained, in a member State, a judgment, a legal transaction or an authentic deed imposing the debtor to pay the debt to the creditor. If the creditor has already obtained a judgment or a legal transaction, the competence to issue a precautionary ordinance for the debt mentioned in the judgment or in the legal transaction belongs to the courts from the Member State in which the judgment was

[4] „debt” means a debt to pay a particular amount of money which is due or a debt to pay a determinable amount of money deriving from a transaction or an event that has already taken place, provided that the court can be notified about this right; see in this regard art. 4 point 5 (EU) Regulation 655/2014 to set up a procedure for the European precautionary ordinance to freeze bank accounts in order to facilitate the cross border recovery of the debts in civil and commercial matters

pronounced or the legal transaction was approved or concluded. In case the creditor obtained an authentic deed, the competence to issue a precautionary ordinance for the debt mentioned in such deed belongs to the courts designated in this regard in the Member State in which such deed was drafted.

The request to issue a precautionary ordinance. The request to issue a precautionary ordinance has to include the following:

(a) name and address of the court where the request is filed.

(b) details of the creditor: name and contact data and, if any, name and contact data of the creditor's representative.

(c) details of the debtor: name and contact data and, if any, name and contact data of the debtor's representative.

(d) the quantum for which the precautionary ordinance is requested. In this regard, we differentiate the situation in which the creditor has not yet obtained a judgment, a legal transaction or an authentic deed, he/she will have the right to ask for the quantum of the main debt or a part of it and the value of the interests cumulated to the debt in accordance with the law applicable until the date of issue of the ordinance, provided that the quantum or the type of interests should not be of such nature that their inclusion represent a breach of the rules of immediate application included in the law of the origin Member State. In case the creditor has already obtained a judgment, a legal transaction or an authentic deed, he/she will have the right to request the quantum of the main debt, as specified in the judgment, legal transaction or authentic deed, or a part of it and the value of any interests and costs generated by the taking out of that judgment, legal transaction or authentic deed, in so far as they established that such costs shall be borne by the debtor.

(e) in case the creditor has not yet obtained a judgement, a legal transaction or an authentic deed, he/she will have to describe (in the request) all the circumstances invoked as grounds of the debt and, if any, of the interests, also mentioning if he/she has already started a procedure on the merits against the debtor.

(f) in case the creditor has already obtained a judgement, a legal transaction or an authentic deed, he/she will have to make a statement according to which the judgment, the legal transaction or the authentic deed have not been executed yet or, if partially executed, to indicate the level of non-execution.

(g) optional mentioning of the creditor's bank account that will be used by the debtor for any voluntary payment of the debt.

Pursuant to art. 8 para.3 of this union regulation, the request should be accompanied by all the relevant supporting documents. Moreover, if the creditor has already obtained a judgment, legal transaction or authentic deed, he/she shall enclose a copy of them in order to establish their authenticity. The request and the supporting documents can be handed in by any means of communication, including electronically, that is accepted based on the procedure rules from the Member State where the request is submitted.

Request to obtain information on the bank account. In case the creditor has obtained an enforceable judgment, legal transaction or authentic deed in a Member State, requesting the debtor to pay the debt to the creditor and the creditor has reasons to believe that the debtor has one or more accounts in a bank in a certain Member State, but he/she does not know the name and/or the address of the bank, or the IBAN/Bic code or another banking number that would allow the identification of the bank, he/she can request to the court where the request to issue the precautionary ordinance that the informing authority from the Member State of execution obtain the information necessary to allow the identification of the bank/banks and debtor's account/accounts.

As an exception, the creditor can request to the court to obtain information regarding the bank account even when he/she has obtained a judgment, legal transaction or authentic deed, without an enforceable character yet, making him/her prove that the quantum to be frozen is significant and that there is a risk that the subsequent execution of the creditor's debt against the debtor be put to risk, thus implicitly determining a significant degradation of the creditor's financial situation.

Starting the procedure on the merits. In case the creditor requested a precautionary ordinance before starting the procedure on the merits, he/she shall start such procedure and submit to the court where the request to issue a precautionary ordinance was submitted, the proof of starting it within 30 days from the date of submission of the request or within 14 days from the issue of the ordinance, if the latter is subsequent to the first. Also, upon the debtor's request, the court can extend such period, for instance to allow the parties to repay the debt and to notify both parties in this regard. In case the ordinance issuing court is situated in the Member State of execution, the revocation or cessation of the ordinance in the respective Member State shall be executed pursuant to the law of such Member State. In case the revocation or cessation has to be enforced in another Member State than the origin Member State, the court shall revoke the precautionary ordinance using the revocation form established by enforcement documents adopted pursuant to the consultation procedure provided in this regulation (see art. 53) and shall send the revocation form to the competent authority in the Member State of execution in order to enforce the measure. *(see in this regard art. 10 also)*

The security delivered bu the creditor and his/her liability. The creditor shall be liable for any damage caused to the debtor by the precautionary ordinance, due to an error of the creditor. The obligation of the test comes to the debtor.

In the following cases, the creditor's error is presumed, except for the case when he/she proves the contrary:

- if the ordinance is revoked because of the creditor's failure to start the procedure on the merits;
- if they discover subsequently that the issue of the ordinance was not justified or it was justified only for a lower quantum;
- if the ordinance is revoked or its execution is ceased because the creditor could not accomplish his/her obligations coming from this regulation, regarding the notification or the communication or the translation of the documents or the obligations regarding the remedy of the lack of notification or of translation.

Private international law problems can occur, considering the presence of the extraneity element. Thus, the law applicable to the creditor's liability is the law of the Member State of execution. In case they freeze accounts from several Member States, the law applicable to the creditor's liability is the law of the Member State of execution:

a. where the debtor has his/her usual residence
b. which has the strongest link to the case

Duration of freezing. The funds frozen by precautionary ordinance shall keep such character, pursuant to the ordinance provision:

1. until the revocation of the ordinance;
2. until the end of the execution of the ordinance;
3. until a measure regarding the execution of a judgment, legal transaction or authentic deed, obtained by the creditor concerning the debt to be guaranteed by precautionary ordinance, produces effects regarding the funds frozen by such ordinance.(*see in this regard art. 20*)

Enforcement of the precautionary ordinance. Following the reception of the ordinance, in case this is provided by the legislation of the Member State of execution, the reception of the corresponding instruction to enforce the ordinance, the targeted bank to which the precautionary ordinance was sent, shall enforce it without delay, by freezing the respective amount from the account and implicitly by transferring such funds into the creditor's account indicated in the ordinance in order to pay his/her debt. The targeted bank shall check the existence of concurrent ordinances regarding such account.

In case the funds held in the debtor's account/accounts, at the moment of execution of the precautionary ordinance, are insufficient to freeze the total quantum mentioned in the ordinance, then the ordinance shall be executed only with the quantum available in the account/accounts.

In case the precautionary ordinance covers more accounts held by the debtor with the same bank and such accounts have funds exceeding the quantum mentioned in the ordinance, the ordinance shall be enforced in the following order of priority:

(a) the savings accounts whose sole holder is the debtor;

(b) the current accounts whose sole holder is the debtor;

We keep in mind also that the funds held in accounts which, pursuant to bank records, are not held exclusively by the debtor or are held by a third party on the debtor's behalf or by the debtor on a third party's behalf, can be frozen in accordance with this regulation only if they can be object of a freeze in accordance with the law of the Member State of execution.

In case the currency of the funds held in a debtor account/accounts is not the same with the one in which the precautionary ordinance was issued, the bank shall make the conversion of the quantum mentioned in the ordinance into the currency of the funds by referring to the reference exchange rate of the European Central Bank or to the exchange rate of the central bank of the Member State of execution, applicable to the purchase of such currency at the date and time of enforcement of the ordinance, and shall freeze the corresponding quantum into the currency of the funds. Until the end of the third working day from the enforcement of the precautionary ordinance, the bank or another entity in charge with the execution of the ordinance in the Member State of execution, shall issue a statement using the statement form established by enforcement documents indicating if and to what extent they froze funds from the debtor's account/accounts and if yes, which was the ordinance enforcement date.

The creditor's obligation to request the release of the excess frozen quantums. It is important to mention which is the solution in case excess amounts were frozen in relation to the provisions of judgments, legal transactions or authentic deeds. We think that such situations are possible when, by ordinance, they decided the freeze of the amount from several accounts in the same Member State or in different Member States or when the ordinance was issued after the enforcement of one or more equivalent national ordinances against the same debtor and targeting the guarantee of the same debt.

Actually, art. 27. para.2 of the union regulation provides that until the end of the third working day from the reception of any statement issued by the bank or another entity in charge with the execution of the ordinance in the Member State of execution indicating such an excess freeze, the creditor shall submit a request of release to the competent authority from the Member State of execution where the excess freeze took place, by the fastest means of communication and by using the form to request the release of the excess frozen accounts.

The right to offer a security instead of a freeze. Upon the debtor's request, the court that issued the precautionary ordinance can decide the release of the frozen funds if the debtor supplies a security in the amount mentioned in the ordinance or an alternative insurance at least equal to such amount.

Conclusions

In conclusion, we think that, at the level of each Member State, there are national procedures to obtain precautionary measures, such as bank account freeze ordinances, but the conditions to decide such measures differ considerably from a Member State to another. Moreover, the means of appeal to the national precautionary measures can be difficult in cross border-related cases, especially when the creditor is trying to freeze several bank accounts situated in different Member States.

For these reasons, and also for other reasons mentioned here, it is necessary to adopt a binding and directly applicable union legal instrument at the level of the addressee States that should establish a unique procedure at the Union level allowing the efficient and rapid freeze of the funds existing in the bank accounts in cross border cases.

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THE PROCESSING OF PERSONAL DATA REGARDING CHILDREN, ACCORDING TO REGULATION (EU) 2016/679

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Abstract: *The development of the information society and the increase of the number of abuses committed against children in the online environment lead to the adoption of new rules in order to guarantee a better child protection. In this context, the current article analyzes the novelties brought to the area of personal data protection for children by the General Data Protection Regulation (GDPR) applicable starting with 25 May 2018 in the EU Member states. Unlike the Directive No 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, the GDPR establishes a supplementary level of protection when such data are being processed, and the aimed person is a child. The establishment of a legislative framework for children in this area it is welcomed, considering his physical, psychical and emotional features.*

Keywords: *child, personal data, processing, consent, Regulation (EU) 2016/679.*

1. Introduction

By the adoption on 27 April 2016 by the European Parliament and the Council of the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) it concluded the legislative reform in the area of data protection within the European Union.

As it is well known among the main objectives of the legislative reform in the Union, was the modernization of the rules regarding the protection of the rights and fundamental freedoms. Thus, GDPR represents the proof of achieving this objective[1], by establishing an ensemble of provisions regarding the right of the natural person to personal data protection and the guarantee of data processing. These provisions shall be directly applicable by all Member States, starting with 25 May 2018.

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[1] Irina Alexe, Constantin Mihai Banu, "De la Directivă la Regulament în reglementarea protecției datelor cu caracter personal la nivelul Uniunii europene", in Irina Alexe, Nicolae-Dragoş Ploeşteanu, Daniel-Mihail Şandru (coord.), *Protecția datelor cu c*aracter personal. Impactul protecției datelor personale asupra mediului de afaceri. Evaluări ale experiențelor româneşti şi noile provocări ale Regulamentului (UE) 2016/679, University Press, Bucharest, 2017, p. 19.

The main purpose of this Regulation, also mentioned by its Preamble, consists in the adjustment and updating of the principles and objectives previously established by the Directive 95/46/EC by direct relation to the technological evolution.

By the new regulations, the communitarian legislator emphasizes on the transparency towards the aimed person and on the responsibility of the data operator towards the means in which the personal data are being processed, on the consolidation of the rights guaranteed for the aimed persons and on the inclusion of new rights: the right to be forgotten, the right to data portability and the right to limit the process. Moreover, are stated severe sanctions for the non-compliance with certain provisions, namely up to 10-20 million Euros or between 2%-4% from the turnover at an international level, for private operators. Among the novelties inserted by the GDPR are enlisted the provisions establishing a series of specific guarantees for the most effective protection of the children's private life, especially on the online.

2. The notion of "personal data" according to the Regulation (EU) 2016/679 (GDPR)

In accordance with Art 3 Para 1 Let a) of the Law No 677/2001[2], the personal data are being defined as "any information regarding a natural person identified or identifiable; an identifiable person is that person who may be identified, directly or indirectly, especially by reference to an ID number or to one or several key factors of his physical, physiological, psychical, economic, cultural or social identity".

This legal definition is completely taken from Art 2 Let a) of the Directive 95/46/EC of the European Parliament and of the Council on 24 October 1995[3]. In a revised and amended form, the definition is found in Art 4 Para 1 of the Regulation (EC) 679/2016[4], which replaced the Directive 95/46/EC and the Law No 677/2001.

Therefore, the personal data[5] are defined by the GDPR as being any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an

[2] Law No 677/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data, amended and completed, published in the Official Gazette of Romania, Part 1, No 790/12 December 2001.

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[5] See: Ramona Duminică, Andreea Tabacu, "Brief considerations about the notion of personal data in the context of the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data", in the volume of the International Conference *History, Culture, Citizenship In The European Union*, C.H. Beck Publ.-house, Bucharest, 2018.

online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Unlike the old legislation, the Regulation (EC) 679/2016 clarifies a series of ambiguities related to the concept of personal data. More specifically, it expressly states the fact that the notion of personal data includes the name, online identifiers, location data and genetic data. Also, it refers to specific definitions for "genetic data"[6], "biometric data"[7] and "data concerning health"[8]. These three categories of information are considered as "sensitive personal data" and the Regulation provides for them a special protection.

The GDPR protects the personal data regardless of the technology used for the processing of those data (automatic or manual processing, with the condition that the data be organized according to pre-established criteria) and regardless of the means of stock (video supervision or on paper). According to Art 4 Para 2 of the Regulation, "processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

If the personal data were given anonymously, irreversibly, so that the natural person is or can no longer be identified, these data shall not be considered as personal data. In exchange, the personal data that became anonymous, encrypted or undergone pseudonymisation, but may be used for the re-identification of a person shall remain personal data and shall be protected by the GDPR[9].

3. Personal data processing in case of children. Conditions applicable for the consent of children in relation to the services of the information society

Etiologically, the term "child"[10] comes from the Latin *infans* which refers to "he who does not speak". The Latin infans was what we call today a baby (toddler). Nowadays, the term of child has a larger meaning, being defined by the United Nations

[6] "*Genetic data" means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question* [Art 4 Para 13 of the Regulation (EU) 679/2016].

[7] "*Biometric data" means personal data resulting from specific technical processing relating to the physical, physiological or behavioral characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data* [Art 4 Para 14 of the Regulation (EU) 679/2016].

[8] "*Data concerning health" means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status* [Art 4 Para 15 of the Regulation (EU) 679/2016].

[9] https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_ro.

[10] A. Draghici, *Protecția juridică a drepturilor copilului*, Universul Juridic Publ.-house, Bucharest, 2013, pp.9-27.

Convention[11]. Thus, according to Art 1 of the Convention[12] "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

In the same meaning, Art 4 Let a) of the Law No 272/2004 on the protection and promotion of the rights of the child[13] defines the child as being "a human being below the age of 18, who has not acquired full capacity of exercise, according to the law". Therefore, it results that two conditions must be cumulatively fulfilled: the person must be under the age of eighteen and without capacity of exercise. According to Art 38 Para 2 of the Civil Code, the person shall attain majority at the age of 18.

As stated by the legal literature[14], in the current legislation, every person has legal capacity, by the simple fact of his existence, without this being offered as effect of his discernment. Therefore, though without discernment, as effect of a legal presumption, the child has the quality as legal subject, being able to participate, to the extent to which the law allows him, in the social-legal life.

But, despite his lack of maturity, of the fact that his physical, mental and moral development is incomplete, the children do not have the ability to be aware of the consequences of their actions or inactions. This is why the legislations recognize a series of privileges for children, in order to protect them from possible damages that they may cause to themselves or to their assets, or in order to protect them against abuses from other persons[15].

In his turn, the communitarian legislator has considered necessary to offer children a special legal protection also in the area of personal data processing.

The reasoning for establishing a special protection unlike the former legislation is also mentioned by Point 38 of the Preamble to the Regulation (EU) 2016/679: "children merit specific protection with regard to their personal data, as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data […]". Also, it states that "such specific protection should, in particular, apply to the use of personal data of children for the purposes of marketing or creating personality or user profiles and the collection of personal data with regard to children when using services offered directly to a child".

Also, Art 8 Para 1 of the Regulation (EU) 2016/679 states that in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorized by the holder of parental responsibility over the child. Regarding the age limit for the expression of a valid consent, the GDPR is

[11] Françoise Dekeuwer-Défossez, *Les droits de l'enfant*, Éditions Presses Universitaires de France, Paris, 1991, p.3.

12 Ratified in Romania by Law No 18/1990, published in the Official Gazette, No 314/13 June 2001.

[13] Published in the Official Gazette No 557/23 June 2004, entered into force on 1 January 2005, republished in the Official Gazette No 159/5 March 2014.

[14] Flavius-Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ion Macovei, *Noul Cod civil. Comentariu pe articole*, C.H Beck Publ.-house, Bucharest, 2012, p.31; Ilioara Genoiu, *Drept civil. Partea generala. Persoanele*. Seminary Notes, 2nd Edition, C.H. Beck Publ-house, Bucharest, 2016, p.48.

[15] Andreea Drăghici, Daniela Iancu, "Câteva aspecte privind copilul ca subiect de drept", *Annales Universitatis Apulensis. Series Jurisprudentia*, No 11/2008, pp. 92-99.

flexible. Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years.

As exception, according to Point 38 of the GDPR, the consent of a parent or guardian shall not be necessary for the services of prevention or counseling provided directly to a child (for instance, the online provision of services for protection of the child using an "online chat" does not require parental authorization).

Art 8 shall be applicable only when the following conditions are cumulatively fulfilled:

a) The processing refers to the offer of the information society directly for the child;
b) The processing is based on consent.

Regarding the notion of "information society service", Art 4 Para 25 refers to a service as defined in point (b) of Article 1(1) of Directive (EU) 2015/1535[16] of the European Parliament and of the Council (1): "service" means any information society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Also, in the meaning of the current definition, the concept "at distance" refers to the fact that the service shall be provided without the simultaneous presence of the parties, "by electronic means" refer to the fact that the service shall initially be sent and received at the destination using electronic equipment for processing (including the digital archiving) and the preservation of the data and shall be fully sent, transferred or received by cable, radio, optical means or any other electromagnetic means, and "the individual request of the services' beneficiary" refer to the fact that the service shall be provided by the transfer of data upon individual request.

In order to establish the meaning of the notion of "information society service", as mentioned by the Work Group "Article 29" for data protection, it is necessary to relate to the EUCJ[17] jurisprudence in this area.

The EUCJ has established that the information society services refer to contracts and other services concluded and sent online. There are cases in which a service has two components: the online component (offer and accepting the offer in the context of concluding a contract or the information regarding products or services, including marketing activities) – which is considered as a service of the information society and the component regarding the personal delivery or distribution of goods which is not covered by the notion of information society service. Thus, the online delivery of a service shall not fall under the area of application of the notion of information society service based on Art 8 of the GDPR[18].

The wording "direct provision to a child" limits the application of Art 8 to certain services of the information society. Therefore, if a provider for a service of the information society clearly informs, without a doubt, the possible users that it provides services only for the persons who have turned the age of 18, Art 8 shall not be

[16] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) published in the Official Journal of the European Union L 241/17 September 2015.

[17] EUCJ, Decision of 2 December 2010, Case C-108/09, (Ker-Optika), Para 22 and 28.

[18] *Guidelines on consent under Regulation 2016/679*, adopted on 28 November 2017 by the Working Group "Article 29" for data protection, pp. 26-27.

applicable. In such case, that particular service shall not be considered as “directly provided to a child”.

Regarding the consent, it represents one of the six pillars of legality regarding the personal data processing, listed by Art 6 of the GDPR[19].

Art 4 Para 11 of the GDPR defines the consent of the aimed person as being “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.

From the legal provisions it results that for a valid consent, are necessary the following cumulative conditions:

- The consent of the aimed person to be freely given;
- the consent of the aimed person to be specific;
- the consent of the aimed person to be given in awareness;
- The consent that the personal data be processed to be given without ambiguities and to be given as a declaration or an unequivocal action.

Moreover, as above mentioned, the GDPR is flexible regarding the age from which the child receiving an information society service may express a valid consent, the Member States having the possibility to state an age lower than the age of 16, with the condition that this new age be no less than 13.

In the legal literature, this provision was criticized, showing that “(...) this left the EU without coherent and uniform age threshold in the European Digital Market and undermined the much-anticipated harmonisation effect of the GDPR. In summary, none of the EU institutions failed to employ an up-to-date means of assessment, question the age limit for consent, assess the impact on children’s rights and the effectiveness of a particular formulation of the parental consent requirement, and to consider adopting a more nuanced version of parental consent”[20].

The Working Group “Article 29” for the protection of data recommends for Member States to seek for a conciliating solution, taking into account with priority the superior interest of the child. Concerning the obligations of data operators, it is shown that “when providing information society services to children on the basis of consent, controllers will be expected to make reasonable efforts to verify that the user is over the age of digital consent, and these measures should be proportionate to the nature and

[19] “*Processing shall be lawful only if and to the extent that at least one of the following applies:*
(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
(c) processing is necessary for compliance with a legal obligation to which the controller is subject;
(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child” [Art 6 Para 1 of the Regulation (EU) 2016/679].

[20] Milda Macenaite, Eleni Kosta, “Consent for processing children’s personal data in the EU: following in US footsteps?”, in *Information & Communications Technology Law* vol. 26, no. 2/2017, p. 194.

risks of the processing activities. If the users state that they are over the age of digital consent then the controller can carry out appropriate checks to verify that this statement is true. Although the need to undertake reasonable efforts to verify age is not explicit in the GDPR it is implicitly required, for if a child gives consent while not old enough to provide valid consent on their own behalf, then this will render the processing of data unlawful"[21]. Such processing of the personal data shall be legal only if the consent was given or authorized by the owner of the parental authority or by the guardian.

Because the GDPR does not refer to the methods of receiving the authorization from the parental authority or the guardian, but just states in Art 8 Para 2 that "the controller shall make reasonable efforts to verify in such cases that consent is given or authorized by the holder of parental responsibility over the child, taking into consideration available technology", the Working Group "Article 29" has recommended the adoption of a proportionate approach.

From the legal provisions it results that the data operator has the competence to determine the measures necessary for each case. Mainly, the data operators must avoid the verification solutions which would refer to massive collection of personal data.

The controllers shall take into consideration the fact that the consent given or authorized by the owner of the parental authority or guardian shall no longer be valid after the child has turned the minimum age mandatory for the expression of the digital consent. This fact compels the controller based on the consent of his users to periodically send reminders with the information that, for children, their consent expires when they turn the age of 16 and it is necessary for a new consent to be given by the interested person[22].

Not least, Art 8 Para 3 of the GDPR states that the norms regarding the conditions applicable for the consent of children "shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child". The rules mentioned by the GDPR in this area represent a legal framework different than the national legislation in the area of contracts, both legal regimes being applicable simultaneously. Therefore, the purpose of the GDPR is not the harmonization of the national provisions in the area of contracts.

Conclusions

Given the vulnerability and sensitivity of children, the increase of the number of abuses against them in current times in the online environment and by applying the principle of the superior interest of the child, the communitarian legislator has established through the Regulation (EU) 2016/679 on the personal data protection (GDPR) applicable starting 25 May 2018 in the EU Member States, a supplementary level of protection when such data are being processed, and the aimed person is a child. This specific protection, as mentioned by the Preamble of the Regulation, shall be applied for the use of personal data of children for marketing purposes or for the

[21] *Guidelines on consent under Regulation 2016/679*, adopted on 28 November 2017 by the Working Group "Article 29" for data protection, p. 27.

[22] *Guidelines on consent under Regulation 2016/679*, adopted on 28 November 2017 by the Working Group "Article 29" for data protection, p. 29.

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UNILATERAL RESCISSION - A UNIVERSAL INSTITUTION, ALIGNED TO THE DEMANDS OF TRADE ANYWHERE

Nora Andreea DAGHIE*

Abstract: *One of the pieces of novelty of utmost interest introduced by the New Civil Code is regulation of the right to unilateral rescission at art. 1.552, drawing up on the legislation of other countries which are particularly sensitive to trade interests, and thought differently of the role of the specialized judge. Under such law systems, the creditor may decide to unilaterally break the contractual bond in case of a default. When the debtor is dissatisfied, and finds such breaking of contractual unreasonable, they may claim and obtain from a judge damages ordered against such a rushed creditor. Thus, the intervention of the judge is nothing but a a posteriori review of rescission, which only occurs further to a claim of a debtor, which, in their opinion, has been unreasonably, imposed the break of the contractual relations. Unilateral rescission regulated by the New Civil Code qualifies as a genuine display of private justice. Today, a creditor under the Romanian law has the possibility, even in absence of a contractual clause, to declare the contract unilaterally and out-of-court rescinded, too. Consequently, we can even state that, by reference to the Ordinance dated 10 February 2016 adopted in France, which was the first to regulate this modus operandi of rescission under the French legislation, Law no. 287/2009 on the Romanian Civil Code was a genuine milestone.*

Keywords: *unilateral rescission, private justice, expeditiousness, loss minimization, creditor's interest*

1. Introductory considerations

Contract rescission for default has become today, whatever the name, a universal institution, but the way in which it operates varies from country to country.[1]

Unlike the regulation under the 1864 Romanian Civil Code, which rendered rescission conditional a court judgment handed down in this respect, relying on an *a priori* review by the third-party judge of contract termination for default, the New Civil Code, despite the risk of unreasonable unilateral termination which can occur when the creditor is left to determine the advisability of rescission, places us among those law systems under which rescission is vested in the non-defaulting party which can decide alone to terminate the contract for default, but their notice of rescission is subject to an *a posterior* review in terms of fulfilment of the rescission conditions, which review is intended to render the party which prepares to claim rescission of the contract more responsible.

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[1] Daghie Nora, *Rezoluțiunea şi rezilierea contractelor*, 2nd publication, Universul Juridic Publishing House, Bucharest, 2016, p. 56, 86-87.

The domestic case-law has already identified a number of specific functions of unilateral rescission, which court-ordered rescission could not have efficiently assumed before, such as: expeditious emergency dissolution of contract, loss minimization further to default, and prompt sanctioning of the wrongful conduct of the debtor. It has even been referred to as "an original way of rescission comparable to court-ordered rescission", and with the effects of the cancellation clause[2]

Contract is concluded for a precise and specific economic justification. Parties set the objectives, and pursue their attainment. Unilateral rescission allows the creditor to break fast a contract that has become useless because their expectations and hopes in connection therewith have been played down.

The break of contract is followed, in most of the cases, by execution of another contract with another counterparty, context in which, the non-defaulting creditor does not need to wait for a court judgment rescinding the contract to be rendered anymore.

That is to say, with the new piece of regulation, the need for speed is no longer quartered in the legal relations between professionals, with the following key benefits: expeditiousness, the slow pace of court proceedings is avoided and, at the same, time, providing compensation for the debtor's default[3].

2. Comparative Law. Landmarks for the Romanian lawmaker[4]

Under the *German law*, contract rescission is not, in principle, submitted to any court proceedings. To the contrary, it is regulated and reviewed as a unilateral act of the creditor. To this end, the creditor of a performance is afforded a conventional or legal right to terminate the contract with retroactive effect[5].

There are two types of contract rescission: legal and conventional. Legal rescission is the most popular. It qualifies for a general rule, and applies where is not express rescission agreement or contractual clause in place. However, the German Civil Code (BGB) does not set out a general clause on legal rescission, but only lists a number of cases of practical application, supplemented by case-law giving a wide interpretation to the text at art. 327. Thus, for the time being, any material default or conduct against the contract, which is sufficiently serious, can qualify as ground for legal rescission.

Conventional rescission should be expressly stipulated in the contract for the different types of default. These contractual clauses are comparable to the express *commissoria lex* under our domestic private law.

Pursuant to art. 349 BGB, whether legal or conventional, rescission occurs in a simple, fast and effective manner, under a declaration of unilateral willingness of the

[2] Turcu Ion, *Noul Cod civil. Legea nr. 287/2009. Cartea V. Despre obligații, art. 1164-1649. Comentarii şi explicații*, C.H. Beck Publishing House, Bucharest, 2011, p. 646.
[3] *Idem.*
[4] Daghie Nora, *op. cit.*, p. 67-75.
[5] Pop Liviu, *Tratat de drept civil. Obligațiile*, vol. II – *Contractul*, Universul Juridic Publishing House, Bucharest, 2009, p. 759. „Ce système plus énergique est lui aussi fondé sur le non-respect de la parole donnée. Il est beaucoup plus en accord avec les nécessités du commerce." – Larroumet Christian, *Droit civil. Les obligations. Le contrat*, 2[e] partie – Effets, Tome III, 6[e] éd., Economica, Paris, 2007, p. 810.

performance creditor to the other party to the contract. The law does not render it conditional on any special form, but, for evidence reasons, it is recommended to be made in writing or any other media. The rescission declaration takes effect upon delivery to its recipient, whereupon the contract concerned is terminated. Manifestly, the other party has the possibility to challenge rescission with the court of law of jurisdiction, which shall examine whether the legal or, as applicable, the conventional conditions for contract rescission have been met. If so, under a declaratory judgment, the court of law shall find that rescission of the contract is valid, and that it has already taken effect.

The same system is to be found also under the provisions of art. 107 of the *Swiss Code of Liabilities*, the art. 108 of which expressly provides for the cases when setting a term for performance is not a condition precedent for rescission.

The *Italian law*, however, is more comprehensive. Similar to the German law, it regulates the choice of the creditor between forced execution in kind, damages and rescission (art. 1453 of the Italian Civil Code), as well as court-ordered rescission (art. 1455 of the Italian Civil Code), or the possibility to provide for an express cancellation clause (art. 1456 of the Italian Civil Code). Still, art. 1454 of the Civil Code also acknowledges the same solution found in the German and Swiss laws, being the possibility to have the contract terminated after setting of a term for performance, which renders rescission independent of any clause which could have allowed it, and any intervention of a judge.

The *law of Québec Province,* as appearing from the New Civil Code effective 1994, does not require lodging of an action for rescission. According to art. 1605 Civil Code, it suffices that the debtor is put in default for the right to rescission to be claimed by the creditor. Consequently, rescission is regulated in manner which is almost similar to that under the German law.

The *Korean Civil Code* adopts the solution found in the German law (art. 349 BGB), and under art. 543(1) expressly provides that rescission occurs further to the unilateral declaration of the creditor. The letter is however required to document the intention to rescind the contract in a duly executed legal instrument. The rescission declaration takes effect upon its delivery to the debtor. Whether this accepts or refuses this declaration lacks importance, as the recipient is given only a purely passive role. This is the reason why, once declared, rescission cannot be unilaterally revoked, unless there is an agreement of the parties thereon[6].

In the *North-American law*, rescission (termination) can only be inferred. The means of indirect performance take precedence, as follows: *expectation damages*, *restitution* and *reliance damages*, as forms of forced execution by equivalent, while direct or in-kind forced execution *(specific performance)* is admissible only in exceptional cases, being deemed an extraordinary remedy allowed only when payment of damages would not be enough to provide adequate compensation for the loss sustained by the creditor[7].

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[6] See Myoung Soon-Koo*, La rupture du contrat pour inexécution fautive en droit coréen et français*, LGDJ, 1996, p. 152-154.

[7] See Perju Pavel, *Contractul*, C.H. Beck Publishing House, Bucharest, 2010, p. 80.

The term *rescission* is not created an explicit legal profile when the duties assumed under a reciprocal contract have not been performed. According to the existing literature, the term *rescission* is used rather in connection to termination of contract by *mistake* of one or both parties at execution of the contract, or where, under a bilateral contract, the parties agree to terminate a contract and conclude a new contract instead[8]. Still *restitution* and *reliance damages*, as remedies for default, imply termination (rescission) of the contract because the outstanding duties, whether not performed in full or in part, no longer rest with the parties, while the ones already performed are no longer returned in kind, but turned into damages.

Therefore, having accepted the idea that rescission is at least implicit, the American literature tackle restitution as the third form of compensation for a break of contract. Restitution allows the party injured by the total break of contract to obtain the restitution of its performance, a solution that is rooted in the idea that "the break" terminates the contract. There are two conditions to be met for *restitution* to be admissible: the injured party to the contract has performed, whether in part or in full, its duties, while the other party to the contract absolutely refuses to perform, either by repudiation, or due to a *material breach*[9].

Restitution applies in three instances[10]: when the object of the duty owed by the party to the contract responsible for the break of contract consists of an amount of money (with forced execution in-kind - *specific performance* operating in this case); when the contract is divisible; or when the injured party to the contract eventually performed after having been given notice of rescission of the contract by repudiation.

Under the *international commercial law*, rescission of contracts is regulated by the Vienna Convention on the international sale of goods of 1980 (CISG)[11], and the UNIDROIT Principles of International Commercial Contracts (2004) issued by the International Institute for the Unification of Private Law of Rome.

According to art. 25 CISG, a contract can only be avoided in case of a fundamental breach of contract by the other party[12].

Avoidance operates under an unilateral declaration of avoidance, which is effective and enforceable only if made by notice to the other party. The party found in a fundamental breach of contract is recommended to be afforded a new term for performance, known as *nachfrist*, which, while not mandatory, can help clarify the situation of the parties, and streamline rescission[13]. The unilateral declaration of avoidance is subject to an *a posteriori* court review (art. 26-27 CISG). Thus, when one of the parties considers that the other party has committed a fundamental breach of

[8] Stoica Valeriu, *Rezoluțiunea şi rezilierea contractelor civile*, All Publishing House, Bucharest, 1997, p. 191.
[9] Perju Pavel, *op. cit.*, p. 94.
[10] *Ibidem*, p. 94 and 95.
[11] As to rescission, the Convention regulates avoidance for a fundamental breach of contract by the seller (art. 49 CISG), from the buyer's perspective, and for a fundamental breach of contract by the buyer (art. 64 CISG), from the seller's perspective.
[12] For details, see Popa Ionuț-Florin, *Remediile neexecutării contractului de vânzare-cumpărare, din perspectiva Convenției de la Viena privind vânzarea internațională de mărfuri (II)*, in RRDP no. 3/2008, p. 112-137.
[13] See, for details, Popa Ionuț-Florin, *Conformitatea lucrului vândut*, Universul Juridic Publishing House, Bucharest, 2010, p. 497, 501-504.

contract, it can declare the contract avoided. Acceptance of such avoidance by the other parties removes any *a posteriori* court review. To the contrary, if the other party finds that there is no fundamental breach on its part and claims, for instance, performance of the other party's duties or damages, the potential avoidance is subject to court review, and should the avoidance conditions not be found met, the conduct of the party which claimed avoidance by breach of contract shall be requalified, with all the consequences arising therefrom (access of the other party to any regulated default remedies)[14].

The *UNIDROIT Principles* contain similar provisions to CISG. Thus, a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance (art. 7.3.1.).

Termination operates under a unilateral declaration of termination made by notice to the other party. A process known as *nachfrist* can be followed before, whereby the creditor affords the debtor an additional period of time, of reasonable length, for performance [art. 7.1.5. para. (3) of the UNIDROIT Principles].

Both CISG (art. 72.1, 72.2, 72.3), and the UNIDROIT Principles (art. 7.3.3 and 7.3.4) regulate almost identically anticipatory avoidance/termination of the contract.[15] If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. Such termination/avoidance relies on a prospective review of the attitude, situation and possibilities of the other party to the contract. Anticipatory termination/avoidance operates also under a unilateral declaration of termination/avoidance made by notice to the other debtor. However, the party to the contract may be asked to provide adequate guarantee of timely performance of any duty or duties not yet falling due. Unless such guarantee is provided in a reasonable period of time, the requesting party may declare the contract terminated.

In the post-modern era, today, the general philosophy and theory of law speak about the need to overcome the inherent limitations of the modern legal concepts, and proceed to a new legal thinking, which needs to consider the special complexity of the modern society, in an increasing globalization setup.

The contemporary Europe is not only the outcome of the modern legal thinking, but it is also faced with new paradigms, of which one is acknowledgment of the legal pluralism and importance of cultures in building and enforcing the law. "We live times of honeycombed lawfulness, or legal porosity, when the many legal systems constantly force us into transitions or misuses".[16]

The Romanian New Civil Code is "eclectic", and has drawn on a number of regulations in an attempt to take from each of them whatever the members of the committee thought was the best rules[17].

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[14] *Ibidem*, p. 505.

[15] Reception of early rescission is controversial under the French law. For the conditions and effects thereof, see Laithier Yves-Marie, *Étude comparative des sanctions de l'inexécution du contrat*, LGDJ, 2007, p. 565-585.

[16] Santos Boaventura de Sousa, *Droit: une carte de la lecture déformée. Pour une conception post moderne du droit*, in Droit et Société nr. 10/1998, p. 382 *apud* Şerban Alexandrina, *Dreptul – ca sistem*, Hamangiu Publishing House, Bucharest, 2012, p. 23.

[17] Baias Flavius-Antoniu, *Noul Cod civil nu trebuie să ridice probleme existențiale*, in RRDA no. 8/2012, p. 28.

As to duties, the Romanian lawmaker "dared" to not only draw on, but also replicate as such (subject to translation and attempts to adapt this as good as possible to the Romanian language) a number of texts from the wide-scale projects intended at unifying the European law of duties and contracts. From this perspective, the New Civil Code is assessed as "the only domestic Civil Code across the entire European legal landscape" which has managed to integrate texts form the UNIDROIT Principles or the Principles of the European Contract Law; this made Professor Flavius Baias proudly say: "we are the only country of European Union which turned to account these European projects intended to unifying the European law of duties and contract, which is very good"[18].

3. Unilateral rescission in Law no. 287/2009 on the Civil Code[19]

There are three situations where unilateral rescission is possible[20]:

▪ the parties have provided for this possibility in the contract

The first case is nothing more than application as such of *commissoria lex*, the content of which can be construed as giving one of the parties the right to consider ta contract rescinded for non-performance, which right is exercised and asserted in a unilateral declaration of rescission[21]. When *commissoria lex* occurs without notice, the declaration of rescission takes effect just as the underlying *lex,* that is automatically and without additional formalities. When *commissoria lex* occurs by notice, the effects thereof will occur too, which means that the declaring party is required, before such display of will, to put the debtor in default.

▪ the debtor is in default by operation of the law (subject to art. 1.523 NCC[22])

The default can occur further to the agreement of the parties, or by operation of the law. In both cases, should a duty fall due after the decease of the debtor, their heirs will only be in default once the 15-day term notified by the creditor has elapsed or, as

[18] *Ibidem*, p. 28 and 29. For an original opinion, some food for thought as to the current developments towards a "legality without right", by creating "alternative types of ordering" which allow a party to assess the risk of the other, in advance, right before concluding the operation, see Smits Jan, *Private Law in a Post-National Society: From* Ex Post *to* Ex Ante *Governance*, (in translation) in Revista română de drept european no. 6/2012, p. 153-162. In the author's opinion, the role of law is changing driven by globalization and technological process. The reputation networks, for instance, seen as alternative types of ordering, are increasingly more important in understanding de-nationalization than the actual efforts employed by the European and supranational organizations to put in place the right rules for the European or the global market.

[19] Daghie Nora, *op. cit.*, p. 214-216; Daghie Nora, *Izvoarele obligațiilor civile*, Universul Juridic Publishing House, Bucharest, 2018, p. 176-183.

[20] This interpretation was provided by the very authors of the New Civil Code in their explanation to 1197[91], part of the preparatory works for the current version of art. 1.552: "The right of one of the parties to rescission can be enforced under a notice of rescission in three cases, namely: when the parties have agreed thereon under a *commisoria lex*, when the debtor is in default by operation of the law and, eventually, when, having been put in default, the debtor continued to fail that duty also during the period of time set by the creditor or, as applicable, during a period of time of reasonable length" (Draft 2008).

[21] Vasilescu Paul, *Drept civil. Obligații*, Hamangiu Publishing House, Bucharest, 2012, p. 522.

[22] In the content of art. 1.523, the New Civil Code lists the cases where no formalities are required to put the debtor in default, this occurring by operation of the law.

applicable, after the notice of the trustee appointed to provisionally manage the estate, subject to art. 1.136 of the New Civil Code.

In this case, the debtor may issued the declaration of rescission directly, and this has the automated effect of termination.

▪ the debtor has failed the duty within the term set by putting in default[23].

In this latter case, effectiveness of rescission further to the unilateral declaration of the creditor is conditional, in absence of an expressly set-out term, upon passing of a period of time of reasonable length of putting in default; reasonability shall be assessed by the creditor and, when challenged by the debtor, by the court of law.

Failure of the formalities required under the law (putting the debtor in default and affording an additional time for performance) shall always be sanctioned by the court of law.

Therefore, for the time being, a creditor has the possibility, even in absence of a contractual clause, to declare the contract unilaterally and out-of-court rescinded, too. Even when unilateral rescission is subject to the conditions regulated under art. 1.516 and art. 1.551-1.552, being the existence of a material and unreasonable non-performance and the putting in default of the debtor (by operation of the law or by the creditor), plus the potential requirements provided under the contract, intervention of the court is still excluded. It is certain that the debtor can ask the court to review the legality of a claim of unilateral rescission of the creditor, when the debtor disputes rescission, or, in the context of the action whereby the creditor claims application of the retroactive effects of rescission (restoring the parties to the previous situation)[24], but this court review occurs after the operation of rescission, and is not necessary to dictate termination of the contract, as it was the case under the effect of the previous regulation[25].

Unilateral rescission regulated by the New Civil Code qualifies as a genuine display of private justice, allowing the creditor to remove from the civil dealings a contract impairment by a material non-performance, without any court intervention, even when this right has not been expressly laid down in the contract[26]. Unilateral

[23] With the additional time for performance, the law intends to help those who, due to a misfortune, could not fulfill that duty in the day set. As for professional contracts, where the debtor is in default by operation of the law, the additional time for performance is no longer necessary, and the creditor can proceed to declaring the unilateral rescission, which can be explained by the fact that "the punctuality in delivery and payment is a sine qua non condition for business regularity" – Vivante Cesare, *Principii de drept comercial*, Ed. Cartea Românească Publishing House, Bucharest, 1934, p. 196-197 *apud* Veress Emöd, *Drept civil. Teoria generală a obligațiilor*, C.H. Beck Publishing House, Bucharest, 2015, pp. 73.

[24] In absence of an agreement with the debtor on restoring the previous situation, this can only take effect further to court proceedings. Therefore, even if unilateral rescission takes effect out of court, without any requirement to seek and obtain the agreement of the debtor thereto, restoring the parties to the previous situation (which implies mutual restitutions of performances) can only take effect when the debtor performs restitution voluntarily, otherwise the creditor shall have to seek this in court (forced restitution of performances, court-ordered correction of the Land's Book, etc.).

[25] Daghie Nora, *Rezoluțiunea şi rezilierea contractelor, op. cit.*, pp. 223-227.

[26] Popa Cornel, Lisievici Andreea, *Probleme privind rezoluțiunea contractului în Noul Cod civil (II)*, in RRDA no. 9/2012, p. 47.

rescission should not be mistaken, not even when the right to declare the contract rescinded is rooted in the contract, with unilateral termination of an agreement[27].

The role of the court shall be limited to reviewing observance by the creditor of the legal (and potentially conventional) conditions of unilateral rescission, of which the severity of non-performance prevails. When the conditions for unilateral rescission are met (material non-performance, putting in default, declaration of rescission, notice of rescission, and other contractual conditions), the court may neither deny the choice of the creditor, nor select a different contractual remedy.

As to the effectiveness conditions, unilateral rescission only distinguishes from court-ordered rescission in terms of form.

The unilateral declaration of rescission is the centrepiece of the unilateral rescission scheme[28]. This consists of a unilateral instrument due to be served, under which the creditor expresses its desire to unilaterally terminate the contract for non-performance.

As to the form of the unilateral legal instrument of rescission, art. 1.552 of the New Civil Code provides for the notice to debtor - but fails to impose any duties in this respect -, while the general rule, being art. 1326 para. (2) of the New Civil Code reads that, unless the law provides otherwise, service shall be by any means adequate to the circumstances[29]. According to the general rules listed at para. (3) of art. 1.326 of the New Civil Code, the unilateral declaration is effective between the parties as of its receiving by the recipient, even not also acknowledged by the latter for reasons beyond their control. As a consequence of the legal nature of the declaration of unilateral legal instrument, para. (4) explains the conditions under which such declaration may be

[27] Reading art. 1270 in connection with art. 1276 of the New Civil Code, it follows that the contract can only be terminated by will of one single party to the contract in two instances: when the authorization clauses under the law apply, pursuant to para. (2) of art. 1270 of the New Civil Code, and when a contractual clause giving one of the party the right to terminate the contract unilaterally applies. In the first instance, exceptions from the principle of binding force are instituted, whereas in the second instance, a potential exclusion from the mandatory nature thereof is out of the question because the contractual clause providing for unilateral termination of the contract stems from the will of all parties. Such a contractual provision is referred to in the case-law also as cancellation clause or decommitment clause, and it is triggered by the exercise of a contractual enabling right. See Zamşa Cristina, in the collective paper *Noul Cod civil. Comentariu pe articole*, Baias Flavius-Antoniu, Chelaru Eugen, Constantinovici Rodica, Macovei Ioan (coord.), Ed. C.H. Beck Publishing House, Bucharest, 2012, p. 1342.

The purpose and the effects of unilateral termination and unilateral rescission are different. Essentially, termination is only a revocation of the initial right, irrespective of the underlying specific cause of such a decision, with effects for the future, while unilateral rescission is caused by non-performance of the contract and terminates the instruments, with effects including for the past, for *uno ictu* contracts. For details about the major differences between the two legal concepts, see Popa Cornel, Lisievici Andreea, *Probleme privind rezoluțiunea contractului în Noul Cod civil (III)*, in RRDA no. 10/2012, p. 90.

[28] Pop Liviu, Popa Ionuț-Florin, Vidu Stelian Ioan, *Tratat elementar de drept civil. Obligațiile*, Universul Juridic Publishing House, Bucharest, 2012, p. 295.

[29] The relevant notice, which needs to be "written" pursuant to art. 1.552 para. (1) of the New Civil Code, can be either enclosed to the declaration of rescission, or include therein. However, it needs to be clearly distinguished from the prior rescission notice, the only purpose of which is to put the debtor in default, and which is a preliminary condition.To this end Pop Liviu, Popa Ionuț-Florin, Vidu Stelian Ioan, *op. cit.*, p. 296.

revoked: before the services thereof to the debtor or, in case a fixed term is set for performance, before the expiry of such term.

As to enforceability against third parties, art. 1.552 para. (3) of the New Civil Code provides for the requirement to have the declaration of rescission or termination entered in the Land's Book (when the derivative subject matter of the contract is a real property), or in any other public registers, term of the nature of the good which makes up the derivative subject matter of the contract. Otherwise, the third sub-buyers of the good may disregard termination of the contract, and preserve their rights thereunder[30].

The unilateral declaration of rescission needs to be made within the limitation period set out under the law for the potential action for rescission [art. 1.552 para. (2) the New Civil Code]. Should the declaration of rescission not be made within the time set under the law for the proceedings on substance, the debtor may bring up a legal action to have the rescission declared ineffective further to the expiry of the limitation period during which the creditor could have claimed rescission[31].

However, the case-law has already drawn attention on the high risk the creditor is exposed to when the court would *a posteriori* find that rescission was misclaimed. While in the court rescission proceedings, the creditor risks only the legal costs and potential damages due to the contractual disturbances caused by making an unsubstantiated claim of rescission, should this be declared ungrounded by the court, in case of unilateral rescission, the creditor is exposed to unfavourable financial consequences.

For these reasons, unilateral rescission is a remedy which needs to be used with due care, by a responsible creditor, who is sure of its justice[32]. Similarly, the mechanism put in place with the prior unilateral rescission notices qualifies as legal techniques which are worthy of full attention when the creditor opts for this type of rescission. Assuming that the creditor has doubts as to the validity of its rescission claim, it is recommendable that they go for the court-ordered rescission approach, in order to lower the potential risks[33].

To conclude, it is worth mentioning that, for once, we were taken by the French as example, when they enshrined unilateral rescission under the Civil Code for the first time, under the Ordinance dated 10 February 2016. Thus, art. 1224 of the French Civil Code provides today that rescission can operate, in case of a sufficiently serious non-performance, by simple notice of them creditor to the debtor. Additionally, art. 1226 of the French Civil Code adds that, by acting in this way, the creditor assumes the risk of a subsequent review by the court of the lawfulness of its decision. Subject to being reviewed and maintained by the judge, the effects of unilateral rescission are identical to those of court-ordered rescission. Except for urgent cases, unilateral rescission should be preceded by putting the debtor in default, including affording the latter a period of time of reasonable length and clearly explaining that, in absence of due

[30] Zamşa Cristina, in the collective paper *Noul Cod civil. Comentariu pe articole*, Baias Flavius-Antoniu, Chelaru Eugen, Constantinovici Rodica, Macovei Ioan (coord.), *op.cit.*, p. 1653.

[31] See Gherghe Aurelian, *Rezoluțiunea, rezilierea şi reducerea prestațiilor*, in Uliescu Marilena (coord.), *Noul Cod civil. Studii şi comentarii, vol. III. Partea I. Cartea a V-a, Despre obligații (art. 1164-1649)*, Universul Juridic Publishing House, Bucharest, 2014, p. 822.

[32] Pop Liviu, Popa Ionuț-Florin, Vidu Stelian Ioan, *op. cit.*, p. 288.

[33] *Idem.*

performance, the creditor shall be entitled to terminate the contract [art. 1226 paras. (1), (2)]. Unilateral rescission is however conditional upon the subsequent exercise of this right, documented in a notice which shall list the underlying reasons thereof [art. 1226 para. (3)]. This formal requirement, in particular the reasoning which needs to accompany the decision to have the contract rescinded, is seen in the case-law[34] as the last chance given to discussions able to prevent a discretionary break of contract.

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[34] Malaurie Philippe, Aynès Laurent, Stoffel-Munck Philippe, *Droit des obligations*, 8e édition, LGDJ, 2016, p. 511.

PERSPECTIVES ON EUROPEAN PUBLIC PROSECUTOR'S OFFICE – A NEW BODY IN THE INSTITUTIONAL SYSTEM OF THE EUROPEAN UNION

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Abstract: *The perspectives on how to achieve the protection policy of EU's financial interests from criminal point of view are presented in this study. More exactly, the perspectives on the new EU body which is going to become operational in a relatively short time are analysed, its establishment being decided through the (EU) Regulation 2017/1939 of the Council dated 12th October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO). Practically, starting from the analysis of the legal texts of the above mentioned Regulation, the following are highlighted in this study: the important role held by this EU body in the protection against criminal offences of EU's financial interests, its material and territorial competences, its foreseen organization and its connections to other EU and national bodies and institutions of the EU Member States. The author's conclusions on the establishment of this European Public Prosecutor's Office, on the role it is going to fulfil, as well as on the possibility to enlarge its competences and on the monitoring and sanctioning of other severe and with transnational impact criminal offences, are presented in the end.*

Keywords: *European Public Prosecutor's Office, protection, crimes, Union's financial interests*

I. European Union's concerns on the protection of its financial interests and the Union's policy on this protection.

Through the establishment of the European Union, it was also highlighted the preoccupation of creating a real freedom, stability and social development space for all EU citizens. Achieving these desiderata could not be, we believe, fulfilled, but through the establishment and subsequently, through the maintenance of a safe European space with economic and financial stability and through assurance of defence and maintenance of the EU's financial interests in safe conditions. At European institutional level, there is the belief that, by guaranteeing them all, the protection and development of all European citizens is practically and indirectly achieved.

Defending the EU's financial interests is an important subject of the EU policies as it is considered to be essential for guaranteeing the adequate usage of European citizens' money and for consolidating and increasing the trust of the European citizens in this reality.

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In order to ensure the protection of EU's financial interests, it is obvious that an adequate strategy and the creation of specialised institutions with responsibilities of protection both from administrative and civil point of view, as well as from criminal perspective, are necessary. We will refer to this last perspective in this study.

These are the reasons for which EU's own policy was outlined in the area of Union's financial interests and the preoccupations for putting it to application and for finding the means capable for achieving protection from criminal point of view of these financial interests were also outlined. For the above, the following are considered evidence: the adoption of the Convention on the European Communities' financial interests dated 26th July 1996 and its three Protocols and the adoption of the Regulation (EC, Euratom) no. 2988/1995 of the Council[1] on establishing the general norms regarding uniform controls, measures and administrative sanctions regarding the deviations from the law of the Union. They present also sectorial norms in fraudulent activity area, as they are defined by the mentioned Convention and putting to application the criminal law and procedures of the Member States. More recently, the Directive (EU) 2017/1371 of the European Parliament and Council on the fight against fraud to the Union's financial interests by means of criminal law was adopted at Strasbourg on 5th July 2017, Directive which replaces the above mentioned Convention and its protocols, as you can see in its art. 16.

In this Directive it is underlined that "in order to ensure putting to application the Union's policy in this domain, it is essential to continue to approach the criminal law of the Member States, through the completion of the Union's financial protection through administrative and civil law, in the most severe types of behaviour from fraud category in this area, avoiding, at the same time, incoherencies within each of these law domains and between them". At the same time, it is shown the purpose of the Directive, which "aims at contributing to the efforts of fighting against these criminal phenomena" and its subject is presented in art. 1: "This Directive establishes minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests, with a view to strengthening protection against criminal offences which affect those financial interests, in line with the acquis of the Union in this field".

From the perspective of criminal law and criminal procedure at Union's level, through the Directive we refer to, the establishment of some minimum norms on the (joint) definition of fraud in the area, on the public officers who can be subject to passive corruption and embezzlement and on the sanction regime applicable to all cases of severe criminal offences against Union's financial interests is had in view, taking into consideration the acknowledgement and establishment of some aggravating circumstances.

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[1] O.J. C319, 18.12.2012, p. 134

II. The European Public Prosecutor's Office (EPPO) – one of the Union's bodies with competence in protection against criminal offences which put to danger the European Union's financial interests.

The first report of the European Commission on anticorruption policy in EU, published in February 2014, highlighted that all member states are affected by corruption in different degrees and that it generates expenses of around 120 billion euro per year for the Union's economy[2]. Within the policy of fighting against corruption, the European Parliament passed an opinion on what is the meaning of "fraud" in the sense of art. 325 of the Treaty on the Functioning of the European Union (in Chapter 6 entitled "Fighting against fraud"), since corruption is detrimental to the Union's financial interests, it must be appreciated as "fraud" in the sense of this law text[3]. Considering all above, the European Parliament supports all proposals for good practice mobility and for finding new measures and methods at Union's level in what concerns the protection of the Union's financial interests against frauds.

To this extent, it was (also) adopted in the year 2017 the Directive of the European Parliament and Council on the fight against fraud to the Union's financial interest by means of criminal law, which we referred to in the previous pages, named also "FIP Directive". This act establishes the legal base of the European prosecutor's competences and defines them. It also states what are "frauds which are detrimental to the Union's financial interests", the "passive corruption", "active corruption" and "embezzlement" criminal offences, establishes the minimum criminal sanctions for the guilty natural persons and the "prescription terms for the offences which are detrimental to the Union's financial interests". The Directive also provides the obligation of the Member States to cooperate between them and with the European Commission, bodies, offices, agencies and the Union's Court of Audit.

Among the new methods of fighting against frauds against EU's financial interests and reinforced cooperation in the Union's area, one is clearly represented by the establishment of the European Public Prosecutor's Office. Its creation was an older preoccupation at Union's level, precisely from the desire to defend its financial interests, being highlighted in the Treaty establishing a Constitution for Europe, which included provisions on such a prosecutor's office. Three systems were proposed in the past for its establishment, namely[4]:

1. Collegiate body system – consisting of prosecutors appointed by the Member States and the decisions on starting the investigations are established with the majority vote;
2. "Integrated" system – to the sense that the European Public Prosecutor's Office will be the Union's body with hierarchical structure, and its decisions are taken according to own organization and operation rules.
3. Supranational system – where this Prosecutor's Office would be Union's body with hierarchical organization, with a unique central structure of prosecutors which can

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[2] 2018 EU Specification sheets, p. 4
[3] *idem*
[4] Grădinaru Daniel, *Investigation of criminal offences against the financial interests of the European Union,* C.H.Beck Publishing House, Bucharest 2016, pp. 128-134.

activate in the entire community space and which can give indications directly to the judicial bodies of the Member States. In this organization system, the establishment of some procedural rules, common and applicable in all member states, is required.

The possibility of creating this Prosecutor's Office was provided by the provisions of art. 86 of the Treaty on the Functioning of the European Union, and in 2017, following to the proposal of the European Commission and to the notification received from 16 Member States[5], the Council adopted the Regulation (EU) 2017/1939 dated 12th October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO).

Starting from the text of the Directive (EU) 2017/1371 of the European Parliament and Council dated 5th July 2017, corroborated with the provisions of art. 86 of the Treaty on the Functioning of the European Union[6] and with the provisions of the above mentioned Regulation, we conclude that an important role in fighting against the offences endangering the Union's financial interests will be held by this European Public Prosecutor's Office.

Starting from the assessment that the offences endangering Union's financial interests, bringing considerable financial losses year after year, are not investigated and prosecuted sufficiently by the member states through their competent authorities in the criminal area at present, through the adoption of this Regulation, competency rules split between EPPO and the authorities of the Member States with responsibilities in prevention of the criminal offences which contravene to the Union's financial interest (as it is provided in the Regulation) were desired to be highlighted.

From the adopted Regulation, we can conclude that it is desired that EPPO manifests itself as an "indivisible body" of the Union, fully independent and autonomous (paragraph (111) of the Regulation), developing its activity as a "single office" (paragraph (21) of the Regulation) and manifest its competencies in a way "as broadly as possible so that its investigations and prosecutions may extend to offences committed outside the territory of the Member States" (paragraph (64) of the Regulation). At the same time, it is foreseen that it can support in its activity the national (including Police) authorities, especially for putting to application the measures of restraint, and the criminal actions and investigations developed should be totally supported by "all national authorities" and by the concerned bodies of the Union, being included among the latter Eurojust, Europol and OLAF (paragraph (69) of the Regulation).

In what concerns the organization of the European Public Prosecutor's Office, by analysing the Regulation adopted by the Council, we consider that this body, which is

[5] It is about Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Germany, Finland, France, Greece, Lithuania, Luxemburg, Portugal, Romania, Slovakia, Slovenia and Spain.

[6] Art. 86, TFEU: paragraph (1): "In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust (...)" and in paragraph (2), it is provided: "The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences".

going to become operational "on the date to be determined)" (paragraph 117) of the Regulation), presents itself according to the last system proposed and presented in previous pages, as a supranational body of the EU, with hierarchical organization. It will consist in EU's decentralised body of magistrates, with exclusive competence in criminal investigation, prosecution and suing of authors and co-authors of the offences harming the EU budged. Art. 8, paragraph (1) – (5) of the Regulation provides that EPPO is "organised at a central level and at a decentralised level"; the central level consists of a central prosecutor's office located at EPPO headquarters and consists in "College, the Permanent Chambers, the European Prosecutors and the Administrative Director". The decentralised level consists in "European Delegated Prosecutors located in the Member States". Both the General Prosecutor's Office and the European Delegated Prosecutors will be assisted in the fulfilment of their tasks by EPPO personnel, based on the Regulation. At the same time, this Prosecutor's Office will benefit from investigation competencies adapted to EU level, being integrated in the internal legal systems of the member states.

In what concerns its role, as it is provided in art. 4 of the Regulation, EPPO has the responsibility of investigating, prosecuting and bringing to judgment the perpetrators of criminal offences "affecting the financial interests of the Union (provided for in Directive (EU) 2017/1371) and determined by this Regulation" and their accomplices. In that respect, it will undertake investigations, carry out acts of prosecution and exercise the public action in the competent courts of the Member States, until the case is finalised.

We can deduct without doubt the extremely important role which EPPO is going to hold, once it will become operational[7] within this activity of fulfilling the policy of protecting the financial interests of the EU by means of criminal law.

It is obvious that in the activity of investigation, criminal prosecution and suing for offences of the type we refer to and which are EPPO responsibilities, the focus is on the reciprocal acknowledgement and cross border cooperation in criminal area, as well as on observance of the rights of the individuals comprised in the Charter of the Fundamental Rights of the European Union, as well as the right to be presumed innocent, the right to defence, the right to a fair trial, as well as guaranteeing the *ne bis in idem* principle. It is desired an improvement of the cross-border cooperation between the Member States and of the reciprocal judicial assistance in criminal area.

III. EPPO's connections with other Union's bodies in the activity of putting to application EU policy of protecting its financial interests

It is obvious that in the actions undertaken, so that its activity to be truly efficient and with the desired results, this new Union's body, EPPO, must collaborate with the competent national authorities from the Member States and with the bodies and institutions of the Union with responsibilities in this protection action.

[7] Possibly between 2020 and 2021, with the Central Office in Luxemburg, as it was published – see also http://vocea-olteniei.ro/2017.

In paragraph (1) of art.15 of "PIF Directive" it is provided that "(…) the Member States, *Eurojust, the European Public Prosecutor's Office and the Commission* shall, within their respective competences, cooperate with each other in the fight against the criminal offences" mentioned in the Directive, to which end "the Commission, and where appropriate, Eurojust, shall provide such technical and operational assistance as the competent national authorities need to facilitate coordination of their investigations". In paragraph 2 it is provided that in order to make it easier "to establish the facts and to ensure effective action against the criminal offences" mentioned in the Directive, "the competent authorities in the Member States", in the limits of own competencies, can exchange information with the Commission, and according to the provisions of paragraph (3), "*The Court of Auditors* and auditors responsible for auditing the budgets of the Union institutions, bodies, offices and agencies (…) shall disclose to OLAF and to *other competent authorities* any fact of which they become aware when carrying out their duties, which could be qualified as a criminal offence" and "the Member States shall ensure that national audit bodies do the same". From the above legal text, we can conclude on the European institutions which are involved in the activity of fighting against fraud to the Union's financial interests by means of criminal law.

During the discussions on the European Public Prosecutor's Office (EPPO), there had been outlined opinions on several aspects which relate, among other things, to its purpose and competences, and to the relations with other European bodies like Europol, Eurojust and OLAF.

In order to improve and make efficient the fight against fraud, an interinstitutional procedure was established in the Regulation (EU, Euratom) no. 883/2013 of the European Parliament and Council dated 11th September 2013[8], with its amendments from 2016, in what concerns the institutions of the Union, procedure through which all institutions are able to collaborate transparently regarding the best methods and practices applicable to the situations which are solved and which bring severe harm to the efficiency of the activity of fighting against fraud.

The provisions on its relations with its partners are included in Chapter X of the Regulation on EPPO. Out of these provisions, it can be concluded that the European Public Prosecutor's Office will have and maintain close relations mainly with Eurojust, OLAF and Europol. With Eurojust, the relation will be established on reciprocal cooperation and on "the development of the operational, administrative and management connections"; in this sense, Eurojust Chairman meets periodically with the European Chief Prosecutor in order to discuss the problems of common interest (according to art. 100 of the Regulation). With OLAF (European Anti-Fraud Office), EPPO will develop close relations, established on reciprocal cooperation and on exchange of information, relations which will have as purpose guaranteeing the usage of all means available for defending the financial interests of the Union, "through the complementarity and support by OLAF to the EPPO" (according to the provisions of

[8] On the investigations performed by the European Anti-fraud Office (OLAF) and on the revocation of (EC) Regulation no. 1073/1999 of the European Parliament and Council and of the (Euratom) Regulation no. 1074/1999 of the Council.

paragraph (1) of art. 101 of the Regulation), with the parenthesis that in the cases when EPPO will perform a criminal investigation based on the regulation we refer to, OLAF will not initiate any parallel administrative investigation regarding the same cases, as it is expressly provided in paragraph (2) of art. 101 of the Regulation.

EPPO will develop also close relations with Europol, purpose for which the two bodies will conclude working arrangements through which they will decide upon the cooperation methods (according to art. 102, paragraph (1) of the Regulation).

Besides the close cooperation with the three bodies presented, based on the same Regulation, EPPO will collaborate also with other institutions, bodies, offices and agencies of the Union. For example, the European Commission will maintain collaboration in order to protect the Union's financial interests, to which sense they will conclude agreements in order to choose upon the cooperation ways. To the other bodies, agencies and offices of the Union, EPPO will offer with expediency the information necessary in order to give them the possibility to decide sundry administrative measures adequate for defending the Union's financial interests (for example, precautionary measures or the measures necessary for the development of the administrative procedures in order to recover the money owed to the Union's budget, disciplinary measures) or for intervening in procedures in its capacity as civil party (according to art. 103, paragraph (1) and (2), letter a-c of the Regulation).

At the same time, EPPO will conclude collaboration agreements also with the authorities of the Member States which do not participate to the consolidated cooperation form regarding EPPO creation, according to the provisions of art. 105, corroborated with art 99 of the Regulation. These working arrangements will have as main subject the agreements on the exchange of strategic information and the secondment of liaison officers to EPPO.

For the efficiency of its activity, EPPO will have cooperation relations in criminal area with the authorities from third party states and with international organizations. It will sign agreements with them, whose main subject will be interinstitutional information exchanges and secondment of liaison officers to EPPO (according to art. 104, paragraph (1) of the Regulation).

More thorough analysis on EPPO relations with other institutions and bodies of the Union, with EU Member States, with third party states and with other international organizations is not the subject of our study, as it will be performed in a different and subsequent study.

IV. Conclusions

The study on the new European body which is desired to be created – the European Public Prosecutor's Office (EPPO) – helped us to observe the existence at Union's level of its own policy in the area of protecting Union's financial interests and the creation of a legal and unitary institutional framework for putting it to application, having in view protection modalities of civil, administrative and criminal nature. The latter have in view fighting against and sanctioning any manifestations of fraud against the Union's financial interests, by means of criminal law. To this sense, from the perspective of criminal law and criminal procedure at Union's level, there were established minimum norms regarding a unitary definition of the fraud activity, of those who can have the capacity of active subjects of such criminal offences and of the sanction regime applicable to these cases. At the same time, it was stressed the preoccupation for the improvement of the cross-border cooperation and legal assistance in criminal area between the Member States for fighting against those criminal offences directed towards the financial interests of the Union. The conclusion at EU level that the criminal offences we refer to at present bring annually great financial losses and they are not sufficiency researched and investigated from criminal point of view by the Member States through their competent authorities, led to the adoption by the Council on 12th October 2017 of the Regulation (EU) 2017 / 1939 "implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO)". The desire to create such a body was manifested by a number of 16 EU Member States, while Sweden, The Netherlands, Malta, Hungary, Ireland, Denmark and Great Britain have not expressed their option to participate to this consolidated cooperation form up to present.

The possibility to create this Prosecutor's Office was given by the provisions of art. 86 of the Treaty on the Functioning of the EU and through the adopted Regulation, it was desired to establish some rules of separating the competencies between this Union's body and the authorities of the Member States with responsibilities in fighting against criminal offences which contravene to the Union's financial interests. Practically, it was desired, we believe, a reconnection of the work developed by the national prosecutors of the Member States in a single body of the Union and though this, the elimination of the disparities existing between the national investigations regarding the wrong usage of the Union's financial resources, disparities which, obviously, represent a disadvantage in the protection of the interests of financial nature of the EU.

Through the creation of this EPPO, EU jurisdiction was practically extended to the defence of its financial interests, defence which will be in the jurisdiction of the new Union's body. In our opinion, through EPPO establishment in the above mentioned purpose, we believe it would be welcome the creation of a supranational European Court corresponding to it. Accordingly, a unitary method of monitoring and sanctioning these quite serious criminal offences would exist also from procedural perspective. The limitation to the procedure norms of the national Courts of the Member States would give the possibility of non-unitary monitoring of these criminal offences following due to their legislative differences.

At the same time, considering the provisions of art. 86, paragraph (4) of the Treaty on the Functioning of the European Union, according to which "the European Council may, at European Public Prosecutor's Office to include serious crime having a cross-border dimension (…)", as well as the actual situation of transnational crime increase which the entire international community and obviously, the European space, is facing, we consider it would be welcome an extension of the European Public Prosecutor's Office also on cross-border serious criminal offences, such as human trafficking, terrorism etc.

Ultimately, we believe it is obvious the extremely important and useful role the European Public Prosecutor's Office will have in the activity of defending the financial interests of the European Union by means of criminal law.

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3. Regulation (EU) 2017/1939 dated 12th October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), O.J. E.U. L283 dated 31.10.2017.

THE CURRENT STATUS OF THE ENGAGEMENT INSTITUTION AND ITS LEGAL AND CANONICAL VALENCES

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Abstract: *In this paper we sought to carry out radiography of the engagement institution, from the current regulation perspective. Traditionally, it has been customary for future husbands to proceed to the conclusion of their engagement, either in a laic, or a religious form. This is the reason why this analysis also requires basic landmarks of the canon law. The interference between the two areas is justified, being noticeable that in this matter there are similarities between the conclusion of engagement in secular law and in canon law. Viewed as a precursor legal status, but non-binding, the so-called "marriage promise" precedes the conclusion of marriage, producing legal effects concerning both the future situation of the fiancés and the possible goods received on this occasion. From the interpretation of the provisions of the Civil Code it follows that the engagement has been given legal value, becoming,through the current regulation, a genuine legal institution, compared to the previous regulation of family relations under the Family Code, where it was only a state of things. The canon law has also undergone such an evolution as regards the meaning of matrimonial union before divinity since ancient times, the effects of engagement, and its relation to the Mystery of Marriage knowing various forms.*

Keywords: *engagement, breaking off the engagement, matrimonial freedom, therightnottomarry,canon law, religious engagement*

1. Preliminary Aspects. Relevant Provisions and Concept

Seen as a stage of transition from the state of celibacy to that of matrimony, although not endowed with binding force, engagement usually announces, in a celebratoryenvironment, the partners' intention to have an affective life under the future patrimonial interests generated by a possible marriage. But in the church plan[1], engagement is nowadays a mandatory ordinance that precedes the Mystery of Marriage, being the first stage in the ceremony of concluding the religious marriage, showing publicly the sincere intent of future bride and groom to unite before God. Between the two forms of the same event there is no dependence, as it happens in the

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1 In this paper we will refer, as a unique religious source, to the rules and canons established by the Romanian Orthodox Church. The canon law, which regulates the field of matrimony theologically and legally, is perceived either as a theological - legal discipline providing the principles and rules of law accordingto which the Church is organized and functions in its sense of religious institution, or can be defined as a theological - legal science intended to expose methodically and systematically the principles and rules of law upon which the Church is organized and administered.

case of marriage[2]. It is necessary to specifye that in the matter of marriage, the two areas (legal and religious) intertwine, even intercondition, having regard to the provisions of Article 259 par. 3 of Civil Code, in the sense that the religious celebration of marriage can be made only after the civil marriage has been concluded. Furthermore, the source of legal conditions and restrictions taken into account at the marriage conclusion derives from church canons. Thus, from the Christian point of view, civil engagement has no spiritual value, being a simple civil procedure. Only religious engagement has a spiritual substrate, and it is accomplished before God in order to receive the grace of the Holy Spirit, through the Mystery of Marriage.

Unlike cohabitation, the two partners both during the period of engagement and, of course, during marriage are under the "umbrella" of the law, having both the rights and the obligations provided by law. To this end, from the perspective of its express regulation, Book II of the Civil Code, titled "About Family", is opened suggestively in Chapter I - "The Engagement" with six articles that illustrate the legal profile of this institution: the conclusion, the breaking of engagement, restitution of gifts, liability for the abusive breaking of engagement and, in procedural matters, the limitation period in the case of instituting legal proceedings that sanction the culpable behavior of one of the fiances (Article 266-270 Civ. C.). In addition, as regards the fulfillment of the substantive conditions necessary for its conclusion, the rules governing marriage are becoming applicable, with the exception of the medical opinion and the guardianship court authorization[3].

On the other hand, from the religious viewpoint, engagement is regulated by its canonical provisions[4]. As we have already mentioned, if civil engagement is not mandatory for marriage conclusion, spiritually,religious engagement is an essential condition for receiving the Mystery of Marriage. Until recently, the engagement service was separate from that of the wedding ceremony, popularly known also as the "half-wedding." It preceded the religious wedding celebration, during which young people had to have intimate relationships until receiving the Mystery of Marriage. There are content differences between the two religious "procedures", in the sense that the engagement service does not have the value of the Holy Mystery, but is only a transient step of accepting the idea that they will become husband and wife before God.

The current provisions and rules presented above are intended to pencil for this institution both a legal, procedural framework, and a church component, the engagementbeing, in the two situations, a mutual commitment to recognition either in

[2]Article 259 par. 3 of the Civil code orders: "The religious celebration of marriage can be made only after the civil marriage conclusion." For details regarding a comparative approach of the marriage institution in the light of legal and canonical considerations, see Chiriluță, Tiberiu, "Current Foundations and Canonical-Legal Values of Family Relationship at the Conclusion of Marriage, in the collective volume *Studies of Law and Administrative Sciences*, Sitech Publishing House, Craiova, 2018, pp. 25-36.

[3] Regarding the conditions required to close engagement and the effects produced, see Lupşan, Gabriela, *Family Law*, Danubius University Press, Galați, 2011, pp. 11-13.

[4]Statute for thefunctioningandorganization of the Romanian Orthodox Church, text approved by the Holy Synod of the Romanian Orthodox Church by Decision no. 4768/2007 and recognized under Law no. 489/2006 on religious freedom and the general regime of denominations, through H.G. Romania nr. 53 of 16 January 2008, published in the Official Gazette of Romania Part I, no. 50 of January 22, 2008. Along with this Statute, other canons are still applicable, such as those provided in the resolutions of the Ecumenical Council of VI.

front of the state authority or before the divinity of certainty regarding the desire for marital communion.

They do not come on barren land, but one that has been previously developed through various laws. As concern the history of engagement, materials oflaw and canon law compete in information[5]. In short, in the Romanian people's tradition, marriage was often preceded by engagement, which consistedin "the mutual promises that a man and a woman make, usually in a family and celebratory environment, to get married together in the future"[6]. In the old Romanian law, the engagement was known both in the upper class, among the aristocrats and in the common people. The Calimach Code established engagement as a mandatory marital preamble, followed by marriage conclusion within 2-4 years[7]. Subsequently, the Caragea Code [8]and Donici Code regulated engagement as an precontract obliging the parties to conclude marriage, its dissolution being admitted only exceptionally. Subsequently, neither the 1864 Civil Code nor the Family Code provided any reference in their corpus about engagement.

The current civil regulation resume some of the previous provisions and regulates engagement minimally, the marriage promises integration into family law by the Romanian legislator signifying the recognition of the social and legal dimensions of this institution. Although many voices hurried to congratulate the legislator's endeavour, other doctrine makers have criticized the unjustified attention given to this institution, arguing that the provisions are inapplicable in the current socio-economic context, the new human typology built by the revolution in systems such as industrial, computer science, etc.,is excludedvoluntarilyto the traditional way,where the first step to marriage is that of the engagement. Many young people do not even want to assume the status of spouses, nor the one of fiancés, preferring cohabitation, without mutual promises towards a possible marriage union[9]. We need to specify that we have not yet regulated this partnership formula, asconcerns protecting common interests, rights and undertaking civil obligations. Moreover, as a social boomerang, starting from demographic statistics reasons, indicating that in Romania is steadily increasing the

[5]See, for example, Lupaşcu Dan, Gâlea Raluca, "Some considerations regarding the regulation of engagement in the new Romanian Civil Code and in some foreign legislation", *LESIJ*, no. XVII, vol. 1/2010, pp. 177-195; Motica, Adina-Renate, "Considerations regarding Engagement Institution in the Romanian Civil Code", Annals of the Law University of Timisoara, Law series, 2013, pp. 119-139; Voicu, Alexandru Virgil, "Engagement institution in the New Romanian Civil Code", 2012, material accessed at: http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2012-1-2/11.pdf; Florian, Emese, "Considerations on engagement regulated by the New Romanian Civil Code, in the Judicial Courier, Bucharest, no.11/2009, pp. 628-634; Corhan, Adriana, *Family Law*, Lumina Lex Publishing House, Bucharest, 2009; Şesan, Valerian (1942). *Course of Universal Church Law,* fourth edition, attended by Dr. Milan Şesan, Cernăuți: The "Metropolitan Silvestru" Publishing House. Floca, Ioan N. (1989). Impediments to marriage and wedding in the *Church Guide,* Cluj, XII, pp. 94-100. Floca, John N. (1990).*Orthodox canonical law. Church legislation and administration.*Vol. II. Bucharest: EIBMBOR.

[6] Albu,Ioan, *Marriage in Romanian Law,* Dacia Publishing House, Cluj-Napoca, 1988, p. 28.

[7] Hamangiu, C.; Rosetti-Bălănescu, I., Băicoianu, Al., *Treaty of Romanian Civil Law*, vol. I, All Publishing House, Bucharest, 1996, p. 188.

[8]Caragea law regulated engagementas being "first speech of the wedding bargaining", determining which were cases where engagement could beund one, as well as what happened to gifts made between the futur espouses on the occasion of engagement conclusion, as legal status prior to marriage. See Motica, Adina-Renate, *op. cit*., p. 120.

[9]For details on the relationship between cohabitation and engagement, see Moloman, Bogdan Dumitru, *Civil and Religious Marriage in Roman Law*, Universul Juridic Publishing House, 2009, pp. 53-61.

rate of births coming from cohabitation relations, it would have been desirable a special law to cover this segment of pragmatic cohabitation. Passing on the other side of the barricade, the Orthodox Church does not encourage, repudiates this formula of coexistence, leading to the relativisation of love relationship and to non-assuming the responsibilities of family life.

The engagement has been mentioned even from the *Old Testament*, in the chapter *Genesis* where is made a reference on the engagement of Rachel, the daughter of Laban, with Jacob and the engagement of Isaac with Rebekah, being designated by the term "aras", meaning in Hebrew "marriage covenant" or "marriage commitment."[10]The engagement is an old secular institution which the Church borrowed it from Roman law, but to which gave a special importance, reaching in the time of Emperor Alexios I Comnenus († 1118) to be equaled in value by the very Mystery of Marriage[11]. In the Roman world, after being consulted the auspices, there followed a series of religious ceremonies, at the end of which it was customary for the man to give the woman a ring. At first there was no age limit, being confirmed the engagement between Tiberiu and Vipsannia, the daughter of Agrippa and Pomponia, that was concluded at one year, by one of their parents.[12] Over time, it became a practice to conclude two, three years before marriage.

Seen from the perspective of tradition and through its evolution, the Church has given great importance to the conclusion of engagement, a fact that now explains the obligation of this ceremony, with short religious content. The strong influence of the Church has made that the blessing of the priest be a validity condition for the engagement. There are sufficient religious arguments that give substance to its maintenance within the marriage ceremony, arguments that will be exposed in this analysis.

Regarding the concept, engagement is in the legislator's view "the mutual promise to conclude marriage" (Article 266 Civ. code), usually made in a festive setting, being a covenant with a particular moral and emotional burden. In the literature, the definitions have been numerous but with common notes concerning the features that shape it: understanding, promise, free will, opposite sex persons, the purpose being the conclusion of a marriage. As such, purely by way of examples, the engagement was defined as "a mutual agreement between two people to get married"[13], "the mutual promise of two people to marry in the future"[14], " the voluntary pre-marriage legal status, rising from the mutual promise occurred, under the law, between a man and a woman, to conclude the marriage[15]", "an optional, pre-marriage, mutual commitment, of the future spouses, agreed precisely in the perspective of marriage conclusion[16]", or "a sentimental and intellectual agreement on a future marriage, a period of reflection

[10]Lupaşcu Dan, Gâlea Raluca, „*Some considerations regarding the regulation of engagement in the new Romanian Civil Code and in some foreign legislation*", *LESIJ*, nr. XVII, vol. 1/2010, pp. 177-195, p. 177.
[11]Panțuru, Cosmin, *Religious engagement and civil engagement,* Lumina newspaper, 26 February 2012, text accessed at http://ziarullumina.ro/logodna-religioasa-si-logodna-civila-71894.html
[12]https://www.scribd.com/document/49922918/Logodna-%C5%9Fi-religia-ortodx%C4%83
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[15]Lupaşcu, D., Crăciunescu, C.M., *Family Law*, Universul Juridic PH, Bucharest, 2011, p. 39.
[16]Oprescu, M.A.,*Engagement in the new Civil Code*, in the *Romanian Case Law Review* no. 4/2012, p. 251.

during which the fiances try their feelings and learn to know each other.[17]" It has also been emphasized that based on this will of agreement, one cannot impose on the other, by way of constraint, to conclude the marriage. Relating the engagement status duration, it will not be converted into marriage, and the marriage status can not be acquired by usucapio[18].

Not being subject to formal rules which imprint a legal character as eloquent as in the case of marriage, broken by any scriptural condition, mere verbal assumption must be likely toprove the engagement conclusion and to implicitly attract legal consequences. It can be consumed in a wide, family, festive environment, or in a small, intimate and unobserved environment. That is why it was said that engagement is a relationship with deep social, moral and juridical character in the vision proposed by the current civil coding, falling, through the normative component,within the new legal configuration of the regulations concerning "family life[19]". We have in mind mainly the relationship between the *promise of marriage* and the actual *marriage conclusion*, the core of the family life. Without being aninterconditioning, the partner's desire to go through both legal stages gives viability to the engagement, which becomes a "loudspeaker" of the will of the two (persons of different gender) to develop a family being under the protection of civil law, not in the form of cohabitation. In other words, *the promised marriage* can lead to its conclusion under the legal conditions, substantive conditions which have also been observed in the case of engagement. By contrast, the marriage conclusion does not imply also the existence of a prior understanding through the form of engagement. Moreover, the engagement followed by thestatus of husband and wife has been regarded as a duty of "honor" to fiancées, with no imperative implications of the law. By doing common front with the affirmations, the Church sees in the right of man to marry the essence of Christian life. Marriage, viewed both legally and religiously, involves a freedom of individual will to set up a family, for it always relies on the free and loving union of man and woman in matrimonial communion, through the Mystery of Marriage[20].

The definition of engagement - sponsalia - has been adopted by the Church from the Roman Law as "*the mutual promise of a man and woman that they will marry in the future*" The Fathers of the Ecumenical Synod V, in Canon 98, believe that the one who marries a woman engaged to another is guilty of adultery, her fiancé being still alive.

Eloquent for the canon law vision is the definition given by Saint Andrei Şaguna, the engagement being "the act through which persons marrying declare themselves before the priest, bridegroom, their parents or guardians and their relatives, to marry.

[17]Malaurie, Ph.,Aynès, L., *La famille*, Ed. Defrénois, Paris, 2004, p. 50.
[18]Florian, Emese, *Family Law*, 4th edition, C. H. Beck Publishing House, Bucharest, 2011, p. 13.
[19]The phrase "family life" has been broadly analyzed by Terzea, V., *New Civil Code*, vol. I (Article 1-1.163), annotated by doctrine and jurisprudence, Universul Juridic Publishing House, Bucharest, 2011, p. 107 şi urm.
[20]Professor Ph.D. Laurentiu Strezasaid in the preface of this book that the Christian family becomes "*the living cell of the Mysterious Body of Christ, in which it is integrated through the Mystery of Wedding.*" Gavrilă, Vasile, *Marriage - Life in the Kingdom*, Tradiția Română Foundation, Bucharest, 2004, p. 2.

This declaration can be made in writing or by word of mouth.[21]" In order to avoid certain inconveniences, the Church intervened at the engagement conclusion with blessing, as well as at the conclusion of marriage, thus the engagement becoming mandatory, *as act preceding the marriage*, a fulfilling act of Christian marriage. Concluded before the bishop or priest, following a certain form (prayers, change of rings), the engagement has almost a character equal in all to marriage.

2. Engagement - Legal Profile: Between Matrimonial Freedom and Right not to Marry

Taking into account the man's asserted right to marry, we amplify below to what extent engagement becomes either *a priori reflection* of this right, or, as it was shared in the doctrine, symbolizes actually the opposite of marital freedom, that is, *the right not to marry*, the right to celibacy. We also find shades of a similar analysis in the case of the ratio: the right to marry vs the right to divorce.[22] In this context, in order to also endorse a church viewpoint, the analysis is becoming simple, unequivocal: marriage is a sacred right, so does the engagement.

The institution of human rights is tributary to morality and Christianity. Having an incidence in all areas where man acts as a social being, the marital phenomenon, the second threshold in a man's life, against birth and death, is based on the free expression of will, is a conscious choice and, implicitly, refers to the freedom of man to marry or not. The universal law of love has made every man our neighbor, and it supports social relations[23], the choices made in life.

The principle of freedom to conclude a marriage is reflected in several international and national acts. Thus, by way of example, we find it expressly regulated in the provisions of Article 16 (1) of the Universal Declaration of Human Rights[24]; also in Article 23 (2) of the International Covenant on Civil and Political Rights[25] or in Article 12 of the European Convention on Human Rights[26]. At internal level, Article 48 of the Constitution expresses this reality by guaranteeing the right to marry and the starting of a family: "the family is founded on a marriage freely agreed between spouses." In full consensus, Article 259 of the Civil Code provides that the woman and the man have the right to marry.

[21]Şaguna, A., *Compendium of Canonic Law of a Holy Synodand Apostolic Churche, IIIrd ed., the Archdiocese Publishing House and Pattern,* Sibiu, 1913, pp. 54-55.
[22]Both theories are developed in Prof. Avram, Marieta, Civil Law. Family, second edition, revised and added, Hamangiu Publishing House, 2016, pp. 26-36.
[23]Ignat, Gina, The *ECHR influence on civil legal contributions,* Hamangiu Publishing House, Bucharest, 2015, p. 5.
[24] "Starting from reaching the legal age, the man and woman, without any restriction on race, nationality or religion, have the right to marry and to found a family. They have equal rights at marriage conclusion, during marriage, and at the marriage dissolution. "
[25] "the right to marry and to found a family is recognized to the man and woman, from the nubile age".
[26] "Starting with the age established by law, the man and woman have the right to marry and to found a family under the national law governing the exercise of this right".

As a conclusion of the interpretation of all the above-mentioned texts, the doctrine considered that matrimonial freedom implies: 1. the right of every person to marry, 2. the right to choose his/her future spouse and 3. the right not to marry[27]. To what extent does the engagement, another free expression of man's will to conclude a marriage, fall into any of these forms? Starting from its definition, a mutual promise to conclude a marriage, the affirmative form of the statement tends to lead the engagement in the same area of positive expression of the freedom to cohabit under the promise of marriage. There are doctrinal voices who, following the French model, have placed the will to conclude the engagement outside the right to marry, even as a form of the right not to marry[28], in the sense that it implies the right not to compulsorily assume the end: marriage. The thesis can be sustained for as long as there is no maximum length as concerns the engagement period: "I am engaged, but I do not intend to marry, it is my right not to marry."

In this case, we render the engagement only a moral, spiritual, momentary value, loaded with romance, without legal implications. However, the new regulation does not allow such an opinion, as long as the engagement breaking is abusive or guilty. The proof of engagement is, therefore, becoming a priority. "Even though in everyday life, most of the time, the engagement is concluded with a verbal promise of marriage, symbolically accompanied by a ring exchange, practically, legally, in case of litigation, it is hard enough to prove what the two have promised. Have they only discussed the possibility of getting married sometime in the future, or have they actually promised to marry each other at a certain time, even without setting a certain date[29]? "Is it an expression of the right not to marry for the choice does not match? Or are we witnessing a genuine engagement that should produce its effects?

As far as we are concerned, it remains only a virtual theory of the right not to marry as te mutual promise assumed only as *negotiumiuris*, but not jokingly, implies indirectly at least the assumption that it is tacitly accepted that a marriage may be concluded.

In relation to the freedom to marry seen as a concept of law, the religious freedom to share the holy Mystery of Marriage carries other *values*, breaks the man with his/her physiological and psychological skills, and prepares him/her for the union with Divinity, a communion for the entire life of the human with the divine. The engagement is an old institution to which the Church has given its appropriate importance. We equally value the constitutional text that guarantees freedom of conscience and freedom of religion to all citizens, the believers being able to ask for the religious blessing of their marriage. The Church sees in marriage something sacred. According to Christian teaching, the family is founded by marriage, being also defined

[27]Benabent, A., *Droit civil. La famille*, 11[eme] ed., Litec, Paris, 2003, p. 44 şi urm. apud Avram, M., *op. cit.*, p. 26.
[28]Avram, M., *op. cit.*, p. 29. Freedom to marry has, like any freedom, a component that implies the right not to exercise it, presenting practical interest through the engagement situation.
[29]Motica, Adina-Renate, *op. cit.*, p. 131.

in and through love, since "the family implies communion and communion is not possible without love.[30]"

Religious freedom in marriage and, implicitly, in engagement is certainly a right, a divine right, acquired even since the sharing of the Baptism Mystery, which marks the acquisition of religious capacity, the baptized person becomes a member of the Church. We specify that, in canon law, by receiving baptism, the individual acquires legal capacity of canon law, thus becoming a subject of rights and obligations in this field.

Holy Synod decided that the religious engagement to be performed along with the Mystery of Marriage in order to protect the faithful from the situation that they would face, from the church point of view, to be counted as concluding a second marriage, if it happened that one of the fiancés dies before concluding the marriage or if one of them refused to marry his/her fiancée. We note, at the same time, previously to the Sixth Ecumenical Synod, that it could be celebrated a religious service of engagement, in which case only the rigors applicable would have been those of dogmatic nature, without legal potential. Currently, however, according to new Synod decisions, since the celebration of wedding service cannot be done without evidence of a marriage validly concluded, the priest is obliged to ask the spouses to submit the marriage certificate issued by the competent civil service[31]. The final decision of the Holy Synod in this matter draws attention to the fact that the conclusion of a civil engagement cannot oblige the priests to also do a religious engagement[32].

As the religious version of engagement covers religious and spiritual considerations, the civil one covers the material and legal needs. Thus, we can say that there are two institutions of engagement: the laic one expressed in the Civil Code and the religious one regulated by the canonical provisions, with the only difference that civil engagement is not mandatory for the conclusion of marriage, while religious engagement becomes essential in receiving the Mystery of Marriage.

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[30]Mladin, N., *Studies of moral theology,* Publishing Houseand Typography of the Archdiocese, Sibiu, 1969, no. 350 apud Harosa, Liviu Marius, *Canon Law*, Universul Juridic Publishing House, Bucureşti, 2013, p. 178.

[31]Since it is a synodal decision, according to Article 10, par. 6 of the Statute for the Organization and Functioning of the Romanian Orthodox Church, the decisions of the deliberative and executive central bodies are binding for the entire Romanian Orthodox Church. That is why any member of the clergy of divine institution must observe it precisely, in order that its applicability be unitary with in the entire Romanian Patriarchate (Article 88, letter b-c, Article 50, letter c of the Statute of the Romanian Orthodox Church).

[32]*Decision no. 9027 of 25 October 2011 of the Holy Synod of the Romanian Orthodox Church in connection with the provisions of the new Civil Code and their implications in the activity of religious units and religious life of the faithful. Following the proposals of the Canonical, Legal and Discipline Commission as well as the unanimously expressed vote, the Holy Synod decided: 1. Approves that, in the future, it is no longer permitted in any situation to be done the religious engagement service independently of the Holy Mystery of Marriage. 2. Approves that at the level of the church units of the Romanian Patriarchate to be specified to the clergy and believers that the conclusion of civil engagement does not oblige the Church to officiate this separately from the Holy Mystery of Marriage, which only the Orthodox Christian faithful who can prove the conclusion of civil marriage.*

3. Conclusions

Finding ourselves at the junction or, better said, at the confluence of the two areas, our study confronted the present legal and canonical valences concerning the marital and premarital (engagement) subject. Although we have not intended in this material to analyze the substantive conditions that build the normative content, the current provisions and rules presented above are meant to make this institution both a legal, procedural framework, and a church component, the engagement being in the two situations a mutual commitment to recognition either before the state authority or before the divinity, of the certainty regarding the wish for marital communion.

Regarding the civil regulation relevance of the institution in question, the majority doctrinal assertions come to assess the legislator's approach, drawing attention to the fact that those who want to embrace this formula will enjoy the protection of the law, but will assume certain obligations. We also estimate that, although they are in serious competition with cohabitation, many young people choose to formalise their relationship, with at least a virtual promise to marry, without vehemently eliminating marital communion from their plans. It is the scenario where there is a fine dividing line between engagement and cohabitation.

Religious arguments that give substance to maintaining the engagement in the marriage ceremony are also sufficient. Firstly, as shown, this is the door through which young people enter into family life. These are like the child who learns to walk, discovering the mysteries of living in two. The family represents life in communion, not the individualism that became a habit, a phenomenon so intensely furthered during this period. Family life should not be regarded as a constraint and a self-renunciation, but on the contrary, a way of expressing all the feelings the two of them have one for another. The man amidst the family is truly free, it is false the idea through which is trying to promote the enclosure of emotions and feelings that, once entered into the life of couple, are lost or atrophied. By abdicating from morality, one actually deviates from our human relationships in the spirit and the letter of Christian faith. It is easy to choose the simplest way without undertaking responsibilities (see the formula of concubinage), but without seeing the future consequences which we will face and we will ask ourselves where we have been wrong, looking for the guilty person for our personal unfulfillments. In civil law, so much emphasis is placed on meeting the formal and substantive conditions, without mentioning whether love is part of them. In fact, what is love? A form or substantive condition? The engagement gives us the first answer: it is actually the first official public act of expressing the will arisen from the feeling of love of the two, aware of their living, with the purpose to fulfill their earthly purpose. "This is why man will leave his father and his mother and will join with his woman and they will both be a body" (Genesis II, 24).

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SELECTIVE ASPECTS ON THE EVOLUTION OF THE REGULATIONS REGARDING THE JUDICIARY IN THE ROMANIAN CONSTITUTIONS AND IN THE ROMANIAN LAW 100 YEARS AFTER THE GREAT UNION

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Abstract: *This study has the following title: Selective aspects on the evolution of the regulations regarding the judiciary in the Romanian constitutions and in the Romanian law 100 years after the great union. Using a Key- Scheme, the following parts of the study are analyzed successively, called: 1. Preamble. 2. The identification of the constitutional regulations on the judiciary in the Romanian constitutional system - selective aspects. 3. Romanian doctrinal references on the judiciary. 4. Judicial references on the judiciary in the decisions of the Constitutional Court of Romania. 5. Conclusions.*

Keywords*: the judiciary, the Romanian constitutions, the doctrinal references, the Constitutional Court decisions.*

1. Preamble

The object of study of this research will be circumscribed to the scientific analysis of the four great parts thereof, i.e.: 2. The identification of the constitutional regulations on the judiciary in the Romanian constitutional system - selective aspects. 3. Romanian doctrinal references on the judiciary. 4. Judicial references on the judiciary in the decisions of the Constitutional Court of Romania. 5. Conclusions.

For the purposes of this study, it is worth highlighting the approach on the regulations on the the judiciary in the constitutional system starting with the first document with constitutional value, i.e. *the Developer Statute of the Paris Convention of 7/9 August 1858* until this day, i.e. the *Constitution of Romania of 2003, the republished form of the Constitution of Romania of 1991.*

Considering this generous topic of study of over 145 years of constitutional evolution of the regulations on *the judiciary* in Romania we should point out since the very beginning the *need of a diachronic approach of this topic* by identifying all the Romanian Constitutions which regulated the constitutional regime during this period.

Moreover, we should also point out that during the stated period, Romania had several forms of government, i.e., monarchy, people's republic, socialist republic and semi-presidential republic.

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For a full but not exhaustive coverage of the area of study, we present a selection of the doctrinal and jurisprudential references to *the judiciary.*

On the other hand, it is important to mention here that the jurisprudence of the Constitutional Court of Romania contributed to the constitutionalization of the judiciary ever since its establishment.

According to the bibliographic research, *the judiciary* is new in point of formulation, but it is not new in point of its existence. Starting from this axiom, and paraphrasing K. Mbaye[1] we may say that: „The history of *the judiciary* overlaps the history of humankind".

The proposed study opens due to this approach a complex and complete view, but not exhaustive, in the current sphere of the judiciary.

In our opinion, the field under analysis is important for the constitutional doctrine, for the parliamentary law doctrine, for the comparative law doctrine, for the general theory of law, for the legislative activity of elaboration of the normative acts, for the legislative technique as well as for the research activity in the field covered by the theme of the study.

Even if the regulation and theorization of *the judiciary* goes back in time to the first constitution written in Romania, the theoretical interest to resume it is determined by the fact that the current specialized literature has not always paid enough attention to the three aspects, normative, theoretical and jurisprudential concerning *the judiciary,* analysed here.

We used the phrase *the judiciary* recalling of the famous theory of the separation of power in a state released by John Locke (*Traité du government civil*, 1690). This theory was later elaborated and consecrated by Montesquieu in his *De l´esprit des lois* (1748), a work which brought its author the title of father of the classical theory of the separation of powers in the state.

1. The identification of the constitutional regulations on *the judiciary* in the Romanian constitutional system - selective aspects.

1.1. Developer Statute of the Paris Convention of 7/9 August 1858[2]

A special attention should be paid to the *Developer Statute of the Paris Convention of 7/19 August 1858*. In our opinion, *the Statute* may be considered a Constitution, considering the provisions of art. XVII which set out the following: "All civil servants, without exception, when taking office, *should pledge allegiance to the Constitution and laws of the country and faith to the Lord"*.

The systematic analysis of the normative content of the Statute shows that it contains no regulation concerning *the judiciary*.

[1] Baye K. M., *Les droits de l'homme en Afrique*, Manuel UNESCO, A. Pedone, Paris, 2002, p.651.

[2] Muraru I., Iancu G., *The Romanian Constitutions, Texts, Notes, Comparative Presentation*, Actami Publishing House, Bucharest, 2000, pp. 7-27.

1.2. The Romanian Constitution adopted at 29 June 1866[3]

It should be noted that the Fundamental Law of Belgium of 1831 was an inspiration for the constitutions of other states among which the Romanian Constitution adopted at 29 June 1866.

The systematic analysis of the normative content of the Constitution shows that in Title III entitled *On the powers of the state*, the following fundamental principle concerning the *judiciary* is consecrated, under the following phrasing: "The judiciary is exercised by Courts and Tribunals. Their decisions and sentences are pronounced under the laws and executed in the name of the Lord".

1.3. The Constitution of Romania of 29 March 1923[4]

At the onset of the study we should specify that the Fundamental Law of Romania of 1866, remained effective for 57 years, though meanwhile important economic and political transformations occurred.

The systematic analysis of the normative content of the Constitution shows that in Chapter IV, Title III, entitled *On the judiciary*, the following fundamental principles concerning the *judiciary* are consecrated, under the following phrasing:

1. *Art. 101.* **–** No jurisdiction can be set up except under the power of a certain law.

Extraordinary commissions and tribunals cannot be set up under any name and any word whatsoever with a view to certain trials, either civil or criminal, or in order to judge certain persons.

2. *Art. 102.* – There is only one Court of Cassation and Justice for the entire Romanian State.

3. *Art. 103.* – It is only the Court of Cassation in united sections that has the right to judge the constitutionality of the laws and to declare as unenforceable those laws which are contrary to the Constitution. The judgement on the unconstitutionality of the laws is limited only to the case on trial.

The Court of Cassation will pronounce just like in the past on the conflicts of assignments.

The right of cassation appeal is constitutional.

4. *Art. 104.* - The judges are irremovable under special conditions set by the law.

5. *Art. 105.* – The jury is set in all criminal matters and for the political and press crimes, except for the cases set forth by this Constitution.

The action for damages resulting from press facts and crimes cannot be filed before the same jurisdiction where the offense was committed.

6. *Art. 106.* – Military justice is organized under a specific law.

7. *Art. 107.* – Special authorities of any kind, having assignments of administrative litigation, may not be established.

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[3] *Ibidem,* pp. 29-60.
[4] *Ibidem,* pp. 61-92.

Administrative litigation is within the scope of the judiciary, according to the special law.

The injured person, either due to an administrative act of authority or due to a management act made by breaking laws and regulations, either by bad intention of the administrative authorities to settle the claim of a right, may file a petition to the courts for the recognition of his right.

The bodies of the judiciary judge whether the act is illegal or not, they may cancel it or may pronounce for civil damage until the date of restoration of the injured right, also having the power to judge the claim for damages, either against the administrative authority summoned to court, or against the guilty civil servant.

The judiciary has no authority to judge government acts or the military headquarters acts.

1.4. The Constitution of Romania of 28 February 1938[5]

In the preamble of this study we should point out that the Fundamental Law of Romania of 1923 remained effective for 15 years.

Under the historical conditions of 1938, the new Constitution Draft was subjected to plebiscite on 24 February 1938. The Constitution was promulgated and was published in the Official Gazette Part I, no. 48, from February 27, 1938.

From the systematic analysis of the constitutional content of the Constitution, it follows that this in Art. 73 - Art. 78 of Chapter V of Title III, titled *About Judicial Power*, establish the following fundamental principles regarding the judiciary, under the following form:

1. Art. 73. - No jurisdiction can be established except in the power of a law.

Commissions and extraordinary courts cannot be created, under any appointment and word, in view of certain processes, whether civil or criminal, or for the trial of certain persons

The jury is abolished.

2. Art. 74 - For the entire Romanian State there is only one Court of Cassation and Justice.

3. Art. 75 - Only Court of Cassation and Justice in united sections has the right to judge the constitutionality of laws and to declare those that are contrary to the Constitution inapplicable. The Judgment of the unconstitutionality of the laws is bordering only to the case

The Court of Cassation and Justice will speak of conflicts of attributions.

Right of appeal in cassation is of order constitutional.

4. Art. 76 – The judges are irremovable. Immovability will be established by a special law which will intervene no later than six months since the promulgation of this Constitution.

In this time, disciplinary sanctions will be applied by the Royal Decree.

5. Art. 77 - Military justice is organized by law.

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[5] *Ibidem*, op. cit. 93-119.

6. Art. 78 - Administrative litigation is in the fall of the judiciary, according to the special law.

The judiciary has no power to judge acts of government as well the acts of command with military character.

1.5. The Constitution of 13 April 1948[6]

The systematic analysis of the normative content of the Constitution shows that in Title VII, entitled *The Judiciary and the Prosecutor's Office* consecrates the following fundamental principles, having the following phrasing:

1. Art. 86. – The courts are: the Supreme Court, one for the whole country, the Courts, the tribunals and the popular district courts.
2. Art. 87. – Special courts for certain branches of activity may be established under the laws.
3. Art. 88. – In all the courts, except for the Supreme Court, the judgement takes place with popular referees, unless otherwise ordered by the law for certain cases.
4. Art. 89. – The first president, the president and the members of the Supreme Court are appointed by the Presidium of the Grand National Assembly of the People's Republic of Romania at the proposal of the government.
5. Art. 90. – The Supreme Court oversees the judicial activity of the courts and judicial bodies, under the laws.
6. Art. 91. - The debates are public, unless otherwise provided by the laws for certain cases.
7. Art. 92. – The right of defence before any court is guaranteed.
8. Art. 93. – The judges of any rank are subject only to the law in the exercise of their duties and enforce the laws equally for all citizens.
9. Art. 94. – A law shall determine the organization and functioning of the courts, as well as the way of appointing and removing the judges of any rank.
10. Art. 95. – In the People's Republic of Romania, the Prosecutor's Office supervises the compliance with the criminal laws, both by the civil servants and by the other citizens.
11. Art. 96 – The Prosecutor's Office watches especially the prosecution and punishment of the crimes against democratic order and freedom, of economic interests, of national independence and sovereignty of the Romanian State.
12. Art. 97 – The Prosecutor's Office consists of a general prosecutor of the People's Republic of Romania and several prosecutors.

It will be determined by law the organization, assignments and functioning of the prosecutor's office.

13. Art. 98, - The General Prosecutor of the People's Republic of Romania shall be appointed by the Presidium of the Grand National Assembly of the People's Republic of Romania, at the proposal of the government.

[6] *Ibidem*, op. cit. 123-139.

1.6. The Constitution of 24 September 1952 [7]

The systematic analysis of the normative content of the Constitution shows that in Chapter VI, entitled *The courts and the Prosecutor's Office* consecrated the following principles, having the following phrasings:

1. Art. 64. – Justice in the People's Republic of Romania is served through the Supreme Court of the People's Republic of Romania, the regional tribunals and popular tribunals, and by the special courts established under the laws.

The organization, jurisdiction and procedure of the courts are set by the law.

2. Art. 65. – The tribunals defend the regime of popular democracy and the achievements of the working people; ensures popular legality, public property and citizens' rights.

3. Art. 66. – Judgment of the lawsuits in all courts is done with the participation of the popular referees, unless otherwise provided by the law.

4 Art. 67. – The Supreme Court of the People's Republic of Romania is elected by the Grand National Assembly for a five-year term.

The judges and popular referees are elected according to the procedure provided by the law.

The appointment of the judges in special courts is determined also under the law.

5. Art. 68. – In the People's Republic of Romania, the judicial procedure is in Romanian, and providing in the regions and districts inhabited by a population of a different nationality than Romanian, for the use of the maternal language of that population.

The parties who do not speak the language of the judicial procedure may get acquainted, through a translator, with the parts of the file, and the right to speak in court and draw conclusions in the maternal language.

6. Art. 69. – In all courts judgement is public, unless otherwise provided by the law.

The accused is guaranteed the right of defence.

7. Art. 70. – The judges are independent and subjected to the law only.

8. Art. 71. – The courts pronounce their decisions in the name of the people.

9. Art. 72. – The Supreme Court of the People's Republic of Romania supervises the judicial activity of all courts in the People's Republic of Romania.

10. Art. 73. – The General Prosecutor of the People's Republic of Romania exercises superior supervision of the compliance with the laws by the ministries and other central bodies, by the local bodies of the state power and administration, by the civil servants and the other citizens.

11. Art. 74. - The General Prosecutor of the People's Republic of Romania is appointed by the Grand National Assembly for a five-year term.

The deputies of the General Prosecutor of the People's Republic of Romania and the prosecutors of the local units of the Prosecutor's Office are appointed by the General Prosecutor for a four-year term.

[7] *Ibidem*, op. cit. 143-166.

12. Art. 75. – The General Prosecutor shall be accountable to the Grand National Assembly of the People's Republic of Romania and – in the interval between sessions – to the Presidium of the Grand National Assembly and to the Council of Ministers.

13. Art. 76. – The Prosecution is independent from local authorities, subordinating only to the General Prosecutor of the People's Republic of Romania.

1.7. The Constitution of 21 August 1965, as republished[8]

The systematic analysis of the normative content of the Constitution shows that in Title VI, entitled *The Judiciary* and in Title VII, entitled *The Prosecution* the following fundamental principles are consecrated, having the following phrasing:

I. Title VI – The Judiciary

1. Art. 101. – In the People's Republic of Romania justice is served, under the laws, through the Supreme Court, county courts, district courts and military courts.

2. Art. 102. – Due to their judgement activity, the tribunals and district courts defend the socialist system and the individual rights, educating the citizens in the spirit of compliance with the laws.

The tribunals and district courts aim, by enforcing criminal sanctions, at the correction and re-education of the offenders and at the prevention of new crimes.

3. Art. 103. – The tribunals and the district courts judge the civil matters, the criminal matters and any other matters under their jurisdiction.

In the matters provided by the law, the tribunals and district courts exercise control on the decisions of the administrative or public authorities with jurisdictional activity.

The tribunals and district courts judge the claims of the injured in their rights by administrative acts and may pronounce under the laws on the legality of these acts.

4. Art. 104. – The Supreme Court exercises general review on the judgement activity of al land any tribunal and district court. The exercise of this review is set by the law.

For a unitary enforcement of the laws in their judgement activity, the Supreme Court issues, in its plenary, guidance decisions

5. Art. 105. – The Supreme Court is elected by the Grand National Assembly during the legislature, in its first session.

The Supreme Court functions until the election of the new Supreme Court in the following legislature.

6. Art. 106. – The Supreme State Council shall account for its activity to the Grand National Assembly, and between sessions, to the State Council.

7. Art. 107. – The organization of the district courts and tribunals, their jurisdiction and trial procedure are set by the law.

Judging trials at first instance, at the tribunals, county courts and military courts is done with the participation of popular referees, unless otherwise provided by the law.

[8] Republished under art. 11 of Law 19 of 23 October 1986, published in the Official Journal of the People's Republic of Romania, Part I, no. 64 of 27 October 1986.

8. Art. 108. – The judges and popular referees are elected in accordance with the procedure set by the law.

9. Art. 109. – In the People's Republic of Romania the judicial procedure takes place in Romanian, providing in the administrative and territorial units inhabited by a population other than the Romanian, for the use of the maternal language of that population.

The parties who do not speak the language of the judicial procedure are provided for the possibility of taking note, through a translator, of the pieces of the file, and for the right to speak in court and to draw conclusions in their maternal language.

10. Art. 110. – The judgement takes place in public session, unless otherwise provided by the law.

11. Art. 111. – In the judgement activity, the judges and the popular referees are independent and are subject only to the law.

II. Title VII – The Prosecution

1. Art. 112. – The Prosecution of the People's Republic of Romania exercises supervision of the activity of the criminal prosecution bodies and the punishment enforcement bodies and watches, under the laws, upon the observance of legality, the defence of the socialist system, of the legitimate rights and interests of the socialist organisations, of the other legal persons and of the citizens.

2. Art. 113. – The Prosecution is led by the general prosecutor. The Prosecution bodies are: General Prosecutor's Office, county prosecutor's offices, local prosecutor's office and military prosecutor's offices.

The Prosecution bodies are hierarchically subordinate.

3. Art. 114. – The General Prosecutor is elected by the Grand National Assembly during the legislature, in its first session, and functions until the election of the new general prosecutor in the first session of the next legislature.

The prosecutors are appointed under the law, except as provided by Art. 87 pct. 6.

4. Art. 115. – The General Prosecutor shall be accountable to the Grand National Assembly for the activity of the Prosecutor's Office, and in the interval between sessions, to the State Council.

1.8. The Constitution of Romania of 8 December 1991[9]

The systematic analysis of the normative content of the Constitution shows that in Chapter VI, Title III, entitled *the Judicial Authority*, it consecrates the following fundamental regarding: *The Courts – Section I,* at *the Public Ministry – Section 2, and, at the Superior Council of Magistracy – Section 3*, having the following phrasing:

I. ***Section 1** - **The Courts***

1. Art. 123: - *Serving justice*

(1) Justice is served in the name of the law.

(2) The judges are independent and are subject only to the law.

[9] The text of the Constitution of Romania was published in the Official Journal of Romania, Part I, no. 233 of 21 November 1991.

2. Art. 124: *- Status of judges*

(1) The judges appointed by the President of Romania are immovable, according to the law. The President and the other judges of the Supreme Court of Justice are appointed for a 6-year term. They may be re-invested in office. The judges' promotion, transfer and sanctioning may be ordered only by the Superior Council of Magistracy, under the laws.

(2) The judge office is incompatible with any other public or private office, except for the teaching positions in higher education.

3. Art. 125: *- The Courts*

(1) Justice is served through the Supreme Court of Justice and by the other courts as set by the law.

(2) It is prohibited to establish extraordinary courts.

(3) The jurisdiction and judgement procedure are established by the law.

4. Art. 126: *- Public character of debates*

The judgement session is public, unless otherwise provided by the law.

5. Art. 127: *- The right to an interpreter*

(1) The judicial procedure shall take place in Romanian.

(2) The citizens belonging to national minorities and the persons who do not understand or speak Romanian are entitled to take note of the acts and deeds of the file, to speak in court and to draw conclusions, by interpreter; in the criminal trials, such right is ensured for free.

6. Art. 128: *- Use of remedies*

The stakeholders and the Public Ministry may exercise against the court decisions remedies, under the laws.

7. Art. 129: - *Courts police*

The courts shall have special police in their service.

II. Section 2 – ***Public Ministry***

1. Art. 130: *Role of the Public Ministry*

(1) In the judicial activity, the Public Ministry represents the general interests of the society and defends the rule of law, as well as the rights and freedoms of the citizens.

(2) The Public Ministry exercises its powers by prosecutors belonging to prosecutor's offices, under the laws.

2. Art. 131: *Prosecutors' status*

(1) The prosecutors carry on their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the minister of justice.

(2) The prosecutor office is incompatible with any other public or private office, except for the teaching positions in higher education.

III. Section 3 – ***Superior Council of Magistracy***

1. Art. 132: *Structure*

The Superior Council of Magistracy consists of magistrates elected for a 4-year term by the Chamber of Deputies and by the Senate in joint session.

2. Art. 133: *Powers*

(1) The Superior Council of Magistracy proposes the President of Romania the appointment of the judges and prosecutors, except for the trainees, under the laws.

In this case, the works are presided without the right to vote, by the minister of justice.

(2) The Superior Council of Magistracy fulfills the role of judges discipline council. In this case, the works are presided by the president of the Supreme Court of Justice.

1.9. The Constitution of Romania of 2003, the republished form of the Constitution of Romania of 1991.[10]

The systematic analysis of the normative content of the Constitution shows that in Chapter VI, Title III, entitled *The Judicial Authority*, the following fundamental principles are consecrated related to: *The Courts – Section I, the Public Ministry – Section 2, and, the Superior Council of Magistracy – Section 3*, having the following phrasing:

Warning. We may see that as compared to the Constitution of 1991 the articles were renumbered and in the case of this section art. 123 of the old Constitution became 124, and this numbering is still maintained for this Chapter.

We also notice in this Chapter that amendments and supplements were made which we will operate in the text.

I. ***Section 1 The Courts***

1. Art. 124: - *Serving justice*

(1) Justice is served in the name of the law.

(2) Justice is unique, impartial and equal for everybody.

(3) The judges are independent and are subject only to the law.

2. Art. 125*: - Status of judges*

(1) The judges appointed by the President of Romania are immovable, under the laws.

(2) The proposals of appointment, as well as the promotion, transfer and sanctioning of judges are the jurisdiction of the Superior Council of Magistracy, under its organic law.

(3) The judge office is incompatible with any other public or private office, except for the teaching positions in higher education.

3. Art. 126: *- The Courts*

(1) Justice is served through the High Court of Cassation and Justice and the other courts established by the law.

(2) The jurisdiction of the courts and the judgement procedure are provided by the law only.

(3) The High Court of Cassation and Justice shall provide for the interpretation and unitary enforcement of the law by the other courts, according to its jurisdiction.

(4) The structure of the High Court of Cassation and Justice and its operating rules shall be established under organic law.

(5) It is prohibited to establish extraordinary courts. Courts specialized in certain matters may be established, with the possibility of participating, as appropriate, of certain persons outside the judiciary.

[10] The text of the Constitution of Romania was published in the Official Journal of Romania, Part I, no. 767 of 31 October 2003.

(6) Judicial review of the administrative acts of public authorities, through administrative litigation, is guaranteed, except for the act regarding the relations with the Parliament, and the commandment acts of military nature. The administrative litigation courts have the jurisdiction of settling the claims of injured persons by ordinance or, as appropriate, by orders in ordinances declared unconstitutional.

4. Art. 127*: - Public character of debates*

The judgement session are public, unless otherwise provided by the law.

5. Art. 128*: - Use of maternal language and of the interpreter in court*

(1) The judicial procedure shall take place in Romanian.

(2) The Romanian citizens belonging to national minorities are entitled to express themselves in their maternal language before the courts, under the organic law.

(3) The ways of exercising the right set out by par. (2), including by using interpreters or translations, shall be determined so that not to prevent the good administration of justice nor involve additional expenses for the stakeholders.

(4) The foreign citizens and the stateless who do not understand or speak Romanian are entitled to take note of all the acts and deeds of the file, to speak in court and to draw conclusions through an interpreter; this rights is ensured in criminal trials for free.

6. Art. 129*: - Use of remedies*

The stakeholders and the Public Ministry may exercise against the court decisions remedies, under the laws.

7. ***Art. 130*****: -** *Courts police*

The courts shall have special police in their service.

II. Section 2 – ***Public Ministry***

Role of the Public Ministry

1. ***Art. 131:*** *Public Ministry*

(1) In its judicial activity, the Public Ministry represents the general interests and defends the rule of law and the rights and freedoms of citizens.

(2) The Public Ministry exercises its powers through prosecutors in the prosecutor's office, under the laws.

(3) The prosecutor's offices function attached to the courts, manage and supervise the criminal investigation of the judicial police, under the laws.

2. ***Art. 132*****:** *Status of prosecutors*

(1) The prosecutors carry on their activity according to the principle of legality, impartiality and hierarchical control, under the authority of the minister of justice.

(2) The prosecutor office is incompatible with any other public or private office, except for the teaching positions in higher education.

III. Section 3 – ***The Superior Council of Magistracy***

1. ***Art. 133*****:** *Role and structure*

(1) The Superior Council of Magistracy is the guarantor of the independence of justice.

(2 The Superior Council of Magistracy consists of 19 members, of whom:

a) 14 are elected in the general assemblies of the magistrates and validated by the Senate; they are part of two sections, one for the judges and one for the prosecutors; the first section consists of 9 judges, and the second of 5 prosecutors;

b) 2 representatives of the civil society, experts in law, who enjoy a good professional and moral reputation, elected by the Senate; they participate only in the plenary works;

c) the minister of justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

(3) The president of the Superior Council of Magistracy is elected for a one-year mandate, not renewable, from among the magistrates set out by par. (2) (a).

(4) The duration of the mandate of the members of the Superior Council of Magistracy is of 6 years.

(5) The decisions of the Superior Council of Magistracy are made by secret vote.

(6) The President of Romania participates in and presides the works of the Superior Council of Magistracy.

(7) The decisions of the Superior Council of Magistracy are final and irrevocable, except as provided by art. 134 par. (2).

2. *Art. 134*: *Powers*

(1) The Superior Council of Magistracy proposes the President of Romania the appointment of the judges and prosecutors, except for the trainees, under the laws.

(2) The Superior Council of Magistracy fulfils the role of court, by its sections, in the line of disciplinary liability of the judges and prosecutors, according to the procedure set forth by its organic law. Under such circumstances, the minister of justice, the president of the High Court of Cassation and Justice and the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice do not have the right to vote.

(3) The decisions of the Superior Council of Magistracy in disciplinary matters may be challenged at the High Court of Cassation and Justice.

(4) The Superior Council of Magistracy also performs other duties set forth by its organic law, while fulfilling its role of guarantor of the independence of justice.

2. Romanian doctrinal references on the judiciary.

We will select from the Romanian doctrine the opinions of authors with recognized prestige, who studied the judicial power or authority.

2.1. The first opinion[11] mentioned for this study analyses The Judicial Authority

The term *justice* has two meanings. In a sense, justice means the judicial bodies, and in the second sense we understand the activity of settling civil, administrative, commercial, criminal, work etc. trials, of applying sanctions, of restoration of rights and violated legitimate interests. In ordinary words, serving justice means making justice

[11] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional law and political institutions,* 14th edition, volume II, C. H. Beck Publishing House, Bucharest, 2013, pp. 286-295.

As social life should be led according to the constitution and laws, there should be a function (a power, an authority) which might know and be able to interpret them and correctly enforce them when they are violated, when the rights and freedoms are violated, when the rights and freedoms of citizens are endangered, neglected.

The term *jurisdictional authority (power)* does not diminish the role of justice, but it emphasizes the similarity of content and principles among several activities which are imperative when the laws are not enforced. Justice remains the substantial part of jurisdictional activity.

The fundamental principles according to which justice is serviced are the following: 1. principle of legality, 2. justice is unique, impartial and equal for all. 3. use of official language and of maternal language in justice. 4. right of defence. 5. presumption of innocence. 6. independence of the judge subjecting him only to the law.

The bodies of the judicial authority are set forth by Title VI of the Constitution of Romania, entitled *The Judicial Authority*.

2.2. A second opinion[12] mentioned for this study analyzes The Judicial Authority

The Constitution of Romania in Chapter VI (art. 124-134) deals under the term "Judicial Authority" three different institutions: the courts, the Public Ministry and the Superior Council of Magistracy, which form together the judicial authority.

The courts are represented in Romania by a) the High Court of Cassation and Justice; b) courts of appeal; c) tribunals; d) specialized courts; e) military courts; and f) district courts.

1. **The notion of justice has two meanings**. In a wide sense the notion of justice designates the idea of justice, of equity and equality before the law.

In a narrow sense, justice means all institutions by means of which the act of justice is exercised: courts, magistrates, lawyers, bailiffs, etc. from this point of view, justice is a public service exercised by the state specialized institutions.

2. **Judicial power** means only the judges who work in courts.

3. **The irrevocability of judges** is the strongest guarantee of justice independence, of the judge's independence and good administration of the act of justice.

4. **The principles underlying the making of justice** are the following: a) Principle of legality. b) Principle of independence of justice. c) Principle of free access to justice. d) Principle of uniqueness, impartiality and equality of justice for all individuals. e) Principle of the right of defence. f) Principle of the presumption of innocence. g) Principle of usage of official language and of maternal language in court. h) Principle of justice as a state monopoly. i) Principle of sessions' advertising. j) Principle of justice functioning on the hierarchy criterion.

[12] Ştefan Deaconu, *Political Institution, Edition 3,* C. H. Beck Publishing House, Bucharest, 2017, pp. 292-314.

2.3. A third opinion[13] mentioned for this study analyses the Jurisdictional Authority

1. Terminology and notions regarding judicial authority

At the onset of the course we should emphasize the place of judicial authorities in the triad of the separation of powers in the state. Concerning this aspect, the constitutional doctrine expresses the following opinion:

"The evolution of the classical theory of the separation of powers also involved the evolution of the explanations and practices regarding the judiciary. This explains the different terminology used to express this *power* in the constitutions and doctrine, i.e.: the judiciary, the jurisdictional power. The name of judicial authority clearly evokes justice, as a distinct function and as a distinct system".[14]

Moreover, the term *justice* is understood in a dual sense, „In a sense, justice means the system of judicial bodies, and in a second sense we understand the activity of settlement of civil, administrative, commercial, criminal, work etc. trials, of enforcement of sanctions, of restoration of violated legitimate rights and interests".[15]

In addition, „this function was and is entrusted to a distinct authority (power), vested with state powers which give efficiency and must be *independent and impartial*".[16]

Concerning the specifics of jurisdictional activity, constitutional doctrine sets forth the following: „in order for justice to be able to fulfil its mission, it has a certain organization, certain principles. The organization of justice is done by degrees of jurisdiction".[17]

2. Fundamental principles according to which justice is made

With reference to the fundamental principles according to which justice is made, the constitutional doctrine expresses the following opinion: „Justice shall meet certain fundamental requirements. Among these requirement, we may list the following: legality, good administration of justice; access to a court; guarantee of a fair trial; trial advertising; judge impartiality; proportionality in deciding sanctions etc.". [18]

The fundamental principles according to which justice is made, should meet two conditions: they should be principles set forth by the Constitution, or derive from constitutional principles.

The fundamental principles according to which justice is made are the following: 1. Principle of legality. 2. Justice is unique, impartial and equal for all. 3. use of official language and of maternal language in court. 4. right of defence. 5. presumption of innocence. 6. Independence of the judge subjecting him only to the law.

3. Bodies of the judicial authority

The systematic analysis of the normative content of the Constitution shows that judicial authority is designated in Chapter VI, Title III, entitled Judicial Authority, and

[13] Nicolae Pavel, *Constitutional law and political institutions,* Part II Political Institutions, Course in IFR Technology, Romanian Tomorrow Publishing House, Bucharest, 2013, pp. 92-97.
[14] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional law and political institutions,* 15th edition, volume II, C. H. Beck Publishing House, Bucharest, 2017, pp. 284-295.
[15] *Ibidem,* p. 267.
[16] *Ibidem*, pp. 267-268.
[17] *Ibidem,* p. 269.
[18] *Ibidem, p*p. 269-270.

are regulated in the following order: 1. courts. 2. The Public Ministry. 3. Superior Council of Magistracy.

3. Jurisprudential references on the judiciary in the decisions of the Constitutional Court of Romania – selective aspects.

3.1. DECISION No. 611 of 3 October 2017 regarding the claims of settlement of legal conflicts of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, such claims formulated by the chairmen of the Senate and of the Chamber of Deputies.

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1. Pending lies the examination of the claims for settlement of the legal conflicts of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, such claims formulated by the chairmen of the Senate and of the Chamber of Deputies. The referrals are based on the provisions of art. 146 (e) of the Constitution and of art. 11 par. (1) pct. A (e), of art. 34, 35 and 36 of Law no. 47/1992 on the organization and functioning of the Constitutional Court were recorded at the Constitutional Court under no. 9.686 and no. 9.687 of 13 September 2017 and are the object of Case File no. 2.428E/2017, of Case File no. 2.429E/2017 respectively.

2. By the Claim no. I 2.480 of 13 September 2017, The Chairman of the Senate requested the Constitutional Court to rule on the existence of a legal conflict of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry, a component of judicial authority, on the other hand.

3. The Court considering the claims for settlement of the legal conflicts of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, claims filed by the chairmen of the Senate and of the Chamber of Deputies, the opinions of the Chamber of Deputies, the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice — National Anticorruption Directorate, the documents duly filed, the report drawn up by the Judge Rapporteur, the allegations of the representatives of the present parties, the provisions of the Constitution and of Law no. 47/1992 on the organization and functioning of the Constitutional Court, holds the following:

The Court

1. Finds that there is a legal conflict of constitutional nature between the Parliament of Romania, on the one hand, and the Public Ministry — the Prosecutor's Office attached to the High Court of Cassation and Justice, on the other hand, generated by the refusal of the chief prosecutor of the National Anticorruption Directorate to appear before the Special Investigation Commission of the Senate and of the Chamber of Deputies to verify the aspects related to the organization of 2009 elections and the result of the presidential poll.

The: Final and binding.

4. Conclusions

Considering the above-mentioned we hold the following ideas here below:

4.1. The aim of the study on the *Selective aspects on the evolution of the regulations regarding the judiciary in the Romanian Constitutions and Romanian Law 100 years after the Great Union,* was attained. in our opinion.

4.2. In our opinion, the analysed area is important for the constitutional doctrine in the matter, for the doctrine of human rights and for the doctrine of the history of the Romanian state and law.

4.3. Constitutional regulations were successively identified concerning the evolution of the regulations regarding the judiciary in the Romanian Constitutions la 100 years from the Great Union.

4.4. The three parts of the study may be considered a contribution to the extension of research in the matter of the evolution of the regulations regarding the judiciary in the Romanian Constitutions la 100 years from the Great Union, in accordance with the current trend in the matter.

4.5. We further point out that this study opens a complex and complete view, but not exhaustive, in the analyzed field.

4.6. The key-scheme proposed, considering the selective approach of the evolution of the regulations regarding the judiciary in the Romanian Constitutions la 100 years from the Great Union may be multiplied and extended for further research in the matter.

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9. Constituția României din anul 2003, a fost publicată în Monitorul Oficial al României, Partea I, nr. 767 din 31 octombrie 2003.
10. Proiectul de Lege privind revizuirea Constituției României, a fost publicat în Monitorul Oficial al României, Partea I, nr. 100 din 10 februarie 2014.
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ABOUT THE INFLUENCE OF THE SACRAMENT JURISPRUDENCY ON ROMANIAN LAW

Andreea RÎPEANU*

Abstract: *The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between ius, honestum and fas. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.*
Keywords: *sacral law, roman law, juridical consultations, religious consultations, state, science of law.*

1. Introduction

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between *ius*, *honestum* and *fas*. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.[1]

The justification of punishment and mainly of capital execution is encountered, at least initially, in religion, in providing the victim to the God offended by fact and whose revenge could fall thus over the entire community.[2] Even the notion of *sanctio*, by which the punishment was determined for the breach of a law is obviously related to *sanctus*, *sacer* and *sacratio*. [3]

2. Law and religion

For several centuries, the pontiffs have known the pomp days[4] and the solemn formulas that the parties in dispute were compelled to pronounce. The pomp days and formulas were revealed and displayed in forum by Gnaeus Flavius, the freedman of

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[1] E. Molcuţ, D. Oancea, *Roman Law*, Şansa Publishing House, Bucharest, 1993, p.60.
[2] J. L. Strachan-Davidson, *Problems of the Roman criminal law*, Oxford Clarendon Press Publishing House, 1912, p.1.
[3] J. L. Strachan-Davidson, *quoted work*, p.3.
[4] Days when trials were judged.

Appius Claudius Caeccus in 301 before Christ.[5] The pontiffs held the monopole of law, being the sole who knew and could provide explanations related to the trial. The first priest of the state was the king, until the foundation of republic.[6] The Romans didn't know later either the distinction existent today between state and church, aspects of religion, of sacred, rites and practices appearing in all aspects of Roman life, including in law and criminal law.

As for religion, Roma did not adopt an expansionist model, but there was rather an absorption of religious elements specific to other Mediterranean civilisations, however we must outline the importance of the cult financed by public resources – *sacra publica*.[7] The religious practices could be encountered in every aspect of daily life. The banquets, the meetings of senate, the parades and the wars were usually preceded by sacrifices. Many of such practices survived as well the period after the adoption of Christianity, as state religion. The sacrifices were forbidden starting with 1 January 439, when it was enforced *Codex Theodosianus*.[8] The religions was present in all aspects of social life, it was not limited to temples and feasts.[9] There was however a clear difference between res sacrae and res publicae. In this respect, it was asserted in recent studies, that both religious practices of Romans, and the juridical ones, wouldn't be so different as previously thought, but much more dynamic, evidence of Roman specific conservationism. Therefore, the feasts with religious character were still organised in the town of Alba Longa, although it hadn't been for long time an important urban centre.[10]

For the lack of faith, it seems that there weren't juridical consequences, according to the former laws. There is however the possibility the state expressly demands a manifestation of faith, on certain occasions. In this respect, after the death of Cesar, when he was turned into a God (endowed with divine power), it was ordered to every citizen, under the death punishment, to celebrate the anniversary of birth of the dictator.[11] There was, mainly during the period of Republic, a religious freedom, but this does not mean that there is no strict supervision of cults.

In order to understand Roman religious one shouldn't ignore the two legends: of foundation of Rome and of first kings. The dam sent by Marte to nurse the two twins prefigure the warrior vocation of Romans. Pursuant to the defeat of Albans, Romulus and Remus decided to found a town on such places, where encountered and raised.[12] Wanting to find out the desire of law in this respect, Romulus selected Palatine and

[5] Vl. Hanga, *Borough of seven cholines*, Bucharest, 1951, p.185.
[6] Fr. Girard, *Histoire de l'organization judiciare des Romains*, Arthur Rousseau Publishing House, Paris, 1901, p.13.
[7] See Jörg Rüpke, (coord.), *A companion to Roman religion*, Blackwell Publishing Publishing House, 2007, p.7.
[8] *Codex Theodosianus*, 16,10,4 decreed: in all places and all towns, the temples must be closed, and pursuant to a general warning, the possibility to sin to belong to bad ones; termination of sacrifices (if someone commits such an act to be victim of revenge); the property of the one executed to be claimed by the town; the governors from province to be punished in the same manner if they neglect the punishment of such acts.
[9] See Jörg Rüpke (coord.), *quoted work*, p.5.
[10] See Plinius, *Naturalis Historia*, 3,69-70.
[11] See Dion, 47,18.
[12] See Titus Livius, *Ab urbe condita*, Minerva Publishing House, Bucharest, 1976, p.14.

Remus the choline of Aventin. The fatidic signs appeared firstly to Remus, in the form of six eagles. Romulus was shown twice more eagles.[13] However, both Remus and Romulus were acclaimed as kings by its own camp, *this being the reason of much trouble, turning into a bloody fight, in tumble, seriously injured by his brother, Remus fell breathless*.

The second legend, presented by Titus Livius, recounts us the fact that Remus jumped over the new walls built up by Romulus, but without any bad intention. However. Romulus, taking the gesture in serious, killed him saying: *all those who dare to jump over the walls built by me to die like this*.[14]

The nature of these myths is symbolic for subsequent development of Roman spirituality and moral. Pursuant to such bloody sacrifice, the first offered to divinity of Rome, the people will always keep in mind a memory not rather pleasant. More than 700 de years, pursuant to the foundation of Rome (753), Horațiu will still consider it an originary sin, the consequences thereof being able to cause the perdition of Borough, determining its sons to murder each other.[15] Similarly, *during every critical moment of its history, Rome will be disquieted, thinking that it feels the pressure of a blast. As on its birth, it didn't taste peace neither with men nor with Gods. This religious anxiety will put a pressure on his destiny. It is easy, too easy to oppose it to an apparent good consciousness of Greek boroughs. However, Athena had known crimes as well: on the origin of the power of Tezeu is the suicide of Egeu.*[16]

It was said that the legends of founding Rome would have on origin indo-European myths, mythological inheritance which, camouflaged in the oldest history of borough, represents by itself a religious creation susceptible to reveal us the structure specific to Roman religion.[17]

Initially, there was in Rome, as in other states of antic world, a confusion between law (*ius*) and religion (*fas*). Consequently, the priests were considered the maintainers and interpreters of divine will. The early legal practice was intensely maintained by pontiffs, from this college being elected as well the superior magistrates. The formula relied on a ritual practice involving accurate reproduction of some words deemed correct. The formulas were reserved to pontiffs, an elitist group of initiated people holding monopole over this knowledge. *Pontifices* were the only one able to draft testaments, contracts and who could provide evidence in trials. Under the direction of *pontifex maximus*, *comittia curiata* determines the sacred law and pontifical college, controlled state religion and ritual training. Starting with 3rd century before Christ, the place of pontiffs is taken by a class of legal advisors providing legal consultations in private law, including, both the field of contract, and that of crime.

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[13] See Titus Livius, quoted work, vol. I, p.14 and Plutarh, *Romulus*, III-XI.

[14] The foundation of a borough entailed very struct rites: in order to be able to see the will of gods a good omen space is delimited on the sky; the space of borough, on its turn, was delimited by the ground plot ploughed, symbolicaly, to become inviolable, sacred.

[15] See Pierre Grimal, *Roman civilisation*, Minerva Publishing House, Bucharest, 1973, p.16

[16] See Pierre Grimal, *quoted work*, p.16.

[17] See Mircea Eliade, *History of faith and religious ideas*, Scientific Publishing House, Bucharest, 1992, p.106.

In a society where guarding sacred goods of borough is deemed public duty and the recognition of sacrificers was an obligation, but which extended as well the application of domestic discipline over free citizen, when state religion was interested in doing this, the accomplishment of religious obligations was primitively rigoursly imposed, as well as sanctioned by criminal law. The one who, without being authorised in this respect, reveals the contents of the book of secret oracles, which may be consulted only based on a state order, risks capital punishment.[18] The guard of public sanctuaries was generally incumbent upon magistrates. When, exceptionally, other individuals were appointed as well, who neglected their duties, a capital crime was committed.[19] There is no technical term to describe the sacrileges committed against Roman religion. The expression of Tertullian, *crimen laesae romanae religionis* is accurate, but it is not used frequently. At the same time, the notion of *sacrilegium* although frequently used, is not accurate, as it designates, at least on origin, the theft from a temple.

Although, the cult of other Gods, than those of Rome or those adopted by state is not deemed a delict, certain forms of foreign religion were morally and politically disapproved. Thus, during the Republic and Empire frequently were taken measures against the Egyptian cult, perceived as being too shocking for occidentals.[20] The repression consists in police measures, such as: it was forbidden public exercise of such practices; the altars and chapels were removed; the foreigners were applied measures of coercion etc.[21] According to Septimiu Sever, the king had, besides the duty to honour the gods of old rite that of disapproving and punishing any alienation from the old rite.[22] Consequently, the legal works consider capital crime the introduction of new divinities and related ritual practices.[23]

The notion of *iniuria* (injustice) of private law was applied more for the state, than for gods. The profanation of a temple or the trouble of development of a religious act has as consequence a criminal action ended with a condemnation. It is ignored the possibility of the existence of particular legal disposals in this respect. Anyway, if such disposals existed, they targeted exclusively the offence of state. Roman criminal law did not include any disposals for the offence committed against a divinity by words or writs.

On Romans, as the ideal was represented by the regularity of annual cycle in the ordered development of seasons, any anomaly represented a crisis situation in the relation with gods.[24] Therefore, the accurate signification of miracles must be deciphered by priests. The magic power of divining the future belonged only to magistrates and military heads; it consisted in the interpretation of forecasts.

The domestic cult, remained unchanged for 12 centuries of Roman history, during the entire period of paganism was led by *pater familias*.[25] On its turn, the public cult

[18] See Val. Max., 1,1,13.
[19] See Cicero, *Pro Rabirio*, 2,7.
[20] See Cicero, *De legibus*, 2,8,19.
[21] See Titus Livius, 4,30; 25,1,7,5.
[22] See Dion, 25,36.
[23] See *Digeste*, 48,19,30.
[24] See Mircea Eliade, *quoted work*, vol.II, p.107.
[25] See Mircea Eliade, *quoted work*, vol.II, p.109.

was under the control of state. During the royalty period, the king held the first rank in sacerdotal hierarchy, being considered *rex sacrorum* (king of sacred).[26] It is known the fact that in the home of King three categories of writs were practiced, dedicated to Jupiter, Iunonei, Ianus, Marte and Ops Consina (goddess of agrarian abundance).

It was rightfully asserted[27], that rituals predominate not only in religious life of Romans, but also in politico-institutional life, marking deeply the entire mental of Roman people.

The cult of Dionis[28] was known in the entire Mediterranean world, including in Rome. Pursuant to the extension of Roman domination in Greece, the esoteric (secret) associations were spread in the entire peninsula, mainly in Campania.[29]

Consequently, in 186 before Christ was adopted a *Senatusconsult of Bacchanalibus* which had as scope the suppression of the cult of Dionis.[30] In this respect, it was foreseen that noone, in the company of more than four individuals, men or women (two men and three women), will participate to sacred rites, but with the approval of praetor and Senate. The manner of investigating the case and of punishment are presented to us by Titus Livius. However, the recounting must be performed under the reserve that, despite its erudition, similar to its ancestors, he does not consider history a science, therefore, he does not feel forced to always consider the historical truth. *Ab urbe condita* contains in fact three kinds of texts (of analysis, rhetoric and literary). The accuracy of text depends however on the source of inspiration; similarly for the transmission of details.[31] The certification of this law[32] is due to the discovery of an inscription in 1640 at Tiriolo. The Consul Spirus Postumius Albinus performed an investigation (*quaestio*) related to conspiracy (*coniuratio*) appeared related to practicing the cult of Dionis.

The supporters of the cult (around 7000) were accused of several crimes, among which: practicing ritual orgies, organisation of crimes for own enriching, forgery of documents etc. The text was analysed by several researchers, who emphasized the similarities with the persecution of Christians later on. There are some debates related to the nature of text and on the reasoning for which the practitioners of cult were punished. Thus, on the one hand, it is stated that, considering that religion was a state monopole, the particulars couldn't be allowed to organise such a cult and also, that it is manifested an opposition towards the influence of Greek culture, and on the other hand, it was asked the question whether in 186 before Christ existed indeed a criminal

[26] See Mircea Eliade, *quoted work*, vol.II, p.111.
[27] See Eugen Cizec, *History of Rome*, Paideia Publishing House, Bucharest, 2002, p.18.
[28] Dionis was in Greek mythology the god of vegetation, of pomiculture, of wine, of ecstasy and of fertility, called on Romans both Bacchus or Liber. In Rome Dionis appeared in the theatre shows and it was called in sacrifices.
[29] See Mircea Eliade, *quoted work*, vol.II, p.226.
[30] Mircea Eliade in *quoted work*, vol.II, p.126, uses the phrase of *nocturne orgy mysteries*.
[31] See P.G. Walsh, *Livy: His Historical Aims and Methods*, Cambridge University Press Publishing House, 1967, pp.150 and 235.
[32] See Victoria Emma Pagan, *Conspiracy Narratives in Roman History*, University of Texas Press Publishing House, 2004, pp.51-53.

organisation using a bacchic cult to hide the activity. This cult was frequently associated[33] with orgy, crime and robbery or falsification.

When a conspiracy was discovered, the procedure consists in delegating a magistrate that leads an investigation, followed by the execution of leaders. It provides as well the neutrality of the group, as well as the rewarding of informers. The conspirators were judged by extraordinary courts. The foreigners were judges as well, since conspiracy was considered a crime against state. Although there were some doubts related to the accuracy of data provided, it is clear that Aebutius and Hispala were the informers of consul Postumius.[34] The consul took them in custody to protect them and presented the case to Senate. Although some of the supporters of the cult committed suicide, the majority were caught, judged and executed or enchained;[35] the same for the leaders of the cult. On their turn, the altars were destroyed.

3. Conclusions

We believe that the asperity of punishments and the manner how this case was settled, must not be related to excessive intolerance of Romans opposite to religious cults, but rather to the prevention of a conspiracy. The severity and ampleness of investigation, carried out within five years prove the political nature of trial. The danger was determined by the existence of a potential complot against state and not by practicing a cult, since, as Ovidiu asserts, *Rome was the most dignified place of meeting of all gods*. The foreign cults were accepted and acknowledged at Rome by formal integration in official cults. Therefore, we must consider the social, political and military context after the second Punic war, when the security of state should be protected against any form of conspiracy.

Taking advantage of this situation, the senate used the legislation to control foreign influence, mainly that of Greek culture, control manifested several times, just to suppress the religious influences. In this respect, in 173 before Christ two epicurean philosophers were exiled; and in 155 before Christ the philosopher Carneades was exiled as well, on initiative of Cato cel Bătrân.

Despite all these, some bacchic practices survived in Rome, being tolerated by state to a certain extent.

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[33] According to Titus Livius there were bacchic rites not forbidden by state. However, the word *bacchic* represented mostly an insult, referring to immorality or sexual deviation.

[34] See Titus Livius, *quoted work*, 39,19,5.

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ABOUT THE PRINCIPLE OF LAWFULNESS IN THE ACTIVITY OF PUBLIC ADMINISTRATION. CONSTITUTIONAL ASPECTS

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Abstract: *In any state of law, by the provisions of the fundamental law, fundamental constitutional principles are identified, principles which emphasize the theoretical concept of the state of law. Along with aspects as the separation of powers within a state, representative governance, independence of justice, the acknowledgement and protection of the citizen's fundamental rights and freedoms, the state of law also considers the principle of legality. Legality must pertain to all state dimensions and not just in regard to the organization of justice, the solution to litigation, identifying certain deeds as crimes, the criminal sanction which is to be applied to a certain deed. Thus, lawfulness must pertain to executive power, public administration in regard to its structure and organization, but also in regard to the activity of multiple and various structures of public administration. The existence and enforcement of this principle in public administration, as well as in regard to its activity, can be aspects considered by express regulation or not, as found in constitutional regulations. However, regardless of law the constitutional lawmaker of a state perceived the necessity of regulating the principle of lawfulness in the fundamental law, whether express or not, of general character or applied to one or more authorities which exercise one of the three powers of the state, as they are identified based on the principle of the separation of powers and the equilibrium of powers within a state, the existence of this principle and the basis of any action of the public authority, namely one of the public administrations based on this principle is, in our opinion, unquestionable.*

Keywords: *principle, lawfulness, public administration, constitution, regulation.*

In today's globalized society, the state of law is a concept acknowledged and regulated by the most important laws, but not only at state level, but also in regard to international community, in order to valorize this level and to perpetuate and spread, in all states of the world, this fundamental values.

Thus, the General Assembly of the United Nations, by a 2005 Resolution, acknowledged the necessity of regulation and enforcement of the supremacy of law, the "ruling" of law both in international law and on a national level[1], by stating that the rule of law, along with good governance "are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger"[2]. Also, by pointing out the necessity of collaboration between states, the conclusion of partnerships

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[1] A/RES/90/1 Resolution adopted by General Assembly 60/1. 2005 World Summit Outcome, http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf, consulted online, date of last access: 12.05.2018.

[2] Idem, point 11 of the Chapter "Values and principles"

between them and the United Nations in order to obtain real development, the same resolution stated the "commitment to sound policies, good governance at all levels and the rule of law"[3]. Even if, by this resolution, the identification of some values and fundamental principles of the UN, the measures which are to be considered in order to enforce these values and principles, is directed towards the states which are currently developing and have a transition economy; however we still state the reaffirming these principles is valid for all states, regardless of their level of development, the remembrance of this principles and values is likely to assist any state in strengthening, including in regard to the state of law. Thus, we believe, this resolution reaffirms the fact that UN states continue to recommit themselves to "protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations"[4]. Also, by point 134 of this Resolution, a series of measures are regulated in order to "recognize the need for universal adherence and implementation of the rule of law at both national and international levels, among which the following are stated[5]: "reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States,…call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality,.. support the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building, … recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work" including in interpreting and enforcing the aspects regarding the state of law.

Also, by regional documents, the states reaffirmed their desire to pass regulations of international organizations, to sustain principles of real democracy, as the one regarding the state of law. Thus, in the Statute of the Council of Europe[6], in its preamble, it is stated that the founding of the Council of Europe was based on a series of fundamental principles, including that of the state of law. The European Union has

[3] Idem, point 21 of the Chapter „Global partnership for development". By referring mostly to developing countries which need to be supported in order to create an environment which allows for the use of internal resources, the following aspects will be considered: "reaffirm the fact that good governance is essential for durable development; that solid economic policies, solid democratic institutions which respond to the need of the people and an enhanced infrastructure represents the basis of sustained economic growth, eradication of poverty, creation of jobs; freedom, peace and security, internal stability, the respect of human rights, including the right to development, the state of law, gender equality and market oriented policies, as well as a global engagement to rightful and democratic societies are also essential and strengthen each other", Ibidem.

[4] Idem, point 119 of the Resolution.

[5] Idem, point 134 letters a), d), e) and f) of the Resolution.

[6] The statute of the European Council was signed in London, on May 5th, 1949 and it was subsequently modified several times. This statute was consulted online at: https://rm.coe.int/1680306052, date of last access 20.05.2018.

also reaffirmed the fact that all states of law, much like the Union itself, are based on the values of the state of law[7]. Furthermore, by corroborating the provisions of article 49 first paragraph first theses with those of second article of the European Union Treaty, we notice that any state which aims to be a member of this union[8] is required, among other things, to acknowledge and promote the values of the European Union, thus acknowledging the state of law.

This concept of the state of law, internationally acknowledged as mentioned above, but also on a regional level, pertains to "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards"[9].

On the other hand, this principle entails "measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparence"[10].

Founded by German doctrine, the theory of the state of law will by subsequently undertaken by French doctrine, and furthermore, by the systems of law of other democratic states, thus becoming one of the fundamental values of any such state.

In essence, in German doctrine, the state of law was that certain state which was limited in its actions by the natural rights of the people, namely the protection of freedom, the safety of a person, the property right and ensuring these rights entailed the respect of certain limits and principles in the organization of the state[11]. The same doctrine stated that, in the fundamental law of a state, it is required to regulate the fact that all natural rights of individuals are acknowledged and certain principles such as: the separation of powers, the supremacy of law, representative governance, independence of judges[12], as the state is, in this context, forced to establish "the rules which apply to its activities"[13].

H. Kelsen stated that that the state of law represents, in fact, a particular type of state centered on principles such as: democracy and legal security, thus the jurisdiction and administration are committed to the law, the members of the Government are

[7] See the Preamble and article 2 of the European Union Treaty, consolidated version JOUE C 326, 26/10/2012, consulted online at: http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012E/TXT&from=RO, date of last access: 12.05.2018

[8] When the most important values and structures which must be respected and fulfilled by a state in order to become a member state were structured, being adopted as the Accession criteria – Copenhagen criteria, in June 1993, among them, the one regarding the "stability of institutions which guarantee democracy, the state of law, human rights and the respect and protection of minorities was established", See Accession criteria – Copenhagen criteria, consulted online at: https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en, date of last access 20.05.2018.

[9] Point 6 of the third chapter of the General Secretary of the United Nations Report - *the State of Law and transition justice in societies which are in conflict and post/conflict* p.4, consulted online at: https://www.un.org/ruleoflaw/files/2004%20report.pdf, date of last access 20.05.2018.

[10] Ibidem.

[11] See Chevallier, Jacques, *Statul de drept (State of law)*, Universul Juridic Publishing House, Bucharest, 2010, 2012, p. 13.

[12] Idem, pp. 14-15.

[13] Idem, p. 21.

responsible for their acts, the courts of law are independent and the citizens enjoy freedom, as their rights are guaranteed[14].

A. V. Dicey noted that the state of law, seen as a fundamental principle regulated by the constitution, has three dimensions: the absolute supremacy of the law unlike the influence of arbitrary, including when it pertains to this arbitrary, the discretionary power of the government; any person, regardless of whether it is a simple individual of an employee of the state or even an authority of the state, will be committed to the law and will only answer based on the law; constitution is not the source of individual rights, but the consequence of these rights as they were defined by the courts of law[15].

From the above mentioned doctrine phrasing, we can see that defining of identifying the main elements of the concept of state of law have several common elements, regardless of the perspective from which this concept and fundamental principle is explained, such as: the acknowledgement and protection of certain rights and fundamental freedoms of the citizens, the supremacy of law - valid not only for the citizens, but also for the governing bodies, building rules and a legal background in which public authorities can function. These constants in explaining the concept of state of law have at least one connecting element - the creation of legal background and the respect of such a background, in other words - the rule of law. Thus, we can quote provisions from the Universal Declaration of Human Rights, which regulates, in its preamble, the fact that it is "essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"[16], or the preamble of the United Nations Charter which states, among others, the founding nations have decided to create this international organization by considering the necessity to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person"[17], as well as the "establishing of conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"[18].

Our doctrine also identifies the essential elements of this concept of the state of law, along with citizen's rights and freedoms valorized in their real dimension by the content of this right: equilibrium, collaboration and mutual control of public powers (public authority); free and real access to justice[19] and the obvious rule of law[20].

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[14] Kelsen, Hans, *Doctrina pură a dreptului (Pure doctrine of law)*, Humanitas Publishing House, Bucharest, 1992, 2000, p. 368.

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[17] See the preamble of the United Nations Charter, consulted online at: http://www.anr.gov.ro/docs/legislatie/internationala/Carta_Organizatiei_Natiunilor_Unite_ONU_.pdf, date of last access 20.05.2018.

[18] Ibidem.

[19] Muraru, Ioan & Tănăsescu, Elena Simina, coordinators, *Constituția României. Comentariu pe articole (Romanian Constitution. Comments by articles),* C. H. Beck Publishing House, Bucharest, 2008, p. 9.

[20] Ibidem.

Our doctrine also points out the fact that, in defining this complex legal concept, we must consider the following: “The Parliament must be committed to the Constitution in its activity and the other bodies of the state must be committed to both the Constitution and organic or ordinary laws”[21], the existence of “a legislative system which is constantly preoccupied with protection of human personality in its wholeness and to create optimum conditions for its development”[22], the “existence of a political class based on the separation of powers within a state and a system of “break and counterbalance” capable to prevent public powers from abusing their duties”[23].

However, in order to ensure that the state of law is not just a complex legal concept, regulated as a fundamental principle in the constitution of democratic states, we must identity and legally configure some “legal mechanisms to create the state of law”[24], namely “the control of the constitutional character of laws, the jurisdictional control of legality of administrative acts and the organization of independent justice”[25].

Article 1 third alignment of the republished Romanian Constitution[26], regulates the fundamental principle of the state of law, which entails, as pointed out by the jurisprudence of the Constitutional Court of Romania “the subordination of the state to the law, ensuring the means which allow law to censor political options and preventing any potential abuse and discretionary exercise of power by state structures” [27]. Or, in our opinion, such a subordination of the state to the law entails the respect of law, acknowledging its primordial character in all dimensions of activity of a state, thus also in public administration. Thus, we believe that one of the dimensions of the state of law pertain to lawfulness, namely the respect of laws.

Lawfulness is seen as “a fundamental principle of organizing and functioning of the system of political organization … which entails the elaboration of laws by competent organisms, following a previously established procedure, with respecting

[21] Drăganu, Tudor, *Drept constituțional şi instituții politice (Constitutional law and political institutions)*. Elementary treaty, volume I, Lumina Lex Publishing House, Bucharest, 2000, p. 289.

[22] Ibidem.

[23] Drăganu, Tudor, *op. cit*, pp. 289-290. In defining the state of law, the author states that “it will have to be understood as a state which, organized based on the principle of separation of the powers within a state and aiming to protect the rights and freedoms inherent to human nature, ensure the strict respect of its regulations by the authorities in their entire activity” – Idem, p. 290.

[24] Idem, p. 291.

[25] Ibidem.

[26] The provisions of our Constitution regarding the state of law are aligned with the constitutional provisions of other states. For example, the Lithuanian Constitution, in the second last phrase of its preamble acknowledges the state of law as one of the fundamental values which were the basis of adopting and proclaiming the Constitution (consulted online at https://www.constituteproject.org/constitution/Lithuania_2006?lang=en, date of last access 20.05.2018), or the Polish Constitution, which, in article 2, declares this republic as a state of law (consulted online at: https://www.constituteproject.org/constitution/Poland_2009?lang=en, date of last access 20.05.2018), or the Slovakian Constitution which proclaims in article 1 first alignment first thesis that “The Slovakian Republic is a sovereign and democratic state, governed by the state of law” (consulted online at: https://www.constituteproject.org/constitution/Slovakia_2014?lang=en, date of last access 20.05.2018).

[27] Romanian Constitutional Court no 70/2000 regarding the unconstitutional exception of article IV point 7 of Government’s Ordinance no 18/1994 regarding certain measures meant to strengthen the financial discipline of economic agents, approved with subsequent changes by Law no 12/1995, published in the Official Bulletin of Romania, part I, no 334 of July 19th, 2000.

the provisions of the laws created by the organs of the state, which, regardless of their category, have a superior position to the bodies of the certain system"[28].

As it is a fundamental principle, lawfulness will also reflect on the activity of public administration - a dimension of executive power, a component of the system of organization and functioning of a state, based on the principle of separation and equilibrium of powers in a state. As lawfulness expresses the idea of conformity with the law, in the wide sense of the term, the principle of lawfulness applies to administration and represents the rule according to which administration must act according to the law, but it must also consider public interest[29]. The activity of public administration must be characterized by lawfulness, which means "the obligation to align this activity to the constitutional provisions of the laws passed by the Parliament and to all law with superior legal force"[30].

However, we believe that this lawfulness must be considered by the public administration in regard to its entire activity, as well as by any organ of the state, public authority and public institution and structure of the state.

As defined on the level of the European Union, the principle of lawfulness represents the fact that "the administration of the Union acts in accordance with the law and enforces the regulations and procedures established by the law of the Union. The administrative competence is based on the law and their content respects the law. The decisions or the measures are never arbitrary or determined by purposes which are not based on the law or motivated by public interest"[31].

Such documents not only proclaim the fundamental principles, including that of lawfulness, as its respecting is necessary not only in the European Union, given its interactions with other member states, but also in the member states of the European Union, as it is recommended to enforce these principles at all levels of national administration.

As stated in the previous paragraph, we believe that the lack of a regulation which *expressis verbis* acknowledges the existence of these provisions in internal law and the

[28] Muraru, Ioan, & Tănăsescu, Elena Simina, *Drept constituțional şi instituții politice (Constitutional law and political institutions)*, volume I, All Beck Publishing House, Bucharest, 2005, pp. 69-70.

[29] Vedel, Georges, & Delvolvé, Pierre, *Droit administratif*, volume I., P.U.F Publishing House, Paris, 1992, p. 445, apud. Apostol Tofan, Dana, *Puterea discreționară şi excesul de putere al autorităților publice (Discretionary power and the excess of power of public authorities)*, All Beck Publishing House, Bucharest, 1999, p. 42.

[30] See, Iorgovan, Antonie, *Tratat de drept administrativ (Administrative law treaty)*, volume II, All Beck Publishing House, Bucharest, 2002, p. 42

[31] See the Resolution of the European Parliament of January15th 2013 which contains recommendations for the European Commission regarding Administrative Procedure Law of the European Union which identifies these principles, namely the *Third Recommendation regarding the general principles which should guide administration* (lawfulness, nondiscrimination, equality in treatment, proportionality, impartiality, consistency and legitimate expectancy) and is recommended to enforce these recommendations in administration [2012/2024 (INL)] (accessed online at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0004+0+DOC+XML+V0//RO#BKMD-4, date of last access: 06.01.2018), or the European Code of Good Conduct, elaborated by the European Ombudsman (accessed online: https://www.ombudsman.europa.eu/ro/resources/code.faces#/page/1, data of last access: 06.01.2018).

existence of this principle in public administration is not an obstacle in acknowledging and enforcing the principle of lawfulness in public administration and its activity[32].

On the other hand, in our opinion, acknowledging the state of law as one of the fundamental laws of any democratic state implies, as stated above, a regulation of the principle of legality.

Anyway, the fundamental law can only point out the fundamental coordinates of this principle given that “performing legality in public administration has a very wide range and, as a result of the fact that it entails the respect of laws as well as regulation of competent administrative bodies”[33], whereas, „in practice, the problem of respecting the laws by the organs of public administration occurs much more frequently than that of their conformity with the Constitution”[34]. This is why it is justified that certain aspects regarding the constitutionality control to be based and developed by the regulations of the fundamental law, whereas those regarding the control of lawfulness in the activity of public administration are regulated by the provisions of the Constitution, Thus, in regard to the main administrative act of our system, by the provisions of article 108 second alignment of the Constitution is expressly stated that Government decisions “are created in order to organize the respect of laws” thus establishing their character of subsequent acts, *secundum legem*, in relation to the law and, we would add, that any act of the Government must be elaborated based on an ability or an emergency law considering the expression of legal delegation stated by article 108 first and third alignment corroborated with those of article 115 of the Constitution. Thus, the Constitutional lawmaker has pointed out the necessity to respect the principle of legality in elaborating a Government decision, in regard to its content in relation to the law it pertains to.

In our opinion, the ordinary lawmaker and not the constitutional one needs to *expressis verbis*, identify the principles which govern public administration and its activity. Thus, a definition of the principle of lawfulness[35], seen as one of the general principles of public administration, is provided by the project of the Administrative

[32] Thus, for example, according to article 18 points 1 and 2 from the Austrian Constitution, the entire public administration is based on the law and each administrative authority can pass regulations based on the law within its area of competence (the provisions of these two points are continued by points 3 to 5); the provisions of article 60 and the following regulate constitutional aspects regarding the organization of administration and the competence of the organs that form public administration. Also, the fundamental law regulates, in article 129-136 of the Chapter called Constitutional and Administrative Guarantees, consistent provisions regarding administrative jurisdiction and the administrative guarantees of respecting the principle of lawfulness. Indeed, our fundamental law does not contain express regulations which state that public administration is organized and functions based on the principle of lawfulness, but we can’t ignore the regulation, in article 1 of the Constitution, of the state of law, of two rights which are guaranteed, namely the petition right of the person who is displeased by an act of a public authority, the latter being seen as grounds of administrative litigation along with other constitutional provisions such as article 126 sixth alignment, according to which judicial control of administrative acts, with the exceptions regulated by the constitution, is performed by the courts of law. The Austrian Constitution was accessed online https://www.constituteproject.org/constitution/Austria_2013?lang=en, date of last access: 21.05.2018.

[33] Drăganu, Tudor, *op. cit*, p. 335.

[34] Ibidem.

[35] Law no 554/2004 of administrative litigation, with subsequent changes does not contain a definition of lawfulness.

Code, which is currently subject to debate in the Romanian Senate[36], according to which: "public authorities and institutions, as well as their personnel, must act with respect of the legal provisions in force[37], a definition which could be much more ample and clear by considering the aspects regarding the necessity: of elaborating administrative acts, legal or individual regulations, by competent public authorities and institutions, by respecting a previously established procedure for their coming into force, as well as in regard to their conformity with the superior provisions of other acts elaborated in the system of public authorities.

On the other hand, when we discuss the legality of administrative acts, it is useful and necessary to mention the two thesis developed by the School of Public Law of Bucharest University Law School and the School of Public Law of Babeş-Bolyai University from Cluj-Napoca. Thus, in the opinion of the specialists of the first school, when we discuss the legality of an administrative act we must also consider its pertinence, as it is nothing more than a legality condition "in the lack of which we can't call an administrative act as valid"[38]. However, the Cluj School of Law states that the notion of lawfulness pertains to the conformity of the administrative act with the provisions of superior laws, generically called the "law"[39], whereas "pertinence entails the conformity of the administrative act with the continuously changing needs of the society"[40].

We believe that the state of law, as characterized by constitutional regulations and the Romanian state, considers the principle of lawfulness, but is not reduced to this principle on one hand; on the other hand, it does not forbid nor limit the right of public administration to exercise its discretionary power in its activity, namely "that certain margin of freedom which is left to the appreciation of an authority such as to fulfill the purpose established by the lawmaker and use any available means of action within the limits of its competence"[41].

However, we believe that, as a principle, this discretionary power or right of appreciation, as specialty literature calls it should not be seen as a condition of legality

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[36] This project was accessed online at: https://www.senat.ro/legis/PDF/2018/18L132FG.pdf, date of last access: 21.05.2018.

[37] In a project of Administrative Procedure Code, article 15, the following definition of the principle of lawfulness was suggested - "Public authorities must act in accordance with the law and principle of law. The exercises of legal duties can't be contrary to the purpose for which they were regulated". This Code was accessed online at http://www.curieruljudiciar.ro/wp-content/uploads/2016/12/Proiect-COD-procedura-administrativa.pdf, date of last access: 21.05.2018.

[38] Iorgovan, Antonie, *op. cit.*, p.49, or Apostol Tofan, Dana, *Drept administrativ (Administrative law),* volume II, All Beck Publishing House, Bucureşti, 2004, p. 26.

[39] Dragoş, Dacian Cosmin, *Discuții privind posibilitatea anulării unui act administrativ pe motiv de inoportunitate (Discussions regarding the possibility of annulment of an administrative act based on the lack of opportunity)*, an article published in Revista Transilvană de Ştiințe Administrative (Transilvania Administrative Science Magazine) no 1(10), 2004, p.31, accessed online at: www.rtsa.ro/rtsa/index.php/rtsa/article/download/270/265, date of last access: 05.01.2018.

[40] Petrescu, Rodica Narcisa, *Drept administrativ (Administrative law)*, Cordial Lex Publishing House, Cluj-Napoca, 2001, p.277. In regard to the opinion of the two schools of law, also see Trăilescu, Anton, *Actele administrației publice locale (Local public administration acts)*, All Beck Publishing House, Bucureşti, 2002, p. 47-48.

[41] Apostol Tofan, Dana, *Drept administrativ (Administrative law)*, volume I, C. H. Beck Publishing House, Bucharest, 2014, p. 11.

of the administrative act[42] which should not mean that, in an exceptional situation, it can't be the subject of control exercised by the courts of law, especially when lawfulness is affected by acting with an excess of power, thus we are no longer in the presence of good administration.

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[42] In support of this point of view, doctrine stated that "Justifying this doctrine option resides in the principle of the separation of powers in a states which prevents judicial authority to "perform administration" namely to intervene in an area reserved, by the Constitution and laws, to executive power", Dragoş, Dacian Cosmin, *op. cit.,* p. 32. Also, by point.81 of Decision no 757/2017, the Constitutional Court has stated that "there is no control mechanism of the opportunity of elaborating an administrative act. As a result, if the law allows the accomplishment of a certain administrative operation within the margin of appreciation of the administrative organ, the censorship of the margin of appreciation can't be discussed". Decision no 757/2017 regarding the solving of the legal constitutional conflict between the Romanian Government and the Prosecution Office of the High Court of Justice, published in the Official Bulletin of Romania part I, no 33 of January 15th, 2018.

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CONSIDERATIONS ON THIRD PARTY OBJECTION TO THE RESOLUTION OF THE GENERAL ASSEMBLY OF SHAREHOLDERS

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Abstract: *Law no. 31/1990 provides the possibility for certain third parties to file an appeal - objection - against certain resolutions of the general assembly of shareholders. In addition to the action for cancellation of resolutions of the general assembly of shareholders, provided in art. 132 of Law no. 31/1990, there is also a possibility to object to such resolutions having as object the transfer of shares. It can be noted that, in addition to the different name of the two remedies, there are other notable differences, such as: the cancellation of resolutions of the general assembly of shareholders may be requested on grounds of absolute nullity by third parties having interest, such right not being subject to the lapse of time, while objection is aimed at repairing the harm caused by the disposal of shares, which would prejudice creditors or any other persons. As regards the possibility of disposing of shares, the recent amendment of the Companies Law brought certain restrictions: the resolution of the meeting of shareholders under which the disposal of shares is resolved shall be filed within 15 days with the trade register, in order to be specified in the register and published in the Official Gazette of Romania so that the state and any other social creditor may file an objection*

Keywords: *companies, objection, resolution of the general assembly of shareholders*

1. Introductory considerations

Law no. 31/1990 provides the possibility for certain third parties to file an appeal - objection - against certain resolutions of the general assembly of shareholders.

In addition to the action for cancellation of resolutions of the general assembly of shareholders, provided in art. 132 of Law no. 31/1990, there is also a possibility to object to such resolutions having as object the transfer of shares.

It can be noted that, in addition to the different name of the two remedies, there are other notable differences, such as: the cancellation of resolutions of the general assembly of shareholders may be requested on grounds of absolute nullity by third parties having interest, such right not being subject to the lapse of time, while objection is aimed at repairing the harm caused by the disposal of shares, which would prejudice creditors or any other persons.

As regards the possibility of disposing of shares, the recent amendment of the Companies Law brought certain restrictions: the resolution of the meeting of shareholders under which the disposal of shares is resolved shall be filed within 15 days

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with the trade register, in order to be specified in the register and published in the Official Gazette of Romania so that the state and any other social creditor may file an objection.

2. Third party objection to the resolution of the general assembly of shareholders

Article 202 (2^3) of Law no. 31/1990 refers to the liability of either the company or the shareholder, establishing that social creditors and any other persons injured due to the shareholders' resolution regarding the assignment of shares have an active capacity to sue and therefore may file an objection under which they should request the court to oblige, as the case may be, the company or the shareholders, to compensate the damage caused, as well as, if appropriate, to incur the civil liability of the shareholder whose intent is to assign its shares.

Regarding the procedural provisions, the dispositions of article 62 of Law no. 31/1990 shall apply accordingly, i.e. that the term for filing an objection is 30 days from the date of publication of the resolution of shareholders or of the amending addendum in the Official Gazette of Romania, Part IV, unless a different term is provided in this law.

Also, the objection shall be filed with the office of the trade registry, who shall publish it in the registry and forward it to the relevant court of law within 3 days from receipt.

From the wording of article 202 (2^3) of Law no. 31/1990 it is undoubted that the lawmaker understood to establish an alternative liability of either the company or the shareholder, and there is no mention of a joint liability.

Therefore, a potential court decision would appear as inadmissible if ordering joint liability against the legal provisions which provide for alternative liability: either of the company or of the shareholders.

The plea of inadmissibility is a relatively constant presence in the civil procedural landscape of Romanian law[1]. Initially, a case of inadmissibility was a defence where the defendant, without directly challenging the right claimed by the claimant, objected to the claim declaring it inadmissible, i.e. not eligible to be scrutinized by the judge[2].

However, the opinion[3] which took form, being adopted by the legal literature, was that our procedural system covers, by its institution of procedural pleas and of

[1] D. Radu, G. Popescu, *Aspecte teoretice şi practice ale excepției de inadmisibilitate în procesul civil [Theory and practice of the plea of inadmissibility in the civil trial]*, in R.R.D. no. 9/1987, pp. 44-52.
[2] *Idem,* p. 45.
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substantial pleas[4], all possible events of inadmissibility, without leaving room for the need to regulate new procedural institutions[5].

It was also shown that inadmissibility is, in fact, the effect tended towards by a procedural plea, and not a specific means of rejecting an introductory claim[6]. The rejection of a claim as inadmissible is only possibly in relation to peremptory pleas which, in fact, are a means to prevent judgment of the claim on the merits[7].

The case law[8] showed that inadmissibility is a procedural plea, strictly related to the lawful submission of a claim in court, and *this plea may be upheld only provided that the party employs a procedural means not provided by law or which is either expressly or implicitly excluded by law* or when the law provides for a preliminary procedure to be completed before referring the claim to the court, such procedure not being followed by the referring party, in default.

The inadmissibility of an introductory claim is a procedural plea which occurs for reasons outside the introductory claim, therefore, if the elements based on which the plea of inadmissibility was upheld referred to aspects in the range of nullities of documents which the introductory claim relies upon, i.e. intrinsic causes, the court decision to uphold such plea is erroneous.

Inadmissibility is, therefore, that procedural instrument which prevents the judge from scrutinizing the merits of the claim, since the party employs a procedural means not provided by law or which is either expressly or implicitly excluded by law or when the law provides for a preliminary procedure to be completed before referring the claim to the court, such procedure not being followed by the referring party, in default[9].

Therefore, as a first analysis, we need to draw a conclusion that the court will hold either the company or the shareholders liable, and that joint liability is not permitted.

Another thing worth analysing is the possibility of a former spouse to file an objection after the initiation of the partition of marital property procedure in court, after the marriage has been terminated, a procedure which was not settled yet.

Taking into account the multi-disciplinary area of this case - companies law and family law, matrimonial regimes - the objection to the resolution of the general assembly of shareholders cannot be exercised by one of the joint owners, and indemnifications cannot be granted to such owner individually.

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[4] Alba Iulia Court of Appeal, Civil Section, civil decision no. 66/18.02.2010 - It is artificial to attempt to consecrate a separate institution of pleas of inadmissibility, since the civil procedure code contains a ranking of pleas as procedural pleas and substantial pleas, not of procedural pleas and pleas of inadmissibility.

[5] For a contrary opinion, see A. Vasile, *Excepțiile procesuale în noul Cod de procedură civilă [Procedural pleas in the New Civil Procedure Code]*, Hamangiu Publishing House, Bucharest, 2013, p. 455.

[6] G. Boroi, M. Stancu, *op. cit.*, p. 414.

[7] Cluj Court of Appeal, civil section, for labour and social security matters, decision no. 313/R/2006 – The plea of inadmissibility of this claim was accepted and produced peremptory effects, thus preventing the court from scrutinizing the claimed right on the merits.

[8] High Court of Cassation and Justice, second civil section, decision no. 2125/14.12.2016.

[9] See also A.C. Ciurea, *Excepțiile procesuale în materie civilă [Procedural Pleas in Civil Matters]*, Wolters Kluwer Publishing House, Bucharest, 2009, p. 188.

As also shown in the specialty literature[10], *the spouse who has concluded the legal act is held liable in tort towards the joint property and not towards the other spouse, any indemnification representing a receivable of the joint property and not a personal right of the "affected" spouse.*

Therefore, this right can be exercised either upon the partition of joint property, or during legal community, or during the termination of this regime.

Explanations to this solution are as simple as they are brief and straightforward.

On the one hand, in the case of joint property, the joint owners shares are not set, and may vary from 0% to 100%.

Since there are no contribution quotas to the assets subject to partition, no prejudice can exist: what if the court decides that the spouse filing the objection is entitled to a 0% share? Does this justify the capacity to file the objection? Has this spouse suffered any harm entitling him or her to file the objection? Is there any interest on the part of this spouse?

All these questions may only be answered by the court vested to settle the judicial partition, and cannot be settled by a court vested to settle the objection to the resolution of the general assembly of shareholders.

On the other hand, any indemnification awarded becomes an amount in replacement of the shares in the property to be partitioned, and this amount is to be divided in its turn.

Under no circumstances, therefore, is a court decision awarding an amount of money to one of the spouses to be admitted without considering the joint nature of this amount and its being subject to partition.

By such a decision, the court would have eluded the provisions regarding the partition in court and would have awarded one of the spouses, without entitlement, an amount of money which should have been subject to partition.

As shown, this claim for indemnification may only be exercised by the joint property and not by one of the spouses alone, since the indemnification will be included in the property to be divided, an element which the court judging on the merits failed to take into consideration.

By such a court award, a portion of the property to be divided may be removed without justification or legal grounds, thus prejudicing the other spouse.

Therefore, the amount representing potential damages following the assignment of shares needs to be introduced in the property to be divided and reviewed by the court vested to settle such partition claim.

Otherwise, the court would merely substitute the court competent to judge the partition and would order a division without having regard to the whole, entire property to be divided and corresponding obligation.

Regarding the means by which a court may establish the amount of indemnifications, we believe that under no circumstances should the court refer to the company's share capital, as this is not a benchmark for this purpose.

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[10] E. Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale [Family law. Marriage. Matrimonial regimes]*, 5th edition, C.H. Beck Publishing House, Bucharest, 2016, p. 220.

The share capital is not to be taken into consideration since it represents the value of contributions in cash and in kind of the shareholders who participate in the establishment of a company, but does not include the company's liabilities[11].

On the other hand, this confusion between assets and share capital is rather common, the confusion creating repercussions on the solution employed in assessing the prejudice[12].

Share capital is divided into shares (in the case of limited liability companies) following the participation of shareholders in the establishment of the company, therefore it is only a value with no material existence.

In establishing the value of indemnification, one cannot take into consideration the amounts that were to be paid to the shareholder from operations either, since this would result in the violation of article 67 of Law no. 31/1990.

According to this article, dividends shall be distributed to shareholders based on their participation in the paid-up share capital and shall only be paid to the shareholders following a resolution of the general assembly of shareholders.

The legal definition of dividends is provided in article 7 (1) (11) of the Fiscal Code, where a dividend is a distribution in cash or in kind performed by a legal entity to a participant in such entity, based on the ownership of participation interests in such legal entity[13].

The old literature[14] defined the dividend as that portion of the net benefits to be paid from time to time for each share.

Recently[15], the dividend was defined as any distribution by a legal entity, in cash and/or in kind, in favour of its shareholders, from the profit established based on the annual balance sheet and profit and loss account. In what regards dividends from the

[11] For developments see St.D. Cărpenaru, *Tratat de drept comercial român [Treaty of Romanian Commercial Law]*, fifth edition, Universul Juridic Publishing House, Bucharest, 2016, pp. 138 and the following.

[12] For the difference between share capital and assets, see St.D. Cărpenaru, *op. cit.*, pp. 141 and the following.

[13] According to the same law, are not dividends: a) any distribution of new participation titles or the increase of the nominal value of existing participation titles, following a share capital increase operation, according to the law; b) a distribution carried out in relation to the acquisition/redemption of its own participation titles by the legal entity; c) a distribution in cash or in kind, carried out in relation to the liquidation of a legal entity; d) a distribution in cash or in kind, carried out on the occasion of decreasing the share capital, according to the law; e) a distribution of issuance premiums, proportional to the share of each participant; f) a distribution of participation titles in relation to reorganization operations, provided in articles 32 and 33 □□ Are deemed to represent dividends from a tax point of view and is subject to the same legal regime as dividend revenues: the gains obtained by individuals from holding participation titles, as defined in the legislation into force, in collective placement bodies; any revenues in cash or in kind distributed by agricultural companies, with legal personality, established according to the legislation into force to a participant in that company, based on the shares held by such participant.

[14] I.L. Georgescu, *Drept comercial român [Romanian Commercial Law]*, volume II, All Beck Restitutio Publishing House, Bucharest, 2002, p. 549.

[15] D.D. Şaguna, *Drept financiar şi fiscal [Financial and fiscal law]*, Eminescu Publishing House, Bucharest, 2000, p. 786 (cited hereinafter as *Fiscal 2000*); D.D. Şaguna, Tratat de drept financiar şi fiscal *[Treaty of financial and fiscal law]*, All Beck Publishing House, Bucharest, 2001, p. 786 (cited hereinafter as *Fiscal 2001*).

point of view of companies, it is believed[16] that they represent that portion of the net profit to be paid to shareholders after the fiscal year end, corresponding to the participation of each shareholder in the share capital, according to the resolution of the ordinary general assembly of shareholders.

The first condition for dividends to exist is that the company registers profit at the end of the fiscal year. However, this condition is not sufficient for a shareholder to receive dividends, since, *according to the principle of prevailing will of the company, the ordinary general assembly will decide how to distribute profit*[17], such profit being able to be put to various uses: replenishment of the share capital, establishment of a reserve fund, reinvestment, acquisition of goods necessary for the good operation of the company, distribution of dividends, etc. As shown in the literature[18], the general

[16] C. Duțescu, *Drepturile acționarilor [Shareholder rights]*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2007, p. 475. See also C. Duțescu, *Drepturile acționarilor [Shareholder rights]*, 3rd edition, C.H. Beck Publishing House, Bucharest, 2010, p. 367.

[17] Bucharest Court of Appeal, sixth commercial section, decision no. 81/R/2007 in *Culegere de practică judiciară în materie comercială 2007 [2007 Collection of Commercial Case Law],* volume II, Wolters Kluwer Publishing House, Bucharest, 2008, p. 196. The court shows that, lacking a resolution of the general assembly of shareholders establishing that dividends should be distributed from the profit registered and the entitlement to such dividends of each shareholder, the appellant's receivable against the debtor company has not arisen, the shareholder not having a certain receivable against the company whose shareholder he was. However, to the extent to which the general assembly failed to meet within the deadline established in art. 111 (1) of Law no. 31/1990 and dividends were not paid within the deadline established in art. 67 (2) of Law no. 31/1990, the shareholder has a right of receivable, since such shareholder may sue the company. This receivable is not subject to the lapse of time since, lacking a resolution of the general assembly of shareholders to approve the financial statements corresponding to the fiscal year ended, the time provided in article 2.517 of the Civil Code does not lapse - see the High Court of Cassation and Justice, commercial section, decision no. 1609/2009. The legal action available to the shareholder is provided by art. 119 (3) of Law no. 31/1990; see also Piteşti Court of Appeal, commercial section and for administrative and tax matters, decision no. 414/R-C/2008: "*In this matter, are applicable the provisions of article 119 (3) of Law no. 31/1990, republished, according to which, when the board of directors or directorate fails to convene the general assembly, the court with jurisdiction over the company's headquarters may authorize the general assembly to be convened by the shareholders who filed the claim. In the same decision, the court shall approve the agenda, set the reference date provided in article 123 (2), the date of the general assembly and the shareholder to chair such assembly*". As it can be noted, a shareholder has judicial means to obtain the payment of dividends, without, however, omitting or eluding the resolution of the ordinary general assembly of shareholders. In terms of authority, the court competent to judge the claim to authorize the general assembly of shareholders to be convened shall be the Tribunal from the company's headquarters - see the High Court of Cassation and Justice, commercial section, decision no. 798/2008: "*According to article 119 (3) of Law no. 31/1990 - legal grounds of the claim - the general assembly will be authorized to be convened by the court from the company's headquarters, this text being in agreement with the provisions of the common law, i.e. article 15 of the Civil Procedure Code, according to which "in company matters, until the end of actual liquidation, all claims shall be judged by the court where the company has its main headquarters". In other words, in terms of territorial competence, the rule is that of settlement of claims - in company matters - this litigation being classified as such - by the court where the company has its headquarters. This court is obviously the tribunal, as a court of common law in commercial matters, having the authority to settle any claims whose object cannot be valued in cash, according to article 2 (1) (a) of the Civil Procedure Code*". We also need to show that, lacking the court's authorization, a shareholder is not entitled to convene the general assembly - the High Court of Cassation and Justice, commercial section, decision no. 2690/2006.

[18] St.D. Cărpenaru, *Tratat de drept comercial român [Treaty of Romanian Commercial Law]*, Universul Juridic Publishing House, Bucharest, 2009, p. 187. A decision obliging a company to pay dividends to its shareholders is unlawful - Supreme Court of Justice, commercial section, decision no. 4458/1999, in Juridica no. 4/2000, p. 161, with a note by M. Şcheaua *apud.* St.D. Cărpenaru, *Tratat 2009*, p. 187.

assembly is free to decide on how to distribute profit, either to the shareholders by the payment of dividends, or to the company in order to be reinvested. It was also shown[19] that the shareholders' right to be paid dividends is conditional upon the existence of a resolution of the ordinary general assembly of shareholders approving the annual financial statements and establishing dividends, lacking such resolution any shareholders claims being ungrounded[20].

From the time when the ordinary general assembly has convened and agreed to pay dividends as well as their amount, the shareholder's right changes from an abstract company right into a right of receivable[21]. For this purpose, it is believed that pending a

[19] M. Cozian, A. Viandier, F. Deboissy, *Droit des sociétés*, 20e édition, Litec Publishing House, Paris, 2007, p. 317.

[20] C. Duțescu, op. cit., 2007, p. 479; St.D. Cărpenaru, *Tratat 2009*, p. 187; Supreme Court of Justice, commercial section, decision no. 3905/2002, in Revista română de drept al afacerilor [Romanian Business Law Journal] no. 7-8/2003, p. 155; Bucharest Court of Appeal, 5th commercial section, decision no. 1710/2003, in *C.A.B. Practică judiciară comercială [Commercial Case Law]*, 2002-2003, p. 136 *apud.* St.D. Cărpenaru, *Tratat 2009*, p. 187. However, if the company remains passive and the general assembly is not convened, it is necessary to oblige the company, by court decision, to pay dividends to its shareholders if it made profit from operations. This solution is justified considering the fundamental right of a shareholder to collect dividends from the company operations - Supreme Court of Justice, commercial section, decision no. 2367/26.04.2001: "*According to Law no. 31/1990 on commercial companies, republished, the right to collect dividends is a fundamental right of a shareholder of such company*". If the general assembly has convened and resolved to reinvest the entire profit or to distribute it to legal and extra-legal reserves, or to replenish the share capital, no court can reverse this resolution, according to the principle of prevalence of the company's will. A claim directed against the company to pay dividends is a commercial claim - Supreme Court of Justice, commercial section, decision no. 3486/05.06.2001: "*In this matter, the debtor of the obligation to pay dividends is a commercial company who, according to article 7 of the Commercial Code, is a merchant. The commercial nature of the obligation derives from article 4 of the Commercial Code, which, adding to the provisions of article 3 of the same code, establishes a presumptive commercial nature for all acts or deeds of a merchant, except when they are of civil nature. Therefore, the obligation to pay dividends is a commercial obligation and thus subject to the provisions of article 43 of the Commercial Code regarding the legal interest*". For certain discussions on this matter, see F. Gârbaci, *Natura comercială a obligației de plată a dividendelor [The commercial nature of the obligation to pay dividends]*, in Juridica no. 8/2001, p. 308: "*Whenever the general assembly of shareholders has failed to set a deadline for the distribution, dividends become receivables of shareholders against the company, due as of the date they were established. The nature of the obligation to pay dividends is commercial, not civil, the consequence being that legal interest accrues by the effect of law. We definitely support the opinion according to which the nature of the obligation to pay dividends is commercial".* See also the High Court of Cassation and Justice, commercial section, decision no. 677/15.02.2011.

[21] St.D. Cărpenaru, *Tratat 2009*, p. 188; Supreme Court of Justice, Commercial Section, decision no. 2310/30.09.1997: "*Since according to* Law no. 31/1990, a legal entity has its own assets, separate from the assets of shareholders, the court judging the appeal correctly held that for the payment of dividends only the commercial company could have been a defendant, and not the shareholders remaining in the company"; Supreme Court of Justice, commercial section, decision no. 2367/26.04.2001: *"The late payment of dividends, as is the case in this matter, is a liability of the company which, in its commercial legal relations, includes commercial interest according to article 43 of the Commercial Code. The lack of use of the amount of money causes prejudice to the creditor, consisting in the amount of interest determined for the period of late performance. The common law remedy established in article 1088 of the Civil Code for obligations of a determined amount, damages for non-performance can only include legal interest and are paid to the creditor without the latter being held to justify its prejudice. According to article 43 of the Commercial Code, interest on commercial debts accrue as of the due date, even when not agreed in a contract between the parties, without notice of delay. Following the approval of the balance sheet and of the profit and loss account corresponding to the fiscal year ended, according to article 111 of Law no. 31/1990, republished, the amount and distribution of dividends was established by the General Assembly of Shareholders for each shareholder and becomes an individual right of receivable of each shareholder as of that time".*

resolution by the ordinary general assembly, shareholders only have the vocation to benefit from a share of the company's profit[22].

Given the above, the court could not take into consideration amounts which were never part of the shareholder's assets, being used in order to develop the company.

Reference could have been made to such amounts only when distributed in the form of dividends, but this was the authority of the court vested to settle the claim to partition the joint property of the spouses.

Any other solution would be an interference of the court in the company's life, dictating how it should run its operations, which is inadmissible from the point of view of company law.

3. Conclusions

As we showed above, there is a slight possibility of company creditors to object to the transfer of shares, as such objection does not affect the actual transfer, but is aimed at indemnifying any affected parties following such transfer.

On the other hand, the reduced possibilities to file an objection are justified given the closed nature of the limited liability company which, according to the literature, is closer to unlimited partnerships than to limited companies.

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PROCEDURAL ASPECTS CONCERNING THE DISCIPLINARY INVESTIGATION OF JUDGES AND PROSECUTORS

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Abstract: *The position of the magistrate in society does not exonerate him from the forms of legal liability for the cases in which he violates the law. The magistrate's disciplinary liability is a form of judicial liability, independent of the other forms, as well as in the common law, the disciplinary liability being direct and personal. The specificity of this form of judicial liability unlike the common law results from the express regulation of the actions representing disciplinary offences (Art. 99 of the Law No 303/2004*[1]*), from the rules of initiating and conducting the disciplinary procedure, from the authority competent to order and conduct the disciplinary investigation, as well as from the sanctions expressly stated by the special laws.*
Keywords: *judges, prosecutors, disciplinary liability, procedure*

I. Introduction

The disciplinary offence of the magistrates has been defined by the doctrine as being "*the offence committed with guilt violating the legal norms governing the statute of magistrates and the activity of rendering justice*"[2].

The specific sanctions which could be applied by the Supreme Council of Magistracy through its competent organs, for the commission by a magistrate of one or more actions from those mentioned by Art 99 of the Law No 303/2004 as disciplinary offences, are the following[3]:

a) Warning;

b) Decreasing the initial gross monthly indemnity by up to 15% for a period from one to3 months;

c) Disciplinary transfer for a period from one to 3 months to a court or prosecutor'soffice within the jurisdiction of the same court of appeal or within the jurisdiction of the same prosecutor's office attached to it;

d) Suspension for a period up to 6 months;

e) Exclusion from the magistracy.

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[1] Law No 303/2004 on the statute of judges and prosecutors, republished in the Official Gazette No 826/13 September 2005, with subsequent modifications and amendments.

[2] Ioan Popa, *Tratat privind profesia de magistrat în România,* Universul Juridic Publ.-house, Bucharest, 2007, p. 368.

[3] Acording to Art 100 of the Law No 303/2004.

Beside these disciplinary sanctions, the legislator has stated a specific sanction for the magistrate in management positions. Thus, they will be revoked from their positions if they have received a disciplinary sanction (but also for other cases mentioned by the legal regulations).

Regarding the disciplinary investigation, its base is represented by Art 44-53 and Art 56 (for the members of the Superior Council of Magistracy) of the Law No 317/2004[4] on the Superior Council of Magistracy, Art 28-36 and Art 41 of the Regulation on the organization and operation of the Superior Council of Magistracy[5] and Art 113 of the Law No 304/2004 (for judicial assistants).

Regarding the owners of the disciplinary action, the current regulation refers to three cases:

- Owners of the disciplinary action may be the Ministry of Justice, the President of the High Court of Closing and Justice or, where appropriate (if we are talking about the disciplinary offence committed by a prosecutor), the General Prosecutor from the Prosecutor's Office attached to the High Court of Closing and Justice;
- The owner of the disciplinary action for the assistant-magistrates is the President of the High Court of Closing and Justice;
- For all cases, the owner of the disciplinary action may be the Judicial Inspection.

For the first two cases, the owners of the disciplinary action shall notify the Judicial Inspection[6]. The Judicial Inspection as owner of the disciplinary action, may be ex officio notified or may receive notifications from every interested individual or even from the Superior Council of Magistracy. Regarding the form of the notification, the legal regulations are vague for the first hypotheses referring to the owner of the disciplinary action, Art 45 Para 1 using the wording "…they may notify the Judicial Inspection…" without stating if the notification shall be verbal or in writing and the elements of the notification. In return, Para 2 of the same article, stating the third case, that in which the Judicial Inspection is the owner of the disciplinary action, expressly refers to the form of notification, which should be in writing, moreover, reasoned.

Thus, we consider that for the case of the notification submitted by the owners of the disciplinary action, stated by Para 1, it is necessary for it to be in writing, also mentioning the reasons for which the disciplinary investigation is required.

The procedure of the disciplinary investigation has three phases: the prior verification, the prior disciplinary investigation and the disciplinary action[7].

[4] Republished in the Official Gazette No 628/1 September 2012, with subsequent modifications and amendments.
[5] Adopted by the Decision No 326/24 August 2005 of the Superior Council of Magistracy, with subsequent modifications and amendments; the Regulation was amended and modified by numerous decisions of the SCM.
[6] According to Art 45 Para 1 of the Law No 317/2004.
[7] As it results from the statements of Chapter 4, Section 4.

II. The procedure during the prior verifications

The prior verification is a procedure by which the judicial inspectors within the Judicial Inspection shall verify and ascertain if there are any clues about the commission of a disciplinary offence. During this preliminary stage, there shall be no verification upon the aspects related to the existence of any clues about the commission of neither a disciplinary offence, nor the action representing a disciplinary offence or the existence of the guilt.

The period during which the prior verification shall be conducted is of 45 days. The date from which this term begins is the same term for the case in which the owner of the notification shall be the Minister of Justice, the President of the High Court of Closing and Justice or, where appropriate, the General Prosecutor from the Prosecutor's Office attached to the High Court of Closing and Justice, also for the case in which the owner is the Judicial Inspection. If, for solid reasons, the prior verification cannot be concluded, the chief-inspector may order its prolongation for maximum 45 days.

After this procedure, the Judicial Inspection may reach two results: there are no clues about the commission of a disciplinary offence or there are any clues about it.

1. For the case in which there are no clues about the commission of a disciplinary offence, the Judicial Inspection, depending on the notification's owner, shall send a proposal either to dismiss the action or the referral.

a) In we are in the presence of the first two cases regarding the owner of the notification, the Judicial Inspection shall notify it with the proposal to dismiss in maximum 10 days from the conclusion of the prior verification.

After receiving the proposal to dismiss, the owner of the action shall have three possibilities, mentioned by the law[8]:

- To order the classification of the notification and notify the result to the person who has submitted the notification and to the person aimed by the notification;
- To reasonably request the supplement the prior verifications, when it considers that these are incomplete. The supplementation shall be performed by the judicial inspector within maximum 30 days from its request stated by the owner of the disciplinary action;
- To order the initiation of the prior disciplinary investigation.

It must be mentioned that the Minister of Justice, the President of the HCCJ or the General Prosecutor from the Prosecutor's Office attached to the HCCJ may order the initiation of the prior investigations even if the Judicial Inspection, after the prior verifications, has ascertained that there are no clues related to the commission of a disciplinary offence.

b) If the Judicial Inspection is the owner of the action, it shall dismiss the notification and notify the result both to the person who has submitted the accusation, as well as to the accused person.

[8] According to Art 45 Para 5 of the Law No 37/2004.

2. If after the prior verifications it is ascertained that there are clues regarding the commission of a disciplinary offence, the Judicial Inspection again has two possibilities, depending on the owner of the action.

a) If the owner of the action is one of those mentioned for the first two situations, then the Judicial Inspection shall send to it the recommendation to initiate the preliminary disciplinary investigation. The owner of the action, after receiving the recommendation to initiate the preliminary disciplinary investigation, may order the initiation of this second procedure. It must be mentioned that if there are clues regarding the commission of a disciplinary offence, the term within which the recommendation shall be sent is smaller than for the case in which there are no clues.

b) If the Judicial Inspection is the owner of the action, it shall order the initiation of the preliminary disciplinary investigation. The document by which it is initiated the preliminary investigation is the resolution.

If there are more notifications regarding the same offence and the same person, they shall be joined, the verifications being made just once. The condition for the connection is the existence of several notifications for the same offence committed by the same person.

III. The preliminary disciplinary investigation

If the results of the prior verifications are positive, the procedure shall move to the next procedural phase: the preliminary disciplinary investigation. During the preliminary disciplinary investigation shall be ascertain the offences representing disciplinary deviations, their consequences, the circumstances in which they have been committed, the existence or inexistence of the guilt of the investigated person.

As well as in the common law, the right to defense of the investigated person is guaranteed. Thus, the hearing of the person concerned is mandatory, having the possibility to present evidence in his defense, evidence to be under verification. The judge or prosecutor under investigation shall have access to all case files.

The procedure of the preliminary disciplinary investigation shall be conducted in compliance with the legal provision on classified information and the protection of personal data.

Similar to the provisions of the common law[9], the reasoned absence of the magistrate during the investigation, or his refusal to defend himself shall not generate effects on the performance of the preliminary investigation, a report to ascertain one of these situations being concluded.

The legal regulations stated by Art 46 of the Law No 317/2004 are incomplete regarding the convocation of the magistrate during the preliminary investigation, without mentioning the means in which the summoning is being performed nor the information contained by it. We consider that this gap in the legal statements should be filled in.

[9] Art 251 Para 3 of the Labor Code states that the absence for reasons due to the legally summoned employee gives the employer the right to order his sanctioning without any preliminary investigation.

The term in which the preliminary disciplinary investigation should be performed is of 60 days, starting from its ordinance in one of the means above mentioned. This term shall be prolonged with 30 days for solid reasons.

The preliminary disciplinary investigation shall be suspended if against the investigated person has been ordered the initiation of the criminal action for the same offence. The criminal investigation organ has the obligation to send to the Superior Council of Magistracy and the Judicial Inspection, within reasonable time, the document ordering the criminal action, so that the Judicial Inspection may order the suspension of the preliminary investigation. The suspension of the preliminary investigation shall be ordered by resolution of the judicial inspector and shall be active until the solution issued in the case which generated the suspension has become definitive. Also for this situation there is the obligation to notify the Judicial Inspection with the decision remained definitive.

After the communication of this decision, the Judicial Inspection may reinitiate the preliminary disciplinary investigation if the investigated person is declared not-guilty in the criminal trial. If, in return, the investigated person is convicted by a definitive decision, we consider that the exclusion from magistracy shall be ordered, without the performance of the disciplinary investigation. Regarding these aspects, the legal regulations are incomplete, not mentioning the attributions of the Judicial Inspection for these situations.

The result of the preliminary disciplinary investigation, if the owner of the action is the Judicial Inspection, shall be rendered in a resolution issued by the judicial inspector. The resolution should be written and to state the reasons for which it was issued. Thus, the resolution is subjected to the confirmation of the chief-inspector, who may approve or reject. Also, he may order the completion of the preliminary investigation, which shall be conducted by the judicial inspector in maximum 30 days from the date it was ordered.

If the chief-inspector refuses the resolution given by the judicial inspector, the first may order a solution himself, less the solution to classify the notification under the conditions stated by Art 47 Para 1 Let b) of the Law No 317/2004. The refusal shall be done in written and shall be reasoned. The chief-inspector shall order in this case, by written and reasoned resolution one of the solutions that the judicial inspector may order as well, considering the investigation case file.

The solutions which may be ordered after the conclusion of the disciplinary investigation, if the owner of the notification is the Judicial Inspection, are[10]:

a) The admission of the notification, by performing the disciplinary action and the notification of the appropriate section of the Superior Council of Magistracy;

b) The closing of the notification, if it is not signed, does not state the identification of the author or clues about the identification of the current situation which lead to the notification, as well as if it is ascertained that there are no clues about the commission of a disciplinary deviation[11].

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[10] According to Art 47 Para 1 of the Law No 317/2004.

[11] According to Art 45 Para 4 Let b) of the Law No 317/2004.

The resolution for the closing is definitive, but there is the possibility of a new notification fulfilling the legal condition.

The reasoning of the legislator is illogic for this regulation. Since the notification does not fulfill the legal requirements, we do not see why is necessary for the second phase of the preliminary investigation to be completed, in order to rule a resolution for closing. Also, the closing is stated after the performance of the preliminary investigation, for the situation stated by Art 45 Para 4 Let b). It refers to the closing of the notification after the prior verifications if there are no clues about the commission of a disciplinary deviation. So, which is the reasoning of Art 47 Para 1 Let b) which states that for the above situation the closing of the notification shall be ordered? Is it possible the performance of the preliminary disciplinary investigation if the closing of the notification has been ordered as conclusion of the prior verifications? We consider as logic the negative answer for the final question. It is logical that the procedure ends with the closing of the notification after the prior verifications.

c) The rejection of the notification, if it is ascertained, after the preliminary investigation, that the conditions for the performance of the action are not fulfilled.

For the rejection of the notification, the person or institution submitting the notification may appeal the resolution for rejection, without having to go through the mandatory preliminary procedure of the administrative contentious.

The court competent in solving this appeal shall be the Bucharest Court of Appeal, though its section for administrative and financial contentious.

The term for registering the appeal is of 15 days starting from the date of the communication of the resolution for rejection. The Court of Appeal shall rule upon the appeal by an irrevocable decision.

The Bucharest Court of Appeal, through its Section for administrative and financial contentious may rule one of the following solutions:

a) The rejection of the appeal; for this solution, the resolution to reject the notification shall generate its effects;

b) The admission of the appeal and the cassation of the resolution of the judicial inspector or, where necessary, of the chief-inspector and sending the case file for further disciplinary proceedings.

If the appeal against the resolution to close the notification shall be admitted, the resolution shall be abolished, and the disciplinary procedure shall continue by the initiation of the disciplinary action, given the fact that the legal provisions use the term “the continuation of the disciplinary procedure” and not “reinitiating the disciplinary procedure”.

If the owner of the disciplinary action is the Ministry of Justice, the President of the High Court of Cassation and Justice or, where appropriate, the General Prosecutor of the Prosecutor’s Office attached to the HCCJ, the result of the preliminary disciplinary investigation shall be communicated to them by the Judicial Inspection within maximum 7 days from the conclusion of the investigation. The owner of the action shall analyze the result sent by the Judicial Inspection and if it shall consider the investigation as incomplete, it shall have the opportunity to request its completion. This right may be used just once. The completion shall be made within maximum 30 days from the solicitation. The result of the investigation after its completion shall be communicated to the owner of the action within the same term as the initial result, namely in maximum 7 days from its conclusion.

After receiving the result from the Judicial Inspection, the Ministry of Justice, the President of the HCCJ or, where appropriate, the General Prosecutor of the Prosecutor's Office attached to the HCCJ may use the disciplinary action by notifying the appropriate section of the Superior Council of Magistracy.

IV. The solution of the disciplinary action

The disciplinary action[12] may be used within maximum 30 days from the conclusion of the disciplinary investigation, but no later than 2 years from the commission of the offence[13].

We consider these terms, as well as in the case of the common law, as being terms of prescription, subjected to the interruption and suspension according to the rules established by the new Civil Code.

For the development of the first two phases of the disciplinary investigation, the competent authorities shall have 2 years from the commission of the offence, without any relevance for the moment of the notification. Thus, if the notification shall be submitted at 1 year and 11 months from the commission of the offence, the notification not being conditioned to fit a certain term by any legal provision, the competent authorities shall have just one month to go through the first two phases, rather cumbersome, in order to fit the term for the disciplinary action. For this reason, we consider as beneficial the regulation either of the term for the notification, or of the beginning of the 2 years term of prescription from the commission of the offence.

The disciplinary action shall be developed in front of the sections of the Superior Council of Magistracy. Thus, if a judge or a person like judge is under investigation, the section for judges of the Superior Council of Magistracy shall conduct the entire procedure, and for the situation of a prosecutor or a person like them, the procedure shall be conducted by the section for prosecutors.

Unlike the phase of the preliminary investigation, for the disciplinary action the mandatory summoning of the investigated person, as well as of the owner of the action is stated by the legal provisions.

Thus, the president of the appropriate section shall order the summoning of the parties according to Art 31 of the Regulation. The summoning shall be done according to the civil procedural norms[14], with the communication of a copy of the disciplinary action for the investigated magistrate.

[12] The provisions regarding the disciplinary action of the Law No 317/2004 are taken, with certain amendments, from the Regulation for organization and functioning of the Superior Court of Magistracy, approved by Decision No 326/24 August 2005 of the Superior Council of Magistracy, with subsequent modifications and amendments.

[13] Art 46 Para 7 of the Law No 317/2004.

[14] According to Art 49 Para 7 of the Law No 317/2004 states that the legal provisions on the solution of the disciplinary action shall be completed by the norms stated by the Civil Procedure Code.

The president of the section shall decide the first term of the hearings, so that from the summoning the judge or prosecutor shall have at least 15 days to prepare his defense.

The judge or prosecutor may be represented by another judge or prosecutor[15]. Also, he may be assisted or represented by an attorney. From the analysis of these procedures, one can understand that, if the judge or prosecutor is not present during the disciplinary procedure in front of the section of the Superior Council of Magistracy, he may be represented by a judge or prosecutor or, where appropriate, by a chosen attorney, and if he is present during this procedure he shall be assisted only by the chosen attorney, and not by another judge or prosecutor.

If in return, the judge or prosecutor is absent during the procedure, nor he is represented, for any reasons, either imputable or not, the trial shall continue anyhow.

The disciplinary action shall be supported by its author. If the author is the Judicial Inspector, the action shall be supported by the judicial inspector who initiated it. As exception, for case of impossibility, the chief-inspector may appoint another judicial inspector to plead the case in front of the sections of the SCM.

If the owner of the action is the Minister of Justice, the President of the HCCJ or, where appropriate, the General Prosecutor of the Prosecutor's Office attached to the HCCJ, the disciplinary action shall be argued by him or by a representative appointed in this regard.

If the investigated person is a member of the SCM, he shall not be able to attend, as chosen member, the meetings of the section trialing the disciplinary action[16].

As well as in the case of the prior phase, if the criminal action is initiated for the same offence, the solution of the disciplinary action shall be suspended, the same regulations being applicable. The suspension shall be ascertained by a conclusion of the appropriate section of the SCM.

The right to defense of the investigated person is guaranteed also for this phase of the disciplinary investigation. Thus, during the trial of the disciplinary action, both parties shall have access to the case files and have the possibility to request the administration of evidence, if these were not administered during the preliminary investigation. The registrar of the section shall provide the parties, for study, the case file, for each hearing, with at least 30 minutes before the court session.

If the members of the section trialing the disciplinary action consider necessary the administration of other evidences beside those registered by the parties, the section may order ex officio the administration of any other evidences necessary for the solution of the disciplinary action. These evidences shall be debated with the parties.

During the disciplinary procedure[17], the appropriate section of the SCM, ex officio or at the proposal of the judicial inspector, may order the suspension of the magistrate, until the definitive solution of the disciplinary action, if the continuous performance of the position could affect the impartial development of the disciplinary procedures or if the disciplinary procedure has the nature to seriously endanger the prestige of justice.

[15] According to Art 49 Para 1 of the Law No 317/2004.
[16] According to Art 56 Para 3 of the Law No 317/2004.
[17] According to Art 52 Para 1 of the Law No 317/2004.

We consider that from a simple omission, both this article, as well as its correspondent from the Regulation (Art 32^1), makes no reference about the other initiators of the disciplinary action, who may also propose the suspension of the magistrate, if they are the ones arguing the disciplinary action in front of the appropriate section of the SCM.

For all cases, the suspension of the judge or prosecutor shall be ordered by the section trialing the disciplinary action and shall trial this request as emergency. The request shall be trialed according to the same procedural rules as for the disciplinary action, the parties being summoned with a copy of the proposal for suspension. The document ordering the suspension is the conclusion.

If the sections of the SCM ascertain, after trialing the disciplinary action, that the notification is reasoned and there is an action representing a disciplinary deviation, committed with guilt by the investigated judge or prosecutor, one of the disciplinary sanctions stated by the law shall be applied. For the application of the sanction shall be taken into consideration the degree of seriousness of the disciplinary offence and the personal circumstances of the magistrate.

If the most serious disciplinary sanction is to be applied, the exclusion from magistracy, the irrevocable decision shall be sent to the President of Romania to issue the decree for releasing from position.

For the judicial assistants, who are similar to judges or prosecutors and to whom are applied the same provisions for their disciplinary deviations the sanctions shall not be applied by the SCM, but by the Minister of Justice.

The decision concluding the disciplinary action shall state[18], beside the common elements established by the civil procedural norms, the following main elements:

a) The description of the action representing a disciplinary deviation and its judicial framework;

b) The legal basis for the application of the sanction;

c) The reasons for which were removed the defenses stated by the judge or prosecutor;

d) The sanction applied and the reasons for its application;

e) The means of appeal and the term in which it may be submitted;

f) The court competent in trialing the appeal.

The decision shall be signed by the president the other members of the section who have taken part in the solution of the disciplinary action. The drafting of this decision shall be made by derogation from the civil procedural law, within maximum 20 days from its deliverance. The communication of the decision in writing both to the concerned magistrate, as well as to the initiator of the disciplinary action is mandatory and shall be fulfilled by the General Secretariat of the SCM.

The means of challenging[19] which may be used against this decision is the appeal. The term to submit the appeal is of 15 days from the communication of the decision. The competence in solving the appeal belongs to the HCCJ, precisely to the Panel of 5

[18] See also Laura Ivanovici and Cristian Dănileț, "Răspunderea judecătorilor şi procurorilor", in *Curierul Judiciar*, No 1/2006, pp. 74-75.

[19] L. Ivanovici, C. Dănileț, *op.cit.*, p. 75.

judges. This panel cannot be formed by voting members of the SCM or by the investigated judge, if necessary. The appeal shall suspend the decision of the section of the SCM for the application of the disciplinary sanction.

The decision rendered by the Panel of 5 judges of the HCCJ is irrevocable.

For the judicial assistants, the means of appeal is the contestation. They may challenge the decision for disciplinary sanction within 30 days upon notification. The competent court shall be the Court of Appeal by its Section for administrative and financial contentious in whose jurisdiction the sanctioned person activates. The sanctions applied for judicial assistants shall be communicated by the Minister of Justice and by the Economic and Social Council.

The irrevocable decisions shall be communicated, through the registrar of the sections of the SCM's office, to the judge or prosecutor, as well as to the bureau of human resources and organization within the SCM, in order to take the appropriate measures, according to the law.

In order to preserve an evidence of the activity of the sections shall be used the following[20]:

a) The general registry, in which are mentioned, in their chronological order, all notifications regarding the compliance with the condition for good reputation and the notifications regarding the violation of the Code of Ethics by the magistrates;

b) The alphabetical description, which refers to the name and surname and, if necessary, the name of the parties of the case, as well as the case file's number;

c) The registry of files having as object disciplinary actions, in which are mentioned for each file, the first hearing and the subsequent ones, the circuit of the file, the number/date of the decision, an abstract of the solution, the date of the appeal, the date in which the file was sent to the court, the solution rendered by the court, the communications for the parties.

d) The registry of the sections' hearing for disciplinary matters, in which are mentioned the files of each hearing, the date of the next hearing, the solution rendered and its number.

V. Conclusions

After the brief analysis of the legal provisions regarding the disciplinary sanction of magistrates, we consider that the current legislation states a very cumbersome and incomplete procedure. Also, it is tiring and useless the continuous mentions of different normative acts in order to ascertain the material aspects and the procedural rules taken by these documents one from another.

It is interesting to ascertain by a simple mathematical computation, the duration from the notification about the commission of a disciplinary offence until the application of a sanction, taking into consideration the maximal terms stated by the law. Thus, the prior verifications may take maximum 90 days, with subsequent prolongation.

[20] Art 36 Para 2 of the Regulation for organization and functioning of the Superior Council of Magistracy.

From their conclusion the result shall be notified within 10 days. The initiator of the action may request a completion which shall be conducted in 30 days upon request. So, for the conclusion of this procedure, for the case in which there are no clues about the commission of a disciplinary deviation, are necessary at least 130 days (over 4 months).

But, if there are clues, the term for the communication of the result is of 7 days. The disciplinary investigation shall be conducted within 60 days and its result shall be notified within 7 days. The investigation may be completed within 30 days. The disciplinary action shall be conducted within 30 days from the conclusion of the investigation and its solution may take all the necessary time, the law not providing with a term for its conclusion. From the deliverance of the decision it shall be drafted in 20 days and communicated immediately. So we are in the presence of a period of minimum 244 days without adding the period necessary for the hearings in front of the sections of the SCM and the case in which an appeal is submitted. Thus, after this mathematical calculation, we note that the procedure has a very large length in time.

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CONSIDERATIONS RELATED TO SOME PECUNIARY AND NON-PECUNIARY RELATIONSHIPS BETWEEN SPOUSES AFTER DIVORCE

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Abstract: *The study examines some theoretical issues of the pecuniary and non-pecuniary relationships between spouses after divorce that raise some debates in the doctrine, such as the date of the marriage dissolution, the termination of the matrimonial regime, the judgement of the divorce claim in case the claimant dies during the trial, the claim for one spouse's family name after the divorce was definitely settled by the court of law and the right to damage of the no-fault spouse in the divorce file. The research consists in the analysis of the new legal provisions related to the spouses' relationships after divorce both from theoretical and practical perspectives. The authors also intend to carry out an analysis of the relevant case law of the courts of law in this matter.*
Keywords: *no-fault divorce, date of divorce, matrimonial regime, spouse's family name, right to damage*

1. Introduction

This paper intends to clarify a few issues related to some pecuniary and non-pecuniary relationships between spouses after divorce that raise some debates in the doctrine.

Therefore, a thorough analysis of the relevant legal provisions is important not only for the authors of family law, but also for the legal practitioners.

Our intention is to examine some main theoretical issues of the divorce such as the date of the marriage dissolution, the termination of the matrimonial regime, the judgement of the divorce claim in case the claimant dies during the trial, the claim for one spouse's family name after the divorce was definitely settled by the court of law and the right to damage of the no-fault spouse in the divorce file and the main authors' opinions of family law already expressed in doctrine.

This paper will provide an analysis of the relevant doctrine, of the main legal provisions and of the jurisprudence in order to outline some options to be considered both by the authors of family law and by the legal practitioners.

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2. Content

2.1. The date of the marriage dissolution

A first aspect that we shall further analyse is the date of the dissolution of marriage, with respect to which there is still a disparity between the provisions of the Law no. 287/2009 regarding the Civil code, republished,[1] (hereinafter the Civile code) and the Law no. 134/2010 on the Civil procedure code, republished,[2] (hereinafter the Civile procedure code), meaning that in case the claimant spouse dies and his or her heirs continue the divorce proceedings, in case the custody court shall find the sole fault of the defendant spouse, it shall admit the divorce claim and the marriage shall be dissolved at the date of death, according to the provisions of article 382 paragraph (2) of Civil code, but according to the provisions of article 926 paragraph (4) of Civil procedure code[3], in the above-mentioned case the marriage shall be considered dissolved at the date of filing the divorce claim.

As previously stated,[4] *de lege ferenda*, article 382 paragraph (2) of Civil code should be amended, given that it stipulates that when the divorce claim is continued by the claimant's heirs, when the latter dies during the trial, the date of the marriage dissolution shall be the date of death, in the sense of the provisions of article 926 paragraph (4) of Civil procedure code, so as to the marriage to be considered as dissolved at the date of filing the divorce claim.

Thus, giving the fact that the regulation within the Civil procedure code is subsequent to the entry into force of the Civil code and taking into consideration also the provisions of article 83 letter k) of the Law no. 76/2012 for the implementation of Law no. 134/2010 regarding the Civil procedure code[5] according to which "*at the date of entering into force of the Civil procedure code there shall be abrogated all other contrary provisions, even if comprised in special laws*", we consider that the date of marriage dissolution shall be the date of filing the divorce claim and we consider also

[1] Republished in the Official Gazette of Romania no. 505 of July 15, 2011 as further amended.
[2] Republished in the Official Gazette of Romania no. 247 of April 10, 2015, as further amended.
[3] Article 926 paragraph (4) of Civil procedure code has been inserted by article 13 pct. 283 of Law no. 76/2012 for the implementation of Law no. 134/2010 regarding the Civil procedure code.
[4] C. Mareş, *Family Law*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2015, p.178; D. Lupascu, C.M. Crăciunescu, *Family Law*, 3rd edition, revised and updated, Universul Juridic Publishing House, Bucharest, 2017, p.343. In the same sense, M. Avram, *Civil Law. Family*, Hamangiu Publishing House, Bucharest, 2013, p.134; E. Florian, *Family Law. The marriage. Matrimonial regimes. Filiation*, 5th edition, revised and amended, C.H. Beck Publishing House, Bucharest, 2016, p. 324 and 328. For the opposite opinion, according to which the exception that a marriage is deemed to have been dissolved at the time of death, when the claimant dies during the trial and the divorce claim is continued by his heirs, from the rule that marriage is deemed to have been dissolved on the date the ruling on divorce has become final, see C.C. Hageanu, *Family Law and Civil status documents*, 2nd edition, revised and amended, Hamangiu Publishing House, Bucharest, 2017, p.187. Other authors also argue that the date of marriage dissolution, if the divorce claim is continued by the heirs of the claimant, is the date of the death of the claimant - party to the divorce trial, and not the date of filing the divorce claim, see in this respect *Comment on Article 382* in B.D. Moloman, L.-C. Ureche, *New Civil Code. Book II. About the family. Article 258-534. Comments, explanations and case law*, Universul Juridic Publishing House, Bucharest, 2016, p.384-385.
[5] Published in the Official Gazette of Romania no. 365 of May 30, 2012.

that at the date of the entrance into force of the Civil procedure code, article 382 paragraph (2) of Civil code has been implicitly amended.

Therefore, in case of the judicial divorce, the rule is that a marriage shall be dissolved when the ruling with respect to the divorce has become final.[6] Exceptionally, when the divorce claim is continued by the claimant's heirs, in the event of death of the claimant, the marriage shall be considered dissolved at the date of filing the divorce claim.

These provisions do not apply in the matter of the divorce by mutual consent of the spouses, by administrative or notary ways, when according to the provisions of article 382 paragraph (3) of Civil code, the marriage is dissolved on the date the divorce certificate is issued.

Another discussion to be made concerns the date of marriage dissolution when the defendant submits a counterclaim within the divorce file, so that he acquires the quality of a defendant – claimant, later he dies and his or her heirs request the continuation of the divorce claim, the court finding the sole fault of the claimant – defendant spouse so, therefore, rejecting the main claim and admitting the counterclaim, shall rule the dissolution of marriage by the exclusive fault of the claimant – defendant. In the previously mentioned case, we consider, along with other auhors[7] that the date of the marriage dissolution must be considered as being the date of submitting the counterclaim and not the date of filing the divorce claim.

2.2. The termination of the matrimonial regime

A second subject we shalls hereby analyse concerns the termination of the matrimonial regime. According to the provisions of article 385 paragraphs (1) and (2) of Civil code "*in case of divorce, the matrimonial regime shall terminate between the spouses at the date of filing the divorce claim. Nonetheless, any of the spouses or both together, in the case of their divorce by mutual consent, may request the court to ascertain that the matrimonial regime has ceased since the date of de facto separation*".

It follows from these provisions that the rule in the case of termination of the matrimonial regime between the spouses, following their divorce, is the date of filing the divorce claim and the exception is the date of their *de facto* separation, but, in the last case, only if one or both spouses make a request in this sense, the custody court that solves the divorce may ascertain this date of termination of matrimonial regime.[8]

Taking into consideration the wording of article 385 paragraph (2) of Civil code, we consider that the custody court cannot be obliged to find, by request, the termination of the matrimonial regime at the date of the spouses' *de facto* separation, but it is for the court to decide on whether it shall admit or shall reject this request. As it was rightfully shown[9], when only one of the spouses makes a request in this regard, the spouse must prove the *de facto* separation, the date of its intervention and that it was total, being

[6] Article 382 paragraph (1) of Civil code.

[7] E. Florian, *op. cit.*, p. 325.

[8] Regarding the exception within the doctrine, it was stated that it is only applicable to the divorce by the consent of the spouses, and not to the contentious claims regulated by article 373 letters b) - d) of Civil code, see in this respect C.C. Hageanu, *op. cit.*, p. 191.

[9] M. Avram, *op. cit.*, p. 139.

excluded the continuation of the matrimonial regime. On the contrary, in case both spouses request the custody court to acknowledge the termination of the matrimonial regime at the date of their *de facto* separation, no evidence must be administrated in this regard and the court should take note of this consent of the spouses.

Taking into consideration also the provisions of article 385 paragraph (3) of Civil code, according to which the provisions on the termination of matrimonial regime shall be duly applied also in the case of divorce through mutual consent of the spouses, by administrative or notary ways, we consider that the date for the termination of the matrimonial regime is the submission date of the divorce claim at the custody court, at the civil status officer or at the public notary. Moreover, it must be mentioned that, in case of divorce before the custody court, the date of termination of the matrimonial regime between the spouses is the date of filing the divorce claim, irrespective of whether it is a mutual consent divorce request or a contentious claim – (i) divorce for justified reasons, when the relations between the spouses are severly damaged and the continuation of marriage is no longer possible,[10] (ii) divorce at the request of one of the spouses, after a *de facto* separation which lasted at least 2 years[11] or (iii) divorce at the request of the spouse whose state of health makes impossible the continuation of the marriage[12].

With respect to the exception regulated by article 385 paragraph (2) of Civil code, we consider, along with other authors[13] that, although according to the provisions of article 385 paragraph (3) of Civil code, the provisions of this article are duly applicable also in case of divorce through mutual consent by administrative or notary ways, neither the civil status officer, nor the public notary can acknowledge the spouses request on the termination of the matrimonial regime at the date of *de facto* separation, giving the fact that this issue exceeds the non-contentious procedure taking place in front of them for the issuance of the divorce certificate.

Moreover, the provisions of paragraph (2) of article 385 of Civil code expressly stipulate that the request of the spouses to acknowledge that the matrimonial regime has ceased at the date of their *de facto* separation, in case of divorce by mutual consent, shall be requested to the divorce court, and not to other authority.

The interpretation of paragraph (3) of article 385 of Civil code should be that article 385 applies also in case of divorce by administrative or notary ways, in the sense that the date of termination of matrimonial regime between spouses is the date of submitting the divorce claim at the civil status officer or at the public notary, and not in the sense that the civil status officer or the public notary to acknowledge that the date of termination of the matrimonial regime between them is the date of *de facto* separation.

However, as it has been said[14], the public notary may, nevertheless, authenticate an agreement or statement of the spouses to agree or to declare that the date of the matrimonial regime termination was at the time of their *de facto* separation.

[10] Article 373 letter b) of Civil code.
[11] Article 373 letter c) of Civil code.
[12] Article 373 letter d) of Civil code.
[13] M. Avram, *op. cit.*, p. 139; C.C. Hageanu, *op. cit.*, p. 191.
[14] F. Baias, C.M. Nicolescu, *Comment on Article 385* in F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *The New Civil code. Comment on articles*, C.H. Beck Publishing House, Bucharest, 2014, p. 463.

From this point of view, we can assert that the divorce gives rise to retroactive effects, although the general rule is that in the divorce matter the effects are *ex nunc*.

We consider it obvious that the termination of the matrimonial regime shall occure retroactively only in case the spouses' divorce, meaning that there is a final court resolution on the dissolution of marriage or a divorce certificate, but not in the case the spouses reconcile or, for any reason, the custody court does not render a final decision on the marriage dissolution or there is no divorce certificate.[15] We cannot agree with the opinion[16] according to which in case of spouses reconciliation during the divorce, the matrimonial regime applicable to them is the legal community regime, at least until they shall exert their right to conclude a matrimonial agreement, due to the fact that, in this particular case, the termination of matrimonial regime can be assimilated with the change of the matrimonial regime, to which it refers article 319 paragraph (2) of Civil code. In case the spouses reconcile, there is no divorce file finalised with a final court resolution or with a divorce certificate and, therefore, the matrimonial regime applicable to said marriage has not ceased.

Therefore, the simple submission of the divorce claim with the custody court, at the civil status officer or at the public notary does not produce *ope legis* the extinctive effect over the matrimonial regime.

With respect to the moment when the termination of the matrimonial regime becomes enforceable to third parties, we hereby underline the provisions of article 387 of Civil code which stipulate that the resolution with respect to the divorce, as well as the divorce certificate are enforceable to third parties after performing the publicity formalities provided by the law.

From the perspective of the application of article 385 of Civil code in time, we must state the fact that these are applicable only in case of divorce after the entrance into force of the Civil Code.[17]

2.3. The continuation of the divorce claim and the rulings of the custody court

As per the provisions of article 380 paragraphs (1) and (2) of Civil code, in the case provided under article 379 paragraph (1) of Civil code, should the claimant spouse die during the trial, his or her heirs may continue the divorce claim, which shall be admitted only in case the court shall find the sole fault of the defendant spouse.

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[15] In the same sense, see M.G. Popescu, *The primary matrimonial regime imperative in the regulation of the current Romanian Civil Code*, Universul Juridic Publishing House, Bucharest, 2018, p. 203-204; F. Baias, C.M. Nicolescu, *Comment on Article 385* in F.A. Baias, E. Chelaru, R. Constantinovich, I. Macovei (coordinators), *op. cit*., p. 464.

[16] For the opinion according to which "*(...) by promoting a divorce claim, whether it is finalised or extinguished by the reconciliation of spouses, the matrimonial regime existing between spouses ceases under the provisions of the first paragraph of article 385 of Civil code Taking into account that the spouses have chosen to maintain the marriage and have reconciled during the trial of the divorce claim, between the spouses, after the dissolution of the existing matrimonial regime, along with the divorce application, it operates the legal regime of the goods community, applicable when by matrimonial agreement the spouses have not opted for another regime permitted by law.* ", see *Comment on Article 385* in B.D. Moloman, L.-C. Ureche, *op. cit*., p. 394.

[17] Article 43 of the Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil procedure code.

The provisions of article 926 paragraph (2) of Civil procedure code also stipulate that, when the divorce claim shall be grounded on the defendant's fault and the claimant dies during the trial, having left heirs, the heirs of the latter may continue the claim, which shall be admitted by the court only in case of exclusive fault of the defendant spouse, otherwise the court shall acknowledge the dissolution of marriage by death and rule the closing of file, by final decision.

From the perspective of the heirs that can continue the divorce claim, within the doctrine there are several opinions.

As per a first opinion,[18] the heirs that can continue the divorce claim are the legal heirs from classes I to IV (article 964 of Civil code), except for the defendant's surviving spouse, the testamentary heirs, universal legatees and the legatees with universal title (articles 1054-1056 of Civil code), or, in their absence, the commune, the city or the municipality in whose territorial jurisdiction the goods are located at the date of the inheritance (article 963 paragraph (3) of Civil code). In the footnote of this interpretation[19] it is stated that the new perspective of the Civil code is that the administrative-territorial unit shall collect the vacant inheritance as heir, being relevant the provisions of articles 1138-1140 of Civil code, contrary to a doctrine opinion according to which the commune, the city or, as the case may be, the municipality could not continue the claim because the administrative-territorial unit does not inherit the vacant legacy as a legal heir, but under the sovereignty right of the state.

In a second, contrary opinon,[20] to which we adhere to, given that the legislator explicitly refers to the "*left heirs*" by the claimant spouse, we do not agree that the commune, city or the municipiality in whose territorial jurisdiction the goods are located at the date of the inheritance can have legal standing, them being entities that collect the patrimony of the deceased, in the absence of legal or testamentary heirs, as per article 963 paragraph (3) of Civil code. Thus, the provisions of article 926 paragraph (2) of Civil procedure code refer to the "*left heirs*" by the claimant, or, the commune, city or the municipality in whose territorial jurisdiction the goods are located at the date of the inheritance do not fall into the category of "*left heirs*", they acquire a vocation to the deceased's inheritance only in the absence of the legal or testamentary heirs.

Moreover, in support of our solution, we also take into consideration the fact that, although the provisions of article 380 of Civil code refer to the "*claimant's heirs*", the provisions of article 926 paragraph (2) of Civil procedure code refer to the "*left heirs*" by the claimant and, considering also the provisions of 83 letter k) of the Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil procedure code, according to which "*at the date on entry into force of the Civil procedure code there shall be abrogated any and all contrary provisions, although comprised in special*

[18] M. Avram, *Civil Law. Family*, 2nd edition, revised and amended, Hamangiu Publishing House, Bucharest, 2016, p. 135; F.A. Baias, C.M. Nicolescu, *Comment on Article 380*, in F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *The New Civil Code. Comment on articles*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 455-456.

[19] See foonote no. 2 in M. Avram, *op. cit.*, p. 135.

[20] E. Florian, *op. cit.*, p. 323; T. Briciu, *Special procedures; the divorce procedure*, in the Conferences on the New Civil procedure code, p. 112, http://www.inm-lex.ro/NCPC/doc/Brosura%20NCPC.pdf

laws", we consider that the previous mentioned provisions of the Civil code have been implicitly amended in the meaning of the Civil procedure code, respectively we shall consider the "*left heirs*" category.

Therefore, in the category of "*left heirs*" we must include only the legal or testamentary heirs and not also the commune, city or the municipality on which territorial jurisdiction the goods are located at the date of inheritance.

With respect to the aplication of the provisions of article 926 paragraph (2) of Civil procedure code, in the doctrine[21] have been made the following mentions: (i) these are to be applied only to the other heirs, and not to the surviving spouse who would be also a heir, being thus excluded the possibility of confusion between the capacity of claimant and of defendant in case of death of the first; (ii) in case the heirs are the children of the deceased, they cannot be represented by the defendant spouse, but a special guardianship will have to be established, given the contradiction of interests between the represented individual and the legal representative.

In the case of continuation of the divorce claim by the heirs, should it be ascertained the exclusive fault of the claimant or the mutual fault of both spouses, it must be established whether the divorce claim shall be rejected as devoid of purpose or it shall be ruled the closing of the file?

Considering the provisions of article 926 paragraph (1) of Civil procedure code[22], as well as the provisions of article 926 paragraph (2) second part of Civil procedure code[23], we assess that the custody court, in the indicated scenario, shall acknowledge the dissolution of marriage and rule the closing of the file by a final decision.[24]

In case within the divorce file has also been submitted a counterclaim and the claimaint – defendant shall die during the trial, and his or her heirs shall continue the divorce claim, we may distinguish the following scenarios: (i) the court shall acknowledge the exclusive fault of the defendant – claimant spouse and, therefore, shall admit the main claim and shall reject the counterclaim; (ii) the court acknowledges the mutual fault of the spouses or the exclusive fault of the claimant – defendant, being therefore not able to render the divorce resolution and, thus, shall acknowledge the dissolution of marriage and shall rule the closing of the file by a final decision.

Moreover, in the case of submitting within the divorce file a counterclaim and the defendant – claimant shall die during the trial, taking into account that he had also the quality of claimant in his counterclaim, his/her heirs may continue the divorce claim, and thus we may distinguish the following scenarios: (i) the court shall acknowledge the exclusive fault of the defendant – claimant spouse and, therefore, shall reject the

[21] T. Briciu, *loc. cit.*, p. 112.

[22] Paragraph 1 – "*If during the divorce process one of the spouses dies, the court will take note of the termination of the marriage and will rule, by final decision, the closure of the file.*"

[23] Paragraph 2 - "*However, when the divorce application is based on the fault of the defendant and the claimant dies in the trial, leaving heirs, they will be able to continue the proceedings, which the court will admit only if it finds the defendant's sole fault. Otherwise, the provisions of paragraph (1) remain applicable.*"

[24] In the same sense, to be seen M. Avram, *op. cit.*, p. 135; M. Eftimie, *Comment on Article 926 Civil procedure code*, in G. Boroi (coordinator), *The New Civil procedure code. Comments on articles. Vol. II. Article 456-1134*, 2nd edition, revised and amended, Hamangiu Publishing House, Bucharest, 2016, p. 740.

main claim and shall admit the counterclaim, ruling the dissolution of marriage by the exclusive fault of the claimant – defendant; (ii) the court acknowledges the mutual fault of the spouses or the exclusive fault of the claimant – defendant, thus it will not be able to rule the divorce and, therefore, shall acknowledge the dissolution of marriage and shall rule the closing of the file by a final decision.

2.4. The separate request of keeping the family name after the divorce

According to the provisions of article 919 paragraph 1 letter b) of Civil procedure code "*On request, the divorce court shall rule also with respect to (...) the spouses' name after the divorce (...)*". Also, paragraph (3) of article 919 of Civil procedure code stipulates that "*The court shall rule ex officio also on the name of the spouses after the divorce, according to the provisions of the Civil code.*"

Following these similar provisions, we consider that the custody court that must rule in the divorce case is obliged to rule on the family name that the spouses shall have after the dissolution of their marriage, even if they have not expressly requested this.

As resulted from the name of the article 919 of Civil procedure code, the request on the spouses' family name after the divorce is ancillary to the divorce claim, on which, as per article 919 paragraph (3) of Civil procedure code, the divorce court must rule even *ex officio*, under the conditions of article 383 of Civil code[25].

Therefore, following the final decision of the divorce file, when within the divorce decision has been mentioned the family name after the divorce of the spouse who has changed it during marriage, it cannot be submitted another request of the former spouses with respect to the family name that they had during that marriage, and in case of submitting such request in front of the competent court, the request must be rejected.[26]

Thus, in order to comply with *res judicata* of the divorce resolution, when the divorce court has ruled on the family name of the spouses after the divorce, no other subsequent agreement of the spouses on their family name during the marriage can have effect.[27]

The solution remains the same in case it would be requested keeping the family name that a spouse had during the marriage, but with respect to which the court has ruled the resumption of the family name which was changed by the spouse, but also in case it would be requested the resumption of the family name that a spouse had before the marriage, but with respect to which the divorce court has ruled keeping the family name changed by the spouse.

[25] Article 383 – Family name after marriage – "*(1) At marriage dissolution by divorce, the spouses can agree to keep their name during marriage. The court takes note of this settlement by the divorce ruling.*
(2) For well-founded reasons justified by the interest of one of the spouses or the best interests of the child, the court may consent to the spouses to keep their name during the marriage, even in the absence of an agreement between them.
(3) If no agreement has been reached or the court has not given its consent, each of the former spouses shall bear the name before marriage."

[26] High Court of Cassation and Justice, civil division, decision no. 2479 of June 10, 2003, http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82654

[27] Craiova Local Court of Law, civil decision no. 2017/MF/2006, http://portal.just.ro/215/Lists/Jurisprudenta/DispForm.aspx?ID=35

Also, the same must be the solution with respect to the divorce by administrative or notary ways, in these cases both the civil statuts officer and the public notary that solve a divorce request, must acknowledge the agreement of the spouses on the family name after the divorce, as per the provisions of article 376 paragraph (5) second thesis of Civil code, on the contrary, should the spouses will not agree on the family name, they must reject the divorce request.[28] Therefore, following the issuance of the divorce certificate either by the civil status officer or by the public notary, the spouses cannot request changing the family name that they had agreed upon in front of these authorities and that was inserted in the divorce certificate.

2.5. The right to compensation provided under article 388 of Civil code

According to article 388 of Civil code which is entitled "Granting compensations"- "*Notwithstanding the right to the compensatory benefit stipulated under article 390, the innocent spouse who shall suffer a prejudice by the dissolution of marriage, may request for the guilty spouse to compensate him. The custody court shall rule on the claim through the divorce resolution"*.

In accordance with these legal provisions based on which only the innocent spouse and who suffers a prejudice following the divorce can be compensated, as claimed in the doctrine[29] and as has been recognized in the case-law[30], this right to compensation is a particular application of the general principle of civil liability. Therefore, all general conditions of civil liability, separate from the special conditions regulated by article 388 of Civil code must be complied with, respectively, the delict, the prejudice, the causal link between the delict and the prejudice and the guilt of the author of the delict.

A first remark would be about the innocent spouse who can claim damages following this provision, which may have the procedural position either as the claimant or as the defendant who submits a counterclaim requesting that right.

The second remark would be that when the divorce court finds the mutual fault of the spouses, the claim for damages based on the provisions of article 388 of Civil code will be rejected as unfounded.

The third remark is that two claims can be submitted in the matter of compensation simultaneously or subsequently, one under article 388 of Civil code and

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[28] See article 277 letter g) of Order no. 2333 / C / 2013 on the approval of the Regulation on the application of the Law of Notaries Public and Notarial Activity no. 36/1995 published in the Official Gazette of Romania no. 479 of August 01, 2013; C. Mareş, *op. cit.*, p. 193 and 199; D. Lupascu, C.M. Crăciunescu, *op. cit.*, p. 307 and 313; E. Florian, *op. cit.*, p. 290 and 294.

[29] E. Florian, *op. cit.*, p. 332; F.A. Baias, C.M. Nicolescu, *Comment on Article 388*, în F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *op. cit.*, p. 467; M. Avram, *op. cit.*, p. 143.

[30] Mehedinți Tribunal, 1st Civil Division, civil decision no. 110/A/2012, *apud* P. Neculae, *The effects of the divorce*, in P. Neculae, D. Popa, R. Cîrlig, *The dissolution of marriage by divorce,* Universul Juridic Publishing House, Bucureşti, 2014, p. 55. This decision stated that "*it is a civil liability, and the spouse seeking compensation must prove that he/she fulfills the conditions for engaging in this form of liability, as provided under article 1357 of Civil code, namely the damage, the delict, the causal link between the delict and the damage, the guilt of the author of the delict and the particular condition that the spouse who claims the damages should not be guilty. These are not fulfilled in the present case, since the parties were actually separated from 2006, all the more so since the reason for the divorce alleged by the claimant did not arise after the 1st of October 2011, so that the innocent spouse can claim damages from the responsible spouse according to article 388 of Civil code*"

another one under article 1357 of Civil code. Unlike the claim based on the provisions of article 388 of Civil code, which must be submitted within the divorce file in order to be settled through the divorce resolution, the one based on the provisions governing the civil liability, under article 1357 of Civil code, may be submitted at any time within the 3-year limitation period.

As already mentioned,[31] the difference between the two types of claims consists in the prejudice that can be claimed, therefore, by the claim based on the provisions of article 388 of Civil code, may be requested the damages caused by the dissolution of the marriage, and by the one based on the provisions of article 1357 of Civil code, any other prejudice caused by the claim of the other spouse, which is not a direct consequence of the dissolution of the marriage. Moreover, the two claims can be simultaneously exercised for separate damages.

According to the provisions of article 388 of Civil code the special conditions to be fulfilled cumulatively for granting the right to compensation are the following: (i) the divorce must be ruled on the exclusive fault of one of the spouses; (ii) the innocent spouse has suffered a prejudice; (iii) the prejudice caused by the guilty spouse is distinct from the significant imbalance that could give rise to the compensatory benefit regulated by article 390-395 of Civil code; (iv) the prejudice is the consequence of marriage dissolution.

As stated within the doctrine,[32] in this matter, the unlawful act shall represent the basis for the right to compensation only indirectly, by the fact that it has been a substantive ground for divorce and the divorce is the one causing the damage.

As far as the prejudice is concerned, as we have already shown,[33] it may be material, moral or professional, since the provisions of article 388 of Civil code do not make any distinction. Thus, material damage may be claimed (for example, the loss of a contract which, because of the divorce, the innocent husband has not been able to conclude), or moral damage (for example, an image damage that would appear for a politician under an electoral campaign), or a professional injury (for example, which would interfere in case of an Orthodox priest).

In addition, it arises the question whether it is possible to repair both actual and certain prejudice, as well as the future, but foreseeable, certain prejudice? We consider that both types of prejudice can be repaired. As to the future prejudice, that will arise after the settlement of the claim for prejudice, if it is certain, insofar both the occurance of said prejudice and the possibility of being determined are certain, we consider that it can also be repaired, and compensation can be granted through the divorce resolution, should its appearence is unquestionable[34]. No eventual prejudice can be repaired, if it is unsure either in terms of existence or in the determination of its extent.

As to the causal link, a number of difficulties raises in practice, being established between the divorce and the prejudice that the innocent husband claims.

The guilty condition is fulfilled by establishing the exclusive fault of one of the spouses.

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[31] D. Lupaşcu, C.M. Crăciunescu, *op. cit.*, p. 352.
[32] M. Avram, *op. cit.*, p. 146-147.
[33] D. Lupaşcu, C.M. Crăciunescu, *op. cit.*, p. 351; C. Mareş, *op. cit.*, p. 207.
[34] Article 1385 paragraph 2 of Civil code.

With respect to the prejudice, we consider that this should not be a regular benefit, as in the case of compensatory benefits. Moreover, they should be given in the form of a single global amount of money and only exceptionally, by request of the party claiming it, and in the form of assets or claims, in relation to the concrete circumstances of the case.

In accordance with the provisions of article 919 paragraph (1) letter d) of Civil procedure code "*Upon request, the divorce court shall also rule on (...) the compensation claimed for material or moral damages suffered as a result of the dissolution of the marriage (...)".*

Thus, the court shall rule the claim for the prejudice through the divorce decision. We consider that if this request would be subsequently filed, separately, and another file would be registered, it would have to be joined to the divorce file, because only in this way the court can rule on such a request through the divorce decision, as stipulated by the law[35]. Otherwise, when the claim based on the provisions of article 388 of Civil code would be submitted after the divorce file has been settled, we consider that this request should be dismissed as inadmissible.[36]

Therefore, the right to compensation stipulated by the provisions of article 388 of Civil code cannot be requested through a claim subsequent to the marriage dissolution, nor by a request made during marriage.

At the same time, a claim having as object the right to compensation provided under the provisions of article 388 of Civil code cannot be disjoined in order to be solved after the marriage dissolution, as done in practice[37]. However, in the mentioned resolution, the claim for damages, based on the provisions of article 388 of Civil code has been dismissed as unfounded, compared to the procedural moment of its submission, being considered that the compensations stipulated by article 388 of Civil code, which establishes a special type of civil liability, can only be granted in cases where the active subject of the judicial report is an "innocent" spouse and the passive subject is the "guilty" spouse, at the same time the text of article 388 of C. civ. limitating the possibility of obtaining damages to the "divorce decision", the claimant introducing its claim after the divorce resolution. However, based on the provisions of the common law on civil liability in respect to the defendant's conduct during 2009-2012, the court examined the request under the provisions of article 1357 of Civil code

[35] For the contrary opinion, according to which "*the compensations could also be claimed separately, of course, within the three-year general limitation period, which will begin to run from the date when the innocent spouse knew the damage caused to him/her by the other spouse*", see F.A. Baias, *Comment on Article 388*, in F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinators), *the New Civil Code. Comment on articles*, Ed. C.H. Beck, Bucharest, 2012, p. 422. Subsequently, this author also changed his view, meaning that damages can be granted only through the divorce ruling and cannot be requested separately, within the 3-year general limitation period, see F.A. Baias, C.M. Nicolescu, *Comment on Article 388* in *The New civil code. Comment on articles,* C.H. Beck Publishing House, Bucharest, 2014, p. 468. In the same sense, see C.C. Hageanu, *op. cit.*, p. 194, which argues as an argument the permissive character of the norm provided under article 388 of Civil code, as well as the regulatory difference in article 391 paragraph 1 of Civil code in which the legislator uses the word "than" in order to come to the idea that this right can no longer be demanded by separate claim.

[36] In the same sense, to be seen E. Florian, *op. cit.*, p. 334.

[37] Zalău Local Court of Law, civil decision no. 2687 of December 18, 2014, available on: http://www.rolii.ro/hotarari/58a44cdee4900958220007b6

and the court dismissed such request as unfounded since the cumulative conditions of civil liability for wrongful conduct and the certainty of the alleged damage had not been proved.

In relation to the possibility of changing the amount of compensation granted, we consider that such request can only be submitted as a criticism within the appeal against the divorce resolution granting the respective prejudice.[38] Contrary to an opinion expressed in the doctrine,[39] we consider that, for the observance of the *res judicata* of the divorce decision through which the divorce court also ruled on the prejudice claimed by the innocent spouse for the dissolution of the marriage, a subsequent claim, introduced separately, of the amount of such damages should be rejected.

From the point of view of the application of the provisions of article 388 of Civil code in time, we must point out that they are applicable if the reasons for divorce shall arise after the entrance into force of the Civil code[40].

3. Conclusions

As far as the date of marriage dissolution is concerned, in the matter of judicial divorce, the rule is that a marriage is dissoluted from the day when the divorce resolution is final. By way of exception, if the divorce claim is continued by the heirs of the claimant, in the event of the claimants's death, the marriage is deemed to have dissolved at the date of the divorce claim. In the matter of divorce, by administrative or notarial ways, the marriage is dissolved on the date of issuance of the divorce certificate.

Regarding the termination of the matrimonial regime at divorce, the rule is that the matrimonial regime ceases between spouses at the time the divorce claim is filed, and the exception is the date of their *de facto* separation, but in this latter case, only if one or both spouses have requested, the custody court that rules the divorce acknowledges this date of termination of the matrimonial regime. Although according to the provisions of article 385 paragraph (3) of Civil code, the provisions of this article shall also duly apply in the case of divorce by mutual consent of the spouses by administrative or notary procedures, neither the civil status officer, nor the public notary may acknowledge the spouses' request for the termination of the matrimonial regime on the date of their *de facto* separation, given that this would go beyond the non-contentious procedure before them for the issuance of the divorce certificate.

In the category of "*left heirs*" stipulated under the provisions of article 926 paragraph (2) of Civil procedure code, who can continue the divorce claim, we will

[38] For the opinion that any claim by the party that justifies a legitimate interest in amending the amount of the compensations granted must be admitted, and it can not be considered that the new claim of the party involved after the divorce judgment is late, see *Comment Article 388* in B.D. Moloman, L.-C. Ureche, *op. cit.*, p. 401-402.

[39] *Ibidem*.

[40] Article 45 of Law no. 76/2012 for the implementation of the Law no. 134/2010 on the Civil procedure code.

have to include only the legal or testamentary heirs and not the commune, the city or the municipiality on whose territories the goods are located at the date of the inheritance.

With respect to the claim for resumption of the family name following the final settlement of the divorce file, when the divorce decision provides the family name of the spouse who changed it during that marriage, we consider that a subsequent claim by the former spouses regarding their family name, which they had during marriage, can no longer be submitted, and if, however, such an application would be filed with the court, it must be rejected.

In the matter of the right to compensation, two claims may be submitted, one under article 388 of Civil code and another one under article 1357 of Civil code. Unlike the claim based on the provisions of article 388 of Civil code which must be requested within the divorce file in order for it to be ruled through the divorce decision, the one based on the provisions governing the civil liability, article 1357 of Civil code, may be submitted at any time within the 3-year limitation period. The difference between the two types of claims consists in the prejudice that may be claimed. Thus, by the claim based on the provisions of article 388 of Civil code, the prejudice caused by the dissolution of the marriage may be requested, and by the one based on the provisions of article 1357 of Civil code, any other prejudice caused by the other spouse, which is not the direct consequence of the dissolution of marriage. Moreover, the two claims may also be pursued simultaneously for distinct damages.

The right to compensation governed by the provisions of article 388 of Civil code cannot be claimed by a subsequent application after the marriage dissolution, nor by a request sumbitted during the marriage.

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ROLE AND COMPETENCES OF THE SECURITY COUNCIL OF THE UNITED NATIONS ORGANIZATION CONCERNING THE USE OF FORCE

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Abstract: *In the contemporary international law, the principle of not using armed force is stipulated in the UNO Charter and developed as aggression by the Declaration concerning the definition of aggression of the General Assembly of UNO of 1974, as well as by the final Act of Helsinki of 1975, which decides that the states will abstain in their mutual relations and, in general, in their international relations, from using force or from threatening to use force, either against the territorial integrity or political independence of any State, or in any other way which is incompatible with the purposes of the United Nations.*

Keywords: *concept of force, concept of aggression, UNO Charter, approval to use force, cases when the intervention of the UN Security Council has been disputed.*

1. Duties of the Security Council regarding the use of force

The Security Council has the main role of maintaining peace and of providing security at international level and of peacefully settling the international conflicts, being considered the most powerful main organ of UNO. According to art. 24 of UNO Charter, the Security Council is responsible for achieving the central goal of the organization, respectively maintaining peace and providing international security.

The Security Council [1] is formed of 15 members, of which 5 are permanent members, namely, the United States of America, the United Kingdom of Great Britain and Northern Ireland, France, Russia and China, and 10 are non-permanent members, appointed by the General Assembly for the term of 2 years. 5 new, non-permanent members are chosen every year, so that the composition of the Security Council is different every year.

In order to make decisions, the vote of minimum 9 members is required, of which the positive vote of the 5 permanent members with the right to vote is mandatory. In case of a negative vote on matters of substance of each of the permanent members, the consequence consists in the impossibility to adopt said decision, regardless whether all the other members would agree or not.

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[1] N. Purdă, N. Diaconu, *Legal Protection of Human Rights*, 2nd edition, revised and completed, Universul Juridic Publishing House, Bucharest, 2011, pp. 114-115; A. Iacob, D. Ungureanu, A. C. Voicu, M. Crețu, *United Nations Organization – organization, operation, duties*, Sitech Publishing House, Craiova, 2009, pp.67-80.

In order to avoid such situations, the practice of the United Nations has introduced and applied a corrective norm, according to which the abstaining of a permanent member from voting is not equal to the negative vote against the decision made in the debate; therefore, the adoption of a resolution cannot be validly prevented by the Security Council[2].

Considering its importance in the United Nations, the Security Council has a series of essential duties.

A first duty consists in preventing conflicts by peacefully settling international disputes[3], according to Chapter VI of UNO charter, materialized by calling the parties to talks in order to settle disputes peacefully, by carrying out inquiries related to any misunderstanding able to give rise to an international dispute, being recognized its competence of recommending procedures or methods to smooth away such situations[4].

The second duty of the Security Council is to adopt the resolutions and recommendations to maintain or restore peace and international security, the UNO Charter regulating coercion measures and punishments for the States that breach the international legality[5].

If the peaceful measures do not put out the conflict, on the grounds of art. 41 of UNO Charter, the Security Council may implement a series of coercion measures without using armed force, such as „*the complete or partial interruption of economic relations or of railway, sea, air, post, telegraphic communications, by radio, and of other communication means, as well as by breaking the diplomatic relations*".

If these coercion measures prove to be insufficient and inefficient, article 42 of UNO Charter gives the Security Council the opportunity to apply coercion measures based on the use of armed force „*with air, naval or land forces, any action that it thinks necessary in order to maintain or restore peace and international security*".

In event of applying armed coercion measures, the Security Council must establish certain conditions both with the member State, asked to put at the Council's service certain armed forced[6], and with the other states that are parties in the conflict, to determine its settlement by making appeal to the good offices of the General Secretary of UNO.

The Security Council may contribute to the maintaining of peace, according to its duties, by using the military staff under the commission of the United Nations for other purposes than those of coercion, such as: respect the truces, supervise the ceasefire, interpose forces at the borders[7].

[2] However, there are other aspects that could not be settled and that lead to the failure to adopt or to the delayed adoption of a resolution of the Security Council.
[3] Gulsher Ahmed, *Statement on the Report of the Special Committee on the Character of the United Nations and on the Strengthening of the role of the Organizations*, doc. A/C. 6/35 of November 7, 1980, pp. 2-9.
[4] D. Mazilu, *International Public Law*, the 5th edition, vol. II, Lumina Lex Publishing House, Bucharest, 2010, p. 221.
[5] Gh. Moca, M. Duțu, *International Public Law*, Universul Juridic Publishing House, Bucharest, 2008, pp. 65-71; R. Miga-Beşteliu, *International Law. Introduction to the international public law*, All publishing House, Bucharest, 1998, pp. 111-116.
[6] The State called to intervene with armed forces must sign a special agreement regarding the nature and training degree of forces and the setting of the effectives of the military contingent.
[7] For instance in Libia, Angola, South-North Korea.

We are specifying that the State which is the victim of an armed aggression benefits from the right to individual or collective self-defense, on the grounds of article 51 of the Charter, having at the same time the obligation to urgently inform the Security Council about the created situation, and the Council will act as such.

Beside the coercion measures, the UNO Charter also regulates the sanctions that may be applied to member States, as follows[8]:

- a member of the United Nations, against whom the Security Council has carried out a preventive or coercive action, may be suspended by the General Assembly, on the recommendation of the General Assembly, on the recommendation of the Security Council, out of the exercise of rights and privileges arising from the capacity of member. The exercise of these rights and privileges may be re-established by the Security Council (art. 5 of UNO Charter);
- a member of the United Nations that persistently violates the principles included in the Charter may be excluded from the Organization by the General Assembly, on the recommendation of the Security Council (art. 6 of the UNO Charter).

2. Cases of action or of armed intervention carried out by the UNO Security Council.

The theory of legitimacy concerning the procedural accuracy of the actions taken by the Security Council, by referring to the degree of participation in making decisions of those that they address, launched in the legal literature, does not give importance to the positive law, which regulates the participation of the States in the decision-making process, which may be illegitimate, unless they observe the procedural standards. At the same time, although the rule set by the UNO Charter is technically breached, although the action is illegal from the point of view of international law, however this action may be legitimate, because it is based on a motivation that complies with a standard included in a unanimously shared value.

Correlated with the aspect related to the legitimacy of the Security Council conduct, based on the compliance with jus cogens or with the customary law norms, that of representativity also arises, namely of the manner in which it carries out its specific assignment of maintenance of peace and of international security in the decision-making process in its frame.

Regarding the actual cases that it was analyzed in, in view of legitimacy of action/intervention of the Security Council, we are mentioning the inter-Korean conflict. According to the standard procedure specified in Chapter VII of UNO Charter, measures must be taken, first of all, without using armed force (diplomatic and economic sanctions) against the aggressor and, if they prove their inefficiency, it is allowed to authorize the use of collective coercion measures. The Security Council has not previously imposed economic or diplomatic sanctions against North Korea, but it went directly to authorizing coercion measures, without invoking any article of the

[8] C. F. Popescu, M.-I. Grigore-Rădulescu, *International Public Law, Introductive Notions*, 2nd Edition, reviewed and completed, Universul Juridic Publishing House, Bucharest, 2017, p. 16.

Charter. Since the Soviet Union boycotted the actions, in sign of protest, the legitimacy of the resolution made by the Security Council, no. 84/1950, authorizing the coercion measures against North Korea, in the absence of the Soviet Union, was disputed, criticism targeting the possibility to adopt such measures in the frame of the Security Council in the absence of the unanimity veto exercised by the permanent members.

Another criticism referred to the delegation, by the Security Council, of the authority to maintain peace and international security to one of its members, the United States of America.

The controversies generated by the situation of North Korea had as effect the failure to authorize similar operations of such magnitude until 1990, when the Security Council authorized an operation similar to that executed by Korea against Iraq in response to its invasion to Kuwait.

As regards the legitimacy of the Resolution no. 678/1990, as well as the possibility of the Security Council to delegate its authority to a State or groups of States, there has been criticism, particularly from Iraq, which disputed the legality of the Resolution no. 678, claiming that the appeal to force may be authorized by the security council only on the grounds of art. 42 and 43 of the Charter. After the liberation of Kuwait, on March 6, 1991, the demilitarizing area from the border of the two countries, created on the request of USA president of ceasefire, started being monitored by a Mission of the United Nations of supervision of Iraq-Kuwait[9], set up by the Security Council. At the same time, Iraq has been imposed a series of sanctions[10], for the monitoring and accomplishing of which the Council created a Committee for sanctions, a total embargo targeting the Iraqi oil exports, the payment of repairs to Kuwait, as well as compensations for all those who suffered from the conflict[11].

In conclusion, the Security Council imposed on Iraq conditions of unconditional capitulation and a regime of sanctions and control. By the resolution 660/August 2, 1990 of the security council, it was shown that the Iraqi invasion in Kuwait constituted a violation of peace and of international security, asking for the immediate withdrawal of Iraq with all its forces from Kuwait, on the grounds of art. 39 and 40 of the Charter. Based on the resolution no. 678/November 29, 1990, the Security Council authorized the member States to cooperate with Kuwait government and to use all the necessary means to implement Resolution no. 660 and all the other relevant subsequent resolutions in order to reestablish peace and international security in the area, resolutions based on the provisions of Chapter VII of the Charter[12].

By interpretation, we deduct that the authorization with the object to implement Resolution no. 660 and the subsequent and relevant resolutions, and to restore peace and security in the area, was based on art. 42 and 48 para. (1) of the Charter[13], but it did

[9] UNIKOM – United Nations Irak – Kuweit Observation Mission.

[10] Iraq has been requested to destroy its entire arsenal of chemical and biological weapons, long-range missiles, as well as the nuclear weapon manufacturing plants.

[11] For the payment of set-offs, a special Committee of the Security Council has been created, formed of members of the Council, with the headquarters in Geneva, that Romania was also part of.

[12] The security council has grounded its resolutions on the provisions of Chapter VII, without specifying, however, those articles of this chapter that it took into account.

[13] In the specialized literature, there have been opinions according to which the military actions represented a manifestation of the right to self-defense, as stipulated in art. 51 of the Charter.

not include a time limit, which may justify the use of force against Iraq at any time in the future, in response to its actions, able to threaten peace. Therefore, for the authorization to be legal, a functional time limit must be instituted, taking into account the central part played by the Security Council in initiating and ceasing the force measures. The Security Council, as a collective body, and not the member States individually, has the competence to decide whether the use of force was necessary to implement the conditions imposed by Resolution no. 687/1991.

Two days after adopting Resolution no. 687, the Security Council adopted Resolution no. 688/April 5, 1991, by which it expressed its concern regarding the retaliation against the Kurdish population and by which it asked Iraq to end this repression, in order to eliminate the threat against peace and security in the area[14]. By resolution no. 688/1991, the Security Council acknowledged the existence of a threat against peace, but this resolution did not include any claim regarding the specific measures to be taken if the Iraqi government did not cease to repress certain parts of the population.

In answer to the countless violations by the Iraqi party of the ceasefire agreement, at the beginning of 1993, the United States, UK and France launched air attacks against Iraq, of which the legality has been disputed, for the reason that, although the security council, as a collective body, allegedly decided that an actual violation of the cease fire agreement intervened, did not explicitly authorize the use of force. In the same year, but in June, the United States launched an attack with missiles over the headquarters of the Iraqi secret services situated downtown Bagdad, motivating the attack as self-defense[15], on the grounds of art. 51 of the Charter, in answer to the failed attempt of the Iraqi secret services to assassinate the former American president, George Bush, who was visiting Kuwait in April 1993.

The Security Council adopted Resolution 949/October 15, 1994 in response to the aggressive movements of the Iraqi troops at the border with Kuwait, and asked Iraq not to use any military force or of any other nature, of a hostile or provocative manner, threatening its neighbors or the operations of the United Nations in Iraq. Claiming this resolution, in September 1996, the United States launched an attack with missiles to defend the plants in southern Iraq and thus it extended the „no-fly zone” from the 32nd to the 33rd parallel.

In support of the United Nations inspectors who were supposed to monitor the compliance of Iraq with the Resolution 687/1991, the United Nations sent armed forces to the Persian Gulf at the beginning of 1998, and since December 1998, the United Nations continued the attacks by missiles and the air attacks in the no-fly area over the Iraqi air defense plants that they identified as shooting at them or threatening them. Unlike the other permanent members of the Security Council, from this moment on, UK has supported the use of force against Iraq, invoking, together with the United States, the argument of implicit authorization, claiming that the anterior adoption of Resolution no. 1205/November 5, 1998 implicitly reactivated Resolution 678/1990. By

[14] Based on resolution no. 688, the United States of America, UK and France introduced and applied the so-called „safe havens” and „no-fly” in northern Iraq.

[15] For more developments related to self-defense, see D. Mazilu, *quoted works*, p. 225.

Resolution no. 1205, Iraq's decision to cease the cooperation with the inspectors of the United Nations was condemned, and the request to revise the decision was drafted, without containing an explicit warrant of use of force and without putting back the Resolution no. 678 on the judgment list. For reasoning purposes, the military response of the United Nations and of UK against the sol-air missile attacks of February 2001 was illicit, the same as the military action of the United States of America and of UK in Iraq, on March 17, 2003, generated great controversies regarding the existence of an implicit authorization to use force by the Security Council. Essentially, neither the principle of self-defense, nor the corroboration of Resolution 678 with Resolution 687 constitute a legal ground to justify the military invasion, which may be ensured only by an explicit authorization of the use of all the necessary means to disarm Iraq, the more so as the last resolution adopted before the invasion, respectively Resolution no. 1441/November 8, 2002, had as object only the establishment of the inspection regime with the purpose to check the stage of the disarming process established by Resolution no. 687/1991. By a joint statement, China, France and Russia stated that Resolution no. 1441 excluded any automatism in the use of force, and in case of Iraq's failure to comply with the undertaken obligations, the Security Council is the only one able to decide the manner of action.

After the military invasion of March 2003, Resolution no. 1483/May 22, 2003 was adopted, which recognized the occupant "authority" of the United States and of UK, and authorized their administration in Iraq on the grounds of Chapter VII of the Charter; however, it did not contain any mention regarding a post factum approval of the military invasion. On the grounds of Resolution no. 1483, a commission was instituted, which supposed a completely military and civilian occupation, again, in lack of any functional limit, persisting even after adopting Resolution no. 1511/October 16, 2003; on the grounds of this resolution, it was stated once again, *inter alia,* that the mandate of the Authority, the same as that of the multinational force of stabilization created by Resolution 1511, would cease when an elected democratic Iraqi government, recognized internationally, takes over the responsibility of the Authority. Consequently, any of the members with veto right of the Security Council may hinder a conclusion of the authorization, which may be extended endlessly.

We appreciate that the commission of the authority in Iraq preserves the illicit character, as long as it has the support of the majority of the members of the Security Council, including of the majority of the permanent members, as the Security Council, as a collective entity, is the only one able to decide over the presence of the authority.

3. Conclusions

The analysis of the activity carried out by the Security Council in the field of adoption of the coercion measures in case of aggression shows that, beginning with the enforcement of UNO Charter, it has not managed to gather the votes of all five permanent members to be able to apply the coercion measures specified by art. 42, implying the use of armed force.

Only in the previously analyzed cases, respectively the aggression of North Korea against South Korea (June 25, 1950) and the aggression of Iraq against Kuwait (August 1990), the Security Council succeeded in adopting favorable resolutions to apply art. 42 of the Charter, and these also, with only four votes of the permanent members, because of the absence of the Soviet representative or of China's abstention, in the second case, although the UNO Charter and the provisory regulation of the Security Council demanded the unanimous vote of the five permanent members.

The fact that, after 1991, the Security Council has not succeeded in adopting any resolution which foresaw, without any doubt, the application of coercion measures, leads to the idea that the veto right established during Yalta Conference, of February 1945, by a un Gentlemen′s Agreement, may affect the functionality of the United Nations Organization, where all member States are equal in rights, in capitalizing the principles of pluralism and of democracy.

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THE ANALYSIS OF ABBREVIATED PROCEDURE FROM A PRACTICAL PERSPECTIVE

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Abstract: *According to the new structure of the trial at the time when the defendant chooses the procedure in which he wishes to be tried, the stage of the preliminary camera is overcome, only the evidence that passed the test of loyalty and legality and which are the basis of the charge. Also, in the new conception of the legislator, the reading of the act of referral is no longer the act marking the moment of the beginning of the judicial inquiry, but this time coincides with the administration of the first probationary procedure, which basically consists in hearing the defendant - if he does not rely on the right to silence, and the court does not change the order of the judicial inquiry. This new order of the court in the first instance comes to remove one of the deficiencies of the previous legal construction, according to which the moment when the defendant could manifest his will to rely on the provisions on the simplified procedure was before reading the notification act and bringing to the attention of blame, an order which, if it had been respected by the courts, would have been likely to create the paradoxical situation in which the defendant had to plead guiltily before he was specifically informed of the charge. The observance of the procedural moment until the defendant can manifest his will in the sense of the application of the special provisions is obligatory, the defendant cannot ask after the commencement of the judicial inquiry or in the appeal to apply the abbreviated procedure, being deprived of this right. Also, the defendant's request for trial under the abridged procedure cannot be upheld, even if it is formulated at the first hearing, as long as the request comes after the commencement of the judicial inquiry.*

Keywords: *Abbreviated procedure, first term, blame, reading of the notification document, special provisions.*

1. Choosing the abbreviated procedure

At the first term when the citation procedure is legally fulfilled and the case is in a state of trial, *the court, after reading the notification document* (the indictment or closure of the preliminary judge by which it admitted the complaint against the prosecutor's decision and ordered to initiate the trial), *after informing the defendant of the charge and of his procedural rights,* he considers the defendant may request that the trial be made only on the basis of the evidence administered during the criminal prosecution and the documents submitted by the parties or the person if he fully acknowledges the deeds in his charge, informing him of the provisions of art. 396 par. (10) NCCP on the reduction of punishment limits, respectively with reference to the effects of the abbreviated procedure on educational measures.[1]

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[1]Conform art. 374 para. 4 C.C.p. reported to art. 375 C.C.p.

The *defendant* may request, *personally or by authentic registration*, the judgment appropriate to the abbreviated procedure for the recognition of the accusation or according to the common law procedure. It is also possible for the defendant to ask for a new term for the appointment of an elected defense counsel and the preparation of the defense at the first term of the trial, and the time allowed to inform him that he wishes the trial to take place according to the abbreviated procedure.[2]

If the *defendant requests* that the trial be conducted in accordance with the abbreviated procedure, the court proceeds *to hear him if he is present*. This hearing of the defendant on the recognition of guilt does not have the legal nature of a means of proof (not being open to the stage of the judicial inquiry in which it is to be heard), but is a mandatory procedural activity to establish the procedural framework, being placed at the time of the issues prior to the admission of the request for trial in accordance with the abbreviated procedure.[3] The mandatory nature of this procedural activity is correlated with the defendant's right to opt for the abbreviated procedure. The court must exercise due diligence during the hearing to be fully convinced that the defendant knows the allegations made against him and effectively recognizes all the allegations made to him both in terms of objective facts and his subjective attitude towards criminal activity.

The defendant's request for the trial to proceed according to the abbreviated procedure is put by the court in the discussion of the prosecutor, the injured person and the parties after hearing the defendant.

By this abbreviated procedure may benefit the defendant who claims to recognize the act of which he is accused, but he understands to be entitled to silence about the court's request to report in detail the facts committed.[4]

After hearing the defendant, the court brings the prosecutor, the injured person and the parties to the prosecutor's request for the trial to proceed according to the abbreviated procedure.

After the debates, the court orders by one of the following solutions:

(i) *admit* the request for trial in accordance with the abbreviated procedure when the above-mentioned conditions are met;

(ii) *reject* the request for trial in accordance with the abbreviated procedure when the above-mentioned conditions are not met; in this case, the court proceeds to hear the case under the ordinary law procedure.

Therefore, the simple manifestation of the defendant's will to apply the court's procedure in case of recognition of the accusation does not automatically lead to the initiation of the abbreviated procedure, the court may reject such a request and proceed to the case under the common law procedure, during the judicial investigation.

After the admission of the request for trial according to the abbreviated procedure, the defendant can no longer return during the criminal trial on his option to be judged according to the abbreviated procedure, which is *irrevocable* (in cases where the

[2]Nicolae Volonciu, Andreea Simona Uzlau, s.a., *Codul de procedura penala comentat*, 3rd edition Revised and added, Hamangiu, 2017, p. 1093.
[3]M. Udroiu, *Procedura penala. Special Part*, C.H Beck, Bucharest, 2017, p. 290.
[4]Ibidem.

legislator wished to provide such a possibility of return, it would be expressly provided for it: for example, waiving the appeal).

Once the option for the application of the abbreviated court case has been made, the court can no longer revert to the provision of admittance of the application. In this procedure, *the judicial inquiry is abbreviated, essentially limiting itself to the administration of documentary evidence*. Thus, once the abbreviated procedure has been opened, the court may allow the defendant, the civil party or the civil party *responsible only to file evidence.* Within this framework, after admitting the request for trial according to the abbreviated procedure, the court asks the parties and the injured person if they propose the taking of evidence.

By the nature of the procedure, we appreciate that the prosecutor cannot demand extra evidence in the indictment of writings, this right being granted by the legislator only to the injured parties and the person injured.

The writings may be requested in circumstantial terms to be used to individualize the sentence (for example, documents relating to the person's personal situation or the defendant's state of health, the studies he or she has followed, job descriptions, etc.) *as well as on elements related to the subject matter of criminal or civil action* (for example, job description issued by the employer in order to prove the scope of the service duties, conclusion of a transaction on the way to repair the damage, etc.)[5].

The court approves the documents that are relevant, conclusive and useful to the case, which may be submitted at the time the court has accepted the request in accordance with the abbreviated procedure or a later term granted for that purpose. *For the submission of documents, the court can only grant one term.*[6]

In wholly exceptional cases in which only the civil aspect can prove the claims of the civil party only by taking evidence with witnesses and not by writings, and the hearing of witnesses is possible even at the first term of trial or by granting one term, we appreciate that the disjunction of the civil aspect of the case would be a disproportionate solution, the requirements of the celerity settlement of the case being a priority. In such situations, we believe that it would be possible to hear witnesses from the civil aspect at the first trial or the only time allowed for that purpose, and then the court to proceed to the trial of both the criminal and the civil side of the appropriate case abbreviated procedure. In this situation, it cannot be remembered the incidence of any procedural sanction that would affect the whole abbreviated procedure, being respected also by the demand for the speedy procedure.[7]

After completing the abbreviated court investigation, the court will give the *speaking* to the prosecutor of the injured party and to the parties, according to the general rules of the debates, as well as *the defendant's final word.*[8]

If the court finds, ex officio, at the request of the prosecutor or the parties, that the legal classification of the act in the notice of appeal should be changed, it is obliged to question the new classification and to draw the attention of the defendant that he has the right to ask for the case finally to be left. The court may order a change in the legal

[5]According to 377 para.2 C.C.p.
[6]Idem.
[7]M.Udroiu, *op.cit.*, p.2 95.
[8]N. Volonciu, A-S. Uzlau, s.a., *op.cit.*, p.1094.

classification of the facts described in the notice by closing it being possible to retain a more favourable legal classification of the defendant, but also a more severe legal classification in relation to the facts with which the prosecutor ordered the court to be notified and which were recognized by the defendant.

If the new legal framing refers to an offense for which the injured person should make a prior complaint, the court summoned the injured person and asks if he or she wishes to make a prior complaint. If the injured party makes a preliminary complaint, the court continues the judicial investigation, otherwise the criminal proceedings are terminated.

If, for the purposes of determining the legal classification, and if, after the change of legal classification, other evidence is required, the court, taking the conclusions of the prosecutor and the parties, *shall order the judicial investigation*. In these cases, the injured person, the parties and the prosecutor may propose the taking of evidence, the procedure being carried out according to the rules of common law[9]. And if the criminal proceedings started under the abbreviated procedure of the recognition of the accusation continues under these conditions with taking the evidence, and after the deliberation the court finds a double identity (the act acknowledged by the defendant is the same as the act that the court deems to be arrested after the administration of the evidence), the defendant will benefit from the effect of reducing the punishment limits provided by art. 396 par. (10) NCCP.

2. The effects of the abbreviated procedure

Admitting the abbreviated procedure produces *cumulatively* the following *two main effects*[10]:

(i) *a procedural effect*, consisting in resolving the case without proceeding with the administration of all evidence during the judicial inquiry; therefore, the case is settled with a quick, usually, single-term trial;

(ii) *a substantial law effect*, since the defendant benefits from a one-third reduction in the penalty limits prescribed by law (*both the special minimum and the special maximum*) in the case of imprisonment and the *one-fourth reduction* in the limits of the punishment provided for by the law in the case of the fine (*both the special minimum and the special maximum of the days-fine provided by the law*); is thus regulated in the provisions of art. 396 par. (10) NCCP a legal cause of reduction of punishment (*substantive criminal law rule*);

In the case of *defendants who have committed minor offenses* (even if they are major at the time of the case), the effect of substantive law is primarily on the choice of the educational measure. Thus, the court may opt for a non-custodial educational measure considering the defendant's sincere procedural attitude or apply a less severe educational measure (for example, the non-custodial educational measure of supervision may be considered more appropriate to honest attitude if the court

[9] Ibidem; M. Udoriu, *op.cit.*, p. 296.
[10] Ibidem, pp. 297-298.

considers that a *deprivation of liberty measure* is required in the case, the abbreviated procedure can lead to a less severe measure of admission to an educational centre.

Each case where the court opts for the establishment of a measure of deprivation of liberty, *the limits of the periods of these measures provided for by the law are reduced by one third*, so the measure of internment in an educational centre can be ordered for a determined period, *8 months and 2 years*, while *the internment in a detention centre* is ordered for a fixed period of between *one year and 4 months and 3 years and 4 months*, if for the offense committed the law provides for imprisonment of less than 20 years, i.e. between *3 years and 4 months and 10 years*, if the punishment prescribed by law for the offense committed is 20 years or more imprisonment or life imprisonment.

The judgment according to the abbreviated procedure does not give the defendant a right to apply the special minimum of the reduced sentence by one third/one fourth, respectively the minimum of the measure depriving the liberty, the court proceeding to the judicial personalization of the punishments/educational measures of freedom) in relation to the criteria provided by art. 74 NCC given the special reduced limits of the punishments/ educational measures depriving them of freedom. Likewise, the defendant does not acquire a right to obtain the postponement of the punishment, or the suspension under the supervision of the execution of the punishment or the application of a non-custodial educational measure[11].

The fact that the trial is carried out according to the abbreviated procedure for the recognition of the accusation does not in itself imply *per se* a change or replacement of the grounds of the preventive arrest/home arrest; the court can order the conviction of the defendant and apply a punishment between the reduced limits with execution under detention and maintain the state of arrest insofar as the deprivation of liberty is necessary and proportionate to the intended purpose; moreover, in the course of the criminal prosecution, the fact that the defendant fully acknowledges the facts of which he is accused before the prosecutor and declares that he intends to use the abbreviated procedure after he is sued does not constitute an impediment to the taking or prolonging of the preventive arrest/at home, the judiciary will be judged on the basis of all the necessary conditions for a preventive measure if, in this context, they are more proportionate to the purpose pursued.

3. Special cases in which the defendant benefits only from the substantive law effect of the abbreviated procedure

Article 396 para. (10) NCCP as amended by G.O. no. 18/2006 provides for *five cases* in which, although the criminal proceedings are carried out in whole or in part according to the rules of common law, the defendant nevertheless *benefits from the substantive law effect specific to the procedure abbreviated to the lack of a procedural fault regarding the loss of procedural effect.*

[11] Ibidem.

1. when the court has *rejected* the defendant's request to be tried in accordance with the abbreviated procedure, has conducted the judicial inquiry and, consequently, *retains the factual situation that had been ab initio and recognized by the defendant;*

2. when the court, *while admitting* the defendant's request to be tried under the abbreviated procedure, *nevertheless carries out the judicial inquiry only to establish the legal classification,* and afterwards *retains the factual situation which had been ab initio recognized by the defendant;*

3. when the court, *while admitting* the defendant's request to be tried under the abbreviated procedure, orders a change of legal classification, and then considers that it is necessary to carry out other evidence by conducting the judicial inquiry, and then *retains the factual situation that had been recognized ab initio by the defendant;*

4. when the court, *although admitting* the defendant's request to be tried under the abbreviated procedure, after deliberation, finds that to resolve the criminal action it is necessary to administer other evidence outside the documents, ordering the case to be pending and carrying out the judicial investigation, *the factual situation that had been recognized ab initio by the defendant;*

5. when the court *rejected* the defendant's request to be tried in accordance with the abbreviated procedure, carried out the judicial inquiry, and afterwards *retained the same factual situation as the one recognized by the defendant*. Thus, through G.O. no. 18/2016, a situation of obvious inequity resulted from the old regulations, *according to which the substantive effects of the defendant who admitted in good faith the acts committed before the commencement of the judicial investigation could not be applied*, but these facts did not coincide with those described in the referral, which is why the court could not accept the defendant's request to be tried under the abbreviated procedure. Under the new regulation[12], *it will be possible to obtain substantive effects even if the defendant acknowledges in good faith the deeds committed prior to the commencement of the judicial inquiry, but the abbreviated procedure cannot be followed because of the errors of the referral if, following the investigation the court sees* ***the same factual situation*** *as that recognized by the defendant, in this context we exemplify the following hypotheses for the application of this case*:

a) *to obtain substantive effects following a change of legal classification to the factual situation held by the court and ab initio recognized by the defendant*: the defendant is accused of committing robbery and, prior to the commencement of the judicial investigation, acknowledges only theft, underlining that did not assault the injured person. Following the court investigation, the court notes that the act committed by the defendant is that of the (recognized) theft and not that of the robbery, ordering the change of the legal classification of the detained act and, if no mediation agreement has been concluded between the defendant and the injured person in the cases provided by Article 231 of the NCP), the enforcement of the objects of substantive law provided by art. 396 para. (10) NCCP;

b) *to obtain substantial substantive effects following the acquittal of the defendant for one or more of the offenses of which he was accused and the detention of the fact acknowledged ab initio by the defendant*: the defendant is accused of committing two

[12]According to art. 396 para.10 C.C.P.

blackmail offenses, recognizing only one of them before the commencement of the judicial investigation and explicitly indicating that he did not commit the second offense. Following the court investigation, the court finds that only the offense of blackmail has been committed, the acquittal of the defendant, according to art. 16 para. (1) letter c) NCCP for the second offense and the application of the substantive law effects provided by art. 396 para. (10) NCCP;

c) *to obtain substantive effects after the court seized some further dynamics of the factual situation with which the case was brought in accordance with the initial statements of the defendant to recognize the accusation:* the defendant charged with committing a theft offense with the other two recognizes the offense of theft by showing that he acted alone and the other co-defendants were unaware of his criminal intentions and did not determine or support him in committing the act. Following the court investigation, the court finds the offense of theft committed only by the defendant who *ab initio* acknowledged and who could not benefit from the abbreviated procedure because the acknowledged factual situation did not coincide with the one described in the notice. In this case, the court will order the acquittal of the co-defendants, the removal of the aggravating circumstance provided by art. 777 letter a) NCP (committing the deed of three or more persons together) and will apply the effects of substantive law provided by art. 396 para. (10) NCCP;

d) *obtaining substantial substantive effects as a result of the reconfiguration of the legal unit of offense and the retention of the facts acknowledged ab initio by the defendant*: the defendant is sued for committing a continuing crime of abuse in the service consisting in the execution of 15 acts of execution the same criminal resolutions. The defendant acknowledges the commission of 10 acts of execution, pointing out that the other 5 were not committed by him, because while the prosecutor claims to have abused his job duties was on legal leave of rest; if, after conducting the judicial inquiry, the court finds that only the 10 acts of execution that are included in the continuation of the offense are proved beyond reasonable suspicion, and for the other 5 the administered evidence is not capable of removing the presumption of innocence, I.C.C.J.[13] the Court held that "there can be no order for some of the actions in the content of the offense to continue payment and for other acts of execution of the same offense the conviction of the defendant continued, since the actions that each of them contain the same offense are not distinct offenses with which the court was heard and decided.

In this situation, the court has been notified of a single continuous crime of deception, and will issue a single solution for proven material acts, excluding the unlawful actions from the content of the offense, thus not infringing the legal unity of the offense." In the same sense[14], another doctrine of the Supreme Court was presented in the doctrine, in which it was stated that "there can be no change in legal classification by holding two distinct offenses in the contest on the grounds of the discrimination of some of the material acts that make up the offense, in the

[13]See I.C.C.J., criminal section, judgmentno. 2647/2012 *(*www.scj.ro*).*

[14]See I.C.C.J., criminal section, judgmentno. 460/2014, apud G. Bodoroncea et all., *Codul penal. Comentariu pe articole,* 2rd edition, C.H. Beck, 2016, p. 114.

circumstances in which during the judicial investigation there were no elements that would remove the legal unity of the offense detained by the defendant. In such a situation, *the unity of the offense requires a single solution*, the restriction of the interactional activity due to the legislative changes, and not the changes, during the judicial investigation, regarding the elements that characterize the factual situation".

Conclusions

Therefore, the court will enforce the effects of substantive law provided by art. 396 para. (10) NCCP on the continued offense of abuse in the service consisting of the execution of 10 acts of execution. Disclosures on the application of the abbreviated procedure will exist especially if the defendant acknowledges the act as described in the indictment, but does not recognize the damage, in other words, does not recognize the civil action initiated in the criminal proceedings.

Considering that the determination of the damage is usually more than a term of judgment, and it is often disposed of the expertise, the dissolution of the civil action becomes obligatory, the defendant being unable to use in this case the legal attenuating circumstances provided by the art. 75 para 1 letter d C.C.

There is also the possibility of rejecting the abbreviated procedure, carrying out expertise, and eventually applying the effects of the special procedure, as the factual situation resulting from the judicial investigation is the same as that described in the indictment.

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4. Law no. 135/2010 (Romanian Criminal Procedure Code).

SERVICES OF GENERAL INTEREST – BRIEF ANALYSIS OF THE EUROPEAN LEGISLATION

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Abstract: *At the level of the European Union there is and there has been a continuous preoccupation regarding the insurance of different services of general interest to allow the sustainable development of each community. Though the Treaty on the Functioning of the European Union does not define these services, the EU practice has stated that the area of the services of general interest covers any service with or without economic feature by which an objective of general interest it is being guaranteed. Starting from this purpose, Protocol No 26 has stated that these services must provide a high level of quality, safety and accessibility, their establishment remaining at the decision of the national or regional authorities. The current study aims a brief analysis of the legal provisions stating the services of general interest in the European Union.*

Keywords: *services of general interest, economic services, social services, European Union, national and regional authorities, legislation*

1. Introduction

Services of general interest have a major role within the European Union Member States, their purpose being that of contributing in the prosperity and well-being of the citizens.

The establishment of new opportunities for consumers and undertakings, the encouragement of modernization, the insurance of benefits improving daily life for citizens are just a part of the arguments for which the European Union has encouraged and still encourages the development of the services of general interest.

Well known in literature as public services, the European Union has used the term of services of general interest, the wording public services being considered by the Green Charter of the European Union on 2003[1]as being “imprecise”. The services of general interest have not been defined as such in the European legislation, thus aiming to insure the necessary flexibility for the provision of such services. Nevertheless, we note different mentions regarding the services of general interest in the Lisbon Treaty – Art 14 of the TFEU[2], Protocol No 26 on the TFEU[3] and Art 36 of the Charter on the Fundamental Rights of the European Union[4].

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[1] Green Paper on services of general interest of 21 May 2003 COM(2003) 270 final, published in the OJEU C 76/ 25 March 2004

[2] Treaty on the Functioning of the European Union, published in the OJEU C 326/47 of 26 October 2012

[3] Protocol No 26, published in the OJEU 115/9 May 2005

[4] Charter of Fundamental Rights of the European Union, published in the OJEU 2012/C/326/02

Thus, Art 14 of the TFEU states that "without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services".

Art 36 of the Charter on Fundamental Rights of the European Union states that "The Union recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union".

Starting from these elements, the European Commission has defined the services of general interests as being the services that the public authorities of Member States considers as being of general interest and therefore, represent the object of certain obligations specific to public services[5].

The principles governing the functioning of services of general interest are being stated by Protocol No 26 which in Art 1 states that "The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights".

Related to the legal provisions above mentioned, it clearly results that even though the European Union may legislate in the area of the services of general interest, the organization, provision and financing of such services belongs first of all to the Member States through the national, regional or local authorities[6]. Also, the European Union has established the common standards for quality in this area so that all citizens could enjoy the same quality of the services. In the same meaning, the White Paper on

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Quality Framework for Services of General Interest in Europe" COM(2011) 900 final, 20 December 2011, p.2

[6] European Parliament Resolution of 5 July 2011 on the future of social services of general interest (2009/2222(INI)), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0239+0+DOC+XML+V0//EN visited on 25 April 2018

services of general interest[7] states a series of principle to be complied with by the national authorities, namely:

- Enabling public authorities to operate close to the citizens
- Achieving public service objectives within competitive open markets
- Ensuring cohesion and universal access
- Maintaining a high level of quality, security and safety
- Ensuring consumer and user rights
- Monitoring and evaluating the performance
- Respecting diversity of services and situations
- Increasing transparency
- Providing legal certainty

The performance of the services of general interest can be made either by individuals or by the public authorities, but the definition of the attributions and obligations remains in the sole task of the state, which would have to define the clear and transparent framework for the selection of the undertakings entrusted with a service of general interest.

2. The classification of the services of general interest

Regarding the classification of the services of general interest, at the European level, it has been stated that these are divided into 2 categories, namely:

1. Services of general economic interest
2. Social services of general interest

Services of general economic interest (SGEI) are defined as being "the economic activities generating results for the general public use that the market would not supply (or would supply under different conditions regarding the quality, safety, accessibility, equal treatment or universal access) if there were no public intervention. The public service obligations refer to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met, for instance, in the matter of air, rail and road transport and energy"[8]. The area of the services of general economic interest has also represented the object of certain cases solved by the Court of Justice of the European Union. In this meaning, the Court has stated that the SGEI have particular features in comparison with other economic activities[9]. In the Court's jurisprudence it is mentioned that "the Member States

[7] White Paper on services of general interest is available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l23013b&from=RO visited on 25 April 2018

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Quality Framework for Services of General Interest in Europe" COM(2011) 900 final, 20 December 2011, p.3

[9] Case C-179/90, *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA*, Rec., 1991, p I-5889, Point 27; Case C-242/95, *GT-Link A/S v De Danske Statsbaner*, Rec., 1997, p I-4449, Point 53 and Case C-266/96, Corsica Ferries France SA v Gruppo Antichi Ormeggiatori del Porto di Genova Coop, arl, Gruppo Ormeggiatori del Golfo di La Spezia Coop, arl and Ministero dei Trasporti e della Navigazione, Rec., 1998, p I-3949, Point 45.

through their national, regional or local authorities, depending on the repartition of the competences between them based on the national legislation, shall enjoy a significant margin of appreciation regarding the definition of what is considered as services of general economic interest"[10].

Related to all the above aspects mentioned by the Court's jurisprudence, the Commission[11] has provided other supplementary criteria for delimitation, such as:

- The distinction between economic and non-economic activities under State aid rules and the qualification of certain entities as undertakings;
- The limits Member States have under State aid rules when defining an economic activity as an SGEI;
- The conditions under which compensation for certain SGEI provided at local level affects trade between Member States, thereby falling within the scope of State aid rules;
- The requirements which public authorities have to follow under State aid rules when they entrust an undertaking with the performance of an SGEI;
- The conditions under which compensation for SGEI does not involve State aid because the tender selects the provider at the least cost for the community or because the price charged is in line with that of an efficient and "well-run" undertaking;
- How to increase convergence between the application of State aid and public procurement rules;
- The interplay between the rules of the Package and other sector specific SGEI rules.

As it can be seen, the criteria for classification take into consideration the principles of proportionality and subsidiary, as well as the culture and tradition of the Member States regarding the degree of their public intervention. Nevertheless, the Commission, and especially the Court, has established means to control this freedom of the Member States in relation to the definition of the SGEI[12].

Currently, the area of SGEI varies from commercial services of great amplitude such as postal services, electric energy, electronic communication or public transportation, the activity for employment supplied by the public agencies for employment to a wide area of health and social services.

[10] Joined cases C-180/98 and C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, Rec., 2000, p I-6451, Point 118; Case C-218/00, Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), Rec., 2002, p I-3949, Point 37 and Case C-355/00, *Freskot AE v Elliniko Dimosio*, Rec., 2003, p I-5263.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Reform of the EU State Aid Rules on Services of General Economic Interest", COM(2011) 146 final of 23 March 2011

[12] Case T-17/02, *Fred Olsen, SA v Commission of the European Communities*, Rec., 2005, p II-2031, Point 216; Case T-289/03, British United Provident Association Ltd (BUPA) and Others v Commission of the European Communities, Rec., 2008, p II-81, Points 165 and next.

Starting from their activity, it must be mentioned that not all SGEI are covered by the EU regulations in the area of competition and state aid, but only those with economic feature[13].

Regarding the non-economic activities, these are classified in:

- Activities linked to the exercise of State prerogatives by the state or by the authorities acting within the limits of their competences as public authorities[14];
- Certain activities of pure social nature, such as the management, under the State's control, of compulsory social security schemes, the provision of child care services and public education financed from the public budget.

The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the Communication on the "A single market for 21st century Europe" – Services of general interest, including social services of general interest: a new European commitment, has stated as "Non-economic services: these services, for instance traditional state prerogatives such as police, justice and statutory social security schemes are not subject to specific EU legislation, nor are they covered by the internal market and competition rules of the Treaty. Some aspects of the organisation of these services may be subject to other rules of the Treaty, such as the principle of non-discrimination"[15].

By concluding, we can state in relation to the criteria for delimitation above analyzed that the economic or non-economic feature of a service is not given by the area in which it operates nor by the statute of the undertaking supplying it (for instance, if an organ is a public undertaking or not, of public or private law, an association of undertakings or part of the state administration) or by its financing, the economic or non-economic feature being determined by the nature of the activity.

The second category of services of general interest is represented by the *social services of general interest (SSGI)*. These have been established as response to the EU need to develop a modern social economy which shall have a substantial contribution to the growth of employment, of the buying power and not least of the economic activity.

SSGI are being defined as the services including the social security systems which cover the main life risks and a series of essential services provided directly to population, having a preventive role of social cohesion.

In their turn, the SSGI are classified into:

- Services represented by the compulsory and complementary social security systems. These are being organized in different forms, namely as organizations

[13] Art 106 Para 2 of the TFEU states that "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

[14] Case C-118/85, *Commission of the European Communities v Italian Republic*, Rec., 1987, Points 7-8

[15] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the Communication on "A single market for 21st century Europe" – Services of general interest, including social services of general interest: a new European commitment, COM(2007) 724 final

with mutual feature or occupational covering the main life risks, such as the risks generated by a disease, age, occupational accidents, unemployment, retirement or handicap;

- Other services supplied directly to the beneficiary, gathering services such as the social assistance, employment and professional training, social houses or long-term care.

Unlike the economic services, the SSGI must be organized in order to answer certain vital requirements, all the more so as they address people who are in a situation of vulnerability. In this context, it is considered that this type of services is an integrated one regarding its organization and functioning, but in the same time the service must also be personalized, because it addresses a large area of users. Social services are being characterized by a wide autonomy, because they must answer both to the variety, and especially to the evolving feature of the social requirements. Also, these services are based on the principle of solidarity and depend to a large extent of public financing in order to ensure the equal access, regardless of the material situation of the beneficiary[16].

3. Conclusions

For the past decades, the social evolution has determined a significant modification both related to the demand of services of general interest, as well as of the means in which these are supplied. This modification of paradigm has also determined an alteration of the means in which the processes for regulation are being approached, in the meaning that the services which the state traditionally directly supplied, currently are being externalized by the national, regional or local authorities being supplied by the private sector.

The services of general interest refer to a wide area of activities starting with those characteristic for the great industrial branches, such as energy, telecommunications, transport, media transmissions and postal services, continuing with those from education, water distribution, waste management, medical and social services. All these services are being of extreme importance for daily life of the citizens and undertakings and reflect the European society. Also, these services have a major role in the insurance of social, economic and territorial cohesion in the Union, being vital for its durable development.

Nevertheless, the area of application and organization of the services is different on the tradition and policy for intervention of each State, the establishment of the nature and area of application of each service of general interest shall fall under the responsibility of public authorities, at the level of specific competence. In this meaning, the European Union has allowed public authorities to decide on the organization and

[16] See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the Communication on "A single market for 21st century Europe" – Services of general interest, including social services of general interest: a new European commitment, COM(2007) 724 final

performance of these activities on their own or when to entrust them to other entities, which can be of public or private law.

The White Paper underlines the importance of the services of general interest as pillar of the European model of society and the need to guarantee the provision of affordable and quality services of general interest for all citizens and undertakings in the European Union.

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POLITICAL LIABILITY OF THE PRESIDENT IN A DEMOCRACY

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Abstract: *The notion of political liability is frequently used in the constitutional law, especially taking into consideration the Government's liability in front of the Parliament. However, the notion cannot be reduced only to this meaning, because the President also answers politically for his acts: either in front of the electoral body or in front of the legislative assembly, depending on the political regime in a state. In fact, even the English term of "impeachment", originally related to the prosecution of ministers, evokes nowadays the responsibility of the head of state in a republican system. The immunity of the President is neither total nor absolute. His activity must be circumscribed to the framework established by the constituent power, the violation of constitutional provisions regarding his competences or the emergence of conflicting states between the public authorities determining the arbitration of the electoral body or the intervention of the mechanisms of checks and balances, characterizing the principle of the separation and balance of powers in the state. By political liability, it must be understood the legal mechanism that involves the President's obligation to respond to the holders of national sovereignty, the people or its representatives, for his acts following a procedure defined by the Constitution. Finally, the assumption of the President's liability gives them an opportunity to assess whether his conduct in the performance of his duties is compatible with the continuation of his mandate. In the event of a negative answer, his sanction is the dismissal.*

Keywords: *president, constitution, liability, suspension, dismissal.*

1. Political liability, a *sui generis* concept

"Political liability" is a notion commonly used in constitutional law, but on which some uncertainty raises when it comes to defining it.

According to some authors, political liability means, in a very broadly sense, the loss of power[1] or it identifies itself with the idea of revocation[2]. Then, very often, many studies concentrated on political liability are limited to explaining its implementation techniques that are considered sufficient to define this institution.

Most of the time, the definition of political liability is primarily about the Government's liability to Parliament. Nevertheless, we appreciate that the notion cannot be reduced to this meaning since the President, too, can politically answer for his deeds either in front of the electoral body, or in front of the legislative assembly, depending on the political regime in a state.

However, an explanation of the prevalence of the Government's political liability may be found in the fact that the assumption of the liability of the President of a

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[1] Jean Gicquel, *Droit constitutionnel et institutions politiques*, Montchrestien, 1994, p. 124.

[2] Philippe Ségur, *Qu'est-ce que la responsabilité politique?*, Revue du Droit Public no. 6/1999, p. 1599.

Republic has its origin in the similar institution of British constitutional law concerning ministers. Even the English term of "*impeachment*" appeared related to the indictment of ministers and not of the President of republic. Only later, once with the adoption of the written constitutions[3], the notion of *impeachment* is, as a rule, used to evoke the liability of the head of state in a republican system, and in order to evoke the institution of ministerial responsibility, the term of ministerial liability was imposed.

Regarding political liability, it is unanimously admitted that it occurs irrespective of the committing of a guilty act, in a legal sense, by the governors. It is also impossible to characterize political liability through the guilt – sanction tandem, as is the case with liability in general. In this case, the sanction, politically imposed by political bodies and for political reasons, will therefore be a political sanction. Thus, this type of liability has a special legal regime that involves specific procedures, different from the forms of legal, civil, criminal or administrative liability. Regarding specific procedures, they are usually governed by constitutions and refer to the voting procedure. The sanction is also specific, consisting in loss of power or, more specifically, in dismissal.

So, by engaging the political liability, we understand a legal mechanism that involves the Head of State's obligation to respond in front of the national sovereignty, the people, or its representatives, for his acts after a procedure defined by the Constitution. Finally, the assumption of liability of the Head of State gives the possibility for the owners of national sovereignty to assess whether his conduct in the performance of his duties is compatible with the continuation of his mandate, by applying either a "positive sanction", the reaffirmation of trust, or a "negative sanction", respectively the loss of power.

2. Regulation of political liability of the President of Romania

According to article 95 of the Romanian Constitution: "In case of having committed grave acts infringing upon constitutional provisions, the President of Romania may be suspended from office by the Chamber of Deputies and the Senate, in joint sitting, by a majority vote of Deputies and Senators... If the proposal for suspension of office has been approved, within a maximum of 30 days, a referendum is held for the dismissal of the President".

[3] The Constitution of the United States of America, the first written constitution, extended the institution of impeachment from ministers to the head of the executive - the president of the republic, becoming famous the text after which the president can be sued by the Senate. However, the procedure was used only twice: in 1868, Andrew Johnson, who became president after the murder of Abraham Lincoln in 1865, was indicted by the House of Representatives. The Senate failed by a single vote to reach a two-thirds majority in order to decide the guilty and consequently the dismissal; in 1974, President Richard Nixon resigned so as to avoid an imminent indictment and dismissal by Congress, because it became obvious that he had seriously violated the Constitution in the Watergate affair; finally, in 1998, President Bill Clinton was indicted for two offenses: perjury before a federal jury and obstruction of justice in the Lewinsky affair. The vote in the House of Representatives was a partisan one 221-212, the Republicans voting for, and the Democrats against. Bill Clinton was tried by the Senate, chaired by the President of the Supreme Court, but he was acquitted, because none of the two counts met the 67 needed votes (out of the 100 votes).

Apparently, article 95 of the Constitution of Romania refers to a distinct institution as essence of the institution of liability, namely the suspension of office. However, in reality, this article governs precisely the political liability of the President of the Republic, because it establishes not only the sanction of suspension, but also the sanction of the dismissal of the President by referendum.

Thus, from the interpretation of the text of article 95, it follows that the political liability of the President of Romania comprises two distinct phases: the suspension from office and the consultation of the people through a referendum on dismissal.

It can be noticed that suspension of office is not itself a form of political liability, but a pre-requisite and mandatory procedure for the possible sanction of the President, as he does not politically answer to Parliament, but to the electoral body. Suspension from office is only a precursor step and absolutely indispensable to engaging the political liability of the President of Romania. Without covering this stage, in which Parliament, the supreme representative body of the Romanian people, plays the main role, it would not be possible to consult the will of the national sovereignty, the Romanian people.

Due to this circumstance, the dismissal of the President of Romania appears as a possible consequence of his suspension by the Romanian Parliament, in case of serious acts of violation of the Constitution.

Thus, the text of article 95 of the Constitution conditions the assumption of liability of the head of state on the fulfilment of certain requirements of substance and form[4]. The substantive condition refers to the existence of sound reasons for the commencement of the proceedings, namely the execution by the President of grave acts in violation of the provisions of the Constitution. Formal conditions concern the observance of the suspension stages and, where appropriate, the holding of the referendum on the dismissal of the President.

3. Grounds for suspension

The text of paragraph 2 of article 95 of the Romanian Constitution stipulates that the Parliament may suspend the President of Romania if he has committed grave acts infringing the provisions of the Constitution.

Grave acts infringing upon constitutional provisions may be considered those acts of the Romanian President that would harm the Romanian state: conclusion of treaties meant to ruin the sovereignty, integrity, unity and independence of the state; flagrant violation of citizens' rights and freedoms; attempts to change the political regime by the use of force or in violation of constitutional provisions; issuance of presidential decrees in areas other than those in his competence; refusal to promulgate the laws; abusive recourse to exceptional measures. Generally, there can be noticed acts leading to the creation of serious institutional blockages, either by the performance of an act

[4] Ion Deleanu, *Instituții şi proceduri constituționale în dreptul român şi în dreptul comparat*, Editura C.H. Beck, 2006, p. 729.

contrary to constitutional provisions, or the failure to fulfil an attribution of fundamental law in his exclusive competence.

Per a contrario, the President of Romania cannot be charged with the exercise of an active role in the political and social life of the country[5], because his role cannot be summed up to a symbolic and protocol exercise of the office, given his constitutional prerogatives and democratic legitimacy conferred through his election by the electorate of the whole country. The functions of warranty and wakefulness enshrined in article 80 of the Constitution[6] imply, by definition, careful observation of the existence and functioning of the state, vigilant surveillance of the way in which the actors of political life act – public authorities, organizations that are legitimated by the Constitution, civil society – and observance of the principles, the norms established by the Constitution, the defence of the values enshrined in the Basic Law.

The comparative law shows that the constitutional gaps and imprecisions related to the reasons triggering the President's liability are not specific only to the Romanian constitutional system. For example, in France, the text of article 68 of the Basic Law, which regulates the political liability of the President of the Republic, does not excel in clarity, the meaning of the phrase "breach of duties in a manner that obviously makes him incompatible with the exercise of the mandate" being quite imprecise. In the French doctrine, it is appreciated that this wording tends to wipe out the distinction between detachable and non-detachable acts of presidential office, since the attempt to the dignity of the highest magistracy may result both from private behaviour (outside the exercise of the presidential function) and from a public behaviour (in the exercise of the presidential function) of the head of state. Thus, in view of the circumstances likely to trigger the dismissal procedure, there were mentioned, on the one hand, the murder or other serious crimes, and on the other hand, the abuse of presidential prerogatives having as consequence institutional blockages (denial of the promulgation of laws, refusal to convene the Council of Ministers and the signing of deliberate decrees within it, refusal to ratify the Treaties, abusive recourse to exceptional measures under article 16 of the Constitution of France).

In Italy, by "assault on the Constitution", a phrase similar to "serious violation of the Constitution", means a change to the fundamental law of the state or of the form of government without respecting the constitutional provisions. In Greece, the "deliberate violations of constitutional norms" by the head of state include in their sphere any inappropriate conduct in relation to the rules laid down by the fundamental law.

In Lithuania, a state in which the political liability procedure of the head of state was terminated by his dismissal, by "serious violations of the Constitution" it is also meant the disclosure of state secrets, the unlawful granting of citizenship of the state, and the use of official quality in order to influence the decisions of the management of a private company in order to obtain material advantages.

[5] Consultative Opinion of the Constitutional Court No. 1 of April 5, 2007, on the proposal to suspend the President of Romania, Mr. Traian Băsescu.

[6] According to article 80, The President of Romania shall represent the Romanian State and is the safeguard of the national independence, unity and territorial integrity of the country, having the role of ensuring the observance of the Constitution and the proper functioning of the public authorities.

4. Suspension procedure of the President of Romania

The initiative on the President's suspension of office may only belong to legally qualified subjects. They are parliamentarians – senators and deputies – and it is required a minimum number of at least one third of their total number to initiate the procedure.

The initiative of the parliamentarians must be brought to the attention of the President of Romania. According to article 66 of the Regulation of the Joint Sittings of the two Chambers of Parliament, the proposal for suspension of office shall be submitted simultaneously to the Standing Bureaux of the Chambers. The Standing Bureaux, under the signatures of their chairmen, shall communicate this proposal without delay to the President of Romania, specifying the date and place of the joint meeting.

Following the initiation of the procedure, the proposal for suspension must be presented in public sitting of the two Chambers reunified, the President of Romania having the opportunity to be present to explain the accusations brought to him.

Upon presenting the request for suspension, the chairman of the joint sitting of the two Chambers consults senators and deputies on the sufficiency or insufficiency of information regarding the conduct of the President's suspension procedure, and the consultation is by vote. If the parliamentarians consider that there is insufficient information regarding the suspension, they may decide, by voting, the establishment of an inquiry committee for the investigation of the serious acts of violation of the Constitution by the President of Romania, according to the provisions of article 67 and article 68 corroborated with article 70 of the Regulation of the Joint Sittings of the Chamber of Deputies and the Senate[7].

The reasoning of the Constitutional Court underlines the fact that the Parliament may set up committees for the exercise of any attribution provided for by the Constitution under its competence, and article 95 of the Constitution, which stipulates the attribution of the two Chambers of Parliament to suspend the President of Romania, does not prohibit the establishment of an inquiry committee for the exercise of this attribution. At the same time, according to the final thesis of article 95 of the Constitution, the President of Romania may give explanations regarding the facts imputed to him, which also presuppose the carrying out of investigations through a committee of inquiry. Otherwise, imputed facts would be investigated by those who propose suspension, which is worse than setting up a commission for that purpose. Moreover, the suspension from office of the President of Romania, whose legitimacy

[7] On the occasion of the proposal to suspend President Traian Băsescu from office in 2007, such an inquiry commission was set up; instead, in 2012, deputies and senators considered that there were sufficient evidence to prosecute the President, so they rejected by vote the creation of such a committee.

results from the vote of the electorate, is a very serious measure, having a sanctioning character, so that the seriousness of the facts must be proved and established[8].

If the parliamentarians consider that there is sufficient information regarding the suspension, the suspension proposal, together with the relevant evidence, shall be submitted to the Constitutional Court for an opinion on the initiative to suspend the head of state, mentioning also the period within which the Constitutional Court must rule[9].

In exercising this competence provided for in article 146 letter h) in conjunction with article 95 paragraph 1 of the Constitution, namely the analysis of the commission of serious acts by which the President violates the provisions of the Constitution and renders a solution on these matters, the Constitutional Court assumes the role of guarantor of the supremacy of the Constitution.

The opinion of the Constitutional Court in the procedure provided by article 95 is an advisory one, as provided by article 146 letter h) of the Constitution: mandatory to ask, but not mandatory to be followed, meaning that its content does not oblige the body called upon to decide on the suspension[10]. The opinion does not in itself produce any direct legal effect, but it expresses the position of the Constitutional Court regarding the proposal to suspend the President of Romania. Of course, indirectly, this consultative opinion provides a "benchmark" for Parliament, or, more precisely, as demonstrated by practice, it offers "arguments" to the political forces represented in the legislative forum to adopt a certain position, according to their own political interests.

On this occasion, the Constitutional Court can decide both on the fulfilment by the Parliament of the constitutional procedure of suspension of office of the President of Romania, and, especially, on the seriousness of the facts imputed to the President.

After obtaining the opinion of the Constitutional Court, whether positive or negative, the Parliament of Romania meets within 24 hours in a joint sitting to vote on the proposal for suspension.

Suspension shall be debated following the procedure established by the Regulations of the Joint Sittings of the Chamber of Deputies and the Senate. On the occasion of the debate on the initiative, Parliament invites the President to provide explanations of the facts imputed to him or, even on his own initiative the President may come to Parliament to provide such explanations. In both cases, Parliament is obliged to listen to the President's explanations, and may have a debate on this. The participation of the President of Romania in a parliamentary debate on his suspension of office is not compulsory, even if Parliament invites him to do so[11].

[8] Decision of the Constitutional Court no. 266 of March 21, 2007, *regarding the constitutionality of the provisions of article 67, article 68 and article 70 of the Regulation of the joint sittings of the Chamber of Deputies and the Senate*.

[9] Article 67 paragraph 2 of the Regulation of the joint sittings of the Chamber of Deputies and the Senate, published in the Official Gazette No. 34 of March 4, 1992.

[10] Ion Deleanu, *Instituții şi proceduri constituționale în dreptul român şi în dreptul comparat*, op.cit., p. 689.

[11] There is nothing stipulated regarding the fact that the President may not appear in front of the parliamentarians, but still present his point of view through a representative. From our point of view, in order to guarantee the fundamental right to defence, we believe that such a solution would be admissible.

The President of Romania shall be suspended by Parliament in the joint sitting of the two Chambers, in the presence of the majority of the parliamentarians (deputies and senators), if this proposal meets the vote of at least half plus one of the total number of parliamentarians. The vote is secret, with ball, and the result is recorded through a decision that will be transmitted within 48 hours to the President of Romania.

The Parliament's decision to suspend the President is published in the Official Gazette of Romania, Part I. It is also communicated to the Constitutional Court so that, on its basis, the Court may verify the observance of the constitutional proceedings of the President's suspension and eventually, in case of a positive vote, to ascertain the circumstances that justify the interim in the exercise of the position of President of Romania.

5. Liability to the electoral body

The constitutional text adopted the principle of legal symmetry in the matter of political liability of the President of Romania: the citizens are the ones who elect him by universal, equal, direct and freely expressed vote; they are also those who have the possibility of dismissal following the organization of the referendum. In such situation, we are in front of a popular dismissal of the head of state.

Thus, the justification of the procedure starts from the premise that the President of Romania was elected by the entire electoral body, within a constituency comprising the whole country, which is why he can be dismissed only by the electoral body so delimited[12]. The President's liability is in this case a political one, but not to Parliament, but to the electorate, because not the Parliament elects the President, but the people. Parliament only suspends the President from exercising the duties assigned to the job. The one who sanctions the President is the electorate, who has the possibility, through the referendum, to decide on his dismissal or on the keeping in office.

The referendum on the dismissal of the President must be held no later than 30 days after the approval of the proposal for suspension by the Parliament.

The object and date of the referendum on the dismissal of the President shall be determined by Parliament's decision. The conduct of the referendum is subject to the Law no. 3/2000 on the organization and conduct of the referendum[13], its provisions being completed by the provisions of the Law for the election of the Chamber of Deputies and the Senate.

The dismissal of the President of Romania is approved if it has obtained the majority of votes validly expressed at the level of the country of the citizens who participated in the referendum, according to article 10 of the Law no. 3/2000 on the organization and holding of the referendum, provided that it is respected the

[12] Mihai Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena Simina Tănăsescu, *Constituția României revizuită – comentarii şi explicații*, Editura All Beck, Bucureşti, 2004, p. 152.

[13] Law no. 3/2000, *on the organization and conduct of the referendum*, published in the Official Gazette No. 84 of 24 February 2000.

requirement stipulated in article 5 paragraph 2 of the same law on the participation of at least 30% of the citizens on the electoral roll, 25% of them having to vote.

The measure of dismissal of the President of Romania takes effect as of the date of publication in the Official Gazette of Romania, Part I, of the Constitutional Court's decision to validate the results of the referendum. Also from this date the vacancy of the position of President of Romania[14] will take place and the 3-months term for the Government to hold elections for a new President will start to run, according to article 97 paragraphs 1 and 2 of the Constitution.

6. Conclusions

The sanction imposed on the President as a result of the mechanism of liability covered by Article 95 of the Constitution is dismissal, not revocation, as stated in the doctrine[15]. The dismissal is the sanction imposed on the President as a result of his committing grave acts of violation of the Constitution, whereby he deviates from the mandate received from the citizens on the occasion of his election. The mechanism of liability provided for in article 95 of the Constitution cannot be triggered independently of the commission of grave acts of violation of the Constitution by the head of state, only because, for example, most citizens do not support him. Being a sanction specific to constitutional law, dismissal implies the existence of a guilty act, or a person who has performed his duties with the utmost exigency cannot be sanctioned even if he is no longer popular. In this respect, we consider that the constitutional legislator's intention, by regulating political liability under article 95 of the Constitution, was to give the people the opportunity to sanction the President who is guilty of committing grave acts by which he violated the Constitution and to simply withdraw the mandate given to him when he was elected. Such an unpopular President may be sanctioned at the next presidential election if he asks the electorate for a new mandate.

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[14] The vacancy of the position of President of Romania is also established by decision of the Constitutional Court at the request of the acting president who exercises the attributions of the President of Romania while he is suspended from office.

[15] Ana Maria Moraru, *Revocarea din funcție a Preşedintelui României, prin referendum*, Revista de Ştiințe Juridice nr. 1/2011, Editura Universul Juridic, Bucureşti, p. 163.

MIGRATION OF LABOR FORCE IN THE EUROPEAN COUNTRIES

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Abstract: *Due to the freedom of movement, citizens of EU Member States have the freedom to travel within the EU borders. Migration policies in the EU for non-EU citizens are increasingly targeting a particular profile of migrants, most often for all specific skills deficits. Selection is generally based on language, professional experience, education, and age. Alternatively, employers can recruit staff so that migrants already have a job on arrival (clear offer, possibly through recruitment agencies).In the context of the economic crisis and restrictive policies on labor migration from the destination countries, new "definitions" of migration are emerging in Romania as a public issue, especially in the media. Access to the European labor market, not the phenomenon of migration, becomes the issue that requires debate and a political and collective responsibility.*

Keywords: *labor migration, economic crisis, public issue*

I. Introduction

Migration is influenced by a combination of economic, political, social, and environmental factors: either in the origin country of a migrant, i.e. the impulse factors, either in the destination country, according to attraction factors). From a historical point of view, it is considered that the relative economic prosperity and political stability in the EU have exerted a considerable attraction effect on immigrants, especially non-Europeans.

For the destination countries, international migration is an instrument used to address labor market deficits. However, in many areas of the EU, there are population aging trends, which raises demographic and, above all, financial problems like payment of pensions.

Due to the freedom of movement, citizens of EU Member States have the freedom to travel within the EU borders. Migration policies in the EU for non-EU citizens are increasingly targeting a particular profile of migrants, most often for all specific skills deficits. Selection is generally based on language, professional experience, education, and age. Alternatively, employers can recruit staff so that migrants already have a job on arrival (clear offer, possibly through recruitment agencies).

In addition to policies encouraging recruitment, immigration policy often focuses on two areas: preventing clandestine migration and illegal employment of migrants without a work permit and promoting the integration of immigrants into society.

Significant resources have been mobilized to fight against the illegal trafficking and trafficking networks in the EU, yet the phenomenon continues and there is no talk of stopping it.

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With the accession of the former communist countries to the European Union and the liberalization of labor market access in 2014, labor migration is experiencing a wide-ranging phenomenon.

II. Migration- a social problem

In fact, migration becomes a social problem that transcends national borders and even is a social issue debated with a certain constant in the political and media spheres both in the countries of origin and in the countries of destination.[1] It is also a European issue, which is subject to policies and positions by the European institutions, hence debated simultaneous in the affected countries.

The economic crisis triggered in 2008 had many implications for emigration-related policies, given that the labor market is experiencing a mutation in various fields of activity, especially those recognized up to the point at the time of the crisis as being occupied in a large proportion to emigrants from Eastern and Central European countries. This is a major moment in the evolution of the migration phenomenon. The second is the liberalization of access to the European labor market for Romania and Bulgaria (January 1, 2014), although political positions were known some years before.

These two contexts intersect, with the economic crisis influencing, within the national public spheres, the character of debates and the formation of points of view regarding the measure of liberalization of access to the labor market and, accordingly, of the issue of migration.[2]

In the context of the economic crisis and restrictive policies on labor migration from the destination countries, new "definitions" of migration are emerging in Romania as a public issue, especially in the media. Access to the European labor market, not the phenomenon of migration, becomes the issue that requires debate and a political and collective responsibility.

Thus, the situation of migrants in the new context becomes significant for the status of Romania in the EU. Relevant in this respect are the statements of the Romanian authorities, which in turn receive messages from the European officials, in order to emphasize the contribution of the migrants to the economy of the destination countries.

The press and the political class introduce a certain principle of generality, namely that Romanians and Bulgarians should not be placed in a separate category in terms of access to the labor market, which would amount to a depreciation of their citizenship status European. By highlighting the position of the European institutions, the issue of access to the labor market is redefined in terms of European responsibility.

"The European Commission report shows that the effect of the liberalization of labor flows of Romanian and Bulgarian citizens is positive for the economies of the host Member States. Following its assessment, the European Commission stresses that

[1]C. Beciu, M. Lazăr, "The Migration of the Labor Force in the Context of the Economic Crisis. Media refinement of a public issue ". "Romanian Journal of Sociology", new series, XXV, no. 3-4, pp. 233-254, Bucharest, 2014

[2] C. Beciu, M. Lazăr*, op.cit.,* p. 235

restricting workers' freedom of movement is not the response to the high unemployment rate in Europe." said the MFA.[3]

Migration is influenced by a combination of economic, political, social and environmental factors: either in the country of origin of a migrant (impulse factors) or in the country of destination (attraction factors). From a historical point of view, it is considered that the relative economic prosperity and political stability in the EU have exerted a considerable attraction effect on immigrants.

In the countries of destination, international migration can be a tool used to address specific labor market deficits. However, it is almost certain that migration, considered individually, will fail to reverse the current aging trend of the population registered in many areas of the EU.

III. The migration phenomenon after 2015

In 2015, 4.7 million people immigrated to one of the EU-28 Member States and, according to reports[4], at least 2.8 million emigrants have left an EU Member State. (not including migratory flows to/from the EU as a whole, as they also include flows between the different EU Member States).

Of the 4.7 million immigrants registered in 2015, it is estimated that around 2.4 million were third-country nationals, 1.4 million were citizens of another EU Member State than the country of destination, about 860 000 were citizens of the EU Member State of destination (e.g. "returning home" or foreign-born nationals) and about 19 000 were stateless.

Germany reported the highest total number of immigrants (1 543 800) in 2015, followed by the United Kingdom (631 500), France (363 900), Spain (342 100) and Italy (280 100). Germany reported the largest number of emigrants in 2015 (347,200), followed by Spain (343,900), the United Kingdom (299,200), France (298,000), and Poland (258,800). In 2015, 17 of the EU Member States reported a higher share of immigration than emigration, but in Bulgaria, Ireland, Greece, Spain, Croatia, Cyprus, Poland, Portugal, Romania, Latvia and Lithuania, the number of emigrants exceeded the number immigrants.

In relation to the size of the resident population, Luxembourg recorded the highest immigration rates in 2015 (42 immigrants per 1 000 persons), followed by Malta (30 immigrants per 1 000 persons), Austria and Germany (both 19 immigrants to 1 000 people). The highest emigration rates in 2015 were reported for Luxembourg (22 migrants per 1,000 people), Cyprus (20 migrants per 1000 persons) and Malta (20 migrants to 1 000 people).

In 2015, the relative share of immigrant nationals, i.e. immigrants with EU citizenship of the destination country, was the highest in Romania (87% of all immigrants), Lithuania (83%), Hungary (56 %), Croatia (55%), Latvia (52%), Estonia (52%) and Portugal (50%). These were the only EU Member States reporting that the proportion of immigration of their own nationals was more than half of the total

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[3] http://stirileprotv.ro/stiri/social/marea-britanie-extinde-inca-doi-ani-restrictiile-demunca-pentru-cetatenii-români.html, 24 noiembrie 2011

[4] http://ec.europa.eu/eurostat/statistics

number of immigrants. In contrast, Luxembourg, Germany, and Austria reported relatively low proportions, as immigration of their own nationals did not represent more than 5-6% of the total number of immigrants in 2015.

The relative share of immigrants born in the country out of the total number of immigrants registered the highest figure in Lithuania (74% of all immigrants), followed by Romania (66%) and Poland (50%). In contrast, Italy, Spain, Luxembourg, Austria,and Germany reported relatively low proportions of immigrants born in the country, accounting for less than 10% of total immigrants in 2015.

The number of immigrants from third countries to the EU-28 was 2.7 million in 2015.

In 2015, the estimated number of immigrants from third countries to the EU-28 was 2.7 million. In addition, 1.9 million people who had previously resided in an EU Member State migrated to another Member State.

According to the previous residence, Luxembourg reported the largest share of immigrants from another EU member state (91% of the total number of immigrants in 2015), followed by Slovakia (80%) and Romania (71%). Relatively low proportions were reported by Italy (26% of all immigrants), as well as by Bulgaria, Slovenia and Sweden (each accounting for 28%).

Concerning gender distribution of immigrants from the EU Member States in 2015, there was a slight prevalence of men among women (56% versus 44%). The Member State reporting the largest proportion of male immigrants was Germany (63%); In contrast, the largest proportion of female immigrants was reported in Cyprus (57%). In 2015, immigrants from the EU Member States were, on average, much younger than the total population already resident in their destination country. On 1 January 2016, the average age of the EU-28 population was 42.6 years. In contrast, the average age of migrants in the EU-28 in 2015 was 27.5 years.

On 1 January 2016, 35.1 million people born outside the EU-28 lived in an EU Member State, while 19.3 million people were born in another EU Member State than the one in which they were residing. Only in Hungary, Ireland, Luxembourg, Slovakia and Cyprus, the number of people born in the other EU Member States was higher than the number of persons born outside the EU-28.

On 1 January 2016, the number of third-country nationals living in the EU-28 was 20.7 million, while the number of non-EU residents living in EU-28 was 35.1 million

The number of third-country nationals residing in an EU Member State was 20.7 million on 1 January 2016, representing 4.1% of the EU-28 population. In addition, on 1 January 2016, 16 million people living in one of the EU Member States were nationals of another EU Member State.

In absolute terms, the largest number of foreign nationals living in the EU Member States on 1 January 2016 was in Germany (8.7 million people), the United Kingdom (5.6 million), Italy (5.0 million), Spain (4.4 million) and France (4.4 million). Foreign nationals from these five Member States together accounted for 76% of the total number of foreign nationals living in all EU Member States, with the five Member States accounting for 63% of the EU-28 population together.

In relative terms, the EU Member State with the highest share of foreign nationals was Luxembourg, with the proportion of foreign nationals accounting for 47% of the total population. A high proportion of foreign nationals (at least 10% of the resident population) was also found in Cyprus, Estonia, Latvia, Austria, Ireland, Belgium, and Germany.

In most EU Member States, most foreign nationals were citizens of third countries; the opposite was true only for Belgium, Ireland, Cyprus, Luxembourg, Hungary, Malta, the Netherlands, Slovakia and the United Kingdom. For Latvia and Estonia, the proportion of third-country nationals is particularly high due to the high number of non-citizens recognized (mainly citizens of the former Soviet Union who have permanent residence in these countries but have not acquired any other citizenship).

In all EU Member States, with the exception of the Czech Republic, Estonia, Latvia, and Luxembourg, the number of persons born in a third country was higher than the number of third-country nationals.

The Romanian, Polish, Italian, Portuguese and British citizens represented the five main EU citizens who lived in the other EU Member States in 2016.

An analysis of the age structure of the population shows that for the EU-28 as a whole, the population of foreign citizens was younger than the national population. The age distribution of foreign citizens, compared to national citizens, indicates a higher proportion of relatively young, active-age adults. On 1 January 2016, the average age of the EU-28 national population was 44 years, while the average age of foreign nationals living in the EU was 36 years.

EU Citizenship offers new rights and opportunities. To move and live freely in the EU is the most closely related right to EU citizenship. Given modern technology and the fact that travel is easier today, free movement allows Europeans to expand their horizons across national borders, to leave their country for shorter or longer periods, to move between EU countries to work, to study for formative activities, to travel for business or pleasure or to shop across borders. Free movement has the potential to enhance social and cultural interactions within the EU and to create stronger links between EU citizens. In addition, it can generate mutual economic benefits for businesses and consumers, including those who stay at home, as internal barriers are constantly being eliminated.

The country with the highest economic level, Germany, is facing a shortage of skilled labor, so it needs a law regulating migration to encourage the arrival of skilled workers in sectors marked by this deficit.

Although more than one million non-European migrants have arrived in Germany in recent years, they have not covered the labor shortages, many of them lacking the required qualifications or the ability to integrate.[5] The number of vacancies in Germany reached a record high in the first quarter of 2018.[6] In the first three months of this year, there were 1.19 million unoccupied jobs at the national level - the highest level since Germany's reunification in 1990. German companies of all sizes are looking for labor, but the highest demand is for small firms with up to nine employees.

Most job vacancies in Germany - 327,000 - are for consultants, tax advisers, architects, market researchers, advertising specialists and IT experts, while in industry,

[5]Directive 2009/50 / EC on the entry of highly qualified migrants is also the legal basis from which these professionals are looking for.
[6]According to a report released by the Labor Force Research Institute (IAB) on June 1, 2018

the traditional economy of the economy, there are 163,000 unoccupied positions, (according to IAB).

To meet staff shortages, employers offer various subsidies, including higher wage increases than inflation rates, flexible working conditions.

German companies have also begun training programs for citizens from other European countries where youth unemployment is high, including Hungary, Romania, Bulgaria, and Spain.

The unemployment rate, which measures the proportion of people without work relative to the working-age population, remained at 5.3% in April 2018. It is the lowest level since the reunification of Germany in 1990.

IV. Romania and migration

The evolution of labor is worrying in Romania, we are the country that lost the largest active population in peacetime after Syria. Over 4 million Romanians have left the country in recent years, and this is primarily in the economy.

On 1 January 2017, the resident population in Romania numbered 19.638 million people. Previously, on January 1, 2016, the resident population was 19.76 million people.[7] The decline in 2016 is higher than in 2015 when the resident population in Romania declined by 110,700.

The number of inhabitants decreased in 2016 by 68,061 only because of the demographic decline, i.e. the difference between the number of deaths and the number of births.

Unlike in 2015, when the demographic decline was the most important cause of population decline, the situation reversed in 2016, with emigration being the main factor.

"Romania continues to be a country of emigration, the emigration phenomenon being the second biggest cause of the country's population decline. The balance of international migration in 2016 was negative, with the number of emigrants exceeding the number of immigrants with over 76,000 people" INS.

The phenomenon accelerated to 2015 when the migration balance was around -58,000.

According to INS series, during 2016, in Romania, 133,248 residents of other states, considered immigrants to Romania, moved to Romania, while 209,456 emigrants - moved their residence to other states.

On 1 January 2017, Romania had 10,528 million inhabitants in cities, accounting for 53.6% of the total population - down 53.8% a year ago.

In the last year, the aging population of Romania continued.

Romania has become a highly skilled labor force exporter[8]: 15,700 Romanian doctors, 15,000 Romanian researchers, and many IT workers are working abroad.

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[7]According to reports published by NIS.

[8]The study "The Emigration of theHighlyQualifiedWorkforce in Romania - An Analysis of the R & D, Medicine and Information andCommunication Technologies", conductedbythe Romanian Association for HealthPromotion, withintheproject EMINET –An active organizations` networkdevelopment in thefieldmigration.

Romania is among the countries exporting high-skilled labor, especially in the fields of research, medicine and information technology. 15,700 Romanian doctors, 15,000 Romanian researchers, and many IT workers work abroad.

The main reason for the decision to emigrate the specialists from the three areas mentioned is not the small income. The most often cited by the specialists were: corruption, lack of professional development opportunities, career advancement on professional merits, bureaucracy in public institutions, low incomes and lack of infrastructure / technical equipment.

Emigration is the pendulum movement of the population between the country of origin (residence) and the place of work (the country of reception). In this case, the country of origin is characterized by a lower degree of economic development, a high share of the youth and, in general, the working population in the total population, high birth rates, the lack of possibilities for national use of force available labor, the absence of investments in some economic sectors. At the same time, the country of origin, from which the labor force leaves, is called a country of emigration.

Emigration is very selective in terms of age, marital status, gender, education level, etc. As adults migrate almost permanently, elders and children migrate less frequently. Studies show that men migrate to a higher proportion than women, and when dealing with family migrants, there are clearly balanced movements of children, elders, and women.

The selective nature of international labor migration results in differences in the composition of the population from where they migrate and the populations of the countries where they are migrating. Especially young people emigrate, and among them, tendencies to emigrate stronger can be found amongst single-person singles with a certain qualification in different professions. The share of women in migration is growing very sensitively as a result of family reunification and, which is relatively new, the development of female activism.

V. Conclusions

The causes of international labor migration are either under economic conditions in that country or under general conditions of a political, religious, cultural, ideological, national, geographical or other nature.

In the particularly complex context of today's labor migration, we can observe two new phenomena: the extremely rapid migration of highly qualified specialists from both developed and developing countries as a result of unemployment, political persecution, religious beliefs or the effects of contemporary technical progress on the human factor; and the expansion of clandestine migration.

The international migration of highly skilled labor - the current feature of labor migration, known as the "brain drain"[9] - clearly evokes a loss of intellectual capital for countries of origin. This phenomenon is not new for recipient countries, developed countries. Specifically, for developed countries is a large number of this category of immigrants.

[9] anemigrationphenomenonbyattractingspecialistsfromdevelopingcountriestothedevelopedones

From the third world countries, where relative overcapacity has much larger dimensions, this exodus is heading for developed countries and capital-developing countries.

Emigration can occur even among people who have a job in the country, with the main economic cause of emigration being the differences in national salary levels. The realities of the contemporary world show that the differences between national average salaries are reflected in real gaps. The low level of wages in developing countries causes part of the workers to emigrate to developed countries where wages are lower than the average wage of domestic workers but higher than those of their homeland. This allows economically developed countries to attract, as a magnet, workers from countries with low working and living conditions (according to Eurostat).

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INCONSISTENCES AND MISUNDERSTANDINGS IN THE APPLICATION OF THE LOCAL PUBLIC ADMINISTRATION LAW

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Abstract: *The present study highlights inconsistences and misunderstanding in legislative issues in the public administration field, starting from the ambiguous and unconstitutional qualifications of some public authorities / offices, and then emphasizing the practical consequences in assessing certain situations, to the ambiguities regarding the legal force of prior agreements, by analyzing the legal status of the office of secretary of the territorial administrative unit and finalizing with the highlighting of some legal deviations and the unconstitutional lack of legal responsibility of the most important functions of the public administration.*
Keywords: *local public administration law, anomalies, legislative misconceptions, unconstitutional qualifications*

Introduction

In applying the laws on local public administration, there are often inconsistent legislative, ambiguous, or even impossibility of proper application of the law in the organization and functioning of these public authorities. If in the case of public authorities at the level of communes, cities or municipalities, of course, conception and precision in the regulation and delimitation of the juridical physiognomy between the executive and the deliberative not the same thing happens at the level of the counties. It is precisely these legislative irregularities that we want to reveal in this study. From the many regulations, we will consider in this approach four situations on which we will analyze them.

1. The official situation of the county council president

If we analyze successively several articles of Law no.215 / 2001 and we correlate them with the constitutional texts, we will observe the anomalies and mistakes that lead, in the process of law enforcement, to incoherent practices and to approximate interpretations of the law, which greatly weakens the functioning of the administration article (1) of Law no. 215/2001, the president of the county council is qualified as "executive authority".

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In the same law, another article, namely Article 108 (1) expressly mentions that “he maintains his capacity as county councilor” together with vice-presidents.

According to art. 101 of the Law no. 215/2001, he is elected and dismissed from the position of the county council, and in his capacity as chairman of the county council, convenes the county council in ordinary sessions, sets the agenda of these sessions, leads the county council sessions, votes the decisions debated on the agenda of the county council, signs his decisions, directs the specialized apparatus of the county council, etc.

What do we observe from the insistence of these texts? We observe that an executive authority leads a deliberative authority, but is part of the deliberative authority as a county councilor. It is both executive authority and part of a deliberative authority. On the other hand, it is cleared and released by deliberate authority even if it is executive authority!

By reading Articles 121 and 122 of the Constitution, we observe constitutional qualifications, namely, local councils as deliberative authorities and mayors as executive authorities elected distinctively and directly, and at the county level only one authority, namely the county council as deliberative authority. The constitution does not mention the president as the executive authority chosen by the county council.

The unconstitutionality of art.1 (1) letter e) of the Law no. 215/2001 leads to very complicated and unexplained situations in the aforementioned organic law. If the president were to be the president of the county, as a distinct executive authority just as the mayor of the territorial administrative unit as a distinct authority from the local council, then we would have had a constitutional and legal logic without cracks, but in this context the anomaly we have raised creates, consequently, heterogeneous situations in practice and very difficult to match. Thus, the question arises: what happens in the case of revocation from the position of president of the county council by the party that sustained it in this case according to.art.15 (1) letter.g ^ 1 of the Law no.393 / 2004?

In this situation, the president preserves the capacity of county councilor, but ceases to hold the position of president of the county council. Law no. 393/2004 and 215/2001 offer some solutions but many of these are in our opinion questionable. Thus, reading art.108 2) of Law no. 215/2001 become applicable, in this case, the provisions of art.69-71 of the same law [with reference to the mayor’s resignation, etc.].

Article 69 (3) states that the prefect issues an order notifying the resignation of the mayor [to be understood in our case, the president of the county council]. This text is similar to that stipulated by art.16 of the Law no.393 / 2001. The president’s duty is to announce in writing the county council and the prefect of this intention.

What happens if the president of the county council does not announce the prefect, but only the county council of his resignation? If, from the point of view of the county council, ”at the first meeting of the council, the chairman of the meeting takes note of this situation, which is recorded in the minutes “the obligation is fulfilled but the question is asked, still, is there a need for an order of the prefect to declare the resignation of the president? Here the practices are different and the ambiguity of the texts is great.

Thus, in a precedent existing in Cluj County in 2014[1], in the situation when the president of the county council resigned from this position, the prefect took note of this resignation by

[1] See the Order of the Prefect of Cluj County No.360 / 06.10.2014

order, the other legal formalities were fulfilled, this order was submitted along with the minutes of the meeting of the judiciary council of the Ministry of Administration and Interior that proposed to the Government the date of election of the new president.

In 2018, in a similar situation, the prefect did not take note of such a resignation and the procedure consisted only in recording the resignation in the minutes of the council meeting and then passing to the presidential council's choice of the new president. The different positions were due to the fact that for two mandates, the ones from 2008-2012 and 2012-2016, the president of the county council was elected by direct vote, by the other county councilors, but from 2016 they went back to the practice before 2012 and the president is chosen from the county councilors according to the procedures established by the law.

However, the law remains in force even if the president of the county council is now elected among the county councilors, and then the question is whether these texts are still current? Is it possible to have a series of obsolete articles as an application but which from a legal point of view are still in force today? Do not forget that the above-mentioned rules are imperative and their application is mandatory but... however, it does not apply! Therefore, what we emphasize in this article goes beyond a mere theoretical analysis of situations having strong references in the concrete application of the law, but which lead to unambitious and ambiguous practices. The lawyer should intervene urgently and regulate coherently and clearly how to remove any legislative inconsistencies that can create in practice unusual and difficult situations to put into practice!

On the other hand, the provisions of the president of the county council, starting with 2006, no longer refer to the control of the lawfulness of the prefect’s institution[2], an aspect that I considered abnormal in the context in which art. 2 of Law no. 215/2001 qualifies the president as the author and the prefect must verify the acts issued or adopted by all local public authorities. Here, the practice of the county councils is heterogeneous, some of them communicate, while others do not communicate the provisions of the president of the county council to the institution of the prefect’s controlling authority. All these aspects would be gone if Law no. 286/2006 did not substantially modify the Law no. 215/2001 and would preserve the good and constitutional logic of the old regulation.

2. The situation of endorsements issued prior to the adoption of administrative acts by the public authority

Changing the register a little, but still within the scope of the Law no. 215/2001, we want to highlight another legal anomaly that puts a lot of obstacles in the good practices of the offices of the local and county councils. Thus, according to art.15 and 16 of the Law no. 215/2001, the territorial administrative units may cooperate and may associate with administrative-territorial units from abroad and their initiative will be communicated to the Ministry of Foreign Affairs and the Ministry of Administration and Interior.

Referring to this aspect, it is necessary to make further clarification, namely that, in the meantime, the competence to appreciate these initiatives, initially given by Law

[2] See the dispositions of article no 115 of Law 215/2001

no. 215/2001 MAI was transferred by order to the Ministry of Regional Disadvantage and Public Administration so that we deal with an implicit change of Article 16 of Law no. 215/2001 as a totally inadequate manner of lawmaking and very difficult to detect by law enforcement (the text of the law has remained unchanged, but only a few specialists working in this domain know about the change).

What we want to mention here is the fact that the Co-operation Agreements before their adoption in the deliberative authorities' meetings will be sent to the two advisory ministries which in 30 days must issue mandatory and binding recommendations for these public authorities. In practice the two advisory ministries do not communicate with each other and the opinions issued are contradictory and sometimes diametrically opposed so that the public authorities that will apply the content of these opinions in the future draft decisions are in a situation impossible to put into practice.

This vicious circle would be the variant that an opinion from a ministry would be sent by authority to the other ministry and vice versa to agree on and then issue co-ordinated and convergent opinions and not divergent ones. If we analyze legal texts, we observe a preference in expressing the legislator when speaking about the Ministry of Foreign Affairs in approving the respective projects, but the plurality used by the lawyer instigates the discussion of the existence of two opinions conforming not only to one having more legal force than the opinion of the other central authority. In addition, the competence of the Ministry of Foreign Affairs in the exercise of this attribution is expressly supported by Art.41 of the Law no.590 / 2003 regarding the treaties, thus giving a bigger weight to the opinion issued by this ministry, but the importance of the opinion issued by the other opinion should not be overlooked being expressly supported by Law no. 215/2001.

In conclusion, it is necessary to clarify these texts and offer clear and logical regulation of such situations, in no way confusing the local public authorities, in good faith, when they want partnerships with similar entities from foreigners.

3. Status and attributions of the secretary of the territorial administrative unit

In the logic of the regulations contained in Law no.215 / 2001 there are many unitary regulations regarding the organization of the functioning of the local and county public authorities given that the constitutional text defines them all under the term "local authorities". Starting from this finding, we will analyze here only some attributions assigned to the secretary of the territorial administrative unit. This function appears regulated in Chapter X of the Law no. 215/2001, but references to this function are found in many other articles of this law as in many other special laws.

Regarding its status, we do not intend to make an exhaustive analysis of this topic that could be the theme of at least a separate dissertation, but only to highlight the anomaly of some situations contained in the organic regulation made by Law no. 215/2001. Because the aforementioned law qualifies this function as the "territorial administrative unit", there are certain legal qualifications. It is known that the person of public law is the territorial administrative unit, and on this territorial administrative unit there are two local public authorities, one being the deliberative - the local council, and the other the executive authority - the mayor, both at the level of the communes, towns and municipalities, and at the county level the county council functions as a public-liberal authority [constitution art.121 and 122].

What conclusion can be drawn from here? A first conclusion would be that this function serves both authoritative powers and this is the result of many articles but also of the fact that the secretary refers to the legality of both the provisions of the mayor and the decisions of the local council. The secretary communicates both administrative acts to the prefect for the legality control. As it is qualified in art.116 of the Law no. 215/2001, this is the territorial administrative unit, and in the art.77 the secretary along with the mayor, the deputy mayors and the specialized apparatus all make up a functional structure called the town hall. What can we deduce from this? We deduce that the secretary is not part of the specialized apparatus of the mayor.So stipulates the law!

To this end, the coherence and consistency of the law begins to be diminished and regulated completely differently. Thus, the recruitment, appointment, suspension, modification, termination of the service relationship and the legal regime of the secretary are made in accordance with the provisions of the law of public office, which gives the Mayor - as executive authority all these attributes mentioned above. According to these regulations, the deliberative authority may be widowed by the objectivity and professionalism of the secretary of the territorial administrative unit in the situation of an open conflict between the executive and the deliberative authority. Can the Secretary in this context also be qualified as a territorial administrative unit in the context in which he is expressly subordinated only to the executive authority? What is the purpose of the aforementioned regulations that establish the status of this function? There are clearly inconsistent and incoherent laws that the legislator introduces into the legal text without trying to think logically when legislating! The situation was regulated logically until 2006, i.e. until the amendments brought by Laws 268 and 251 Laws 215/2001 and 188/1999.

Until that time, as originally appeared in Law no.215 / 2001 the secretary was appointed, sanctioned, qualified and dismissed from office by the prefect of the county in whose subordination this function was, only the workplace and the salary were at the level of the territorial administrative unit. Until then, the texts were coherent and logical then the anomaly persists giving birth in practice as ambiguous situations and vulnerable to the good functioning of these public authorities. Thus, in the circumstances of convening extraordinary meetings by a third of the local councilors [usually opposed to the mayor], the mayor made all the efforts to boycott this session by forbidding the subordinate compartments to participate in any way at such meeting [drafting specialty reports, establishing meetings, etc.]

At county level, the situation is identical only until 2006 that the county secretary was appointed by Order of the Administration and Intranet Ministers under whose subordination the secretary functioned.

The vulnerability of the status of the secretary of the territorial administrative unit leads implicitly to the vulnerability of the administrative decisions, because the a priori legality assured by him prior to the issuance of the administrative acts was vulnerable by the precarious status, even now being in the position of censoring, legally issued by the hierarchical chief, namely the mayor, even if this hierarchy is not expressly established but implicitly results from the aforementioned regulations. Unfortunately, even in the draft Administrative Code, which is in the advanced legislative phase, this anomaly is not removed because the influence of the mayoral associative structures are stronger than the associative structures of the secretaries of the territorial administrative units and thus the anomaly introduced in 2006 and the future legal regulation was preserved.

Regarding the attributions, we want at this moment to highlight an article of law, namely art.65 as introduced by Law no.20 / 2014. This article gives the possibility of the mayor to "delegate the attributions conferred by the law and other acts the deputy mayor, the secretary of the administrative-territorial unit, the heads of the functional departments or the staff of the specialized apparatus, as well as the heads of the public institutions and services of local interest, depending on their respective competences."

This aspect is welcomed in the context in which, in practice, there were often situations when such attributions were temporarily taken over by delegation by the secretary of the territorial administrative unit.

Unfortunately, even if the main attributions of the secretaries of the territorial administrative units were provided in a chapter (Chapter X of Law no. 215/2001), this law does not apply to the county secretaries because the texts of the public law are imperative and strictly intertwined and cannot be extended to situations other than those expressing them in those norms. In situations similar to those of communes, cities or municipalities were also counties when such delegates should have been imposed, but in the absence of a clear and explicit text that widens the scope of the expressions of art.65 of the law is not an incident in the county secretaries' sittings. In their situation, only the application of art.104 (7) as introduced by Law no.20 / 2014 [can the duties of the president be delegated except for the issuance of the provisions and the main authorizing officer].

4. Liability of public authorities

Taking into account the amendments brought by the Law no.140 / 2017 Art. 128 of the Law no. 215/2001, the legislator exonerates the juror, the mayor, the president of the county council, the chairperson of the meeting and the person empowered to exercise this position (usually deputy mayors, vice-presidents, the public administrators] precisely those who have the main administrative attributions in the good functioning of the public administration and in the hands of whom the administrative decision is.

According to art.128 (2) they only "invest with the formula of authority of administrative acts issued or adopted in exercising their attributions", the above mentioned regulation is a very dangerous one because it removes from the sphere of legal responsibility those who are responsible for the organization and functioning of the public administration, separating the advantages of the public office of responsibility within the public office.

In the above-mentioned context, we wonder what the relevance of the provisions of Art.175 of the NCP is, which stipulates the following:

Public servant

(1) Civil servant, within the meaning of criminal law, is the person who, permanently or temporarily, with or without remuneration:

a) exercises attributions and responsibilities, established by law, in order to achieve the prerogatives of the legislative, executive or judicial power;

b) performs an office of public dignity or a public office of any kind; "

In our opinion the functions "exempted" by Law no.140 / 2017 amending article 128 (2) of the Law no.2001 collide directly with the aforementioned criminal text. These functions are all of public dignity and the respective persons exercise over the duration their mandate, with remuneration [substantial indemnities] attributions and responsibilities established by the Law no. 215/2001 in the realization of the powers of the executive power.

Analyzed in the mirror, the two legal texts consider that texts of the law are still applicable, and suspects cannot be held criminally liable when infringing such texts expressly provided for by law.

In this context, the contradiction is even between paragraphs 1 and 2 of art.128 of Law no.215 / 2001, so at paragraph 1 there is talk of the existence of legal responsibilities in their duties functions [including criminal liability] but at par. 2 they are relieved of any liability!

It is for the first time when in our legal system when creating serious juridical and constitutional equities bringing over the law a category of public dignitaries seriously violating Article 16 of the Constitution.[3] We are surprised by the inefficiency of the People's Advocate and the Constitutional Court in analyzing the constitutionality of this text of the law. The head of state has not surpassed this constitutional anomaly and we hope that in a dispute in some court in the country, this unconstitutionality of the law will be invoked and the Constitutional Court will be denied this unfortunate regulation of which I have previously spoken. It seems that in this case the influence of the associative structures of the mayors was that which caused the legislator to resort to such discrimination and to such a decriminalization of legal liability, a very important category at the decisional level of the local public administration.

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7. LAW Nr. 393 of 28 September 2004 on the Statute of local elected officials. 912 of 7 October 2004

[3] See Article 16 (2) of the Constitution

LEGAL VALUE OF SILENCE IN ADMINISTRATIVE LAW

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Abstract: *In common language, to any question there are three possible answers: affirmative, negative or abstaining. Legally, we get "silence" more and more, which gets legal signification in many law branches not only in administrative law and not just nationally. Therefore, this is the pretext from which we start our study, the curiosity of knowing how "silence" works from the legal point of view under the silent approval form and in other regulated situations. This study is multi disciplinary containing elements from constitutional law, administrative law, European Union law, civil or criminal law being at the interference between public law and private law. The scientific methods that we are going to use are diverse and combined, utilizing both qualitative and quantitative methods used in law, such as: comparative method, deduction, statistics, observation etc. The documentation sources include, as it is natural: legislation, doctrine and jurisprudence. Finally, we will find the conclusions that come out of the performed analysis.*

Keywords: *the silence of the administration, the silent approval, legal fiction, presumption, Constitution.*

1. Introduction

Generally we can state about "silence" that it values as consent or not, depending whether we are on the land of private law or public law. In civil law, the doctrine states that "it values consent when the law states it expressly, when by the express will of the parties a certain legal silence significance is attributed, when the silence has the value of consent, according to custom"[1]. Also, it is well-known the latin adage according to which: "*qui tacit consentire videtur*" which means "that who is silent, consents".

Contrary to private law, when as we already shown usually silence values consent, in public law, and we mean administrative law, things are nothing like that. For example, one of the particularities of the administrative act, act of public power emitted by a public authority, is that the beneficiary's or the addressee's consent is not necessary because it represents, by its essence, a legal unilateral will, that of the emitting public authority. Therefore, the silence does not value consent in administrative law but there is one exception that being the silent approval, procedure mentioned in the 27/2003 Government's Emergency Ordinance regarding *the*

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[1] Beleiu Gh., *Romanian civil law*, The "Sansa " SRL editing and press House, Bucharest, 1995, p.133.

procedure of the silent approval with the subsequent modifications and completions[2] and on which we will come back in another section.

2. The actual content of the paper

2.1.The legal silence significance in law

In legal doctrine, but not in legislation, just like we will exemplify, silence has been qualified either as a legal fiction or legal presumption but we will only mention those situations that we consider relevant for the subject that we analyze.

Firstly, the terminology is explained in the Romanian Language Explicit Dictionary like so: fictions are: "imaginary representations of the surrounding reality"[3] and presumption represents: "conclusion drawn by the law or jurisdictional organ over the existence of an unknown fact that cannot be proven directly, by confirming a known fact, neighboring and related"[4]. Secondly, the doctrine and here we refer to the *"Legal fictions"* work written by Ion Deleanu in which he states that: "(…) when the legal norm itself gives legal intentionality to a behavior, active or passive, of the law subject or when the legal norm is deducted from the exclusive interest of a contract the existence of its will, these hypotheses signify legal fictions"[5]. The working mechanism of the legal fiction is explained by the same author like so: "the silence does not value exteriorized consent, but the presumption of the existence of this consent, which, in reality has not been expressed, is at the base of the legal fiction"[6].

On the other hand, in law there are presumption situations, in which the legal value of the "silence" problem is being analyzed, such as: criminal law where *the presumption of benefit of a doubt* of a person exists, in criminal procedure mainly in article 4 from the New Criminal Procedure Code: "any person is considered innocent until the establishing of the guilt by definitive decision". In civil law, the law states legal presumptions such as: *the presumption of paternity* (article 414 line 1 New Civil Code: "the child born or conceived during marriage, has as a father the husband of the mother"), *the presumption of co-sharing* (article 633 New Civil Code: "if the good is held together, the co-sharing is presumed, until contrary proof ") etc. As we mentioned on a different occasion, we criticize the fact that "the presumption of the benefit of a doubt belongs to criminal law, because the jurisprudence developed differently and in another way that we consider to be right. We refer to the European Court of Human Rights which extended many warranties, that were met in criminal matter, like the presumption of the benefit of a doubt, the Court appreciated, applies in the case of

[2] The 27/2003 Government's Emergency Ordinance regarding the procedure of the silent approval, published in the Official Gazette number 291 from April 25, 2003 with its subsequent modifications and completions.
[3] Public information available at the web address: https://dexonline.ro/definitie/fic%C8%9Biune, last accessed April 22, 2018.
[4] Public information available at the web address: https://dexonline.ro/definitie/prezum%C8%9Bie, last accessed April 22, 2018.
[5] Deleanu I., *Legal fictions*, All Beck publishing house, Bucharest, 2005, p.205.
[6] *Ibidem*, p.253.

some civil law suits respectively disciplinary“[7]. “The most relevant in this matter is the *Vanjak* vs. *the Croatian Republic* cause“[8]. On the land of public international law, the so called reserved to a treaty institution exists, underlined by the author Anghel that states: “in this domain, *the silent approval to reserves*, in the absence of the states’ objections, is currently the most common way of acceptance in the states’ practice“[9].

Returning to the subject at hand, from practice, the intervention of the silent approval is established in public law, in the situations detailed by the Constitution regarding law making, like article 75 line 2 from the Constitution that expressly states that: “The First Chamber seized pronounces in 45 days. For Codes and other laws of particular complexity the term is 60 days. *In the case of these terms being over passed, it is considered that the laws or the legislative proposals have been approved*“. Therefore, the “silence“ with legal value in constitutional law exists. Also, by comparison, we mention that, in the European Union law the co-decision procedure exists at the level of the Union which represents the common procedure of approving the Union legislation by the European Parliament and the Council. From our point of view, this situation is a legal fiction because it is found on the same line with the two law makers: the Parliament and the Council, from this point of view being alike to the bicameral Parliament, in which the law making procedure assumes the debate of the law projects in the two rooms or the silent approval, by passing time, as we will develop later in our study. The co-decision is mentioned in article 294 of the Lisbon Treaty as ordinary law making procedure in three lectures[10].

Returning to the national law, we will shortly make the following clarifications. According to article 75 of the Constitution there is the usual procedure of approving of the law projects and legislative proposing for the ratification of the international treaties (…) and of the organic law projects (…). The exception is found in article 114 line 3 from the Constitution named *the Governments responsibility*: “ if the Government has not been dismissed (…), the modified or completed law project (…) is considered as being approved (…)“. Also, we mention that the revision of the Constitution in 2003 has instated the “ silence “ in the procedure of the adopting of the laws, giving it the legal significance of silent approval in article 75 line 2 and article 115 line 5, like so: “(…) If in 30 days from the deposal, the seized Room does not pronounce on the ordinance, this is considered adopted and it is sent to the other Room that also decides in emergency procedures“.

Thus, we observe that the specific of the silence in this matter of constitutional law, for it to have legal value, is the fact that 2 cumulative conditions are imposed: the passivity of the seized Room and the passing of the term stated by the law for adopting.

[7] Stefan Elena Emilia, *Legal responsibility. Special glance on the responsibility in administrative law*, Prouniversitaria publishing house, Bucharest, 2013, p.293.

[8] Vanjak vs. the Croatian Republic*, 29889/04, January 14, 2010* - http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber":["861037"],"itemid":["001-96705"]}, accessed June 21, 2012, apud Stefan, E.E. Resposibility…, *op. cit.*, p.293.

[9] Anghel I. M., *The treaties law*, edition 2, volume I, Lumina Lex publishing house, Bucharest, 2008, p. 658.

[10] Public information available at the web address: http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_2&format=PDF, accessed April 22, 2018.

For example, on the Deputy's Room web page one can check the situation of the law projects or the law proposals that have been silently adopted by the Deputy's Room, as the first seized Room, in 2017, as an over passing of the constitutional term, according to the article 75 line 2, III rd thesis from the revised Romanian Constitution[11].

2.2. Specific matters of administrative law regarding the legal value of "silence"

In administrative law there is a distinct category of administrative acts entitled: *assimilated administrative acts* that are mentioned in the Administrative Litigations Law number 554/2004 article 1 line 1 letter c) II nd thesis combined with article 2 line 2 like so: "there are assimilated to the administrative acts in the sense of the present law the contracts signed by the public authorities that have as an object the enhancement of the public property goods, the execution of the public interest works, public services, public acquisitions (…); there is also assimilated to the unilateral administrative acts (…) the fact of not responding to the soliciting in legal term"[12].

The Administrative Litigations Law number 554/2004 sanctions the state of passivity of the administration, qualifying it through the procedure entitled legal fiction, as"*the administration's silence*" which has as a legal significance as the value of an unilateral administrative act although it is indeed an administrative act because it gives the harmed person's a right or a legal interest, according to article 52 from the Constitution, to go to justice, at the administrative litigations sections, against the public authority that has not responded to a request in the legal term. Thus, "the silence of the administration" is defined in article 2 line 2 letter h) from the Law number 554/2004 as: "the fact of not answering to a soliciting in the term of 30 days from the request's registration, if by law another term is not mentioned". But, in this case, the silence does not value consent and it is not mentioned in the exception of the special procedure of silent approval, regulated through the Government's Emergency Ordinance number 27/2003 regarding the procedure of the silent approval.

Regarding *the silent approval*, as we mentioned, this is the only exception from administrative law, applicable to some categories of authorizations, in which "*the silence of the administration*" values consent. But, it was noticed that in practice, to get the proving document, many times they have to go to the administrative litigations courts. According to article 3 line 1 letter b) from the Government's Emergency Ordinance number 27/2003 regarding the procedure of the silent approval, *the procedure of the silent approval* is: "the procedure by which the authorization is considered approved if the public administrative authority does not respond in the term given by the law for the emitting of the authorization"[13]. We mention that regarding the term in which the public authority is forced to answer a request, there is a legal stipulation in the Government's Ordinance number 27/2002 regarding the regulation of

[11] Public information available at the web address: http://www.cdep.ro/pls/proiecte/upl_pck.lista?std=TACIT&ans=2017, accessed April 22, 2018.

[12] The Administrative Litigations Law number 554/2004, published in the Official Gazette number 1154 from December 7, 2004 with the subsequent modifications and completion.

[13] Stefan Elena Emilia, *Administrative law. Part II*, academic course, Universul Juridic publishing house, Bucharest, 2018, p.18.

the activity of solving the petitions[14] which expressly stipulates in article 8 line 1: “the seized authorities and institutions have the obligation to communicate to the person in a *30 days term from the registration of the petition* the answer no matter if the solution is favorable or unfavorable“. This is the rule about the term, 30 days, except the situation in which by law another term is stated.

Like the doctrine underlined, “the silent approval procedure does not apply:

- To the authorizations emitted in the domain of the nuclear activities, of those regarding the fire arms, munitions and explosives regime, the drugs and its predecessors regime, the domain of national safety (article 2 from the Government’s Emergency Ordinance number 27/2003);
- Building authorizations, the urbanism certificates and the urbanism documentations (…);
- In other domains established by laws and ordinances (for example, the environmental accord regarding the expropriation for public utility cause (…)”[15].

The Government’s Emergency Ordinance number 27/2003 regarding the silent approval procedure details, from the legal point of view, states what steps need to be taken by the holder of such a request of according a new authorization to which the holder still did not get an answer by the public authority, in legal term. Thus, according to article 7 line 1: “after the term given by the law expired and in the absence of a written communication from the public administrative authority, the solicitor can carry out its activity, can do the service or do the profession for which the authorization was asked“ and line 2: “to get the official document by which the carry out of the activity, the doing of the service or the profession is permitted the solicitor can ask the authority or go straight to justice“.

In its jurisprudence the High Court of Cassation and Justice appreciated that, “given the special nature of the assimilated administrative acts (the unjustified denial and “the administration’s silence“), these do not carry a procedural solution identical to the one given in the case of typical administrative acts, where the interested party must ask in justice, mainly the annulment of the harming act“[16]. Also, the Constitutional Court of Romania decided that: “the legal solution consecrated through text (…) is determined and the action type promoted in justice, this being in establishing and not realizing a right. So, the infringement follows, in this case, the establishing of a subjective right of the plaintiff against the defendant (…)“[17].

The High Court of Cassation and Justice, through Decision number 13 from September 16,2013, (the Appeal in the interest of the law) established that (…) the building authorizations, the urbanism certificates and the urbanism documentations do

[14] The Government’s Ordinance number 27/2002 regarding the regulation of the activity of solving the petitions, published in the Official Gazette number 84 from February 1, 2012.

[15] Săraru Cătălin Silviu, *Administrative law. Fundamental problems of public law*, C.H.Beck publishing house, Bucharest, 2016, p.68.

[16] The decision of the High Court of Cassation and Justice number 2037/2017, the administrative litigations and fiscal sections, available online: https://www.universuljuridic.ro/refuzul-autoritatii-de-a-solutiona-favorabil-cererea-reclamantei-dreptul-la-actiune-raport-de-accesorietate-intre-solicitarea-de-anulare-a-unui-act-administrativ-si-obligarea-la-plata-de-sume-compen/, accessed May 6, 2018.

[17] The Constitutional Court of Romania number 597/2017, published in the Official Gazette number 1004 from December 18,2017.

not enter under the incidence of the Government’s Emergency Ordinance number 27/2003[18]. From a check up done on the jurisprudence it came out that, in practice, there are many litigations whose object is “the silent approval“, respectively the observation of the prolonged taxi authorizations[19].

3. Conclusions

Like we showed in this study, in some situations the law maker gives silence legal value in some law branches. In administrative law the silence values consent only in one case established by the law, that being the silent approval, situation established legally by the Government’s Emergency Ordinance number 27/2003 regarding the procedure of the silent approval. Also, like we briefly showed in our study, in the constitutional law even the Constitution’s law maker gave silence legal value in the law making procedure. Thus, unlike the administrative law where it is necessary to get through justice, the infringement of the silent approval, in the case in which the public administration is “silent“ about a request, in the case of law making from the constitutional law such an action is not mentioned and it is enough for the legal term to be over passed and we mean the approval of law projects and the legislative proposals. Therefore, silence has different legal value in the private law where, in general, the silence values consent, unlike the public law.

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[18] The decision of the High Court of Cassation and Justice number 13 from September 16,2013, published in the Official Gazette number 674 from November 1, 2013.

[19] For example, https://legeaz.net/spete-contencios-ca-cluj-2011/decizia-civila-72-2011-ca-cluj-qyc, accessed at April 22, 2018.

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PROPERTY ACQUISITION. A COMPARATIVE ANALYSIS BETWEEN THE ROMAN LAW AND THE CURRENT ROMANIAN CIVIL ONE

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Abstract: *The present work aims to make a comparison between the property acquisition within the Roman law and the current Romanian civil law, trying to underline both the similarities and the differences between the two legal systems. Apart from the actual forms of property acquisition, the present work will also analyze the definition itself of property acquisition both in the Roman law and the Romanian one. The Roman law has evolved from the point where it was difficult to transmit certain assets, through solemn and rigid ways, up to the moment of mutual agreement. Moreover, the vision of property has also evolved, from a relation between an individual and an asset, towards the modern meaning of civil subjective right. These notions typical to an ancient society have provided particular features to the forms of acquiring property.*

Keywords: *Roman law, Romanian civil law, property acquisition.*

I. Defining "property acquisition"

For a long time, the Roman legal thinking did not define the idea of property transmission, particularly when it came to the things considered to be valuable for the ordinary life, such as: beasts of burden, agricultural land and Italian houses, slaves and so on. The value of these things was being given by their extremely tight relation with the basic occupation of Romans – agriculture. They constituted a genuine family patrimony, which was aimed to be unalienable and transmittable by inheritance only to close relatives who had to preserve it and use it in the spirit of the Roman tradition. For this reason, the mancipi things could be alienated with difficulty, by means of a solemn complicated ritual called *mancipation,* aimed to insure a family and even community control upon such alienation[1]. This conception regarding the transmission of property also results from the analysis of the mancipation formula: "*Hunc ego hominem ex iure quiritium meum esse aio isque mihi emptus esto pretio.... hoc aere aeneaque libra*" (I affirm that this slave is mine according to quiritary right, and he is purchased by me with this piece of bronze and scales). As it could be noticed, the Roman law statement has two contradictory parts: the first one states the idea of power creation, while the second one refers to a sale.[2]

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[1] Vladimir Hanga, *Drept privat roman,* Editura didactică şi pedagogică Publ. House, Bucharest, 1977, p. 236.

[2] Emil Molcuţ, Dan Oancea, *Drept roman,* Casa de editură şi presă "Şansa" S.R.L Publ. House, Bucharest, 1993, p.122.

The fact above is the expression of an evolution registered by the Roman mentality, from the inalienability of certain assets, particularly during the creation of the Roman state, when the living conditions were particularly harsh, towards their alienation, in the age when the Roman state was developed enough so as not to depend on agriculture in a vital way. It wasn't however the case of the things nec mancipi, which were considered inferior by the Romans, such as precious metals and debt rights. These could be more easily alienated, without solemn rituals. This factual situation also influenced the legal norms which were expressing it, so that the property right notion and its implicit transfer had a slow evolution, from the moment when the Roman confused the subjective right with its emolument – the asset, up to the latter becoming abstract, as a subjective attitude given to those enjoying personality.

Due to the fact that the Romans originally conceived the property right as the expression of power upon certain assets and persons, some ways of property acquisition – although constituting ways to transmit the quiritarian property – were not considered as such. It was only when the property was defined without the power element that the notion of the property right transfer came up.[3] According to the modern legal vision, the property right is first of all a subjective one, an ability of its owner to put to value a legally protected interest. According to article 555 of the Civil Code, private property is the right of the owner to own, use and decide in regards to an asset in an exclusive, absolute and perpetual way, within the limits imposed by law. Naturally, the antique notion of power over assets and particularly persons has disappeared from the contemporary legal vocabulary, being the expression of a society based on slavery. Nowadays, the legal relation in general and the real property one in particular regard the law subjects and are not created between man and goods.

The transmission of property within the Roman law was also influenced by its diversity, as the Romans had several property forms, such as: the Pretorian, peregrine and provincial property, each of them having a different legal regime. It was only during the Justinian's rule that these types were reunited under a dominium, characterized by a highly abstract form, which has influenced the modern vision of property. Today, we can also speak of various classifications of the property right, such as the public and the private one, each with a different legal regime; when it comes to the private one, we can identify forms of property right with a different legal regime in terms of alienation. We are referring to the differences between the common and periodic property or, if speaking of common property, between the property on shares and the one in joint ownership. Some of the property right forms could also be encountered in the Roman law, for instance common property, while others, such as periodical property, are more modern-like, adapted to the demands of present society. Periodical property clashes with a principle of Roman law regarding quiritarian property: *proprietas ad tempus constitui non potest*.

It can be noticed that in the Roman law the object of the property right also influenced the transmission way. Thus, as previously mentioned, the distinction between mancipi and nec mancipi led for a long period of time to the use of mancipation or the simple traditio. In the same way, the distinction between mancipi

[3] Ion M. Anghel *Dreptul roman,* Lumina Lex Publ. House, II edition, Bucharest, 2000, p.119.

immovables and mancipi movables led to different conditions for usucapion applying: 1 year for movable assets and 2 for immovable ones. The distinction between movable assets and movables, respectively between real estate and movable property is also relevant today, when it comes to transmission. Thus, according to article 557 paragraph 4, the property right for immovable assets is acquired through the inscription of the assets in the real estate register, with the exceptions clearly stated by law.

Typical to the Roman law is also the fact that, in order for a property to be transmitted, the will agreement was not enough, but it was also necessary, apart from the legal cause, to have a tangible element too – the possession's change of venue.[4] The Roman law was making a distinction between the legal act which served as support for transferring property from the act which enforced the voluntary transfer of property. In Romania, the apparition of the real estate register had also brought up again the distinction between the legal act serving as support for property transmission and the act through which the property passes from the person alienating it to the acquirer.[5]

II. Ways of property acquisition in the Roman law and the current Romanian civil one

The Roman legal system has experienced several classifications of the ways to acquire property, the Romans being often interested rather in the practical needs than in refining the purely theoretical constructions. For the Romans, laws were first of all a useful tool, necessary to solve their present problems. A first classification divided the ways of property acquisition between the ones by particular title (*per singulas res*) and by universal title (*per universitatem*). This classification does not meet the conditions of a classical one, as it's missing the correct criterion for making the distinction. Only the first part of it refers to acquiring property as such, while the second one regards the transmission of the patrimony.[6] Another classification regarded the acquisition of things mancipi and nec manicipi, but in time it became anachronistic, so that the distinction of value between the assets disappeared. A classification which was recognized by the classical legal practitioners, being also used by Justinian, was based on forms of property acquisition according to the natural and civil law. The first category includes: occupation, traditio, accession, mixture and specification. The second one includes: mancipation, in iure cessio and usucapion. The Roman law has also experienced forms of property acquisition through legal authority and law. The current Romanian civil law contains a list of the ways to acquire the property right, at article 557. According to the latter, the property right can be acquired by convention, legal or testamentary inheritance, accession, usucapion, as an effect of the good will possession when it comes to movable assets and fruits and by means of court sentence when it transfers property. In the cases particularly mentioned by law, property can be acquired through the effect of an administrative act. With the exception of the cases

[4] Ion M. Anghel *quoted works,* p.119.
[5] Mihail Jakotă, *Drept roman*, Cugetarea Publ. House, Iaşi, 2002, p.368.
[6] Vladimir Hanga, *quoted works,* p.268.

provided by the law, when it comes to immovable assets, the property is acquired through its registration in the real estate register.[7] Article 941 of the Civil Code also regulates occupation. [8]

If we compare the two legal systems under scrutiny, we can notice quite significant similarities between them, many of the Roman forms of property acquisition being used today too. For instance, we can also encounter nowadays: convention, will and legal inheritance, accession, usucapion and the court sentence. Of course that there are also differences between the content of the same forms of property acquisition described by the two normative systems, generated by the different historical periods, but they are the same in their essence or even identical in some cases (for instance occupation or accession). There are also forms not familiar to the Romanian law, such as mancipation and in iure cessio*,* or not regulated by the Roman law, such as the registration in the real estate register.

We will continue by making a comparative analysis between these ways of property acquisition, starting with occupation.

For the Romans, the latter represented the take into possession of the goods that belonged to no one and, if we analyze the provisions of article 941 of the Romanian Civil Code[9] we can notice the same definition.

Convention currently represents the most used form of transmitting the property right. We are talking here about the contracts transferring property, such as the sale and the donation one. In principle, contracts are based on mutual agreement and the property is transferred on the basis of the agreement of wills, without further formalities being required (for instance several current sales of consumer goods). There are also situations in which the property right is transmitted after the agreement of wills, such as:

a. the sales of immovable assets, when the right is transmitted at the moment of the property registration in the real estate book

b. when the object of the contract is a future asset, so that the right is transmitted when the asset is accomplished

c. in the case of the assets in kind, in regard to which property is transmitted when they are particularized

d. when the parties postpone the transmission for a subsequent date or after a condition is met.

The sale contract is defined by the current article 1650 of the Romanian Civil Code as the contract by means of which the seller transmits or, according to the case, commits to transmit the property of an asset to the buyer, in exchange for a price which the buyer commits to pay. In the Roman law, until the sale based on mutual agreement

[7] In some auhtors' opinion, the registration in the real estate register is not an actual way of acquiring property, but it's a condition for some forms of property or a constitutive element of them to have the desired effect. See for this matter Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Curs de drept civil.Drepturile reale principale*, Hamangiu Publ. House, Bucharest, 2013, p.249.

[8] Not including occupation and thesaurus in the list of article 557 of the Romanian Civil Code is criticized by a part of the Romanian Civil Law literature. See for this matter Corneliu Birsan, *Drept civil. Drepturile reale principale*, Hamangiu Publ. House, Bucharest, 2013, p.355.

[9] The owner of a movable asset that belongs to no one becomes its owner through occupation, from the moment when he enters its possession, but only if this is done according to the legal conditions.

was established, solemn contracts were used instead, like mancipation or sale based on stipulations. Mancipation was a solemn act which involved the presence of 5 witnesses, of a libripens who weighted the copper, of a mancipant and a mancipee. Stipulation was an abstract act that was used by the Romans for any convention that didn't have its own legal form. It consisted in the seller and buyer's solemn commitments of selling and buying the asset for the price agreed. With these commitments, obligations were being born, but the enforcement involved other subsequent acts. The sale based on mutual agreement appeared within the practice of the state of selling war prisoners in the public markets. Such operations were practically impossible to accomplish through the solemn forms of civil law and, therefore, it came to the situation where the simple agreement of will between the questor and the buyers of the slaves was capable to transmit property. Subsequently, this practice also expanded towards the relations between private persons. It is important to mention that, in the case of the Roman sale, the seller committed to peacefully transfer the possession of an asset and the buyer committed to pay the price, while they subsequently needed certain acts that acknowledged the effective property transfer. Nowadays, when a sale contract is concluded, the property is in principle transmitted at the conclusion of the agreement of will, while when another one's asset is sold, the obligation to transmit the property is created when the latter is acquired or ratified by the third owner. Due to the effect of creating obligations, typical to the Roman contract, it was possible at that time too to conclude what is today called the "sale of someone else's asset".

When it came to donation too, the legal regime within the Roman law was different from the present one, particularly in what the form was concerned. At present, donation is a solemn contract by means of which a party called donor makes irrevocable and free provisions in regard to a certain asset, in the favor of another party called donee, with the intention of offering a reward to the latter. The same happened in the Roman law too, but here, since donation couldn't be ascribed to any of the Roman contracting forms, it was considered a pact, sanctioned by the praetor and later, in the post-classical era, by the emperors. In other words, due to the Roman rule saying that simple conventions could not have effects, donation had to embody one of the contracting ways, such as mancipation.

Will and legal inheritance appear both in the Roman law and the current Romanian civil one as forms of transmitting the property right. The differences between the systems analyzed here reside particularly in the successors classes, in the right to inherit, in the types of wills and legacies. A quite big differentiation, which lasted up until Justinian's rule, was related to the fact that the Romans experienced civil kinship (agnation) for a long time, this being also the foundation of the succession system. Agnation was the connection between the persons who were found at a certain point under the same power, namely who had been in the past under the same power of *pater familias*. The Roman philosophy regarding the family organization and, implicitly, the transmission of the family patrimony, was different from the current one. It was based on the power exerted by the family leader. The blood kinship (cognation) did not have effects for a long time or was protected by the praetor. But in its essence, this way of acquiring property is the same and has remained unchanged since the Romans, namely: when *de cuius* dies, his heirs – be them legal or instituted through the testator's will – take possession of the inheritance patrimony in a certain order, by becoming the owners of the deceased's rights and duties in front of the legal system.

In the Roman law, accession was a way to acquire property, which consisted in expanding an already existing one, by reuniting an object with another. In other words, the main object increased in size through the accessory ones (*accesorium cedit principali*). In order for this rule to apply, the following conditions had to be met:

- there had to be a main object and an accessory one,
- between an immovable and a movable asset, the first one was the main one. Between two movable assets, the main one was the one that preserved its individuality,
- the accessory thing had to be absorbed by the main one.[10]

Three situations of accession were known at that point: alluvion and avulsion, appropriation between movable and immovable assets, appropriation of movable assets. Article 567 of the Romanian Civil Code states that through ascension the owner of an asset becomes the owner of everything that comes together with that asset or is incorporated therein, if the law doesn't state otherwise. Accession can be of a real estate or movable type. The real estate one is subdivided into natural and artificial one and it can be noticed that it includes also the situations provided for by the Roman law, such as: alluvion and avulsion, but also constructions, plantations or any other works made on another's terrain. According to article 598, when it comes to accession based on movable assets, the movable asset produced with someone else's materials belongs to the one that manufactured it or, according to the case, to the owner of the materials, according to the relation between the labor and the value of the materials, determined when the asset is manufactured. This case of accession was treated distinctly by the Romans, as a specification. The owner of the asset was bound to pay damages equal to the value of the labor or of the materials, according to the case. If two movable assets with different owners are united, each of them can claim the separation of assets, while if this one is not possible, the rules above shall apply. It must be underlined that the institution of nowadays accession is in great part designed according to the Roman model.

In the Roman law, usucapion consisted in acquiring the property of things mancipi, by using them for a long period of time. The conditions applying to usucapion in the Roman law were: possession, term, just title, good faith and a thing capable to be subject of usucapion. In order to have effects, the possession of the thing didn't have to be vitiated by acts such as violence or clandestinity. The terms were of 1 year for movables and 2 for immovables. Not all things could be part of usucapion, for instance stolen things or the religious ones. The just title was the act or legal deed which justified the take into possession, while good faith consisted the certainty of the person benefitting from usucapion that he had acquired the asset from his owner or that he entered into the possession of an abandoned thing[11]. If we analyze the institution of usucaption as it was regulated by the 1864 Romanian Civil Code, we can notice considerable similarities with the Roman one, less for the terms, which were longer: 10-20 years and 30 years respectively. At present, usucapion is regulated by the

[10] Ion M. Anghel *quoted works*, p.137.
 Emil Molcuț, Dan Oancea, *quoted works*, p.123.

Romanian Civil Code at section 2 chapter III – "Effects of possession" – being in strong connection with the real estate register institution. Just like the in the Roman law, the new Romanian Civil Code distinguishes between the real estate usucapion and usucapion based on immovable assets, which can be tabular and extra-tabular. According to article 930, the property right cam be inscribed in the real estate register, on the ground of usucapion, on behalf of the person that possessed it for 10 years, if these conditions are met:

a. the owner inscribed in the real estate register died or his life was ended, according to the case,

b. the statement of giving up to property was registered in the real estate register,

c. the immovable was not registered in any real estate register.

When we speak of tabular usucapion, article 931 shows that the rights of the one that was registered without a legitimate cause in the real estate register, as the owner of an immovable asset, can no longer be contested when the person registered in good faith possessed the immovable for 5 years from the moment when the registration application was filed, if the possession of the asset was not vitiated.

As for the real estate usucapion, article 939 of the Civil Code shows that the person who possessed someone else's asset for 10 years, in other conditions than those required for the presumption of property generated by good faith possession, can acquire the property right through usucapion.

We can notice that the idea of this institution has remained unchanged ever since the Romans, namely that of encouraging the use of assets according to their destination, be them movable or immovable. Both systems know the both forms of usucapion, but in the current Romanian law, it actions in a secondary way when it comes to acquiring the possession of movable assets, the rule being the good faith possession. The essential element of usucapion was and continues to be the possession, and not any kind of possession, but the useful one. The terms according to which possession was acquired at the Romans are different, just as the real estate register criterion can be encountered only at present.

The court sentence is mentioned by article 557 of the Romanian Civil Code as a way to acquire a property right, under the circumstances in which it transfers property, since as a rule this sentence has a declarative effect. This kind of sentences come to supply the will of a party in the case of contracts transferring property, such as the situation in which there is the refuse to enforce a pre-sale contract. In the Roman law, acquiring property through the court sentence occurred in three cases: at the exclusion from the division of inheritance, if the co-heirs could not reach an agreement, at the exclusion from the division of inheritance for other causes than the inheritance related ones and when there was a misunderstanding regarding boundaries.[12]

This way of acquiring a property right through law was known in the Roman law in situations such as attributing the things confiscated by the publicans to the revenue authority or the publican societies. Moreover, the Romans used fictional trials in some case in order to transmit property, for instance in the iure cessio case. Giving up to the property in front of the magistrate involved for the parties to come before the latter,

[12] Vladimir Hanga, *quoted works,* p.288.

according to a previous agreement. Here the plaintiff (who was actually the buyer) stated that the asset was his, while the defendant (who was the seller) remained silent, thus acknowledging the plaintiff's claim. Through the intervention of the magistrate, who ruled in favor of the plaintiff, the transfer of property operated indirectly.

III. Conclusions

The comparative analysis of the ways to acquire property in the Roman law and the Romanian civil law strengthens once again the conclusion that the Romanian legal system has inherited a great part of the principles and institutions which were created more than 2000 years ago by the Romans. This conclusion most not be regarded as an absolute one, as there are also differences between the legal institutions analyzed, given that some ways of acquiring property are typical to an ancient slavery society (for instance mancipation in iure cessio); nevertheless, it can also be noticed that the essence and the basic idea of some institutions such as usucapion, occupation, accession, will and legal inheritance have remained unchanged also in the Romanian Civil Code. Moreover, the concept itself of acquiring property has had a slow evolution, from creating power over a thing, the direct relation with the thing, up to the meaning inherited by us today, namely acquiring a subjective right on the basis of the will of agreement between the legal subjects involved.

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THE MAGISTRATE'S IMPARTIALITY – GUARANTEE OF THE RIGHT TO A FAIR TRIAL

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Abstract: *The role of the legal power to fulfill the jurisdictional activity is conditioned by the insurance of certain mechanism to guarantee the procedural rights, the access to courts, one of the guarantees of the law to a fair trial being the magistrate's impartiality. For the purpose of insuring the good administration of justice and magistrates' impartiality, the legislator has established a system of exigencies in order to insure the prestige of justice, which shall be analyzed by the present study.*
Keywords: *impartiality, courts, guarantees, fair trial, justice etc.*

I. Introduction

The impartiality of justice is related to the organization and functioning of the courts and by the judge, on the other hand. The requirement of the impartiality is stated by Art 2 Para 3 of the Law No 303/2004 on the statute of judges and prosecutors[1], by Art 2 Para 1 and Art 10 of the Law No 304/2004 on the judicial organization[2], and by Art 9-11 of the Code of Conduct for Judges and Prosecutors, approved by the Decision of the Superior Council of Magistracy Plenum No 328/2005[3], and in the area of the criminal trial and civil procedure, the provisions contributing in the insurance of impartiality, namely the incompatibility of the judge, the abstaining, the challenge of the judge are stated by Art 64, 66-67 of the current Code of Criminal Procedure[4], namely Art 41-53 of the current Code of Civil Procedure[5].

The magistrate's impartiality, as guarantee of the right to a fair trial, can have a double meaning: a subjective approach, which trends to determine the personal belief of a judge ruling a litigation, which refers to the so-called subjective impartiality and an objective approach, with the purpose of ascertaining if enough guarantees to exclude any doubt concerning him have been made, which refers to the so-called objective impartiality. Also, the Court has ascertained that the subjective impartiality is presumed until the contrary, unlike the objective ascertainment of impartiality

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2 Published in the Official Gazette of Romania, Part 1, No 576/29 June 2004, republished in the Official Gazette of Romania, Part 1, No 826/13 September 2005.

3 Published in the Official Gazette of Romania, Part 1, No 815/8 September 2005.

4 Law No 286/2009, published in the Official Gazette of Romania, Part 1, No 510/24 July 2009.

5 Published in the Official Gazette of Romania, Part 1, No 485/15 July 2010, republished in the Official Gazette of Romania, Part 1, No 247/10 April 2015.

consisting in the analysis if, independent of the judge's personal behavior, certain verifiable circumstances may cause suspicions about the lack of impartiality[6].

The ECHR jurisprudence differentiates between the "objective impartiality" and the "subjective impartiality", or it mentions the "personal beliefs", "personal behavior", "personal impartiality", "legitimate reasons to fear the lack of impartiality" or "objectively justified fears".

The objective impartiality refers to the establishment of the fact that regardless of the personal behavior of the judges, certain verifiable circumstances or facts authorize the debate upon their impartiality. Thus, the ECHR has decided that for the consideration of the objective impartiality, the appearances play an important role, because in a democratic society the courts must inspire full trust for the justice seekers.

The subjective impartiality is related to the internal personality of the judge and this is why the European Court has stated that it is presumed until the contrary.

In order to overturn this presumption of impartiality it must be proven that, the judge favored or disadvantaged a party, which is very hard to prove, especially because the appearances are not enough for the ascertainment of the judge's partiality, but it is necessary that his prejudice be externalized in order to be proven.

The impartiality shall be taken into consideration, under its two premises, for each case. In order to answer the European exigencies, it is necessary to modify certain national normative acts stating guarantees for impartiality, but also a change in the judge's mentality regarding these requirements. Since in a democratic society the courts must inspire complete trust for the justice seekers, every judge considered not to be completely impartial in ruling the litigation randomly assigned is compelled to withhold from its examination[7].

The principle of impartiality of the magistrate is also stated by the international normative acts which Romania has joined. In this meaning, the right to an impartial court is guaranteed in Europe by Art 6 of the Convention on human rights and fundamental freedoms.

2. Doctrinaire and jurisprudential acts on the impartiality of the magistrate

In the practice of the European Commission and European Court on Human Rights has decided that the issue of complying with the right to a fair trial shall be examined depending on the trial and the principles for the organization of each procedure but, there is the possibility to take into consideration certain important aspects of the procedure, before the conclusion of the trial. Thus, the fundamental element of the right to a fair trial is the exigency that each of the parties accesses enough possibilities, equivalent and appropriate in order to support his position on the

[6] Decision No 333/12 June 2014, published in the Official Gazette of Romania, Part 1, No 533/17 July 2014.

[7] Viorel-Mihai Ciobanu in the volume coordinated by Ioan Muraru and Elena-Simina Tănăsescu, *Constituția României. Comentariu pe articole*, C. H. Beck Publ.-house, Bucharest, 2008, p.1220.

matters of law and facts, and that neither of the parties shall be disadvantaged in relation to the other[8].

Justice is impartial, in the meaning that, being performed by special appointed authorities, these are neutral, do not have nor should have a particular interest, specific for the trial under examination. It is based on the idea of neutrality, by excluding the bias or rejection towards one of the parties. This characterization expresses in a constitutional form the classic custom according to which one cannot be the judge of his own case; it expresses the idea of neutrality which is the very essence of justice[9].

The protection insured for the fundamental procedural rights refers not only to the equal access to justice, but also to a fair and equal procedure. A particular application of the constitutional principle of equal access to a fair trial, equal weapons represent one of the features of the fair trial[10].

Under certain circumstances in which the trial in good conditions of litigation is under the sign of doubt, the law allows the transfer of the trial to another court than the one which normally would be competent to rule[11].

The purpose of the institution of transfer is for the parties or the victim to enjoy a fair trial, unaffected by the judge's lack of impartiality[12].

The court has considered that, for a transfer of a criminal trial, the reasonable doubt refers to the existence of data or information regarding the circumstances of the case or the quality of the parties, having the nature to persuade an objective and neutral observer that the impartiality of the judge is violated. Thus, the simple opinion or presumption, even if supported by good-faith, cannot be mistaken with the reasonable doubt, should be based on facts or circumstances allowing the shaping of quantifiable degree of probability, namely the one to persuade an objective and neutral observer that the judge's impartiality is violated[13].

The rejection of the request for transfer is equivalent with the ascertainment of the existence of the judge's impartiality, the suspicions for its absence not having a real support, the submission of a request to relocate not being able to create the absence of the impartiality of the court from which the case is to be moved. On the contrary, by submitting a transfer request without any reasonable suspicion that the impartiality of the judges is affected, both the provisions on the judge's challenge (Art 67-68 of the Code of Criminal Procedure), as well as those regarding the transfer of the case would be evaded.

From the jurisprudence of the Constitutional Court it results that the transfer is a procedural incident regarding the notified court, aiming to insure optimal conditions

[8] Ioan Muraru and Viorel-Mihai Ciobanu in the volume coordinated by Ioan Muraru and Elena-Simina Tănăsescu, *Constituția României. Comentariu pe articole*, C. H. Beck Publ.-house, Bucharest, 2008, p.181.

[9] M. Constantinescu, Antonie Iorgovan, Ioan Muraru, Elena-Simina Tănăsescu, *Constituția României revizuită – comentarii şi explicații*, All Beck Publ.-house, Bucharest, 2004, p.266.

[10] Elena-Simina Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publ.-house, Bucharest, 1999, p.247.

[11] Gabriel Boroi and Mirela Stancu, *Drept procesual civil*, Hamangiu Publ.-house, Bucharest, 2015, p.254.

[12] Decision No 545/13 July 2017, published in the Official Gazette of Romania, Part 1, No 954/4 December 2017.

[13] Decision No 438/21 June 2014, published in the Official Gazette of Romania, Part 1, No 857/27 October 2016.

for the performance of the justice, by removing any suspicion related to bias and objectivity in the solution of the cases brought to trial[14], having as finality the removal of the suspicions which could emerge regarding its independence or impartiality.

By Decision No 65/11 February 2014[15] regarding Art 6 Para 1 about the right to a fair trial stated by the Convention on Human Rights and fundamental freedoms, the Court has ascertained that there are no incidents in this matter, given that these conventional procedures refer only to the protection of civil rights mentioned by the Convention, without applicability in the procedure solving a request for transfer of the case[16].

The transfer represents an exceptional remedy for situations in which the full impartiality – especially its objective element, namely the apparent impartiality in the view of an objective and reasonable observer, and not insinuative and tendentious – of the court in its ensemble, cannot be insured[17].

With the opportunity of analyzing the exception for unconstitutionality of Art 503 Para 3 of the Code of Civil Procedure, the Court has referred that the legal norms criticized does not affect the specific guarantees which the courts enjoy based on Art 124 of the Constitution concerning the uniqueness, impartiality and equality as features of the justice and represents the obligation of the judges to provide a legal non-discriminatory treatment for all participants in the judicial procedures[18].

The Court underlines the fact that the Law No 134/2010 on the Code of Civil Procedure[19], the legislator has felt the need to clarify the criticized text by mentioning in Art 191 Para 3 that "For all cases, the request shall be solved, by summoning the parties, by a conclusion, given by the council chamber, by another panel of judges than the one establishing the fine or the compensation". Thus, unlike the previous regulation, the new Code states the attribution to solve the request for reexamination for another panel different than the one establishing the fine or the compensation, the provision having the nature of insuring the guarantees for a fair trial from the perspective of the impartiality in the trialing of this appeal. Thus, it is expressly stated the fact that the reexamination shall be solved with the summoning of the parties, by conclusion, in the council chamber, and not in a public hearing, thus eliminating the different opinions existing in the previous judicial practice[20].

The notion of right to a fair trial, in the meaning of Art 6 of the Convention, is used with two meanings. On the one hand, it refers to the ensemble of the procedural guarantees listed by this provision and, on the other hand, the right to fair trial is an independent guarantee joining the other guarantees in order to establish the first meaning of the notion.

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[14] Decision No 65/11 February 2014, published in the Official Gazette of Romania, Part 1, No314/29 April 2014.

[15] Published in the Official Gazette of Romania, Part 1, No314/29 April 2014.

[16] Decision No 617/11 October 2016, published in the Official Gazette of Romania, Part 1, No 34/12 January 2017.

[17] Decision No 98/7 March 2017, published in the Official Gazette of Romania, Part 1, No 393/25 May 2017.

[18] Decision No 608/22 September 2016, published in the Official Gazette of Romania, Part 1, No 1048/27 December 2016.

[19] Republished in the Official Gazette of Romania, Part 1, No 545/3 August 2012.

[20] Decision No 631/27 October 2016, published in the Official Gazette of Romania, Part 1, No 50/17 January 2017.

The incompatibilities insure the impartiality of the judge and protect him from outside pressures.

The constitutional principle of the judge's iremovability and the legal principle of the prosecutors' stability represent guarantees for their independence and impartiality in the provision of justice or during the judicial procedures, and not in the activity performed as managers for the courts and prosecutor's offices[21].

Guaranteeing a fair trial, as stated by Art 6 Para 1 of the Convention on Human Rights, it refers to the facts that: the court must be established by the law, independent and impartial[22].

The magistrate performing his duties, dedicated to the provision of justice is compelled to a series of obligations insuring the impartiality of justice, as defining feature of him[23].

For the provision of justice, the activity of the specialized auxiliary staff of the courts represents a real support for the judges and prosecutors, the competence of this category of personnel and the correct fulfillment of its activities have an important role in the functioning of the courts and prosecutor's offices[24].

Though compelled by obligations and interdictions similar to them, the specialized auxiliary personnel have a statute different than the magistrates. Thus, though both professional categories are committed to the provision of justice, their role is obviously different, only the judges having the right to "establish the law"[25].

The Court has also stated that the lack of legal personality of the court cannot influence the impartiality of the judge performing his activity, or the correctness of the legal decisions[26].

The legal decision represents the act of disposal of the court regarding the claims subjected to trial, thus being the final act concluding the trial[27].

The reasoning represents a guarantee for the parties that their claims have been carefully analyzed and offer the possibility for the performance of the judicial control. The analysis performed by the judge in relation to the reasons de jure and de facto which have determined his belief, in the meaning of a certain solution should be clear and simple, precise, concise and just, in a single word, having the power of conviction. Also, the same attributes must be used for the reasoning regarding the claims he rejected[28].

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[21] Decision No 375/6 July 2005, published in the Official Gazette of Romania, Part 1, No 591/8 July 2005.
[22] Decision No 518/31 May 2007, published in the Official Gazette of Romania, Part 1, No 559/15 August 2007.
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[27] G. Boroi, D. Rădescu, *Codul de procedură civilă comentat şi adnotat*, All Publ.-house, Bucharest, 1994, p.359.
[28] V. M. Ciobanu, *Tratat*, 2nd Volume, p.255.

The obligation for the reasoning of the judicial decisions represent a condition for the fair trial, exigency mentioned by Art 21 Para 3 of the Constitution of Romania and Art 6 Para 1 of the Convention on Human Rights and Fundamental Freedoms. The judges who did not take part in the trial cannot motivate and sign the judicial decision, because they cannot guarantee the good administration of justice.

The reasoning of the judicial decision is inherent to the position of the judge, representing the expression of his independence and cannot be transferred to a third party. The reasoning does not represent only the premise of a good understanding of the decision, but also the guarantee of its acceptance by the justice seeker, who shall subject himself to the act of justice by trusting the fact that it is not arbitrary. It represents a key element of the judicial decision, a powerful guarantee of the judge's impartiality and the quality of justice, as well as a premise of the appropriate performance of the judicial control for legality and solidity by the superior court. Or, under the conditions in which the judicial decision would be drafted or motivated by another person than the judge of the case, the justice seeker shall be deprived of this guarantee[29].

The doctrine has stated that one of the rules regarding the activity of prosecutors "shall be claimed from a moral principle – that of impartiality" – which the Constitution of Romania engages in guiding the activity of the Public Ministry using the means of delivering justice through the supreme value of the rule of law[30].

The notion of impartiality does not overlap with the one of independence because the independence is related to other powers than the judicial one, as well as to the parties, while the impartiality is related to the organization and functioning of the courts and the judges.

One could state that the independence is prior to the impartiality, because a judge cannot be impartial unless he is independent.

3. Conclusions

The impartiality of the magistrate enjoys real and appropriate legal instruments for protection.

Regardless of the aspect under which is approached, the impartiality of the magistrate represents a guarantee provided for the citizens, created to insure the compliance with their right to a fair trial.

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NOTARY PUBLIC AT THE CELEBRATION OF A CENTENNIAL FROM THE GREAT UNION

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Abstract: *This paper is intended to address the evolution of the profession of notary public focusing specifically on the Great Union and the period that followed, reaching to this day. The work concerns not only the institution of the notary seen from the singular context, but also the collaboration and interdependence of the activity with the real estate advertising registers. In order to provide a fuller analysis, our approach follows a comparison with the regulation of notarial law in other EU countries and not only by showing that unitary practice and interstate cooperation is the key to the development of the profession of notary public*
Keywords: *notary, centennial, real estate publicity, European Union*

1. Aspects of the history of notarial activity

The origin of the institution of the notary is found in antiquity, where, in the slave order, some particular elements can be recognized, which induce the idea of some incipient forms of exercising the notary profession. The importance of the notary has always been in his function of preventing disputes and preconstituting documents or other forms of evidence. Originally, in human societies, testimony was of particular importance in establishing the truth, and most conventions were born in public in the presence of numerous witnesses.Then there came the sacramental formulas and the material remittances of goods, so that, finally, with the appearance of the writing, the primacy of the written test on the testimony was consecrated. Thus, the first wills, respectively contracts, were written in Mesopotamia thousands of years ago, so it is not accidental that wesee at the *notary* as *a millenary institution*[1].

In the Romanian space, the notary preserved the Roman particularities characteristic of the period when Dacia was an imperial province. In the Romanian Lands, in the sec. XIII and XIV, the chronicles mention the existence of the so-called "*confirmation places*", which together with the practices of the reigning chancelleries of the scribes and of the grammars created customary rules[2] that related to the authentication of documents, the making of evidence and the keeping of official documents.

* Notary public, Chamber of Notaries Public Ploieşti.
[1] A. Hilsenrad, D. Rizeanu, C. Zirra, *State Notary*, Ed. Ştiinţifică Publishing house, Bucharest, 1964, p.14.
[2] These practices somewhat copied the existing procedures in Roman law and feudal law in Western Europe.

During the Principalities[3], the notary function gains an exceptional importance in Transylvania and Northern Bukovina, where, according to Austrian and Hungarian models, there are notaries dealing with the authentication of conventions between individuals, the making of evidence, the keeping of civil status registers, etc. In both Moldavia and Wallachia, both the *Calimah Code* and *Caragea Legislature* have modified the regime of authentic evidence and documents. With the entry into force of the *1864 Civil Code and the 1865 Civil Procedure Code*, the notaries' regime became uniform, the notaries operating under the tribunals and then the courts and under the direct control of the Minister of Justice. With the application of the *Law on the authentication of documents*, from September 1, 1886, we can talk about the appearance of the notary institution in its modern sense.

The Great Union of 1918 determined an effective completion of all Romanian provinces in a united national state which in some cases extended until World War II and connoted the institution of the notary public. An universal valid notarial legislation proved to be difficult to apply on the one hand because of century-old customs, on the other hand, because of the acts of a different nature written in the Old Kingdom, Transylvania and Banat or Bessarabia, each of these provinces legally suffering from French, German and Russian influence.

According to the French Civil Code of 1803, taken over in the Old Kingdom, *the power of probation and the enforceability* of acts made by the notary public were recognized, but in Transylvania and Banat, where German influence had been decisive, the situation was confusing as the preventive protection was reduced, being only the contracts between spouses, fiancées or general or special powers of attorney. Moreover, counterprobation was admitted. Then, for political reasons, the supervision of the majority Romanian population, the Hungarian authorities allowed the local notaries to draft legal acts. Due to the lack of qualified staff and considering that the transition will be easier, the Romanian law of 1925 took over this provision, but only for Transylvania and Banat. Only the land and buildings registry and wills, due to the lack of sound legal knowledge of these local notaries, had reeched to being invalidated in proportion of 90%[4].

The Conductor Council, the provisional authority to lead Transylvania after the Union, kept the judges and notaries public, but *suppressed their irremovability*. Now, for “the public silence”, they could be dismissed ex officio without their consent. In 1920, the unification commission in Cluj established that the notaries appointed by the Hungarian authorities had to swear an oath to the Romanian ones, and change seals and use them in Romanian language[5].

The most drastic reform occurred after the Great Union in the matter of succession by introducing the stamping law, and the heirs were required to prove the payment of taxes to obtain a payment term. Otherwise, successions were delayed so that in 1929 only 10% of them had been transcribed in the register book.

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[3] Bogdan Vişinoiu – *Notarial Law and Real Estate Publicity* Lecture notes taught in the 2012-2013 academic year, semester 2, Faculty of Law, University of Bucharest (course 1).

[4] Georgeta Filitti – *History of the notary in Romania,* https://notariatpublic.com/blog/istoria-notariatului-in-romania;

[5] Georgeta Filitti – *idem.*

A unification of practices in the Old Kingdom with those of Transylvania and Banat was difficult but imminent.[6] The notaries who collaborated with the Oradea magazine made the recommendations: to automatically inventory all successions; after the death, the public notary to pass the conscription of the estate and the summoning of the heirs, then sent to the financial administration, to introduce also in the Old Kingdom the cadastre, for proper assessment, the certificates of heirs issued by the local notaries to be abolished because they were formal, usually declaring a lower value of the goods.

The conclusion became evident: *leaving exclusively the professional public notaries to conclude all acts relating to property***.**

The Journal of Law, Doctrine and Jurisprudence (Official Body of the General Union of Notaries Public in Romania) publishes in 1939 the "Memorandum of the General Union of Notaries Public in Romania submitted to the Minister of Justice" which starts by recalling that "The public notary was and is an institution of great importance and great authority, being the emanation of a historical development of centuries, which, in the most unsafe and darkest times in history, when repressive justice was still an idea in formation, was the only defence of security of legal links". It is also clear from the memorandum that, at that time, authentic and certified acts were made by three systems, namely: in the Old Kingdom by the County Courts (Notary Section), the Judges, the Local and the Police Courts, Bessarabia and Bukovina by the same authorities and public notaries, and in Transylvania, Banat, Maramures and Crişana exclusively by the notaries public. At the conclusion of the legal acts, three criteria were considered: *the will of the parties, the interest of the parties and the provision of the laws*, and their harmonization was the duty of the person called upon to draw up the legal acts of the parties in authentic form. It was concluded that the most suitable authority for this purpose was the notary public himself, since the judge could not get involved throughout the drafting act, "cannot assist in dicussing the minor interests of the parties, cannot deal with their special affairs" while the lawyer, representing the interests of one party, could not be impartial." It is therefore necessary for the high service of the preventive Justice to set up an independent, autonomous and confined office with the most severe personal liability of its officials. This office is the Public Notary Public ". It was indispensable to realize these principles in 'the new codification, gathering in a bundle everything that is useful in the various laws existing on the territory of the country, eliminating the possible decreases.'[7].

After the seizure of power by the communists, the first legal document regarding the notaries was Decree no.79 / 1950 which included principles, competence, organization, procedures and responsibilities of notaries. Also, *the name of state notary was first introduced*. In Article 1, "Notary State aims to help citizens of Romanian People's Republic in preparing entries ascertaining their legal relationship, providing them and thus help them exercise their civil rights in the spirit of socialist legality". Under Article 2, state notaries dealt with "drawing up and authentication of documents, issuing certified copies, legalization of signatures and acts of protest of bills, checks and other promissory

[6] Georgeta Filitti - *Short history of the notariate on Romanian territory* https://www.cnpb.ro/?page_id=162.
[7] "*The Memorandum of the General Union of Notaries Public in Romania submitted to the Minister of Justice*", Journal of Law, Doctrine and Justice (Official Body of the General Notaries Public Union of Romania), no. 10, 1939.

notes", and according to article 3, the material competence notaries longer fell and "the right to receive the deposit acts and documents and give a certain date to the documents that were submitted for the purpose and for translations into or from Romanian".

The administration of the state notary was strictly controlled by the minister of justice who could decide the localities where the offices of the state notaries and the main offices will be established. Attachments to the main notary offices were also the county central archives of the state notary.

The procedure for the authentication of acts by state notaries was governed by the same principles: non-contentious character, legality, litigation prevention, disclosure of true relations between the parties. In the authentication procedure, the counter-signing of the document was obligatory by the secretary of the state notary after the notary had signed and stamped the said document, and the notarial acts were enforced and executed by the courts according to the common law, which still did not have enforceable title. The Decree further regulates the procedure for legalizing copies, making translations, receiving in the deposit, and appeals against notarial acts.

Subsequently, by Decree no. 377/1960, the notarial system was reformed. Decrees no. 358/1944, respectively no. 79/1950 were repealed, increasing the material competence of state notaries, which may, according to art. 4, perform the following procedures as follows: "a) drawing up at the request of the parties any documents for the authentication or legalization of the signature; b) the authentication of the documents c) the legalization of the signatures d) the giving of a certain date to the documents submitted for this purpose e) the certification, in the cases stipulated by law, of the acts established by the state notary personally f) the legalization of copies of dcuments g) making and legalizing translations, h) receiving in the deposit of acts and documents, i) enforcing authenticated documents as well as bills of exchange and promissory notes, j) drafting of bills of exchange, checks and of other promissory notes k) the issue of enforceable titles in the cases provided by the law l) the notarial succession procedure m) the performance of the legal works of immovable publicity in the cases provided for by law, as well as those relating to land books; n) the issuance of duplicates from notarial records. "

Also, special material competence has been provided for the executive committees of municipal or town councils in localities where state notaries are not operating, and they can largely proceed with the same procedures as state notaries, except for "conventions over 3,000 lei, and those which have as their object donations of any kind, mortgages and the transmissions of land or buildings ". Moreover, certain socialist organizations were recognized in this sense, but only for minor acts (Article 11).

With the adoption of Law no. 36/1995, the legal regime of the notary is modified, the function being liberalized, even if it is still under the direct control of the minister of justice. *State notaries disappear, in their place the notaries public appear*. Powers do not change substantially, some procedures such as authentication of documents and non-contentious succession proceedings remain the special privilege of notaries. There are established the national governing bodies, the Union of Notaries, and the Chamber of Notaries at the local level.

The notarial act acquires the character of enforceable title, rules are set by which the number of notaries public is updated and new notary offices can be opened. The Union of Notaries extends its cooperation with various institutions: ANCPI, the

Romanian Banking Association, the Ministry of Interior, concludes agreements and protocols for collaboration with other institutions, establishes the system of notarial lists for the average values of real estate trading, the obligation to cancel the fiscal stamp on the notarial acts is waived, the notarial national registers in material and electronic form are created by different notarial procedures. Also, the old archives of former State Notaries are transferred to the Chambers of Notaries Public. In some cases, the archive fund is fully digitized from 1953 to the present (Bucharest), in order to streamline notarial activity. The procedure of apostilising and legalizing notarial acts is handled by the Chambers of Notaries Public. By Law no. 202/2010 non-contentious divorce falls under the competence of notaries.

Last but not least, by adopting the new Civil Code, notaries receive extensive competences: in addition to finalizing divorce proceedings (which now includes the possibility of divorce even though there are children), notaries can become fiduciaries and retain the exclusivity over authentic acts. Matrimonial conventions can only be concluded in genuine notarial form. The dissolution act becomes extremely widespread in the matter of succession and obligatory to change the matrimonial regime.[8]

Law no. 36/1995 has suffered several changes since its entry into force. The last and most important, made by Law no. 77/2012 introduces new procedures for notaries: the liquidation of inheritance liabilities, mediation and arbitration in interprofessional litigation, the procedure for the organization of auctions in connection with the liquidation of the inheritance, the summoning (which became a *sui-generis* procedure) and the verification of inheritance records.

2. Indispensable link between the profession of notary public and real estate publicity

In order for the notary public and the notary activity carried out by him to ensure maximum security of the civil legal circuit, it is absolutely necessary to collaborate with the real estate publicity registers and not only. Currently, according to art. 18 par. (1) of the Civil Code, "the rights, acts and deeds relating to the status and capacity of persons, those related to the assets belonging to them, as well as any other legal relations are subject to publicity in the cases expressly provided by law" and the par. (2) of the same article provides that "the publicity shall be made through the Land Book, the Electronic Archive of Real Securities Guarantees [...] through the Trade Register, as well as through other forms of publicity provided by law".

Therefore, the notaries public, through the profession they exercise, are those who work directly with registers of different types, having the legal obligation to interrogate and communicate the acts handled in the registers established at national level under the administration of the National Administration Center of Notary National Registers (CNNRN) - Infonot, such as the National Notarial Record of Liberal Evidence (RNNEL), the Notarial National Register of Inheritable Options (RNNEOS), etc. Thus,

[8] Ioan Popa, Alin Adrian Moise, *Notarial law. Organization of the activity. Notary status. Notary procedures*, Universul Juridic Publishing, Bucharest, 2013, page 139 and the following.

through these registers, there is a record of the existence or non-existence of the notarial acts, which have to be communicated at national level, any notary public having access to them since 2007.

Regarding real estate publicity, we can define it as the legal form of publicity consisting of all the legal norms concerning how to publicize the legal status of the real estate as well as the corresponding real rights[9]. As we shall see, in the 21st century, the notary public can not exercise his profession outside his close connection with the real estate publicity system. Metaphorically, we can say that just as we, the individuals, identify us by our identity card, so the buildings also have their own identity card, namely the land book that the public notary has the duty to work on a daily basis. Thus, any notarial act relating to immovable property, in order to be given notice against third parties must be registered or recorded in the land book of the building. In the future, the enrollment in the land book of the building will have a constitutive effect, as it appears from art. 885 Civil Code corroborated with art. 56 of the Civil Code Implementing Law. This indispensable link between notarial acts on buildings and their publicity is currently governed by the Civil Code, and the special regulation in Law no. 7/1996 on cadastre and real estate publicity, as well as in Order no. 700/2014 of the General Director of ANCPI regarding the approval of the Regulation for the approval, reception and registration in the cadastral and real estate publicity. Therefore, according to art. 35 of Law no. 7/1996, the notary public is obliged, within no more than two working days after the conclusion of the notarial act of transfer / modification / creation / extinguishment of a real right, to proceed ex officio with the registration of the notary in the land register of the real estate. This practice is not only mandatory but also extremely useful for the safety of the civil circuit, providing information to third parties, resolving the conflict of rights between third-party acquirers of the same right or a competitor's right attributed by the same registering author on the same building[10], acquiring ex law a new legal situation, specific to the land book system, as well as the proof of the legal status of the buildings included in the book, etc. By observing the obligation to transmit the notarial acts to the land registry of the building, the notary public is, among other things, the guarantor of respecting the right to property on the immovable property, as guaranteed by the fundamental law of the state, respectively the Constitution. Therefore, the transfer of immovable rights is opposable to all, because by means of notarial acts and consulting the real estate identity card (land book) anyone can have a clear mirror of the building's history, owners and other rights holders.

Current land books are referred to in Law no. 7/1996 on real estate cadastre and publicity "new land books" and are part of the real estate publicity system. The differentiation is due to the need to distinguish the land books regulated by this law from the land books in Transylvania and southern Bucovina, as they were found in Decree-Law no. 115/1938. The current land book system will replace the existing property publicity systems (personal registers, transcription and inscriptions registers, land books and land records books). Thus, being in the year of the centennial, we can

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[9] Marian Nicolae, Marian Nicolae, "*Treaty of Real Estate Publicity*", vol. II New Land Books, second edition, revised and amended, Universul Juridic Publishing house, Bucharest, 2011, p. 769.

[10] Traian Dârjan, " *The land book - the identity card of the building*", Hamangiu Publishing, Bucharest, 2013, p. 45.

not deal with the history of the notary without questioning this long-standing collaboration of the two institutions by briefly describing the relation of the notary at that time to the real estate publicity system in force at that time, the notary having often attributions of real estate publicity. It should be noted first of all that the obligation of the notary (public) to take care of the publicity of his acts was foreseen for the first time in 2005 when Law no. 7/1996 was amended by Law no. 247/2005, so that by art. 56 it is stipulated the obligation of the notary public to request ex officio the registration in the land register with the territorial office in whose range the activity of the real estate is the right acquired through the instrumented document.

Prior to the Law no. 7/1996 on cadastre and real estate publicity, which aims to unify the practice at national level regarding the way of working with the real estate publicity registers, there were simultaneously the two real estate publicity systems, namely the real publicity system (whic applies in Transylvania, Banat, Crişana, Maramureş and Bucovina) and the personal publicity system (which applies to the rest of the country). The personal publicity system implies the inclusion in the register by person rather than on real estate, and the principal element is the owner, not the good, as is the case with the real publicity system. Below, we will try to expose the collaboration of notaries at that time with these two types of registers.

The real system of land books was first regulated by Decree-Law no. 115/1938, which proposed, like the current Law no. 7/1996 on cadastre and real estate publicity, the unification of the land book provisions that were countless until then. Based on the data resulting from the cadastral identification of real estate, the real publicity system could be applied after the mapping of these regions was completed, the decree-law being the one under which there is the current regulation of real estate publicity. The effect of this system was the constitutive one of rights and the presence of innumerable advantages over the personal publicity system (of transcriptions and inscriptions). At that time, the land books were drawn up in a single copy, as is the case at present.

On the other hand, the personal publicity system has been harshly criticized, as pursuing the good was very difficult. Regulated by the Civil Code of 1864 and the Code of Civil Procedure (applicable in the Old Kingdom), it was based on the function of opposability of the registrations in the transcription and inscription register. This task was the responsibility of the former state notaries, who were competent both to authenticate the documents, to carry out other notarial procedures, and to transcribe these documents into the transcription register and the inscriptions register. In the transcription register, the contract was completely rewritten, which, at a subsequent investigation, led to a great waste of time, and there was no possibility of abbreviated contracts, and in the inscriptions register the encumbrances of real estate were registered. In 1950, when the reform of the notarial system took place, the two registers merged into what was called the unique register of transcriptions and inscriptions, a register maintained by the state notaries at that time until their transfer to the judges, in 1995, upon the entry into force of Law no. 36/1995: "At the time of the entry into force of this law, the duties of movable and immovable publicity, all the works, the records, the transcriptions-inscriptions registers, the mortgage maps, as well as the land books will pass to the jurisdiction of the courts in whose district the state notaries are located”.

Therefore, we can conclude that: the real estate publicity registers and the notary public institution (irrespective of the state or those organized according to Law no. 36/1995 of the notaries public and the notarial activity) have an indispensable link, together with the mission to keep citizens' trust in real estate identity cards (land books).

3. Notarial activity in European context

Notarial activity has gained a new dimension in recent years, entering the large family of the European notary.

Of the 28 Member States, in 22 of them there is a notary, in a similar form to the organization in our country. The missing ones, namely the UK and the Nordic countries, whose legal system is based on *common law*, have several variants of the profession, but none of them with the same importance as our legal system, and can at most legalize signatures and have no attributions similar to the authentication procedure regulated in our legislation. The legal system based on *common law* has as its central point the jurisprudence of the courts. The principle is an apparently simple one: the decision taken in a process is influenced by the decisions taken in past trials, and this, in turn, affects future decisions. If there is no provision for a case submitted to justice, it is the responsibility of the judge to create a right by creating the precedent.

Perhaps the most important distinction between the Latin law and the *common law* system is that the notary public, through its powers, has a vital role to play in preventing disputes by ensuring the legality of acts and by providing advice to its clients. He is a representative of the state, but he is also an independent and equidistant professional, who oversees the interests of all parties involved. The notary is a true peace judge.

The International Union of the Notariate, a non-governmental organization established in 1948 and reuniting 87 countries on October 20, 2016, defines the notary as a law professional, holding a public office appointed by the state to give an authentic character to acts and legal aspects contained in the documents he concludes and to advise those who use his services.[11] On October 8, 2013, at the General Assembly in Lima, the Union adopted the Code of Ethics applicable to all its practitioners. Thus, says the document, the notary is both an official to whom the state has delegated powers of authentication of the documents he conceives, to whom he gives them probative force and subsequently archives them, under the law, as well as a practitioner of law exercising his duties in a well-defined independent legal framework. Any notary is enrolled in a Notary Chamber, which is in its turn affiliated with the National Union of that State, the legal framework of which is provided by the Ministry of Justice. The notary checks the legality of acts, acting impartially, with independence and responsibility, resulting in their authentication, thus ensuring a legal climate favorable to the social and economic development of the civil society of that state. The activities of notaries can not be delegated to other persons except under strictly regulated conditions. In all cases, the notary must be lawfully licensed and passed all the examinations in order to become a notary. In most cases, before becoming a notary

[11] http://www.uinl.org/146/les-principes-fondamentaux-du-notariat-de-type-latin.

finally, there must be a period of internship, which varies from state to state. The notary must enjoy a good reputation and be delimited by any behaviour that could lead to the loss of civil society's trust in the notary's institution. He must be a trustworthy third party to ensure that the parties are properly informed so that the act is legally enforced and produces the legal effects desired by the parties. It's about professional secrecy. Also, the notary cannot instruct acts that will bring him any direct or indirect benefit. He will cooperate with the courts and the state institutions and agencies, respecting the legal framework. The notary can practice independently in an office, which he has the task of equipping it properly, with the necessary technology and adequate space for work and archiving.

Although the goal is to unify the profession, at least at European level, we cannot deny that there are differences that will be quite difficult to overcome from one state to another.

As an example, in Germany there is *richternotar*, having a status "close to the magistrate", but in some Länder (Berlin, Hesse, Schleswig-Holstein, Rhenania-Westfalia) there is also the institution of the lawyer- notary (*anwaltsnotar*).[12] In any of the forms of exercise of the profession, the notary is appointed, as in our legislation, by the Minister of Justice, who makes an estimate of the application for notaries annually. Notaries who are beginners can become holders either by appointment to a vacancy or by appointment to a newly created post. Unlike our legislation, a maximum of 4 tenured notaries can operate in a notary office in Germany. Notaries exercise their profession only within the territorial jurisdiction of the district in which they were appointed. They are also required to have a notary office and reside in the same district.

Another example is France, which is a model for us, our legislation being based and inspired by French law. Not surprisingly, the French notary has attributions similar to our legislation, having the power to issue and authenticate documents that have enforceable force, without which a court decision would be needed. He also provides legal advice to individuals and legal entities, whether or not related to the preparation of documents, and may intervene, as an adjunct, in property management and real estate negotiations. The main areas of activity are family law (marriage contracts, successions, donations, adoptions), real estate and civil and commercial contracts. The French notary can exercise his profession either individually or through association within a professional civil society. Differences arise when talking about how to enter the profession and how to tax the acts and collect taxes for the state.

While it may seem somewhat outside the proposed subject, in the context of political and legislative changes, both at European and global level, which have affected the notarial profession as well, we consider it important to specify a European state but not yet part of the big family of the European Union, Serbia, which introduced and regulated the profession of notary public in 2014. The main reasons were to relieve the activity of the courts and streamline the civil circuit. This was a real support for notarial activity in general, confirming once again, if necessary, its theoretical and practical importance and strengthening the credibility and usefulness of the notary profession.

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[12] Ioan Popa, Alin-Adrian Moise – *Notarial law. Organization of the activity. Notary status. Notary procedures*, Universul Juridic Publishing, Bucharest, 2013, p. 30.

Under Serbian law, the notarial act is a document relating to a transaction or operation, drafted by a notary public, being mandatory for the following legal matters or declarations: contracts relating to patrimonial relations between spouses, those relating to patrimonial relations between unmarried partners, on the sharing of common property of spouses or unmarried partners, agreements on legal support and maintenance under the law, contracts relating to the transfer of immovable property of the persons without exercise capacity, contracts relating to the transfer and sharing of property during life, maintenance contracts, promises donation, donation contracts in case of death, and any annexes to the above contracts. A notarial act is an enforceable title if it contains a specific obligation on the part of a party and if it contains an explicit statement of the party assuming the obligation that enforcement can be applied on the basis of that document after the due date.

With regard to the future of the notary in the European Union, where there is an eternal struggle between the common law system and Latin law, although there are clear tendencies inclined towards the first system, one cannot deny that the countries of the Union are the followers of the second system in an overwhelming majority. In 1993, the Council of Notaries of the European Union was established. Initially, it had other names, the one of today being assigned to it on January 1, 2006. The main purpose of the Council is to assert the notary in the service of the European citizen. Also, through the Council's care, member countries are aware of the legislative changes that have an impact on notarial activity. Moreover, the Council is making proposals for legislative changes so that the citizens of the European Union, increasingly mobile, are not affected by the major changes in the legislation they are passing through.

The Council of Notaries in the European Union currently has 22 members, linked by the same law and the Latin notary of which we spoke earlier and which are Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain. Macedonia, Montenegro, Serbia and Turkey have observer status. There are 40,000 notaries registered in the Council. Together they drafted and signed *the 2020 Plan* by which notaries in the European Union demonstrate their desire to build a European justice policy that meets the socio-economic challenges. This plan is in line with and fits perfectly with the Europe 2020 strategy, where the European Commission relies on the Member States to make reforms to match its recommendations. The commitments made in the 2020 Plan are: finding new solutions to the everyday life of citizens, supporting business development in Europe, strengthening cross-border cooperation between notaries, improving the efficiency of justice through the authentic instrument and working with national administrations.

The fate of the notary has become closely linked to the fate of the European Union and its institutions. In the current context, where laws are constantly moving and changing, it is good to know that there are both national and international institutions that defend the notary, considering it a useful and appropriate tool for defending citizens' interests and ensuring the legality of complex acts which arise as a result of humanity's evolution on all levels.

4. Conclusions

The notarial institution, an institution with deep historical roots, fascinates us both through the evolution it has traveled over time, especially in the light of the role it has played in the Romanian society.

As we have seen in this paper, there are similarities in the organization of the institution in different epochs or in the way of carrying out the specific activity, the notary being seen as a representative figure in society, through education and social prestige.

Regardless of how to regulate the profession, as a notary public after 1918, as a state notary after 1950 and again as a notary public since 1995, he is a professional who performs a function in which the state has an interest - the authentic act being invested with public credibility. For objectivity, authentication of acts is required to remain the responsibility of a neutral body separate from the magistracy or bar, in this case the notary public, the guarantor of the preventive legal protection, who must harmonize the will and the interest of the parties with the legal provisions.

Reborn, after a period called the "*period of rights necrosis*", the notary public regulated by Law 36/1995 imposed the principle for which it was established: to provide natural and legal persons finding legal or commercial non-litigious relationships and the exercise of rights and protection of interests, according to the law. The current Romanian notary public - an institution belonging to the Latin system, revolves around the notion of preventive administration of justice. The non-contentious character of the notarial activity essentially separates the activity performed by the notaries public by the activity of the courts, the non-contentious activity carried out by the notary public avoiding the litigation and pursuing the harmonization of the interests of the parties.

Thus, the notary public, through the powers conferred by the law, is close to citizens at all important moments of life, from engagement and marriage, to the purchase of the first property in the commercial sphere, the dissolution of marriage and the division of heritage up to the provisions of ultimate willingness and inheritance field, while at the same time being legally obliged to protect the weak or disadvantaged - minors, incapable, elderly.

The strengths of notarial activity are trust and efficiency, not least neglecting the cost of the notarial act and the time it takes for it - which are well below the economic and social costs of disputes that it avoids. Efficiency is also due to the fact that the notary does not practice as a civil servant of the state, but in the form of a liberal profession, which allows other standards.

Notaries, through the nature of the conciliator function, are in permanent cooperation with other liberal professions, lawyers, bailiffs, etc., as well as with international institutions, in order to meet the needs of the new social realities in which we live - a attitude specific to a respectable profession.

Although having a history of ups and downs, influenced by diverse economic, political and social realities, the Romanian notary tried, as far as possible, to keep the traditions and not to depart from its primary purpose, namely to prevent litigation. Even though, over time, the institution has not been able to meet citizens' expectations, history helps us to learn from mistakes, and day by day we can manage to bring the institution of the notary to the highest peaks of perfectionism, the choice to go to the notary to conclude the legal act making the difference as in the case of a disease, between preventing and treating.

In conclusion, we cite the appraisals made, almost 100 years ago, by the first president of the General Union of Notaries Public in Romania, Ioan T. Cosma, regarding the magistrate of the graceful procedure, which will be named notary public, appraisal which, over years and years, is as current as possible:

"Life of law is based on millions of legal acts and only in secondary on court judgments. Where goodness, security and keeping the legal acts is ensured by the state through well-trained bodies, framed in a professional organization confined with the most perfect accountability, autonomy, freedom and dignity, there can be talked about the life of law, the safety and order of legal acts. Every legal act is solid brick in the edifice of social life. It is the most important part of the moral construction of the state. Even the civil code is decreed by the law of the contracting parties, giving it the great importance in the life of the state.

On these legal acts, which day by day conclude between citizens forming new obligations and rights, more important and of greater value, than all the riches found in and across the land of the Homeland, on these acts rely on the whole edifice of the state. If these millions of law relations are well established, well-administered and well preserved, the state's life is also well and thoroughly built...

Litigations, hatred, trials, expenses, anxiety and anarchy are born from the acts concluded in the absence of bodies without responsibility and legal training. It is futile any desire to stop this evil spirit by magistracy, for all work will be useless, and the processor outflow from these acts will flood with its poisoned waters all the springs of social and state life.”

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LEGAL DISPUTES OF A CONSTITUTIONAL NATURE BETWEEN PUBLIC AUTHORITIES. A SPECIAL REGARD TO THE PUBLIC ADMINISTRATION

Cristina TITIRIŞCĂ*

Abstract: *Legal disputes of a constitutional nature between public authorities, regulated by art. 146 letter e) of the Constitution of Romania, republished, are becoming more and more current. Law practitioners, as well as the general public could not fail to notice that, since last year, their number has increased, directly proportional to the differences between public authorities, disputes started, for the most part, for political reasons. Whether we are talking about the legislative, the executive, the judiciary or the President of Romania, the Constitutional Court is called upon to mediate these disputes and indicate the conduct to be followed by the public authorities involved, in accordance with the Constitution. In this context, we appreciate it being of interest a study which addresses this issue, with a special focus on public administration.*

Keywords: *Constitutional Court, legal disputes of a constitutional nature, public authorities*

1. Legal framework

In the evolution of the Constitutional Court, after its establishment, the power provided by art. 146 letter e) of the Basic Law[1], respectively the settlement of legal disputes of a constitutional nature between public authorities, marked the activity of the institution and constituted a real challenge.

This task, of great importance and complexity, has been introduced by the Law on the amending of the Constitution, in 2003. Taken from the experience of other countries, where the constitutional courts also have this role in their jurisdiction[2], it increased the degree of difficulty and complexity of the Constitutional Court's mission. It is, in a way, natural, if we consider the importance of the authorities involved (the President, the Parliament, the Government, the judiciary etc.), their power and influence, their institutional autonomy and independence, within the principle of the separation of powers (the cooperation and balance of this principle is often left aside)[3].

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[1] Art. 146 letter e) of the Romanian Constitution, republished: „The Constitutional Court shall have the following powers: […] e) to solve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the president of the Superior Council of Magistracy; […]".

[2] Under different forms, such powers to solve legal disputes fall under the jurisdiction of the Constitutional Courts (or Courts) in Portugal, Slovakia, Poland, Italy, Spain etc.

[3] See, in this respect, I. Muraru, E.S. Tănăsescu, (coord.), *Constituția României. Comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2008, p. 1.404-1.407.

2. Some statistical data

Until the date of this paper[4], out of the total of 41.460 cases of the Constitutional Court, there were 37 requests for legal disputes of a constitutional nature between public authorities[5], but only in 16 cases the Constitutional Court has found that such a conflict exists. At the same time, out of the total of 18.618 decisions, rulings and opinions of the Constitutional Court, 31 decisions (representing approximately 0,17% of the total) were pronounced under art. 146 letter e) of the Romanian Constitution, republished[6].

From a statistical point of view, the weight of the admission decisions in the case of legal disputes of a constitutional nature between public authorities is represented in the chart below:

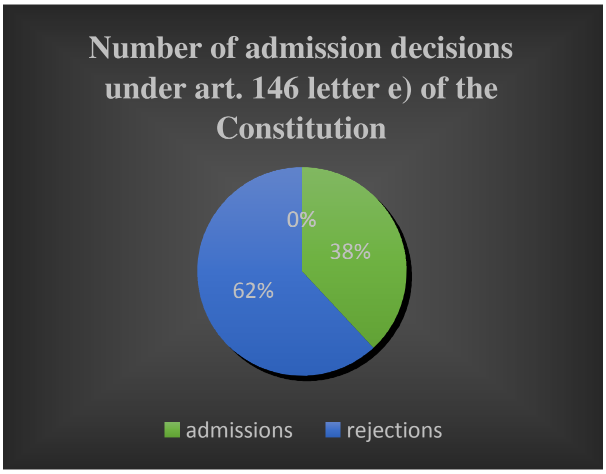

Chart no. 1

We also note that, in the last period, there is an increase in the number of requests for settlement of the legal disputes of a constitutional nature between public authorities, as shown in the chart below:

[4] The middle of May 2018.

[5] We have taken into account the files registered since the establishment of the Constitutional Court up to the present. Source: www.ccr.ro [last accessed on 07.05.2018]

[6] Source: www.ccr.ro [last accessed on 07.05.2018]. The situation is presented since the establishment of the Constitutional Court until 30 April 2018.

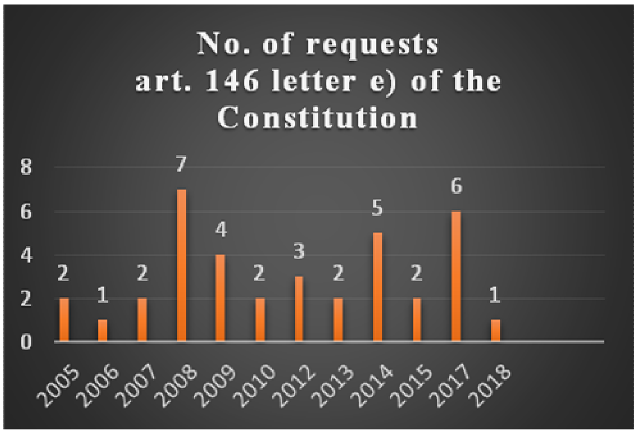

Chart no. 2

3. The features of the legal dispute of a constitutional nature between public authorities, as they are apparent from the case-law of the Constitutional Court of Romania

The specialized literature has not developed much of the subject, so it was left to the Constitutional Court to analyse it and to bring concrete aspects in support of its definition.

The beginning of these applications took place in 2005, with the authorities involved being the President of Romania and the Parliament[7]. We note that, from the very beginning, by virtue of its quality of guarantor of the supremacy of the Basic Law, the Constitutional Court behaved as an impartial and objective arbitrator, always inviting the parties to a loyal constitutional conduct, one of cooperation and mutual respect, that is the expression of the spirit of the constitutional principle of the separation and the balance of powers, which implies, among other things, that public authorities must cooperate loyally with each other, must maintain a constructive dialogue, eventually using the path of the compromise, to find solutions that best match the interests of each other, in order to avoid conflicts. Thus, by resolving the existing conflicts between different public authorities, it is intended to remove possible institutional blockages and not to solve some political divergences[8].

At the same time, according to its constitutional role as a guarantor of the supremacy of the Constitution, enshrined in art. 142 para. (1) of the Basic Law, the Court cannot confine itself to finding the conflict and, possibly, to indicating the violated constitutional rules and principles. She has an obligation *to solve* the conflict, showing the conduct that the public authorities involved should follow, in accordance

[7] Decision no. 53/2005 on the requests for solving the legal dispute of a constitutional nature between the President of Romania and the Parliament, formulated by the President of the Chamber of Deputies and the President of the Senate, published in the Official Gazette of Romania, Part I, no. 144 of 17 February 2005.

[8] Decision no.148/2003, published in the Official Gazette of Romania, Part I, no.317 of 12 May 2003.

with the constitutional provisions to which the parties have to comply. In this respect are relevant the recitals of Decision no. 68 of 27 February 2017[9], whereby, starting from the provisions of art. 1 par. (3), (4) and (5) of the Constitution regarding the fundamental objectives of our rule of law, it is considered that one of the conditions for achieving these objectives is the proper functioning of public authorities, respecting the principle of separation and balance of powers, without institutional blockages. Undoubtedly, given the generally valid principle of non - retroactivity of the law, the obligations laid down for the parties will apply in the future, once the decision has been published.

It should be noted that the notion of "legal “dispute of a constitutional nature" is not defined by the Constitution, so that the Constitutional Court has the task of establishing, by way of jurisprudence, which public authorities may be involved in the dispute, but also the content and scope of these disputes. In this respect, it was noted that the public authorities that might be involved in a legal dispute of a constitutional nature are only those included in Title III of the Constitution, namely: the Parliament, made up of the Chamber of Deputies and the Senate, the President of Romania, as a unipersonal public authority, the Government, the central public administration bodies and the local public administration, as well as the bodies of the judiciary[10].

In order to exercise this power, the Court may be seized only at the request of the President of Romania, of one of the Presidents of the two Chambers, of the Prime Minister or of the President of the Superior Council of Magistracy. As it has been pointed out in the Court's constant case-law, 146 letter e) of the Constitution does not distinguish whether or not the subjects with rights to seize the Court are parties to the conflict that is the subject of the referral. The fundamental law distinguishes only between the holders of the right to refer to the Constitutional Court - expressly listed as the President of Romania, one of the Presidents of the two Chambers, the Prime Minister or the President of the Superior Council of Magistracy - and the public authorities that may have the status of a party to the conflict, established by the jurisprudence as all the authorities provided by Title III of the Constitution. The purpose of this differentiation is to delimit the procedural qualities of the two categories of holders in the case before the Court, since the first category acts by virtue of the Constitution's right to do so without acquiring the procedural quality of a part of the conflict, and the second category acquires this procedural quality. Being the holder of the right of referral to the Court is not subject to the justification of an own interest which would be harnessed or recognized through the resolution of the conflict. If they would hold only the justification of a particular interest of the holder's complaint, in conjunction with the limitation of the persons who can initiate such a procedure, it would conclude that the constitutional provision restrict the access to the Constitutional Court in resolving legal disputes between authorities, an interpretation which is

[9] Published in the Official Gazette of Romania, Part I, no.181 of 14 March 2017.
[10] For example, see Decision no.63/2017, published in the Official Gazette of Romania, Part I, no.145 of 27 February 2017, Decision no.441/2014, published in the Official Gazette of Romania, Part I, no.657 of 5 September 2014 or Decision no.988/2008, published in the Official Gazette of Romania, Part I, no.784 of 24□November 2008.

inadmissible, so that it is fully possible for public authorities not party to the alleged conflicts to bring the matter before the Constitutional Court[11].

With regard to the concept of a "legal dispute of a constitutional nature", it was established that it involves "acts or concrete actions by which an authority or more assume the powers, duties and competencies which, under the Constitution, belong to other public authorities, or the omission of public authorities, consisting in declining their jurisdiction or refusing to perform certain acts falling within their obligations"[12]. The Court also noted that: "The legal dispute of a constitutional nature exists between two or more authorities and may regard the content or the extent of their attributions deriving from the Constitution, which means that they are conflicts of competence, positive or negative, and which may create institutional bottlenecks"[13]. The Court also held that art. 146 letter e) of the Constitution "establishes the competence of the Court to settle in substance any legal dispute of a constitutional nature between public authorities and not only the conflicts of competence arising between them"[14]. Thus, the notion of a "legal dispute of a constitutional nature" refers to any conflicting legal situations the birth of which resides directly in the texts of the Constitution.

4. The public administration - part of the legal dispute of a constitutional nature between public authorities

Although, ever since the beginning of the applications to the Constitutional Court on the settlement of legal disputes of a constitutional nature between public authorities, the Constitutional Court has established that part of such conflicts can also be the bodies of the central public administration and of the local public administration, together with the other public authorities included in Title III of the Basic Law, in fact there were few such cases. Relevant to this study are, we believe, the Decisions of the Constitutional Court no. 901/2009 and no. 108/2014[15]; in the first case, the Constitutional Court found that the aspects brought before the Court do not meet the criteria of a legal dispute of a constitutional nature within the meaning of art. 146 letter e) of the Constitution, and in the second, that there is no legal dispute of a constitutional nature.

In order to rule so, on *Decision no. 901/2009*, the Court held that by application made by the President of the Superior Council of Magistracy, it was requested to find the existence of a legal dispute of a constitutional nature between: the judiciary,

[11] See Decision no.270/2008, published in the Official Gazette of Romania, Part I, no.290 of 15 April 2008, Decision no.972/2012, published in the Official Gazette of Romania, Part I, no.800 of 28 November 2012, Decision no.460/2013, published in the Official Gazette of Romania, Part I, no.762 of 9 December 2013, Decision no.261/2015, published in the Official Gazette of Romania, Part I, no.260 of 17 April 2015 and Decision no.68/2017, published in the Official Gazette of Romania, Part I, no.181 of 14 March 2017.

[12] Decision no.53/2005, published in the Official Gazette of Romania, Part I, no.144 of 17 February 2005.

[13] Decision no.97/2008, published in the Official Gazette of Romania, Part I, no.169 of 5 March 2008.

[14] Decision no.901/2009, published in the Official Gazette of Romania, Part I, no.503 of 21 July 2009.

[15] Official Gazette of Romania, Part I, no.257 of 9 April 2014.

represented by the Superior Council of Magistracy, on the one hand and the executive authority, represented by the Government of Romania, on the other hand, as well as between the judicial authority represented by the Superior Council of Magistracy, on the one hand, and the executive authority, represented by the Ministry of Justice and Citizens Freedoms, a specialized body of the central specialized public administration subordinated to the Government, on the other.

The object of the legal dispute of a constitutional nature with which the Constitutional Court was referred concerns three main aspects:

a) the chronic sub-financing of the judiciary, the failure to manage court budgets by the High Court of Cassation and Justice and the ignoring of the Superior Council of Magistracy by the Government in the process of adopting the budgetary normative acts concerning the justice system;

b) the Government's omission to seek the opinion of the Superior Council of Magistracy on the draft normative acts concerning the activity of the judiciary;

c) the pursuing of certain control activities by the Ministry of Justice and Citizens Freedoms to some courts, also targeting aspects on which the verification falls under the exclusive competence of the Superior Council of Magistracy.Documents and SettingsLaptes GabrielaSintact 2.0cacheLegislatietemp%2522

Analysing the data of the case in comparison with the considerations of principle retained its case-law, the Court held that to qualify some revenue sources as belonging to the state budget or to the local budgets is a decision on the opportunity of the budget, which can be censured by the Constitutional Court only if the operation of a the state's powers are jeopardized, which, in the present case, is not the case. Also, the financial independence of the judiciary cannot be affected by the fact that the budget allocations are managed by the Ministry of Justice and Citizens Freedoms or the High Court of Cassation and Justice, since the financial independence is not determined by the existence of a certain person charged with management of the budget, but by the existence of sufficient budgetary allocations to ensure the proper functioning of the courts.

Neither the criticism regarding the failure to observe the constitutional role of the Superior Council of Magistracy as a guarantor of the independence of the justice by failing to submit its endorsement on normative acts regarding the justice is founded, given that, in its case-law[16], the Court held that the failure of the Government of Romania to comply with a legal obligation in a legislative procedure does not give rise to a legal dispute of a constitutional nature; in the present case, the issues raised by the President of the Superior Council of Magistracy would cover a possible unconstitutionality of laws, and not a legal dispute of a constitutional nature, but the unconstitutionality of a law or ordinance can only be established under the conditions of art. 146 letter a) and d) of the Constitution and not on the basis of the constitutional text of art. 146 letter e).

In addition to these issues, the Court, having regard to differences of interpretation between the parties to the dispute regarding the notion of "endorsement", has also held that it should be circumscribed only to normative acts directly relating to the organization and functioning of the judiciary and the functioning of courts, magistrates'

[16] Decision no.97/2008, published in the Official Gazette of Romania, Part I, no.169 of 5 March 2008.

career, their rights and obligations etc., in order to avoid the distortion of the role of the Superior Council of Magistracy.

As regards the failure to request the Superior Council of Magistracy's opinion on budgetary normative acts concerning the field of justice, it was noted that such a criticism is unfounded. Thus, the budgets of the courts of appeal and of the courts within their constituency are subject to the Superior Council of Magistracy's approval, so it follows that the draft law of the state budget is not subject to the opinion of the Superior Council of Magistracy. It only approves court budget proposals, and the Government is the sole responsible for deciding on the final draft of the draft state budget law. Accepting the thesis supported by the Superior Council of Magistracy, it would lead to the case that an institution that has the role of guaranteeing the independence of the justice might censor issues concerning the management of the national budget, in other words it would carry out an opportunity control over the budget, which is inadmissible.

Finally, with regard to the claim on the existence of a legal dispute of a constitutional nature between the judicial authority represented by the Superior Council of Magistracy, on the one hand, and the executive authority represented by the Ministry of Justice and Citizens Freedoms, a specialized body of the central specialized public administration subordinated to the Government, on the other, motivated by the fact that the audit missions carried out by the Ministry of Justice and Citizens Freedoms have overcome its powers, it was found that such claim is without constitutional support. Any overrun of the competency limits of audit engagements is not a matter of constitutionality, but a strict legality one, so that their report can be censored before the courts. It follows, therefore, that there was no legal dispute in this respect between the Superior Council of Magistracy and the Ministry of Justice and Citizens Freedoms.

In the case of the *Decision no. 108/2014*, the particularity resulted from the fact that the prefect of Suceava County did not initiate the disciplinary procedure, respectively did not issue the order to cease the mandate of a mayor before the deadline, regarding the mayor of a commune in connection with which, through a report of the National Agency on Integrity and a judgment of the Suceava Court of Appeal confirming the conclusions of the report, the existence of a conflict of interest status was found for a certain period of time. As a consequence, the President of the Superior Council of Magistracy notified the Constitutional Court with the request for the settlement of the legal dispute of a constitutional nature between the judicial authority, represented by the Suceava Court of Appeal, on the one hand, and the executive power represented by the Government of Romania, on the other hand.

The Constitutional Court held, in this case, that, examining the constitutional provisions governing the institution of the prefect, the only expressly stipulated competence is that of art. 123 para. (5), according to which " The Prefect may challenge, in the administrative court, an act of the County Council, of a Local Council, or of a Mayor, in case he deems it unlawful". Also, the analysis of the other constitutional provisions not only does not directly establish any clear competence regarding the role of the prefect to issue a cease order, but it does not even derive in any way from them.

Thus, from the analysis of the alleged claims reported to constitutional provisions of art. 123 – The Prefect of the Constitution, the Court found that the existence of any legal dispute of a constitutional nature cannot be taken into account, since the competences of the prefect in the analysed matter derive from the law and not from the Constitution. Thus, the complaint alleging the breach of the role of the institution of the prefect to issue an order of dismissal and establishing forfeiture of any right to occupy a eligible position for a period of three years following the end of mandate could not be received, because, although, by failing to fulfil an obligation which derives from a normative act lower than the Constitution, a legal dispute was born, which cannot be treated as one of a constitutional nature.

In other words, the failure to comply with legal obligations does not automatically create a legal dispute of a constitutional nature, since the eventual ignorance of such a power of an institution or public authority, whether nominated in the very third Title of the Constitution of Romania, is not *eo ipso* a problem of constitutionality, but rather one of legality, because their report can be censored before the courts.

Therefore, the Constitutional Court cannot resolve disputable issues which fall within the competence of other public authorities and institutions, which is why the way of interpretation and application of the relevant legal provisions falls within the scope of justice, provided that the courts are referred to by specific actions. As such, the Court's intervention becomes legitimate whenever the public authorities and institutions referred to in Title III of the Constitution ignore or assume constitutional powers which might have the nature to create blockages which cannot be otherwise removed, this being the essence of a legal dispute of a constitutional nature.

Consequently, the Constitutional Court found that, in this case, the prefect of Suceava County did not depart from constitutional competencies, but from powers that spring from laws subsequent to the Basic Law and, therefore, do not face a legal dispute of a constitutional nature, since the prefect's power to issue a cease order is not provided for by the Basic Law.

5. Conclusions

Undoubtedly, the task of the Constitutional Court to settle legal disputes of a constitutional nature between public authorities became, over time, one of the most remarkable of its powers. Even if their number does not approach the one of the *a priori* or *a posteriori* constitutional review, their importance and impact on public authorities cannot be denied. As such, we embrace the opinion expressed by the doctrine, that such an attribution should not lead to conflicts between the constitutional court of law and other authorities, and "the constitutional judges must manifest undeniable independence and impartiality, prudence and tact, and, why not, a rich imagination in constitutional spirit"[17].

[17] I. Muraru, E.S. Tănăsescu, (coord.), *op.cit.*, p. 1.404.

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THE NOTION AND BASIS OF CIVIL LIABILITY

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Abstract: *The common framework for the establishment of tort law civil liability for the own act is established by the provisions of art. 1357-1371 Civil Code. Integrated presentation of liability in the current Civil Code generates the need to distinguish between the two forms of liability, given that each of them presents its own specific features. Considered as a common right in the area of civil liability, the rules that constitute the legal basis of tort liability are to complement the matter of contractual liability whenever the latter is insufficient. It can be seen that a thorough knowledge of the constitution of tort liability lies not only in the extra-contractual area, but also in the area of contrctual relations. Also as a matter of novelty in the matter, the current legislator has distanced himself from the subjective conception governing the matter of tort or delict, being concerned about regulating objective, independent liability assumptions. Thus, we find in the current Civil Code a single hypothesis of civil liability that is based on fault (civil delict for own act), for the rest of the hypotheses of indifference being indifferent to the analysis of the operability conditions (for example: tort liability for things, for the ruin of the edifice, etc.). In this context, the culpability can no longer be the key to analyzing the conditions to be fulfilled in order to incur civil liability, the place being taken over by the damage, as a genuine sine qua non condition for the admission of the action.*
Keywords: *civil liability, guilt, intent, repair, injury*

1. Introduction

Tort liability in a concise manner implies the obligation to compensate the person guilty of causing non-contractual damage by an unlawful act.[1]

In order to incur civil liability, it is necessary to meet cumulatively the following conditions: the existence of damage; the existence of an illicit act; the existence of a causal relationship between the unlawful act and the damage; the existence of the guilt of the person causing the damage.

It should be emphasized that the form under which this guilt is presented has no relevance in the field of civil law, which may consist of intention or the smallest fault, the consequence being the same in any situation, namely the obligation of the guilty party to fully repair the damage.[2]

As has been shown and already known, not all forms of damage to the environment can be repaired through civil liability, so that it operates, need to be

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[1] Lacrima Rodica Boila, *Raspunderea civila delictuala obiectiva,* Editia 2, Ed. C.H. Beck, Bucuresti, 2014, p.15
[2] *Ididem.*

identified / identifiable, the damage is concrete and quantifiable, such as and to establish the causal link.[3]

2. The necessary conditions

Civil liability for the remedying of environmental and wider damage to environmental protection must be seen as an adaptation of civil law to new needs determined by the evolution of society and as a manifestation of the universality of civil liability.[4]

Civil liability under the Civil Code occurs in environmental law when the perpetrator of the illicit act is known and when there is a causal link between the illicit act and the injurious consequences.

However, the peculiarities of the environment have led to a tendency to „objectify" the liability regime, meaning that in some cases the fault-based liability is shifted to one that seeks, first of all, to repair the damage, presumption of fault or independent of its existence.[5]

The texts of the law provided in art. 1357-1358 of The Civil Code establish the principle of liability based on the guilt of the author of the illicit and prejudicial act. As such, the obligation to repair the damage lies with the person who caused it by an unlawful act „*committed with guilt*"[6]. Moreover, it is stated that „*the author of the damage is responsible for the slightest fault*"[7], which leads to the idea that the obligation to repair exists both in the case of intentional and non-intentional guilt.

We emphasize the aspect of guilt as a necessary condition only in principle, when civil liability is called subjective responsibility, because its scope is, by excellence, the liability for damages caused by its own illicit act. [8]

The Romanian legal doctrine[9] defines guilt as *„the psychic attitude of the author of the illicit and degrading act of the act and of the consequences of that act"*.

We also highlight that the distinction between the forms of guilt is usually not of practical significance, because the civil reparation liability has as a result not only the condemnation of the perpetrator, but also the complete reparation of the injurious damage caused to the victim, the quantum of the reparation depending on the extent of the damage rather than the guilt.

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[3] M. Duțu, Andrei Duțu, *Răspunderea în dreptul mediului*, Ed. Academia Română, Bucureşti, 2015., p. 118; Directive 2004/35/CE of the European Parliament and Council of 21st April 2004 on environmental liability in relation to the prevention and remedying of environmental damage, in the Official Journal of the European Union L.143 / 56, 30 April 2004, Preamble, point 13.

[4] Ph. Le Tourneau (dir.), *Droit de las responsabilité et des contracts. Régimes d'indemnisations,* dixième éditions, février 2014, Ed. Dalloz, Paris, p. 10.

[5] Mircea Duțu, Andrei Duțu, *op. cit.,* p. 118.

[6] Art. 1357 Civil Code.

[7] Art. 1357 par. 2 Civil Code.

[8] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Curs de drept civil. Obligațiile,* Universul Juridic, Bucharest. 2015, p. 351.

[9] L.B. Boilă, *Vinovăția, fundament al răspunderii civile în ambele sale forme, în textele noului Cod civil, ca şi în ale celui precedent,* in „Dreptul" no. 1/2012, pp. 151-185; M. Eliescu, *Răspunderea civilă delictuală,* Academiei, Bucharest, 1971, p. 176.

However, in some cases, the distinction between forms of guilt is of interest[10], if two or more persons are jointly and severally liable for the damage.[11]

Thus, the burden of reparation shall be proportionally divided according to the contribution of each to the damage or, if it can not be established proportionally, with the intent or severity of each individual's fault.[12]

It can also be said that one who did not represent his act and did not foresee the injurious consequences and which, according to circumstances, should not and could not objectively foresee them, acts unintentionally.[13]

As the Civil Code also provides[14], civil liability for torts operates in principle for the easiest fault *(in the law Aquilia et levissima culpa venit).*

With regard to the degree of culpability, according to the criterion of the intensity / gravity of the guilt in both forms, still under Roman law, the distinction between serious guilt (*culpa lata*), mild (*culpa levis*) and very slight (*culpa levissima*) was made.

The serious guilt (*culpa lata*) is sometimes assimilated to the intention, according to the *culpa lata dolo aequiparatatur* adage.

The classic criterion to judge the degrees of culpability is the abstract standard formulated in the *bonus pater familias*[15] syntactic.

A serious fault is that fault that would not be guilty even of the furthest man in the sense that any person with minimal diligence could have predicted the outcome of the act[16].

Mild guilt (negligence) is the imprudence that would not be guilty of a “*good family parent*”, that is, a man with average, normal diligence.[17]

The very slight guilt (*culpa levissima*) is the one that could only be avoided by „*an excellent family parent*”, thereby understanding the man with maximum diligence, having a predictable ability out of the ordinary.[18]

Anyway, this classification of fault was not taken up in the old Civil Code and is not found in the new Civil Code.

However, Art. 16 par. 3 the final thesis of The Civil Code defines the serious fault as „*when the author acted with negligence or imprudence that neither the most deficient person would have manifested in his own interests*” and the principle of liability for any fault being consecrated, art. 1357 par. 2 The Civil Code states that: „*the author of the damage shall be liable for the lightest guilt*” in the matter of civil liability for his own act.

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[10] Denisa Barbu, *Some Aspects Concerning the Civil Action in the Criminal Proceedings,* presented in World Lumen Congress Logos Universality Mentality Education Novelty |15th Anniversary Edition|Iasi, Romania|April 12-17, 2016. Available online at: http://conferinta.info/program-wlc2016/ - Logos Universality Mentality Education Nolelty 2016 Book Series European proceedings of Social and Behavioural Sciences Volume 15, p. 95-101, 2016.

[11] According to art. 1382 Civil Code.

[12] According to art.1383 thesis I, Civil Code.

[13] Liviu Pop, s.a., *op. cit.,* p. 450.

[14] Art. 1357 par. 2 Civil Code.

[15] Sache Neculaescu, *Răspunderea civilă delictuală. Examen critic al condiţiilor şi fundamentării răspunderii civile delictuale în dreptul civil român*, Ed. Şansa, Bucureşti, 1994, p. 293.

[16] Liviu Pop, ş.a., *op. cit.*, p. 354.

[17] *Ibidem.*

[18] *Ibidem.*

Regarding the above, we can say that the position and role of the guilt in the structure of tort liability can be tinted.

Thus, a fault *in abstracto* does not exist, it can not have a conceptual autonomy, being merely the expression of causality of prejudice, in the sense of subjective imputation.[19]

For subjective accountability, the guilt is a condition of existence, while objective responsibility does not require guilt. The latter is based not on guilt, as it claims, but on a causal assumption between the situation, the quality of the person to be held responsible and the detrimental act.[20] The presumption, according to some authors[21], is iuris tantum, which can be overturned, not by the proof of fault, but by the proof of the foreign cause.

Thus, the gravity of the guilt also has some importance in the matter of tort law, as follows:

a) in the case of the joint guilt of the author and the victim of the injury, a circumstance in which the gravity of the guilt of the two is taken as a criterion for determining the extent of the indemnity owed by the author;[22]

b) in the situation regulated by art. 1354 par. 1 of the Civil Code, according to which „*the victim can not obtain reparation for the damage caused by the person who has given unprofitable help or the work, the animal or the building he used free of charge, unless he proves the intention or serious fault of the person, according to the law, he would have been called to be liable*";

c) in the case of exclusion or limitation clauses, clauses which, according to art. 1355 par. 2 Civil Code, „*are valid only if, exceptionally, they exclude liability for damages caused by mere negligence or negligence to the goods of the victim*."

The Civil Code[23] establishes the so-called „particular criteria for assessing guilt", stating that for the „appraisal of guilt", account shall be taken of the circumstances in which the damage occurred, alien to the person of the perpetrator of the deed and, where appropriate, the damage was caused by a professional in operating an enterprise.

Contrary to an authoritative opinion that approves these criteria, pointing out that „*the author will be at fault only if it proves that he did not have the prudence and diligence of the human model under the same concrete circumstances*", we agree with the opinion[24] and we argue that such criteria for „objective fault" are contrary to the concept of guilt, as described in the current Civil Code.

Therefore, we consider that once the guilt has been defined according to the model of the criminal liability[25] stipulated in art. 16 Criminal Code, it could only be assessed in relation to the attitude of the perpetrator to the outcome of his actions, so that,

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[19] Sache Neculaescu, *op. cit.,* p. 293.
[20] *Ibidem.*
[21] *Ibidem.*
[22] According to art. 1383 Civil Code; Ion Dogaru, Pompil Drăghici, *Drept civil. Teoria generală a obligațiilor în reglementarea Noului Cod civil*, Ediția a II-a, Ed. C.H.Beck, Bucureşti, 2014, p. 378.
[23] Art. 1358 Civil Code.
[24] Sache Neculaescu, *op. cit.,* p. 294.
[25] Denisa Barbu, *Controverse in jurisprudenta cu privire la rezolvarea actiunii civile in procesul penal*, Universul Juridic Premium, in Articole Drept Penal si Procesual Penal Premium, 9.08.2017.

however „private" would be „other circumstances", they are indeed „foreign", not only to the author, but also by the new advanced concept.[26]

In criminal law, from where the definition of guilt is taken, such criteria only concern the individualization of punishment, not the degree of guilt of the person called to respond. [27]

Thus, when establishing the guilt, when embodying the forms of intent, there is no difficulty, but it is quite different when the fault is established, consisting of imprudence or negligence.

We should note that in both cases[28], there are some deficiencies in the intellectual process, that is to say, to imprudence, the perpetrator foresees the consequences of his act, but he rightly considers that they will not occur or that he will avoid them, and negligently, the perpetrator does not foresee the consequences of his illicit conduct, though he had to foresee them.[29]

But what would be the criterion to consider that the author regarded „without foundation" or that the author „had and could" foresee the outcome?

Discussions in the literature have oscillated[30] over time between two fundamental concepts and some intermediate concepts. The lack of legal criteria in the old Civil Code for the determination of culpability has given rise to a series of debates and jurisprudence and, as a result, three points of view have emerged:

- in a first conception, a subjective, concrete assessment criterion has been adopted, starting from the actual capacity of each subject in part to fully understand and appreciate the significance of their own actions, in their social design.[31]

Thus, we believe that the behavior of the author of the illicit deed should be compared with his usual conduct.[32]

- in a second conception, an objective criterion was adopted, of reporting the behavior of the concrete author to the model behavior of an abstract person, taken as a comparison term.[33]

This view is appropriated by the majority judicial practice, arguing that it is necessary to take into account the level of prudence and diligence required by the society of a man of average ability to be cautious and diligent.

Thus, if there is wider application of the subjective criterion of concrete judgment in criminal matters[34], this does not mean that the objective criterion is excluded.

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[26] The Air Code of December 30, 1953, does not release the aircraft operator during the flight from his responsibility unless it is possible to impute a victim to a serious offense or at least a serious fault (Article 97); see M. Eliescu, *Răspunderea civilă delictuală,* Ed. Academia Română, Bucureşti, 1972 p. 184.

[27] Sache Neculaescu, *op. cit.,* p. 294.

[28] Liviu Pop, ş.a., *op. cit.*, p. 354.

[29] C. Stătescu, *Drept civil. Teoria generală a obligațiilor,* IX, revised and added, Hamangiu, Bucharest, 2008, p. 201.

[30] *Ibidem*, p. 181

[31] *Ibidem*, p. 181.

[32] Liviu Pop, ş.a., *op. cit.*, p. 283; P. Anca, *Faptele ilicite,* in Popescu/Anca p. 188.

[33] C. Stătescu, *op. cit.*, p. 181; M. Eliescu, *op. cit.*, p. 185 and the following; I. M. Anghel, Francisc Deak, Marin F. Popa, *Răspunderea civilă,* Ştiințifică, Bucharest, 1970, p. 134 and the following; Tudor R. Popescu, Petre Anca, *Teoria generală a obligațiilor,* Ştiințifică, Bucharest, 1968, pp. 197-198.

[34] Denisa Barbu, *Drept procesual penal*, Lumen Iasi, 2016, p. 21.

As such, it is considered that the outcome was predictable when „any normal and careful man should have foreseen it".[35]

In civil law, it is preferable to adopt, as a rule, the objective criterion in the assessment of the guilt, supplemented by some subjective elements related to the concrete circumstances arising from the place, the time, the circumstances in which the act was committed, the qualities and the preparation of the active subject, as well as other such circumstances.[36]

- in a third, intermediate, conception, it was considered that the assessment of the guilt is also based on the subjective criterion, that is, by reference to the behavior of a normal, abstract man, acting with diligence and prudence towards society and his fellow men, that is, a *bonus pater familias.*[37] This criterion is complemented by some objective circumstances, in our opinion, art. 1358 of the Civil Code stating the intermediate solution according to which the fault is assessed according to the objective criterion, also taking into account „the circumstances in which the damage occurred, foreign to the person of the perpetrator of the act, and, if the case, the damage was caused by a professional in operating an enterprise."

Conclusions

From this, we can conclude that we can not take into consideration the subjective internal circumstances and traits of the author of the detrimental act, such as: age, sex, temperament, skill, etc.[38] This view is supported by the French literature.[39]

Referring to such „private" and at least unusual criteria in civil law, novelty, the French authors[40] consider the justifying facts that are external circumstances[41] and the clauses of irresponsibility, the unilateral attitude of the victim.[42]

Far from the minimum requirements of codification, the normative statement does not offer at least the slightest explanations, such as the method of exemplification, in order to see what the authors of the normative text had in mind. Does it refer to the causes defined below, to art. 1360-1364 of the Civil Code?

The answer, from our point of view, can not be affirmative, because the legitimate defense and the disclosure of commercial secret are not alien to the person of the author, only the necessity of this character. We also note that these criteria have not been determined by lack of systematization.

[35] Vintilă Dongoroz, *Explicații teoretice ale Codului penal român,* vol. I, II, CH Beck, Restitutio Collection, Bucharest, 2012, p. 120.

[36] C. Stătescu, *op. cit.*, p. 181.

[37] M. Eliescu, *op. cit.*, p. 188 and the following; C. Stătescu, op. cit., pp. 201-202; L. Pop ş.a., *op. cit.*, pp. 453-545.

[38] Liviu Pop, ş.a., *op. cit.*, p. 355.

[39] G. Vincy, P. Jourdain, *Les conditions de la responsabilité,* 4e édition,m Ed. L.G.D.J., Paris, 2013, pp. 401-403; François Terré, Philippe Simler, Yves Leguette, *Droit civil. Les obligations,* 11e édition, Dalloz, 2013, pp. 711-712.

[40] François Terré, Philippe Simler, Yves Leguette, op. cit., pp. 742-745.

[41] For example, the order of law or of a legitimate authority, the state of necessity.

[42] For example, legitimate defense, its consent. See Fr. Terré, Ph. Simler, Y. Leguette, *op. cit.*, p. 743.

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NEW CHALLENGES IN LEGISLATION REGARDING THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract: *This article first examines the current regulations and possible effects of the European Convention on Human Rights regarding the surveillance system on serious violations of human rights, through its Additional Protocols, such as Protocol no. 16 added to the Convention, which will enable the European Court of Human Rights to address preliminary questions. The new challenges posed by the entry into force of Protocol no. 16 after being added to the Convention will probably have a positive impact, by creating a uniform European law for fundamental rights and freedoms, and at the same time will ensure a more appropriate response to possible violations in the future. At the same time, it offers the possibility for the highest courts of the Contracting Parties to seek a consultative opinion on the interpretation or application of fundamental rights and freedoms and many other options, such as creating some prerequisites for facilitating the work of the ECHR by reducing its workload, and facilitating the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the assumption that the two mechanisms are relatively similar, and to raise some questions about the possibility of access to justice of each individual before the ECHR.*

Keywords: *Council of Europe, European Convention on Human Rights, Protocol no. 16 to the Convention, advisory opinion, challenges*

I. Introduction

The Council of Europe, an international interstate organization with political and cultural vocation[1] mainly, was set up on the 5th of May 1949 following the Treaty of London, currently counting 47 Member States, of which 28 are members of the European Union, was created to edify peace based on justice and international cooperation, being of vital interest in preserving and educating human society and civilization.[2] The ideas underpinning its formation are at the same time the cornerstone of the adoption in 1950 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and of its monitoring mechanism, represented by the European Court of Justice of Human Rights (hereinafter referred to as the ECHR), created in 1959.

The Convention is characterized by a permanent evolving capacity, and since this evolutionary character allows progressive, increasingly binding commitments for states, it can be seen that beyond this progress, human rights, including those mentioned in the Convention, must be in a permanent symbiosis with the evolution of

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[1] Irina Moroianu Zlătescu, Elena Marinică – *European Union Law*, Editura Universul Academic and Editura Universitară, Bucharest, 2017, pp. 40-48

[2] Duculescu Victor, *Legal protection of human rights - domestic and international means*, New edition, revised and added, Ed. Lumina Lex, Bucharest, 1998, p. 98

society, of the mentalities, in order to provide an adapted and effective protection of human rights[3].

In this respect, the Council of Europe's action regarding human rights, through the adopting of additional protocols, completes the evolutionary picture of European human rights law and demonstrates that the development of fundamental rights in Europe is a constant, and the contribution of the Council is of paramount importance[4].

II. Protocol no. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Protocol No. 16, an annex to the Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by the Committee of Ministers pertaining to the Council of Europe on July 10th, 2013 and was ready to be signed on October 2nd, 2013. The adoption of Protocol No 16 and its addition to the European Convention on Human Rights by the Member States of the Council of Europe and other High Contracting Parties to the Convention arises from the need to extend the jurisdiction of the Court to provide consultative opinions with a view to intensifying and strengthening relations between the Court and national authorities.

The Protocol is essentially another cornerstone of the European legal system for the protection of fundamental rights and freedoms. The basis for these regulations is the concern of the member states of the Council of Europe regarding the long-term effectiveness of the Convention's control. The concern dates back to 2005, following the Warsaw Summit, when the Council aimed to "examine the issue of the long-term effectiveness shown by the control mechanism of the European Convention on Human Rights"[5] and the report drawn up on that occasion proposed this new procedure that became a matter of fact much later, in 2013.

In the category of main complements to the Protocol, there is the possibility for the highest courts of the Contracting Parties to seek an advisory opinion on the interpretation or application of the fundamental rights and freedoms defined in the Convention or in its Protocols, if a certain pending case raises questions. Procedurally, after requesting the advisory opinion, this request is examined by a college of 5 Judges of the Grand Chamber, and finally the ECTHR's Grand Chamber delivers its opinion.

The protocol is open for signing since October of 2013, and in order to come into force, it has to be ratified by 10 states; this was not easy to achieve because some supreme national courts were and are very reluctant, other states have expressed their refusal (Germany, Russia, Poland, the United Kingdom) and other states have shown an expectant attitude without taking any decision.

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[3] Jean Francois Renucci – *Treaty of European Human Rights,* Editura Hamangiu, Bucharest, 2009, p. 33

[4] *Ibidem*, p.84

[5] See *the Explanatory Report drawn up by the Council of Europe on Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, p.1, available at https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_FRA.pdf

Since the entry into force of the Protocol was expected as early as 2013, the tenth state in number to ratify Protocol No. 16 for the entry into force of these regulations still missing, the tenth State which ratified the addition of Protocol No. 16 to the Convention this year is France. This latest ratification by France triggers its entry into force and its applicability to the following countries: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine (as required by Article 8 of the Protocol). France thus becomes the state that allows the entry into force of this protocol, reinforcing the French ideals and convictions of European justice, conceived as a space for dialogue and complementarity. Nine other countries have signed the protocol, but have not yet ratified it: Italy, the Slovak Republic, the Netherlands, Turkey, Norway, Romania, Greece, the Republic of Moldova and Andorra.

Thus, in France, by Law no. 237 of April 3rd, 2018, the Protocol no. 16 annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms is approved, by submitting the instrument for the ratification of the Protocol in Copenhagen. Thus, starting with the 1st of August 2018, it will be possible to address preliminary questions to the European Court of Human Rights, which is an important step forward in creating a uniform European law on fundamental rights and freedoms.

As far as Romania is concerned, our country signed the Protocol no. 16 annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms on 14 October 2014, submitting also the "Declaration regarding the highest Romanian jurisdictions that will be able to request an advisory opinion to the European Court which include, besides the Constitutional Court and the High Court of Cassation and Justice, the national Courts of Appeal. [...] This confirms the decision of the State Parties to the Convention to reform the conventional system and to contribute to solving issues of interpretation of the Convention ahead of time and, implicitly, of domestic law, preventing both the development of divergent national jurisprudence, as well as the recording of a significant number of individual applications to the European Court of Human Rights (ECHR)."[6] For the provisions of Protocol 16 to be applicable in Romania, the protocol must be ratified first.

The provisions of that protocol closely resemble the procedure of reference for a preliminary ruling by the national courts addressed to the European Union (hereinafter referred to as ”the EU”) under Article 267 of the Treaty on the Functioning of the European Union (hereinafter referred to as ”the TFEU”), in which the Court of Justice of the European Union (hereinafter referred to as "CJEU") issues recommendations to the EU Courts, "in cases where the interpretation or validity of an EU law is concerned, in case a national court is required to make a decision after an European institution has given a resolution or there is no other way of appeal."[7] The preliminary reference is a fundamental mechanism of European Union law which seeks to ensure, interpret and uniformly apply EU law by giving the courts of the Member States an instrument allowing them to have recourse to the CJEU on a preliminary basis, asking questions

[6] See https://www.mae.ro/node/29238
[7] See https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM%3AI14552

related to the interpretation of Union law or the validity of acts adopted by Union institutions, bodies, offices or agencies.[8]

The difference between the procedure before the CJEU and the new procedure before the ECHR is due to the binding nature of the decisions made by CJEU, based on the principle of the supremacy of EU law on national law, compared to ECHR opinions that will be consultative, without the possibility of applying any sanction.

At the same time, Protocol No. 16 strengthens Protocol No. 15 which is meant to make the functioning of the ECHR more efficient by including provisions on the principle of subsidiarity, among other things, in the Preamble to the Convention. In addition to allowing dialogue between the highest national courts and the ECHR, the aim of the Protocol is also to ensure a stronger implementation of the Convention in line with the principle of subsidiarity.[9] In order to interpret the provisions of the Protocol, a series of guidelines were developed to provide practical assistance for the initiation and follow-up of the procedure provided for in Protocol No. 16 to those courts competent to submit a request for an advisory opinion. These measures "must be seen in the spirit of dialogue and cooperation between the national authorities and the European Court of Human Rights (" the Court ") underlying the Protocol. Guidelines that are not binding must be interpreted in the light of the provisions of Protocol No. 16 annexed to the Convention and the corresponding rules modelled on the Court's rules)."[10]

Requesting the opinion will demonstrate in time the tendency of national authorities to voluntarily access this opportunity offered by the Protocol, so that subsidiarity, present in each article in the Protocol, will demonstrate the role and work of Member States and courts in exercising control by using this procedure. Article 1 of the Protocol states that:

”(1) Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols annexed thereto.

(2) The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

(3) The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.”

The notion of "Highest courts and tribunals of a High Contracting Party" in Article 1 al. (1) may also include courts that have so far been unable to address the ECHR directly. The wording "Supreme Courts of the High Contracting Parties" offers some freedom of choice, referring to the jurisdictions at the upper limit of the national judicial system, thus allowing "the inclusion of possible jurisdictions which, although

[8] See Constanța Mătușescu, *Institutional law of the European Union*, Ed. Pro Universitaria, Bucharest, 2013, pp. 249-256. For more information see also https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016H1125(01)&from=RO;

[9] According to the Court's Opinion on the Draft Protocol no. 16 of the Convention and the extension of its power to provide advisory opinions on the interpretation of the Convention adopted by the ECHR on 6 May 2013, the ECHR fully subscribes to these objectives.

[10] CEDO – *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention* (as approved by the Plenary Court on 18 September 2017), available at https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

smaller than the Constitutional Court or the Supreme Courts, are nevertheless of particular importance because they are the "highest" jurisdictions for a given category of cases."[11] At the same time, Article 1 (2) imposes the request for an advisory opinion to be made in a case pending before the court, but the procedure does not allow a theoretical analysis of the legal rules that have not been applied in the case in question. According to the Council of Europe's Explanatory Report on Protocol No. 16 annexed to the Convention for the Protection of Human Rights and Fundamental Freedoms, "Article 1 (3) lays down certain procedural requirements to be met by the requesting court. They reflect the purpose of the procedure which is not to transfer the dispute to the Court, but to give the court requesting the advisory opinion the means necessary to ensure that the Convention's rights are respected when it is in the process of judging the pending litigation." The requirements serve two objectives, first, that the requesting court examined the necessity and usefulness of requesting an advisory opinion to the Court in order to be able to explain the reasons for that request and, secondly, that the jurisdiction which formulated the application seeks to define the legal and factual context, thus allowing the Court to focus on the main issue concerning the interpretation or application of the Convention or its protocols."[12]

In accordance with the provisions of Article 10, the designated Contracting Parties shall be established as follows: " Each High Contracting Party to the Convention shall, at the time of signature or when submitting its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates according to Article 1, paragraph 1, of this Protocol. This declaration may be modified at any later date and in the same manner."

Consequently, the analysis of the two articles may indicate the optional nature of the request, which implies the right to withdraw the request at any time of the procedure, and at the same time it can be seen that the determination of the competent courts to request the opinion is left to the free choice of states, with the statement that they must be of the highest jurisdictions. The rule set out in the Protocol does not have to do with the request for such an opinion, but the request must possess a character of its own, individuality and be proactive, having an incidental or exceptional character, and it has to respect the rights and freedoms protected by the Convention, since the Protocol does not seek to impose a higher workload for the ECHR, but only to streamline the procedures and establish the importance of opinions by issuing them at the request of the highest national courts, with a major impact on internal jurisprudence and by establishing a dialogue between ECHR judges and those of the national courts concerned.

Articles 4 and 5 of the Protocol provide that advisory opinions must be substantiated, published and forwarded to the requesting court and to the High Contracting Party to which that court belongs and that advisory opinions are not binding. Although the Consultative Opinion of the Grand Chamber will be public, it

[11] *Explanatory Report on the Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, p. 2, available at https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_FRA.pdf
[12] *Ibidem*, p. 3.

will not be mandatory for either the Supreme Court or the ECHR, this representing only the interpretation given by the ECHR to the Convention.

As a working procedure set out in the Protocol, the request for an opinion is judged by a college of 5 Judges of the Grand Chamber, which decides on the admission of the request for an advisory opinion. If the application is admissible, the Grand Chamber issues an advisory opinion, and if the application is rejected, it must be reasoned. The College and the Grand Chamber include the judge chosen to represent the high contracting party to which the requesting court belongs. According to Article 2 paragraph (3) "if that judge is absent or unavailable, a person chosen by the President of the Court shall serve as a judge, being chosen from a list submitted in advance by the High Contracting Party." Also, "the Human Rights Commissioner of the Council of Europe and the High Contracting Party to which the requesting court belongs shall have the right to submit written observations and to take part in the hearings. In the interests of the proper administration of justice, the President of the Court may invite any High Contracting Party or any interested person to also make written submissions or to take part in the hearing "(Article 3). In practice, the Council of Europe's Commissioner for Human Rights is granted a right equivalent to his participation in a third-party intervention in proceedings before a Chamber or the Grand Chamber, in accordance with Article 36 (3) of the Convention.

The Protocol does not provide for a time limit for the examination of the application, but it is intended to give priority to these requests, as any delay could be considered as a deterrent.

It remains to be seen what the effects of this procedure will be in the long run, taking into account that these ECHR opinions are not binding on the national court, with only an advisory role (Article 5), risking that they will not fulfil any desired purpose or any finality at all. Even with this consultative role, these opinions will form the ECHR jurisprudence in time, leading to the evolution of European law in a broad sense, beyond the 28 EU Member States, to the 47 member states of the Council of Europe currently, and the states that wish to accede to the Convention in the future. An advantage in using this mechanism is the approximation of national legislation and ECHR jurisprudence, so that the ECHR will be better acquainted with national particularities.

The effects of this procedure will be apparent before long, starting from the possibility of individual access to justice before the ECHR. Thus, if this procedure is used by the national court, which will take into account the opinion issued, thus deciding the possibility of the citizen to address the ECHR is questionable. If the national court decides not to take into account the ECHR's opinion, the possibility of access to justice for the individual is still present. One can notice that the many reforms of the Convention system over the past two decades have and may have effects on the means of applicants for access to justice in the (new) judicial system.[13]

[13] For more information regarding the acces to justice Janneke H. Gerards, Lize R. Glas - *Access to justice in the European Convention on Human Rights system*, Netherlands Quarterly of Human Rights, 2017, Vol. 35(1) 11–30, available at http://journals.sagepub.com/doi/pdf/10.1177/0924051917693988

III. Conclusions

At the same time, in terms of relations between the European Union and the European Court of Human Rights, on the assumption that the two mechanisms are relatively similar, one could contribute to the construction of the EU accession to the Convention for the Protection of Human Rights and fundamental freedoms, currently blocked by the CJEU's negative opinion, ruling on the draft agreement regarding the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, identifying aspects of incompatibility with EU law.

With regard to Protocol No. 16 concerning the ECHR, in a CJEU's press release[14] it is stated that it "authorizes the highest courts of the Member States to address requests for an advisory opinion to the European Court of Human Rights on issues of principle concerning the interpretation or application of the rights and the freedoms guaranteed by the ECHR or its protocols. Given that the ECHR would be an integral part of Union law in the event of accession, the mechanism established by that protocol could undermine the autonomy and effectiveness of the preliminary ruling procedure provided for by the EU Treaty, particularly where rights guaranteed by the Charter correspond to rights recognized by the ECHR. Thus, it is not excluded that a request for an advisory opinion submitted under Protocol 16 by a national court may initiate the Court's "prior involvement" procedure (this procedure is stipulated by the draft agreement itself and seeks to enable the Court to get involved in cases brought before the European Court of Human Rights and in which Union law is at stake, but this has not yet been interpreted by the Court), thereby creating a risk of circumvention of the preliminary reference procedure. The Court appreciates in this regard that the draft agreement does not provide anything concerning the correlation between the two mechanisms."

The literature suggests that the draft agreement on EU accession to the ECHR is incompatible with the EU Treaties; thus "although both the Strasbourg Court and the Luxembourg courts tried to avoid a conflict between their case-law bodies, while Article 52 (3) of the Charter promotes the deference of the CJEU shown to the ECHR and the ECHR quotes and increasingly takes EU law into consideration, the CJEU remains clearly very concerned about protecting the autonomy of the EU legal order and the exclusivity of its own competence.[15] At the same time “by treating the ECHR as a source of inspiration, and not as a binding charter of rights, fully and formally incorporated”, the ECJ has retained, for EU law, the "freedom to go" further than the Convention, or to deviate from it in certain ways.... this approach to the European Convention as a "floor" rather than a "ceiling" for EU human rights law has been maintained by Article 52 (3) of the Charter of Fundamental Rights, which states that the meaning and scope of those rights corresponding to rights guaranteed by the ECHR

[14] See CJUE Press Release no. 180/14 Luxemburg, december 18, 2014 on Opinion 2/13 "of the CJEU, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180ro.pdf

[15] Paul Craig, Gráinne de Búrca, *European Union law. Comments, jurisprudence and doctrine*, 6 Edition, Ed. Hamangiu, Bucharest, 2017, p. 480.

are the same as those provided for by the Convention, but that this provision does not prevent Union law from granting broader protection."[16]

It is therefore obvious that this protocol will not solve the conflicts of legitimacy between the ECHR and the CJEU, but it may be a step forward in streamlining measures and diminishing the human rights violations covered by the Convention.

At the same time, it is clear from the analysis of the protocol that it goes beyond creating prerequisites for facilitating the ECHR's work by reducing workload, ensuring that Member States have to be the first to ensure compliance with the Convention and to ensure progressive evolution regarding the protection of fundamental rights in Europe.

In Romania's case, considering the entry into force of the Protocol, it is imperative to participate actively and to use the procedure for requesting an advisory opinion, if one takes into account that a significant number of litigations[17] that have been and are presented before the ECHR refers to our state and its violation of human rights and fundamental freedoms. Requesting a consultative opinion by the national courts should, at least on a theoretical level, ensure a significant reduction in national requests to the ECHR over time, a better and more effective dialogue with ECHR judges and a case law that will help to respect, protect and promote human rights and fundamental freedoms at national, European, and international level.

The Protocol and the new Regulated Procedure represent the path to a better future of human rights and substantial progress in the effectiveness of the protection of fundamental rights in Europe, in the case of serious and systematic violations submitted to the European Court of Human Rights. It can be concluded that the new Protocol no. 16 annexed to the Convention represents a significant step forward for the member states of the Council of Europe but also for the European Union, as the importance of the ECHR acquis is well known, the Court being directly involved in the elaboration of the Charter of Fundamental Rights of the European Union by incorporating its principles into European law.

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[16] *Ibidem*, p.432

[17] According to the Statistical Analysis of the Council of Europe on the activity of the European Court of Human Rights for 2017, published in January 2018, Romania is at the forefront of the Court's workload on procedural stages and judicial training with a total of 9920 followed closely by Russia, Turkey and Ukraine, p.12 and p. 50

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THE MAIN RULES FOR THE ORGANIZATION AND FUNCTIONING OF THE LEGAL SYSTEM IN ROMANIA

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Abstract: *Justice is an element of the state, its attribution to trial, to solve different conflicts between legal subjects, thus excluding the possibility to perform this jurisdiction by other structures or by persons or private institutions. The norms regarding the organization and functioning of the legal system are stated both constitutionally, as well as by special laws, their application and interpretation being the object of controversies in a jurisprudential area, relevant being the aspects mentioned by the practice of the Constitutional Court, guarantor of the constitutional supremacy.*

Keywords: *legal system, magistrate, courts, judicial power, judicial authority, Constitution*

1. Criteria for the development of the legal system

The Romanian Constitution[1] states the norms for the organization and functioning of justice, in Chapter 4, "Judicial Authority", norms stating the criteria for the development of the judicial system, namely:

a) The judicial authority if represented by: the courts, the Public Ministry and the Superior Council of Magistracy;
b) The prohibition of establishing extraordinary courts, the justice being accomplished by the High Court of Cassation and Justice and by the other courts stated by the law;
c) The publicity of the hearings and the performance of the judicial procedures in the mother tongue (Romanian);
d) The irremovability of the judges, their independence and subjection only to the law;
e) Legality, impartiality and hierarchic control in the activity of prosecutors;
f) The establishment of incompatibilities and interdictions regarding the position as judge or prosecutor.

If all these organizational structures represent judicial authorities, not all of them fall under the exigencies that the principle of the separation of state powers demands for the definition of the judicial power. The third state power – the judicial power – acts only within the limits of the courts' system, these being the only public authorities summoned to fulfill state justice, with the support of the Public Ministry and the Supreme Council of Magistracy[2].

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[1] Published in the Official Gazette of Romania, Part 1, No 233/21 November 1991, republished in the Official Gazette of Romania, Part 1, No 758/29 October 2003.
[2] Mihai Constantinescu, Ion Deleanu, Antonie Iorgovan, Ioan Muraru, Florin Vasilescu and Ioan Vida, *Constituția României - comentată şi adnotată*, "Monitorul Oficial" Press, Bucharest, 1992, p.277.

Though is not mentioned by the Constitution, one cannot leave outside the Public Ministry, which holds a special role in the administration of justice. It is the organ of the specialized public administration having attributions stated by the law in the area of justice, of enforcing the criminal penalties, as well as regarding its activity, by insuring the conditions necessary for the entire system to function, based on the severe application of the law, in accordance with the democratic principles of the rule of law[3].

The legislator has rigorously established that the performance of the judicial power, the administration of justice, is achieved only by the courts, and not by the two other components of the judicial authority (Public Ministry and the Supreme Council of Magistracy), whose attributions are different and also mentioned by the Constitution.

"Justice has become one of the incontestable guarantees of human rights. The explanation of this position resides in several elements, of which we shall name a few. First, this is the natural result of the separation/balance of state powers as dominant rule in the organization and functioning of the constitutional order. Second, the role and functions the justice provides. To make justice refers to the protection of rights, freedoms and legitimate interests. Finally, justice is delivered according to certain principles emphasizing its independence and effective possibility to fulfill it. Moreover, the challenge of court rulings is possible only within the judicial system"[4].

Art 21 of the Constitution uses the term of "justice" which can be confusing, given the meaning of its two understandings.

In a limitative meaning, justice is provided only by certain public authorities – the courts.

In a large meaning, this notion could refer to all jurisdictional authorities, regardless if they are part of the judicial system or not. The jurisprudence of the Romanian Constitutional Court has ruled upon this issue in the meaning that Art 21 only refers to the courts, and not to other jurisdictional authorities. In exchange, the existence of the jurisdictional organs represents a supplementary constitutional guarantee for the protection of the rights and freedoms of individuals for as long as they do not hamper the free access to justice[5].

Justice is delivered according to certain principles valorizing its independence and the effective possibility of being provided. Moreover, the appeal against judicial decisions is possible only within the judicial system[6].

The compatibility between the jurisdictional and judicial activity must not lead to the idea of including the jurisdictional organs within the system performing an activity providing justice[7]. "There are two different aspects: justice, as a fundamental dimension of the rule of law, which is provided by the judicial authority and the administrative-jurisdictional activity, as means of performing the public administration".

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[3] Ioan Muraru and Elena-Simina Tănăsescu, *Drept constituțional şi instituții politice*, 13th Edition, 2nd Vol., C. H. Beck Publ.-house, Bucharest, 2009, p.284.

[4] Ioan Muraru and Mihai Constantinescu, *Studii constituționale*, 1st Vol., Actami Publ.-house, Bucharest, 1995, pp.184-185.

[5] Simina-Elena Tănăsescu, *Principiul egalității în dreptul românesc*, All Beck Publ.-house, Bucharest, 1999, pp.234-235.

[6] Ioan Muraru and Mihai Constantinescu, *Studii constituționale*, 1st Volume, Actami Publ.-house, Bucharest, 1995, pp.184-185.

[7] Simina-Elena Tănăsescu, *op. cit.*, p.236.

This is why the administrative-jurisdictional activity performed by the public administration organs shall be concretized, under the aspect of the judicial nature, in administrative acts having a jurisdictional feature, and not as judicial decisions.

Art 125 of the Constitution refers only to the performance of justice within the judicial system.

This article shall not take into consideration other jurisdictional activities…[8].

For the system of the Romanian Constitution, justice has become one of the guarantees of performing the citizens' rights and freedoms. This role is motivated by the localization of the judicial power within the system of public powers and its functions. Justice is being delivered in the name of the law by independent judges subjected only to the law. The judicial activity is related only to the law and insures the unconditioned application of the law and only of the law. The functions of justice are to interpret and apply the law to specific cases, to trial and apply sanctions, to deliver justice.

The specific performance of these functions is insured by the rules of development of the activity of justice, among which we mention the publicity, orality and contradictory of the debates, the obligation to motivate the decisions, the possibility of appealing the decisions etc.[9].

2. The Romanian constitutional jurisdiction on the organization and functioning of the judicial system

Starting from the constitutional provisions mentioned by Art 123 Para 2, Art 124 Para 1 and Art 131 Para 1 of the Constitution, one can conclude that the limitation of the role of each element of the judicial authority is proven also by the different means in which the texts regarding the judges and prosecutors are stated, the latter ones having a different statute than the judges, because the prosecutors do not deliver justice nor are independent towards the hierarchical authorities.

By Decision No 873/25 June 2010[10], the Constitutional Court has ascertain as necessary the examination of the statute of magistrates, by stating that "…the statute of judges and prosecutors is stated by Art 125 of the Constitution – for judges and by Art 132 – for prosecutors", provisions found in Title 3, "Public authorities", Chapter 6 "Judicial authority", Section 1 "Courts of law" (Art 124-130), Section 2 "The Public Ministry" (Art 131-132) and Section 3 "Superior Council of Magistracy" (Art 133-134). According to Art 125 of the Constitution, the judges appointed by the President of Romania are irremovable; the proposals for appointment, as well as the promotion, transfer and sanctioning of judges are under the competence of the Superior Council of Magistracy, and the position as judge shall be incompatible with any other public or private position, except the didactic positions in the superior education system. According to Art 132 of the Constitution, the prosecutors perform their activities according to the principle of legality, and the position as prosecutor is incompatible

[8] Decision No 41/7 July 1993, published in the Official Gazette of Romania, Part 1, No 218/6 September 1993.

[9] Ioan Muraru, Viorel-Mihai Ciobanu in *Constituția României – Comentariu pe articole*, coord. Ioan Muraru and Simina-Elena Tănăsescu, C. H. Beck Publ.-house, Bucharest, 2008, p.177.

[10] Published in the Official Gazette of Romania, Part 1, No 433/28 June 2010.

with any other public or private position, except the didactic positions in the superior education system.

At a infra-constitutional system, the statute of magistrates is stated by Law No 303/2004, according to which the judges are independent, subjected to the law and should be impartial; the prosecutors appointed by the President of Romania enjoy stability and are independents, and the assistant-magistrates enjoy stability. Chapter 2 of the Law No 303/2004 states a series of incompatibilities and interdictions for the judges and prosecutors, applied correspondently to assistant-magistrates, such as:

- It is forbidden for judges and prosecutors to perform economic activities, activities of arbitration in civil litigations, economic trades or of other nature, to be associates or members in the board of administration, management or control of civil entities or economic entities, including banks or credit institutions, insurance or financial companies, national companies or autonomous directions, to be members of a group of economic interest;
- It is forbidden for judges and prosecutors to be members of political parties or structures, or to perform and attend political activities;
- Judges and prosecutors have the obligation that in the performance of their duties to abstain from expressing their political beliefs;
- Judges and prosecutors cannot publicly express their opinion regarding litigations in trial or about cases submitted to the prosecutor's office;
- Judges and prosecutors cannot give written or verbal opinions in litigations, even if those cases are in front of other courts or prosecutor's offices than the ones in which they work, nor can fulfill other activities which, according to the law, is to be performed by the advocate etc.

According to Art 66 of the Law No 303/2004, the incompatibilities and interdictions, as well as the continuous professional training and periodical evaluation, the rights and obligations, as well as the disciplinary liability of the judges and prosecutors shall be correspondently applied to assistant-magistrates. Thus, the Court emphasizes that the independence of justice – the institutional component (the concept of the "independence of judges", without referring only to judges, but covering the entire judicial system), as well as the independence of the judge – the individual component, it entails the existence of numerous aspects, such as: the absence of the incursion of the other powers into the judicial activity, the fact that no other organ than the courts can decide upon the specific competences stated by the law, the existence of a procedure stated by the law regarding the appeals of court rulings, the existence of funds enough for the performance and deliverance of justice, the procedure of appointment and promotion of magistrates and, where necessary, the period for which they are appointed, the appropriate work conditions, the existence of a number of magistrates sufficient to avoid an excessive workload and to allow the solution of the cases within a reasonable time, remuneration proportional with the nature of their activity, the impartial assignment of case files, the possibility to establish associations having as main object the protection of the independence and interests of magistrates etc.

It is without a doubt the fact that the principle of independence of justice cannot be limited only the amount of the remuneration (the salary and the pension) of the magistrates, this principle entailing a series of guarantees, such as: the statute of magistrates (conditions to access, procedure of appointment, solid guarantees to insure the transparency of procedures by which the magistrates are being appointed, the promotion and transfer, suspension and termination of the position), stability or irremovability, financial guarantees, administrative independence of magistrates, as well as the independence of the judicial power towards the other state powers. On the other hand, the independence of justice refers to the financial security of magistrates, which states the insurance of social guarantees, such as the pension of magistrates.

By the previous mentioned decision, the Court has ascertained that the principle of independence of justice protects the pension of magistrates, as integrant part of their financial stability, to the same extent to which it protects the other guarantees provided by this principle.

Both the jurisprudence of the Romanian Constitutional Court, as well as the jurisprudence of other constitutional courts stated that the financial stability of magistrates represents one of the guarantees of the independence of justice[11].

The quality as magistrates, both of the judges and prosecutors, is of no relevance, for as long as their attributions and statute, except certain common elements, are different, according to the Constitution.

Also, the Constitutional Court has mentioned that the Public Ministry, though is part of the judicial authority, represents a special magistracy, which does not fulfill the jurisdictional requirements.

By Decision No 866/28 November 2006[12], the Constitutional Court has mentioned that "The Public Ministry was established, according to Art 131-132 of the Romanian Constitution, as an element of the judicial authority, having the role to represent in the judicial activity the general interests of society and to protect the rule of law, as well as the rights and freedoms of citizens".

The prosecutors, as well as the judges, have the constitutional statute as magistrates, expressly stated by Art 133-134 of the Constitution. Thus, according to Art 133 Para 2 Let a) of the Constitution, the Superior Council of Magistracy is formed by 2 sections, one of 9 judges and the other of 5 public prosecutors, appointed by the general meetings of the magistrates.

In the same meaning, the Constitutional Court states that the prosecutors are appointed, as well as judges, at the proposal of the Superior Council of Magistracy and that the same organ of the judicial authority fulfils the role as court of law in the area of the disciplinary liability of the judges and prosecutors.

Finally, the Court ascertains that the constitutional judicial statute of the prosecutors is identical to that of judges regarding the incompatibilities stated in the same terms as Art 125 Para 3 and Art 132 Para 2, according to which the position as prosecutor, as well as that of judge, is incompatible with any other public or private position, except the didactic positions held in superior education system.

[11] Decision No 873/25 June 2010, published in the Official Gazette of Romania, Part 1, No 433/28 June 2010.
[12] Published in the Official Gazette of Romania, Part 1, No 5/4 January 2007.

By applying the constitutional principles above mentioned, the legislator has stated, by the Law No 303/2004 on the statute of judges and prosecutors[13], identical or similar norms on the incompatibilities and interdictions applied for prosecutors and judges, the admission into magistracy and the professional training for judges and prosecutors, the appointment of judges and prosecutors, the access for prosecutors to the position as judge and vice versa, the rights and duties of the judges and prosecutors, their judicial liability.

In the meaning of the above mentioned, the Court has stated that the role of the Superior Council of Magistracy as "court of law" does not qualifies it as a court, thus it cannot forbid the free access to justice of the person trialed by this "extrajudicial court"[14].

Also, the Court has mentioned that "it is the exclusive competence of the legislator to establish the rules of a trial in front of the courts and the means of appeal, and the principle of the free access to justice refers to the possibility of those interested in using them, according to the law, so that the free access to justice does not refer to all judicial structures and procedural means by which justice is delivered. There is no constitutional text to guarantee the right to two degrees of jurisdiction. Even the international regulation in the area of human rights, namely Art 2 of the Protocol No 7 to the Convention on Human Rights and fundamental freedoms guarantees the right to a double degree of jurisdiction only for criminal matters, not for the administrative ones"[15].

The judicial power refers only to the system of the courts (does not refer to the entire authority also mentioning the Public Ministry and the Superior Council of Magistracy), regarding which it cannot state a procedure for the interpretation of the normative acts since the courts do not have the competence to generate themselves legal norms. Therefore, under the conditions in which the object of the law is ambiguous, aiming the procedure of the normative acts, the reference within the law to the courts would lead to their qualification as state organs having the competence to adopt normative acts, which would be a violation of Art 1 Para 5 and Art 124 of the Constitution[16].

The meaning of Art 124 Para 1 of the Constitution is that the courts providing justice, according to Art 126 Para 1 of the Constitution, shall follow the law, the material or procedural law, being the governor of all social relations subjected to trial. The constitutional provision states the principle of the legality of the legal act and it shall be correlated with Art 16 Para 2 of the Constitution, stating other two constitutional principles: the independence of the judge and his subjection only to the law. These provisions substantiate the activity of the courts on the one hand and set their position towards the law, on the other hand. It is unanimously accepted the fact that the judge's attributions refer to the identification of the incident norm, the analysis of its content and a necessary application of it to the judicial facts he already established. Thus, in his activity to perform justice, the judge interprets the law, by

[13] Published in the Official Gazette of Romania, Part 1, No 576/29 June 2004, republished in the Official Gazette of Romania, Part 1, No 826/13 September 2005.
[14] Decision No 148/16 April 2003, published in the Official Gazette of Romania, Part 1, No 317/12 May 2003.
[15] Decision No 403/13 June 2017, published in the Official Gazette of Romania, Part 1, No 785/4 October 2017.
[16]

achieving a balance between its spirit and letter, between the exigencies of drafting and the purpose aimed by the legislator, and shall apply it to the conflictive relation subjected to his judgment, by concluding it with a judicial decision applicable for the situation generating the conflict.

Precisely for the consideration of this conclusion, the Constitution states the principle according to which "Justice shall be performed in the name of the law", thus eliminating any other source which could represent a base for arbitrary or injustice. The achievement of justice cannot be subjective, pro causa for the judge, but objective, impartial, derived from the relation to the law of the current situation and the overlapping of the judge with the law. The deviation from these rigors, based on subjective reasons, can be sanctioned by appeal, stated by the law against the judicial decision.

The deliverance of justice, in the name of the law, has the meaning that the act of justice streams from the legal norms, as well as its enforcement. In other words, the judicial decision represents an act for the application of the law in solving a conflict of rights or interests, representing the means for the reestablishment of the legal order and consolidation of the citizens' trust in state authority. The judicial decision, having the authority of res judicata, answers the need for legal security, the parties having the obligation to subject themselves to the mandatory effects of the jurisdictional act, without the possibility to debate what is already established by the court. Thus, the judicial decision is placed among the acts of public authority, being invested with specific efficiency by the constitutional normative order. Due to this fact, the judicial decision – referring to the result of the judicial activity – represents, without any doubt, the most important act of justice[17].

3. Conclusions

The detailed statement of the constitutional statute of each element of the judicial authority, of course, for reasons related to their importance in a rule of law, has contributed to the clear separation of the role and attributions of the institutions forming this authority.

Only the courts are part of the judicial authority, their activity being performed by judges, Art 123 Para 2 of the Constitution stating their independence and subjection only to the law, while the judicial authority also refers to the courts, the Public Ministry and the Superior Council of Magistracy, each of these institutions having attributions established by the laws of organization and functioning.

Neither the Public Ministry, nor the Superior Council of Magistracy are part of the judicial power, the prosecutors performing their activity under the authority of the Ministry of Justice, while the Superior Council of Magistracy represents an organism interposing itself between the judicial power and the executive one for the insurance of a full independence of justice.

[17] Decision No 33/23 January 2018, published in the Official Gazette of Romania, Part 1, No 146/15 February 2018; Decision No 972/21 November 2012, published in the Official Gazette of Romania, Part 1, No 800/28 November 2012.

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JURISDICTION OF PUBLIC PROCUREMENT AND NEW AMENDMENTS ON PUBLIC PROCUREMENT IN ROMANIA

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Abstract: *Streamlining activities of public institutions and public authorities and their accountability in terms of spending public funds has determined reform of the legislation on public procurement in România effective 2006, when the Government Emergency Ordinance no 34/2006 regarding award of public procurement contracts, concession contracts for public works and concession contracts for services was adopted. Later, the rigours imposed by the European Directives and the clarifications made by the decisions of the Court of Justice of the European Union have determined România to adopt Law 98/2016 regarding public procurement, Law 99/2016 regarding sectoral procurement and their application rules and Law 101/2016 regarding remedies and appeals in relation to award of public procurement contracts, sectoral contracts and concession contracts for works and services as well as organisation and functioning of the National Council for Settlement of Contestations. Given the need to adopt some urgent measures to make the public procurement system better and more flexible, otherwise there may be the risk of reducing the degree of spending the funds earmarked, including European funds, the most serious consequence in this case would be postponement/delay in the implementation of some major investment projects, with social and economic impact at national and local level, the Emergency Ordinance no. 45/2018 for amending and supplementing some normative acts with impact on public procurement sector was adopted on 24 May 2018 and published in the Official Gazette no. 459/04.06.2018.*

Keywords: *public procurement, award procedures, contestation of public procurement procedure, jurisprudence of CJEU*

I. Reforming of the public procurement system in Romania under the 2014/24 / EU and 2014/25 / EU directives

At European level, streamlining activities of state institutions in the public procurement sector started by adopting some regulations in 1962, when the Council of Ministers adopted two programmes for elimination of intra-Community trade restrictions between Member States. These programmes represented guidelining documents and were issued to enforce articles 52 and 53 of Treaty establishing European Economic Community. In this respect, the European Union adopted a series of Directives which were also transposed in the Romanian legislation after România joined the European Union.

Despite the fact that initially there were distinctive directives on works, services and goods, which left out the concession agreements, the directive reform in 2004 was to combine in a single directive (considered the "classic" framework directive) the

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award principles applicable to public procurement of products, services and works (other than utilities) and to concession of works[1], a distinct directive being dedicated to the utility sector[2]. These directives were to be supplemented by distinct directives on regulating remedies (legal measures intended to protect tenderers in award procedures for cases when the public procurement legislation is violated) and norms applicable to award of some contracts in the sector of security and defence[3].

Starting from the need to take over in the legislation the clarifications made by the jurisprudence[4] and the adaptation of the legislation on public procurement to all categories of services on the market, 2014 saw a new legislative reform which led to adoption of a new classic directive, a new directive regarding utilities and, for the first time, a new directive dedicated to concessions in particular. Some amendments were also brought to the remedy sector, without a publication in this respect.

The new classic directive also took over some principles expressed in documents intended to implement the current public policies at European Union level, among which **"The Europe 2020 Strategy"** for "a smart, sustainable and inclusive growth" and the initiatives characterised by the European documents as emblematic within this strategy, respectively: "A Digital Agenda for Europe"[5], "An Innovation Vision"[6], "An Integrated Industrial Policy for the Globalisation Era"[7], "Energy 2020"[8], "A Resource-Efficient Europe"[9], the Single Market Act[10], in particular the twelfth key action: "modernising and revising public procurement legislation".

In 2014 the European Commission passed a set of normative acts intended to modernise public procurement within the European Union:

- Directive 2014/23/EU of the European Parliament and Council of 26 February 2014 *regarding award of concession contracts*[11]*;*

[1] Directive 2004/18/EC regarding coordination of award procedures applicable to public procurement contracts for works, goods and services.

[2] Directive 2004/17/EC regarding coordination of award procedures applicable to procurement contracts in the water, energy, transport and postal services sectors.

[3] Monica Amalia Ratiu, *Public Procurement Law*, Vol. I, Public Procurement Contract. Legal Regime applicable to Contract Award, Universul Juridic Publishing House, 2017, p. 21

[4] The Court of Justice of the European Union rendered in relation to case C-689/13 (PFE) Preliminary Reference – Public Procurement Contract for Services – Directive 89/665/EEC regarding supremacy of the European Union Law in relation to national law: "The request for the preliminary decision regards interpretation of article 1 (3) of Directive 89/665/EEC of Council of 21 December 1989 regarding coordination of laws and administrative acts regarding application of procedures on appeals relating to award of public procurement contracts for goods and works, as amended by Directive 2007/66/EC, of article 267 TFEU, as well as principles of supremacy and effectiveness of the Union Law. The Court decided that article 1 (1) of par 3 and 1 (3) of Directive 89/665/EEC should be construed in the sense that they oppose as an appeal filed by a tenderer who has an interest in obtaining a specific contract and who was harmed or is likely to be harmed as a consequence of a violation of the Union Law on public procurement contracts or norms on transposition of such law and by which exclusion of another tenderer is pursued to be declared unacceptable by virtue of national procedural norms which provide priority analysis of the incident appeal filed by this other tenderer".

[5] COM (2010) 245.

[6] COM (2010) 546.

[7] COM (2010) 614.

[8] COM (2010) 639.

[9] COM (2011)21.

[10] COM (2011)206.

[11] *Directive 2014/23/UE, in OJEU L 94 of 28 March 2014 (see* http://eur- lex.europa.eu/legal-content/RO)

- Directive 2014/24/EU of the European Parliament and Council of 26 February 2014 *regarding public procurement and repeal of Directive 2004/18/EC*[12]*;*
- *Directive 2014/25/EU of the European Parliament and Council of 26 February 2014* regarding procurement by entities operating in water, energy, transport and postal services sectors and repeal of Directive 2004/17/EC[13].

Pursuant to article 288 of TFEU[14], the directive is mandatory for each recipient Member State in relation to the result which should be obtained and grants national authorities the competence concerning the form and the means. Rom□nia has complied with this imperative requirement and adopted the National Strategy for public procurement, adopted by Government Decision no. 901/2015 regarding National strategy for public procurement[15]. This document proposes actions defining government policies with regards to the reform of the national system of public procurement between 2015 and 2020. *“The development of the strategy represents a crucial stage in reforming the Romanian system of public procurement, as it sets a common vision at a key moment when the new related directives propose Member States to adopt a new paradigm in the context in which public procurement becomes the main instrument in de-blocking the economic growth at European level".*

The three European directives on public procurement were transposed in the national legislation by the following normative acts:

- Law no. 98/2016 regarding public procurement[16];
- Law no. 99/2016 regarding sectoral procurement[17;]
- Law no. 100/2016 regarding concessions of works and concessions of services[18].

Directive 89/665/EEC of Council of 21 December 1989 regarding coordination of laws and administrative acts regarding application of procedures on appeals in relation to award of public procurement contracts for products and public contracts for works[19] and Directive 92/13/EEC of Council of 25 February 1992 regarding coordination of laws and administrative acts on enforcement of community norms relating to procedures of public procurement by entities operating in the water, energy, transport and telecommunications sectors were transposed in our legislation in Law no. 101/2016 regarding remedies and appeals relating to public procurement contracts and concession contracts and for organizing and functioning of the National Council for Settlement of Contestations[20].

[12]*Directive 2014/24/UE, in OJEU L 94 of 28 March 2014 (see* http://eur- lex.europa.eu/legal-content/RO).
[13]*Directive 2014/25/UE, in OJEU L 94 of 28 March 2014 (see* http://eur- lex.europa.eu/legal-content/RO)
[14]See consolidated version of Treaty *at (*http://eur-lex.europa.eu/legal-content/RO).
[15]Official Gazette no. 881 of 25 November 2015.
[16]Initially published in the Official Gazette no. 391 of 23 May 2016, amended by Emergency Ordinance no. 45/2018 for amendment and supplement of some normative acts with impact on the public procurement published in the Official Gazette no. 459/04.06.2018.
[17]Initially published in the Official Gazette no. 391 of 23 May 2016, amended by Emergency Ordinance no. 45/2018 for amendment and supplement of some normative acts with impact on the public procurement published in the Official Gazette no. 459/04.06.2018.
[18]Initially published in the Official Gazette no. 391 of 23 May 2016, amended by Emergency Ordinance no. 45/2018 for amendment and supplement of some normative acts with impact on the public procurement published in the Official Gazette no. 459/04.06.2018.
[19]Directive 89/665/EEC of Council of 21 December 1989, in OJEC L 395 of 30 December 1989
[20]Official Gazette no. 391 of 23 May 2016.

For transposition of Directive 2009/81/EC of the European Parliament and Council of 13 July 2009 regarding coordination of procedures for the award of some agreements for works, supply of goods and provision of services by contracting authorities or entities in the sectors of security and defence and amendment of Directives 2004/17/EC and 2004/18/EC, adoption was made of the Government Emergency Ordinance no. 114/2011 regarding award of some public procurement agreements in the sectors of defence and national security.

II. Award procedure applicable to public procurement contracts

Section 1 Standard Award Procedures

According to article 68 of Law 98/2016, the award procedures are: a) open bidding[21]; b) limited bidding[22]; c) competitive negotiation[23]; d) competitive dialogue[24]; e) partnership for innovation[25]; f) negotiation without prior publication[26]; g) solution contest[27]; h) award procedure applicable to social services and other specific services[28]; i) simplified procedure[29].

According to article 7 (1) of Law 98/2016 regarding public procurement, the award procedures regulated by this law, for which a contract notice and/or an award notice shall be published in the Official Journal of the European Union[30], are applicable to award of public procurement contracts[31]/frame agreements[32] of which estimated value, exclusive of VAT, equals or exceeds the following threshold values: a) 24,977,096 lei, for public procurement contracts/framework agreements for works; b) 648,288 lei, for public procurement contracts/framework agreements for goods and services; c) 994,942 lei, for public procurement contracts/framework agreements for goods and services awarded by the county council, city hall, local council, General Council of Bucharest Municipality, as well as public institutions reporting to them; d) 3,376,500 lei, for public procurement contracts/framework agreements for services, more specifically social services and other specific services, set forth in Annex no. 2."

[21]Regulated in article 71-75 of Law 98/2016.
[22]Regulated in article 76-79 of Law 98/2016.
[23]Regulated in article 80-85 of Law 98/2016.
[24]Regulated in article 86-94 of Law 98/2016.
[25]Regulated in article 95-103 of Law 98/2016.
[26]Regulated in article 103 of Law 98/2016.
[27]Regulated in article 105-110 of Law 98/2016.
[28]Regulated in article 112-113 of Law 98/2016.
[29]Regulated in article 113 of Law 98/2016.
[30]Available at https://eur-lex.europa.eu
[31]Public procurement contract – onerous contract assimilated, according to the law, to the administrative act, concluded in writing between one or several economic operators and one or several contracting authorities, of which object is to execute works, provide products or services.
[32] Framework agreement – agreement concluded in writing between one or several contracting authorities and one or several economic operators of which object is to set the terms and conditions governing the public procurement contracts which are to be awarded for a specific timeframe, especially in relation to terms and, where appropriate, quantities considered.

2.1.1. Open Bidding

The open bidding is initiated by conveyance for publication of a contract notice, in accordance with publicity and transparency rules as regulated by the law, by which the contracting authority/entity requests the economic operators to submit tenders. In the procedure of open bidding, all and any economic operator is entitled to submit a tender following publication of a contract notice. The open bidding procedure is usually conducted in a single mandatory stage. The contracting authority/entity[33] applies the open bidding procedure by electronic media – online electronic auctions[34], in which case only the economic operators registered in the SEAP/SICAP[35] may submit a tender. In the event that the award procedure is not fully conducted by electronic media, the contracting authority/entity is entitled to decide on organising a final stage of online electronic auction, situation in which such authority/entity shall state such decision in the contract notice and in the award documentation. The tenderer shall submit the tender in accordance with information and requirements provided in the procurement documents, accompanied by the documents or the European single procurement document, where appropriate, so as to prove compliance with qualification criteria set by the contracting authority/entity.[36]

2.1.2 Limited Bidding

In the procedure of limited bidding, all and any economic operator is entitled to submit a request for participation following publication of a contract notice (in case of public procurement), respectively as response to an invitation to the competitive bidding procedure (in case of sectoral procurement). Only the candidates who meet the qualification and selection criteria set by the contracting authority/entity will be entitled to submit a tender for the following stage. The limited bidding procedure is usually conducted in two mandatory stages:

a. stage of submitting requests for participation and selection of candidates, by application of qualification and selection criteria;

b. stage of submitting tenders by candidates selected in the first stage and their assessment, by application of the award criteria and the assessment factors. The contracting authority/entity applies the limited bidding procedure by electronic media, in which case only the economic operators registered in SEAP/SICAP may submit a request for participation. In the event the award procedure is not fully conducted by

[33]According to this law, contracting authorities/entities are: a) public central or local authorities and institutions, as well as structures therein which were delegated the capacity of credit release authority and which were set competences in the public procurement sector; b) public law bodies; c) associations formed of one or several contracting authorities as stipulated in letters a) or b).

[34]Online electronic auction – the repetitive process carried out by electronic media after a comprehensive initial assessment of the tenders submitted, in relation to which the tenderers may reduce prices submitted and/or improve other values of the tender which allow classification of tenders by automated assessment methods.

[35]Electronic System of Public Procurement/ESPP. Effective 2018 it was replaced by SICAP – Collaborative Computer and Software System for a Performant Environment of Public Procurement.

[36]For details see Dan CIMPOERU, *Public Procurement, Concessions, Remedies and Appeals*, C.H. Beck Publishing House, Bucharest, 2016, p. 55.

electronic media, the contracting authority/entity is entitled to decide on organising a final stage of online electronic auction, in which situation the authority/entity shall state such decision in the contract notice/invitation to the competitive bidding procedure and in the award documentation. In case the award procedure is fully conducted by electronic media, the economic operator shall convey the request for participation, including ESPD[37], in electronic format and no later than the deadline and the hour provided for their submission, stated in the contract notice. The documents will be signed using extensive electronic signature, against a qualified certificate, issued by a provider of accredited certification services, and loaded on SEAP/SICAP in the special sections available in the electronic system and only by the economic operators registered. In the event that the award procedure is not fully conducted by electronic media, the economic operator shall submit the request for participation, including ESPD, at the address and no later than the deadline and the hour provided for their submission, stated in the contract notice.[38]

2.1.3 Competitive Negotiation

In the procedure of competitive negotiation, all and any economic operator is entitled to submit a request for participation following publication of a contract notice (in case of public procurement), respectively as response to an invitation to the competitive bidding procedure (in case of sectoral procurement). Only the candidates who meet the qualification and selection criteria set by the contracting authority/entity will be entitled to submit a tender for the following stage. Based on this tender, the contracting authority/entity will conduct negotiations with a view to improving them. The competitive negotiation procedure is usually conducted in two mandatory stages:

a. stage of submitting requests for participation and selection of candidates, by application of qualification and selection criteria;

b. stage of submitting initial tenders by candidates selected in the first stage and assessment of their compliance with minimum requirements set by the contracting authority/entity and negotiations with a view to improving initial tenders, submission of final tenders and their assessment by application of the award criteria and the assessment factors.[39]

2.1.4 Competitive Dialogue

In the procedure of the competitive dialogue, all and any economic operator is entitled to submit a request for participation following publication of a contract notice or a notice on existence of a qualification system (in case of sectoral procurement). Only the candidates who meet the qualification and selection criteria set by the contracting authority/entity will be entitled to participate to the dialogue stage, whereas the candidates still competing in the final stage of this procedure are entitled to submit

[37]DUAE – European Single Procurement (ESPD) available in electronic format by use of the standard format set by the European Commission, consisting of the economic operator's own accountability statement regarding compliance with qualification and selection criteria.

[38]Dan CIMPOERU, *cited works*, page 57 and Sebastian LAZĂR, *Public Procurement, Principles, Procedures, Operations, Methodology*, Wolters Kluder Publishing House, Bucharest, 2009, p. 59.

[39]Dan CIMPOERU, *cited works*, p. 59.

final tenders. The competitive negotiation procedure is usually conducted in three mandatory stages:

a. stage of submitting requests for participation and selection of candidates, by application of qualification and selection criteria;

b. stage of the dialogue with the candidates selected, in order to identify the solution(s) which meet the contracting authority/entity's needs and on which basis the final tenders will be submitted;

c. stage of submitting final tenders by the candidates still competing in the dialogue stage and their assessment, by application of qualification and selection criteria.[40]

2.1.5 Partnership for Innovation

In this procedure, all and any economic operator is entitled to submit a request for participation following publication of a contract notice or a notice on the existence of a qualification system (in case of sectoral procurement). Only the candidates who meet the qualification and selection criteria set by the contracting authority/entity will be entitled to submit initial tenders in the following stage, on which basis the contracting authority/entity will carry out negotiations with a view to improving them. The partnership for innovation is conducted in three stages:

a. stage of submitting requests for participation and selection of candidates, by application of qualification and selection criteria;

b. stage of submitting initial tenders by candidates selected in the first stage and assessment of their compliance with requirements set by the contracting authority/entity;

c. stage of negotiations with a view to improving initial tenders, submission of final tenders and their assessment, by application of the award criteria and the assessment factors.[41]

2.1.6 Negotiation without Prior Publication

The contracting authority is entitled to apply the procedure of negotiation without prior publication of a contract notice for awarding public procurement contracts/framework agreements for works, goods and services as follows:

a) in the event that for on open bidding or a limited bidding organised for procurement of goods, services or works, no tender/request for participation has been submitted or only non-compliant tenders/requests for participation have been submitted, providing that the initial requirements on procurement are not substantially different and a report is conveyed to the European Commission, upon the latter's request;

b) providing that the works, goods and services may be provided only by a certain economic operator due to one of the following reasons: - the objective of the procurement is to create or procure a unique work of art or artistic performance; - there are no other competitors, due to technical reasons; - protection of some exclusive rights, including intellectual property rights.

c) as a strictly required measure, when the timeframes for the open bidding, limited bidding or competitive negotiation may not be observed due to extreme

[40] Sebastian LAZĂR, c*ited works*, p. 63

[41] Dan CIMPOERU, *cited works*, p. 65.

emergency situations which are determined by unforeseeable events and which by no means are caused by an action or inaction of the contracting authority;

d) when the goods to be procured are exclusively manufactured for scientific research, for experimental, study or development purposes, and the public procurement contract does not provide for mass production of some quantities of such goods with a view to setting their commercial reliability or recovery of research and development costs;

e) when it is necessary to procure from the initial contractor some additional quantities intended for partial replacement or expansion of the existing products or installations and only if change of the initial contractor may place the contracting authority in the position to procure goods of different technical specifications compared to the initial ones, which would generate incompatibility or disproportionate technical difficulties in terms of use and maintenance;

f) for the goods listed and procured from a commodity market such as farming products, raw materials and power exchanges, in cases in which the regulated and monitored multilateral trading structure naturally guarantees the market prices;

g) for procurement of goods or services under favourable terms from an economic operator who is to cease trading definitively or who is under bankruptcy, has an arrangement with the creditors or is under such similar procedure. In the case provided at letter c) above, the contracting authority is not entitled to set the length of the contract for a period exceeding the one required to deal with the emergency situation which determined application of the negotiation procedure without prior publication of a contract notice.

Additionally, according to Law no. 98/2016, the contracting authority is entitled to apply the procedure of negotiation without prior publication of a contract notice when, after award of a public procurement contract for works or services, the contracting authority intends to procure new works or services and only if the following conditions are observed cumulatively:

a) the award of the initial contract and the new works or services consist in repeating some similar works or services stated in the initial contract awarded and comply with the requirements set in the procurement documents elaborated upon award of the initial contract;

b) the estimated value of the initial contract for works or services was also determined in consideration of the new works or services which may be procured at a later date;

c) the contract notice for the procedure applied for the award of the initial contract stated the fact that the contracting authority is entitled to opt for a later procurement of new works or services, from the economic operator whose tender was declared winner in such procedure;

d) the procedure of the negotiation without prior publication of a contract notice is applied within a timeframe which may not exceed 3 years from termination of the contract.

The lawmaker imperatively sets forth that the contracting entity is entitled to apply the procedure of negotiation without prior invitation to a competitive bidding procedure for awards of sectoral contracts, only in one of the cases stated at article 104 (5), letters a-d of Law 101/2016.[42]

2.1.7 Solution Contest[43]

The solution contest may be organised as follows:

a. in relation to an award of a public procurement contract/sectoral service contract;

b. as a distinct award procedure, with prizes or payments awarded to participants. The solution contest is initiated by publication of a contest notice by the contracting authority/entity by which the economic operators are requested to submit projects. The contracting authority/entity organising a solution contest shall convey for publication a notification on the results of the contest and shall have to make proof of such conveyance. In case the contracting authority/entity intends to limit the number of participants to a solution contest, the former sets clear, objective and non-discriminatory qualification and selection criteria which shall be explicitly stated in the procurement documents. [44]

2.1.8 Simplified Procedure

The contracting authority/entity is entitled to award public procurement contracts/sectoral procurement contracts/framework agreements and to organise solution contests which regard public procurement/sectoral contracts of which estimated value is lower than the legally regulated thresholds by application of a simplified procedure, providing that the principles underlying awards of public procurement/sectoral contracts and organisation of solution contests are complied with. The simplified procedure is initiated by publication in SEAP/SICAP of a simplified contract notice, accompanied by the relating awarding documentation. The contracting authority/entity may decide to conduct the simplified procedure:

a. either in one stage;

b. or in several stages which imply both selection of candidates and negotiation and tender assessment.

Should the contracting authority/entity decide to request qualification and selection criteria, they may request only requirements concerning:

a. exclusion reasons, in compliance with chapter IV, section 6th, par 2 of Law no. 98/2016, respectively chapter V, section 6th, par 2 of Law no. 99/ 2016;

b. capacity to carry out professional activity, in accordance with article 173 of Law no. 98/2016, respectively article 187 of Law no. 99/2016;

c. similar expertise, in accordance with article 179 letter a) and b) of Law no. 98/2016, respectively article 192 letter a) and b) of Law no. 99/2016.

In case of simplified procedure, the economic operator may call the support of one/several third parties for maximum 50% of the requirement which was set by the contracting authority/entity in the procurement documents.[45]

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[42]Sebastian LAZĂR, *cited works,* p. 63.

[43]Solution contests- procedures which allow the contracting authority to procure, especially for sectors such as spatial planning, architecture, engineering or data processing, a plan or a project selected by a jury on competitive grounds, with or without award of prizes.

[44]Idem 43, p. 63.

[45]Dan CIMPOERU *cited works*, p. 73.

Section 2. Direct Procurement

The contracting authority is entitled to procure goods, services or works directly in cases when the estimated procurement value, exclusive of VAT, is lower than the value thresholds stipulated in article 7 (5) of Law 98/2016, i.e. 135,060 lei without VAT for the procurement of goods or services and 450,200 lei without VAT for the procurement of works. The contracting authority will make the purchase directly against supporting documents. Following access to catalogues published by SEAP/SICAP, the contracting authority/entity is entitled to choose from among the goods, services or works presented in these catalogues and therefore to convey, via SEAP/SICAP, notifications to the economic operators which offer such products. The notifications shall include information on:

a. identification data on goods, services or works requested;

b. requirements on delivery of goods, provision of services or execution of works;

c. payment terms.

Using SEAP/SICAP, the economic operator shall convey the acceptance or non-acceptance of the requirements imposed by the contracting authority/entity. In case the economic operator accepts the requirements of the contracting authority, the former shall convey the latter, via SEAP, the firm offer on goods or services to be provided or the works to be executed. Should the contracting authority/entity accept the firm offer of the economic operator, the former shall complete the direct procurement process via SEAP/SICAP. Should the contracting authority/entity fail to identify in the electronic catalogue satisfactory products, services or works or notice that the price posted by the economic operators for the object of the procurement process exceeds the market price or, due to technical reasons imputable to SEAP/SICAP, the access to the electronic catalogue is denied, the contracting authority may complete the purchase from any other economic operator, providing that supporting evidence is prepared in this respect[46].

III. Contesting the award procedure

Section 1 Jurisdictional Administrative Procedure before the National Council for Settlement of Contestations

1.1 Preamble

Law 101/2016[47] regulates remedies, appeals and procedure to settle them, under the administrative-jurisdictional or judiciary procedure relating to award of public procurement contracts, sectoral contracts or concession contracts. It also regulates the organising and functioning of the National Council for Settlement of Contestations. In connection with public procurement, a special procedural mechanism was established

[46] Idem 46, p. 75.

[47] Law 101/2016 regarding remedies and appeals in relation to public procurement contracts, sectoral contracts and concession contracts for works and services and to organising and functioning of the National Council for Settlement of Contestations initially published in the Official Gazette no. 391 of 23 May 2016, as amended by Emergency Ordinance no. 45/2018 for amendment and supplement of some normative acts with impact on public procurement sector, published in the Official Gazette no. 459/04.06.2018.

for settlement of disputes. The disputes on public procurement relating to the actual public procurement procedure stage will be settled firstly by the National Council for Settlement of Contestations. The decisions of the Council on the contestation settlements may be appealed by either party concerned, by filing a complaint with the competent court of law. Pursuant to article 4 of Law 101/2016, (1) For settlement of contestation, the person who considers that he/she was harmed, may refer: a) either under an administrative-jurisdictional procedure, to the National Council for Settlement of Contestations; b) or under the judiciary procedure, to the court of law. In terms of the competence to settle contestations by the administrative-jurisdictional body of the National Council for Settlement of Contestations, the practice has shown that it only settles contestations filed against administrative acts prepared by contracting authorities in one of the award procedures stipulated at article 68 of Law 98/2016.[48] In this respect, Bucharest Court of Appeal also rendered a judgment by Decision no. 88/17.01.2017 by which it declined their jurisdiction to settle in favour of the National Council for Settlement of Contestations.[49]

1.2. Active Legal Standing

According to article 8 of law 101/2016"The person who considers that an act of the contracting authority caused harm, may refer to the Council with a view to having such act annulled and forcing the contracting authority to issue an act or adopt remedial measures, and also acknowledged the alleged right or the legitimate interest within:

a) 10 days, starting from the day following acknowledgment of the contracting authority's act being illegitimate, when the estimated value of the public procurement/sectoral procurement procedure or concession equals or exceeds the value thresholds in relation to which it is mandatory to have the Official Journal of the European Union publish the contract notices, according to legislation on public procurement, legislation on sectoral procurement or legislation on concessions of works and concessions of services;

b) 5 days, starting from the day following acknowledgment of the contracting authority's act being illegitimate, when the estimated value of the public procurement/sectoral procurement procedure is lower than the value thresholds in relation to which it is mandatory to have the Official Journal of the European Union publish the contract notices, according to legislation on public procurement, legislation on sectoral procurement or legislation on concessions of works and concessions of services". Failure to file the contestations within the timeframe stated above will trigger its dismissal on grounds of late submission. [50]

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[48]See Decision no. 2436/C8/3308 of 20.096.2017 by which the National Council for Settlement of Contestations declines jurisdiction on settlement of contestation in favour of Bucharest Tribunal, stating that the procurement procedure – simplified procedure – does not represent a procurement procedure as regulated by article 68 of law 98/2016; therefore it is a court of law that would have jurisdiction thereon. In this case, ANAP stated the same grounds.

[49]Decision no. 88/17.01.2017 rendered by Bucharest Tribunal by which jurisdiction is declined in favour of the National Council for Settlement of Contestations as the subject matter of this case is the annulment of some acts issued in relation to the award procedure.

[50]Decisions of the Council no. 1795/C2/1603,1630,1649,1721,1760,1766,1812,1857,2242 of 18.07.2017

Therefore, article 1 (1) and (3) and article 2 (2) last paragraph of Directive 92/13/EEC of the Council regarding coordination of laws and administrative acts on application of community norms with regard to procurement procedures (...) shall be construed in the sense that the time limit for filing an action for annulment against the decision to award a contract should start running again when a new decision of the contracting authority was adopted after such award decision, but prior to conclusion of the contract and which is likely to affect the legality of the subsequent decision or, in its absence, from the date the latter acknowledged such decision. In case a tenderer acknowledges an irregularity after the expiry of the time limit for filing such action, as regulated by the national legislation, and the irregularity is alleged to have occurred prior to the award of the contract, the former is entitled to file a contestation within such time limit, except the cases when there is an express provision in the national law which guarantees such right, in accordance with the Union law.[51]

Therefore, the active legal standing may be held by the *harmed person* – namely the economic operator who meets the requirements stated at article 3 letter f) of law 101/2016 or, by way of exception, *a third party* – namely any person who considers that the remedial actions adopted by the contracting authority caused any harm.

To resort to the administrative-jurisdictional procedure before the National Council for Settlement of Contestations, the person who considers that he/she was harmed shall cumulatively observe the following requirements:

a) shall have the capacity of economic operator;

Any member of an association of economic operator, without legal personality, may file an appeal as regulated by Law no. 101/2016.

One may observe that the person who considers himself/herself harmed should firstly have the capacity of “economic operator" as set by the law, namely any natural person or legal person, of common or private law, or group or association of such persons, which legally executes works and/or constructions, provides goods or services, including any temporary association made up of two or several such entities[52];

b) has or had an interest in relation to the award procedure;

The literature considers interest to be a condition to exercise a legal action [53] and defines it as “the practical use that the party pursues by initiating the judicial procedure".

The interest should observe some requirements[54]:

- to be legitimate, namely not to conflict with the law;
- to be personal, namely the practical use should concern the person initiating the procedural form and not his/her adversary;
- to exist and be present, i.e. if the party concerned did not resort to such action at a particular time, he/she would be likely to be exposed to a prejudice.

[51] Viorel Terzea, *Public Procurement*, *Jurisprudence CJEU*, Universul Juridic Publishing House, 2016, p. 558; CJUE, 201/307, decision of 8 May 2014.

[52] Art. 3 (1) letter jj) of Law no. 98/2016, art. 3 (1) letter ii) of Law no. 99/2016, art. 5 (1) letter x) of Law no. 100/2016.

[53] V M. Ciobanu, *Theoretical and Practical Treaty on Civil Procedure. General Theory*, Național Publishing House, Bucharest, 1999, p. 270.

[54] V.M. Ciobanu, *cited works*, p. 271-273.

c) suffered, suffers or is likely to suffer a prejudice as a consequence of an act of the contracting authority, of nature to take legal effects, or as a consequence of the failure to settle a request regarding an award procedure within the time limit.

The prejudice is the essential element of the legal liability and is represented by the result, the negative effect suffered by a certain person as a consequence of a licit action of another person[55]. The prejudice may be *material* or *moral*. To obtain remedy, the prejudice should meet some requirements, i.e. to be *certain* and *not repaired by a specific date.* The certainty of the prejudice means that the prejudice is sure, both in terms of actually existing and of being assessed. The *present* prejudice is always certain*,* meaning that the prejudice already occurred prior to requesting its remedy. The *future prejudice* is certain providing that it is certain to occur in the future and may be assessed[56].

By *way of exception, "all and any person who considers that the remedial measures adopted by the contracting authority harmed them in any way may refer to the Council in order to have the act of the contracting authority annulled and to force this authority to issue an act or adopt a remedial measure and to acknowledge the alleged right or the legitimate interest"*[57]. Therefore, acknowledgment is also given to the possibility of a third party – other than an "economic operator" within the meaning of the law – if they suffered a prejudice due to an award procedure of a public procurement contract/sectoral procurement contract/concession contract – to request remedial actions under common law with the contentious court of law according to Law no. 554/2004 and not under administrative-jurisdictional law before the National Council for Settlement of Contestations. In this respect, CJEU rendered the decision of 21 October 2010, Symvoulio Apochetefseon Lefkosias versus Anatheoritiki Archi Prosforon, C-570/08 – By request to render a preliminary decision, demand was made for interpretation of article 2 (8) of Directive 89/665/EEC of Council of 21 December 1989 as amended by Directive 92/50/EEC of the Council of 18 June 1992. The Court decided that the article mentioned shall be construed in the sense that the Member States are not compelled to provide in favour of the contracting authorities an action in court against the decisions made by bodies of non-legal nature, responsible for procedures on appeals relating to public procurement. Nevertheless, this provision does not prevent the member States from providing, when appropriate, in their legal order, such appeal in favour of the contracting authorities.[58]

1.3. Passive Legal Standing

The passive legal standing may be held by the contracting authority/entity of which acts[59], prepared in relation to the public procurement procedure, are liable to

[55]C.Stătescu,C. Bîrsan, C*ivil Law. General Theory on Obligations*, All Publishing House, Bucharest, 1992, p. 140.
[56]C. Stătescu, C. Bîrsan, *cited works*, p. 147-150.
[57]Article 8 (1) of Law no. 101/2016.
[58]Viorel Terzea, *cited works*, page 525, CJEU, C – 570/08, decision of 21 October 2010.
[59]Act of contracting authority – all and any act, operation which takes or may take legal effects, failure to observe within the legal timeframe all and any obligation laid down by the relating legislation, the omission or the refusal to issue an act or to carry out a specific operation arising from or in relation to an award procedure set by article 68 of Law no. 98/2016 regarding public procurement as amended and supplemented, by article 82 of Law no. 99/2016 regarding sectoral procurement, as amended and supplemented, or by article 50 of Law no.100/2016 regarding concessions of works and concessions of services, as amended and supplemented.

have harmed the economic operator. By virtue of article 3 letter b of law 101/2016, contracting authority is any of the following entity: (i) contracting authority, as defined by the legislation on public procurement; (ii) contracting authority or contracting entity as defined by the legislation on sectoral procurement; (iii) contracting authority or contracting entity as defined by the legislation on the concessions of works and concessions of services.

1.4. Time limits. Legal Nature

The timeframes laid down in law no. 101/2016 are time limits and are calculated in accordance with article 5 of law 101/2016, as follows: times expired in days start running as of the first hour of the first day and end upon expiry of the last hour of the last day of the time limit. The day on which a procedural act was notified is not taken into consideration upon calculation of the time limit. Should the last day of a time expressed other than in hours be a non-working day, the time limit expires upon expiry of the last hour of the following working day.

1.5. Procedural Rules

The procedure on settlement of contestations is carried out in compliance with the principles of legality, the principle of celerity, the principles on the defendant's right to be heard and to be provided defence, the principle of impartiality and independence in terms of the administrative and jurisdictional activity.[60]

The person who considers himself/herself harmed usually files a single contestation either with the National Council for Settlement of Contestations (this procedure is optional and administrative-jurisdictional) or with the contentious administrative court (common law procedure).

In the event of a plurality of contestations, the court of law takes precedence in relation to the National Council for Settlement of Contestations, irrespective of which of the two bodies was referred to first. The solution chosen by the lawmaker may be explained by a need for a good administration of justice. It is true that if one or several different contestations on the same public procurement procedure were settled at the same time by two different bodies, both competent (positive conflict of competence), different judgments may be issued, which would create difficulties in practice.

In case there are several contestations filed in relation to the same procedure, the amendments brought in May 2018 set at article 17 the following: "(1) In order to provide a unitary solution, the contestations filed in relation to the same award procedure shall be settled as follows: a) in the stage prior to the time limit set for the submission of candidacies/ tenders, they shall be settled by the same panel; b) in the stage subsequent to the time limit set for candidacies/tenders, they shall be settled by the same panel, other than the one provided at letter a). (2) In each stage, the contestations filed in relation to the same procedure are joined."

According to article 9 (1) of Law 101/2016, after receipt of the contestation, the contracting authority may adopt the remedial measures considered to be required as a consequence of the contestation, in maximum three days from receipt of contestation.

[60]Dan CIMPOERU, *cited works*, p. 220-221

The measures adopted shall be communicated to the contester, the other economic contesters involved in the award procedure and to the Council no later than a working day from their adoption. In order for the economic operators concerned to be notified thereon, the measures adopted prior to the time limit set for submission of requests for participation or, if required, the tenders, shall be published in SEAP.

In accordance with article 16 (1) and 2 of Law 101/2016, under penalty of dismissing the contestation on grounds of late submission, the contestation will be remitted both to the Council and the contracting authority, no later than the expiry date set for submitting the contestation. The contracting authority shall publish the contestation in SEAP within one working day from its receipt, without the information stated by the economic operator to be confidential, classified or protected by a right of intellectual property. The contracting shall convey the Council and the contester, within 5 working days from receipt of contestation, ex officio, their legal view on the contestation.[61]

1.6. Suspension of the Award Procedure

In well grounded cases and in order to prevent imminent harms, the Council may rule, upon request of the person concerned, within 3 days from receipt of the request, on the measure to suspend the award procedure or to apply any decision of the contracting authority until settlement of the contestation. The Council settles the request for suspension by taking account of the consequences of such measure on all categories of interests which may be harmed, including the public interest. The decision on the settlement of the request for suspension may be appealed by filing a complaint with the competent court of law set forth in article 32 (1), separately, within 5 days from notification.[62]

The contract concluded in violation of the provision on rightful suspension as a consequence of the preliminary notification *will be null and void.*

In the event that, in relation to the same award procedure, the contracting authority purchases goods, services or works broken down by batches, the suspension of the right to conclude the contract will take effect only in relation to the batches for which the preliminary notification was filed.

1.7. Settlement of the Contestation. Deadlines for Settlement. Legal Nature of Decisions

In line with article 24 (1) of law 101/2016, the Council settles in substance, within 15 days from receipt, under the terms of article 18 (2), the contestation of the public procurement file, sectoral procurement file or concession file, respectively within 5 days in exceptional cases which prevent analysis in substance of the contestation. The timeframe for the settlement of the contestation may be extended by 10 days for good grounds.

[61]See Decision no. 249/26.01.2017 rendered by Bucharest Tribunal by which the exception is admitted and the late submission is acknowledged as per provisions of article 16 (1) of Law 101/2016.
[62]See Dan CIMPOERU, *cited works*, p. 227.

The decision[63] by which the contestation is settled or by which the National Council for the Settlement of Contestations states that they have ceased judging on the case, despite not having settled the contestation in substance, is called decision. All the other decision rendered by the National Council for Settlement of Contestations are called document of acknowledgment, except those which unify the administrative-jurisdictional practice. The decisions/resolutions rendered by the Council are administrative acts of jurisdictional nature.[64]

In compliance with the principle of availability, the Council analyses the legality and the merits of the act under appeal and may: a) render a decision by which it annuls it in full or in part[65]; b) order the contracting party to issue an act/adopt a measure required in reinstating legality, providing that clear and precise indications on the operations are carried out by the contracting authority; c) annul the award procedure, when the act appealed may not be remedied. In addition, the Council may dismiss the contestation as groundless.[66] According to article 26 (10) of Law 101/2016, ”the Council may not decide on awarding the contract to a specific economic operator, except the case when the latter was appointed by the contracting authority or its capacity of winner in the tender is based on the information enclosed in the contestation settlement file”. At article 26, after (10), a new paragraph was inserted - (10^1) – with the following content: “In the event that the contestation concerns the result of the procedure and orders reassessment of the tenders, the Council shall clearly and precisely indicate the limits of the assessment, respectively the identity of the tenders under assessment, the stage(s) of the award procedure under assessment and the concrete measures which are to be adopted by the contracting authority in relation to the reassessment.”[67]

The reasoned decision shall be communicated to the parties in writing, within three days from rendering. The decision shall be published within 5 days from rendering, on the webpage of the Council, in the sector of the official newsletter, without providing references to the parties' identification data, their personal data as well as the information stated by the economic operators in their tenders as confidential in accordance with provisions of article 19 (1), classified or protected by any rights of

[63] The Decision of the Council includes:
a) the introduction which indicates the file number, the date, the surname and given name, the domicile or residence, the fiscal code of the contester who is a natural person or, where appropriate, for legal persons, the name, the head office, the VAT number, the registry number with the Trade Registry, the persons who are authorised to represent them and their capacity, the award procedure in relation to which the act appealed has been issued;
b) the recitals which indicate the objects of the contestation and the brief views of the parties, the actual situation as acknowledged by the Council based on the evidence presented, the reasons of fact and law used in grounding the solution, as well as the grounds of their admittance, on the one hand, and the grounds for dismissing the parties' petitions, on the other hand;
c) the main part which includes the surname, given name or, where appropriate the name of the parties, the solution to all requests referred for settlement and the amount represented by legal fees granted.

[64] Article 2 letter d) of Law 554/2004 of contentious administrative defines the administrative-jurisdictional as the act issued by an administrative authority vested with special administrative and jurisdictional powers, in accordance with an organic law.

[65] By way of example, see Decision of Council no. 1696/C4/1859, 1866 of 30.09.2016.

[66] By way of example, see Decision of Council no. 570/C4/484 of 16.03.2017.

[67] By way of example, see Decision of Council no. 1866/C3/2081 of 28.10.2016.

intellectual property. The decisions by which the Council orders remedial measures shall be weekly forwarded to ANAP[68] by electronic media. The decision shall be published by the contracting authority, within 5 days from receipt, in SEAP/SICAP, without providing further information stated by the economic operators in their tenders as confidential, classified or protected by any rights of intellectual property.

The latest amendments regarding the jurisdictional procedure on the settlement of the contestations are intended to streamline the activity of the National Council for Settlement of Contestations.

Section 2 Procedure on Settlement of Disputes before the Court of Law

2.1. Preamble

According to article 29 of Law 101/2016, the decisions of the Council on contestation settlement may be appealed by the contracting authority and/or any other person harmed by the measures ordered by the Council by filing a compliant with the competent court of law, both for unlawfulness and for groundlessness, within 10 working days from notification for the parties concerned, respectively from the data of acknowledging them by the other parties harmed.

In order to ensure prompt conveyance to the court of the file used in rendering the decision by the Council, the person who filed the complaint with the court will also remit a copy of the complaint to the Council. To settle the complaint, the Council will convey the court the file used in rendering the final decision, within maximum 3 days from receipt of complaint, in original and in duplicate.

2.2. Material and Territorial Competence

In terms of material competence, the court competent to settle the complaint filed against the decision rendered by the National Council is the court of appeal, Contentious-administrative and fiscal department. As for territorial competence, the court competent to settle the complaint filed is the court which has jurisdiction for the area where the contracting authority is based. The complaints are settled by panels of judges specialised in public procurement.

The court competent to settle the complaint filed against the decision rendered by the National Council on procedures for awards of services and/or works of transport infrastructure of national interest is Bucharest Court of Appeal, Contentious-administrative and fiscal department.

2.3. Active Legal Standing/Passive Legal Standing

Active legal standing or passive legal standing will be held by the contracting authority or the economic operator, where appropriate. The National Council for Settlement of Contestations has no legal standing. The suing parties are named: contester – the entity filing the complaint against the decision of the Council and defendant – the entity against which the complaint is filed.[69]

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[68]National Agency for Public Procurement.

[69]See the solution rendered by Suceava Court of Appeal – Contentious-administrative and fiscal department, by decision no.1463/08.11.2016.

2.4. Obligations of Parties

The party filing the complaint shall convey, within the timeframe stated at article 29 (1), a copy of such complaint as well as the supporting documents to the other party/parties involved in the contestation before the Council, and shall submit the proof of such conveyance by the first court date. According to article 32 of law 101/2016, the first court date is maximum 20 days from submission of the complaint and the following court dates may not exceed 15 days. The letter of defence is mandatory. The defendant shall convey the letter of defence to the court and the petitioner within 5 working days from notification on the petition by the court. Failure to submit the letter of defence within the time limit set forth by the law will lead to termination of rights regarding submission of evidence and invocation of exceptions other than those of public order. The defendant shall convey the letter of defence to the court and the petitioner within 5 working days from notification on the petition by the court.

Failure to file the letter of defence within the time limit set forth by the law will lead to termination of rights regarding submission of evidence and invocation of exception other than those of public order.

The contester will file a written complaint and may not invoke reasons against the acts of the contracting authority other than those contained in the contestation filed with the National Council. In order to settle the complaint, the Council conveys the court the file used in rendering the decision within maximum 3 days from receipt of complaint, in original and in duplicate.

The party which filed the complaint shall have to prove their interest relating to submission of such complaint; otherwise, the action will be dismissed due to lack of interest.[70]

2.5. Solutions of the Court of Law

Pursuant to the latest amendments, article 34 (1) will have the following text: "(1) Admitting the complaint, the court amends the decision of the Council and orders, where appropriate: a) annulment in full or in part of the act of the contracting authority; b) issuance by the contacting authority of another act/adoption of measures required to reinstate legality, with clear and precise indications of the operations which are to be carried out by the contracting authority; c) observance of some obligation by the contracting authority, including removal of all and any discriminatory technical, economic or financial specifications from the contract notice, the award documentation or any other documents prepared in connection with the award procedure; d) annulment of the award procedure, when the act under appeal may not be remedied." In addition, two new paragraphs were added to article 34:"6) In the event that the contestation regarded the award procedure and the court, admitting the complaint, orders reassessment of the tenders, the court shall clearly and precisely state the limits of the reassessment as well as the identity of the tenders subjected to reassessment, the stage(s) of the award procedure subjected to reassessment and the concrete measures which the contracting

[70]Decision no. 99/16.01.2017 rendered by Bucharest Tribunal by which the complaint is dismissed due to lack of interest.

authority is to take in relation to such reassessment. (7) The court may not decide on the award of the contract to a specific economic operator, except the case when the latter was appointed by the contracting authority or their capacity of winning tenderer is proven by the information contained in the contestation settlement file."

The decision by which the court settles the complaint is final. The reasoned decision is drawn up within 7 days from rendering and is promptly conveyed to the parties concerned.

After the complaint has been settled by the court of law, the case file will be returned by the latter to the National Council, accompanied by a copy of the reasoned decision. The reasoned decision rendered by the court is conveyed, in duplicate, within 15 days from draw-up, to the National Agency for Public Procurement, which will publish it in SEAP/SICAP, without indication of the parties' identification data, personal data, as well as the information stated by the economic operator to be confidential, classified or protected by a right of intellectual property.

IV. CONCLUSIONS

According to the Annual Report for 2017 of the Court of Justice of the European Union[71], a number of 23 cases were pending before this Court (of which: 1 direct action, 21 preliminary references and 1 appeal on interim relief or intervention). A number of 16 decisions were rendered. In accordance with the same report, between 2013 and 2017, a number of 85 cases were settled by decision, opinion or ordinance of jurisdictional nature in relation to public procurement (12 - in 2013, 13 – in 2014, 14 – in 2015, 31 – in 2016 and 15 - in 2017).

Romania's partnership agreement on the financial programming period 2014-2020, approved by Decision of the European Commission no. C (2014) 5.515 of 6 August 2014, sets the horizontal ex-ante conditionalities which should be observed by the Romanian governemt in relation to use, especially for public procurement, of the structural funds for the financial programming period 2014-2020. Considering the special importance attached to structural funds for the national economy, as well as the negative effects on the development potential of the national economy generated by a low-level of absorption of structural funds, and to streamline the activity of the contracting authorities/entities in the public procurement sector, the executive power and the legislative power are preoccupied with the permanent harmonisation of the legislation on public procurement with European norms and are constantly focus on bringing it into line with the jurisprudence of the Court of Justice of the European Union on public procurement.

The latest amendments of the legislation on public procurement, be they on reduction of thresholds, reduction of time limits, setting precise terms and conditions regarding jurisdictional activity (The National Council for Settlement of Contestations or Court of law) or setting the competent body entitled to acknowledge and apply sanctions, respectively the Romanian Court of Accounts, and in particular the creations of the conditions required to set

[71]Raport anual al CJUE pe anul 2017, Activitate judiciară - https://curia.europa.eu

up the National Service for Centralised Procurement and its territorial structures, unequivocally determine the streamlining of public procurement in Romania.

The dynamics of the free market will determine an ongoing adaptation of the public procurement system. One may see this concern both at national and European level. One may also see that the European Member States adapt their own legislation on public procurement taking into account the requirements of the domestic market and the level of understanding and adaptation of the specialists to the rigours of the legislation in this sector, the final goal being to simplify the procedure and render the activity of the contracting authorities more efficient.

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CUMULATIVE CHARACTER OF WORKING TIME FEATURES. CONSEQUENCES ON DELIMITING WORKING TIME FROM REST TIME

Răzvan ANGHEL*

Abstract: *The article presents an analysis of the provisions of Directives 93/104/EC and 2003/88 and of the case law of the Court of Justice of the European Union, which supports the conclusion that the characteristic features of working time must be cumulatively met so that a time frame falls within this category. Next, the importance and consequences of this requirement are outlined regarding the process of delimiting working time from rest time.*
Keywords: *working time, rest time, cumulative features*

1. Cumulative character of working time features

Beginning with Directive 93/104 / EC[1] and continuing with Directive 2003/88 on certain aspects of the organization of working time, the purpose of European Union regulation was to promote and ensure safety and health at work[2]. A problem posed by the definition of working time covered by European Union regulation, which is very important for its delimitation from rest time, was whether, in order to qualify as working time, a period must cumulatively fulfil all the conditions indicated in the definition content or only part of them.

The European Commission, in a proposal to amend Directive 93/104, stated that the three conditions must be met cumulatively[3]. The Luxembourg Court finally concluded that all the features must simultaneously exist but how it came to that conclusion and the consequences of adopting this solution are best derived from the analysis of the Court's case-law.

Thus, the adoption of this solution has led the Court to a significant interpretation effort in order to reach the conclusion that certain periods should be included in

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[1] Concerning certain aspects of the organisation of working time (JO L 299 p.9).
Article 2 -Definitions
„For the purposes of this Directive, the following definitions shall apply:
1. "working time" means any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.
2. "rest period" means any period which is not working time;".

[2] CJEU, judgement of 1 December 2005, Second Chamber, case C-14/04, Abdelkader Dellas, ea ECLI:EU:C:2005:728, par.41; available at www.curia.eu.

[3] European Comission, Communication […] on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC, COM (1998)662 final – Explanatory memorandum, publicată în limba engleză la *ec.europa.eu/social/BlobServlet?docId=2933&langId=en,* p.12 pct.6.

working time, despite national laws and practices in the Member States. That determined, in some cases, the analysis to be less structured, the appreciation to be global and the conditions not to be individually analyzed and to be considered fulfilled through each other, which results from the analysis of the jurisprudence evolution.

Even from the SIMAP[4]case and subsequently in the Jaeger case[5], the question arises as to whether there are three characteristic features of working time and whether they must be considered distinctly and cumulatively met, or the assessment whether or not to include a period during working time or rest time should be made in a global manner, being sufficient to fulfil only some of the features indicated in the definition given by the Directive, the conclusions of the Advocates-General in the two cases being relevant[6].

The problem arose at the time when the situation had to be analyzed for periods of time that did not clearly meet all three features but only a part of them, such as periods of on-call service or continuity, periods that were considered at most as falling within an intermediate category, which does not constitute either working time or rest time, and in any event were not considered to be working time in most Member States[7].

This question has been raised from the outset also in the case of the duration of the transportation to the workplace, as most of the member states exclude this period from working time, others treat it in a special regulation (e.g. France) and in others it is considered, at least by some of the employers, working time[8].

In principle, the distinction was made according to the degree to which the employee had to be in the workplace and the circumstance if he actually did work

[4] CJEU, judgement of 3 October 2000, case C-303/98, Sindicato de Médicos de Asistencia Pública (Simap) c. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, par.30-38, available at www.curia.eu.

[5] CJEU, judgement of 9 September 2003*, case C-151/02, Landeshauptstadt Kiel c. Norbert Jaeger, ECLI:EU:C:2003:437* available at www.curia.eu.

[6]Advocate General Saggio, in the opinion presented in SIMAP case, argued that the requirement of cumulative fulfillment of the three criteria is difficult to reconcile with the purpose of the Directive because it would involve the exclusion from working time of the periods in which the employee carries out his specific activities but is not the place of work or periods during which the employee is at work but do not fulfill his obligations while at the employer's disposal - Opinion of Advocate General Saggio delivered on 16 December 1999 (1) Case C-303/98, Sindicato de Médicos de Asistencia Pública (SIMAP) v. Consellería de Sanidad y Consumo de al Generalidad Valenciana, ECLI:EU:C:1999:621, available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d59826f5d68d4942f79d4984a44a4a0406, par.34; the same reasoning was put forward in Jaeger case by Advocate General Ruiz-Jarabo Colomer, who, continuing Advocate General Saggio's argument, also stated that the three defining criteria of working time are autonomous, considering that the Court also have taken in consideration that solution in paragraph 48 of the judgment in SIMAP case, and that, in order to achieve the purpose of the directive, it is necessary to define extensively the concepts contained in Article 2 of the Directive in order to include all the cases which may arise in practice and not being necessary all three features to coexist in order to include a period of time in the duration of working time- Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 8 April 2003 (1) Case C-151/02, Landeshauptstadt Kiel v Norbert Jaeger, ECLI:EU:C:2003:209, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=48191&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=190152, par.28.

[7]European Commission - State of implementation of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, COM(2000) 787 final, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0787&from=EN, p. 7; in French case law there was made the difference between home on call and on call periods at work place – see Supiot, Alain. "Temps de travail: pour une concordance des temps." Droit social (1995) p. 950.

[8]eg UK, see Berg, Peter, Gerhard Bosch, and Jean Charest. "Working-time configurations: A framework for analyzing diversity across countries." ILR Review 67.3 (2014), p. 807.

during the availability period, being considered working time only when the work is actually done not only by Member States but also by the Commission[9].

As the Court expressly ruled out this possibility in its judgment in SIMAP case and Jaeger case it became necessary to find a solution for the delimiting working time by rest time in such cases.

The solution proposed by the Advocates-General in SIMAP case and Jaeger case was coherent and would solve a series of problems that arose later. However, the opinion of the Advocates General was contrary to the Commission's view that, in a proposal to amend Directive 93/104 of 1998, stated that it was clear that the three characteristic features of working time are cumulative[10].

In the case of SIMAP, where this issue was raised for the first time, the CJEU, while accepting the Advocate General's opinion on the solution, also did not accept the solution to the question of cumulative character. It is true, however, that the Court has not established the opposite. In that case, the Court confined itself to finding that all three characteristic features of working time were nevertheless met, which made it unnecessary to debate the question of the need for cumulative fulfilment of those, noting that the first two criteria were met and the third was fulfilled *de facto* from the fulfilment of the first two[11].

However, on the one hand, considering that in that case the worker "carries out his work or performs his duties" by being in the workplace and at the disposal of the employer to carry out his work at any time, the Court did not analyse, in reality, this condition in an individualized way and has not established for it an independent content.

On the other hand, it has created for the future the possibility that the analysis actually targets only two of the defining features, the third resulting implicitly, although all three features are formally analysed. This method of analysis was subsequently used in the Jaeger[12] case, consolidating the jurisprudence of the SIMAP and CIG[13] cases.

In its subsequent case-law, the Court continued to analyze all three defining features of working time so that, in the TYCO case, it would carry out an analysis of them with a greater degree of systematization, in the sense that it refers separately to each of those features, analysing if they are met, which leads to the conclusion that the Court's opinion is certain that all three traits must be met[14].

We cannot agree with the contrary view expressed in the recent doctrine that the requirement for the worker to be at the employer's disposal "prevails over the others", a

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[9] Opinion of Advocate General in SIMAP case, cited, par. 33.

[10] European Commission, Communication […] on the organisation of working time in the sectors and activities excluded from Directive 93/104/EC, COM (1998)662 final – Explanatory memorandum, available at *ec.europa.eu/social/BlobServlet?docId=2933&langId=en,* p.12 pct.6.

[11] Judgement in case SIMAP, cited, par. 48.

[12] Judgement in case Jaeger, cited, par. 65.

[13]CJEU, 6th Camber,Order of 3 July 2001*, case C-241/99, Confederación Intersindical Galega (CIG) c. Servicio Galego de Saúde (Sergas), ECLI:EU:C:2001:371, par.33 şi 34.;*

[14]of the same opinion also Del Giudice, F., Izzo, F, Solombrino, M. – Manuale di diritto del lavoro, ed.XXXIV, Editura Simone, Napoli, 2016, p.244; Gheorghe, Monica, *Timpul de muncă. Realităţi şi perspective, volumul Actualităţi şi perspective în legislaţia muncii – Conferinţa Sibiu 2015, Ed. Universul Juridic, 2016,* p.141, citing also Rodière, P., Droit social de l'Union Européenne, 2014, p.134.

conclusion supposed to result fromparagraph48 and 58 of the CJUE judgment in Dellas case[15], paragraph.28 of the judgment in Vorel case[16] and paragraph 36 of the judgment in TYCO case[17].

On the contrary, the paragraphs cited are part of an integrated analysis of all three features of working time, as it has been shown, and paragraph 36 of the TYCO judgment is part of the analysis of the condition that the worker is at the disposal of the employer after the Court, in paragraph 30-35 analyses the condition for the worker to exercise his / her activities or functions and in par.43-46 the condition for the worker to be at work is analysed. Then, although in paragraph 58 of the judgment in Dellas, it is stated that it is sufficient for the worker to be available to the employer for a period of time to qualify that period as working time, but the conclusion is expressed by claiming that this qualification does not depend on the intensity of the work and refers to the period during which the worker is at work, on the assumption that this condition, which the Court expressly refers to in paragraph 48 of the judgment, is fulfilled. Toward the same conclusion leads paragraph 28 of the judgment in Vorel case, in which the Court finds that is satisfied the requirement that the worker is at work, explaining then the reason why the condition for performing his duties is also fulfilled.

In these very cases, the CJEU has made a significant effort to explain that all the defining features of working time are met, developing the notions contained in the definition.

The CJEU has never established that the working time feature of staying at the employer's disposal would prevail over the other characteristics, but on the contrary, has checked the fulfilment of all these defining features. As it has been shown, since the SIMAP case was settled, it was noted that although the worker is at the disposal of the employer, the period at which he is at home is not working time, clearly resulting that the failure to meet the conditions of being at work is equally important. As a result, it has been shown that 'relevant to qualifying the respective period of time as work or rest is not only the obligation of the employee to remain available but also the place where that obligation is fulfilled' in the sense that, in principle, if that place is in the space belonging to the employer the period is working time and if the place is outside these spaces the period constitutes rest time[18].

However, in order to maintain this line of case-law, the Court has come to the point of trying to explain why one or other of the features of working time can be found for a certain period of time and so, ultimately, it found that one or other of the features exists implicitly.

[15] CJUE, judgement of 1 December 2005, case C-14/04, Abdelkader Dellas, Confédération générale du travail, Fédération nationale des syndicats des services de santé et des services sociaux CFDT, Fédération nationale de l'action sociale Force ouvrière c.Premier ministre, Ministre des Affaires sociales, du Travail et de la Solidarité, ECLI:EU:C:2005:728, available at www.curia.eu; see also R. Anghel, *Timpul de lucru şi timpul de odihnă – Jurisprudenţa Curţii de Justiţie a Uniunii Europene,* Universul Juridic 2017, p.172 – 176.

[16] CJEU, 5th Chamber, Order of 11 January 2007, case C 437/05, Jan Vorel c. Nemocnice Český Krumlov, ECLI:EU:C:2007:23, available at www.curia.eu.

[17] Panainte, Septimiu Vasile, Drept european al muncii, Ed. Hamangiu Bucureşti 2017, p. 244; Panainte, Septimiu Vasile, Dreptul individual al muncii – curs universitar, Ed. Hamangiu Bucureşti 2017, p.210.

[18] Dimitriu, Raluca, *Consideraţii în legătură cu flexibilizarea timpului de muncă al salariaţilor,* Revista Dreptul nr. 7/2008, p.124 and also, in different context on p.123.

A good example of this is precisely the judgment in TYCO case, because in this case the Court opted for a seemingly structured analysis of each feature and not for a global analysis that would have allowed for a less structured evaluation and would have avoided redundant elements.

Thus, in the TYCO case, although it refers to the 'first constituent element of the working time', the Court begins the analysis with the condition that the worker exercises the activity or functions, which is the third element in the definition, the option being considered in the doctrine original and unpredictable but probably determined by the mobile nature of the workers concerned[19].

The Court then retains the condition that the worker is automatically placed at the workplace by fulfilling the first condition[20], in order to adapt the features of working time to the characteristics of mobile workers[21].

As it has been pointed out in the doctrine, the definition of working time could envisage the determination of the alternative character of the characteristic features[22] or at least the need to assemble only two of them.

However, at this state of the CJEU case law, it is clear that the three characteristic features of working time are cumulative and not alternative[23].

2. Consequences on delimiting working time from rest time

As the characteristic features of working time must be met cumulatively, if at least one of the defining features of working time is not met, that period should be considered rest time, the two notions being mutually exclusive[24].

Thus, since the CJEU has already established that it is not sufficient for the worker to be at the employer's disposal (for example by performing on-call duty) but at his own home / residence or other place freely chosen by him[25], it can be concluded that it is also not enough that the worker is only present in the workplace for the period in which he is in that place to be considered working time as the condition that the worker is at the employer's disposal when, at the workplace, when not working, is considered

[19]Fabre, Alexandre, "*Le temps de trajet des travailleurs nomades devant la Cour de justice: la mobilité vue de plus haut.*" Droit Social 1 (2016), p.60.

[20] par.43 of judgement in case TYCO.

[21]Fabre, Alexandre, *"Le temps de trajet des travailleurs nomades devant la Cour de justice: la mobilité vue de plus haut."* *Droit Social* 1 (2016): p.61.

[22]De Groof, Sarah, "*Travelling Time is Working Time According to the CJEU… at Least for Mobile Workers.*" European Labour Law Journal 6.4 (2015), p.391.

[23] on the same opinion also Del Giudice, F., Izzo, F, Solombrino, M., *Manuale di diritto del lavoro*, ed.XXXIV, Editura Simone, Napoli, 2016, p. 244 and Roşioru, Felicia, *Dreptul individual al muncii*, Ed. Universul Juridic, Bucureşti, 2017 p.412.

[24] CJUE, C-303/98, judgement of 3 October 2000, *SIMAP*, cited., par.47.

[25] CJUE, judgement in case SIMAP, cited, par. 50; on the contrary, if the obligations imposed on the worker are such as to objectively restrict his ability to pursue his personal and social interests by being obliged to remain in a restricted area, it follows that he is in a place imposed by the employer by default and the on-call time at home is working time – see CJEU – 5th Chamber, judgement of 21.02.2018 in case C-518/15, Ville de Nivelles c.Rudy Matzak, available at www.curia.eu and R. Anghel, *Perioada de gardă la domiciliu poate constitui timp de lucru. Nuanțări recente în jurisprudența Curții de Justiție a Uniunii Europene*, Curierul Judiciar, nr.3/2018, pp. 150-154.

by the Court to be necessary for the inclusion of a certain period of time in the category of working time[26].

During the planned periods of work interruption, although the worker may still be at work, he is not at the employer's disposal and in the exercise of his duties or functions, even if he may exceptionally be required to resume work[27] because this interruption of work is not incompatible with making any eventual and exceptional interventions required by the employer in the appropriate timeframe, if necessary, such as for security reasons (in which case the intervention itself will be taken into account when determining the duration of actual work)[28]. Thus, such a theoretical possibility was considered by the CJEU as insufficient to determine the inclusion of a period of time during working time[29].

In Grigore case[30], the Court held that, in interpreting Article 2 (1) of Directive 2003/88, the classification of a period as "working time" "does not depend on the provision of tied accommodation within the range of forest within that forester's purview in so far as that provision does not imply that he is required to be physically present at the place determined by the employer and available there to his employer so that he may take appropriate action if necessary". From the reasoning of the judgment, it follows as a principle that the existence of a dwelling space in the space which constitutes a place of work is not such as to lead to the conclusion that the time spent by the worker in the dwelling is neither working time nor rest time, and the Court stated that the criteria already set out in its case-law must be applied in order to delimit working time from rest time in this case[31].

Starting from the cumulative character of the three defining features of working time, the immediate conclusion would be that, when the worker is at work, it is sufficient for a period not to be regarded as working time either the employee not to be at the employer's disposal or not to exercise his / her duties. Although theoretically, such a possibility cannot be ruled out, in practice, it may be necessary rather that none of these two defining features are present because, as has been shown, the CJEU has come to the conclusion several times that the existence of one of these, combined with the presence at the workplace, also attracts the fulfilment of the other. From this perspective alone, there is another conclusion, namely that none of the two features should be met[32].

A similar situation is found in the regulation of sectorial directives in the field of transport activities where, in view of the specific nature of the activities which prevent the worker from moving daily at home / residence, certain periods of time, which certainly have the purpose of restoring work capacity, are included in rest time and are consequently excluded from working time even though the worker is still in a place imposed by the

[26] CJEU, judgement in case SIMAP, cited, par. 48.

[27] see R. Anghel, *Delimitarea timpului de lucru de timpul de odihnă şi remunerarea muncii suplimentare şi de noapte în cazul personalului militar voluntar*, Curierul Judiciar nr.2/2018 pp.70-76.

[28] Cour de cassation, Chambre social, audience publique du 28.05.2014, n° de pourvoi 13-10544, audience publique du 28.05.2014, n° de pourvoi 13-13996 available at www.curia.eu www.legifrance.fr;

[29] regarding home on call see the judgement in case SIMAP, cited, p.50.

[30] CJEU (6th Chamber), Order of 04.03.2011, in case C-258/10, Nicuşor Grigore v Regia Naţională a Pădurilor Romsilva - Direcţia Silvică Bucureşti, available at www.curia.eu;

[31] R. Anghel, op. cit., p. 74.

[32] Ibidem, p. 75.

employer or even in the place of work[33], because during those periods the workers are not are available to the employer and do not perform any activities or functions.

3. Conclusions

Stating in its case law that characteristic features of working time must be met cumulatively, CJEU opted apparently for a restrictive interpretation of the working time definition. Even though, it is reasonable to say that in fact, looking to ensure the protection of health and safety at work as enshrined by Directive 2003/88, the Court gave more extensive interpretation of the working time notion in different cases (especially regarding on call periods) while trying to maintain a rigorous system of analysis, based on three defining features of working time, so that assessing whether a period must be or not included in working time, on case to case bases, would be a serious process with results limited to the purpose of the European Union's Directive.

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[33]For example, according to Directive 2002/15 / EC, it is rest time for mobile workers who drive the vehicle, the period spent standing by the driver or in the crate while the vehicle is in motion; in accordance with Directive 2014/112 / EU, in the case of inland waterway transport, the notion of "rest" also includes rest periods on board when the vehicle is moving or at rest; a se vedea şi R. Anghel, *Delimitarea timpului de lucru de timpul de odihnă şi remunerarea muncii suplimentare în cazul lucrătorilor mobili care desfăşoară activităţi de transport rutier,* Curierul Judiciar nr.1/2018, p.10-19.

INTRODUCING THE CIVILLY RESPONSIBLE PARTY INTO THE CRIMINAL PROCEEDING. ANALYSIS OF DECISION NO. 257 OF 26 APRIL 2017 ON THE OBJECTION OF UNCONSTITUTIONALITY OF THE PROVISIONS OF ARTICLE 21 (1) OF THE CODE OF CRIMINAL PROCEDURE

Vasile COMAN*

Abstract: *This paper presents the procedure for introducing in the criminal proceedings the civilly responsible party after the Decision no. 257 of April 26, 2017 of the Constitutional Court, a crucial issue within this framework being the deadline until those entitled have to request this so as to respect the right of defense of the civilly responsible party. By Decision no. 257 The Court finds that the criminal procedural rules of Article 21 (1), which regulate the possibility of an injured party who has been a civil party to request the civilly liable party "to initiate the judicial investigation" in any criminal proceedings, including after the closure of the preliminary-ruling procedure, is liable to undermine the right of defense and the right of free access to justice of the civilian party. In its argumentation, the Court points out that it is necessary to ensure by the criminal procedural rules in the matter the right of the civilly liable party to lodge claims and exceptions on the lawfulness of the court's notification, the lawfulness of the taking of evidence and the execution of acts by the criminal investigation bodies in the proceedings before the Board of Appeal, precisely in order to strike a balance between the fundamental rights in the competition, namely the right of free access to justice and the right of defense of the injured person who is a civil party, on the one hand, free access to justice and the right of defense of the civilian party, on the other.*

Keywords: *civilian party, preliminary chamber, right of defense, prosecutor, right of access to justice*

I. Legislative premises of the Constitutional Court's decision. The decision

Starting with the date of entry into force of the new Criminal Procedure Code on February 1, 2014, following the notification of the unconstitutionality exception, the Constitutional Court pronounced in an appreciable number of cases, ascertaining the unconstitutionality of provisions included in the new legislation, some decisions concerning the substance of the regulation, and others only marginal aspects.

Decision no. 257/2017 falls within the category of judgments which indirectly create a constitutional court in the matter of the preliminary procedural criminal proceedings, since, by resorting to its relevant case-law, it restores once again the right to a fair trial, in this case the procedural question of the introduction of the civilly responsible party in the criminal proceeding.

* Judge, Prahova Tribunal.

The legislative premise of the analyzed decision is therefore the provisions of art. 20 par. (1) and Article 21 (1) both of the Code of Criminal Procedure, being criticized by the civilly responsible party in a criminal case before the Baia Mare Court. By the annotated decision, the Court dismissed as ungrounded the unconstitutionality complaint concerning the first of these texts, instead admitted the exception of unconstitutionality and found that the phrase "within the term stipulated in art.20 paragraph (1)" in the article 21 paragraph (1) of the Code of Criminal Procedure is unconstitutional. Unlike other judgments, the Court no longer specifies unequivocally the procedural solution to be followed, which is the time limit until the person in charge of civil proceedings must be brought in the criminal proceedings[1], so that some considerations can be made in this respect - in addition to those made by to us in another paper[2], the importance of this decision in the criminal proceedings being undeniable.

In the decision under consideration, the Court first of all observes that the commission of an act provided for by the criminal law may have, apart from the criminal nature, extrapolar consequences - civil, administrative, disciplinary - so that, along with the criminal law conflict criminal law), there may also be an extrapenal law conflict (extrapolated legal relationship). When this extrapolated report is of a civil law nature, it may be brought before the judicial authorities to obtain reparation for the harm suffered, the legal means serving to bring the civil conflict report to the judicial bodies is the legal action having the name "civil action". The Court notes that, from a substantive point of view, the object of the civil action is the exercise of the right to claim remedies through the judicial bodies, and, from a procedural point of view, the civil action has as its object the extraditable civil liability of the persons responsible under civil law for damages produced by committing the deed which is the object of the criminal action (Article 19 (1) of the Code of Criminal Procedure). At the same time, in order for the civil action to be exercised in the criminal proceedings, it is necessary to meet certain conditions, namely to have an unlawful deed materially or morally damaging, the damage be certain both in terms of existence and under the aspect of its extent and has not been repaired, there is a causal link between the offense committed and the prejudice, there is a manifestation of will in the sense of being a civil party in the criminal trial. Taking into account the last condition, the Court notes that in the criminal proceedings the civil action is initiated by establishing as a civil party the injured person, in accordance with art. 20 of the Criminal Procedure Code, the request for constitution being necessary in writing or orally, indicating the nature and extent of the claims, the reasons and the evidence on which they are based. In case of non-observance of any of the aforementioned conditions, the injured person or his / her successors can no longer be a civil party in the criminal trial, but they have the possibility to bring the action before the civil court. The Court also notes that civil action can be exercised by the injured person or, as the case may be, by his legal representative (where the injured person is deprived of his / her capacity to exercise or is restricted) or his successors. Exceptionally, civil action may also be

[1] For a critical view on the terminology used by the legislator in this case, see M. Udroiu & Co., *Code of Criminal Procedure. Comment on Articles*, 3rd Edition, C.H. Beck, Bucharest, 2017, p. 147.

[2] See, Vasile Coman, *Current Reports on the Settlement of Civil Action in Criminal Proceedings, in the recent jurisprudence of the High Court and the Constitutional Court*, in the Supplement of Valahia University Law Study, Publishing Bibliotheca, 2017, pp. 463-478.

exercised by the public prosecutor for persons with little or no capacity to exercise the exercise of the action by the prosecutor being subsidiary, subject to the passivity of the legal representative of the injured person or his absence.

The Court observes that, in principle, the injured party is free to decide whether to initiate civil action separately from the criminal proceedings, as the one who can dispose of this legal instrument during the criminal proceedings, the civil action adjacent to the criminal action being governed by the principle of availability. The principle of availability is a characteristic of the civil procedure and, in the light of that, the injured party can determine not only the existence of a civil action in the criminal proceedings, also the content of this action by establishing the procedural framework of the parties and the object, as well as from the perspective of the defense formulated.

In those circumstances, the Court finds that the injured person decides on the procedural framework for the fulfillment of his claims either by bringing the matter before the civil court or by joining the civil action in criminal proceedings, and in that latter case he is also in a position to choose the moment of exercising the right to (1) the first sentence of the Code of Criminal Procedure, namely "until the commencement of the judicial investigation", a procedural moment starting with the actual administration of the evidence in the to the court of first instance. Neither the prosecutor nor the court can limit the availability of civil action, as none of these judicial bodies can subrogate to the rights of the injured person. However, according to the second sentence of Article 20 (1) of the Code of Criminal Procedure, the judicial bodies referred to above have the obligation to inform the injured person that he can be a civil party in the criminal proceedings, under the conditions of Article 111 of the Code of Criminal Procedure - at the beginning of the first hearing, when the injured party is informed of his rights and obligations, of art. 353 of the Criminal Procedure Code - by summoning the injured person for the first term, indicating that he can become a civil party until the beginning and Article 374 paragraph (3) of the Code of Criminal Procedure - which provides that, at the first term when the citation procedure is legally fulfilled and the case is in a state of trial, the President refers to the injured person may be a civil party until the commencement of the judicial inquiry. The Court notes that this obligation still has a justification from the point of view of the active role the judiciary has to play, even if the current criminal procedural law, not regulating this principle, has attributed to the judge a more proactive role, similar to that of the adversary systems, the prosecutor while remaining active in the criminal process.

The Court notes that the "introduction" of the civilly liable party into the criminal proceeding may take place, under the terms of Article 21 of the Code of Criminal Procedure "at the request of the party entitled under civil law" within the time limit laid down in Article 20 (1) the same code, so "until the beginning of the judicial investigation". Also, according to the criminal law in force, when exercising the civil action, the prosecutor is obliged to demand the introduction of the civil responsible party in the criminal proceeding, under the conditions of paragraph (1) of art.21, observing the aforementioned term. At the same time, the "person" civilly liable, exposed to a separate civil action, has an interest in "intervening", as a civilly responsible party, in the criminal trial in which civil action is to be handed down, and in which a judgment,, in accordance with Article 28 (1) of the Code of Criminal Procedure, will have the force of res judicata before the civil court with regard to the existence of the offense and the person who committed it, so that the Court holds that,.21 paragraph (3) of the Code of Criminal Procedure, the civilly liable party may intervene in the criminal trial until the first instance court case has been terminated, taking the procedure from the stage at which it intervenes. The Court notes that the intervention of the civilly responsible party in the civil proceeding of the criminal proceeding evokes to some extent the incidental voluntary intervention regulated in Article 61 (3) and Article 63 of the Code of Civil Procedure, stating that the civilly responsible party does not intervene only to support the defense of the defendant, but to formulate their own defense in solving the civil action adjoining the criminal proceedings in progress. By his introduction or due to his intervention in the process, the "person" responsible civilly becomes a "party" in the civil action in the criminal trial and as such acquires, implicitly, the procedural rights inherent in the defendant's counter-action regarding the civil action in the criminal proceeding, so it can invoke any evidence in the criminal case file or may propose the administration of new evidence demonstrating that the claims of the civil party are unfounded. Equally, the Court rightly points out that the civilly responsible party together with the defendant forms a procedural group obliged to compensate for the damage caused by the offense, it being obvious that the civilly responsible party has its own interest in removing the conditions that would entail its civil liability.

Referring to its well-known Decision no. 641 of November 11, 2014[3], the Court recalls that the proceedings in the Preliminary Chamber are of particular importance, having a direct influence on the conduct and fairness of the subsequent proceedings, including the actual process. In this procedural framework, the lawfulness of the administration of evidence and the execution of acts by the criminal prosecution bodies takes place, which is closely related and exclusively related to ensuring the fairness of the criminal trial. Therefore, the principle of contradictory and equality of arms, derived from art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, seeks full participation of the civil party and the civilly responsible party in the proceedings before the Chamber of Deputies, both in substance and in stage of judicial review of the contestation.

The civil party, as well as the civilly responsible party, must have the concrete and effective opportunity, like the defendant and the prosecutor, to challenge the "content" of the prosecution through the principle of legality. The Preliminary Chamber judge is sovereign in determining the lawfulness of the taking of evidence and the conduct of the acts of pursuit, being the only one who can appreciate these elements, the acts he performs having a *direct influence* on the conduct and fairness of the process. Once the trial has begun, the Fund judge can no longer assess the evidence excluded in the preliminary hearing, nor the legality of the evidence that has been won by the trial.

On the basis of these prerequisites, the civilly responsible 'introduced' *at the end of the preliminary hearing is unable to lodge claims and exceptions* as to the jurisdiction and lawfulness of the case, the lawfulness of the taking of evidence and the conduct of acts by the criminal investigation authorities, therefore, *the free access to justice for this part depends exclusively on the manifestation of will of the injured person*. The Court

[3] Published in the Official Gazette, Part I, no.887 of 5 december 2014.

finds that the injured party, as a civil party to the criminal proceedings, has interests contrary to the civilly responsible party, so that he can exercise his right to seek redress through abusive judicial bodies in order to limit excludes access by the civilly responsible party to the preliminary camera stage, which, as has been shown in the previous paragraph, is of particular importance to subsequent judgments in the light of its object.

At the same time, according to the Court, the condition of the right of free access to justice of the civilly responsible party for its introduction in the criminal proceedings within the term regulated by art.21 par. (1) of the Code of Criminal Procedure, namely "*until the commencement of the judicial investigation*", results in the deprivation of the right of this party. In other words, the protection afforded to the injured party who has been constituted as a civil party and which may require the civilly liable party "to the start of the judicial investigation" determines the limitation of the right of free access to justice of the civilly responsible party, and in such circumstances it is necessary for the legislature to use appropriate means for such a limitation to be proportionate to the aim pursued, since the absolutisation of one of the two rights - where their sphere of expression is concomitant - could lead to damage the substance of the other right.

However, as regards the rights of the defense, the Court notes that it is constitutional in nature, being enshrined in Article 24 of the Basic Law which states that "*the right to defense is guaranteed*" and that "*throughout the course of the trial, the parties have the right to be assisted by a lawyer elected or appointed ex officio.* " The right of defense confers on any party involved in a proceeding, in accordance with its interests and whatever the nature of the proceeding, the opportunity to use all means provided for by law to invoke in its defense facts or circumstances. This right involves participation in court hearings, the use of evidence, the invocation of exceptions provided for by criminal law, the exercise of any other criminal procedural rights and the possibility of benefiting from the services of a defense counsel. The Court also notes that Article 10 of the Code of Criminal Procedure regulates the right of defense as a principle of criminal proceedings and of the criminal proceedings as a whole, in accordance with the constitutional provisions establishing this right, establishing both procedural rights of parties and procedural subjects (Article 10 (2) and (3)), as well as their procedural safeguards (Article 10 (4) and (5)). Under these circumstances, the Court finds that the manifestation of the will of the injured person who was a civil party to seek the introduction of the civilly liable party "in the criminal proceedings", at any stage of the proceedings, including after the closure of the preliminary- ensures the respect of the right to defense of that Party, *but is likely to prejudice the fundamental right of defense of the civilian party*.

Similarly, the Court points out that the solution and the recitals referred to are also applicable *mutatis mutandis* to the case where the prosecutor exercises the civil action under Article 20 (1) and (2) of the Code of Criminal Procedure and is required Article 21 (2) of the Code of Criminal Procedure, to request the introduction of the civilly responsible party in the criminal proceedings under the terms of paragraph (1) of the same article.

Finally, the Court also pointed out that by Decision No. 84 of 23 February 2016[4], further examined the objection of unconstitutionality of the provisions of Article 21 of

[4] Published in the Official Gazette of Romania, Part I, no. 371 of May 13, 2016.

the Criminal Procedure Code, rejecting it as unfounded. The Court observes, however, that the criticized solution, namely the provisions of Article 21 (1) of the Code of Criminal Procedure, was justified in the old criminal procedural law, given that in the criminal proceedings the phase of the preliminary chamber was not regulated, and the verification of the competence and legality of the court notification, the verification of the lawfulness of the administration of the evidence and the execution of the acts by the criminal prosecution bodies were carried out in the second phase of the criminal trial - the stage of the trial. The Court finds that the legislative solution criticized in the present case has no basis in the criminal procedural law in force in which the procedure of the preliminary-ruling chamber was introduced and, in particular, how that new phase of the proceedings The Criminal Code was set up by the Constitutional Court's Decisions No. 641 of November 11, 2014 and No. 631 of October 8, 2015, underlining the importance of this new phase in the criminal trial and the fact that the civilly responsible party should be given the same rights as and the defendant, in view of the fact that it together with the defendant forms a procedural group obliged to repair the damage caused by the offense, while at the same time this part is not alien to the interest in solving the criminal aspect of the criminal process on which the resolution of the civil aspect.

II. Comment. Implications and consequences of the analyzed decision

A first consequence of the correction applied by the Constitutional Court to the legislator by the commented decision is that the rights and interests - inherently - of the civilly responsible person can not be ignored, on the contrary they must be equally defended against the extent of the working authority judging the criminal decision on a subsequent civil lawsuit, the length and probationary framework provided by the criminal trial - knowing that it is generally shorter than the civil process, but especially the civil and prosecutor's order to enter the civilly responsible party to respond to the damage caused by the offender through the offense[5]. The Court thus established that, in order to respect the right to a fair trial of the person in charge of the civil service[6] – from the point of view of the right of defense, access to justice and equality of arms in the criminal proceeding – the civilly responsible party must also be recognized as having full procedural rights in the proceedings of the preliminary chamber.

The reasoning of the decision shows that the introduction of the civilly responsible party in the criminal proceeding is unconstitutional if it occurs after the closing of the preliminary camera proceedings, which starts with the moment of the final stay of the

[5] It should be noted that, as a result of the restriction of the principle of the active role, in the new Criminal Procedure Code, the Preliminary Chamber judge and the court are no longer obliged to proceed with the civil person in charge of the trial, this task falling exclusively on the prosecutor in cases civil action is exercised by the "office".

[6] The "responsible" civilian becomes a "party" in the criminal proceeding, thus acquiring all the procedural rights provided by the law, only after the civil prosecution has been approved by the prosecutor by reasoned ordinance (including where the prosecutor, in the alternative, the person responsible in civil law in the criminal proceedings, following the ex officio civil action), respectively by the preliminary chamber judge through reasoned conclusion.

conclusion by which the judge of the preliminary chamber orders the commencement of the trial. *Per a contrario*, this must be done by those concerned during the criminal prosecution or at the latest at the beginning of the preliminary camera procedure. In these circumstances, it is noted that although civil action is governed by the principle of availability for civil proceedings, when exercised in the criminal proceedings, it lends itself to the imperative nature of the criminal action - the main action, when it is desired to introduce the civil party in the criminal proceedings.

In particular, regarding the *term* in which the person in charge of civil matters must be brought in the matter, in the absence of a clear indication of the Court in the decision under consideration and of the inaction of the legislature which has not so far regulated this matter - although more than one year to the finding of the vice of unconstitutionality in the art.21 paragraph (1) of the Code of Criminal Procedure, we consider that it should be established differently for the prosecutor and the civil party.

Thus, the prosecutor must make this process in the course of criminal prosecution, at the latest until the time when the indictment is submitted to the preliminary chamber judge in the court having jurisdiction to hear the case or the court designated under Art. 76 of the Criminal Procedure Code. This is because the activity of identifying the civilian person is a research activity specific to the prosecution bodies[7], not indicating it in the indictment as being an irregularity of the act of filing, which can however be corrected by the prosecutor within the 5 days term granted by the provisions of art. 345 par. (3) of the Code of Criminal Procedure[8].

Moreover, after the decision no. 102 of 6 March 2018 of the Constitutional Court[9], in the case of all juvenile offenders, the criminal investigative body has the obligation to quote all the persons mentioned in art. 505 par. (1) of the Criminal Procedure Code, in which case possible persons responsible in civilian matters can be identified and conceived. In such circumstances, there are cases in which the persons referred to in Article 505 of the Code of Criminal Procedure acquire the capacity of a civil party (for example, the parent or the principal of the minor offense).

Instead, the civil party must, as a rule, expressly request the prosecutor in the course of the criminal prosecution, and if for objective reasons this was not possible at this mandatory stage, ask the chamber judge to bring the matter to the person responsible civilly, within the term (at least 20 days) mentioned in the written address issued and communicated according to art. 344 par. (2) second sentence of the Criminal Procedure Code, a judicial term established by that judge at the stage of the preceding measures, after receiving the indictment.

In this context, it should be noted that the provisions of Art. 342 par. (2) the first and second sentences of the Code of Criminal Procedure, which require only the defendant to serve the indictment and not the injured person and the other parties - to whom a simple *address* is referred to the subject matter of the preliminary chamber and

[7] In this respect it was decided in the judicial practice before the commented decision, see I.C.C.J., s.pen., P. JCP no. 231 from 19.2.2016, unpublished, in C. Ghigheci, *Requests and Preliminary Exceptions, I. Procedure, Regularity of the Notice of Proceedings, Legality of the Criminal Investigations*. Comments and jurisprudence, Hamangiu Publishing House, Bucharest, 2017, p. 261-262.

[8] In this respect, the Alexandria District Court, JCP no. 81, 7.4.2016, in C. Ghigheci, I., *op. cit.*, p. 262.

[9] Published in the Official Gazette of Romania, Part I, no. 400 of May 10, 2018.

the procedural rights[10] *is unconstitutional* because it unjustifiably limits the right defense and equality of arms of these people, rights that remain theoretical. It may be contrary to this view, but it should be noted that in the absence of effective communication of the indictment (the indictment), the *written address* issued on the basis of the legal text evoked is clearly insufficient for the injured party and the other parties to be able to do the concrete and effective defense, or to invoke any criticism of the illegality of the evidence or the acts of criminal investigation (which is in principle non-public), and especially the elements of the indictment irregularity. Those participants in the trial remain the only way to move to the court where the indictment is registered and to obtain a copy of it, at their own expense and money, costs that can not be ignored. However, this task imposed on the other participants than the defendant is disproportionate, contrary to the very considerations of the Constitutional Court, first of all Decision no. 641/2014, a reference for a preliminary ruling procedure, in which the Constitutional Court notes that, from the point of view of contradiction - a defining element of the equality of arms and the right to a fair trial, *the legal rule must allow communication to all parties to the criminal proceedings - defendant, civil party, civilly responsible party - of documents that are likely to influence the judge's decision and provide for the possibility for all these parties to effectively discuss the observations made to the court* (paragraph 43); the indictment being the court referral, it is undoubtedly the first "document" capable of influencing the subsequent course of the trial itself by going into the next procedural stage - the preliminary chamber. At the same time, the European Court of Human Rights has ruled that a fundamental aspect of the right to a fair trial is that in criminal matters, including procedural elements, it should be conducted in a contradictory manner, with equality of weapons between prosecution and defense. The right to a contradictory trial means, in a criminal case, that both the prosecutor and the defendant must be given the opportunity to be aware and to be able to comment on all the evidence submitted or on the observations submitted by the other party to influencing the court's decision (judgment of 16 February 2000 in *Rowe and Davis v. the United Kingdom*, paragraph 60). National legislation can fulfill this requirement in various manners, but the method adopted by it must ensure that the adverse party is aware of the comments and has a real opportunity to comment (Judgment of 28 August 1991 in the Brandstetter case against Austria). However, this possibility is not a real one, but rather an obstacle by not communicating the indictment to all parties at the beginning of the preliminary chamber procedure, thus the defendant is thus unjustifiably advantageous.

[10] Art. 342 para. (2) of the Code of Criminal Procedure was amended by point 9 of art. unique from Law no. 75 of April 28, 2016, published in the Official Gazette no. 334 from 29 April 2016, as follows: "(2) The certified copy of the indictment and, if necessary, the certified translation thereof shall be *communicated to the defendant* at the place of detention or, as the case may be, to the address or the address he has requested communication of procedural documents. The defendant, the other parties and the injured person shall be informed (by *written address* - nn) of the subject matter of the proceedings in the preliminary chamber, of the right to hire a defense counsel and of the term from which they can, from the date of the communication, the lawfulness of the court's notification, the lawfulness of the taking of evidence and the execution of the acts by the criminal prosecution bodies. The term is determined by the preliminary chamber judge, depending on the complexity and particularities of the case, but can not be shorter than 20 days. "

In the event of non-observance of these procedural intervals by the civil party and the prosecutor, the Preliminary Chamber judge must dismiss as late as possible a request for bringing the civilly accountable person liable for the damages caused by the offender by offending, invoking - until the express intervention of the legislator, Decision no. 257/2017 and other constitutional and conventional rules in the field. Of course, under art. 21 par. 2 of the Criminal Procedure Code, the civilly responsible person can intervene on his / her own initiative in the criminal trial until the end of the judicial investigation at the first instance court, but in this case the procedure at the *stage* at which it intervenes.

It is worth mentioning briefly, within the limits of the present study, that through the legislative draft of April 2018, the Joint Special Committee of the Chamber of Deputies and the Senate for the systematization, unification and ensuring of legal stability in the field of justice, it is proposed (point 9 of the project) modification of art. 21 par. (1) of the Criminal Procedure Code, in the sense that "*the civil party may be prosecuted at the request of the party entitled under civil law, pending the opening of the proceedings of the preliminary chamber*". However, the legislator should also intervene on the provisions of Article 20 paragraph (1) of the same Code, concerning the time limit for the constitution of the civil party, as a procedural law which, for the legislative co-ordination, should also have been limited to the same maximum temporal reference.

Referring to the amendment proposed legislation state that the new text entered is ambiguous and does not clarify accuracy and predictability required a procedural rule that is required specifically to the person civilly responsible can be brought to trial because of the phrase "*to start preliminary chamber procedure*" can mean both when registering to court the criminal case prepared by the prosecuting authority[11], and the expiry of the minimum 20 days set in accordance with art. 344 par. (2) of the Code of Criminal Procedure, the injured party and the parties may make requests and exceptions on the legality of prosecution or be removed from office except by the judge for preliminary chamber. The latter solution is the most practical and equitable is, in our opinion, in the spirit of regulation, the context in which we see that the explanatory memorandum to the said project developer legislative down to retrieve *tale quale* expression used by the Constitutional Court Decision No. 257/2017, although it must be adapted to precise and predictable technical language specific to procedural rules.

On the other hand, it is noted that the text is not correlated with the subsidiary obligation of the prosecutor to proceed with the introduction of the civilly responsible person, a judicial body that, although not a "party" but a participant in the criminal trial, is equally targeted by the question of law examined, as is apparent from paragraph 34 of the Decision no. 257/2017.

Finally, the text introduced is inadequate because no reference is made to the complaint procedure against the prosecutor's complaint in the cases where a defendant is included, also included in the functional jurisdiction of the preliminary chamber judge, where the admission of the complaint can be reached to the decision to start the

[11] This interpretation is not excluded and is based on another procedural rule, which can be applied by analogy, art. 192 par. (2) of the Code of Civil Procedure, which states that "The (*civil* - n.n.) process starts by registering the application with the court, under the law."

trial against the defendant. Thus, art. 341 par. (7) of the Code of Criminal Procedure provides that "In the cases in which the criminal proceedings have been ordered to commence, the Preliminary Chamber Judge shall: (...) 2. verify the lawfulness of the taking of evidence and the conduct of the criminal proceedings, exclude the unlawfully administered evidence or, as the case may be, sanction according to art. 280-282 acts of criminal prosecution carried out in violation of the law and: a) dismiss the complaint as unfounded; b) admitting the complaint, abolishing the contested solution and sending the case to the prosecutor in order to complete the prosecution; c) *admitting the complaint, abolishing the contested solution and ordering the commencement of the trial on the facts and persons for whom criminal proceedings were initiated during the criminal investigation, when the legally administered evidence is sufficient, sending the file for random assignment*. Obviously, in this context, it may be the question of engaging the accused's civil liability towards the injured party as a civil party, who will have the interest to request the introduction of the civil person in charge, especially in cases where the defendant is insolvent. In turn, the person in charge of the civil service will be interested in having the possibility of challenging the lawfulness of the investigations carried out by the criminal prosecution bodies, since the ordering of the decision to initiate the trial entails, in principle, the impossibility of further criticizing the lawfulness of the evidence and the follow-up criminal.

In the absence of a legislative solution, we consider that in the analyzed situation the civil party and, as the case may be, the prosecutor must take steps to request or order the introduction of the persons responsible civilly in the course of the criminal investigation – before the issuing of the solution, so that they have the possibility to invoke applications and exceptions in the preliminary camera stage. Only by doing so, will the right of defense and the right of access to justice of the person in charge of the civil service to be respected, to which it is also to be recognized that, under Art. 341 par. (9) of the Code of Conduct to lodge an appeal against the conclusion of the judge hearing the application for a preliminary ruling ordering the opening of the trial.

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THE SOCIAL JUSTICE AND THE DEROGATIONS FROM THE FORMAL EQUALITY IN THE CONSTITUTIONAL STATE

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Abstract: *The following article addresses briefly the elimination of the formal equality by the institution of the right of difference, the focus being on the discrimination of some citizens, the violation of the principle of formal equality,by giving privileges to some people, the derogation from the principle of sex equality, and the unlawful principle of excluding a person from practising a profession by violating the principle of rights equality. Since this principle is applied both to the different treatment of people and to discrimination, it is only the law that is the same for all the individuals, the institution of formal equality seems to be in an abeyance, because its crystallization comprises the adjustement of the social norms to the evolution of society and of human beings as individuals and members of our society.*

Keywords: *State, society, jurisprudence, discrimination, equality.*

1. Introduction

In order for a society to be democratic and in order for it to function within an objective frame of freedom, without any arbitrary socio-judicial situations allowed by the law, the state has the obligation to protect the society as a whole and also the fundamental individual rights, by its implementation mechanisms. The idea of legality has to come first in a civil society, meaning that the moral demands of the members of the society or the legal framework of the state should meet the individual freedom. Therefore, the application of the protection of citizens can be done differently, but this „ positive discrimination" should not have as its result the suppression of the formal equality principle. This study has as a subject a comparative analysis of some judicial situations meant to reveal the manner in which the understanding and the application of law can bring to the discrimination of individuals within the society on the legal basis of the exclusion from the principle of equality. This article considers the Constitution of Romania, of the Hellenic Republic, of the Republic of Austria and of the Republic of Germany.

2. The formal equality as a defining element of social justice

The principle of formal equality is the one around which the judicial standards have been conceived, because the phenomenon of law has evolved together with the society, assuring within it the idea of justice not only for the society in itself, but also for each and every individual.

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Coming from the principle of individual freedom, the instauration of formal equality by law has as its aim the accomplishment of justice in such a manner that every individual should have his rights respected by referring to his deeds and to the contribution to the service of society.

Because the right of individuals to equal treatment is a fundamental one, it has been stated in the rule of law, a specific focus being not only on the equality of people in front of the law, but also on the equality between men and women.

3. The suppression of formal equality by the instauration of the right to difference

It is well-known that a society needs stability and order, well established by the texts of judicial standards. Therefore, the decisions of the Constitutional Court of every state and the decisions of ECHR are part of the judicial standards of society. Consequently, we will proceed to an exemplification of some Decisions regarding the instauration of the right to difference resulting from the right to affiliation, which brings to the suppression of the formal equality.

4. The differences of discrimination regarding the Romanian citizens of Hungarian origins excepting those of German origins, noticed by the Romanian Constitutional Court by its Decision no. 47/1994

Even if, in accordance with the fundamental law, all citizens are equal in front of the law, the Constitutional Court was seized regarding a cause which had as an object the discrimination on ethnic ground, present in the law no 44/1994, about the war veterans and some rights of the disabled people and of the war widows.[1]

In the address to the Court it is shown that, by art. 2 let b)[2] from Law no.44/1994 there are persons who are expelled from the benefits stated in the law, persons who faught against the Romanian Army, among whom there are almost 6.000 Romanian citizens of Hungarian origin, who were enrolled to fight in the Hungarian army between 1940-1945, in the Romanian provinces temporarily occupied.

Consequently, the senators and the representatives addressed the Court to notice that art.2 align. b) is discriminatory, because the citizens of Hungarian origin are excluded from this stipulation, even if they were part of the German army in World War II.

Moreover, in order to prove the text aforementioned as being unsconstitutional,it has been undelined that the recruitment of the citizens present in the address was made pursuant the Vienna Award from 1940, which has no judicial effects anymore, being null and void.

In the cause brought to the Constitutional Court,it is justly stated that the refuse to give the quality of veteran to the inhibitants of the Romanian provinces temporarily occupied between 1940-1945 who were part of the Hungarian army was a

[1] The Official Gazette, I, no. 139 from de 02.07.1994.
[2] ”if they fought against the Roman army”.

discriminatory treatment. On the other hand, considering the fact that an obligation which is impossible to accomplish cannot be reproached to anyone, the ousting of some citizens from the benefits of the Law no. 44/1994 is a contravention both from the constitutional provisions and from Law no. 772/1946, which stated as discriminatory any exclusion of people who, according to the law, are considered to have accomplished their military duty[3].

Furthermore, the Court has stated that the Romanian state is forced by its Constitution not to introduce those provisions whose enforcement would be discriminatory among its citizens, to whom the Romanian state guarantees the equality not only in front of the law, but also in front of the public authorities, „ without privileges and discrimination" into the legal system[4].

In conclusion, the Constitutional Court stated that in the indication from art.2 let b) from the Law no. 44/1994 of the text *"if they did not fight against the Romanian army"* it is unconstitutional not because of the violation of art. 4 align. (2), from the fundamental law, but because of art 16, align. (1), which forbids the differences with a discriminatory nature among the people of Romanian citizenship.

From those written above, one can notice that, by the Decision no. 47/1994, the existence of a difference of treatment among the Romanian citizens on the basis of a subjective and unreasonable justification, has been lawfully stated by the Court by reference to some historical events which were not connected anymore to the new national and international legal framework, in an unfair and absurd manner, the legislator forcing the restraint of practice of some rights, not in order to defend some value of fidelity towards the country, but in order to protect an old-fashioned idea which is not to be found in a democratic state.[5]

5. The derogation from the principle of equality, the privileges given to some people by the exclusion of others. The Case of Karner vs. Austria

The difference of treatment cannot be built on criteria able to affect the practice of the fundamental rights, since the difference of treatment should be justified by reasons which will not bring a violation of art 14 from the European Convention of Human Rights, which states the interdiction of discrimination. For example in the case of *Karner vs. Austria*[6], the Court noticed that the Austrian state applied a difference of treatment to the claimant, based on the criteria of sexual orientation, by violating the right of transfer of the leasing contract of the building in which he had lived with his partner, after the death of the latter. The Supreme Austrian Court motivated in the rejection of the claimer that the legislator limited the right to transfer of the leasing contract only for couples of straight people, after the death of one of them. Or, this

[3] Article. 1 lit. b) from the Law no. 772/1946.
[4] Article. 16 alin. (1) şi art. 4 alin. (2) din Rumanian Constitution, article 7, Universal Declaration of Human Rights and article 26 - The international Pact on Civil and Political Right
[5] Nicoleta Morar, "Aplicarea diferențiată a protecției minorităților naționale în raport de situația lor concretă", Bibliotheca Publishing House Târgovişte, 2016, pp. 39-41.
[6]Cause Karner vs Austria, 24.07. 2003, 40016/98.

argument is not enough by itself, since the Austrian judges did not expose any reason to justify this legal limitation regarding the transfer of the contract. So, even if the equal treatment of all citizens is guaranteed by the Constitution of the Republic of Austria, as is the quality of citizens in front of the law, the difference of treatment founded on the sexual orientation of the claimer has as a consequence the limitation of practice of his rights on his domicile, the Austrian state did not have, in this case, the ability to prove the protection of the so-called „traditional family" by this discrimination on a sexual orientation ground. Directly and unconstitutionally, by violating art 7 align. (1) from the Constitution[7], the Austrian legislator privileges the heterosexual couples, by the exclusion of the homosexual ones, regarding the practice of rights over the domicile.

6. The derogation from the principle of equality between sexes. The case of Karlheinz Schmit vs Germany

The equality between men and women has been and it still is the subject for many socio-judicial debates, even if, at the main level, the equality between the citizens of a country includes that between men and women. In order to underline this, some legal authorities have chosen to include this principle in their constitutions. The Constitution of the Republic of Germany, for example, in art. 3, align.1 states the principle of equality of all people in front of the law and in art 2 refers to the specific one between men and women.[8] Even if Germany gives a special importance to the conformation to the fundamental human rights, being present from the first article of the Constitution, the institution of a formal equality between men and women is suppressed by the implementation of specific law in favour of women, exempting them from the fulfilment of some duties. A relevant case in this socio-judicial reality is *Karlheinz Schmit vs Germany*[9].

By the request addressed to the European Court of the Human Rights, the claimer demands to notice the violation from the German state of art 14 from the Convention regarding the prohibition of discrimination because, violating the principle of sex equality, the authorities of Baden-Wurtemberg forced her to pay a fire-men tax which was not collected from the female citizens, who were admitted as volunteer fire workers. The judges from ECHR have noticed that at that time, 13 German territories imposed by the law the contribution of their citizens to the actions of fire-men only if the number of volunteers was not enough, but 9 lands from the total of 16 had stated such a duty only for male citizens. Also, the contribution requested from the claimer was not applicable to women, only in the lands where men and women are subject to compulsory service. But, since the fire-men service duty is a normal civil duty and so the number of volunteers is always enough, the Court stated that because of the lack of obligation to practice this duty from the male citizens to serve as fire-men, the financial

[7] Constitutin of the Republic Austria, art. 7, alin 1.
[8] Constitution of Germany, Article 3.
[9] ECHR, Cause Karlheinz Schmit vs Germany, 18.07.1994.

contribution requested from the claimer is unjustified. The case reflects not only the manner in which the derogation from a fundamental principle supresses the principle of feminine equality but also the manner in which the judicial standards can provide obligations for citizens in a differentiate manner, thus applying a discriminatory treatment between sexes, unsubstantiated and unconstitutional.

7. The illegitimacy of the exclusion from the practice of a certain profession by the violation of the principle of rights equality. The case of Thilmmenos vs. Greece

Because equality can only be judicial or formal, since naturally, people cannot be equal, it is necessary that in different judicial situations, the judicial treatment applied to individuals be different. Otherwise, if a state applies the same principle to people being in different situations, it violates the fundamental principle of non-discrimination. Nevertheless, ECHR stated, in the case of *Thilmmenos vs Greece*, that the state is not forced to apply a different treatment in situations which are *„sensibly different„*[10]. In fact, by the request addressed to the Court, the claimer, being part of Jehovah's Witnesses, showed that he was convicted to 4 years of detention by a military court because, out of religious reasons, he refused to wear the military uniform during a general mobilisation. A few years after he had followed half of his sentence, Thilmmenos took part in a contest for the position of accountant; even if there were 12 vacancies, and even if he came second, the commission refused to hire him, because he had a conviction. The Court rejected the case of the claimer, giving reason for it that the person has the right to become part of the public service only if he does not have any convictions. The judges of the Court noticed that the Greek law makes no distinction between the crimes committed out of religious reasons and the common ones; therefore, the freedom of religious manifestation was violated. So, the Court considers that it is possible for a state to resort to discrimination by applying a different treatment to people in different situations, but it is unreasonable for the different treatment to be applied in *situations which are „sensibly different"*.[11]

Even if the Constitution of the Hellenic Republic states in art 25 that in the situation of the violation of some rights, the state has to respect the principle of proportionality, the exclusion of Thilmmenos from the practice of accountancy is an unjustified penalty since there is no direct connexion between the capacity of the claimer to practise this profession and the fact that he refused to enrol in the army on religious grounds. Moreover, considering that the claimer fulfilled the detention, the treatment he suffered by being expelled from practising the profession of accountant is a clearly unfair reaction of the state, who did not envisage a legitimate aim, being the reason to consider art 14 from the Convention as violated.

[10] ECHR, Cause Thilmmenos vs Greece, 06.042000.
[11] *Idem.*

8. Conclusions:

The protection of the individual fundamental right of non-discrimination by violating the principle of equality has as its aim the completion of the principle of individual freedom, and also the increasing of efficiency of justice. In its essence, justice is the one meant to ensure the social order, by submitting it to a legal order. Therefore, justice is necessary for the good development of social relationships and becomes a privilege of the suzerainty of the rule of law.

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COPYRIGHT FOR THE ADVOCATES' PLEADINGS VS. THE JUDICIAL OR ARBITRAL RULINGS

Rodica VLAICU*

Abstract: *In a previously published article, we have analyzed the copyright on the advocates' pleas, but it is well known the fact that in a judicial or arbitral ruling there may be paragraphs taken from the advocates' pleas, which compels the judge, namely the arbitrator, to the use, according to common usage*[1]*, of this type of creation (namely, protected by the law). The judicial or arbitral ruling represents an official document, which is not protected by the legislation on copyright.*

Keywords: *copyright, moral right, masterpiece, creation, plea, advocate, judicial or arbitral ruling, judge, arbitrator, plagiarism.*

I. Introduction

Art 7-8 of the Law No 8/1996 on copyright and neighboring rights, state the categories of creations under the copyright, among them listing the advocates' pleas. Also, the same law removes from protection other works, even if they fulfill the conditions to be protected by the copyright, among them being listed the judicial rulings, and by assimilation, the arbitral rulings.

II. Theoretical aspects regarding the judicial and the arbitral rulings

The judicial ruling, according to all legal systems, is a fundamental institution[2]. This is the final act of disposal and the most important one of the trial, by which the court ends the litigation between the parties. The specificity of the ruling is the fact that it compels the parties, as well as to all those aimed by it, to a certain behavior. The ruling refers to the court's order, as a constraint organ, to perform a certain service or to withhold from the performance of a certain service, order which if not voluntarily fulfilled by the concerned persons, may entail the enforcement, the payment of compensations etc.

The judicial ruling is the official document of a court, of importance not only for the solved litigation and for the participants in that litigation, but its importance is

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[1] Marius Pantea, *Dreptul de autor şi hotărârea arbitrală,* paper presented during the Conference "*Arbitrajul – o altfel de justiţie*", Bucharest, 2016, available at https://arbitraj-institutionalizat.ro/wp-content/uploads/2017/02/HOT-ARBITRALA-SI-DREPT-AUTOR.pdf, visited on 9 February 2017.

[2] Gabriel-Florin Ivănescu, *Hotărârea judecătorească civilă. Analiză comparativă NCPC – CPC 1865*, Hamangiu Publ.-house, Bucharest, 2014, p.1.

general, as efficient means for the reestablishment of the democratic rule of law and efficiency for the norms of the substantial law, to preserve the prestige of justice, as well as the trust of the members of society in the authority of the justice.

The ruling fulfils this role due to its mandatory feature and state's guarantee of its execution.

On the other hand, the judicial ruling has an educative role, to the extent to which it is logic and persuasive for those assisting the debates.

The judicial ruling shall be expressed in writing. This requirement is justified by the fact that the solution it refers to must be preserved, and its reasoning is, sometimes, necessary for its correct explanation and understanding, being public for those interested in them. Another justification for the written form is that the ruling shall be communicated to the parties. Also, the court for judicial control must have the opportunity to verify its legality and reasoning, and it is to be enforced, if need be by force, it is necessary to know the exact length of the performance to which the debtor is compelled to and who has the right to claim it.

Throughout history, the institution of the judicial ruling has had a sinuous trajectory. Thus, from the perspective of the form, the civil ruling used to be an oral order, an instruction given to by a person appointed by the parties to end the litigation. After that, gradually, it has evolved towards an act with a material projection, as writing.

Nowadays, the principle of the mandatory reasoning of the ruling has been stated everywhere, the Italian Constitution even mentioning it. Currently, this principle is considered to be a guarantee against the arbitral rulings[3], but to a larger extent, as guarantee that the trials shall be well trialed.

Despite the fact that in the states from the Roman-Germanic law family, the rulings embrace the same conception by the fact that it should be motivated, the style of their draft being different for each state[4]. Thus, in some states the idea of French origin[5] was established, according to which the judicial ruling should be comprised in a single phrase, being considered even more imposing as it is lapidary and sober, in that concentrated style understood and respected by the experienced jurists.

Regarding Romania, we need to mention that "sometimes the court rulings have mentions about doctrinaire works or about other previous jurisprudences, but for the moment we cannot talk about a generalization of this style"[6].

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[3] Viorel-Mihai Ciobanu, *Tratat teoretic şi practic de procedură civilă, volumul I*, Naţional Publ.-house Bucharest, 1996, p.256.

[4] G. Corla, *Civilian judicial decisions. A historical account of Italian Style*, 44 Tulane Law Review 740-749, 1970, pp.371-374.

[5] This practice, together with France, is followed on the European continent by Belgium, Luxembourg, Netherlands, Spain, Portugal and the Scandinavian states, except being Sweden, which has waved it. In other states, on the contrary, the court ruling is issued under a developed form and according to a certain fixed plan, which is different for each state. This is the case of Germany, Greece, Italy, Switzerland and recently Sweden. The court rulings from the states of the previous list often refer to prior rulings or to doctrine, these mentions not being recommended nor met in the court rulings issued in the states of the first group.

[6] Gabriel-Florin Ivănescu, *Hotărârea judecătorească civilă. Analiză comparativă NCPC–CPC 1865*, Hamangiu Publ.-house, Bucharest, 2014, p.3.

The technique of drafting, of the reasoning of the judicial rulings, has received a new impulse by the judicial cooperation within the European construction. The establishment at the European level, of certain reasoning criteria, of lines to follow, makes the style of the rulings to expand beyond borders and traditions.

Thus, the Opinion No 7/2005 on "justice and society" of the Consultative Council of the European Judges[7] (CCEJ) establishes as priority the accessibility, simplicity and clarity of the language used by courts in drafting the rulings. Art 59 of the Opinion No 7/2005 states that "the judicial language should be concise and plain, avoiding – if unnecessary – Latin or other wordings that are difficult to understand for the general public. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents".

The judicial rulings should always have a clear motivation and a complete reasoning. The requirement of the reasoning of the judicial ruling is essential[8]. This fact is also supported by Prof. Andrei Rădulescu[9], in an article published in the "Dreptul" Magazine, published in 1926, stating that "*The drafting of the rulings is not only one of the main attributions of the magistrate, but also an important requirement for the evolution of the judicial sciences*" and advising the magistrates to imprint their rulings "*the value of their own thoughts, which represents the only purpose of the reasoning of the legal solutions*"[10].

In our jurisprudence, especially the old one, we often see rulings flawless as way of thinking and expression, which look like small masterpieces revealing deep legal knowledge, but also the talent or vocation to give the litigation the beautiful coat of a "*clear style and language. One cannot claim the literary form of the judgment but, a strict and carefree style being necessary all logical thinking, which should not be neglected in their drafting, because the style grinds the idea and increases its value*"[11].

As a conclusion, the ruling is "*the act of disposal adopted by the court in contentious matters, regardless if it solves the very base of the litigation or only an incident occurred during the trial, an accessory and pre-litigation dispute prior the main one*"[12].

Regarding the *arbitral ruling*, we need to mention that the analysis of Art 603-606 of the Code of Civil Procedure revealed that the arbitral ruling should state the same elements as the judicial ruling, of course adjusted to the specificity of the arbitral procedure. In this context, two statements are of importance, namely that it shall be written (from the same reasons as the court ruling), and for all cases the reasoning is mandatory.

[7] Opinion No 7/2005 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on "justice and society", adopted by CCEJ at its 6th meeting (Strasbourg, 23-25 November 2005).

[8] It needs to be mentioned that according to G.O. No 13/1998, the court ruling was reasoned only if the parties submitted an appeal against it.

[9] Andrei Rădulescu was a Romanian magistrate and jurist, member and President of the Romanian Academy during 1946-1948; founder of the School for Research of the Romanian Law and President of the High Court of Cassation and Justice.

[10] Radu Dimiu, „*Condițiuni legale şi tradiționale în redactarea hotărârilor*", Pandectele Române, 1939, pp.113-124; George Iulian, *Stilul hotărârilor judecătoreşti,* Pandectele Române, 1936, pp.116-117.

[11] Marin Voicu, Stilul şi calitatea hotararilor judecatoresti şi arbitrale. Privire comparată, available at http://www.romanianarbitration.ro/?p=837R, visited on 2 February 2018.

[12] Ion Deleanu and Viorel Deleanu, Hotararea judecatoreasca, Servo-sat Publ.-house, Arad, 1998, p.9.

It must be mentioned that according to Art 606 of the Code of Civil Procedure, “*the arbitral ruling notified to the parties shall be definitive and mandatory*”, its effects being the same as for the court rulings, stated by Art 429-435 of the Code of Civil Procedure.

The arbitral decision is the final and most important document of the arbitrage procedure, because it represents the very purpose of the arbitrage, namely to solve the litigation by issuing a ruling assimilated, under certain conditions, to the court ruling[13].

III. View on the advocates’ pleas in the media presenting the litigation

In the French law, the advocates’ pleas are protected by the copyright and it is considered that the principle of the publicity of the debates hampers the author to oppose the reproduction of this work by the media presenting the litigation, but for its subsequent publication being necessary the authorization of the advocate.

In the Romanian law, the use of the advocates’ pleas is possible only with the author’s approval. Nevertheless, under certain conditions, the work may be used without this consent, but only under the conditions and limitations stated by the Law No 8/1996.

Thus, the pleas are protected by copyright, as in France, paragraphs of the advocates’ speech being sometimes inserted in the news about the litigation, by invoking the need to inform the public[14].

If for the pleas gathered in books, anthologies and other works representing the object of press articles the rules are clear, a special debate shall be made about the pleas included in the judicial or arbitral rulings, which as mentioned before are works not protected by the Law No 8/1996.

As previously mentioned, though the author of a work has an exclusive and patrimonial right over his creation, there are cases in which the legislator has considered as necessary to limit this right, under the fulfillment of certain conditions, namely: the work to be public, its use to be according to good customs and not contrary to the normal use of the work, and to not cause prejudice for the author.

As mentioned in the previously published article dedicated to copyright, the Bern Convention and the Law No 8/1996 allow the “*quotation*”, namely “*the use of short paragraphs from a document for analysis, comments or critics, or as example, to the extent to which their use justified the length of the quote*”. This quote it is necessary to refer to its source and author, if possible.

IV. The advocates’ pleas during the judicial procedures

During the judicial procedures, often the court must register the statements of the parties or their defendants [Art 425 Para 1 Let b) and Art 603 Para 1 Let b) of the Code

[13] Rodica Vlaicu, “*Arbitrajul în materia transferului dreptului de proprietate asupra bunurilor imobile*” (fragment) – presented during the Symposium on 4 December 2015.

[14] André Françon, *Cours de propriété littéraire, artistique et industrielle*, Litec Publ.-house, Paris, 1996, p.162.

of Civil Procedure]. These mentions could be as abstract or *mot à mot* when the statements are nuanced and have a special importance for the formulation of arguments or reasoning, as well as when certain exemplifications are required.

Under these conditions, the judge or arbitrator may include the statements of the parties as abstract or they may use the legal provisions regarding quotations and to include in their rulings brief paragraphs taken from the parties' arguments or from the advocates' pleas with subsequent comments or analysis. These conditions fall under Art 33 of the Law No 8/1996.

If it is necessary the *mot à mot* quotation in the arbitral rulings of certain paragraphs from the pleas (which bear the print of originality) held in court, we are in a delicate situation, on the one hand by having a plea under copyright, and on the other hand by having a work (judicial or arbitral ruling) excluded from the protection of Law No 8/1996.

Though the copyright is a recent institution enlisted among the preoccupations of the legal theoreticians, the present case has drawn their attention, their opinions often being divergent. Thus, certain specialists state that "*the quotation of a plea in a court ruling transforms that plea into a part of the ruling and exempts it from copyright*"[15], while others consider that "*the use of the advocates' pleas in the court or arbitral rulings should be done as to not violate the copyright*"[16].

Starting from the above mentions, we consider that the judicial or arbitral rulings may refer to short paragraphs from the advocates' pleas, for analysis, comments or examples.

Also, regarding the means of quotation of the pleas by the judicial or arbitral rulings, we support the position of the esteemed Prof. Marius Pantea, who stated that "*it is necessary to consider the fact that in an arbitral ruling, when used works under copyright, it is mandatory for them to be in accordance to good customs. In other words, it must be used the quotation, paraphrasing and indicating the source*"[17].

Regarding all aspects, though in practice are frequent the cases (especially criminal cases) in which are used paragraphs from the advocates' speech, until current times we are not aware of a decision compliant with Art 33 Para 4 of the Law No 8/1996.

Instead of a conclusion, to avoid an accusation of plagiarism, the judges and arbitrators must comply with the legal provisions managing the area of copyright in Romania.

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[15] Viorel Roş, *Dreptul proprietății intelectuale, vol. I. Dreptul de autor, drepturile conexe şi drepturile sui-generis*, C. H. Beck Publ.-house, Bucharest, 2016, p. 222.

[16] Marius Pantea, *Dreptul de autor şi hotărârea arbitrală*, paper presented during the Conference "Arbitrajul – o altfel de justiție", Bucharest, 2016, available at https://arbitraj-institutionalizat.ro/wp-content/uploads/2017/02/HOT-ARBITRALA-SI-DREPT-AUTOR.pdf, visited on 9 February 2017.

[17] *Ibidem*

4. Ion Deleanu and Viorel Deleanu, *Hotararea judecatoreasca,* Servo-sat Publ.-house, Arad, 1998
5. Gabriel-Florin Ivănescu, *Hotărârea judecătorească civilă. Analiză comparativă NCPC–CPC 1865*, Hamangiu Publ.-house, Bucharest, 2014;
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STRENGTHENING THE INDEPENDENCE OF THE JUDICIARY, AN IMPORTANT FACTOR IN RESPECTING THE RULE OF LAW

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Abstract: *This article brings into discussion a current topic about the importance of strengthening the independence of the judiciary and the judge for the existence of the rule of law in Romania. The problem is being treated from the perspective of enumeration several pressure factors and conflicts of interest which may influence the independence and impartiality of the judge in the act of justice. These aspects emphasize the need to strengthening the independence of the judiciary and the judge in Romania.*
Keywords: *rule of law, judge, independence, impartiality, pressurefactors, conflicts of interes*

1.The separation of powers principle as a modality of realizing the rule of law

The rule of law is based on the prevalence of law and organized on the basis of the separation of powers principle.

The right of each person for an independent and impartial process is recognized by the states which join to the European Convention of Human Rights and Fundamental Freedoms, one of which is Romania, as being a fundamental human right and a pillar of a democratic state based on the rule of the law.

It is regulated in the Article 6, paragraph 1 of the convention that:„Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial court established by the law."[1]

Furthermore, the justice is one of the pillars supporting every democratic society, but also being a public service with the main mission of serving the interests of public.

The theory of Montesquieu about the separation of powers in the state, and the achievement of a balance between them, in order the citizen's freedom being ensured through a mutual control system of these three powers: legislature, executive and judiciary.

According to the theory of the great philosopher, the three powers defined by the three branches of the state, legislature, executive and judiciary, cannot be cumulated. That means the legislator is not able to adopt the laws of the cases, being forbidden to apply them, the executive is not able to change them according to momentary interests, being prohibited by law, the judge only and only interprets the law, without creating it and without imposing the sentence.[2]

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[1]The European Convention of Human Right and Fundamental Freedoms, Council of Europe, Rome, 1950.

[2]Dănişor Dan Claudiu, *Drept Constituţional şi Instituţii Politice*, Vol. I, Teoria Generală, Tratat, CH Beck, Bucureşti, 2007.

According to the theory of Montesquieu, everything is lost, if the same leader or the same staff exercises these three powers and moreover,„the experience teaches us that every person who has power is inclined to abuse of it and he can go further until he gives the borders."[3]

At least, in the democratic countries the separation of powers principle is accepted as a general principle of constitutional nature. It is the technique through which the Constitution achieves its purpose to be the guarantor of individual, offering independence and safety and in the same way it tries to stop any power from being abusive.

The separation of powers principle is a way of achieving the rule of law because it tends to eliminate arbitrariness by limiting the possibilities of every one of the powers given to become despotic and it has constitutional value.

In our country it was governed by the Romanian Constitution from 1991, also revised in 2003, so that in Article 1, paragraph 4 to stipulate that„The state shall be organized based on the principle of the separation and balance of powers, legislature, executive and judiciary, within the framework of constitutional democracy.[4] Consequently, through this regulation the Romanian Constitution recognized the existence of the judicature as a system in relation to the other powers constituted in the state, legislature represented by the Parliament, executive represented by the Government.

2. The independence of judge and judicature, an essential factor for the existence of the Rule of Law in Romania

Based on the theory of the separation of powers in the state, the independence of justice represents the ability of the judiciary as a system to prevent the other two powers, legislative and executive from committing any kind of abuses (power stop power), the goal being to safeguard the human rights and the fundamental freedoms.

The United Nations Principle no.3 acts that the judges should decide impartially and without any restriction, but also representing the subject of some influences, pressures, threats or different kinds of illegal interventions, direct or indirect, no matter by whom and the reason for.[5]

Thus, in Article no.2 of the Universal Charter of the Judges, these should exercise the judicial power in full independence according to the all kinds of constraints, economic and political pressure and independently from other judges and from the administration of the judiciary, as owners of the judicial authority.

According to the same international document the independence of the judges represents not a right, but it is an obligation. These should ensure the right of each individual of benefiting to a fair trial and to use all the means they need to solve the trials publicly, in a reasonable term, in front of an independent and impartial tribunal established by law, with the reason of the domination and obligation of every civil

[3]Montesquieu C., *Despre Spiritul legilor*, Vol. II, Editura Ştiinţifică, Bucureşti, 1970.
[4]The Constitution of Romania from 1991, republished (2003), published in the Official Monitor, Part I, no 767/2003.
[5]The Basic Principles on the Independence of the Judiciary, UN, 1985.

rights or against their real criminal charges.[6] Also, the points 5 and 6 from the SUVA statement make the duty of the judges to ensure the equality of access to justice, but also the effective access to justice requiring a full understanding of the language and procedures of the court by the participants.[7]

The European principles of the independent justice are regulated also in the Recommendation R (94) 12 of the CoE, point 2, letter d) taking into consideration the independence, effectiveness and the roll of judges, according the above quote, that the legislation should regulate the independence of judges and they should uphold the public authorities to address different instructions them referring to their jurisdictional attributions.[8]

The judges should be in a position to accomplish their professional tasks, in an independent and impartial manner and the executive and legislative powers should ensure this independence.

The purpose of the independence of the judiciary is the existence of an impartial justice.

Hence, it should be up to the judges to ensure and to exercise their duties independently and impartially and the executive and legislature should be able to guarantee this independence to them.

The strongest safeguard of the independence of judges is their irremovability, which means that they may not be moved by transfer, delegation detachment or promotion without their freely consent. They may be suspended or dismissed from their office only under the law that regulates their statute.

The guarantee of independence of the judges should be applied in accordance with the way of designating them in the departments of the court for distributing the cases and also the possibility of change the judge of a particular case.[9]

The impartiality is the attitude of the court and the parties of that case, as well as the way the proceeding is ruled.

This implies that judges must deliberate objective declaration solely, based on their own appraisal of the relevant facts of the applicable law. They must not harbor preconceptions on the matter put before them and without any act in ways that promote the interests of only one of the parties.[10]

Professional deontology obliges the judge to practice his task objectively, having as a unique basis the law and the general principles of law, without responding to the external pressures and influence.

It follows that the judge must not grant any word or act none of the parties. Moreover, he permanently is going to pursue that none of the parties may be or feel disadvantaged.

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[6] The Universal Statute of the Judge, International Association of Judges, 1999, Taipei.

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[10] Human Rights Committee, Communication no.387/1989 Arvo O. Karttunen c Finlanda (Opinions adopted on the 23 October 1992) in the document ONU - GAOR, A/48/40 (vol II), p 120, par. 7.2).

It is not enough for the independence and impartiality justice the existence of the legislative guarantees, but also the courts themselves must be credible to justice seekers, the independence and impartiality must be efficient and recognized by justice seekers.[11]

So the independence is not a privilege of judges, but is a privilege of the citizens in a rule of law, where the courts and judges only administers this privilege for the people.[12]

3. The factors that influence independence of justice and judges

A society that is confident in its justice system, in the efficiency of the norms, and in applying the constitutional principle according to which citizens are equal before to the law**,** is a strong and prosperous society.

Unfortunately the opinion polls conducted in recent years in our country shows that the trust of the population in the justice system is not very large, as raises questions regarding the causes that have determined this situation.

One of the causes that may influence judges' independence and impartiality and that may contribute to lowering public confidence in the act of justice are represented by pressure factors and the conflict of interest.

3.1. The pressure factors and their influence on the justice system and on the judge.

Pressure factors can influence the act of justice, which is related to the resolution of a legal conflict, the act of administration of justice, which refer to the selection, appointment, promotion of judges, the assignment of judges on the sections, the assignment of cases, the designation of judges for the formation of the judgment complete and the economic and financial resources, both the pressure directly felt on the justice system and the pressure directly felt by the judge.

The Romanian legislation in force avoids a definition of pressure factors, Law no.303/2004 on the Statute oh the Judge and the Prosecutor, being the only one that provides in Article 2, paragraph 4 that: "any person, organization, authority or institution" must respect the independence of the judge, but no sanction if this obligation is breached which means that judges are not defense or pressure factors.

The press releases of the Superior Council of Magistracy that certain had an impact on the independence of the judiciary and in particular, the judge did not have the force of a legal regulation, the certain action, has affected the independence of the judiciary and the judge do not have the force of a legal regulation, the effectiveness of the procedure being used, the answers being far too late and without any effects within the mass media, as well as among the population.

The Superior Council of Magistracy does not have an active and prompt involvement in those situation where the judiciary is affected in its entirety by the media, the conclusion being that this body does not really support this independence.

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[11]Voinea Motoc Iulia, *Independența şi imparțialitatea justiției în Convenția europenaă a drepturilor omului*, Revista Română de drepturile omului, no 10/1995.

[12]Ernest Market, *Judicial independence in a nutshell*, EUROJUSTIȚIA of the European Magistrate Association vol.5 Issue1, Ljubljana/ Slovenia, 2001, p.1.

This institution should increase the degree of transparency, not only in its own relation of activity, but also in the courts one.

By the posting to different public authorities then courts, the judge loses his independence because this procedure cannot be functional only within the judiciary and in close connection with decisions related to the activity of justice, activity which according to Article 126, paragraph 1 of the Romanian Constitution is performed only by the High Court of Cassation and Justice and the courts which is a pressure factor, because the excesses of the judiciary ruin the independence of justice.

Another disturbing pressure factor in relation to the independence of the courts is the exercise of the economic and financial management act by the Superior Council of Magistracy, which give its opinion, and especially from the Ministry of Justice, the main authorizing officer, without taking into account the fact that this act is recommended to belong to the judicial authority.

The Code of Ethics has become an instrument scarcely used in the daily activity of the judicial power and of judges and Associations of judges have had little involvement in the effort to propose to decision makers the public policies as to combat pressure factors and conflict of interests.

Another pressure factor is that the media solves the cases in their place before the adoption of a judicial solution, and if such solution do not coincide, media put the blame on and allegations of corruption and incapacity appears, press still representing a powerful aspect of individual independence.

It is noted that the pressure factors mentioned above are external, but may also be internal, when it refers to the judge's incapacity to assume responsibility for the solutions.

If we try to define the pressure factors, we can conclude that these are those circumstances or actions directly or indirectly aimed at influencing the solution pronounced in a case, regardless the circumstances determined by the parties or by the third parties.

3.2. Conflict of Interest as a disturbing factor of judge's and judicial impartiality

Impartiality may concern the jurisdiction as a whole and it refers to any judge in the same situation, bat it may be personal, when it refers to a particular judge, whom should have no reason to favor or disadvantage anyone.

In the case of functional impartiality, the organization of jurisdiction must be flexible enough to remove any doubt of the judiciary.

Therefore, any judge who has dealt with a case at a trial stage cannot take any new decision, on the substance, in the same case.

Personal independence refers to a particular judge who is also to make a fair, objective, unbiased, and fair assessment of the subject of the case with which he is invested to judge.

Paragraph 2 of Article 5 in Law no. 303/2004 the Statute oh the Judge and the Prosecutor defines the general concept of conflict of interest in relation to a judge*'s* duty to recuse.

Thus, the legislator defines this notion in a simple way, namely as a conflict between the interests of the judge and the public interest in the pursuit of justice.

In fact, the conflict of interest arises between the duty of the judge who is randomly assigned to the case and the personal interests of any nature, which could improperly influence the fulfillment of the obligations and responsibility in the case in which it was invested.

In the conflict of interest is real, the judge must notify the other members of the full court, as well as the leading committee, and in this case there is no possibility of having to settle the case.

If there is only the appearance of a possible conflict of interest and the judge is aware of them, he should notify the leading committee as well as the parties of the case, the discussion being recorded at the end of the meeting.

If one of the parties formulates a request for recusal to the judge, the full court must sentence by which the request will be admitted or rejected, but this sentence must be very well motivated.

There may also be a conflict of interest in the applying of a legal text deemed by the judge to be inconsistent with the general principles of law, where the rule to be applied may lead to a contradiction between the interest of the parties and the general interest of the society interest of the right.

Similarly, the conflict of interest may exist if the application of the rule can lead to an unfair and unacceptable onerous sentence for one party.

Also, the deliberation can be influenced by the conflict of interest, which attract disciplinary or even criminal liability of the case judge, to the extent that the conflict and the casual relation between sentence and interest is proven.

If the alteration did not occur, but the image of the act of justice appears distorted as a result of the existence of a conflict of interest, the solution lies in the transparency of the act of justice and in removal of all from of hypocrisy.

It is a much more dangerous a justice that given the impression that it respect the principles, but it violates them seriously, in comparison to the one that respects them, despite the fact that it does not create this impression.

The sentences represent the evidence of the accumulation of professional knowledge and reflect the personality of the judge, who is influenced by an almost unlimited number of factors such as age, the experience, the books read, the attitude towards the parties.

4. The importance of consolidating the judiciary and the judge in the rule of law in Romania

The consolidation of the independence of justice is essential in the rule of law, which put the citizen in the middle of attention and that protects his rights.

Thus, the justice is not only one of the main three powers in the state, but also a public service.

Moreover, the guarantees offered to judges according to their status they become guarantees for citizens in case of an independence justice.

The judges have to prove citizen that they are in their service, that they are independent and also the fact that theirmain goal is the justice.

Also it is necessary for them to judge fair, impartiality and professionalism, in order the public opinion should understand the quality of the justice act.

In conclusion the independence of justice in the rule of law refers to an independence judge by the political power, who divides the justice in a competent and equidistant way, in order to solve the human needs.

These citizens do not look for a philosophical ideal in the court, but only an equitable trial in which the sentence should stress on the law and on the judge own consciousness.

Regardless of all these attributes, those who address justice must be confident that the sentence is legal and solid, so assuming and declaring the conflict of interest show the proof of maturity of a judge.

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CONSTITUTIONAL JUSTICE –
HISTORY, CHARACTERISTICS AND MODELS

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Abstract: *In the sense recognized today, the term „constitutional justice" appears in Hans Kelsen's and Gh.Eisenmann's work. For the first, it means „the constitutional guarantee of the constitution", and for the second „that kind of justice or better jurisdiction which bears over the constitutional laws", thus, Eisenmann states that without this form of jurisdiction regarding constitutional norms, the constitution is nothing more than „a political program, only morally binding". For both Kelsen and Eisenmann, constitutional justice is a jurisdictional guarantee of the constitution, but Eisenmann distinguishes between „constitutional justice" and „constitutional jurisdiction", the juridical meaning of „constitutional justice". Constitutional justice has been and is considered an immanent dimension of the rule of law, seen less as a state, and more as a movement of rationalization of power, in which constitutional control "is valued as a structural principle". Identifying the features of constitutional justice, in the narrow sense of constitutional control, is an useful and necessary approach not only to reveal the particularities of this form of justice, carried out by a special and specialized body, but also to achieve the delimitation of this body by others which also, to a greater or lesser extent, undertake a constitutional review. The French doctrine uses the syntagm of control of the constitutionality of laws as a synonym for constitutional justice, an expression that seems to be initiated in Romania as well. Examining constitutional systems and doctrine, it appears that the emergence of constitutional control of laws, and of constitutional justice, is a long-lasting historical process, which is based on the rule of law. Control of the constitutionality of laws is the result of a double European and American tradition, whose components have mutually influenced one another. The theoretical foundation of this control is the existence of a hierarchy of norms or the existence of the supremacy of the constitution. In turn, the recognition of this hierarchy of norms is the result of a long historical development of legal thinking.*

Keywords: *constitutional justice, constitutional jurisdiction, control of the constitutionality of laws.*

1. Introduction

The phrase „constitutional justice" is difficult to say when it has appeared and is susceptible to several meanings, some common, other specific, and for this reason, it requires technical, specialized language. It could be said, for instance, that constitutional justice is that form of justice that is based on and within the constitution[1]. It is difficult, however, to delimit the term „constitutional justice" from the other forms

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[1] The term of „justice" is itself susceptible to several meanings („right", „body systems", „activity performed by these bodies"), apud Ion Deleanu, *Drept constituțional şi instituții politice,* Editura Europa Nova, Bucureşti, 1996, vol.I, p. 9, *apud* Victor Rusu, *Note de curs, Jurisdicția constituțională,* Chişinău, 2013.

of justice, which are also, first and foremost, based on and within the constitution. The „constitutional justice" syntagm, therefore, calls for a distinctive, own meaning. Under the sign of a specialized significance, the notion of constitutional justice designates "the ensemble of institutions and techniques" through which, without restriction, the supremacy of the constitution is ensured.

In the sense recognized today, the term „constitutional justice" appears in Hans Kelsen's[2] and Gh.Eisenmann's[3] work. For the first, it means „the constitutional guarantee of the constitution", and for the second „that kind of justice or better jurisdiction which bears over the constitutional laws", thus, Eisenmann states that without this form of jurisdiction regarding constitutional norms, the constitution is nothing more than „a political program, only morally binding". For both Kelsen and Eisenmann, constitutional justice is a jurisdictional guarantee of the constitution, but Eisenmann distinguishes between „constitutional justice" and „constitutional jurisdiction", the juridical meaning of „constitutional justice" being, as a last resort, „guaranteeing the division of prerogatives between ordinary law and constitutional law", and that of „constitutional jurisdiction" as the body through which „constitutional justice" is achieved.

In another opinion, namely that of Michel Fromont[4], constitutional justice can be defined from two points of view. A first definition gives the constitutional judge the status of „judge of the constitutional public powers, in particular the legislative and executive powers". The second meaning of the notion is to consider the constitutional judge as „the judge applying the constitutional rules".

The French doctrine uses the syntagm of control of the constitutionality of laws as a synonym for constitutional justice, an expression that seems to be initiated in Romania as well. Although suggestive and under a certain aspect immanent, we can not say that it is appropriate, since the control of the constitutionality of laws is only one of the techniques available to constitutional justice, this being the most important technique that constitutes constitutional justice. The attributions of constitutional justice confirm this observation, apparently. According to a synthesis opinion, they appear to be:

a) ensuring the authenticity of the manifestations of will of the sovereign people;

b) vertically and horizontally respecting the competencies conferred by the constitution of different public authorities;

c) protection of citizens' fundamental rights and freedoms;

d) solving some of the contentious issues given by constitution to the constitutional law.[5]

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[2] Cited in Alexandru Arseni, *op. cit.,* V.I, p. 166, *apud* Victor Rusu, *Note de curs, Jurisdicția constituțională,* Chişinău, 2013, p.15.

[3] Cited in Ion Deleanu, Drept constituțional şi instituții politice, Editura ACTAMI, Bucureşti, 1997, p. 281, apud *apud* Victor Rusu, *Note de curs, Jurisdicția constituțională,* Chişinău, 2013, p.15.

[4] Michel Fromont, *La diversité de la justice constitutionnelle en Europe,* în Mélanges Ardant, 1999, p. 47-59, *apud* Claudiu Dănişor, "Modelele de justiție constituțională: de la divergență la o relativă convergență", în *Revista de ştiințe juridice nr. 34/2005.*

[5] Alexandru Arseni, *Drept constituțional şi instituții politice,* Chişinău, 1997, p. 166.

Constitutional justice has been and is considered an immanent dimension of the rule of law, seen less as a state, and more as a movement of rationalization of power, in which constitutional control "is valued as a structural principle". This movement tends to subordinate the functioning of public powers to a set of rules whose respect is imposed on everyone and have a legal force superior to the other rules in the legal system.

Taking into consideration the different classifications of forms of control, the embryonic forms of constitutional control appear once the constitutional regime has been crystallized.

The emergence of the constitution, as the fundamental political and judicial principle of a state organization, determined the appreciation of its judicial force in relation to the other norms of the legal system. The principle of supremacy of the constitution deduced from its very structure and purpose requires a system of safeguards against possible violations by laws or by other normative acts. Thus, control of the constitutionality of laws was born, and once again the competent authority to exercise it, in accordance with democratic principles. Here was created the complex concept of constitutional justice.

The necessity of establishing constitutional justice was imposed by some political and legal considerations:

- the legislator is – himself also - subjected to mistakes, especially because, through his heterogeneous composition, highlighted (we speak of the parliament), he does not excel through professionalism;

- the parliamentarian expresses more the will of his party than the nation;

- the constitution itself is – itself also - interpretable, like any other law. Its gaps and ambiguities, as far as they exist, favour the phenomenon and practice of unconstitutionality;

- the lack of control of the constitutionality of laws not only leaves room for free parliamentary arbitration but is also likely to cause legal instability and confusion de facto;

- there is no reason to deal with the rules contained in the law other than the other rules that have to be hierarchical;

- by reserving to Parliament alone the right to appreciate the constitutionality of the laws, the judge is confused with the party, which means excluding the notion of control.

2. Characteristics of the constitutional justice

Identifying the features of constitutional justice, in the narrow sense of constitutional control, is an useful and necessary approach not only to reveal the particularities of this form of justice, carried out by a special and specialized body, but also to achieve the delimitation of this body by others which also, to a greater or lesser extent, undertake a constitutional review.

Indeed, when the constitutionality control is „concentrated", then, when a single institution has the monopoly of this control, this institution may be a Constitutional

Courthouse or Constitutional Court (for example in Austria, Italy, Germany, France, Spain, Romania, Bulgaria, Hungary, Poland, Republic of Moldova, etc.), on the contrary, the supreme court from the judicial bodies system[6] - a Supreme Court of Justice (for example, in the USA, Canada, Japan). The name “Supreme Court” cannot, however, be used in this case as a synonym for those of the “Constitutional Court”. As it has been said, perhaps slightly malicious, using the expression “Supreme Constitutional Court”, *mutatis mutandis* and equally surprising, we could speak of a presidential parliamentary regime.

Thus, in identifying the features of constitutional justice, we consider only that form of constitutional control (as one of the competences of constitutional justice and perhaps the most important one) that integrates the „model of the constitutional courts”, the „European model” as it is also called, according to origin and author[7], the „austrokelsenian model”.

- Constitutional justice is entrusted to a Court or a Constitutional Courthouse, independent (as Kelsen emphasized) from all other State Authorities (few exceptions are the names of the body that implements constitutional justice: Court of Arbitration - in Belgium, the Constitutional Council - in France).
- The condition of this independence is the existence of a “constitutional statute” of the body that implements constitutional justice, defining its organization, functions and attributions.

Here are some other conditions:

a) the inclusion of provisions on constitutional justice in the very constitution of the state;

b) statutory administrative and financial autonomy;

c) the independence of judges and their irremovability;

d) establishing a proper disciplinary regime for the judges belonging to the constitutional justice body;

e) verification of its own competence through final and binding decisions;

f) the prevalence of constitutional justice decisions over any other judicial decision;

g) incompatibility of the constitutional judge with any other public or private office.

Synthesizing, any institution whose existence, function or attributions is at risk of being questioned by the legislature or by the government can not be considered a Constitutional Court, nor, in general, a constitutional jurisdiction.

- Constitutional justice is an exclusive and concentrated justice, with a constitutional monopoly. In other words, for the common law courts cannot be recognized prerogatives in the area of constitutional litigation, and even more so, they cannot even arrogate them.

[6] In the judicial systems, which know a duality or a plurality of jurisdictional orders, it does not really exist a Supreme Court, but only there where, like in the USA, the jurisdictional order is unique; Ion Deleanu, *Drept constituțional şi instituții politice,* Editura Lumina Lex, Bucureşti, 1996, p. 282, *apud* Victor Rusu, *Note de curs, Jurisdicția constituțională,* Chişinău, 2013.

[7] Ion Deleanu, *Justiția constituțională,* Editura Lumina Lex, Bucureşti, 1995, p.15, *apud* Victor Rusu, *Note de curs, Jurisdicția constituțională,* Chişinău, 2013.

- Constitutional justice is not only a special form of jurisdiction but also a constitutional body with the mission of maintaining the constitutional balance.
- Judges of constitutional justice are appointed by the political authorities among persons who may not be magistrates and on different criteria than those followed in the recruitment, appointment and promotion of career magistrates.

This way of designating the constitutional judge by political authorities involves the following consequences [8]

a) the freedom to choose among those who can become constitutional judge;

b) the approximation of the European civil law system to the American common law;

c) this type of appointment strengthens the legitimacy of the constitutional judge;

d) the periodic renewal of some members of the Constitutional Court allows the adaptation of its structure, corresponding to the transformations within the public authorities.

- Constitutional justice is a genuine jurisdiction. Two clarifications are, however, necessary:

a) it is a special jurisdiction, with some particularities in relation to the other forms of jurisdiction;

b) not all attributions belonging to the constitutional judge are carried out in court proceedings.

- Constitutional justice is located outside the jurisdiction apparatus, made up of regular, ordinary jurisdictional bodies. So it is, therefore, an "independent power", a power that is not at the top of a jurisdictional edifice. This is the fundamental difference between a Supreme Court and a Constitutional Court - the first, as its name suggests, is necessarily placed at the top of a jurisdictional pyramid[9]. However, there are some links between the Constitutional Court and the Supreme Court or the other courts, as a rule (except for the French system, which, exceptionally, in electoral matters involves some connection between the ordinary judge and the constitutional judge). So, though organic, the two forms of jurisdiction are totally independent, they functionally interfere.
- Constitutional justice is a form of jurisdiction with its own procedural rules. By the nature of the "constitutional litigation" and the authorities called upon to solve it, the constitutional justice procedure necessarily has some peculiarities.

3. The control of constitutionality of laws – technique that constitutes constitutional justice

Examining constitutional systems and doctrine, it appears that the emergence of constitutional control of laws, and of constitutional justice, is a long-lasting historical process, which is based on the rule of law. With the proclamation of the independence

[8] Louis Favoreau, citat de Ion Deleanu, *Drept constituțional şi instituții politice,* Editura Lumina Lex, Bucureşti, 1996, p. 284, *apud* Victor Rusu, *Note de curs, Jurisdicția constituțională,* Chişinău, 2013.

[9] *Ibidem*, p. 285.

of many states, with the evolution of written law and the adoption of new constitutions, it was reinforced that a law contrary to the constitution should no longer apply, with the emergence of an effective mechanism to control this. The concept of "constitutional justice" needs to be examined differently from constitutional law, a branch of law, defined as the totality of norms and legal institutions that regulate those social relations that arise in the process of exercising public power[10]. Thus, constitutional justice has the meaning of a set of legal techniques and means by which the supremacy of the constitution must be guaranteed.

Subsequently, after the appearance of written constitutions, the foundation of constitutional justice became the principle of the supremacy of the constitution, according to which the norms established by the Basic Law have superior legal force and are imposed on all other legal norms. In England, the idea of a supreme law was accepted, and the legislator could not enact laws contrary to common law rules, but the 1688 Revolution ruled out all judges' control over the laws. In France, although the Constitutions of 1791 and 1852 accepted the idea of control of the constitutionality of laws, the attempts to recognize an effective mechanism by which a law contrary to the constitution should no longer apply were defeated by the influences of Rousseau and Montesquieu who promoted the idea of the supremacy of written law and the rigid separation of powers in the state.

As M. Cappelleti[11] noted, more than a century of history of law was behind Marshall, who in 1803 proclaimed the principle that a law incompatible with the constitution was null. Thus, the decision of the United States Supreme Court in *Marbury vs. Madison* (1803), which marked the emergence of the American model of constitutional justice, is one of the most important theoretical foundations of constitutional control and of the concept of supremacy of the constitution. In its recitals, the President of the Supreme Court, John Marshall, analysed the courts' right to control the constitutionality of laws by a decision that is imposed by virtue of the precedent authority, but which does not involve the intervention of the executive bodies in order to carry it out, and thus, to be the object of a refusal. He then instituted the constitutional control on a classical reasoning: either the constitution is superior to the law, which therefore must conform to it, or if it has the same power as a law, the constitution is unnecessary and can be changed at any time by the ordinary legislator, as well as any other law. At present, constitutional control in the United States of America is also being carried out in the Praetorian way, due to the existence of a common law system based on the precedent of the judicial precedent.

In the case of *Marbury vs. Madison*, the pretext was the refusal of Madison (Jefferson's Justice Minister) to hand Marbury's act of appointment as Judge to the Supreme Court, an act that had been issued by former President Adams. The Supreme Court, led by Chief John Marshall, found that the law obliging the Minister of Justice to hand over this act is unconstitutional because the new president, Jefferson, had the constitutional right to install a judge whom he considered to be in line with his vision.

[10] Jean Gicquel*, Droit constitutionnel et institutions politiques,* 17 ed. Paris, Montchrestien, 2001, p.27, *apud* Ion Deleanu, *Instituții şi proceduri constituționale,* Ed C.H. Beck, Bucureşti, 2006, p.17.

[11] Mauro Cappelletti, *Cours constitutionnelles europeennes et droits fondamentaux,* sous la direction de Louis Favoreu, Economica, Presses Universitaires d'Aix-Marseille, 1982.

Thus, although Jefferson's anti-federalists were in power as a result of the alternation, they fully expressed their agreement to the Supreme Court's ruling, and the pronounced decision inaugurated the control of the constitutionality of the law on the praetorian path, which, paradoxically, had among other consequences the strengthening of the US federation.

The disjunctive syllogism built by Marshall has been widely appreciated as the first logical demonstration of the need to control the constitutionality of laws:

- either the constitution is a superior and sovereign law, impossible to change by ordinary means, and as a consequence, a contrary piece of legislation is not a law;

- or it is a law like any other, at the discretion of the legislator, and then it is only an absurd attempt of the people to limit a power (legislative) unlimited by its nature.

It was also noted that it was true that those who drafted the written constitutions regarded them as representing the supreme and fundamental law of the nation, and consequently the theory of any such government must be that an act of the legislator contrary to the constitution is null.

The early forms of control of the constitutionality of laws were forms of political control, which circumscribed the existing power relations between the monarch and the assemblies of states. This type of control was based on three pillars: the relationship between the natural and the positive right, the respect of the law and the necessity of the written constitution, and especially targeted the Parliament. Later, however, with the outlining of the third component of state power, the judiciary one and the assumption by the judge of the role of "sharing justice" and of sanctioning any violation of the law, the judiciary power gradually assumed the role of sanctioning even the violation of the fundamental law, laying the foundations for judicial review of constitutionality and subsequently of political-judicial control.

Control of the constitutionality of laws is the result of a double European and American tradition, whose components have mutually influenced one another. The theoretical foundation of this control is the existence of a hierarchy of norms or the existence of the supremacy of the constitution. In turn, the recognition of this hierarchy of norms is the result of a long historical development of legal thinking.

4. Models of constitutionality control

The way in which constitutional control has been achieved has been concretised in two models: the American and the European one. The control of the constitutionality of state acts was imposed for the first time on the North American continent. But the origins of the system are British, even though they could not have been developed there. The first court ruling stating the Court's ability to control Parliament's acts is thus the one delivered by Sir Eduard Coke in 1610 in the Bonham affair[12]. The British judge found that the law of the British Parliament was contrary to the common law,

[12] Louis Favoreu, Patrick Gaïa, Richard Ghevontian, Jean-Louis Mestre, Otto Pfersmann, Andre Roux, Guy Scoffoni, *Droit constitutionnel,* Dalloz, Paris, 2001, p. 191, *apud* Claudiu Dănişor, "Modelele de justiție constituțională: de la divergență la o relativă convergență", în *Revista de ştiințe juridice nr.34/2005.*

which he conceived as a fundamental law of the Kingdom and as a direct emanation of reason.

Control of the constitutionality of laws has become a true political and legal phenomenon with the emergence and consolidation of the American control system as a model, but especially with the creation of the first Constitutional Courts in Europe.

We note that the American model consists of a control exercised by the ordinary courts, the unification of the practice being carried out at the top by the Supreme Court, due to the principle of the previous authority, while in the European model, the constitutional litigation is separated from all other forms of litigation, the constitutional jurisdictional body being unique, specialized, invested with the monopoly of constitutional litigation.

Therefore, different from the American model of control of constitutionality of laws, born out of the absence of express texts, the European model is the fruit of the theoretical work of the great Austrian jurist Kelsen, who proclaimed the jurisdictional guarantee of the constitution. The creation of a unique and specialized court in constitutional litigation presents, in Kelsen's view, net benefits for the smooth running of legal life.

The characters of the American model of constitutional justice are as follows: control is diffuse, carried out by all ordinary courts under the authority of the Supreme Court; the control is basically concrete, carried out after the law has been enforced, and with regard to a determined case in court, which is now the case; the control is created in principle a posteriori, by way of exception; Finally, control leads to a decision that enjoys the relative authority of res judicata.

The European constitutional justice model introduced for the first time in Czechoslovakia and Austria in 1920 under the direct influence of Kelsen is characterized by the existence of a concentrated constitutionality control achieved by a specialized constitutional court through the existence of an abstract control through the presence of control over a way of action triggered by public or political authorities and by the absolute authority of res judicata of decision-making. This ideal model is not met in a pure state nowhere, which has led to a critique of the theorizing of a European model, culminating in affirming the existence of a plurality of models.

The European model of constitutional justice can be practically spoken only after the Second World War. This does not mean that before there were no European countries that knew the constitutionality control, but that they introduced control after the American model.

Europe became aware of constitutional control also before the introduction of concentrated control through a specialized court in 1920. There were diffuse control models inspired by the American system in Portugal, Greece, Switzerland and Romania. Thus, the Portuguese Constitution of 1911 introduces a diffuse system of constitutional control, even if it is combined with a concentrated control by the Constitutional Court.

In Romania, the system of constitutional control was also diffused, concrete and with inter partes effects, starting after 1912, when, through Journal nr. 909 of 2 February 1912, the Ilfov Courthouse grants itself the right to control the constitutionality of the laws, by way of exception. As for the external model[13] of constitutional justice, our constitution has been attached to the European model and not to the American model, also known as the Kelsenian model[14]. The system is the creation of Kelsen, who predicted a new type of constitutional justice, opposed to the American established by the praetorian method[15]. In order to have a clearer picture of this aspect, it should be emphasized that the newly created institution in Romania considered the institution of the French Constitutional Council, but without taking over absolutely all aspects of the competences of this institution; in the first instance, the Committee for drafting the constitution also had the same name for Romania as Constitutional Council, but the term Constitutional Court, which was used in other countries (Austria, Italy, Russia), precisely to give a better expression to the idea of creating a constitutional justice.[16]

The system of control of the constitutional jurisdiction by the constitution is met in most states. In other countries, such as Italy, Russia, Hungary, Croatia, etc., the laws on the organization and functioning of the Courts are constitutional laws. A more particular system is found in Bulgaria, where the constitution (Article 149 paragraph 2) provides that the Constitutional Court cannot be regulated by law[17]. Created according to the Western model, especially in countries where there is a multiple system of jurisdictions, the Constitutional Court in Romania is the guarantor of the supremacy of the constitution, having as a fundamental task the control of the constitutionality of the laws, the most frequently exercised task. It appears as a special jurisdiction, being an independent body from all other state authorities. Being an exclusively jurisdictional

[13] In connection with the control of the constitutionality of laws, it should be noted that constitutional justice can be represented in two forms: first, in the form of a judicial or centralized control, in the jurisdiction of the highest judicial forum (the Supreme Court), but diffuse, as it is in the US, at the level of any court; a second way is the European model, which views the creation of distinct constitutional courts and tribunals with the task of ensuring compliance with constitutional provisions; Ion Deleanu, *Justiția constituțională,* Editura Lumina Lex, Bucureşti, 1995, p. 31, Victor Duculescu, Georgeta Duculescu, *Revizuirea Constituției. Istoric. Drept comparat. Documente. Opinii., Editura Lumina Lex, Bucureşti, 2002, p. 45, apud* Mirela Carmen Iacob, "Examen comparativ al unor curți constituționale europene", *în Analele Ştiințifice ale Universității „Al.I.Cuza"* Iaşi, Tomul LI, Ştiințe Juridice, 2005.

[14] At present, the model of constitutional jurisdiction - created in its original lines by Austrian lawyer Hans Kelsen - is widely spread in Europe. The name of the authority entrusted with such control differs from one state to another, but the principles of organization and functioning are similar; Cristian Ionescu, *Drept constituțional şi instituții politice,* Ediția a II-a, Editura All Beck, Bucureşti, 2004, p. 483, *apud* Mirela Carmen Iacob, "Examen comparativ al unor curți constituționale europene", în *Analele Ştiințifice ale Universității „Al.I.Cuza"* Iaşi, Tomul LI, Ştiințe Juridice, 2005.

[15] Mihai Constantinescu, Ion Deleanu, Antonie Iorgovan, Ioan Muraru, Florin Vasilescu, Ioan Vida, *Constituția României – comentată şi adnotată,* Regia Autonomă "Monitorul Oficial", Bucureşti, 1992, p. 303, *apud* Mirela Carmen Iacob, "Examen comparativ al unor curți constituționale europene", în *Analele Ştiințifice ale Universității „Al.I.Cuza"* Iaşi, Tomul LI, Ştiințe Juridice, 2005.

[16] "Constitutional justice is an exclusive and focused justice. In other words, common law courts can not recognize prerogatives in the area of constitutional litigation and, moreover, they can not even arrogate", Ion Deleanu, *op. cit.,* p. 14, *apud* Mirela Carmen Iacob, "Examen comparativ al unor curți constituționale europene", în *Analele Ştiințifice ale Universității „Al.I.Cuza"* Iaşi, Tomul LI, Ştiințe Juridice, 2005.

[17] Genoveva Vrabie, Marius Bălan, *Organizarea politico-etatică a României,* Institutul European, Iaşi, 2004, p. 245, *apud* Mirela Carmen Iacob,"Examen comparativ al unor curți constituționale europene", în *Analele Ştiințifice ale Universității „Al.I.Cuza" Iaşi,* Tomul LI, Ştiințe Juridice, 2005.

body, it is not integrated with the judiciary system, as is the case in other states[18]. Rules on the role of the Court, composition, duration of the mandate, ways of appointing judges and the president, conditions for taking the position of judge, incompatibilities, independence and immovability, competence, effects of decisions are contained both in Title V of the Romanian Constitution and in the Law no. 47 of 18 May 1992 on the organization and functioning of the Constitutional Court[19].

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15. Victor Rusu, *Note de curs, Jurisdicția constituțională,* Chişinău, 2013.

[18] Genoveva Vrabie, Marius Bălan, *op. cit.,* p. 249, *apud* Mirela Carmen Iacob, ”Examen comparativ al unor curți constituționale europene”, în *Analele Ştiințifice ale Universității „Al.I.Cuza"* Iaşi, Tomul LI, Ştiințe Juridice, 2005

[19] This law was amended and supplemented by Law no. 138 of July 24, 1997, being subsequently republished, and after revision of the Constitution, it was amended and supplemented by Law no. 232 of 3 June 2004 and subsequently republished in the Official Gazette no. 643 of 16 July 2004, *apud* Mirela Carmen Iacob, ”Examen comparativ al unor curți constituționale europene”, în *Analele Ştiințifice ale Universității „Al.I.Cuza"* Iaşi, Tomul LI, Ştiințe Juridice, 2005.

TRANSITION PERIODS PROVIDED FOR IN THE ACT OF ACCESSION OF ROMANIA TO THE EUROPEAN UNION. GENERAL CONSIDERATIONS

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Abstract: *Beginning shortly after the regime change in December 1989, the process of rapprochement between Romania and the European Communities was a long and difficult one.In order to acquire the status of a Member State, our country had to prove the fulfillment of both the accession criteria set out mainly at the meetings of The European Council in Copenhagen and Madrid, as well as the punctual conditionality highlighted during the accession negotiations.All this involved severe adjustments of political, legal, social, economic nature and not only. Due to the possible effects that the radical change in the factual situation might have in the afore mentioned spheres, Romania supported the necessity of inserting in the Accession Act certain transition periods so to facilitate the accommodation to the status of Member State of the Communities and subsequently, of the European Union. Our study focuses on the transition periods that we have previously referred to, which we will examine from the perspective of the Act of Accession and the doctrine of specialty.*
Keywords: *Romania, European Union, accession act, periods, transition, free, movement, goods, persons, services, capital, payments.*

I. Introductory considerations

The return of Romania to the great European family, which it abandoned, temporarily and against the orientations it had revealed that far, because of the instauration of the communist regime, was the constant desideratum of the overwhelming majority of the country's population and political decision-makers in post-December Romania.

However, Romania's accession to the European Union happened only relatively late in 2007, at the end of a difficult process of rapprochement and negotiation with the European Union regarding the conditions in which the accession was to take place. In order to meet the accession criteria, the Romanian state had to carry out important reforms, mainly in the economic sector, which attracted difficult social consequences, and to make a sustained effort to insert the former Community AQUIS into the internal legal order, the norms of which came, not a few times, in contradiction with pre-existing domestic legislation.We will briefly describe the main coordinates of this process in the following.

Thus, post-revolutionary Romania has established diplomatic relations with the CEE since 1990, and since 1991 has benefited from a special guest status with the Community, while also benefiting from the funds made available under the PHARE

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program (Poland Hungary Aid for Reconstruction of the Economy), extending beyond the initial beneficiaries.Further on, on 1 February 1993, the negotiations between Romania and the Communities, for the signing of the European Agreement establishing an association between Romania, on the one hand, and the European Communities and their Member States, on the other, or, for ease of expression, The European Association Agreement. However, given the difficulty in negotiating, concluding and ratification, an Interim Agreement on Trade between Romania, the EEC and the ECSC was initially signed. The European Association Agreement entered into force on February 1, 1995, marking an important successful policy for our country.[1]

Without going into the details of this agreement, let us mention, in support of what has been said, that Article 1 states that its purpose is to "*provide a framework for the gradual integration of Romania into the Community*", further detailing the main coordinates of the political and institutional dialogue that will lead to its fulfillment.[2]

In fact, following these developments, in June 1995, Romania was able, to address its application for membership of the European Communities.[3]

The request of Romania did not receive an immediate positive response at the European Councils of Cannes (1995), Madrid (1996), Florence (1996), Dublin (1996), Amsterdam (1997) and Luxembourg (1997)m because of both the criteria that the states that want to join must fulfill (developing the original Copenhagen criteria) and the situation of each East European country, so thateventually, starting with 1998, to opt for starting the accession negotiations with Poland, Hungary, Estonia, the Czech Republic, Slovenia and Cyprus and only in 1999, at the European Council in Helsinki, the decisionto start negotiations with Romania, Bulgaria, Lithuania, Latvia, Malta was made.[4]

As far as the actual negotiations are concerned, they officially started on 15 February 2000, and were held between the European Commission as a representative of the Communities and the Government of Romania through the Ministry of European Integration and the Delegation for Negotiation of Romania's Accession to the European Union, led by a Deputy Minister and Chief Negotiator on behalf of Romania. Also, a Ministry of European Integration was responsible for coordinating all aspects of this objective.[5]

Also, they proceeded on the basis of a scheme comprising 31 chapters, corresponding to a number of areas in which Romania, in the eyes of the EC representatives, had to meet a number of conditions for accession.[6]

For each chapter, Romania had to periodically draw up position papers detailing the progress made, the current situation of the respective field and eventually

[1]Dan Vătăman, Ion David, *România şi Uniunea Europeana – Istorie şi actualitate*, editura Pro Universitaria, Bucuresti, 2008, p.132, apud *Dragoş – Adrian Bantaş, România înainte şi după aderarea la Comunităţile Europene/Uniunea Europeană – reperele principale*, LEX - Revista consilierilor juridici din armată, Nr. 1/2017, pp. 69-80.

[2]Dragoş – Adrian Bantaş, *România înainte şi după aderarea la Comunităţile Europene/Uniunea Europeană – reperele principale* – LEX - Revista consilierilor juridici din armată, Nr. 1/2017, pp. 69-80.

[3]Ibidem.

[4] Dan Vătăman, Ion David, op. cit., pp. 137-139, apud Dragoş - Adrian Bantaş, op. cit., pp. 69-80.

[5] Dan Vătăman, Ion David, op. cit., P.139, pp. 69-80, apud Dragoş - Adrian Bantaş, op. cit., pp. 69-80.

[6]Dragoş - Adrian Bantaş, op. cit., pp. 69-80.

requesting extensions of deadlines or transition periods and, following its analysis, the Union adopted positions in which it expressed his own point of view on Romania's claims.[7]

As a result of the progress made by our country, on December 8, 2004, at the EU-Romania Accession Conference in Brussels, the last negotiation chapters were closed[8] and, on December 17, the same year, at the European Council in Brussels, Romania received the political confirmation of the conclusion of the accession negotiations with the European Union[9], so that on April 13, 2005, the European Parliament would grant Romania its adherence and again, on April 25, during an official ceremony held in Neumunster Abbey in Luxembourg, to sign the Treaty of Accession of Romania (and Bulgaria) to the European Union.[10]

Of course, technically speaking, given that the Treaty establishing a Constitution for Europe had been signed (on 29 October 2004), but the ratification had not yet been rejected by referendum in France (29 May 2005) and the Netherlands (June 1), and the optimism surrounding this moment urged to await its full ratification and entry into force, both an Act of Accession was signed (for the situation where the Constitutional Treaty does not enter into force and the Union continues on the basis of the TEU and TEC) and an Accession Protocol for the situation in which the Constitutional Treaty enters into force.[11]

Considering the failure of the ratification of the Constitutional Treaty, the Accession Protocol will no longer enter into force, and the Act will produce its expected legal effects, so that Romania's accession to the European Communities will take place as of 1 January 2007.[12]

As stated in the specialized doctrine, "*the two documents, the Act and the Protocol, essentially have identical content, differing only from the reference to the texts of the European Constitution, namely the Treaty establishing the European Community and the Treaty on European Union*".[13]

The structure of the Treaty of Accession of Romania and Bulgaria to the European Union comprises the following elements: General Parts: the Treaty itself, the Act of Accession / the Accession Protocol; Annexes, which contain the measures agreed in the negotiations (permanent measures) and temporary measures (transitional periods) and the Declarations.[14]

As far as we are concerned, we will continue to use the name of the Act of Accession, seen as a component of the Treaty, for the document containing the main provisions related to Romania's accession to the European Union, the Accession Protocol not producing its effects, as mentioned above.

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7 Dan Vătăman, Ion David, op. cit., p.140, apud Dragoş - Adrian Bantaş, op. cit., pp. 69-80.
8 Dan Vătăman, Ion David, op. cit., p.44, apud Dragoş - Adrian Bantaş, op.cit., pp. 69-80.
9 www.ec.europa.eu/romania/about-us/eu_romania_en, *UE şi România*, accessed 05.11.2017.
10 Dan Vătăman, Ion David, op.cit., p.44, apud Dragoş – Adrian Bantaş, op.cit., pp. 69-80.
11 Dragoş - Adrian Bantaş, op.cit., pp. 69-80.
12 Ibidem.
13 Augustina Dumitraşcu, *Tratatul de aderare a României şi Bulgariei la UE – prezentare generală* – Revista de Drept Public, nr. 2, 2005, Editura All Beck, Bucureşti, 2005, pp. 98 – 106.
14 Ibidem.

II. Transition periods contained in the act of accession of Romania to the European Union

As we have said before, the particular situation of Romania and Bulgaria, and the disparities between these and the old members of the European Union, have forced the insertion of a transition period in the Accession Treaty, so to allow our country to adapt to the requirements in the binding EU acts and to rally at all its developments when they are truly prepared.

A first example is the provisions on the Economic and Monetary Union. According to them, both Romania and Bulgaria assume all obligations stemming from EMU-related provisions, including the adoption of the Euro (even the Romanian Constitution, revised in the perspective of joining the European Union, specifying, in Article 137, that *" in the conditions for adhering to the European Union, by means of organic law, the circulation and replacement of the national currency with that of the European Union can be recognized*"[15]), but they benefit from a "*derogation within the meaning of Article 122*[16]*of the EC Treaty* ".[17]

As well as the application of the agreements concluded jointly by the Community and the Member States, some transition periods are laid down. According to them, "*from the date of accession until the entry into force of the necessary protocols under paragraph 2*[18], *Bulgaria and Romania shall apply the provisions of the agreements or conventions concluded jointly by the present Member States and the Community prior to accession, with the exception of the Free Movement of Persons Agreement entered into with Switzerland. This obligation shall also apply to agreements or conventions which the Union and the present Member States have agreed to apply provisionally.*"[19]In other words, the transition periods concern the period between the date of accession and the entry into force of the protocols referred to in the cited article.

Next, Article 8 of the Act of Accession makes an express reference to the existence of transition periods which it describes as derogations from the application of the Treaties and acts adopted by the Community institutions (at that time) on the basis thereof. The main premises for these exemptions are set out in Annexes VI (for Bulgaria) and VII (for Romania) annexed to the Accession Treaty, but such provisions

[15] Constitution of Romania, art. 137, par. (2).
[16] Its content is taken over in the current art. 140 TFUE.
[17] Act of Accession, Art. 5.
[18] Article 5 (2) reads as follows: "*Bulgaria and Romania undertake to accede, under the conditions laid down in this Act, to agreements or conventions concluded or signed by the present Member States and the Community acting jointly. The accession of Bulgaria and Romania to Agreements or Conventions concluded or signed by the Community and the present Member States, acting jointly with certain third countries or international organizations, shall be approved by the conclusion of a Protocol to such Agreements or Conventions between the Council, acting unanimously on behalf of Member States, and the country or third countries or international organization concerned. The Commission negotiates these protocols on behalf of the Member States on the basis of the negotiating directives approved by the Council, acting unanimously and in consultation with a committee composed of the representatives of the Member States. The Commission shall submit to the Council the draft Protocols to be concluded.*"
[19]Ibidem, art. 5, par. (4).

may also be found outside the listed annexes.We will return, during our work, to the legal classification of thetransition periods.

Also in institutional matters, certain derogations, such as the number of mandates in the European Parliament pertaining to each state, are established. More specifically, "*by way of derogation from the maximum number of Members of the European Parliament (...), in order to take account of the accession of Bulgaria and Romania, the number of Members of the European Parliament shall be increased by the following number of members from those countries, corresponding to the period between the date of accession and the start of the 2009-2014 parliamentary term: Bulgaria 18 Romania 35.*"[20] In other words, the above provisions concern the period between 1 January 2007 and the date from 2009, when the said legislature starts. Romania and Bulgaria have also benefited from a deadline expiring on 31 December 2007 to hold elections to allocate their mandates to the European Parliament. In the case of the organization of elections after the date of accession (they were indeed organized after the date of accession on 25 November 2007), the Act of Accession provided that "*the members of the European Parliament representing the peoples of Bulgaria and Romania shall be appointed for the period between the date of accession and the date of each of the elections referred to in paragraph 2, by the parliaments of those States in their ranks, in accordance with the procedure laid down by each State.* "[21]

In regard to the operation of the pre-accession financial instruments and the ISPA program, in order to avoid a sudden cessation of their operation, the Commission was empowered to adopt "*appropriate measures to ensure that the legally required staff are maintained in Bulgaria and Romania for no more than nineteen months after accession.*"[22]

Also regarding the financial aspects, the Act of Accession provides that "*in the first year of accession, the Union shall grant Bulgaria and Romania provisional financial assistance, hereinafter referred to as the" Transition Facility ", in order to develop and strengthen their administrative and judicial capacity, to implement and ensure compliance with Community law and promote the exchange of best practices between partners.*"[23]It also specifies the creation of a Schengen Facility „*for Cash Flows as a provisional instrument for supporting Bulgaria and Romania between the date of accession and the end of 2009 to finance actions at the new external borders of the Union, application of the Schengen acquis and control of external borders and to support the improvement of cash flows within national budgets.*"[24] Finally, in this area, the Act also provides that "*in addition to the regulations on rural development in force at the date of accession, the provisions laid down in Sections I to III* (Supplementary Temporary Measures on Rural Development for Bulgaria and Romania, Special Provisions on Support for investments in Bulgaria and Romania, respectively Special provisions on support for early retirement in Bulgaria)*Annex VIII applies to Bulgaria and Romania for the period 2007-2009* (thus a two-year transition period) *and the*

[20]Ibidem, art. 24 par. (1).
[21]Ibidem, par. (3).
[22]Ibidem, art. 27 par. (4).
[23]Ibidem, art. 31 par. (1).
[24]Ibidem, art. 32 par. (1).

special financial provisions provided for in Section IV (Specific Financial Provisions for Bulgaria and Romania for the period 2007-2013)*of Annex VIII shall apply to Bulgaria and Romania during the 2007-2013 programming period*."[25]

A special provision is found in Article 36 of the Act of Accession, which enshrines a safeguard clause[26] in the economic field. It may be activated within three years from the date of accession if "*significant difficulties arise and are likely to persist in any sector of the economy, or which may cause serious damage to the economic situation in a particular area* [and allows Romania and Bulgaria to request] *authorization to take protective measures to remedy the situation and to adapt the sector concerned to the internal market economy*. [Also for the same reasons], *any current Member State* [referring to the Member States as of the date of signature of the Accession Treaty, thus excluding Romania and Bulgaria only] *may request that it be authorized to take protective measures with respect to Bulgaria, Romania or with both states.*"[27] The effective content of the measures referred to above may consist of "*derogations from the rules of the EC Treaty* [TFEU] [TFEU] *and the present*[Act of Accession], *to the extent and for the strictly necessary timeframe to achieve the objectives referred to in paragraph 1)*"[28], that is, those we have referred to earlier.

The correspondent of the general safeguard clause contained in Article 36 of the Act of Accession is the safeguard clause for the internal market, which states that "*if Bulgaria or Romania has not fulfilled its commitments in the context of the accession negotiations, causing significant disruption to the smooth functioning of the internal market, including any commitments made in the context of sectoral policies affecting cross-border economic activities or the imminent danger of such disturbance, the Commission may take appropriate action until a maximum of three years at the date of accession, at the motivated request of a Member State or on its own initiative.*"[29]

A safeguard clause for the home affairs area has also been inserted into the Act of Accession. It states that "*if in Bulgaria or Romania there are significant deficiencies or an imminent risk of such deficiencies in transposition, implementation or compliance with Framework Decisions or any other commitments, cooperation instruments and decisions on mutual recognition in criminal matters* (...), *as well as directives and regulations on mutual recognition in the field of civil law (...), the Commission may adopt action, by a maximum of three years from the date of accession, at the substantiated request of a Member State or on its own initiative and after consulting the Member States, take appropriate measures and specify the conditions and modalities in which these measures enter into force.*"[30]

These measures, adds to the Act of Accession, "*may take the form of a provisional suspension of the application of the relevant provisions and rulings in the relations*

[25] Ibidem, art. 34 par. (1).
[26] According to the document entitled "*Progress Report on the Cooperation and Verification Mechanism - Procedural Aspects*", Brussels, 27 June 2007, available at europa.eu, accessed February 11, 2018, the safeguard clauses are *"mechanisms (…) which can be activated in order to prevent or remedy certain problems or threats to the functioning of the Union."*
[27] The Act of Accession, art. 36, par. (1)
[28] Ibidem, par. (3)
[29] Ibidem, par. 37.
[30] Ibidem, par. 38.

between Bulgaria or Romania and any other Member States, without prejudice to the continuation of close judicial cooperation"[31] *and " beyond the period referred to in paragraph 1 [to which I have referred] as long as these deficiencies persist.*"[32]

As regards the fields of the common agricultural policy and the veterinary, phytosanitary and food law rules, the Act of Accession, in Articles 41 and 42, provides for a period of three years from the date of accession (with the possibility of an extension, in the first case, following a special procedure), within which the Commission can adopt measures to support the transition from the current regime in Romania and Bulgaria to that resulting from the application of Union rules in these areas.

Moving on to the analysis of the transition periods contained in the annexes to the Act of Accession, it is clear from Annex V that in the matter of State Aid Romania and Bulgaria have a period of three years from the date of accession to modify the aid measures applied in certain areas, such as transport, in order to comply with the guidelines applied by the Commission.

Annex VII, the main headquarters of the,Transition Periods which finds its applicability in the case of Romania, addresses firstly the issue of the free movement of persons (mainly with regard to workers). In that regard, it states that "*Article 39 and the first paragraph of Article 49 of the EC Treaty (now Articles 45 and 56 TFEU) are fully applicable only to the free movement of workers and to the free movement of capital which involves temporary movement as defined in Article 1 of Directive 96/71 / EC between Romania, on the one hand, and each of the present Member States, on the other hand, to which the transitional arrangements set out in paragraphs 2 - (14)* "[33] These provisions state that "*by the end of a two years period from the date of accession, the present Member States shall continue to apply national measures or measures resulting from bilateral agreements governing the access of Romanian nationals to the labor market of each of these States. The current Member States may continue to apply these measures until a five years period after the date of accession has expired.* "[34] However, the same Annex also allows that "*at the end of the five year period referred to in paragraph 2, a Member State which maintains national measures or measures resulting from bilateral agreements may continue as such if within the labor market there is, or is likely to occur, serious disturbances and, after notifying the Commission, apply those measures until the end of a period of seven years from the date of accession.*"[35]There is therefore a structure consisting of 2 + 3 + 2 years, a total of 7 years from the date of accession. These provisions are complemented by additional norms of a pronounced technical nature, which, for space considerations, are not listed in our approach.

In the area of freedom to provide services, Annex 7 provides for a derogation from the provisions of *Directive 97/9/ECof the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes*.In particular, "*by way of derogation from Article 4 (1) of Directive 97/9 / EC, the minimum compensation shall not apply in*

[31]Ibidem.
[32]Ibidem.
[33]Annex 7 to the Act of Accession, point 1, paragraph (1).
[34]Ibidem, par. (2).
[35]Ibidem, par. (5).

Romania until 31 December 2011. Romania shall ensure that its investor-compensation scheme provides for compensation in a minimum of EUR 4 500 from 1 January 2007 to 31 December 2007, of at least EUR 7 000 from 1 January 2008 to 31 December 2008, of at least EUR 9 000 from 1 January 2009 to 31 December 2009, of at least EUR 11 000 from 1 January 2010 to 31 December 2010 and at least EUR 15 000 from 1 January 2011 until 31 December 2011."[36]

The free movement of capital also has certain exceptions in its application in Romania. Thus, "*Romania may maintain, for five years from the date of accession, the restrictions established by its legislation, existing at the time of signing the accession treaty, on the acquisition of ownership of land for secondary residences by nationals of Member States or States which are parties to the Agreement on the European Economic Area (ESEE), not resident in Romania, as well as by companies formed in accordance with the laws of another Member State or of an ESEE Member State and which are not established, nor have a branch or representation on the territory of Romania.* "[37] Also "*Romania may maintain for seven years from the date of accession the restrictions laid down in its legislation existing at the time of signing the Accession Treaty on the acquisition of ownership of agricultural land, forests and forest land by nationals of Member States; or of the States which are party to the Agreement on the European Economic Area as well as by companies constituted in accordance with the legislation of another Member State or of a State Party of ESEE and which are neither established nor registered in Romania. (...). Farmers [sic!] who are nationals of another Member State and who wish to establish themselves and reside in Romania shall not be subject to the provisions of the preceding paragraph or any procedure other than those shall apply to Romanian nationals.* "[38]

The competition policy is also addressed in the same Annex VII, which provides that the exemptions from the corporate tax may continue to be granted "*on the basis of the Government Emergency Ordinance no. 24/1998 on the regime of disadvantaged areas, as amended: - for 3 deprived areas (...) up to and including 31 December 2008,* [and for] *22 deprived areas up to and including 31 December 2010.*"[39] Further on, "Romania may continue to grant exemptions from the payment of royalties under Law no. 84/1992 on the free zones regime, as amended, until 31 December 2011"[40]

In the field of agriculture, "*by way of derogation from Article 19 (1) to (3) of Regulation (EC) No. 1493/1999, Romania may recognize replanting rights obtained by deforestation of hybrid varieties which may not be included in the classification of varieties cultivated on an area of 30 000 hectares. These replanting rights may be used until 31 December 2014 exclusively for the planting of Vitisvinifera..”*[41] Also, "*the structural requirements of Regulation (EC) No 852/2004 Annex II Chapter II and Regulation (EC) No. No 853/2004 Annex III, Section I, Chapters II and III, Section II, Chapters II and III, and Section V, Chapter I shall not apply to establishments in*

[36]Ibidem, section 2.
[37]Ibidem, paragraph 3, par. (1).
[38]Ibidem, par. (2).
[39]Ibidem, point 4, lit. A, par. (1).
[40]Ibidem, par. (2), let. (A).
[41]Ibidem, point 5, let. A, first paragraph.

Romania listed in Appendix B [attached to Annex VII] *until 31 December 2009 subject to*" fulfilling certain conditions.[42] Also in the same area, Annex VII establishes that "*the milk processing establishments listed in Appendix B* [attached to Annex VII] *may receive until 31 December 2009 quantities of raw milk which do not correspond or have not been handled in accordance with the requirements laid down in Council Regulation (EC) No 853/2004 Annex III, Section IX, Chapter I, Subchapters II and III, provided that the farms supplying the milk are included in a list drawn up for this purpose by the Romanian authorities.*"[43]

In the field of phytosanitary legislation, Romania has the possibility to "*postpone the deadlines for provision of the information provided in Annexes II and III to Directive 91/414 / EEC on plant protection products currently authorized in Romania and marketed exclusively on Romanian territory, (sulfur, oxychloride or hydroxide), sulfur, acetyl chloride, dimethoate and 2,4-D, provided that these ingredients are included in Annex I to that Directive until 31 December 2009 with the exception of 2, 4-D, for which the deadline may be postponed until 31 December 2008 at the latest.* "[44]

Neither shipments are exempted from the existence oftransition periods, since Annex VII provides that "*by way of derogation from Article 1 of Regulation (EEC) 3118/93 and until the end of the third year after the date of accession, carriers established in Romania are excluded from the provision of national road haulage services in other Member States and carriers established in other Member States are excluded from the provision of national road haulage services in Romania.*"[45] Further to these provisions, it is also stipulated that "*before the end of the third year following the date of accession, Member States shall inform the Commission if they extend this period for a maximum of two years or where, from that date, will apply Article 1 of the Regulation in full. In the absence of such notification, Article 1 of the Regulation shall apply. Those Member States in which Article 1 of the Regulation applies pursuant to point (b) above may use the procedure below until the end of the fifth year following the date of accession*."[46] We are therefore witnessing the establishment of a new 2 + 3 year system since the date of accession, as we have seen that it has also been applied to the free movement of workers. A further derogation in the field of transport concerns the provisions of Article 3 (1) of Directive 96/53 / EC and provides that „*vehicles meeting the limit values in categories 3.2.1, 3.4.1, 3.4.2 and 3.5.1 provided for in Annex I to that Directive may only use unrecoverable sections of the Romanian road network until 31 December 2013 if it complies with the Romanian mass margins on the axis in force.*"[47]. The provisions of Directive 1999/62 / EC are subject to a derogation, which states that "*the minimum charge levels set out in Annex I to the Directive shall not apply in Romania to vehicles engaged exclusively in inland transport operations until 31 December 2010*"[48]an providing at the same time, a timetable according to

[42]Ibidem, let. B, pct. I, let. (a)
[43]Ibidem, let. (c).
[44]Ibidem, let. (d).
[45]Ibidem, paragraph 6, par. (1), let. (a).
[46]Ibidem, let. (b) and (c).
[47]Ibidem, par. (2), first subparagraph.
[48]Ibidem, par. (3).

which the tariffs applied in Romania to the vehicles referred to in the said Directive must reach the values stipulated therein.

Also affected by its accession to the European Union, taxation is provided for in Annex VII, point 7. In this area, Romania has been able to "*postpone until December 31, 2009 the application of the total minimum excise duty applied to the price (including all taxes) of cigarettes in the best-selling category, provided that during this period Romania gradually adjusts its excise duty rates to the "total minimum excise duty*"[49] provided for by Directive 92/79 / EEC. Also, "*Romania is authorized not to apply the provisions of Article 1 of Directive 2003/49 / EC until 31 December 2010. During that transitional period, the rate of tax on interest or royalties paid to an associated company in another Member State or to a permanent establishment situated in another Member State of an associated company in a Member State shall not exceed 10%.*[50]We consider it useful to mention that, in accordance with the provisions of point 7 (4) (a) to (c) of Annex VII, Romania has the possibility to apply a number of transition periods for the alignment of the national level taxation of unleaded petrol (January 1, 2011), gas oil used as fuel (January 1, 2013), natural gas used for heating (January 1, 2010), heavy fuel oil (January 1, 2010) or other than district heating (January 1, 2009) and electricity (January 1, 2010) in some of these situations with interim targets.

In the energy sector, as regards the Romanian State, the provisions of Article 1 (1) of Directive 68/414 / EEC as regards the levels of minimum stocks of petroleum products will apply after a transitional period which lasted until 31 December 2011, with targets and interim deadlines.

The field of environmental policy is subject to numerous derogations, agreed in the same Annex VII. For example, with regard to the provisions of Directive 94/63 / EC on specific requirements for terminal storage facilities, they did not apply to certain installations until 31 December 2007 and to other installations until 31 December 2008 and 31 December 2009 respectively. The need to comply with the loading and unloading specifications for existing tanks within the terminals of Directive 94/63 / EC was postponed until 31 December 2007, 31 December 2008 and 31 December 2009, depending on the installations or tanks concerned. Directive 94/63 / EC has also been exempted from the provisions of its provisions on the loading of existing tanks at fuel stations until 31 December 2007 and 31 December 2009, depending on the installations in sight. Council Regulation (EEC) No 259/93 did not apply, until 31 December 2011, to the Romanian State, with the possibility to object to the transport of certain types of waste (listed in Annex III to that Act) to our country, applicable situation and in the case of Regulation (EEC) (EEC) No 259/93 on shipments of waste for recovery not specified in its Annexes, which could be completed by 31 December 2015, Regulation (EEC) No 259/93 concerning shipments of waste which are not intended for recovery and have a temporarily exempted destination from the application of Council Directive 96/61 / EC or Directive 2001/80 / EC of the European Parliament and of the Council

[49]Ibidem, paragraph 7, par. (1), first subparagraph.
[50]Ibidem, par. (2), first subparagraph.

until the expiry of the validity of the exemption to which the receiving installation benefited.

The global recovery or incineration targets set by Directive 94/62 / EC could be met by Romania until 31 December 2011, following a timetable with intermediate targets. Also, the targets for the recovery or incineration of waste in incineration plants with energy recovery had to be achieved by 31 December 2013, with interim targets also being applied.

The recycling of plastic, covered by the same directive, required other global and intermediate targets, to be achieved by 31 December 2011 and, in the case of plastic recycled material, by 31 December 2013 with intermediate steps.

Regarding the recycling of wood covered by the same directive, the final target had to be reached on 31 December 2011, after reaching some intermediate targets.

Transitional periods were also established in the field of hazardous waste (Directive 1999/31 / EC), water control, infiltration management, soil or water protection and gas stability control, which in Romania did not apply to certain municipal landfills waste until July 16, 2017.

Summarizing the provisions of point 9 of Annex VII on the environment, we also specify that certain provisions of Directive 1999/31 / EC on "*liquid, corrosive and oxidant waste and the prevention of surface water infiltration in landfilled waste*"[51] have not been applied to a number of installations specified in that Annex, in each case by the date specified therein, and in any case no later than 31 December 2013. The same provisions have also been applied in the case of a number of specified tailings ponds with the application of maximum annual quantities.

Other deadlines for complying with the provisions of the Union normative acts have been established in the field of separate collection of waste pursuant to Directive 2002/96 / EC (four kg per capita, coming from households by December 31, 2008), discharges cadmium, mercury, lindane, hexachlorobenzene, hexachlorobutadiene, dichloroethane, trichloroethylene and trichlorobenzene according to Directives 83/513 / EEC, 84/156 / EEC and 76/464 / EEC (31 December 2009 for certain industrial installations) or water collection and treatment Urban waste (December 31, 2018, this transition period being still unfinished). As for waste water disposal, some intermediate values have also been established.

A number of installations covered by Directive 96/61 / EC are subject to permit conditions which may derogate from that Directive up to a set period for each installation in the context of the environmental provisions in Annex VII to the Act of Accession. Similarly, certain expressly mentioned medical waste incinerators are subject to derogations from the conditions laid down in Directive 2000/76 / EC in respect of the admissible emission levels, even until certain dates set for each of them. Similarly, the installations covered by Directive 2001/80 / EC, with regard to nitrogen emissions (with transitional periods expiring on 1 January 2016 and 31 December 2017 for installations meeting certain technical characteristics) and dusts, also benefit from similar conditions.

[51] Annex VIII, point 9.

III. Conclusions. The legal nature of the transition periods of the act of accession of Romania to the European Union

We have seen, in the above-mentioned, that Romania's Act of Accession to the European Union includes an appreciable range oftransition periods, the existence of which is motivated by the difficulties that our country would have encountered in case it would have been forced to comply with all the provisions of the Union legislation from the moment of accession. We have identified, for example, transitional aspects in the fields of the Economic and Monetary Union, the application of the agreements concluded jointly by the Community and the Member States, the composition of certain EU institutions, financial instruments, the Schengen acquis and beyond. Moreover, we have identified three safeguard clauses, not including the postponement clause, which fortunately has not yet been applied. Annex VII shows the existence of transition periods in the areas of free movement of persons, services and capital, but does not identify similar clauses on the free movement of goods or payments. In addition, there are various transition periods in the spheres of competition, agriculture, plant health, transport, energy or the environment.

With regard to the nature of exceptions or waivers of these transition periods, first of all, we note that Article 8 of the Act of Accession expressly qualifies them as derogations.

Analyzing the significance of this notion, we note, on the one hand, that in the relevant literature of the Romanian space it is stated that "*the exception always refers to the general norm, being, what the name also calls it, a particular alternative to the legal general norm, and the derogation also operates in relation to the exception created in a normative act by reference to a general rule; the derogation is also justified where the legislator considers that a derogation provided for by a legal regulation requires the establishment of a derogatory regime; the derogation relates not only to the general rule but also to the special one, so the derogation, in such cases, appears to us as an exception to the exception; the general legal rule, the exception and the derogation are subject to a derivation report, the logical appearance of which is as follows: general rule - exception-derogation.* "[52]

On the other hand, in regardto the understanding of these terms in the Anglo-Saxon culture area, we note that the exception refers to the act of excluding a situation from the scope (of a rule) under which, in other circumstances, has been included, or may have the procedural meaning it holds in Romanian law, while the derogation refers to the temporary or partial non-application of a rule.[53]

As regards the language used by the Treaties on which the European Union is based, itprefer to use the term of derogation, at least in the Romanian, English and French versions, for situations where certain rules do not apply to a given situation or

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[52]Ioan Vida, *Manual of Formal Legislation (Introduction to the Law and Procedure),* Bucharest, Public Law Publishing House, 2000, p. 177, apud Victor Balmuş, Derogation and exception in doctrine and in national legislation, Academy of Sciences, Innovation, Culture and Art Number 1 (36) / 2015, available at www.akademos.asm.md, accessed 11.02.2018.

[53]www.wikidiff.com, accessed 11.02.2018.

for a period while the exception is used to exclude certain recipients from the scope of a rule.

In this regard, we consider that the transition periods inserted in the Treaty of Accession of Romania to the European Union (more precisely, in the Act of Accession and its annexes) presents the characteristics of derogations, as the Act itself qualifies.

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THE PRESCRIPTION OF THE RIGHT TO EXERCISE THE ENFORCEMENT OF THE ASSIGNED BANKING DEBTS

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Abstract: *As a result of the new economic realities, many of the people who have approached banking institutions in order to obtain loans have been unable to pay the instalments according to the reimbursement schedules. In most cases, the banking institutions started the mechanism provided in the contract for declaring the expected maturity of unpaid instalments, and then assigned non-performing loans to debt recovery companies. Given the fact that in some cases the last payments were made in 2009 (at the time of the economic crisis), the non-performing debts being assigned as early as 2010, the issue of the lawfulness of enforcement initiated by debt recovery companies after the year 2013 by reference to the extinctive prescription of the right to demand enforcement. Thus, it is necessary to examine some aspects of this issue, such as the moment when the limitation period begins to run, the causes of suspension and interruption, the effects of the term and the ways in which the courts can analyse this issue.*
Keywords: *limitation period, banking debts, assignment of banking debts, enforcement of assigned banking debts*

1. Premises

In the present paper, there will be analysed the aspects regarding the prescription of the right to exercise the enforcement of the debts declared in advance by the lending institution and subsequently transferred to a debt recovery company.

The analysed issue is of interest, is common in practice, as usually credit agreements that are in the process are not being assigned, being well-known that bank policy tends to assign debts arising from non-performing bank loans.

2. Definitions

A pertinent analysis of the topic under consideration is conditioned by the definition of the legal institutions presented.

Limitation period – starting from the provisions of art. 2500 Civil Code[1] - is a civil sanction consisting in termination of the right to compel a person, with the help of the public force, to execute a certain benefit, to observe a certain legal situation or to incur another civil sanction.

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[1] Law no 287/2009 regarding the Civil Code, published in the Official Gazette no. 511/24.07.2009;

Banking debt

Legislation does not define the notion of debt, although this is repeatedly encountered in the Civil Code and the Code of Civil Procedure.

Usually, the debt is synonymous with the right to debt.

Therefore, the bank debt is the right of a bank (creditor) to ask the other party of the bank loan agreement (the debtor) to fulfil the obligation to give, do or do nothing, which the latter assumed it under the bank credit contract. In particular, the bank debt involves the bank's right to demand the enforcement of the borrower's obligation consisting in paying the price of the loan agreement.

Assignment of banking debts

Starting from the provisions of art. 1566 Civil Code applied in the case of banking debts, the assignment of banking debt represents the contract through which the bank, the assigning creditor, sends to a debt recovery company, assignee, a debt against a third party, assigned debtor.

3. The applicable law

In this legal process, from the point of view of the applicable procedural law only the enforcements governed by the new Civil Procedure Code[2], respectively the enforcements started after February 15th 2013 will be analysed.

Thus, it will be taken into consideration the provisions or art 3 (1) of Law 76/2012[3], according to which the provisions of the new Code of Civil Procedure apply only to enforcements after its entry into force. Enforcement begins at the time of filing the forced execution request to the enforcement body, as is stated in the provisions of art. 622 (2) Code of Civil Procedure

In regard to the material law, which completes the procedural law in the field of the limitation period, it is noted that this will be, as is the case, Decree no. 167/1958[4] or the Civil Code, in compliance with art. 711 Code of Civil Procedure reported to the art 201 of Law no. 71/2011[5].

4. Procedural aspects

4.1. Invoking the limitation of the right to demand enforcement by the debtor

The debtor of a bank debt assigned by the banking institution to a company specializing in the recovery of debts may rely on the limitation of the right to demand the enforcement of that claim, either by way of action or by way of exception.

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[2] Law no 134/2010 regarding the Code of Civil Procedure, republished in The Official Gazette no 247/10.04.2015;

[3] Law no 76/2012 for implementing Law no 134/2010 regarding the Code of Civil Procedure, published in The Official Gazette no 365/30.05.2012;

[4] Decree no 167/1958 regarding the limitation period republished in B. Of. no 11/15.07.1960;

[5] Law no 71/2011 for implementing Law no 287/2009 regarding the Civil Code, published in the Official Gazette no 409/;

4.1.1. Invoking the prescription of the right to demand enforcement through action

The assigned debtor may start a legal action, based on the provisions of art. 35 Code of civil procedure, requesting the court to declare the intervention of the limitation of the right to demand the enforcement of the declared matured debt in advance and subsequently assigned.

The debtor, knowing the date on which the last voluntary payment was made, at the time he becomes aware of the assignment of the banking debt declared to be due in advance (upon receipt of the notification of the assignment of debt) may choose not to remain passive and to start a declaratory action, in contradiction with the assignor creditor through which to ask to be noted that the right to demand enforcement of the respective debt is prescribed. The court order, which establishes the limitation of the right to exercise the enforcement, will prevent further start of procedure of enforcement.

The court in the matter of solving an application for a declaration of enforceability of an assigned bank debt will, on the basis of art. 666 (5) point 7 Code of civil procedure, the request made by the bailiff, because there is an impediment to enforcement, namely a court decision that establishes that the right to demand enforcement of the respective debt is prescribed.

If the creditor (assignee) starts the enforcement, if the bailiff and the court, which issued the declaration of enforceability, were not aware of the existence of this decision, the debtor may submit an appeal against the enforcement by which to invoke the power of the res judicata of those noted by the decision of the court.

4.1.2. Invoking the prescription of the right to demand forced execution by way of exception

a) within the contestation to enforcement

If the debtor remained in passivity, he may invoke the prescription of the right to ask for the enforcement in the contestation of the enforcement itself, formulated within the time limit stipulated by art. 715 (1) point 3 Code of civil procedure, respectively within 15 days from the moment when he received the summons, together with the sending of the conclusion of the enforceable execution and the executory title.

If the limitation of the right to demand enforcement is invoked with the contestation of other enforcement acts (enforcement by garnishment, sale of a real estate on auction), the court will find that the debtor is no longer in due time to invoke the exception of prescription of the right to ask for enforcement in respect of the entire execution, if prior to such acts of enforcement was given the summons, the enforceable title and the enforceability of the enforcement, without challenging the enforcement itself.

In order to ascertain the right to demand enforcement by garnishment or legal seizure of movable or immovable property, it is necessary to have the limitation period reached from the date of the last enforcement act or the date of the last voluntary act of execution.

b) in other incidents during the enforcement

In practice, there is a situation in which the prescription of the right to demand enforcement is invoked in the procedure of validation of the garnishment.

Thus, the debtor who did not file an appeal against execution at the moment when the enforcement was initiated formulates this defence in the file having as object the validation of the garnishment. After the petition to summon has been sent to the court, with the object of validation of the garnishment, the debtor protects the defence by requesting the rejection of the application, invoking the right to request enforcement.

In analysing the debtor's response, the court will first examine what these defences relate to.

Thus, a defence relating to the entire enforcement may be delayed by reference to the period within which it was required to formulate the contestation to the actual execution if it had been served with the summons and other enforcement acts.

In the situation, which is rarely encountered in practice where the debtor first became aware of enforcement with the communication of the application for the validation of the garnishment, the court will examine whether the defence invoked in this case, the invocation of the limitation of the right to request enforcement is made in compliance with the 15-day term stipulated by art. 715 (1) point 3 Code of Civil Procedure.

On the other hand, a defence concerning the right to be ordered the enforcement by means of garnishment must be analysed on the basis that the submission of the enforcement request and the performance of a writ of execution (including the establishment of garnishment) are causes which interrupt the limitation period. Most of the time, it will be noted that the limitation period of 3 years is not fulfilled by reference to the date when the enforcement request was filed and the date on which the defence regarding the interdiction of the right to request enforcement is not fulfilled in the limitation period of 3 years, being interrupted successively by the enforcement acts in question.

The question arises whether the third party that was garnished can invoke in defence the prescription of the right to demand enforcement.

It should be taken into account that the third party that was garnished cannot contest the execution; he must base his defence during the procedure of validation of the garnishment, according to art 787 (5) Code of Civil Procedure.

With regard to the defence the garnished third party may argue, it can be observed that he may oppose to the pursuing creditor all the exceptions and means of defence which he would be able to oppose to the debtor in so far as it is based on a cause prior to the removal, stipulated by art 790 (3) final thesis Code of Civil Procedure.

Therefore, the injured third party can only defend the legal relationship between him and the debtor and cannot claim against the following creditor the debtor's own defences. Eventually, the third party may invoke the exception of the prescription of the right to demand enforcement, but only in relation to the debtor's claim to him (being a defence that is the cause of his garnishment).

4.2. Invoking the limitation of the right to request enforcement by the court ex officio

According to art. 201 of Law no.71 / 2011 for the implementation of the Civil Code, the prescriptions initiated and unfulfilled on the date of entry into force of the Civil Code are and remain subject to the legal provisions that have established them.

Also, as it was set by the High Court of Cassation and Justice through Decision no 1/2014[6], given in solving some Appeals in the interest of the law, for interpreting and applying the provisions of art 5, art 201 and 223 of Law no 71/2011 for the implementation of Law no 287/2009 regarding the Civil Code and art 6 (4), art 2.512 and art 2.513 of Law no 287/2009 regarding the Civil Code, the limitation periods started before October 1st 2011, fulfilled or unfulfilled at that date, remain under the provisions of art 18 from the Decree no 167/1958 regarding the limitation period, republished, so that the courts, ex officio, as well as the interested parties can invoke the exception of the limitation period, regardless the stage of the case, even in litigations started after October 1st 2011.

In view of these provisions, it is found that in this situation the old law ultra activates and that the prescription, which began before the entry into force of the new Civil Code, is fully subject to the old regulations, including the nature of invocation and the legal nature.

According to the Decree no. 167/1958, the prescription of the material right to action is an institution of public order, regulated by imperative norms.

Thus, according to art. 18 of Decree no. 167/1958, the court is required to examine ex officio whether the right to action is prescribed.

As a result, the exception to the limitation of the right to demand enforcement should be invoked ex officio if the applicable law (determined according to the rules above) is represented by Decree no. 167/1958.

If the law supplementing the provisions of the Code of Civil Procedure in matters of enforcement is the new Civil Code, the prescription institution is strictly private, and cannot be investigated ex officio, unless the party concerned has invoked the law within the prescribed time limit.

5. Analysis of the prescription of the right to demand enforcement

5.1. The moment when the term begins to run

The limitation period begins to run from the date when the right to obtain enforcement is born, as established by art 706 (2) Code of Civil Procedure. In the case of bank debts, the rule is that for each instalment owed by the debtor a separate prescription runs from the date it is due according to the reimbursement schedule accepted by the parties.

If due to the failure of the debtor to pay the instalments, the banking institution activates the commissary pact entered in the contract and declares the anticipated maturity of the remaining instalments, a single prescription will run for the entire amount to be paid and the term will run from the date the bank issues the notification informing the debtor of the fact that the credit was due or a later date mentioned in the notice (sometimes the debtor is given the chance to save the contract by noting that he will not declare the due date if it resumes payments until a certain date).

[6] The Decision of the High Court of Cassation and Justice no 1/2014, given in solving an Appeal in the interest of a Law, published in the O.G. no 283/17.04.2014;

5.2. The limitation period for the right to demand enforcement

According to art 706 (1) Code of Civil Procedure, the right to obtain enforcement shall be prescribed within 3 years, unless the law provides otherwise. In the case of bank debts, no special limitation period is set by law, so that the 3-year general term will be the case.

5.3. Causes of suspension of the limitation period of the right to demand enforcement

The cases leading to the suspension of the prescription of the right to request enforcement are set in art. 708 (1) Code of Civil Procedure, these being: 1. in the cases established by the law for the suspension of the limitation period of the right to obtain the defendant's obligation (to be determined by the applicable law, namely Decree No 167 / 1958 or the Civil Code); 2. while the suspension of enforcement is provided by law or has been determined by the court or other competent jurisdiction; 3. for as long as the debtor has no traceable or non-recoverable goods, or stops his incomes and goods from pursuit; 4. in other cases provided by law.

5.4. Causes of interruption of the prescription period of the right to demand enforcement

According to art 709 (1) Code of Civil Procedure, the limitation period shall be interrupted: 1. on the date of fulfilment by the debtor, before the enforcement started or during the enforcement, of a voluntary act of execution of the obligation stipulated in the enforceable title or the recognition, in any other way, of the debt; 2. on the date of the filing of the enforcement request, accompanied by the enforceable title, even if it was addressed to an unqualified enforcement body; 3. on the date of submission of the request for intervention in the course of enforcement initiated by other creditors; 4. on the date of performance of an execution act during enforcement; 5. on the date on which the request for resumption of enforcement was filed; 6. in other cases provided by the law (to be determined according to the applicable law, namely Decree No. 167/1958 or the Civil Code).

The cases expressly listed in the Code of Civil Procedure do not pose problems in establishing their existence and from the moment they operate.

On the other hand, the interruption of the prescription referred to by art. 709 (1) point 6 Code of Civil Procedure may lead to different interpretations in practice.

In particular, it may be questionable whether the operations prior to the commencement of enforcement by the creditor transcend the extinctive prescription and will be analysed from this point of view: the conclusion of the assignment agreement, the notification of the debtor by the creditor, the registration of the assignment to A.E.G.R.M..

According to art. 2537 Civil Code, the prescription shall be interrupted: 1. by a voluntary act of execution or by the recognition in any other way of the right whose action is prescribed by the person in whose favour the prescription runs; 2. by filing a claim for legal action or arbitration, by filing the claim at the creditor's table in the insolvency proceedings, by filing the application for intervention in the forced pursuit of other creditors, or by invoking, by way of exception, the right whose action is prescribed; 3. by establishing as a civil party during the criminal prosecution or before the court of law until the commencement of the judicial investigation; if the compensation is granted, ex officio, according to the law, the commencement of the criminal prosecution interrupts the prescription, even if it has not been constituted as a civil party; 4. by any act by which the person in whose favour the prescription runs is delayed; 5. in other cases provided by law.

The causes of interruption of the extinctive prescription course provided by art 16 of Decree 167/1958 are: a) by the recognition of the right whose action is prescribed, by the one in whose favour the prescription runs. b) by filing an application for a court or arbitration, even if the application was filed with a court or an arbitration body, unqualified; c) by a new enforcement act. The prescription shall not be interrupted, if the end of the trial has been adjourned, if the request for legal action or execution has been rejected, cancelled or if it is obsolete or if the person who has made it has renounced it.

The conclusion of the bank transfer assignment contract in practice takes place at the earliest on the date of the anticipated maturity of the non-performing loan. There are situations in which the assignment takes place over a longer period of time than the date on which the credit is due to be declared. As shown, in the situations contemplated by the present legal approach, the prescription of bank claims begins to run completely from the date of communication to the debtor of the expected maturity of the loan, and not separately for each instalment.

In itself, the conclusion of the assignment contract does not fall within the cause of interruption of the prescription of the right to demand enforcement, expressly stipulated in art 709 (1) Code of Civil Procedure, in art 2537 Civil Code or in art 16 of Decree 167/1958.

Instead, the notification of the assignment made under the conditions of art 1578 Civil Code through which the debtor is also placed in delay as provided by art. 1522 Civil Code (the debtor may be delayed either by a written notification by which the creditor requests the execution of the obligation or by the request for a summons), may interrupt the limitation period under the conditions of art 2540 Civil Code, if he is followed by his appearance within 6 months of the date of the delay.

The question that arises naturally is whether it can be interpreted that the above provisions are extended also if enforcement takes place within 6 months of the date of delay.

We consider that the notification of communicating the assignment of debt through which the debtor is placed in delay can interrupt the limitation period of the right to demand the enforcement, because the credit contract represents an executory title[7] and it is no longer necessary the summoning of the debtor in this case, but only if the enforcement was commenced within 6 months of the notification being served.

[7] Regarding the old art. 79 (2) of Law no 58/1998 regarding the banking activity – the contracts of banking loans, and also the real and personal guarantees, constituted for the purpose of guaranteeing the banking credit, constitutes executory titles. The Emergency Ordinance no 99/2006 (adopted through Law no 227/2007) replaces the old law and establishes, through art 120, the same executory characther of the credit contracts made by a credit institution.

A problem that has been frequently debated in practice and which is still invoked by debtors surrendered in enforcement appeals has started from the character of the enforceable title of the credit agreement that is maintained or not after the conclusion of the debt assignment contract [8].

The first argument of the text that supports the idea that the debt assignment does not lose the character of the executory title of the credit contract is apparent from art. 1568(1) Civil Code according to which the assignor assigns to the assignee all the rights the assignor has in relation to the ceded debt, the warranty rights and all other accessories of the ceded debt.

At present, the practice seems to be unitary in retaining the enforceability of the ceded debt, especially since the High Court of Cassation and Justice has drawn the direction, albeit indirectly, by rejecting as inadmissible requests for the release of certain law matters.

Regarding the registration of the assignment of the debt in the Electronic Archive of Security Interests, we consider that this is not a cause that leads to the interruption of the extinctive prescription of the right to demand enforcement. In this respect, it is taken into account that it does not fall into the causes of interruption of the prescription of the right to demand enforcement, expressly stipulated in art 709 (1) Code of Civil Procedure, in art 2537 Civil Code or in art 16 of Decree 167/1958.

Enrolment in A.E.G.R.M. is made in order to ensure the opposability to third parties, as it appears from the provisions of art 1579 Civil Code, according to which the assignment of universality is not opposed to third parties only by its inclusion in the archive.

Another cause of interruption of the limitation period for the execution of bank debts is represented by the recognition of the debt by the assigned debtor, recognition that may take the form of a partial payment to the assignee, the signing of a payment commitment, the request for a payment deadline or any other express or tacit expressions that can be interpreted as recognition.

6. Effects of fulfilling the limitation period of the right to demand enforcement

If the debtor has started an action in finding prior to the commencement of the enforcement by the creditor, the enforcement may be prevented from the moment when the approval of enforcement is considered, the application may be rejected on the basis of art. 666 (5) point 7 Code of Civil Procedure, as noted above.

If the debtor did not proceed in this way and the enforcement started, if it is established that at the date of the execution of the enforcement the right to request execution was prescribed, the court in charge of the settlement of a contestation of execution will admit the request made by the debtor and will cancel the enforcement.

[8] Ioana Păsculeț, *Efectele cesiunii creanței rezultate din contractul de credit bancar asupra caracterului sau executoriu*, în Executarea Silită, dificultăți şi soluții practice, vol. II, Universul Juridic Publishing House, Bucharest, 2017

If enforcement actions have been executed until the appeal to the enforcement has been settled at the request of the debtor, the parties may be ordered to return to the previous situation by accepting the request for return of the execution made by the debtor.

The issue of collateral against evictions can also be raised in the relationship between the assignor and the creditor.

According to art 1585 (1) and (2) Civil Code, if the assignment is for consideration, the assignor has, de jure, a guarantee obligation to the assignee. Thus, the assignor guarantees the existence of the claim in relation to the date of assignment, without being also responsible for the solvency of the ceded debtor.

In case it is noted as prescribed the right to demand the enforcement, the creditor who is unable to make the claim for this reason will not intervene against the eviction on the basis of the previous provisions (of course, unless there is a contrary stipulation on liability for eviction in the event of insolvency or for any other cause), as it cannot be remembered that there was no claim at the date of assignment.

According to art 1586 (1) Civil Code, in all cases, the assignor is responsible if, by his own deed, alone or concurrently with the deed of another person, the assignee does not acquire the claim in his patrimony.

However, we consider that it cannot be held guilty in the fulfilment of the limitation of the right to request forced execution on the part of the assigning creditor – banking institution that did not carry out enforced execution acts interrupting the prescription between the moment of declaring the anticipated maturity credit and time of assignment of the debt.

7. Conclusions

Referring to the above-mentioned facts, it is noted that invoking the extinctive prescription of the right to demand enforcement by the debtor of an assigned bank debt can be an effective defence against enforcement by the creditor of the assignment - debt recovery company.

However, the procedural aspects of how this defence should be invoked should not be omitted, and it is necessary for the debtor to formulate such support under the conditions, form and time required by law to be effective.

In its analysis of defence, the legal nature of the extinctive limitation of the right to request the enforcement or sanction of the creditor who remained in passivity and did not trigger the mechanisms by which is ensured the support of the coercive force of the state in the enforcement of his debt.

It is also worth considering the fact that in many of the situations encountered in practice although the claim was assigned in the years 2010-2012, enforcement is started after 2016.

Moreover, another common occurrence in practice is the successive assignment of debts between debt recovery companies resulting from non-performing bank contracts. Besides analysing the issue of prescription of the right to demand enforcement, in this situation it is necessary to investigate with great care the aspect related to the acquisition of the claim by the last creditor assignee (proof of the transfer of the debt to be considered among all the assignee creditors), as well as the notification of the debtor with respect to all the assignments.

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A FEW REMARKS ON THE CONSTITUTIONAL COURT'S DECISIONS AND THE MORE FAVORABLE CRIMINAL LAW

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Abstract: *The effects of the decisions of the Constitutional Court of Romania, within the meaning of their application only for the future, have not been disputed for a long time. However, a tendency must be noted in the last period, at least on the part of the political environment, to recognize a retroactive effect to those who have declared as being unconstitutional a criminal law or part thereof. The topicality of the theme addressed is given by the transition from public political statements which impose a pressure on the judiciary system, to taking action, by depositing during the month of April 2018, to the Standing Bureau of the Senate a legislative project which aims inter alia the recognition of the retroactivity of the decisions of the Constitutional Court of Romania for the cases in which they can be assimilated to the more favorable criminal law (lex mitior). In the following we aim to do a brief analysis of the arguments invoked by those who support the retroactive application of the decisions of the Constitutional Court of Romania and who, using the legislative project reminded, aim to offer by law, a legitimacy of their retroactivity when they can be assimilated to the more favorable criminal law. Can such a perspective be supported? What would the main legal effects be in the situation in which the legislative initiative will be materialized in a law? These would be the challenges to which we try to outline an answer for in what follows.*

Keywords: *The decisions of the Constitutional Court, retroactivity, effects, the more favorable criminal law*

1. Introduction

In the current political environment is manifested the tendency to influence the recognition of a retroactive effect for the decisions of the Constitutional Court of Romania through which a criminal law in whole or only a part of it is declared unconstitutional, which could be assimilated by the final content, to a more favorable criminal law. It can be said that the tendencies and the political declarations should be the subject of political sciences studies, but when they begin to be reflected in the approaches for the modification of the legislation in force we believe that they exceed the scope of politics and they enter the area of jurists' competence. Thus, recently, in April 2018, all these unrest of politics have been materialized in the submission to the Senate, as the first Chamber referred to, of a legislative project through which it is intended to carry out certain amendments and additions to the Criminal Code, hereinafter referred to as the *Legislative project of amendments and*

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additions to the Criminal Code L238/18.04.2018[1], whereas the use of the name chosen by the initiators, through the length, it would prove inadequate for an article on the topic of legal certainty.

The subject to the present analysis will focus only on the additions to the Article 4 of the Criminal Code, namely the introduction of two new paragraphs, and the arguments used by the initiators of the *Legislative project of amendments and additions to the Criminal Code L238/18.04.2018*, in the explanatory reasons, to support their necessity. In the course of the article we will try to analyze the relevance of the reasons invoked for the introduction of two new paragraphs from the point of view of compliance with the constitutional provisions and the involvement of the Legislative Council, as the specialized department responsible for the approval of legislative projects in the framework of the proceedings of enactment.

We believe that certain initial information relating to the current provisions of the Romanian Constitution are necessary, given the content of the paragraph 2, through which the initiators of the legislative project aim to supplement Article 4 from the Criminal Code. Thus, the paragraph which is wanted to be introduce provides that "it shall be assimilated to the decriminalization criminal law the decisions of the Constitutional Court which state the unconstitutionality of certain provisions in the criminal laws, which state as constitutional only certain versions of criminalization or through which the whole offense or part of it, is considered as being contrary to the Constitution, and decisions which relate to the different type of criminal rules than those of criminalization. Compulsory application of the decisions of the Constitutional Court as more favorable criminal law refers both to the operative part and their considerations"[2]. However, the state's fundamental law, states at present that the decisions of the Constitutional Court "shall be published in the Official Gazette of Romania. From the date of publication, decisions shall be general binding and effective only for the future”[3].

From a comparative interpretation of the mentioned texts results the importance of the constitutional provisions, given by the steps taken for the amendment and completion of the Criminal Code, a lower-ranking law compared to the Constitution, are clearly in contradiction with the constitutional provisions. For this reason we believe that any initiative having as its object the acceptance of a retroactive effect of the decisions of the Constitutional Court, which could be assimilated to a more favorable criminal law, should be carried out only after a revision of the Constitution.

[1] *The law on the accordance of the provisions of the Law no. 286/2009 on the Criminal Code, with subsequent amendments and additions, with the decisions of the Constitutional Court, the Directive (EU)2016/343/EC of the European Parliament and of the Council of 9 March 2016 on the consolidation of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, the EU Directive 2014/42/EC of the European Parliament and the Council of 3 April 2014 on the freezing and seizure of instruments and products of offenses committed in the European Union*, as it results from the address submitted to the Senate Standing Bureau, registered with no. L238 of 18.04.2018, the document can be found at the URL: https://www.senat.ro/legis/PDF/2018/18L238FG.pdf, accessed from the date of 01.05.2018.

[2] *Legislative project of amendments and additions to the Criminal Code L238/18.04.2018,* the document can be found at the URL: https://www.senat.ro/legis/PDF/2018/18L238FG.pdf, accessed from the date of 01.05.2018.

[3] The Romanian Constitution, art. 147 (4).

Only in the situation in which this revision would take place, the legislator or the legislative project initiators could subject to debate the way in which the new constitutional provisions concerning the retroactivity of the mentioned decisions can be transposed in the primary legislation, in this case the Criminal Code. But as such amendments have not taken place, we believe that this initiative, as regards the additions which are the subject of the article, is clearly unconstitutional.

2. The (Non) Involvement of the Legislative Council

The reason for which we continue the analysis of these provisions is given by the fact that in the opinion of the Legislative Council[4], which is favorable to the legislative proposal, we notice that there is no note on the clearly infringement of the constitutional provisions by the additions that the initiators of the legislative project wish to make on Article 4 from the Criminal Code.

Thus, up to the date of the completion of the article we have as documents of study, on the one hand, the legislative initiative project, and, on the other hand, the opinion of the Legislative Council. In respect of the quality of the preparation of the legislative project, we can say that it is in correlation with the lack of the meritocracy criterion for those who are its initiators, whether they are senators or deputies. Even if, from a legal point of view, it has not been imposed such a condition in respect of those who initiate a legislative project, we believe that, on its own initiative, they should have been able to cover this "legal vacuum", through the use of the legal advice services of experts in the legal field. The coopting of such specialists would have meant to cover the legal gaps and it should be reflected in the quality of the legislative projects, which would thus correspond to the minimum requirements for initiating projects of normative acts. Otherwise, we risk that the subject of legislative projects will be proposals drawn up by persons who do not have the necessary specialization and who have as their objective the introduction/changing/completion of the legislation in accordance with the political requirements, but without taking into account the minimal legal requirements.

Admitting no legal obligation for the initiators to have legal knowledge[5], we are left with the fact that the current system for the adoption of a legislative project must fulfill their responsibilities to ensure that, in the end, the form in which it will be active in the legal fund to correspond, on the one hand to the constitutional principles, and on the other hand to the rules of the preparation of the normative acts.

The first filter in this respect is the Legislative Council, an "advisory specialized body of the Parliament, which signs off the projects of normative acts for the purpose

[4] The Legislative Council, the opinion no. 380/25.04.2018, concerning the *Legislative project of amendments and additions to the Criminal Code L238/18.04.2018*, pp.4-5, the document can be found at the URL: https://www.senat.ro/legis/PDF/2018/18L238LG.pdf, accessed on 08.05.2018.

[5] Although on the list of initiators we note that among them are included specialists in law (lawyers, academics, etc.) the document can be found at the URL: https://www.senat.ro/legis/lista.aspx?nr_cls=L238&an_cls=2018&nr_cls=L238&an_cls=2018, accessed on 09.05.2018.

of systematization, unification and coordination of the whole body of laws"[6]. Given the important role this body has, the present legislation requires certain conditions for the staff of the Legislative Council, and it may even talk about the retrieval of the principle of meritocracy, whereas "it may be named in the functions of the president of the Legislative Council, president of the station, head of department and adviser persons who had Romanian citizenship and residence in the country, as well as top legal training, and a good reputation professional and moral[7]". Whereas the procedure for appointing represents the result of a "selection system within the society and its foundation by levels of a decisional hierarchy, which will be occupied by the ones who are recommended by their knowledge, skills, training and experience and their character"[8], we can say that the selections complies with the principle of meritocracy. Unlike the senators and deputies, for whom there is no requirement to be jurists, the staff of the Legislative Council must have a top legal training to enable it to carry out its tasks in operation on the highest standards.

In principle, such as legal practice has shown, up to the present, the role of the statement of the unconstitutionality would be given to the Constitutional Court, whose decisions have an *erga omnes* effect, whereas "the constitutionality of the law is not a private option. Hence, a law declared contrary to the Constitution is unconstitutional for everyone and in all cases in which it is to be applied[9]". However, taking into account the specified, the Legislative Council would have had to intervene, even if it comes to observing an aspect of unconstitutionality to this part of the proposed legislation. In relation to the time and procedural step in which the legislative proposal is, the Legislative Council should have specify in its reply that he finds that the constitutional provisions are contradictory to those subjected to analysis. We believe that the intervention of this body would have been entitled, whereas one of its powers provided for in the law governing the setting up, organization and functioning of the Legislative Council explicitly specifies that the opinion given is advisory is issued and has as its object the "consistency of the proposed rules with the Constitution, with the framework laws in this field, with the rules of the European Union and international documents to which Romania is a party to[10]. Can it be a flaw of the Legislative Council as regards the inconsistency with the Constitution, or "the desire of politics" to complete the current legislation with the mentioned retroactive effect should be so great that are even accepted violations of the fundamental law? Whatever the response of the specified versions is, we believe that invoking them is unacceptable from the Legislative Council, whose staff, on the one hand, must be selected in accordance with the principle of meritocracy, and, on the other hand, due to the fact that the staff "may not join political parties"[11], thus being created the premises for the existence of an apolitical body.

[6] The Romanian Constitution, art. 79 (1).
[7] The law no. 73/1993, art. 18 (1).
[8] VEDINAŞ Verginia; VEDINAŞ Ioan Laurențiu, „The valences of meritocracy in the evolution of the Romanian society" published in The Public Law magazine, no. 3, Bucharest, 2015, p. 17.
[9] VIDA Ioan The formal Legistica: introduction to the technique and the legislative procedure, Ed. Universul Juridic, Bucharest, 2012, p. 210.
[10] The Law no. 73/1993, art. 3 (3) a).
[11] The Law no. 73/1993, art. 20 (2).

3. Reason invoked: legal vacuum?

The initiators of the *Legislative project of amendments and additions to the Criminal Code L238/18.04.2018* claim that in the current regulations "the part that relates to the scope and effects of the decisions of the Constitutional Court, when it declared unconstitutional, in whole or in part, certain provisions of criminalization from the criminal law, is missing"[12]. We believe that in order to analyze this aspect is important to know what criterion of analysis we choose, a formally one, when the adoption of the more favorable criminal law is the legislator's prerogatives, thus being required to comply with the rules of legislative technique in elaborating it, or a material criterion throughout which we compare the content of the rules before being declared unconstitutional, in whole or in part, to the one after the declaration of its unconstitutionality, when is deleted from its content the part which do not comply with the provisions of the Constitution, resulting in a law whose content can be assimilated to a more favorable criminal law.

The importance of the criterion chosen is also given by the time in which it applies. Thus, by choosing the formal criterion, we believe that the law subjected to examination under the exception of unconstitutionality will become a more favorable criminal law at the time that the legislator puts the aspects that were declared unconstitutional in accordance with the provisions of the Constitution. This can be done either within the period of 45 days from the publication of the decision of the Constitutional Court in the Official Gazette of Romania, or at a later date in the anticipation of this term. But, in order for a controversy as regards the nature of the more favorable criminal law to not exist, we consider that it is necessary to have an overlap in time of the material criterion with the formal one.

3.1. The putting in accordance of the provisions declared unconstitutional within the period of 45 days.

On the one hand, if within the period of 45 days the provisions declared unconstitutional are made in agreement with the fundamental law, then they are within a period in which they are suspended by law and we believe that they do not affect the situation of the persons concerned. The beginning of the period of suspension of the provisions declared unconstitutional coincides with the time of publication of the Court's decision in the Official Gazette, and the end of the term may not exceed the period of 45 days. We believe that during that period the suspension by law is not standstill for enforcement, in case a party is affected by the provisions of the criminal law. Although the provisions declared unconstitutional are suspended by law, for the duration of the suspension we consider that we cannot speak of a more favorable criminal law, but only after the entry into force of the law through which they are put in accordance with the provisions of the Constitution. In the case of a more favorable criminal law we consider

[12] *Explanatory reasons to the Legislative project of amendments and additions to the Criminal Code L238/18.04.2018*, p. 2, the document can be found at the URL: https://www.senat.ro/legis/PDF/2018/18L238EM.pdf, accessed from the date of 01.05.2018.

that an analysis of its effects could be made following the spirit of the law considered by the legislator in the case of appeal of the preventive measures. So, when a conclusion pronounced by the judge of the rights and freedoms, "through which it was disposed the taking or extension of preventive measures or by which it was found the termination of right"[13], is appealed, the opposition is not standstill for enforcement. In other words, the defendant keeps executing the preventive measure up to the settlement of the appeal[14]. Similarly, *mutatis mutandis*, the legal position of the party to whom it was accepted the exception of unconstitutionality shall be maintained until the date of the putting into agreement the unconstitutional provisions with the provisions of the Constitution. For this reason we believe that a situation like this should not born controversy, these provisions being suspended in a first stage by law, and the putting into agreement carried out within the 45 days corresponds to the time when the legal provision acquires the character of a more favorable criminal law.

3.2. The putting in accordance of the provisions declared unconstitutional outside the time limit of 45 days

On the other hand, if the agreement with the constitutional provisions is carried out at a later date in the anticipation of the period of 45 days from the date of the publication of the decision of the Constitutional Court in the Official Gazette of Romania, then we consider that throughout the duration of the fulfillment of 45 days and up to the time of the agreement with the constitutional provisions, there will be a separation between the formal criterion and the material one, whereas from the fulfillment of that period, these provisions have been removed from the legal active fund, therefore they no longer exist as a legal requirement, but an agreement with the constitutional provisions has not been carried out by the legislator.

And that is why, in the doctrine has been given the opinion that "decisions of the Constitutional Court through which the unconstitutionality is stated (...) have the nature of sources of criminal law, because, although they do not create rules of criminalization, they have the ability to eliminate from the force such a rule"[15]. Therefore, the ending of the legal effects of the unconstitutional provisions, at the expiration of the term of 45 days, is another way for the law to come out of force. Taking into account that they came out of force, "the unconstitutional provisions may no longer be put in accordance with the Constitution after the expiration of the 45 days evoked, but only within this period (in which they shall remain in force, being suspended by law)"[16]. Virtually, at the moment of the fulfillment of this term, we find in the legal system a provision which by its content,

[13] Criminal Procedure Code, art. 204 (3).

[14] ATASIEI Daniel, "Preventive measures and other procedural measures", in VOLONCIU Nicolae (coord.), The New Procedure Code with comments, Ed. Hamangiu, Bucharest, 2015, p. 457.

[15] STREȚEANU Florin, NIȚU Daniel, Criminal Law: the general part, Ed. Universul Juridic, 2014, p. 75.

[16] POPESCU Liviu, The Unconstitutionality of the criminalization law. The legal nature. Effects. Application: The Constitutional Court Decision no. 363/2015 concerning Article 6 of Law no. 241/2005", published in the electronic edition of the magazine Pro Law, no. 3-4, Bucharest, 2015, the document can be found at the URL: http://revistaprolege.ro/neconstitutionalitatea-normei-de-incriminare-natura-juridica-efecte-aplicatie-decizia-curtii-constitutionale-nr-3632015-referitoare-la-art-6-din-legea-nr-2412005/, accessed on 06.05.2018.

may be treated as a more favorable criminal law in comparison with the one previous to the declaration of unconstitutionality.

Even if the rigors of interpretation requires us to keep the same criterion from the beginning to the end, we believe that this would represent, in practice, a violation of human rights and freedoms, all the more so as calling into question the existence of a law which, by removing the provisions declared unconstitutional, it may be treated as a more favorable criminal law. We believe that this is the time interval which is able to arise polemics in respect of the assimilation to a more favorable criminal law, because after the putting in agreement with the provisions of the Constitution the formal criterion overlaps with the material one and should no longer exists any controversy.

In order to prevent such a situation, the constitutional provisions provide a real sanction for the legislator's lack of reaction, through the introduction of a special situation as regards the manner of termination of the effects of legal provisions, namely their abolition from the legal system whereas "the legal effects cease to exist 45 days after the publication of the decision of the Constitutional Court if, within this period, the Parliament or Government, as the case may be, do not put in agreement the unconstitutional provisions with the provisions of the Constitution"[17]

Thus, we consider that the constitutional provisions have pursued a lack of separation in time for the notion of the more favorable criminal law depending on the material criterion or formal one, by sanctioning the legislator for its lack of activity, in a special way, by eliminating the legal provisions. Therefore, we can say that this legislative project aims to cover the legislator's lack of reaction when correcting a situation of unconstitutionality regarding legal provisions. Actually, the culpability of the legislator in failing to fulfill the obligations stipulated by the Constitution, that of agreeing the unconstitutional provisions with the provisions of the Constitution, becomes the reason for the change of the Criminal Code.

4. The fulfillment of constitutional obligations: the solution for legal problems

We appreciate that the legislator's attention should be geared to the development of normative acts of a superior quality, by requesting assistance from law experts or by respecting the recommendations coming from specialized institutions, as is the case of the Legislative Council, whose opinion, although is the advisory, should involve a compliance of the legislator with the recommendations received on the occasion of its reception, or, in a situation where they are not supported, is established the obligation of motivating the non compliance "throughout the project's act of presentation or in an accompanying note"[18]. This compliance should be taken into account, especially when the opinion is negative, as there were situations when, although the Legislative Council has issued a negative opinion, the legislative project followed its course without being operated the indicated changes[19].

[17] The Romanian Constitution art. 147 (1).
[18] The law no. 24/2004, art. 10 (4).
[19] See in this respect the lack of compliance of the Government with the instructions received from the Legislative Council with the adoption of GEO no. 76/2016 when the opinion was negative but the procedure followed its course without being considered.

It is apparent that there is a problem at the understanding of the terms used level which, within the current meaning of the participants in the process of legislation, confines to their interpretation without taking into account the spirit in which they were used. What is then the meaning of imposing the obligation for the legislator to refer to the Legislative Council, if this procedure is seen in the strict sense of checking the request, as a procedural step[20], and regardless of the recommendations received, by a positive or negative opinion, the project pursues its course unchanged? Through this opinion the legislator took into account only obtaining a document or, in fact, pursued an improvement in the quality of the normative act? This seems to be the initiators of legislative projects' problem.

Without going into more detail about what the proposal to addition Article 4 from the Criminal Code with paragraph 3 "(3) In the case referred to in paragraph 2, the enforcement of the sentences, of the educational measures and the preventive measures, pronounced on the basis of the law laid down to be unconstitutional, considered constitutional only for certain versions of criminalization or through offences are totally or partially decriminalized, and all the criminal consequences of judicial decisions concerning these deeds must be analyzed, on its own initiative, as a matter of urgency, in maximum 5 days following their publication in the Official Gazette, by the courts of execution"[21], we hold the attention of the term of a maximum of 5 days. What is the logic of this term and how it came to him, only the initiators of the project may know. In other words, if we, the senators and deputies, have a term of 45 days in order to implement the provisions declared unconstitutional in accordance with the provisions of the Constitution, and we do not fulfill this constitutional obligation nor in terms measurable in years[22], this means that you, the courts of execution, have a maximum of 5 days to review all the consequences of our failure to comply with the our obligation. How many times should the number of courts of execution increase in order to cope with the number of decisions of unconstitutionality given in the case of the adoption of the legislative project in the present form, as well as a result of the high quality of the normative acts issued by Parliament and the Government?

In view of the issues raised, from the constitutionality point of view, contents of the project related to the supplementing of the Article 4 of the Criminal Code, as well as of the existence or not of a legal vacuum with regard to the so-called retroactive

[20] "After their development and the completion of the approval procedure referred to in paragraph (1), the law projects, legislative proposals, as well as the projects of emergency ordinances and resolutions with legislative character of the Government shall be subjected to the compulsory approval of the Legislative Council", Law no. 24/2000, art. 9 (2).

[21] *Legislative project of amendments and additions to the Criminal Code L238/18.04.2018,* pp. 1-2, the document can be found at the URL: https://www.senat.ro/legis/PDF/2018/18L238FG.pdf, accessed from the date of 01.05.2018.

[22] Invoking the fact that some texts of the Criminal Code had been declared unconstitutional, the initiators note in this respect the Constitutional Court's decisions who are years old, so "The Decision 265/2014 with reference to Article 5, Decisions 68/2017 and 405/2016 with respect to Article 17, the Decision 368/2017 with respect to Article 35, the Decision 11/2015 regarding Article 1121, Decision 508/2014 with respect to Article 159, the decision of the CCR 224/2017 with respect to Article 335 and the decision of the CCR 732/2014 regarding Article 336", *Explanatory reasons to the Legislative project of amendments and additions to the Criminal Code L238/18.04.2018*, p. 2, the document can be found at the URL: https://www.senat.ro/legis/PDF/2018/18L238EM.pdf, accessed from the date of 01.05.2018.

effect of the Constitutional Court's decisions through which the unconstitutionality of legal provisions which may be assimilated to a more favorable criminal law is stated, we find that there is a period of time which may constitute a source of doctrinaire disputes within the meaning of: can decisions of the Constitutional Court be assimilated with a more favorable criminal law or not, but this is due to the fault of the Government or the Parliament who have not fulfilled their constitutional obligations in due time. Starting from this premise, the legislator's fault, we believe that it would be much more beneficial for the Romanian legal system that the provisions of the legislative project would not enter into force, whereas the effects would not be reflected only on the Criminal Code and the Criminal Procedure Code, although it has not been provided for by the initiators, but their lack of the specialists quality is perhaps forgivable, but also on the Constitution, its revision being required. Thus we note that we are at a time of inversion of the values, when the Constitution no longer represents the first law governing the method of creating the other laws, in order to defend the human rights and freedoms, but other rules come to impose the revision of the Constitution.

Therefore, it should be noted that there is no indication of the affecting of the principle of legal stability, which will come into spin whereas each new decision of unconstitutionality will generate the effects of the more favorable criminal law, nor in terms of the number of applications that will be registered at the court/court of execution. Because of this, we believe that instead of confusing the legal system by placing two paragraphs which may lead to a blockage of both the courts of execution, as well as of the system itself, those 171 initiators should protect the legal system by simply fulfilling their constitutional obligations within the time limit provided for in the fundamental law, and when drafting normative acts, to do it so in compliance with the constitutional provisions in the spirit in which they were created, to minimize the number of situations in which the Constitutional Court decide that certain legal provisions are unconstitutional. As the quality of the normative acts drawn up will increase, the number of their decisions regarding the unconstitutionality will decrease and there will be no need for amending the Criminal Code, the Code of Criminal Procedure, the Constitution, etc.

We however admit that the retroactive effect problem, not of the decisions of the Constitutional Court, but the law itself, remains open, which, from the material point of view, by eliminating the provisions declared unconstitutional, from the moment of the ending of the period of 45 days, and until the date of the putting in accordance with the constitutional provisions, which can be interpreted as the more favorable criminal law. Who is responsible for the creation of this situation through the non-fulfillment of constitutional obligations? Nobody. With all this, in a state governed by the rule of law this "nobody" should be held responsible for, as that effect is assimilated to a more favorable criminal law, and therefore it affects the rights and freedoms of an indefinite number of persons. This is way the logic which should have been taken into consideration for granting the supremacy of constitutions, should put to the foreground "the granting of human rights. The purpose of this supremacy is not the logical organization of the legal system, but the protection of human beings against possible excesses of the exercising political power"[23].

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[23] DĂNIŞOR Dan Claudiu „The ordinary courts in the field of constitutional justice (I) - Litigations of rights and liberties", published in Dreptul, no. 11, Bucharest, 2017, p. 68;

THE CORRELATION BETWEEN MEDIATING AND TERMINATING COLLECTIVE LABOR AGREEMENTS AND WHAT INITIATES COLLECTIVE LABOR DISPUTES – A COMPARATIVE ANALYSIS, ROMANIA AND THE REPUBLIC OF MOLDOVA

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Cătălin FĂGHIAN**

Abstract: *The legislation and jurisprudence of Romania and the Republic of Moldova have contributed as a starting point for the national doctrines of the two countries, in an attempt to highlight the fact that the two major institutions of labor law, more specifically collective labor agreements and collective labor disputes, influence one another having an inversely proportional relationship, in the sense that when the employees refuse to start, continue or terminate collective negotiations, they trigger collective labor disputes. Equally important to point out is that once the collective labor agreements are mediated and terminated, generating collective labor disputes becomes impossible or unlikely to be generated.*
Keywords: *collective labor agreements, collective labor disputes, mediating, terminating.*

1. Introduction

Legally, collective labor agreements are defined as:

– according to the Romanian legislation, they are signed conventions between employers and employers' organizations on one hand, and employees that are represented through unions or under other conditions provided by law. on the other, through which terms regarding work conditions, salary, but also other rights and obligations resulting from work relations[1] or signed conventions between employers and employers' organizations, that appoint terms regarding the rights and obligations resulting from employment relations[2];

– according to the Republic of Moldova's legislation, they are legal acts which regulate employment relations and other social relations in the work place, concluded in written form between employees and employers along with their representatives[3], the content and the structure of the collective labor agreements being determined by all partied involved.

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[1] art. 229. (1) from Romania's Employment Code, Law nr.53/2003, republished in M.Of. nr. 345/2011.

[2] art.1, (i) from Romania's social dialogue, nr. 62/2011, published in from Romania'a M.Of., into force from May 13, 2011.

[3] art. 30, (1) from Law nr. 154 from 03. 28.2003, Emplyment Code of the Republic of Moldova, published at 07. 29.2003 in the Official Journal, Nr.159-162.

Furthermore, in law literature, many definitions for the collective law agreement have been proposed, being considered[4]:

„- some kind of law regulation of the employment agreed between the two production factors: equity, represented by owners, and employment represented by employees[5];

„- written agreement, that is prior to negotiation between social partners at different levels, which aims at creating a single, general, framework for proper work relation acts, regarding work conditions, along with any other conveyed aspects assumed by the parties in direct or indirect connection to employment relations"[6];

In turn, legally, collective labor disputes are defined:

- In Romanian legislation, as work disputes that occur between employers and employees in relation to the commencement, development or termination of the negotiations regarding the contracts or collective labor agreements[7];
- In the Republic of Moldova legislation as unsolved disagreements between employees (or representatives) and employers (or representatives) with reference to laying down employment conditions (salary included) about conducting collective negotiations, terminating, modifying and implementing collective labor agreements along with collective conventions regarding the employer's refusal to take into account the position of the workers' salary representatives in the process of adopting, in the unit, legal acts including norms of law employment, as well as disagreements regarding economic, social, professional and cultural interests of the employee, that have surfaced at different levels among social parties[8], the exact moment that would trigger a collective labor dispute being represented by the date at which the employer announces the decision (or his representatives at different levels) or, where appropriate, to the public authority thereof, regarding the total or partial refusal to fulfill the employees' claims, or the date the employer (his representatives) or the specified public authority was expected to be in charge of these claims, or the date the official record was assigned about the disputes within collective negotiations [9]. And the Republic of Moldova's legal doctrine assumed this legal definition, viewing it exhaustive, without providing clarifications, additions or supplements to the mentioned legal text [10].

The present text is focused on the following legal aspects:

- Mediating and terminating collective labor agreements;
- In particular, in relation to the cause for collective labor disputes, due to declining negotiations and terminating these collective labor contracts, specifically since the law highlights the fact that by terminating collective labor contracts the

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[4] Eduard, Boişţeanu, Theoretical - practical fundamentals regarding judicial institution of the social partnership in the work area, PhD thesis in Law, Moldavian State Law Faculty, Chisinau 2015.

[5] G. Plastară, „Collective law contract", article, in the publication „Democrația", nr.10/1919; p.3.

[6] M. Volonciu, „Negotiation of the collective labor contract", pg. 205, Ed. Omnia –UNI-SASD, 1999, p 250.

[7] art.1, lit o), from Social Dialogue waw, nr. 62/2011.

[8] art. 357, alin.1 from the Republic of Moldova Labor Code.

[9] art. 357, alin.2, idem.

[10] Teodor, Negru, Cătălina Scorțescu, Labor Law – university course, pg. 295, Ed. Labirint-Cutaşevici I. Chişinău-2010, p 320.

purpose is to promote and defend the interests of the parties in the agreement, to prevent and limit labor disputes in order to secure social cohesion[11].

2. Comparative analysis

In both labor laws from Romania and the Republic of Moldova, terminating a collective labor law agreement is preceded by its negotiation.

In Romanian legislation, Title VII of Law nr. 62/2011, is regulated the manner of organization and pursuit of these collective negotiations, as well as the conclusion of the collective labor contracts[12].

Collective labor agreements can be negotiated at the level of the unit, groups of units and business lines[13], and as part of the collective labor agreements category are included the conventions between the parties from the agreement, through which the collective labor conflicts are being resolved, along with arbitrary decisions in this matter starting with the designated date of judgement. Arbitrary decisions are transmitted to the trustee of the collective labor agreements for registration[14].

From a legal perspective, collective negotiation is mandatory only at unit level, with the exception of the situation in which the unit has less than 21 employees[15], the negotiation initiative pertaining to the employer or the organization[16]. With no less than 45 calendar days before the expiry of the collective labor contract or the expiry of the period of applicability of the stated terms in the amendments of the collective labor agreements, the employer or the organization will initiate the collective negotiation[17].

In the case where the negotiation is not initiated by either the employer or the organization, this negotiation will commence at the written request of the trade unions association representatives or the representatives of the employees, within 10 calendar days from the requested application[18].

The duration of a collective negotiation may not exceed 60 calendar days, unless there is an agreement between parties[19], therefore the collective labor contracts may potentially provide regular renegotiation of any agreed terms between the involved parties[20].

Both parties are equal and free when negotiating the terms and when terminating collective labor agreements[21], and any interference of the public authorities in any form or manner regarding the negotiation and termination of these contracts[22] is prohibited.

[11] art.1, lit i) final thesis, from the Social dialogue law, nr. 62/2011.
[12] art. 127, idem.
[13] art. 128, alin.1, idem;
[14] art. 128, alin.4.
[15] art. 129, alin.1.
[16] art. 129, alin.2.
[17] art. 129, alin.3.
[18] art. 129, alin.4.
[19] art. 129, alin.5.
[20] art. 129, alin.6.
[21] art. 131, alin.1.
[22] art. 131, alin.2.

The terms of the collective labor contracts may provide rights and obligations only within the limits and the conditions laid down by law[23]; at the termination of the collective labor contracts, the legal provisions referring to the employees' rights being minimum in nature[24], the collective labor agreements are unable to include terms that would establish rights of an inferior level to the ones agreed to through the applied collective labor contract concluded at top-level[25].

The collective labor law will be concluded in a determined period of time, which cannot be less than 12 months and more than 24 months[26], both parties being able to prolong the application of the collective labor agreement under the conditions set out by the social dialogue law, nr. 62/2011, once, by not more than 12 months[27]; under the assumption that within a unit, there is not a collective labor agreement, all parties may agree its negotiation at any moment[28].

The employees have the right guarantee by law to set off conflicts regarding the commencement, development or termination of the negotiations about the contracts or collective labor agreements[29], however, the employees' claims for whose solution, it is necessary to adopt a law or a legislative act, cannot constitute a reason for collective labor disputes[30].

Collective labor disputes can be triggered by the following situations[31]:

a) The employer or the organization refuses to commence the negotiation of a contract or the collective labor agreement, on the conditions that such a contract or agreement are not terminated, while the previous one has concluded;

b) The employer or organization refuse the claims formulated by the employees;

c) Both parties do not reach an agreement regarding the conclusion of a collective labor contract or agreement until a mutually agreed date is fixed for the conclusion of these negotiations.

When there are prerequisites regarding what provoked a collective labor conflict, the trade union organization or the employees' representatives may refer the matter in writing, like the employer organization about the situation at hand, indicating the employees' claims, what motivated them, as well as putting forward solutions, the employer being bound to accept and register the written request[32], this requirement is deemed to be fulfilled even in the case where the claims, the reasoning and solutions are addressed to the concerned trade union, or the allected representatives of the union when thy meet with the employers' representatives or the organization's representatives, only if the discussion is included in an official record [33].

[23] art. 132, alin.1.
[24] art. 132, alin.2, from the Romanian Law nr. 62/2011;
[25] art. 132, alin.3.
[26] art. 141, alin.1.
[27] art. 141, alin.2.
[28] art. 141, alin.3.
[29] art. 156.
[30] art. 157.
[31] art. 161.
[32] art. 161, alin.1.
[33] art. 161, alin.2.

Within two days following the receival of the referral, the employer or the organization has the obligation to answer in writing to the trade unions, or, in their absence, to the employees' representatives, specifying their stand on each of the formulated claims[34].

In the case where the employer or the organization had not answered to all the formulated claims, even if gave a reply, the trade unions or the employees' representatives, where appropriate, may not agree with their formulated stand, creating the right conditions for a collective labor conflict to surface.

Must be mentioned the fact that through the legal period of validity of a contract or collective labor agreement, the employees cannot incite a collective labor dispute[35].

In the Republic of Moldova, labor law gives employees' representatives the right to initiate and participate at collective negotiations for the compiling, concluding, modifying or completing the collective labor contract or the collective conventions[36], the representatives of the parties receiving the written proposal of commencing the collective negotiations are obliged to proceed their investigation within 7 calendar days from the day of endorsement[37].

Participants of the collective negotiations are free to select the aspects that will constitue the regulatory goal of the collective labor contracts and collective conventions [38], both parties having to mutually provide the necessary information for the development of the collective negotiations at the latest two weeks from the time of the request[39], while the terms, place and the manner of conducting the collective negotiations shall be determined by the representatives of both parties who are part of the mentioned negotiation[40].

If during the collective negotiations period of time, a coordinated decision regarding the aspects discussed, has not been adopted, an official report shall be drawn up on the existent disagreements, how to regulate them during the collective negotiations process, in order to terminate, modify or complete the collective labor contract or the collective convention, performed in the legal manner defined by the Labor Code of the Republic of Moldova[41].

Thereby, the purpose of negotiating and concluding collective labor contracts is diverse, to be more precise: promoting equal working employment relationship, that would generate social security for the workers governed by the employers of a company; to prevent and limit labor conflicts, but also strikes that could affect the profit of the employer; and lastly, to ensure social peace[42].

[34] art. 161, alin.3.
[35] art. 164.
[36] art.26, al.1 from the Republic of Moldova Labor Code.
[37] art.26, al.2 from the Republic of Moldova Labor Code.
[38] art.27, al.1.
[39] art.27, al.6.
[40] art.27, al.8.
[41] Idem.
[42]Gioni Popa-Gavrilovici, Cătălin Făghian, „The influence of abandoning the negotiation and termination of Sole Collective labor contracts", article, pg.2/art., presented at the Conference <<Romanian Law, 100 years since Great Britan. Continuity and>>, organized in March, the 30, 2018, at Târgovişte, at Dâmbovița Tribunal & the Association for Profesional Work Relations & the Assciation of Judicial Officers from Romania– Affiliate Dâmbovița.

Romanian case-law recognizes that: *the purpose for concluding such contracts is to promote equal working relationships, liable to ensure the social protection of employees, preventing or limiting collective labor conflicts or strikes".* [43]

To conclude

Based on the legislation of the Romanian law nr. 62/2011 regarding the social dialogue, we can point out that: collective labor disputes represent labor conflicts that arise between employers and employees, the reason behind it being the commencement, progress or termination of the negotiations in respect to the contract and collective labor agreements. Thereby, employers' refusal to commence, advance or terminate collective negotiations, serves as a legal basis for the initiation of collective labor disputes.

And by submitting reports to the provisions of ER 357, (1) from the Republic of Moldova Labor Code, we can emphasize that the collective labor dispute is the conflict that arises between employers and employees, for the reason, amongst others, carrying out collective negotiations, concluding collective labor contracts and collective conventions.

Therefore, in Romania, collective labor contracts fall only within employers' refusal to commence, advance and terminate collective negotiations, and on no account to the employees' refusal to – after commencing, advancing and terminating collective negotiations – to terminate collective labor contracts, unlike the Republic of Moldova where initiating collective labor disputes can arise even in the assumption of employers' refusal to terminate collective labor contracts and collective conventions.

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8. Law nr.154 din 28.03.2003, Republic of Moldova Labor Code, published in July 29, 2003, in the Official Journal, Nr. 159-162;
9. www. avocat-dreptul-muncii.eu, Civil Judgement, nr. 993 from April 19, 2013, issued by Galati Tribunal.

[43] Idem.

SOME ASPECTS OF GUILT AS A SUBJECTIVE ELEMENT IN THE ANALYSIS OF CIVIL TORT LIABILITY FOR OWN ACT

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Abstract: *In order to incur civil liability, it is necessary to meet cumulatively the following conditions: the existence of damage; the existence of an illicit act; the existence of a causal relationship between the unlawful act and the damage; the existence of the guilt of the person causing the damage. It should be emphasized that the form under which this guilt is presented has no relevance in the field of civil law, which may consist of intention or the smallest fault, the consequence being the same in any situation, namely, the obligation of the guilty party to fully repair the damage. The common framework for the establishment of tort law civil liability for the act is established by the provisions of articles 1357-1371 Civil Code. Guilt is another distinct and essential condition of civil tort liability and represents the mental attitude of the perpetrator of the act, from the moment of its commission. To emphasize the importance of guilt as a subjective element, it should be noted that in article 16 Civil Code, the condition of guilt is found. In this context, the fault can no longer constitute the keystone in analyzing the conditions to be fulfilled in order to incur the tort of civil liability, this place being taken over by the damage, as a genuine condition sine qua non for the admission of the action. For these and other reasons, reparation of the damage acquires new theoretical and practical valences, which implies a detailed deepening of the matter.*
Keywords: *civil liability, the damage, the consequences.*

1. Introduction

Examining these provisions, a distinction should be made between the intellectual and the voluntary factor. [1]

Thus, the intellective factor implies its predictability/possibility, the consciousness of facts/consequences, which implies an evaluation with the help of a scale of values existing in the society in which it lives. [2]

The volitional factor involves deliberation and decision. Thus, in doctrine[3], it is argued that liability will only be committed if the author of the illicit act chose the antisocial conduct.

The texts of the law provided in article 1357-1358 of the Civil Code establishes the principle of liability based on the guilt of the author of the illicit and prejudicial act. As such, the obligation to repair the damage lies with the person who caused it by an unlawful act „*committed with guilt*"[4]. Moreover, it is stated that „the author of the

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[1] Sache Neculaescu, Livia Mocanu, Gh. Gheorghiu, Ilioara Genoiu, Adrian Țuțuianu, *Instituții de drept civil. Curs selectiv pentru licență,* Universul Juridic, Bucharest, 2013, p. 293.

[2] *Ibidem.*

[3] *Ibidem.*

[4] Art. 1357 Civil Code.

damage is responsible for the slightest fault"[5], which leads to the idea that the obligation to repair exists both in the case of intentional and non-intentional guilt.

We emphasize the aspect of guilt as a necessary condition only in principle, when civil liability is called subjective responsibility, because its scope is, by excellence, the liability for damages caused by its own illicit act.[6]

The Romanian legal doctrine[7] defines guilt as „*the psychic attitude of the author of the illicit and degrading act of the respective act and of the consequences of that act*".

2. The components of guilt

As provided by the Civil Code[8], guilt has two forms: intention and guilt. These forms of guilt are described in the provisions of article 16 paragraph 2 and 3 of the Civil Code, being essentially taken over from criminal law. [9] Thus, the act is committed intentionally (it is idiosyncratic) when its author provides the result of his act and pursues his production, or, although he does not pursue it, accepts the possibility of producing this result.[10] From this definition it follows that the intention can be of two kinds: direct intention (direct downward) and indirect intention (indirect downward).

The direct intention is when the perpetrator provides for the result of his act and seeks to occur, while the indirect intention is in the situation where the perpetrator provides the result of his act and, although he does not pursue it, accepts the risk or possibility that the result is produced.[11]

Regardless of the form, in the case of intent, both elements of guilt - intention and volition - are obvious and very easy to notice.[12]

The act is committed by fault in the situation where the author provides the result of his act, but does not accept it, reasoning without reason that it will not occur or, as the case may be, does not foresee that result, although it should have foreseen it.[13]

Thus, the guilt has two forms: the guilt with foresight (imprudence) and the guilt without foresight (negligence).

The guilt with foresight occurs when the author provides the result of the act or does not accept it, hoping and sometimes believing that it will not occur, while the guilt without foresight is when the author does not foresee the outcome of the act although under the circumstances he had to and could foresee it.[14]

[5] Art. 1357 para. 2 Civil Code.
[6] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Curs de drept civil. Obligațiile,* Universul Juridic, Bucharest, 2015, p. 351.
[7] L.B. Boilă, *Vinovăția, fundament al răspunderii civile în ambele sale forme, în textele noului Cod civil, ca şi în ale celui precedent,* in „Dreptul" no. 1/2012, pp. 151-185; M. Eliescu, *Răspunderea civilă delictuală,* Academiei, Bucharest, 1971, p. 176.
[8] Art. 16 para. 1 Civil Code.
[9] Art. 16 Criminal Code: Denisa Barbu, *Drept procesual penal. Partea generala,* Lumen, Iasi, 2016, p. 38.
[10] Acording to art. 16 para. 2 Civil Code.
[11] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *op.cit.*, p. 352.
[12] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Tratat de drept civil. Obligațiile conform noului Cod civil,* Universul Juridic, Bucharest, 2012, p. 449.
[13] Acording to art. 16 para. 3 Civil Code.
[14] Liviu Pop, s.a., *op. cit.,* p. 353

Regarding the elements of guilt, both in the case of the guilt with foresight and in the case of the guilt without foresight (negligence), the intellectual factor is manifest, while the elective element is only evident in the case of the guilt with foresight (imprudence).

We emphasize that the distinction between the forms of guilt is usually not of practical significance, because the civil reparation liability has as a result not only the condemnation of the perpetrator, but also the complete reparation of the injurious damage caused to the victim, the quantum of the reparation depending on the extent of the damage rather than the guilt.

However, in some cases, the distinction between forms of guilt is of interest, if two or more persons are jointly and severally liable for the damage.[15]

Thus, the burden of reparation shall be proportionally divided according to the contribution of each to the damage or, if it can not be established proportionally, with the intent or severity of each individual's guilt.[16]

It can also be said that one who did not represent his act and did not foresee the injurious consequences and which, according to circumstances, should not and could not objectively foresee them, acts unintentionally.[17]

As the Civil Code[18] also provides, the civil liability for torts operates, in principle for the easiest guilt (*in the law Aquilia et levissima culpa venit*).

Regarding the degree of culpability, according to the criterion of the intensity/gravity of the guilt in both forms, still under Roman law, the distinction between serious guilt (*culpa lata*), mild guilt (*culpa levis*) and very mild guilt (*culpa levissima*) was made.

The serious guilt (*culpa lata*) is sometimes assimilated to the intention, according to the *culpa lata dolo aequiparatatur* adage.

The classic criterion to judge the degrees of culpability is the abstract standard formulated in the phrase *bonus pater familias*.[19]

A serious guilt is that fault that someone would not be guilty even of the furthest man, in the sense that any person with minimal diligence could have predicted the outcome of the act[20].

Mild guilt (negligence) is the imprudence that someone would not be guilty of a „*good family parent*", that is, a man with average, normal diligence.[21]

The very mild guilt is the one that could only be avoided by „*an excellent family parent*", thereby understanding the man with maximum diligence, having a predictable ability out of the ordinary.[22]

However, this classification of fault was not taken up in the old Civil Code and is not found in the new Civil Code.

However, Art. 16 par. 3 of the final thesis in the Civil Code defines the serious fault as „*when the author acted with negligence or imprudence that neither the most*

[15] Acording to art. 1382 Civil Code.
[16] Acording to art. 1383 Thesis I Civil Code.
[17] Liviu Pop, s.a., *op. cit.,* p. 450.
[18] Art. 1357 para. 2 Civil Code.
[19] Sache Neculaescu, s.a.,*op. cit.,* p. 293.
[20] Liviu Pop, ş.a., *op. cit.*, p. 354.
[21] *Ibidem.*
[22] *Ibidem.*

deficient person would have manifested in his own interests" and the principle of liability for any fault being consecrated, art. 1357 par. 2 of the Civil Code states that: „*the author of the damage shall be liable for the mildest fault*" in the matter of civil liability for his own act.

In view of the above, we can say that the position and role of the guilt in the structure of tort liability can be tinted.

Thus, a guilt *in abstracto* does not exist, it cannot have a conceptual autonomy, being merely the expression of causality of prejudice, in the sense of subjective imputation.[23]

For subjective accountability, fault is a condition of existence, while objective responsibility does not require fault. The latter is based not on fault, as it claims, but on a causal assumption between the situation, the quality of the person to be held responsible and the detrimental act.[24] The presumption, according to some authors[25], is *iuris tantum*, which can be overturned, not by the proof of fault, but by the proof of the foreign cause.

Thus, the gravity of the guilt also has some importance in the matter of tort law, as follows:

a) in the case of the joint guilt of the author and the victim of the injury, a circumstance in which the gravity of the guilt of the two is taken as a criterion for determining the extent of the indemnity owed by the author;[26]

b) in the situation regulated by art. 1354 par. 1 of the Civil Code, according to which "*the victim cannot obtain reparation for the damage caused by the person who has given him unprofitable help or the work, the animal or the building he used free of charge, unless he proves the intention or serious fault of the person, according to the law, he would have been called to answer*";

c) in the case of exclusion or limitation clauses, clauses which, according to art. 1355 par. 2 Civil Code, "*are valid only if, exceptionally, they exclude liability for damages caused by mere negligence or negligence to the goods of the victim*."

The Civil Code[27] establishes the so-called "*particular criteria for assessing guilt*", stating that for the "*appraisal of guilt*", account shall be taken of the circumstances in which the damage occurred, alien to the person of the perpetrator of the act and, where appropriate, the damage was caused by a professional in operating an enterprise.

Contrary to an authoritative opinion that approves these criteria, pointing out that "*the author will be at fault only if he proves that he did not have the prudence and diligence of the human model under the same concrete circumstances*", we associate our opinion[28] and we argue that such criteria for "objective fault" are contrary to the concept of guilt, as described in the current Civil Code.

Therefore, we consider that once the guilt has been defined according to the model of the criminal liability stipulated in art. 16 Criminal Code, it could only be assessed in relation to the attitude of the perpetrator to the outcome of his actions, so that, however

[23] Sache Neculaescu,s.a., *op. cit.,* p. 293.
[24] *Ibidem.*
[25] *Ibidem.*
[26] Acording to art. 1383 Civil Code; Ion Dogaru, Pompil Drăghici, *Drept civil. Teoria generală a obligațiilor,* II, CH Beck, Bucharest, 2014;, p. 378.
[27] Art. 1358 Civil Code.
[28] Sache Neculaescu, s.a.,*op. cit.,* p. 294.

"private" would be "other circumstances", they are indeed "foreign", not only to the author, but also by the new advanced concept.[29]

In criminal law, from where the definition of guilt is taken, such criteria only concern the individualization of punishment, not the degree of guilt of the person called to respond.

Thus, when establishing the guilt, when embodying the forms of intent, there is no difficulty, but it is quite different when the fault is established, consisting of imprudence or negligence.

We note that in both cases[30] there are some deficiencies in the intellectual process to imprudence, the perpetrator foresees the consequences of his act, but he rightly considers that they will not occur or that he will avoid them, and negligently, the perpetrator does not foresee the consequences of his illicit conduct, though he had to foresee them.[31]

But what would be the criterion to consider that the author considered "without foundation" or that the author "had and could" foresee the outcome?

Discussions in the literature have oscillated[32] over time between two fundamental concepts and some intermediate concepts. The lack of legal criteria in the old Civil Code for the determination of culpability has given rise to a series of debates and jurisprudence and, as a result, three points of view have emerged:

- in a first conception, a subjective, concrete assessment criterion has been adopted, starting from the actual capacity of each subject in part to fully understand and appreciate the significance of their own actions in their social design.[33]

Thus, we believe that the behaviour of the author of the illicit act should be compared with his usual conduct.[34]

- in a second conception, an objective criterion was adopted, of reporting the behaviours of the concrete author to the model behaviour of an abstract person, is taken as a comparison term.[35]

This view is appropriated by the majority judicial practice, arguing that it is necessary to consider the level of prudence and diligence required by the society of a man of average ability to be cautious and diligent.

Thus, if there is wider application of the subjective criterion of concrete judgment in criminal matters, this does not mean that the objective criterion is excluded.

[29] The Air Code of 30th December 1953 does not release the aircraft operator in the course of the flight, unless it can be attributed to the victim an intention or at least one serious guilt (Article 97); see M. Eliescu, *Răspunderea civilă delictuală,* Academiei, Bucharest, 1971, p.184.
[30] Liviu Pop, ş.a., *op. cit.*, p. 354.
[31] C. Stătescu, *Drept civil. Teoria generală a obligaţiilor,* IX, revized and added, Hamangiu, Bucharest, 2008, p. 201.
[32] *Ibidem*, p. 181
[33] *Ibidem*, p. 181.
[34] Liviu Pop, ş.a., *op. cit.*, p. 283; P. Anca, *Faptele ilicite,* in Popescu/Anca p. 188.
[35] C. Stătescu, *op. cit.*, p. 181; M. Eliescu, *op. cit.*, p. 185 and the following; I. M. Anghel, Francisc Deak, Marin F. Popa, *Răspunderea civilă,* Ştiinţifică, Bucharest, 1970, p. 134 and the following; Tudor R. Popescu, Petre Anca, *Teoria generală a obligaţiilor,* Ştiinţifică, Bucharest, 1968, pp. 197-198.

As such, it is considered that the outcome was predictable then "any normal and careful man should have foreseen it".[36]

In civil law, it is preferable to adopt, as a rule, the objective criterion[37] in the assessment of the guilt, supplemented by some subjective elements related to the concrete circumstances arising from the place, the time, the circumstances in which the act was committed, the qualities and the preparation of the active subject, as well as other such circumstances.[38]

According to some authors[39], the objective, abstract criterion, "simply means that the court must adopt the normal, informed, prudent man as a reference; *un bonus pater familias*".

This objective criterion is both a dynamic and variable criterion. It is dynamic[40], because its level of exigency grows with the development of society, material and spiritual changes, with the development of human sciences and knowledge, as the general development of citizens' education.

It is variable[41], since its application must take into account the specific conditions in which it operates, such as the external circumstances of the conduct (time, place, etc.). Also, the variability results from the fact that the level of exigencies grows as a person with specialized professional training in the respective field acts in comparison with the activity of a nonprofessional. It is also variable due to the type of activity during which the illicit act of injury occurred, i.e. an ordinary activity, sport activity, etc.

- in a third, intermediate, conception, it was considered that the assessment of the guilt is also based on the subjective criterion, that is, by reference to the behaviour of a normal, abstract man, acting with diligence and prudence towards society and his fellow men, that is, a *bonus pater familias.*[42] This criterion is complemented by some objective circumstances, in our opinion, art. 1358 of the Civil Code stating the intermediate solution according to which the fault is assessed according to the objective criterion, also taking into account "the circumstances in which the damage occurred, foreign to the person of the perpetrator of the act, and, if the case, the damage was caused by a professional in operating an enterprise."

From this, we can conclude that we cannot take into consideration the subjective internal circumstances and traits of the author of the detrimental act, such as age, sex, temperament, skill, etc.[43] This view is also supported by the French literature.[44]

[36] Vintilă Dongoroz, *Explicații teoretice ale Codului penal român,* vol. I, II Edition, CH Beck, Restitutio, Bucharest, 2012, p. 120.

[37] Tudor R. Popescu, Petre Anca, *Teoria generală a obligațiilor,* Ştiințifică, Bucharest, 1968, p. 188.

[38] C. Stătescu, *Drept civil. Teoria generală a obligațiilor,* IX, revized and added, Hamangiu, Bucharest, 2008, p. 181.

[39] Ibidem, p. 181; Boris Starck, *Droit civil. Obligations. Contrat.* III, neat edition by H. Roland şi L. Boyer, Litec, Paris, 1989, p. 159.

[40] C. Stătescu, *op. cit.*, p. 181.

[41] *Ibidem*; M. Eliescu, *op. cit.*, p. 188 and the following.

[42] M. Eliescu, *op. cit.*, p. 188 and the following; C. Stătescu, op. cit., pp. 201-202; L. Pop ş.a., *op. cit.*, pp. 453-545.

[43] Liviu Pop, ş.a., *op. cit.*, p. 355.

[44] G. Vincy, P. Jourdain, *Les conditions de la responsabilité,* 4e édition,m Ed. L.G.D.J., Paris, 2013, pp. 401-403; François Terré, Philippe Simler, Yves Leguette, *Droit civil. Les obligations,* 11e édition, Dalloz, 2013, pp. 711-712.

Referring to such "private" and at least unusual criteria in civil law, novelty, the French authors[45] consider the justifying facts that are external circumstances[46] and the clauses of irresponsibility, the unilateral attitude of the victim.[47]

Far from the minimum requirements of codification, the normative statement does not offer at least the slightest explanations, such as: the method of exemplification, in order to see what the authors of the normative text had in mind. Does it refer to the causes defined below, to art. 1360-1364 Civil Code?

The answer, from our point of view, cannot be affirmative, because the legitimate defence and the disclosure of commercial secret are not alien to the person of the author, only the necessity of this character. We also note that these criteria have not been determined by lack of systematization.

Thus, after the rule provided by the provisions of art. 1358 Civil Code, which refers to these criteria, is interfered with the provision of art. 1358 of the Civil Code regarding the reparation of the prejudice consisting in the injury of an interest, and only then the four cases are defined, without showing that they are those stipulated by art. 1358 Civil Code or that they are different.[48]

Conclusions

We consider that a new wording of the provisions of art. 1358 Civil Code. Concerning the last part of the statement regarding the damage caused by a professional, we emphasize that art. 3 par. 1 of the Civil Code states that "*the provisions of this Code also apply to the relationship between professionals and their relationship with any other legal subject*". According to art. 3 par. 2 Civil Code: "*all who exploit an enterprise are professionals*".

Some authors[49] also support the need for tort law as a distinct condition for tort or delict civil liability.

We emphasize that this is only an element of the condition of the culpable guilt of the author of the illicit act, because there can be no guilt if there is no discernment for the committed act.[50]

The civil tort liability under the Civil Code also operates within the framework of the civil action related to the criminal proceedings against the persons responsible[51] under the civil law for the damage caused by committing the act which is the subject of the criminal

[45] François Terré, Philippe Simler, Yves Leguette,. *Droit civil. Les obligations,* 11e édition, Dalloz, 2013, pp. 742-745.
[46] For example, order of law or legitimate authority, the state of necessity.
[47] For example, legitimate defense, its consent. To be seen: Fr. Terré, Ph. Simler, Y. Leguette, *op. cit.*, p. 743.
[48] Sache Neculaescu, ş.a., *op. cit.*, p. 295.
[49] I.M. Anghel, Fr. Deak, M.F. Popa, *Răspunderea civilă,* Ştiinţifică, Bucharest, 1970, p. 71; I. Albu, V. Ursa, *Răspunderea civilă pentru daune morale,* Dacia, Cluj-Napoca, 1979, p. 29.
[50] Ion Dogaru, Pompil Drăghici, *op. cit.*, p. 484.
[51] Denisa Barbu, *Some Aspects Concerning the Civil Action in the Criminal Proceedings.* Prezented at World Lumen Congress Logos Universality Mentality Education Novelty |15th Anniversary Edition|Iasi, Romania|April 12-17, 2016. Online at: http://conferinta.info/program-wlc2016/ - Logos Universality Mentality Education Nolelty 2016 Book Series European proceedings of Social and Behavioural Sciences Volume 15, p. 95-101, 2016.

action[52], with the statement that "the civil court is not related to the provisions of the criminal law nor the final judgment of acquittal or termination of the criminal proceedings as to the existence of the damage or the guilt of the unlawful act"[53] and the limitation period is precluded, in the sense that "in all cases where the compensation derives from a fact subject to the criminal law prescription is longer than civil law, the limitation period for criminal liability also applies to the right to action in civil liability."[54]

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23. The Criminal Procedure Code.

[52] Art. 19 C.C.p.
[53] According to art. 1365 Civil Code.
[54] According to art. 1394 Civil Code.