ANALELE UNIVERSITĂȚII TITU MAIORESCU

Drept

Serie nouă

2010

- anul IX -

Editura Universității Titu Maiorescu
www.utm.ro/anale_drept

Editura Universităţii Titu Maiorescu, 2011
București, România
Calea Văcărești nr 187, sector 4
Tel.: (004021) 330.21.42.
(004021) 316.16.46.
Fax: (004021)330.10.83.
(004021) 331.22.97

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ISSN: 1584-4781

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LA MODIFICATION DE LA LEGALITE PENALE SOUS L'INFLUENCE DE L'EUROPE

Claudia LEMARCHAND-GHICA[*]

ABSTRACT

Réunissant des conceptions juridiques différentes, la Cour européenne des droit de l'homme dégage des concepts unitaires afin d'harmoniser les analyses juridiques des Etats membres. Mais tous ces concepts reposent sur la légalité pénale qui s'en trouve profondément modifiée. D'autre part, l'Union européenne poursuivant la construction d'un espace économique commun poursuit un objectif global d'intégration aboutissant à une nouvelle analyse légaliste. Ces deux conceptions perturbent la forme traditionnelle de la légalité pénale et en modifie substantiellement l'acception. Le fonctionnement même des mécanismes du droit pénal s'en trouve modifié.

KEYWORDS

Le Traité de Lisbonne, l'adhésion de l'Union européenne à la CESDH, modification de la procédure applicable devant la Cour de cassation, la jurisprudence de la CJUE,

Depuis le siècle des Lumières, le droit pénal est considéré comme le moyen le plus sûr de mesurer le degré de civilisation d'un pays, car il est un droit empreint d'un besoin impératif d'équilibre entre des intérêts antagonistes. D'une part, l'Etat doit sauvegarder l'ordre public et assurer une répression exemplaire des comportements interdits. D'autre part, le droit pénal est un droit contraignant qui peut porter atteinte aux libertés fondamentales de l'individu. S'il n'est plus le « *jus gladii* » et ne manie plus la sanction suprême de la peine de mort, il peut imposer des restrictions fondamentales à la liberté individuelle. A ce titre, le droit pénal est soumis à des contraintes et jouit de privilèges exceptionnels au sein de la matière juridique.

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La naissance du courant légaliste, inspiré des sources philosophiques des Lumières, a donné ses lettres de noblesse au droit pénal – rempart essentiel contre l'arbitraire et l'abus de pouvoir. La publication du « Traité des délits et des peines » par Cesare Beccaria, en 1764, largement nourri par les réflexions de Montesquieu dans son « Esprit de lois », pose les fondements du droit pénal moderne. La répression pénale devient un moyen de sauvegarde fondamentale du contrat social fondateur de nos démocraties modernes. De l'union des volontés particulières naît une personne publique recherchant le bien commun. Pour remplir cette mission, cette personne se dote de lois qui régissent tous les domaines de la société, y compris la répression pénale. Toute personne qui en viole les prescriptions essentielles s'expose à des sanctions, la peine représentant le sommet de la gravité de la sanction. La première conséquence de cette vision est que les lois fixent les peines pour chaque infraction et le droit de faire des lois pénales ne réside que dans la personne du législateur. « Seules les lois peuvent déterminer les peines et les délits et que ce pouvoir ne peut résider que dans la personne du législateur qui représente toute la société unie par le contrat social ». BECCARIA assortit le principe de la légalité d'une exigence de rédaction des textes. Les lois ne doivent pas être obscures, car alors il n'y a nul besoin de les interpréter. Ces exigences d'existence et de qualité de la loi pénale sont constantes au sein du droit pénal et leur modernité est, sans cesse, réaffirmée par les décisions contemporaines les plus importantes.

La Déclaration des droits de l'homme et du citoyen de 1789 affirme avec force le principe de la « légalité des délits et des peines » qui marque profondément l'ensemble des règles pénales. Le principe « *nullum crimen, nulla poena, sine lege* » recouvre tous les domaines du droit pénal : des incriminations et peines jusqu'au règles de procédure. Le code d'instruction criminelle de 1808 et le code pénal de 1810, s'inscrivant dans le cadre des codes napoléoniens, consacrent ce principe comme la clé de voûte du droit pénal français. Appréhendé par le droit français et sa tendance universaliste du dix-neuvième siècle, le principe de la légalité pénale représente un rempart contre l'arbitraire et la sauvegarde de la liberté individuelle.

Si la criminalité est un phénomène universel et sempiternel, elle est restée pendant très longtemps à un échelon national. La mythologie grecque est émaillée de meurtres odieux (le Minotaure dévorant les jeunes Athéniens envoyés en offrande au roi Minos) ou devenus un moyen normal de succession (le roi Mithridate a empoisonné l'ensemble des membres de sa famille pouvant prétendre au trône). Le sultan Schahriar, déçu par l'infidélité de son épouse, la fait mettre à mort, et afin d'éviter d'être à

nouveau trompé, il décide d'assassiner chaque matin la femme qu'il aura épousée la veille. Shéhérazade, raconte chaque nuit au sultan une histoire dont la suite est reportée au lendemain, ce qui lui vaut d'obtenir un sursis. Les « Contes des mille et une nuit » prennent leur sources dans la menace de l'exécution de la peine de mort. Du meurtre d'Abel par son frère Caïn, à Ali Baba et ses quarante voleurs, tous les pays et toutes les formes de gouvernement ont été confrontés à la délinquance. Mais elle était un phénomène local recevant un traitement limité dans le temps et l'espace. Ainsi, Vlad Tepes, mieux connu sous le nom de Dracula, a gagné sa réputation en empalant ses ennemis, mais aussi les brigands qui avaient créé un grand climat d'insécurité en Valachie.
La Seconde Guerre Mondiale a démontré que la criminalité pouvait atteindre un stade insoupçonné lorsqu'elle était appliquée à un niveau transnational ou international. Les crimes du troisième Reich, de l'Union des Républiques socialistes soviétiques ou de l'Empire du Soleil Levant ont révélé que l'horreur pouvait être indicible lorsqu'elle était déclinée dans des crimes de masse. La seconde moitié du vingtième siècle a apporté un extraordinaire développement des richesses et des activités humaines. Or, la criminalité est une forme de l'activité humaine et ne déroge pas à la règle. Puisque l'économie prospère dans un environnement international, la délinquance suit le même schéma et s'exporte. Le début du troisième millénaire correspond à l'ère de la mondialisation, avec tous ses avantages et inconvénients. La délinquance fleurit dans ce contexte économique et s'affranchit des frontières, elle suit un mouvement de globalisation. La réponse à ce type de criminalité doit être coordonnée, globale et passe par une coopération soutenue des Etats atteints par ce fléau.

L'Europe, théâtre et source des deux guerres mondiales, doit veiller à pacifier ses populations et à créer un espace propice à une vie harmonieuse. Des structures se mettent en place et elle touchent le droit pénal de manière inégale et graduée. D'une part, le Conseil de l'Europe, à travers sa Convention de sauvegarde des droits de l'homme et de ses libertés fondamentales de 1950, influence substantiellement le droit pénal. Réunissant des conceptions juridiques différentes, la Cour européenne des droit de l'homme dégage des concepts unitaires afin d'harmoniser les analyses juridiques des Etats membres. Mais tous ces concepts reposent sur la légalité pénale qui s'en trouve profondément modifiée. D'autre part, l'Union européenne poursuivant la construction d'un espace économique commun poursuit un objectif global d'intégration aboutissant à une nouvelle analyse légaliste. Ces deux conceptions perturbent la forme traditionnelle de

la légalité pénale et en modifie substantiellement l'acception. Le fonctionnement même des mécanismes du droit pénal s'en trouve modifié.

Le principe de la « légalité des délits et des peines » accordait un monopole au législateur dans la création de la norme pénale. Ce pouvoir réservé reposait sur une conception idéale, parfois même idéaliste, de la loi pénale pour deux raisons. D'une part, la loi doit être générale et absolue, afin d'en assurer une application optimale et de lui permettre une évolution en adéquation avec la société. Cependant, le juge n'avait aucun pouvoir d'interprétation, car il était cantonné à la simple application de la loi et ne pouvait assurer l'adéquation avec les nouvelles exigences techniques de la société. D'autre part, les mots n'ont pas un sens unique, la richesse d'une langue repose sur ses nuances, laissant une marge d'interprétation aux juges afin de faire vivre la loi. La conception étroite du principe de la « légalité des délits et des peines », reposant sur une acception étroite formelle, se trouve réduite à une forme de textualité, insuffisante pour rendre compte de l'évolution du droit. La Cour européenne des droits de l'homme enrichit les sources de la légalité pénale d'une conception matérielle et les ouvre à la jurisprudence (II). En même temps, les sources de la textualité se multiplient et rendent le paysage juridique complexe (I).

I. LA MULTIPLICATION DES SOURCES TEXTUELLES EUROPEENNES

Le principe de la légalité pénale, dans sa version originelle, faisait résider le pouvoir de création des incriminations et des peines dans la seule personne du législateur. La Constitution de 1958 a apporté un premier infléchissement, car l'article 34 réserve les crimes et les délits au pouvoir législatif, alors que les contraventions appartiennent au pouvoir réglementaire, selon l'article 37, dédoublant ainsi le principe de légalité au plan interne. Mais l'article 55 de la Constitution va encore plus loin car il prévoit que les traités internationaux priment sur la loi interne et il appartient au juge judiciaire de contrôler et d'assurer cette primauté. Le juge pénal s'est affranchi du contrôle en interprétation du Ministère des affaires étrangères et assure de manière effective ce contrôle à l'égard des conventions internationales. Le cadre juridique contraignant de l'Europe a enrichi les sources du principe de la légalité pénale. Aux côtés de la loi interne, le juge pénal doit appliquer la Convention de sauvegarde des droits de l'homme et des libertés fondamentales et le droit de l'Union européenne. La chronologie permettrait de commencer par le Conseil de l'Europe, mais

l'analyse juridique exige d'inverser l'ordre et de commencer par l'Union européenne.

A. LE DROIT DE L'UNION EUROPEENNE

A l'origine de la création des Communautés européennes, le droit pénal était peu affecté par le droit communautaire, car la dimension de la souveraineté nationale restait très importante dans le cadre de la politique pénale. Ainsi, que le disait M. le professeur Soyer, l'Etat doit continuer à battre monnaie et « à battre le délinquant ». Les différents traités communautaires ont respecté cette logique car le droit pénal restait dans le cadre du troisième pilier de la coopération interétatique. L'initiative des textes était maîtrisée, ainsi que leur adoption. Etaient adoptés dans le domaine pénal des directives qui ne sont pas des actes contraignants à portée générale. Les Etats sont liés quant aux résultats à atteindre, mais peuvent choisir les moyens d'application afin d'y parvenir. La coopération judiciaire ou policière en matière pénale est renforcée, mais elle reste dans un cadre classique de rapports interétatiques soumis à la volonté souveraine des Etats. Cette vision classique a beaucoup évolué ces dernières années et le droit de l'Union européenne semble accéder au premier rang des sources de la légalité pénale.

1. LA COMMUNAUTARISATION INDIRECTE DU DROIT PENAL

Dans les traités fondateurs de la Communauté européenne, le droit pénal s'inscrit dans le troisième pilier des traités de la Communauté, où le pouvoir d'initiative et de décision est dévolu aux Etats. Le premier pilier, le pilier du droit communautaire contient les objectifs essentiels de la Communauté et donne pouvoir légiférant à la Commission, contraignant les Etats dans un certain nombre de domaines limitativement énumérés par les traités institutionnels. La concurrence et l'environnement en font partie. Ces deux domaines s'apparentent au droit répressif et peuvent, de ce fait, empiéter sur le droit pénal. Dans une décision fondamentale du 13 septembre 2005[1], la cour de Justice de l'Union européenne a procédé à la communautarisation du droit pénal par son attraction dans le cadre des objectifs essentiels de la Communauté.

Le 27/01/2003, le Conseil adoptait à l'unanimité une décision-cadre dans laquelle il obligeait les Etats à adopter de façon concertée des sanctions pénales à l'encontre des auteurs des atteintes à l'environnement. L'Union

[1] CJCE 13 septembre 2005, Dr. pén. 2005, étude n° 16, Ramu de Bellescize.

européenne entendait lutter ainsi à l'encontre de l'augmentation préoccupante des infractions contre l'environnement (les affaires du Prestige et de l'Erika ont laissé des traces profondes). La décision-cadre liait les Etats quant aux résultats à atteindre, mais leur laissait une totale liberté quant aux moyens à mettre en place. La décision-cadre énumérait les agissements qui devaient être réprimés, elle les classait selon une échelle de gravité susceptible d'encadrer le niveau des peines susceptibles d'être prononcées. Le Conseil se plaçait sous l'empire du troisième pilier relatif à la coopération policière et judiciaire en matière pénale.

La Commission européenne a contesté ce fondement. La protection de l'environnement constitue un des objectifs de la Communauté, s'inscrivant ainsi dans le cadre du premier pilier communautarisé, avec des mécanismes propres de décision. Les sanctions pénales constituant ici un complément indissociable de la protection de l'environnement, elles étaient attirées dans la sphère du droit communautaire du premier pilier.

La CJUE adopte ce raisonnement de phénomène d'attraction des sanctions pénales par le droit communautaire. La Cour reconnaît le caractère exceptionnel de sa décision, car elle s'entoure de multiples précautions. Tout d'abord, elle rappelle que les règles du droit pénal, tout comme la procédure pénale, ne relèvent pas du droit communautaire. Elle reconnaît aussi qu'il n'y a pas de précédent d'intrusion du droit communautaire dans le droit pénal et que la décision soumise à son examen est essentielle de ce point de vue. Ensuite, la Cour rappelle que sa mission est de s'assurer que les actes relevant du domaine intergouvernemental (troisième pilier) n'empiètent pas sur la compétence communautaire (premier pilier). La protection de l'environnement est un des objectifs essentiels de le Communauté et s'inscrit, à ce titre, dans le premier pilier. Les articles réservant une compétence propre aux Etats en matière de droit pénal et d'administration de la Justice ne sont pas de nature à remettre en cause la compétence de la Communauté en matière pénale. La mise en œuvre de la politique de sauvegarde de l'environnement nécessite une harmonisation pénale afin de garantir l'effectivité du droit communautaire. Donc, la CJUE estime que si une politique communautaire (comme celle de l'environnement) nécessite la mise en œuvre de sanctions pénales complémentaires, la Commission peut passer outre et se placer dans le domaine du premier pilier (communautarisé), imposant une politique pénale commune aux Etats membres.

Cette décision de communautarisation silencieuse et indirecte du droit pénal a soulevé une grande émotion dans les revues juridiques, mais aussi dans la

presse populaire, car elle représente une intrusion sans précédent dans la souveraineté pénale des Etats. Pour continuer la réflexion de M. Soyer, les Etats avaient déjà perdu le droit de battre monnaie avec l'euro, et on les dépossédait, de facto, du droit de battre le délinquant. Devant les critiques juridiques et politiques, la CJUE a choisi de rendre une nouvelle décision, dans le droit fil de la première, afin de rendre son choix définitif et irrévocable.

La CJUE[2] fait droit aux demandes de la Commission et déplace l'action du cadre du troisième pilier au sein du premier pour des sanctions pénales dans le cadre de l'environnement, mais la solution se distingue de l'arrêt de 2005. D'une part, elle peut se reposer sur un précédent, ce qui facilite l'argumentation. Mais la CJUE va plus loin et communautarise une compétence nationale, dès qu'elle présente un rapport avec un des objectifs essentiels de la Communauté.

Ainsi, les deuxième et troisième piliers se trouvent privés d'effet utile, car la CJUE a le moyen de vider le domaine de la coopération interétatique de sa substance. Cela porte atteinte à la nature souveraine du droit pénal, sans pour autant en retoucher les principes ou nécessiter une révision constitutionnelle. La CJUE maintient le principe de la compétence étatique, mais introduit et élargit une exception de communautarisation.

L'extension du domaine communautaire au détriment de la politique intergouvernementale et de la souveraineté des Etats a des conséquences importantes sur le domaine des compétences de l'UE, mais aussi sur la répartition constitutionnelle des compétences en droit français. La CJUE augmente les compétences propres de l'Union européenne au détriment des compétences nationales des Etats en matière pénale. Il est important de rappeler qu'en adoptant cette interprétation, la CJUE méconnaît ouvertement la volonté expresse de tous les Etats membres qui avaient adopté, à l'unanimité, la décision-cadre par la voie du Conseil. La Cour substitue sa propre interprétation, suivant la Commission, à celle des Etats membres qui avaient défini les lignes de coopération qu'ils entendaient suivre.

De plus, pour arriver à ce résultat, la CJCE applique une série de principes dégagés par son interprétation du traité, notamment, par l'intermédiaire de « l'effet utile ». La Cour recourt à un principe qui, à ses yeux, domine tous les autres – la primauté de l'intégration communautaire qui doit commander tout le reste, de gré ou de force. Cette interprétation téléologique permet de

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[2] CJCE 23 octobre 2007, Dr. pén. 2008, étude 2, « La communautarisation silencieuse du droit pénal. A propos de l'arrêt de la CJCE du 23 octobre 2007 », R. DE BELLESCIZE.

vider de substance la répartition de compétences entre les piliers si le premier peut exercer une force d'attraction absolue et sans contrôle sur les autres. La Cour étant le recours ultime, elle n'encourt pas le risque de critique ou d'un autre recours, à moins d'ouvrir une crise politique majeure, risque qu'aucun Etat n'assumerait.

Cette jurisprudence préfigure les nouvelles règles introduites par le Traité de Lisbonne qui modifie de manière substantielle la compétence de l'Union européenne dans le cadre du droit pénal.

2. LA NOUVELLE HIERARCHIE DES NORMES

Le Traité de Lisbonne, signé le 13 décembre 2007, entré en vigueur le 1er décembre 2009, tire les leçons de la communautarisation du droit pénal et modifie, de manière indirecte et silencieuse, la hiérarchie des normes en droit pénal. Son objectif ambitieux de superposer une Europe politique et juridique à la Communauté économique remodèle substantiellement la légalité pénale.

D'une part, dès les premières pages, le Traité garantit la dignité humaine, la liberté, la démocratie, l'égalité, l'État de droit et les droits de l'homme, valeurs fondamentales communes au sein de l'Union européenne, connues pour leur appartenance, par essence ou par application, au droit pénal. La mise en place d'un espace de justice, de liberté et de sécurité est une des grandes priorités de l'Union européenne. Le traité de Lisbonne modifie en profondeur les règles applicables en la matière. Certains actes juridiques uniformes sont en effet adoptés en vertu de la procédure de codécision, qui renforce le rôle du Parlement européen en tant que colégislateur, et le principe du vote à la majorité qualifiée est étendu au Conseil. Ainsi, une majorité qualifiée suffit désormais pour des textes sur la politique de lutte contre la traite des êtres humains ou la coopération judiciaire – autre qu'en matière pénale (la politique pénale, soumise à l'imperium des Etats, reste soumise à la règle de l'unanimité).

L'action de l'Union européenne est facilitée par la suppression de la distinction entre les domaines politiques, également appelés «piliers», qui caractérisait la structure institutionnelle de la coopération policière et judiciaire en matière pénale. La règle de la codécision et de la majorité permettra désormais l'adoption de règles minimales définissant les infractions et les sanctions pour un certain nombre de comportements transfrontaliers (blanchiment, exploitation sexuelle, terrorisme, trafic de stupéfiants). Toutefois, des actes législatifs peuvent toujours être adoptés à l'initiative des États membres (au moins un quart d'entre eux) dans le

domaine de la coopération policière, pénale et administrative. La Commission européenne continue de jouer son rôle de gardienne des traités et de veiller, aux côtés de la Cour européenne de justice, à la bonne application des décisions. Cependant, l'attitude vindicative de communautarisation de la matière pénale, lorsqu'elle n'était pas possible dans les principes, laisse augurer d'une politique volontariste commune dans le domaine pénal. Cela permet de mettre en place des outils de répression pénale très efficaces : Eurojust comme appui et soutien d'Europol, le mandat d'arrêt européen, l'entraide judiciaire directe en matière pénale, les équipes communes d'enquête. Cet effet positif souhaitable se double, cependant, d'un risque mal mesuré à moyen et long terme – la remise en cause de la conception classique de la légalité pénale.

D'autre part, dans la conception classique de la légalité pénale, le législateur national, garant du pacte social, a toujours été la source première des incriminations et des peines, même si certains pouvoirs concurrents ont émergé. La concurrence de l'Union européenne peut-elle remettre en cause ce principe fondamental du droit pénal ?

La loi du 23 juillet 2008 a introduit dans le cadre de la Constitution française un mécanisme de contrôle de constitutionnalité des lois a posteriori. Le contrôle de constitutionnalité relève du monopole du Conseil constitutionnel et ne pouvait être opéré qu'avant la promulgation de la loi. Cette loi introduit un mécanisme de question préjudicielle d'inconstitutionnalité. Lors d'un procès pénal, le justiciable peut soulever une exception d'inconstitutionnalité. Cependant, le juge judiciaire n'a pas compétence pour en connaître, contrairement à l'exception d'illégalité et d'inconventionnalité, mais surseoit à statuer et renvoie devant la juridiction suprême de son ordre qui décide ou non de saisir le Conseil constitutionnel. La loi organique n° 2009-1523 du 10 décembre 2009, entrant en vigueur le 1er mars 2010, a fixé les modalités de mise en œuvre de la question prioritaire de constitutionnalité. Pour que la question puisse être posée au juge ordinaire, il faut que trois conditions soient remplies : qu'une disposition législative porte atteinte aux droits et libertés garantis par la Constitution ; que ce soit lors d'une instance en cours devant une juridiction ; qu'une des parties en fasse la demande dans un écrit distinct et motivé. Le juge ne peut soulever d'office une question prioritaire de constitutionnalité.

Il existe des conditions spécifiques au droit pénal. En premier lieu, il faut que la disposition contestée soit applicable au litige ou à la procédure, ou constitue le fondement des poursuites. La question prioritaire peut, par conséquent, ne pas consister en une mise en cause de la seule loi incriminant

les faits ; pourra aussi être discuté le texte relatif à la composition de la juridiction ou au déroulement de la procédure. Toutes les dispositions législatives, substantielles comme procédurales, intéressant un litige - et non conditionnant seulement son issue - peuvent être constitutionnellement critiquées. Toutes les juridictions pénales, d'instruction comme de jugement ou d'application des peines, de première instance et d'appel, de droit commun comme d'exception peuvent connaître de la question prioritaire, sauf la cour d'assises. En deuxième lieu, la loi ne doit pas déjà avoir été déclarée conforme à la Constitution dans les motifs et le dispositif d'une décision du Conseil constitutionnel, « sauf changement de circonstances » (relatives aux données techniques, économiques ou sociales dans lesquelles la loi est adoptée à un moment donné et dont le changement peut affecter la perception de la constitutionnalité du texte). En troisième lieu, « la question ne doit pas être dépourvue de caractère sérieux ». Ce dernier point, essentiel pour éviter l'encombrement du Conseil par des revendications saugrenues ou motivées par la seule provocation, laisse un pouvoir d'appréciation important aux juges du fond.

Une des dispositions fondamentales porte sur le caractère prioritaire de la question de constitutionnalité. Le juge est investi du pouvoir d'examiner et de contrôler directement la conventionnalité de la loi pénale. Or, certains principes sont contenus, à la fois, dans la Constitution et dans le CESDH (le principe de légalité pénale, de non-rétroactivité de la loi pénale, d'interprétation stricte, de protection de la liberté individuelle et interdiction des détentions arbitraires). Le juge pénal pourrit ainsi exercer un contrôle indirect de constitutionnalité sur certaines lois pénales. Il pourrait refuser leur application du fait de leur inconventionnalité et écarterait ainsi une loi qui aurait été considéré comme constitutionnelle par le Conseil constitutionnel. Cette hypothèse s'est déjà produite devant la cour de cassation, mais cette dernière a opportunément refuse d'exercer son pouvoir de contrôle conventionnel et d'empiéter sur le contrôle de constitutionnalité[3]. Afin d'éviter de tels conflits, la loi organique de 2009

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[3] Crim. 12 déc. 2007, Dr. pén. 2008, comm. n° 34, obs. J.-H. ROBERT ; JCP G, I 181, obs. ROBERT J.-H.. Une personne morale et deux personnes physiques sont poursuivies pour des infractions à la réglementation fiscale du vin (ils le commercialisent sans en avoir le droit). Ils sont condamnés à une amende fiscale de confiscation et à une amende pénale proportionnelle pour les mêmes faits. Les prévenus contestaient le cumul de ces sanctions comme violant le principe de proportionnalité inscrit dans l'article 6 CESDH, comme continuation du principe de légalité de l'article 7. La cour de cassation affirme l'irrecevabilité de l'exception d'inconventionnalité, car cette exception est fondée sur le principe de la proportionnalité des peines qui « relève du contrôle de constitutionnalité des

que si la juridiction est saisie, à la fois, de moyens tenant à l'inconstitutionnalité de la loi et à son inconventionnnalité, elle doit se prononcer par priorité sur la première. Cette disposition est conforme à l'analyse classique de la hiérarchie des normes au sein du droit continental, hiérarchie qui place la Constitution en haut de la pyramide de la légalité. Cependant, cette interprétation traditionnelle a été remise en cause par la jurisprudence de la CJUE.

La Cour de cassation[4] a renvoyé à la Cour de justice de l'Union européenne la question de la conformité au droit de l'Union de la loi organique du 10 décembre 2009, en tant que cette loi impose aux juridictions de se prononcer par priorité sur le renvoi au Conseil constitutionnel d'une question de constitutionnalité. Quel est l'ordre devant être opéré entre cette question de constitutionnalité et la question préjudicielle de compatibilité avec le droit de l'Union européenne qui prévoit un renvoi en interprétation à la CJUE ? Elle a à cette occasion défini d'une manière inédite et inattendue les rapports entre le contrôle de constitutionnalité et le contrôle de compatibilité au droit de l'Union devant les juridictions et le Conseil constitutionnel, saisis au titre de l'article 61-1 de la Constitution.

La CJUE[5] énonce les conditions de la compatibilité de la question prioritaire de constitutionnalité française avec le droit de l'Union européenne : « l'article 267 TFUE s'oppose à une législation d'un Etat membre qui instaure une procédure incidente de contrôle de constitutionnalité des lois nationales, pour autant que le caractère prioritaire de cette procédure a pour conséquence d'empêcher, tant avant la transmission d'une question de constitutionnalité à la juridiction nationale chargée d'exercer le contrôle de constitutionnalité des lois que, le cas échéant, après la décision de cette juridiction sur ladite question, toutes les autres juridictions nationales d'exercer leur faculté ou de satisfaire à leur obligation de saisir la Cour de questions préjudicielles. En revanche, l'article 267 TFUE ne s'oppose pas à une telle législation nationale pour autant que les autres juridictions nationales restent libres :

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lois ». La doctrine de cet arrêt paralyse l'exception d'inconventionnalité à chaque fois que la règle est inscrite à la fois dans une convention internationale et « le bloc de constitutionnalité » interne, ce qui est logique car la compatibilité et la recevabilité des arguments ne doit pas être déterminée par sa source nationale ou inernationale. Le moyen contestant un principe constitutionnel est inopérant devant le juge pénal.

[4] Cass. 16 avr. 2010, M. Melki, AJDA 2010. 1023, note P. Manin.

[5] Cour de justice de l'Union européenne le 22 juin 2010, n° C-188/10.

- de saisir, à tout moment de la procédure qu'elles jugent approprié, et même à l'issue de la procédure incidente de contrôle de constitutionnalité, la Cour de toute question préjudicielle qu'elles jugent nécessaire,
- d'adopter toute mesure nécessaire afin d'assurer la protection juridictionnelle provisoire des droits conférés par l'ordre juridique de l'Union, et
- de laisser inappliquée, à l'issue d'une telle procédure incidente, la disposition législative nationale en cause si elles la jugent contraire au droit de l'Union. Il appartient à la juridiction de renvoi de vérifier si la législation nationale en cause au principal peut être interprétée conformément à ces exigences du droit de l'Union ».

Donc, le juge doit saisir en priorité la CJUE d'une question de compatibilité avec le droit de l'union européenne et seulement après, le Conseil constitutionnel au sujet d'une éventuelle inconstitutionnalité. Donc, si la question de constitutionnalité est prioritaire, elle n'est en aucun cas première. Cette solution portant sur l'ordre procédural des questions de compatibilité doit être prolongée dans le cadre des règles de fond. Si la première compatibilité à examiner et la compatibilité européenne, cela signifie que les normes de l'Union européenne priment sur les normes constitutionnelles et la pyramide de la légalité pénale se trouve essentiellement modifiée. Si cette solution était présagée par les modifications constitutionnelles afin de rendre le droit français compatible avec le droit communautaire, le schéma classique était sauf, car la référence essentielle était la Constitution. Dorénavant, le droit de l'Union européenne prend le pas sur la Constitution par l'effet d'une décision de la CJUE, sans aucune modification de la Constitution et de ses règles.

Enfin, le droit initial de l'Union européenne ne faisait nullement référence aux droits fondamentaux. Cependant, ce sujet est le terreau universel permettant à l'Europe d'exister car une coopération européenne dans ce domaine est vitale. Il semble inconcevable de se contenter du volet économique. Les Etats membres de la C.E.E. ont décidé d'œuvrer dans ce sens et ont fait une déclaration commune à Luxembourg le 5 avril 1977 dans laquelle ils affirmaient « l'importance primordiale qu'ils attachent au respect des droits fondamentaux tels qu'ils résultent de la CESDH ». L'Acte unique européen de 1986, qui fusionne les trois communautés européennes, exprime le même rattachement à la CESDH. Enfin, le Traité sur l'union européenne de Maastricht, signé le 7 février 1992, confirme dans son préambule l'attachement des Etats signataires aux droits de l'homme. Plus précisément, le titre relatif à la coopération sur la Justice renvoie

spécifiquement à la CESDH. La question la plus épineuse est de savoir pourquoi l'Union européenne n'adhère pas à la CEDH ? Par un arrêt du 28 mars 1996, la CJUE avait décidé que la Communauté européenne n'avait pas compétence pour adhérer à la CESDH, seuls les Etats ayant le droit de le faire. Le traité de Lisbonne a totalement modifié les règles, même si une évolution a été amorcée en 2000, avec l'adoption de la Charte des droits fondamentaux.

Premièrement, le traité de Lisbonne autorise l'adhésion de l'Union européenne à la CESDH. La CESDH a procédé aux modifications nécessaires pour permettre cette nouvelle adhésion – le protocole n° 14, qui modifie l'article 59, permet spécifiquement à l'U.E. d'adhérer. Le 17 mars 2010, la Commission a proposé des directives de négociation en vue de l'adhésion de l'U.E. à la CESDH. Le 4 juin 2010, les ministres de la justice de l'UE ont mandaté la Commission pour conduire les négociations en leur nom. Le 26 mai, le Comité des Ministres du Conseil de l'Europe a donné à son Comité directeur pour les Droits de l'Homme un mandat occasionnel pour élaborer avec l'UE l'instrument juridique requis en vue de l'adhésion de l'UE à la CEDH. Les pourparlers ont commencé le 07 juillet 2010. En adhérant à la CEDH, l'UE se placera sur un pied d'égalité avec ses États membres en ce qui concerne le système de protection des droits fondamentaux, au respect duquel veille la Cour européenne des droits de l'homme de Strasbourg. L'adhésion permettra à l'U.E. d'être entendue dans les affaires examinées par la Cour de Strasbourg. Une adhésion ferait de l'UE le 48ème signataire de la CEDH. Elle pourrait désigner un juge à la Cour européenne des droits de l'homme à Strasbourg. Cette adhésion offrira également une nouvelle possibilité de recours aux particuliers, qui pourront désormais – après avoir épuisé toutes les voies de recours nationales – saisir la Cour européenne des droits de l'homme d'une plainte pour violation supposée des droits fondamentaux par l'UE.

L'adhésion de l'UE à la CEDH s'impose en application de l'article 6 du traité sur l'Union européenne et est prévue par l'article 59 de la CEDH telle qu'amendée par le Protocole n° 14. À l'issue du processus, l'accord d'adhésion sera conclu entre les 47 parties contractantes actuelles à la CESDH et l'UE (par une décision à l'unanimité du Conseil de l'UE; le Parlement européen, qui doit être pleinement informé de toutes les étapes de la négociation, doit également donner son assentiment: la décision nécessite la ratification par les Etats Membres de l'UE). L'accord d'adhésion devra également être ratifié par chacune des 47 parties contractantes à la CESDH, conformément à leurs exigences constitutionnelles respectives, y compris

par les parties qui sont aussi États membres de l'UE. Même si les deux parties sont désireuses de conclure les pourparlers avec souplesse et rapidité, afin que l'adhésion soit effective le plus vite possible, cela risque de prendre beaucoup de temps.

Mais des problèmes conceptuels se posent et ils risquent une nouvelle fois de modifier la vision de la légalité pénale et l'équilibre des pouvoirs en charge de la création de la norme pénale. Un organe du Conseil de l'Europe contrôlerait si l'U.E. respecte les droits fondamentaux. De plus, la Cour étouffe sous les nombreux recours individuels et peine à remplir son rôle. Malgré la nouvelle procédure entrée en vigueur le 1er juin 2010, issue du protocole n° 14, l'encombrement continuera et la réforme est, d'ores et déjà, jugée comme insuffisante. Une question se profile en filigrane : l'adhésion à la CESDH pourrait-elle permettre à l'Union européenne de faire l'économie de la mise en œuvre effective de la Charte européenne. Surviendrait alors un nivellement par le bas des droits de l'homme dans le cadre européen.

En effet, le traité de Lisbonne garantit la mise en œuvre de la Charte des droits fondamentaux signée à Nice, en 2000, et qui figure en annexe, faisant ainsi partie des droits effectifs, pas simplement comme un objectif à atteindre. L'Union européenne se dote donc d'un éventail de droits civils, politiques, économiques et sociaux qui sont juridiquement contraignants, non seulement pour l'Union européenne et ses institutions, mais aussi pour les États membres, dans la mise en œuvre du droit de l'Union. Cette charte regroupe tous les droits fondamentaux au sein de six grands chapitres : la dignité, la liberté, l'égalité, la solidarité, la citoyenneté et la justice. Les institutions de l'Union doivent respecter les droits énoncés dans la charte. Il en va de même pour les États membres lorsqu'ils mettent en œuvre la législation européenne. La Cour de justice est chargée de veiller à l'application correcte de la charte. L'intégration de la charte ne modifie pas les attributions de l'Union, mais offre davantage de droits et de libertés aux citoyens. Cependant trois Etats ont fait des réserves concernant sa mise en œuvre : l'Irlande, la Pologne et le Royaume-Uni. La CJUE et les juridictions internes de ces Etats ne peuvent écarter des textes internes en considérant qu'ils sont incompatibles avec la Charte. La Charte s'inspire essentiellement de la CESDH, mais aussi de la jurisprudence de la CJUE et des traditions constitutionnelles nationales. Si sa philosophie principale reste empreinte de la vision de la CESDH, les deux textes présentent deux différences majeures. D'une part, la Charte a un champ d'application territoriale plus restreint (27 membres par rapport aux 47 du Conseil de l'Europe). D'autre

part, elle a un champ d'application matérielle plus large, car elle ne se limite pas aux droits fondateurs de liberté qui sont uniquement les droits civils et politiques. Cependant, en l'état, la Charte n'a aucune effectivité, elle constitue une simple déclaration de principe.
Cette mise sous contrôle de l'Union européenne par la CESDH pose un problème de hiérarchie des normes.

B. LA CONVENTION (EUROPEENNE) DE SAUVEGARDE DES DROITS DE L'HOMME

La CESDH a été élaborée dans le cadre du Conseil de l'Europe et a été signée à Rome, le 4 novembre 1950. Elle regroupe 47 Etats membres, donc la quasi-totalité du continent européen.

1. LA LEGALITE PENALE, UNE EXIGENCE EUROPEENNE

Son objet n'est pas exclusivement pénal, mais elle y a de nombreuses incidences. Son article 7 affirme le principe de la légalité pénale et son corollaire, la non-rétroactivité de la loi pénale. « Nul ne peut être condamné pour une action ou une omission qui, au moment où elle a été commise, ne constituait pas une infraction d'après le droit national ou international. De même, il n'est infligé aucune peine plus forte que celle qui était applicable au moment où l'infraction a été commise. » Il est important de souligner que la CESDH n'exige pas une loi, mais une base en droit national ou international. Cette différence de termes a permis de déduire que si le système français, en particulier, et les systèmes romano-germaniques, en général, exigent une base légale, le système européen se contente d'une base prévisible en droit. Cette interprétation permet de retenir une conception harmonieuse de la légalité pénale, renvoyant au principe de textualité (système juridique de civil law), et à la règle du précédent (système juridique de common law).

La CESDH constitue la source internationale la plus importante du droit pénal. La procédure pénale actuelle est constamment modifiée par les exigences de l'article 6 et le procès équitable. A ce titre, la procédure par défaut a évolué, la présomption d'innocence et ses corollaires, le droit de ne pas contribuer à sa propre incrimination, le droit au silence, ont été renforcés. La France s'est dotée de la loi n° 2010-1 du 4 janvier 2010[6] relative à la protection du secret des sources des journalistes qui vient compléter la loi du 29 juillet 1881 sur la liberté de la presse. Le secret des

[6] BLANC E., Rapport Ass. Nat. N° 771.

sources des journalistes est largement protégé dans « l'exercice de leur mission d'information au public » et, en aucun cas, l'atteinte ne peut se traduire par l'obligation de révéler ses sources. La loi considère que le fait de chercher à découvrir les sources d'un journaliste au moyen d'investigations sur une personne entretenant des relations habituelles avec un journaliste et détenant des informations permettant l'identification peut constituer une atteinte indirecte. Le législateur français a totalement intégré l'enseignement de l'arrêt Goodwin c/ Royaume-Uni, rendu par la Cour européenne des droits de l'homme le 27 mars 1996, dans lequel elle avait considéré la presse comme « le chien de garde » des démocraties et elle avait considéré la protection des sources journalistiques était « une des pierres angulaires de la liberté de la presse ».

2. MODIFICATION DE LA PROCEDURE DEVANT LA COUR DE CASSATION

L'exemple le plus intéressant est celui de la modification de la procédure applicable devant la Cour de cassation, procédure en vigueur depuis des siècles et unanimement défendue par la Justice et la doctrine, en application du principe de l'égalité des armes. Le ministère public auprès de la cour de cassation joue un rôle particulier. Plus qu'un véritable représentant de la société, il est jurisconsulte, il conseille les juges sur l'état du droit applicable et est considéré comme un *amicus curiae*. Traditionnellement, sa position dans la procédure était privilégiée. Il recevait le rapport du juge rapporteur et il assistait au délibéré, sans voix participative. La CEDH[7] a considéré ces particularités comme contraires à la procédure équitable de l'article 6, solution transposée devant le Conseil d'Etat[8]. « La seule présence de l'avocat général au délibéré de la chambre criminelle de la Cour de cassation est incompatible avec l'article 6 CEDH », en application de la théorie des apparences (« justice must not only be done, it must also be seen to be done »). Cette remise en cause a été très mal vécue en France[9], car elle ne permettait même pas à l'avocat général d'être présent de manière passive, sans aucune participation et lui nie son appartenance à la juridiction, le réduisant au rôle d'une partie[10]. La jurisprudence européenne a montré ici sa force car elle a condamné trois pratiques

[7] CEDH 31 mars 1998, Reinhardt et Slimane-Kaïd c/ France.
[8] CEDH 7 juin 2001, Kress c/ France.
[9] J. ANDRIANTSIMBAZOVINA, « Bien lus, bien compris, mais est-ce raisonnable ? Toujours à propos du droit à un procès équitable et du ministère public », D. 2004, p. 886.
[10] J.-F. BURGELIN, « La paille et la poutre », D. 2004, p. 1249.

traditionnelles au sein de la cour de cassation, aboutissant à leur suppression: la transmission du rapport du conseiller-rapporteur à l'avocat général mais non au demandeur au pourvoi, la non communication des conclusions de l'avocat général au demandeur avant l'audience, la présence de l'avocat général au délibéré. Cette jurisprudence a considérablement modifié la procédure suivie devant la chambre criminelle de la Cour de cassation[11]. Pour satisfaire aux normes européennes, depuis le 1er janvier 2002, l'avocat général ne participe plus à la conférence préparatoire au cours de laquelle sont examinés avant chaque audience les rapports et les projets d'arrêts, de même qu'il n'assiste plus au délibéré. Le parquet général travaille en toute autonomie par rapport au siège. Il est chargé d'exprimer l'état de l'application du droit (par les différentes juridictions) et apporter une expertise nourrie par les contacts avec les acteurs économiques et sociaux, sans se faire leur porte-parole. Il est une « fenêtre sur l'extérieur ». Le rapport du conseiller rapporteur est communiqué aux parties et est expurgé de toute indication sur la décision envisagée,ce qui constitue une garantie d'impartialité.

Cependant, la CEDH ne juge pas satisfaisante la réforme[12] : « l'absence de communication au requérant ou à son conseil, avant l'audience, du premier volet du rapport du conseiller rapporteur, alors que ce document avait été transmis à l'avocat général, ne s'accorde pas avec les exigences du procès équitable ». Concrètement, cela signifie qu'il y a violation de l'article 6 lorsque le requérant n'a pas été informé, par une lettre du greffe de la cour de cassation, de la date du dépôt du rapport du conseiller rapporteur et de la possibilité de le consulter en temps utile.
Une nouvelle conséquence semble se dégager, imprévue à l'origine. La cour de cassation commence à faire usage des moyens d'ordre public, soulevés d'office, qui lui permettent de casser les décisions sans faire droit aux moyens du pourvoi[13]. Ces moyens de pur droit peuvent devenir un nouveau mode de régulation de la jurisprudence, sans implication des théories soutenues par les parties.

La polémique sur les droits prépondérants du ministère public continue devant la CEDH sous un autre angle, qui est celui de l'article 505 du Code de procédure pénale qui fixe le délai pour faire appel des jugements

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[11] J.-L. NADAL, « La jurisprudence de Strasbourg : une chance pour le parquet général de la Cour de cassation », D. 2005, p. 800.
[12] CEDH 24 juillet 2008, Arouette c/ France, Dr. pén. 2009, Chron. « Un an de droit européen en matière pénale », n° 3, obs. DREYER E.
[13] Ass. Plén. 16 nov. 2007, JCP 2007, II, 10210, J. LEBLOIS-HAPPE.

du Tribunal correctionnel devant la cour d'appel. Si le prévenu et le procureur de la République dispose de dix jours, le procureur général près la cour d'appel dispose de deux mois. La Cour européenne a dressé un constat de violation de l'article 6 §1 car « le fait que le parquet bénéficie d'une prolongation du délai d'appel, conjugué à l'impossibilité pour le requérant d'interjeter appel incident, a mis ce dernier dans une position de net désavantage par rapport au ministère public »[14]. Si la partie civile et le ministère public ne sont pas des adversaires, il n'en est pas de même pour le parquet et la personne poursuivie. L'égalité des armes est un principe général qui s'applique à toutes les phases du procès pénal – en première instance, comme pour l'exercice des recours. Son exercice est général et se manifeste par la possibilité d'exercer les voies de recours, mais aussi la durée du délai pour l'exercer. La CEDH réitère son analyse de violation de l'article 6 et du principe de l'égalité des armes lorsqu'il y a un déséquilibre entre les droits de la partie poursuivante et les droits du prévenu, ce qui crée une situation d'insécurité juridique pour la personne qui est relaxée en première instance. Ce rapport de net désavantage est contraire à l'égalité des armes[15].

La chambre criminelle a décidé d'effectuer un revirement de jurisprudence[16] et décide que n'est pas compatible avec le principe de l'égalité des armes qui découle de l'article 6 CEDH la disposition de l'article 505 CPP qui ouvre au procureur général près de la Cour d'appel un délai d'appel plus long que celui accordé aux parties. Certains auteurs sont allés jusqu'à dénoncer ici « la rhétorique de la tyrannie »[17] de la CEDH. La chambre criminelle de la cour de cassation adopte, sans réserve et de manière absolue, l'analyse de la CEDH[18].

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[14] CEDH 3 OCTOBRE 2006, Ben Naceur c/ France.

[15] CEDH 22 mai 2008, GACON c/ France, RSC 2008, p. 635, obs. GIUDICELLI A ; RSC 2008, p. 692, Jurisprudence de la CEDH, obs. MARGUENAUD J.-P..

[16] Crim. 17 septembre 2008, JCP 2008, II, 10195, note TUROT J. : La cour d'appel avait considérablement aggravé le sort du prévenu en appel, sur appel du procureur général, alors que le prévenu n'avait pas fait appel initialement et ne pouvait plus le faire après la déclaration du procureur général, car il était forclos. La cour de cassation avait rejeté l'appel en considérant que le principe de l'égalité des armes était respecté à partir du moment où les parties disposaient du droit de faire utilement appel. La CEDH considère que le prévenu s'est trouvé dans « une situation d'insécurité juridique née de la différence entre les délais de recours ». Un tel déséquilibre crée un net désavantage par rapport au ministère public et est contraire au principe de l'égalité des armes.

[17] B. EDELMAN, « La CEDH : une juridiction tyrannique ?, D. 2008, p. 1946.

[18] Crim. 10 février 2009, AJ pénal 2009, p. 234, obs. SAAS C. Deux personnes sont condamnées et le PG fait appel 35 jours après la décision. L'appel des condamnés est

La loi française se trouvait remise en cause par les condamnations répétées de la Cour européenne des droits de l'homme et le refus de la cour de cassation de la mettre en œuvre. La loi pénitentiaire du 24 novembre 2009 a modifié les dispositions de l'article 505 :« En cas de jugement de condamnation, le procureur général peut également former son appel dans le délai de vingt jours à compter du jour du prononcé de la décision.
Sans préjudice de l'application des articles 498 à 500, les autres parties ont alors un délai de cinq jours pour interjeter appel incident. Même en l'absence d'appel incident, la cour d'appel peut, en cas d'appel formé par le seul procureur général en application du présent article, prononcer une peine moins importante que celle prononcée par le tribunal correctionnel. »
Pour se conformer au principe de l'égalité des armes, la partie poursuivie dispose d'un appel incident qui ouvre un nouveau délai. De surcroît, le juge pénal peut prononcer une peine moindre en l'absence d'appel de sa part. La juridiction d'appel réforme la décision dans le sens demandé par une partie : interdiction de la reformatio in pejus (on ne peut pas condamner la personne poursuivie plus lourdement en appel en l'absence d'appel formé par le ministère public).

Si les apparences du principe de la légalité pénale semblent sauvegardées par cette affaire, car la loi apporte la modification des conditions d'exercice des voies de recours, il est impossible d'ignorer la pression des juges et leur pouvoir à s'affranchir de la loi. Se pose la question essentielle de savoir quelle place le principe de la légalité pénale laisse à la jurisprudence.

II. L'ELARGISSEMENT AUX SOURCES MATERIELLES

La multiplication des sources formelles de la légalité pénale par l'introduction d'une dimension européenne ne remet pas en cause l'analyse classique de la maxime « *nullum crimen, nulla poena sine lege* ». L'incrimination et sa peine sont définies de manière verticale par le pouvoir législatif interne ou assimilé dans le cadre de l'Union européenne. Cependant, la mise en œuvre de ce dernier et, surtout, la CESDH posent la question de la prise en compte de la jurisprudence au sein de la légalité

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déclaré irrecevable et la cour d'appel prononce de nouvelles peines à l'encontre des condamnés. La chambre criminelle casse sans renvoi l'arrêt de la cour d'appel : « le principe de l'égalité des armes impose que les parties au procès pénal disposent des mêmes droits, spécialement du droit à l'exercice des voies de recours ». Confirmation de la jurisprudence inaugurée par la CEDH.

pénale. Les juges peuvent-ils édicter des règles et que valent leurs décisions ? Une définition matérielle de la légalité pénale, acceptant la jurisprudence comme source du droit (A), remet en cause les principes fondamentaux de doit pénal classique et préfigure l'apparition d'un droit pénal hybride entre les conceptions de civil law et common law. Se pose inévitablement la question d'un nouvel équilibre des pouvoirs et contre-pouvoirs au sein du droit (B).

A. LA DEFINITION MATERIELLE DE LA LEGALITE PENALE

Le droit de l'Union européenne et la CESDH donnent une valeur supérieure à la jurisprudence émanant de juridictions chargées de leur mise en œuvre, ainsi que celle qui est reconnue traditionnellement aux décisions des juges répressifs sur le plan interne.

1. LA VALEUR DE LA JURISPRUDENCE EUROPEENNE

Le droit pénal français, empreint de la tradition légaliste, considère que le juge applique la loi générale à l'espèce qui lui est soumise. S'il n'est plus simplement « la bouche de la loi », ainsi que le considérait Montesquieu, car le Code pénal lui donne l'autorisation d'interpréter la loi, il y est strictement soumis. A ce titre, il ne peut en aucun cas formuler des règles générales ou donner des directives d'interprétation, car les arrêts de règlements sont prohibés par l'article 5 du Code civil qui est un texte de portée générale, s'appliquant aussi au droit pénal. Ainsi, la jurisprudence ne peut influencer l'évolution de la règle, le droit interne la privant de valeur particulière.

Le droit de l'Union européenne retient une solution essentiellement différente car les principes généraux du droit dégagés par la Cour de Justice de l'Union Européenne constituent une source non-écrite du droit communautaire. Ce corps de règles fondamentales a une valeur incontestable, notamment en ce qu'il reprend des principes de base auxquels les Etats ont adhéré. Le juge national doit apprécier la compatibilité des règles internes avec les principes généraux communautaires invoqués. Si la question de droit est nouvelle, il peut saisir, par la voie de l'exception préjudicielle, la C.J.U.E. et sa décision lie, non seulement le juge de renvoi, mais encore toutes les juridictions pénales qui auront à appliquer ce texte. Cependant, un arrêt ayant acquis l'autorité de la chose jugée ne peut être réexaminé, même s'il est contraire au droit communautaire[19].

[19] CJCE 16 mars 2006, JCP 2006, II, 10173, note KOSTOVA-BURGEIX A.. Le principe de coopération découlant de l'article 10 CE n'impose pas à une juridiction nationale

La jurisprudence acquiert ici une force exceptionnelle car elle repose sur la combinaison de différents principes qui tendent à l'englober aux sources de la légalité pénale. D'une part, le droit communautaire est d'applicabilité directe en droit français. Il créé des obligations à la charge des individus et des Etats et des garanties équivalentes. D'autre part, le droit communautaire prime sur le droit interne[20], imposant au juge national d'écarter la loi nationale qu'il est censé appliquer pour faire prévaloir les principes énoncés par la CJUE. Cette dernière a clairement affirmé l'autonomie de ses interprétations et leur primauté, y compris, en droit pénal. En effet, elle ne se prononce jamais directement sur un texte de droit pénal, mais sur un texte européen qui régit un autre domaine, mais a des conséquences sur le droit pénal. La CJUE recherche « l'effet utile » et fait primer la finalité spécifique du texte sur les principes nationaux de droit répressifs. Certains auteurs parlent de la conception machiavélique de la CJCE qui admet que « la fin justifie les moyens »[21].

La modification de la législation française sur les jeux de hasard est la meilleure illustration en la matière. La CJUE considère que l'organisation des jeux est une prestation de services et à ce titre doit être ouverte à la concurrence, sauf aux Etats de justifier les restrictions qu'ils y apportent pour des « raisons impérieuses d'intérêt général » parmi lesquelles figurent l'encadrement de la « consommation des jeux afin de prévenir le développement des phénomènes de dépendance »[22]. La chambre commerciale de la Cour de cassation[23] et le Conseil d'Etat[24] se montrent

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d'écarter des règles de procédure internes afin de réexaminer une décision judiciaire passée en force de chose jugée et de l'annuler, lorsqu'il apparaît qu'elle est contraire au droit communautaire.

[20] C.J.C.E 15 juillet 1964, affaire Costa c/Enel et Siemmenthal 9 mars 1978 : « le juge national chargé d'appliquer les dispositions du droit communautaire , a obligation d'assurer le plein effet de ces normes en laissant au besoin inappliquée, de sa propre autorité, toute disposition contraire de la législation nationale, même postérieure, sans qu'il ait à demander ou à attendre l'élimination préalable de celle-ci par voie législative ou par tout autre procédé constitutionnel ».

[21] F. GARRON « L'interprétation des normes supralégislatives en matière pénale », RSC 2004, p. 773.

[22] CJCE 6 mars 2007, Placanica, D. 2007, p. 1314, note J.-L. CLERGERIE, RSC 2007, p. 641, obs. L. IDOT.

[23] Ch. com. Cour de cassation 10 juillet 2007, D. 2007, p. 2098, note C. MANARA : il n'y a pas de raisons impérieuses lorsque les paris sont pris à l'étranger avec, pour support, les courses de chevaux organisées en France.

sensibles à cette argumentation et remettent en cause le monopole de la Française des jeux sur les jeux de hasards et les paris en ligne. La cour de cassation adopte une position bien plus protectrice de la souveraineté pénale, soutenue par la conception classique de la légalité pénale[25]. La chambre criminelle, fidèle à sa jurisprudence[26], réaffirme que le droit interne satisfait au Traité de Rome. Les textes de droit interne qui réservent l'organisation et l'exploitation des loteries à une société contrôlée par l'Etat ne sont pas contraires aux dispositions du traité de CE pour deux raisons. D'une part, ils sont commandés par une raison impérieuse d'intérêt général tenant à la protection de l'ordre public par la limitation des jeux et leur contrôle, alors que cela constitue une restriction à la liberté de prestation de services et d'établissement. D'autre part, les mesures sont proportionnées à l'objectif poursuivi. Cependant, cette décision est discutable du point de vue du droit communautaire.

La loi (n°2010-476) du 12 mai 2010 relative à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne, a été adoptée et a été déclarée entièrement conforme par le Conseil constitutionnel. La loi autorise l'ouverture en ligne des paris hippiques et sportifs, ainsi que de certains jeux de cercles, tels le poker, et se dote d'une nouvelle autorité administrative indépendante de contrôle : l'ARJEL (autorité de régulation des jeux en ligne). La loterie n'est pas concernée par cette loi et reste soumise au monopole de la Française des jeux. La justification de cette limitation est puisée dans le fait que les jeux de hasard faisant appel à un certain savoir-faire (poker, pari sportif) présentent un risque d'addiction moindre que ceux qui reposent sur le pur hasard.

Si la jurisprudence de la CJUE joue un rôle essentiel, mais ne revendique pas son appartenance aux sources du droit pénal, la jurisprudence de la CEDH est plus audacieuse et transforme profondément

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[24] C.E. 9 mai 2008, D. 2008, p. 1869, note J.-L. CLERGERIE : CE saisit la CJCE par voie de question préjudicielle pour apprécier la conventionnalité de la réglementation française s'appliquant à une société maltaise.

[25] Crim. 3 juin 2009, Dr. pén. 2009, comm. n° 109, obs. JH ROBERT ; D. 2009, p. 1714, obs. CHAUMONT P. et DEGORCE E., D. 2009, p. 2825, obs. ROUJOU DE BOUBEE G. . Une personne vend une brochure contenant un jeu de hasard dont le but est de gratter un ticket qui permet de participer à un tirage au sort permettant d'obtenir une rente mensuelle viagère. La Française des jeux se constitue partie civile et la personne est poursuivie du chef de loterie prohibée et tromperie. Il est condamné. Il attaque cette décision sur la base de l'interdiction des monopoles des prestations des services contenue à l'art. 49 du Traité instituant la CE.

[26] Crim. 22 mai 2007, Bull. n° 198.

l'acception de la légalité pénale, autant à l'égard de sa jurisprudence elle-même, que de la jurisprudence interne.

S'il est incontestable que la CESDH prime sur le droit interne et peut paralyser la loi interne en cas de conflit, quelle est la valeur des arrêts de la CEDH ? Cette question revêt une importance particulière, car la CEDH est une juridiction unique dans son principe et son fonctionnement. La CEDH est la seule juridiction des droits de l'homme à assurer un respect effectif d'une déclaration des droits de l'homme. Ces déclarations sont nombreuses, mais la CESDH est la seule à être effective de par le fonctionnement de la Cour. La CESDH a rendu obligatoire le mécanisme du recours individuel, permettant à un simple justiciable de saisir la Cour pour la violation d'un droit par un Etat. La CEDH déroge ainsi au principe du fonctionnement entre « pairs » qui caractérise la justice internationale et décide de traiter à égalité un citoyen et un Etat. Les décisions de la Cour permettent de constater une violation d'un des articles de la CESDH et d'accorder une satisfaction ou une réparation à la victime. Mais peuvent-elles jouer un rôle au-delà de l'espèce étudiée ? La CEDH est le seul interprète officiel de la Convention. Or, les juges ont décidé que la Convention était un instrument vivant, devant évoluer selon les besoins de la société et qu'ils pouvaient adopter un système d'interprétation dynamique pour la faire évoluer dans le sens considéré comme souhaitable.

A l'origine, les article de la CEDH avaient une valeur purement déclarative. L'article 53 de la CESDH dispose : « les Hautes parties contractantes s'engagent à se conformer aux décisions de la Cour dans les litiges auxquels elles sont partie ». Les Etats ont le libre choix des moyens pour se conformer aux décisions de la Cour, mais ils se sont engagés à le faire et le Comité des ministres est chargé d'en surveiller l'exécution, selon les articles 46 et 54 de la CESDH. Pourtant, il s'agit d'une préoccupation récente car le Comité des ministres a publié le premier rapport annuel sur la surveillance de l'exécution des arrêts de la CEDH en 2007[27]. Cet intérêt récent résulte d'un besoin de consolidation de la protection européenne des droits de l'homme qui se décline tant par la réalisation subjective des droits que par l'efficacité dans l'exécution des arrêts. L'augmentation continue des arrêts rend nécessaire, même si elle est matériellement plus difficile, la

[27] L. SERMET, « La surveillance des arrêts de la CEDH, entre ombre et lumière – Du premier rapport annuel du Comité des ministres sur l'exécution des arrêts », JCP 2008, act. 226 et 281.

surveillance de l'exécution des arrêts[28]. Afin de contrecarrer ce manque d'intérêt et de suivi pour l'exécution des arrêts, la CEDH elle-même a décidé d'opérer un contrôle indirect sur la mise en œuvre de ses décisions[29]. La Cour se reconnaît compétente lorsqu'un requérant soulève un problème nouveau, non tranché par l'arrêt initial. En utilisant cet artifice, la Cour reconnaît sa compétence en vue de contrôler l'exécution de ses propres arrêts. La cour affirme que si l'existence d'une procédure de révision en droit interne est « un aspect important de l'exécution de ses arrêts », cette existence « n'est pas en soi suffisante, « encore faut-il que la juridiction nationale visée applique directement la Convention et la jurisprudence de la Cour ». La cour fait produire un effet direct à ses propres arrêts et exerce un contrôle de fond sur la procédure de révision en droit interne. Celle-ci doit permettre de « remédier de manière effective et concrète à une violation constatée de la Convention ». Si à l'issue d'un arrêt constatant la violation de la Convention, le requérant ne bénéficie pas d'une remise des choses en l'état, dès lors qu'elle est possible, il est fondé à alléguer une nouvelle violation de la Convention devant la Cour. Le principe du libre choix des moyens dont dispose l'Etat pour s'acquitter de son obligation de « se conformer » aux arrêts de la Cour ne semble plus être la règle. La CEDH peut constater une nouvelle violation, afin de maintenir la pression sur l'Etat responsable.

Cette valeur déclarative semble être modifiée par l'introduction d'une nouvelle voie de recours afin d'assurer la reconnaissance et la réparation de la violation de la CESDH par les juridictions internes. Cette voie de recours exceptionnelle est spécifique à la matière pénale, car elle assure ainsi une

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[28] Rapport annuel 2009, D 2010, p. 1078 : augmentation continue du nombre d'affaires qu'il s'agisse les nouvelles affaires (1500) ou l'avancement des mesures d'exécution (7800). L'entrée en vigueur du Protocole 14 laisse augurer un nouvel accroissement du nombre d'affaires.

[29] CEDH 4 octobre 2007, VGT c/ Suisse, JCP 2008, I, 110, n° 1, SUDRE F. : le juge interne a refusé à la société la diffusion d'un spot publicitaire. La CEDH a conclu à la violation du droit d'expression. La société a saisi le juge interne d'une demande de révision de la décision interne qui a été rejetée . Le Comité des ministres , exerçant sa compétence de surveillance des arrêts de la CEDH, mit fin par une résolution à l'examen de l'affaire sans attendre l'issue de la procédure de révision ouverte en vertu du droit suisse.VGT saisit de nouveau la Cour en considérant que le maintien de l'interdiction constitue une nouvelle violation. Le refus du juge interne de revenir sur l'interdiction du spot est considéré par la Cour comme une nouvelle violation de la liberté d'expression. Il n'est pas certain que cette décision incite les Etats à mettre en place une procédure interne de révision des arrêts définitifs ayant entraîné un constat de la violation de la Convention par la Cour, notamment en dehors de la matière pénale.

apparence de respect de la légalité pénale, en cantonnant la CEDH et le juge répressif français à l'application de la norme pénale issue d'un texte. Ainsi la loi du 15 juin 2000, relative à la présomption d'innocence, a introduit le réexamen d'une décision pénale à la suite d'une décision de la CEDH aux articles 626-1 et suivants du code de procédure pénale. La personne reconnue coupable d'une infraction peut demander un réexamen de son affaire, qui équivaut à une révision de son procès, lorsque la CEDH constate une violation de la Convention dès lors que, par sa nature et par sa gravité, la violation constatée entraîne pour le condamné des conséquences dommageables auxquelles la satisfaction équitable allouée ne pourrait mettre un terme. Les décisions de la Cour de Strasbourg ne peuvent mettre à néant les décisions juridictionnelles internes, mais la procédure prévoit un alignement de la solution française sur la solution européenne[30]. La commission de réexamen de la Cour de cassation peut renvoyer l'affaire devant la juridiction responsable de la violation de la CESDH. Dans la plupart des cas, la commission de réexamen renvoie devant l'Assemblée plénière de la cour de cassation qui doit statuer en l'état[31] du premier pourvoi[32], mais la Chambre criminelle dépasse parfois ses attributions afin de se mettre à l'abri de tout risque de violation de la CESDH[33]. Mais si le

[30] F. DOROY , « Le réexamen d'une décision pénale consécutif au prononcé d'un arrêt de condamnation de la CEDH. Mise en œuvre de la réforme du 15 juin 2000. Questions juridiques et problèmes pratiques », Dr. pén. 2003, étude n° 18

[31] Ass. Plén. 8 juillet 2005, AJ Pénal 2005, p. 374. Les parties ne peuvent soulever de nouveaux moyens, seule la C. cas peut soulever des moyens d'office (ex. application immédiate d'une loi plus douce).

[32] Ass. Plén. 18 janvier 2006, JCP 2006, II, 10075, note LEBLOIS-HAPPE J.

[33] Ass. Plén. 4 juillet 2008, JCP G, Act. 513, J.-Y. Maréchal. Dans une affaire de faux en écriture et prise illégale d'intérêts, a été poursuivi un officier supérieur de l'armée de terre, responsable d'organismes chargés de la formation des personnels et ayant qualité, à ce titre, pour passer des marchés avec des entreprises sans recours à la procédure d'appel d'offres. Il a octroyé des marchés à une société et association dans lesquelles il était intéressé et a émis une fausse facture enregistrée dans la comptabilité de la société. Condamné pour les deux délits, il a formé un pourvoi en cassation rejeté par la Cour de cassation le 13 juin 2001. Dans un arrêt du 14 novembre 2006, CEDH a condamné la France pour violation de l'article 6 car le rapport du conseiller-rapporteur avait été transmis à l'avocat général et constituait une violation du procès équitable. L'assemblée plénière a été saisie de l'affaire et elle doit statuer sur les seuls moyens présentés devant la chambre criminelle, tout nouveau moyen étant irrecevable. L'arrêt rappelle ce principe, mais répond néanmoins à la demande du prévenu d'obtenir communication du rapport du conseiller rapporteur, pour corriger le reproche formulé par CEDH. Cette communication est vaine, puisque le rapport est communiqué devant l'assemblée plénière, ce qui le prive de tout intérêt. La cour de cassation prend la peine d'examiner les deux moyens pour les rejeter.

réexamen du pourvoi n'est pas suffisant pour remédier à la violation des droits de l'homme, la commission de réexamen doit renvoyer devant une juridiction de renvoi, ce qui est fort rare[34].
La jurisprudence de la chambre criminelle de la Cour de cassation semble reconnaître une valeur effective aux arrêts émanant de la CEDH. Les arrêts de condamnation des juges internes perdent leur caractère définitif lorsque la CEDH constate une violation[35]. La jurisprudence de la CEDH a profondément modifié le visage du droit pénal français et son influence est une réalité de tous les jours. Pourtant, l'optique du juge pénal national et de la CEDH ne sont pas identiques. Le premier doit faire prévaloir l'intérêt général et l'ordre public, alors que la seconde s'assure de respect des droits et libertés individuels. Le dynamisme interprétatif de la CEDH est tantôt loué pour ses qualités d'évolution et d'harmonisation des législations européennes, tantôt critiqué pour ronger la marge nationale d'appréciation des Etats afin d'imposer « une grille universelle du discours des droits de l'homme », sans reposer pour autant sur une conception morale[36]. Si ce discours uniforme de la CEDH correspond à un désir d'harmonisation des règles pénales applicables au sein des Etats membres, peut-on accepter de reconnaître une quelconque valeur à la jurisprudence émanant des juges répressifs internes ?

2. LA VALEUR DE LA JURISPRUDENCE PENALE

La jurisprudence de la CEDH a procédé à une modification de la légalité pénale et a retenu une conception matérielle large, s'éloignant de la

[34] Comm. réexamen 28 sept. 2006, JCP 2006, actu, 485, note LEBLOIS-HAPPE J. La commission considère que l'erreur avait été commise par le tribunal correctionnel qui avait condamné un individu en son absence à un an d'emprisonnement avec sursis. Sans fournir d'excuse valable, son avocat n'avait pas été entendu et le pourvoi avait rejeté son pourvoi. La commission considère que l'erreur commise à l'origine par le tribunal correctionnel avait été répétée par les autres juridictions. Elle a donc renvoyée devant un tribunal correctionnel compétent pour réparer l'erreur. Le procès recommence donc dès le début.

[35] Crim. 16 novembre 2007, AJ pénal 2008, p. 87, obs. S. LAVRIC. Une personne est poursuivi pour avoir donné un coup de pied dans une voiture de police au cours d'une manifestation. Condamnation pour dégradation volontaire d'un objet d'utilité publique et prononce la contrainte par corps. CEDH condamne la France pour violation du procès équitable car la défense ne profite pas de la communication du rapport du conseiller rapporteur comme le PG. Réexamen par l'Assemblée plénière de la cour de cassation. La cour de cassation relève d'office le moyen tiré de la loi du 9 mars 2004 qui judiciarise la contrainte par corps en la transformant en contrainte judiciaire. La cour affirme que l'arrêt a perdu son caractère définitif et annule la contrainte par corps.

[36] Pascal MBONGO, « La CEDH a-t-elle une philosophie morale ? », D. 2008, p. 99.

conception formaliste rigoureuse retenue par certains Etats membres. L'article 7 de la CESDH définit la légalité pénale comme la préexistence de la règle en droit national ou international, sans référence aucune à son caractère écrit ou quant à sa source émanant du pouvoir législatif. Cette rédaction correspond aux besoins cohérents de sécurité juridique régissant autant les systèmes de civil law, que les systèmes de common law. De nombreuses ingérences dans certains droits (droit à l'intimité de la vie privée, la liberté d'expression) sont admises lorsqu'elle prévues par « la loi ». La CEDH a dû se prononcer sur le sens donné à cette exigence, en accord avec la base légale prévue par l'article 7 CESDH.

Dans son arrêt fondateur Sunday Times c/ le Royaume Uni[37], la Cour constate que dans "prévue par la loi" le mot "loi" englobe à la fois le droit écrit et le droit non écrit. Elle pose aussi des exigences de qualité de la base légale – l'accessibilité et la prévisibilité. Il faut d'abord que la "loi" soit suffisamment accessible: le citoyen doit pouvoir disposer de renseignements suffisants, dans les circonstances de la cause, sur les normes juridiques applicables à un cas donné. En second lieu, on ne peut considérer comme une "loi" qu'une norme énoncée avec assez de précision pour permettre au citoyen de régler sa conduite. Il doit être à même de prévoir, à un degré raisonnable dans les circonstances de la cause, les conséquences de nature à dériver d'un acte déterminé. Elles n'ont pas besoin d'être prévisibles avec une certitude absolue, l'expérience la révèle hors d'atteinte. En outre la certitude, bien que hautement souhaitable, s'accompagne parfois d'une rigidité excessive; or le droit doit savoir s'adapter aux changements de situation. Aussi beaucoup de lois se servent-elles, par la force des choses, de formules plus ou moins vagues dont l'interprétation et l'application dépendent de la pratique. L'expression « prévue par la loi » doit s'entendre au sens large et il ne peut être soutenu que le système de common law, ne correspondant pas à ce « concept consacré » ne doivent pas assurer le principe fondamental de la sécurité juridique. La légalité pénale doit donc s'adapter au système de droit non-écrit et tenir compte de la règle du

[37] CEDH 24 avril 1979, Sunday Times c/ le Royaume Uni, A 30 : la Cour constate que dans "prévue par la loi" le mot "loi" englobe à la fois le droit écrit et le droit non écrit. Elle n'attache donc pas ici d'importance au fait que le contempt of court est une création de la common law et non de la législation. On irait manifestement à l'encontre de l'intention des auteurs de la Convention si l'on disait qu'une restriction imposée en vertu de la common law n'est pas "prévue par la loi" au seul motif qu'elle ne ressort d'aucun texte législatif: on priverait un État de common law, partie à la Convention, de la protection de l'article 10 par. 2 (art. 10-2) et l'on frapperait à la base son système juridique.

précédent et du droit d'origine jurisprudentielle consacré par le système de common law.

Le principe subit aussi des modifications dans le sens retenu par les systèmes de droit romano-germanique et le concept évolue vers une acception matérielle. Ainsi, la France s'est vue opposer une analyse de la légalité pénale qui ne correspond absolument pas aux conceptions légalistes classiques[38]. Les mots "prévue par la loi", au sens de l'article 8 § 2, veulent d'abord que la mesure incriminée ait une base en droit interne, mais ils ont trait aussi à la qualité de la loi en cause: ils exigent l'accessibilité de celle-ci à la personne concernée, qui de surcroît doit pouvoir en prévoir les conséquences pour elle, et sa compatibilité avec la prééminence du droit. Quant à l'existence de la base légale, deux conceptions antagonistes s'affrontent. D'une part, par "loi", il y aurait lieu d'entendre "droit en vigueur dans un système juridique donné", en l'occurrence "l'ensemble constitué par le droit écrit" et "par la jurisprudence qui l'interprète". D'autre part, dans le cas des "pays continentaux", dont la France, seul "un texte normatif de portée générale" - voté ou non par le Parlement - peut s'analyser en une "loi" aux fins de l'article 8 § 2. La CEDH a pu juger que le mot « loi » englobe à la fois le droit écrit et le droit non écrit, mais elle n'aurait songé là qu'au système de la common law. Or, il présenterait des "différences fondamentales" avec, notamment, le "système français". Dans celui-ci, la jurisprudence représenterait "une source de droit" certes "très importante", mais "secondaire", tandis que par "loi" la Convention désignerait "une source primaire". La CEDH tranche en faveur de l'acception matérielle, bien plus large, non "formelle"; elle y a inclus à la fois des textes de rang infralégislatif et le "droit non écrit". L'arrêt Sunday Times concernait certes le Royaume-Uni, mais on aurait tort de forcer la distinction entre pays de common law et pays "continentaux". La loi écrite (statute law) revêt de l'importance dans les système anglo-saxons. Au même titre, la jurisprudence joue traditionnellement un rôle considérable dans les pays continentaux, des branches entières du droit positif y résultent, dans

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[38] CEDH 24 avril 1990 , Kruslin et Huvig c/ France, D 1990, p. 353. Dans cette affaire était jugé la conformité du système français des écoutes téléphoniques avec la CESDH. Cette pratique constitue une ingérence dans la vie privée des individus. Néanmois, l'article 8 § 2 l'autorise lorsqu'elle est prévue par la loi, qu'elle est proportionnelle à l'objectif poursuivies et qu'elle est nécessaire dans une démocratie. Le Gouvernement français considérait que le système était prévu par la loi car le code de procédure pénale autorisait le juge d'instruction de procéder « à tous actes utiles à la manifestation de la vérité ». Partant de ce texte, la cour de cassation avait érigé un véritable système de contrôle des écoutes téléphoniques et avait accordé des garanties solides aux individus.

une large mesure, des décisions des cours et tribunaux. Ainsi que l'affirme la Cour « à la négliger, elle ne minerait guère moins le système juridique des États "continentaux" que son arrêt Sunday Times du 26 avril 1979 n'eût "frappé à la base" celui du Royaume-Uni s'il avait écarté la common law de la notion de "loi". Ainsi, la jurisprudence peut être considéré comme source de droit, car elle fait corps avec les textes qu'elle applique.

Mais la CEDH ne se contente pas d'exiger l'existence de la loi, encore faut-il qu'elle présente une qualité minimale de prévisibilité et d'accessibilité. Si cette dernière condition est remplie, la prévisibilité est remise en cause par la Cour. Si certaines règles se déduisent des textes du Code, d'autres se dégagent de jugements et arrêts prononcés au fil des ans, de manière fragmentaire et, dans leur nette majorité, après les écoutes téléphoniques mises en cause, à l'aide d'une interprétation analogique d'actes existants. Bien que plausible en soi, une telle "extrapolation" ne fournit pas en l'occurrence une sécurité juridique suffisante. En résumé, le droit français, écrit et non écrit, n'indique pas avec assez de clarté l'étendue et les modalités d'exercice du pouvoir d'appréciation des autorités dans le domaine considéré et n'assure pas aux individus le degré minimal de protection voulu par la prééminence du droit dans une société démocratique.

Cette analyse se détache de la conception classique de monopole législatif (ou assimilé) dans le cadre de la légalité pénale. La position de la CEDH est difficilement soluble dans le droit français, raison pour laquelle elle a été affirmée avec clarté et force dans d'autres arrêts rendus à l'égard de la France[39]. La Cour admet le libellé d'une loi peut présenter un certain degré de généralité lui permettant de s'adapter, par la voie de l'interprétation, aux changements de situation. La plus parfaite des lois ne pourrait se passer du juge pour préciser ses contours et la légalité peut reposer « sur une abondante jurisprudence qui neserait pas plus critiquable que toute autre définition légale ». L'article 7 CESDH, siège de la légalité commande de ne pas appliquer la loi pénale de manière extensive au détriment de l'accusé, notamment par analogie. Il en résulte qu'une infraction doit être clairement définie par la loi. Cette condition se trouve remplie lorsque le justiciable peut savoir, à partir du libellé de la disposition pertinente et, au besoin, à l'aide de son interprétation par les tribunaux, quels actes et omissions engagent sa responsabilité pénale. La CEDH affirme que la notion de "droit" ("law") utilisée à l'article 7 correspond à celle de "loi" qui figure dans d'autres articles de la Convention; elle englobe le droit d'origine tant

[39] CEDH 15 novembre 1996, Cantoni c/ France, 17862/91.

législative que jurisprudentielle et implique des conditions qualitatives d'accessibilité et de prévisibilité. En raison même du principe de généralité des lois, le libellé de celles-ci ne peut présenter une précision absolue. L'une des techniques types de réglementation consiste à recourir à des catégories générales plutôt qu'à des listes exhaustives. Aussi de nombreuses lois se servent-elles par la force des choses de formules plus ou moins floues, afin d'éviter une rigidité excessive et de pouvoir s'adapter aux changements de situation. La fonction de décision confiée aux juridictions sert précisément à dissiper les doutes qui pourraient subsister quant à l'interprétation des normes, en tenant compte des évolutions de la pratique quotidienne.

La Cour rappelle que la portée de la notion de prévisibilité dépend dans une large mesure du contenu du texte dont il s'agit, du domaine qu'il couvre ainsi que du nombre et de la qualité de ses destinataires. La prévisibilité de la loi ne s'oppose pas à ce que la personne concernée soit amenée à recourir à des conseils éclairés pour évaluer, à un degré raisonnable dans les circonstances de la cause, les conséquences pouvant résulter d'un acte déterminé. Il en va spécialement ainsi des professionnels, habitués à devoir faire preuve d'une grande prudence dans l'exercice de leur métier. Aussi peut-on attendre d'eux qu'ils mettent un soin particulier à évaluer les risques qu'il comporte.

Donc, pour apprécier la violation de l'article 7 et du principe de la légalité pénale, le juge peut compléter de manière utile les sources de la règle applicable, s'il lui assure une qualité suffisante de prévisibilité et d'accessibilité. La cour lui reconnaît un pouvoir d'interprétation de la « loi », mais peut-il aller plus loin et se substituer au législateur dans la création de la norme ?

B. LES DANGERS DE L'EMERGEANCE D'UN POUVOIR DES JUGES

La Constitution en mettant en place le système actuel de fonctionnement des démocraties a distingué les prérogatives des pouvoirs législatif et exécutif de création de la norme, des attributions de l'autorité judiciaire qui garantit « la liberté individuelle ». Le juge pénal applique la loi pénale et il est strictement soumis au principe de la légalité pénale. Il ne peut punir d'autres comportements que ceux qui sont prohibés par la loi ou prononcer d'autres peines que celles qui ont été édictées par la loi. Si le juge doit appliquer la loi, peut-il l'interpréter et, dans quelle mesure, son interprétation peut-elle être créatrice de droit?

1. UN POUVOIR D'INTERPRETATION JUDICIAIRE NECESSAIRE

L'article 111-4 du Code pénal reconnaît un pouvoir d'interprétation au juge pénal en affirmant que la « loi pénale est d'interprétation stricte ». Le juge pénal acquiert le pouvoir d'interpréter la loi et le législateur lui impose la méthodologie à suivre. Cependant, en l'absence d'une définition de l'interprétation stricte de la loi pénale, l'espace de recherche du juge reste relativement vaste et les questions se bousculent. Quel est le contenu de la méthode d'interprétation stricte ? Quels sont les pouvoirs du juge ? Quelle est la valeur de son interprétation ? Peut-il à terme devenir le concurrent du législateur ?

La méthode de l'interprétation stricte de la loi est présentée généralement comme le corollaire naturel du principe de la légalité pénale. En raison du pouvoir d'interprétation que s'arroge le juge pénal, peut-on dire aujourd'hui que ce principe concurrence indirectement la légalité, en menaçant l'équilibre constitutionnel de l'organisation de notre système démocratique ? S'il semble nécessaire d'accorder un pouvoir d'interprétation au jugé pénal, il convient, néanmoins, de le contenir dans des limites strictes afin de ne pas vider le principe de la légalité pénale de son essence même. Ce principe est le prolongement naturel de la séparation des pouvoirs constituant le fondement de la société démocratique.

Il semble évident aujourd'hui que l'interprétation judiciaire est une nécessité au sein du droit pénal, qui ne saurait être figée à sa conception becarrienne de la légalité pénale. D'une part, le droit n'est pas seulement conventionnel, il est avant tout naturel, car « il ne trouve pas sa source exclusivement dans les textes de lois, mais aussi dans le milieu réel où vivent les humains qui le génèrent et pour qui il est fait »[40]. D'autre part, le droit n'est pas seulement une logique formelle, mais aussi une science. Enfin, en appliquant les règles scientifiques au droit, le droit devient une science positive capable de générer ses propres normes. Cependant, le droit doit transcender ce carcan formel afin de retrouver l'idéal de justice, valeur suprême de la norme juridique qui doit animer le législateur et le juge lorsqu'ils formalisent la règle de droit[41]. Le Doyen CARBONNIER

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[40] DE PALMARI A., « La norme juridique et la libre recherche scientifique : une analyse critique de l'œuvre de François Gény », in « François Gény, mythe et réalités ; 1899-1999 centenaire de « Méthode d'interprétation et sources en droit privé positif – Essai critique », Les Editions Yvon Blais Inc., Dalloz, Bruylant Bruxelles, 2000, p. 233.

[41] THOMASSET C. et LAPERRIERE R., « François Gény, la libre recherche scientifique et la nature des choses », in « François Gény, mythe et réalités ; 1899-1999 centenaire de « Méthode d'interprétation et sources en droit privé positif – Essai critique », Les Editions Yvon Blais Inc., Dalloz, Bruylant Bruxelles, 2000, p. 271.

perpétue et approfondit l'étude de ce lien entre la sociologie juridique et le droit. L'interprétation est analysée comme une méthode permettant de coordonner la sociologie, définie comme « la science des mœurs »[42] et qui est de nature descriptive, et le droit, procédant de la morale qui est une discipline normative de nature prescriptive. La conception de la morale théorique confuse disparaît lentement pour faire place à une conception claire et positive tenant compte de l'ensemble des faits comme d'un objet de science.

Le droit pénal impose comme méthode d'interprétation de la loi pénale, l'interprétation stricte. L'interprétation de la loi doit tendre à dégager tout le sens de la loi, sans y ajouter ou retrancher[43]. Une paraphrase de la méthode d'interprétation dégagée pour le Code civil se montre adéquate à l'interprétation téléologique : « Toute la loi pénale et au-delà de la loi pénale, mais par la loi pénale ».

Le droit positif est l'exemple d'une obéissance admise à la loi et d'une défiance encouragée envers l'équité[44]. Le droit pénal est soumis au culte de la loi infaillible et nulle injustice ne peut résulter de l'application stricte de la loi. L'adage romain nous enseignait déjà « Dura lex, sed lex ». Le magistrat est enfermé dans ce carcan légaliste rigoureux. « Le légalisme est chez nous un dogme civique de caractère quasi religieux »[45]. Le juge applique la loi dans sa lettre et dans son esprit, car il a accès au savoir juridique lui permettant de révéler le contenu de la loi. Sa mission se dédouble : appliquer la loi, mais aussi retrouver son véritable sens. A part sa formation professionnelle spécifique, le juge dispose d'un indice unique, d'une piste de réflexion, d'un idéal à atteindre : l'équité, qu'il peut réintroduire dans la loi à travers son interprétation.

Si tous s'accordent sur le fait que l'équité constitue l'idéal à atteindre, sa nature est source de questionnement. Si elle est contenue dans la lettre du texte, elle émane du législateur, paré de toutes les vertus. Si elle est intrinsèquement contenue dans l'esprit du texte, le juge doit la dégager avec sagesse et délicatesse. Lorsque la lettre et l'esprit découlent d'une même inspiration et se rejoignent, la Justice est œuvre d'équité. En cas contraire, seule l'interprétation de l'équité par le juge peut faire pencher la

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[42] CARBONNIER J., « Essai sur les lois », Defrénois, Paris, 1995, p. 278.

[43] HELIE F., « Leçons sur les Codes pénal et d'Instruction criminelle », préface dans Boitard, p. XIII.

[44] LAFAY F., « La modulation du droit par le juge. Etude de droit privé et de sciences criminelles », T. II, P.U.A.M., 2006, p. 492.

[45] JESTAZ Ph., « La jurisprudence, réflexions sur un malentendu », D. 1987, chron., p. 11

balance d'un côté ou de l'autre. En l'absence de critères scientifiques permettant de la définir ou de la quantifier, ses contours ne relèvent plus du raisonnement mystérieux du juge, mais d'une appréciation mystique de la situation.

L'équité est omniprésente en droit pénal, car elle permet de transformer la loi en décision individuelle et la Norme abstraite en Justice. La parole désincarnée du législateur est appliquée par des êtres humains, jugeant avec leur caractère, émotions, expériences, même si leur formation professionnelle les met à l'abri des excès d'émotivité. Les cours d'assises, institution médiatisée formée de professionnels et de profanes, se singularisent par une application souvent émotionnelle des règles de droit et jugent souvent en équité et en violation des principes généraux du droit. La notion d'équité paraît avoir été formellement introduite en droit pénal par le mécanisme du procès équitable et de l'équité de la procédure pénale, notions consacrées par la C.E.S.D.H. La cour de cassation semble s'emparer du pouvoir d'interprétation et de l'utiliser dans certains domaines comme arme de politique pénale, permettant d'aggraver ou d'infléchir la répression. Le droit contemporain, dans le sillage de la CEDH doit-il reconnaître une autorité à l'interprétation jurisprudentielle et lui permettre de concurrencer la loi ?

Dans le sillage de la doctrine civiliste ayant admis l'interprétation prétorienne au sein des sources du droit, le droit pénal semble entamer une révolution de ses principes fondateurs. La Cour européenne des droits de l'homme a consacré une conception matérielle des sources de la légalité applicable à la matière pénale. Cette atteinte directe au principe traditionnel de la légalité pénale semble incompatible avec la structure du droit français. La jurisprudence ne peut devenir l'égale ou l'alter ego de la loi. Incorporée aux sources du droit, elle permet à la loi de vivre et de se développer, mais ne peut la concurrencer ou lui faire ombrage. L'interprétation judiciaire ne peut revêtir une autorité absolue, mais doit se contenter de l'autorité relative.

Au stade de la formulation de la règle, le droit est déclaration de la volonté. Il ne prend forme qu'à travers son application et son interprétation. Le produit du système parlementaire devient réalité à travers l'interprétation. Le droit mort figé de la loi prend vie à travers les interprètes. Ainsi, Pygmalion, le célèbre sculpteur grec acheva une statue en ivoire d'une beauté inégalée. Il passa ses nuits et ses jours auprès de sa statue afin de rendre de plus en plus belle et en tomba éperdument amoureux. Il la baptisa Galatée. Mais la statue glacée et figée ne pouvait lui

rendre ses sentiments. Touchée par cet amour dévoué et impossible, Aphrodite, déesse de l'amour, décida d'insuffler vie à la statue. Galatée prit vie sous les yeux de Pygmalion.
Tel un Pygmalion, le législateur façonne son œuvre. Pendant des nuits et des jours, les navettes parlementaires l'améliorent constamment. Mais il est lettre morte tant qu'il ne commence pas à être interprété par ceux qui sont chargés de son application.

Le droit pénal fait appel à des sources protéiformes et ses bases s'en trouvent ébranlées conduisant à de nouvelles questions inattendues. La solution ne repose plus exclusivement sur la loi, mais sur la norme désignant la règle applicable. Le changement de terminologie démontre une évolution importante au sein du droit. La légalité s'est transformée et a fait place à la normativité aux contours flous et extensibles.

Le système juridique ne repose plus exclusivement sur les sources formelles. L'image du droit positif formé d'un corpus de textes se transforme en un système de règles présentant trois propriétés essentielles : l'univocité (l'idéal des idées claires et distinctes garantit la vérité et l'efficacité), la cohérence (respect du principe de non-contradiction de normes pouvant coexister au sein d'un même ordre juridique), la complétude (le système fournit une seule solution à un problème de droit donné)[46].

L'interprétation de la loi constitue « *la viva vox juris* »[47], représentant la voix vivante du droit. Le droit est « avant tout le droit jurisprudentiel, c'est-à-dire celui qui se réalise pour faire de la science, non du roman. La jurisprudence constitue la matière première sur laquelle doivent s'exercer les recherches, le droit est tel qu'elle le comprend et l'aménage, les documents législatifs n'étant que certains des matériaux dont l'assemblage et la mise en œuvre lui sont confiés »[48].

L'interprétation conduit à un développement du concept même de droit en l'étendant au-delà de ses frontières légales traditionnelles. Le doyen CARBONNIER affirme que « le droit est plus grand que l'ensemble des sources formelles du droit »[49] lui permettant de dégager « la norme des normes », qui est la loi naturelle issue des multiples relations entre les individus différents à l'intérieur de divers réseaux normatifs. Cette vision

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[46] FRYDMAN B., « Le sens des lois, p. 205.
[47] DEMOLOMBE, « Cours de Code civil », Paris, Durand, 1865, p. V.
[48] JOSSERAND, « Cours de droit civil positif français », Paris, Sirey, 1929, p. VII.
[49] CARBONNIER J. « Flexible droit. Textes pour une sociologie du droit sans rigueur », L.G.D.J., Paris 2001, p. 21.

évolutive lui permet de désigner le droit positif comme « le droit qui vit »[50] et de refuser la « glaciation légale » du droit positif ramenant le droit à une collection de codes et jurisprudences nécessitant une mémoire d'ordinateur. Le « droit qui vit » est un pullulement de corpuscules en mouvement (les centaines de milliers de décisions de justice) tenant compte de l'épaisseur des lois dans leur histoire, de l'infinité des interprétations concevables d'une position jusqu'à son diamétral contraire. Le nouveau concept de normativité englobe le droit qui vit et se détache du carcan formel de la légalité pénale.

2. MODIFICATION DES PRINCIPES GENERAUX DU DROIT PENAL

Le juge pénal a été encouragé par ces signes favorables à l'extension de ses pouvoirs d'interprétation et, surtout, à l'autorité de son interprétation. Plusieurs arguments plaident dans ce sens.

Premièrement, le législateur lui-même a indirectement reconnu une valeur à l'interprétation de la loi pénale à partir du moment où il a admis la procédure permettant de demander des avis interprétatifs à la Cour de cassation. Les articles 706-64 à 706-70 du Code de procédure pénale[51] permettent aux juridictions pénales, à l'exception des juridictions d'instruction et de la cour d'assises ou lorsque la personne est placée en détention provisoire ou sous contrôle judiciaire, de solliciter un avis en posant une question de droit. Le juge surseoit à statuer jusqu'à la réception de l'avis car la Cour de cassation doit se prononcer dans un délai de trois mois. Selon les principes généraux de droit, l'avis est facultatif, non susceptible de recours et ils ne lient pas le juge du fond l'ayant sollicité. Sa nature juridictionnelle semble s'imposer. Cependant, deux arguments plaident en faveur d'une valeur supérieure et quasi-contraignante pour les juridictions inférieures. D'une part, si l'avis n'a pas de valeur obligatoire, en principe, il s'impose au juge du fond, de facto. Connaissant la position théorique de la Cour de cassation, le juge essaie de s'y conformer afin d'éviter la censure de sa décision. D'autre part, le législateur lui-même a reconnu une valeur de principe à l'avis en prévoyant la possibilité de la publier au Journal Officiel de la République française. Les décisions judiciaires ne sont pas publiées dans ce recueil réservé aux sources de la légalité.

Le deuxième argument fait écho à la polémique actuelle portant sur l'application des revirements de jurisprudence dans le temps. Le Code pénal, en écho à la Déclaration des droits de l'homme et du citoyen de 1789,

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[50] CARBONNIER J., « Essai sur les lois », p. 328.
[51] Loi organique n° 2001-539 du 25 juin 2001, JO 26 juin 2001, p. 10119.

incorporée au bloc de constitutionnalité, à la Convention européenne de sauvegarde des droits de l'homme, à la Déclaration Universelle des droits de l'homme de 1948, au Pacte international relatif aux droits civiles et politiques de 1966, édicte le principe de la non-rétroactivité de la loi pénale de fond plus sévère[52] nuancée par la rétroactivité in mitius de la loi de fond plus douce. Par un parallélisme de traitement, certains revirements ne font pas naître de difficultés quant à leur application temporelle. Lorsque la jurisprudence infléchit sa position et se montre moins sévère avec la personne poursuivie, la règle plus favorable bénéficie immédiatement à l'individu. Deux arguments consolident cette solution. D'une part, la rétroactivité in mitius de la loi pénale de fond plus douce contamine la règle de droit et aboutit à son application immédiate à une procédure en cours. D'autre part, le juge est toujours autorisé à faire de l'interprétation in favorem.

Seul le revirement de jurisprudence risquant de porter tort à la personne poursuivie cause une difficulté quant à son application dans le temps. La Chambre criminelle applique immédiatement le revirement de jurisprudence, même lorsqu'il aggrave le sort de la personne poursuivie[53]. « Attendu qu'en l'absence de modification de la loi pénale, et dès lors que le principe de non rétroactivité ne s'applique pas à une simple interprétation jurisprudentielle, le moyen reste inopérant ». Pourtant, le pourvoi reposait sur une argumentation juridique solide issue de la nouvelle acception de la légalité selon la définition européenne incorporant la jurisprudence aux sources du droit. A ce titre, elle se trouve soumise aux mêmes exigences que les autres sources. L'application rétroactive d'une interprétation jurisprudentielle plus sévère de la loi afin d'aggraver le sort du prévenu constitue une violation du principe de la non rétroactivité de la loi pénale et indirectement du principe de la légalité pénale. Cette application rétroactive des revirements de jurisprudence, indépendamment de leur nature plus ou moins douce pour les parties, a été généralisée au sein des autres branches du droit[54].

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[52] Le principe s'applique aux lois de fond visant les incriminations et les peines, à l'exception de mesures de sûreté reposant sur la dangerosité de l'individu et nullement sur sa culpabilité : Cons. Const. 8 décembre 2005, 2006, jur., p. 966, note ROUVILLOIS F.

[53] Crim. 30 janvier 2002, Bull. n° 16 ; Dr. Pén. 2002, comm. n° 43, obs. VERON ; RSC 2002, p. 581.

[54] Soc. 7 janvier 2003, D. 2004, jp., p. 1761 : « la sécurité juridique, invoquée sur le fondement du droit à un procès équitable prévu par l'article 6 CEDH, ne saurait consacrer un droit acquis à une jurisprudence immuable, l'évolution de la jurisprudence relevant de l'office du juge dans l'application du droit ».

Un groupe de travail, présidé par le professeur Nicolas MOLFESSIS, s'est penché spécifiquement sur cette question et remis son rapport, le 30 novembre 2004, au Premier Président de la Cour de cassation, M. Guy CANIVET[55]. Le revirement rétroactif change la solution dans une affaire que la Cour de cassation juge et dont les faits ont déjà eu lieu, étant antérieurs à l'arrêt qu'elle va rendre. Le principe nouveau qu'elle consacre régit des comportements commis sous l'empire de l'ancienne interprétation. Selon le rapport, le revirement déjoue les anticipations légitimes des justiciables et met en cause la sécurité juridique. Le Groupe de travail propose que la Cour de cassation accepte de limiter dans le temps les effets des revirements, dès lors qu'ils entraînent des conséquences néfastes pour les plaideurs. La Cour de cassation doit elle-même définir les critères selon lesquels elle doit moduler l'application dans le temps des revirements. Deux facteurs doivent être pris en considération – la situation du justiciable et l'intérêt général. Ces termes s'appliquent à la totalité des branches juridiques, mais il semble évident qu'en droit pénal, une cohérence est souhaitable : le critère de l'aggravation du sort de la personne poursuivie doit être privilégié. Cette nouvelle théorie de l'application dans le temps des revirements de jurisprudence a pour effet secondaire de raffermir la thèse selon laquelle la jurisprudence est source de droit. Le juge n'a pas un pouvoir créateur, mais un pouvoir d'interprétation qui lui permet de fixer les limites de l'application de la norme. Accepter de limiter dans le temps ce pouvoir aboutit à créer une déontologie des revirements.

Cette approche « réaliste »[56] a été critiquée car elle s'oppose aux principes fondamentaux de l'organisation judiciaire. L'article 4 du Code civil ne permet au juge d'édicter des règles que pour la cause qui lui est soumise, alors que l'article 5 prohibe les arrêts de règlement. Les règles posées par la jurisprudence ne sont pas créées ex nihilo par le juge, mais il y procède par petites touches successives, en vue d'améliorer le système. Le revirement de jurisprudence constitue une amélioration de la règle de droit, qui devrait s'appliquer immédiatement à tous. « Le juge n'est pas le rival du Parlement »[57]. A ce titre, il interprète chaque cause qui lui est soumise et seul le Parlement a le pouvoir de modifier la règle. Il n'appartient pas au juge de limiter dans le temps l'application de la jurisprudence, fût-elle issue d'un revirement de jurisprudence.

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[55] Communiqué, D. 2004, rapp., p. 3148.

[56] HEUZE V. : « A propos du rapport sur les revirements de jurisprudence. Une réaction entre indignation et incrédulité, JCP 2005, I, 130.

[57] Idem.

Cette application pure et formelle des principes fondamentaux heurte directement le principe de sécurité juridique reconnu par les juges européens. Le juge communautaire a recouru à la notion de revirement pour l'avenir au titre des « considérations impérieuses du principe de sécurité juridique ». La CEDH a consacré la même technique du revirement pour l'avenir au nom « de la sécurité juridique, nécessairement inhérente au droit de la convention et au droit communautaire ». L'arrêt PESSINO c/ France[58] sanctionne l'imprévisibilité de la jurisprudence pénale car contraire au principe de non rétroactivité de la loi pénale. La CEDH choisit de conditionner l'application de l'article 7 à la prévisibilité raisonnable, dont l'absence découle de trois situations : cas totalement nouveau d'extension de l'incrimination ou de la peine ; conflit grave de jurisprudence en présence d'une application chaotique des règles ; revirement clair de jurisprudence. La CEDH relève le manque de jurisprudence claire résultant de l'absence de « précédents topiques » et fixe la méthode de travail. Les précédents topiques, qui permettent de constater une prévisibilité raisonnable de la règle, résultent du droit national[59] ou international[60]. La prévisibilité émane

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[58] CEDH du 10 octobre 2006, JCP 2007, II, 10092, note ZEROUKI-COTTIN D. ; D. 2007, notes, p. 42, note D. ROETS. Le requérant poursuit des travaux malgré une décision du juge administratif ordonnant le sursis à exécution du permis de construire dont il était le titulaire. Les juges hésitent entre deux qualifications pénales et il attaque sur le fondement de la rétroactivité du revirement jurisprudentiel qui lui était défavorable. La CEDH accueille sa demande en considérant que la France a violé l'article 7 sur le principe de légalité et de non rétroactivité car « il était difficile, voire impossible pour le requérant de prévoir le revirement de la Cour de cassation et de savoir qu'au moment où il les a commis, ses actes pouvaient entraîner une sanction pénale ».

[59] CEDH 22 nov. 1995, C.R. contre RU, série A, n° 335 BC. Il s'agissait d'un cas de viol entre époux qui était couvert au Royaume-Uni par une immunité pénale avant que la House of lords n'accomplisse un revirement de jurisprudence en 1992. Le mari violeur demandait à ce qu'on ne lui applique pas ce revirement de jurisprudence, ses agissements étant antérieurs. La CEDH lui refuse ce droit. Le revirement aboutissant à ériger un acte en infraction ne reconnaît pas l'article 7 CEDH dès lors que l'incrimination nouvelle « constitue une étape raisonnablement prévisible » de l'évolution de la loi. Les juges ici n'ont fait que « parachever une tendance perceptible dans l'évolution de la jurisprudence ». Cet arrêt est louable dans sa solution, mais il conduit à remplacer la légalité des incriminations par leur légitimité.

[60] CEDH Grande Chambre 22 mars 2001, Streletz, Kessler et Krenz c/ Allemagne. L'homicide d'une personne franchissant illégalement le mur de Berlin était puni en RDA. Pourtant, les policiers avaient été condamnés après la réunification selon une interprétation renouvelée de la règle de droit. La CEDH a considéré que cette condamnation était justifiée car ces agissements constituaient « une infraction définie avec suffisamment d'accessibilité et de prévisibilité par les règles du droit international relatives à la protection des droits de l'homme ».

donc des termes du texte ou de l'évolution normale et prévisible des normes[61].

Selon ces arrêts et, notamment, PESSINO, les juges ne doivent plus juger la seule qualité formelle de la règle de droit, mais aussi sa qualité substantielle. La CEDH consacre le principe du réalisme juridique (comme le rapport Molfessis) et s'écarte de l'analyse traditionnelle du droit pénal. Mais cela pose un problème réel en droit pénal qui est un droit éminemment textuel – héritage légaliste et beccarien. S'il est heureux d'appliquer strictement le principe de la sécurité juridique, la question de la remise en cause des sources est permise. Il y a un défaut de logique dans l'application du principe de la légalité pénale. La CEDH impose au législateur une exigence légaliste – la clarté et la prévisibilité des textes - tout en acceptant que le juge le leur confère lorsque celle-ci fait défaut.

La CEDH semble assimiler la jurisprudence aux sources textuelles du point de vue de la légalité pénale et les soumet aux mêmes principes que sont la non-rétroactivité et l'interdiction de l'interprétation in malam partem en recourant aux exigences d'accessibilité et de raisonnable prévisibilité, critères de la qualité de la base en droit[62]. Donc, selon la CEDH il existe

[61] CEDH 17 mars 2009, Ould c/ France, D. 2009, jur., p. 1573, obs. RENUCCI J.-F., D ; 2009, p. 2825, obs. ROUJOU DE BOUBEE G. : Un officier de l'armée mauritanienne, venu faire un stage en France, est poursuivi pour des faits de torture commis en Mauritanie lors d'affrontements ethniques, faits couverts par une amnistie dans leur pays de commission. La loi française est applicable en raison de la compétence universelle exceptionnelle prévue à l'article 689-1 et 689-2 CPP (en cas de génocide et de torture). Le problème juridique émane de ce que les faits s'étaient produits entre 1990-1991, lorsque la torture ne faisait pas l'objet d'une incrimination autonome en droit français (apparu en 1994), mais constituait une circonstance aggravante. Cette incrimination autonome postérieur, aggravant le sort de la personne poursuivie pouvait-elle lui être appliquée ? La CEDH répond par l'affirmative car le dispositif constitue une évolution du CP entraînant non pas l'apparition d'une nouvelle infraction, mais un aménagement que l'intéressé pouvait raisonnablement prévoir, compte tenu de la condamnation universelle de la torture, norme appartenant au jus cogens.

[62] CEDH 24 mai 2007, Dragotoniu et Militaru-Pidhorni c/ Roumanie. Les deux requérants sont employés d'une banque à capital privé. En 1991, ils ont été accusés de corruption passive sur la base d'un article (254) du CP qui visait la corruption de fonctionnaire. Un autre article du CP étendait les dispositions de cet article « aux autres salariés ». Seule une loi de 1992 les rend applicables « aux salariés travaillant dans des sociétés commerciales à capital privé ». Les juridictions roumaines assimilent les requérants aux autres salariés.

La CEDH condamne l'interprétation roumaine en reprenant son argumentation soutenue dans l'arrêt PESSINO. La jurisprudence roumaine n'a pas fourni de précédent procédant à cette assimilation. Une nouvelle interprétation jurisprudentielle défavorable à la personne poursuivie inaccessible et imprévisible ne peut être appliquée rétroactivement. Elle apporte

deux sortes de revirements de jurisprudence actuellement. D'une part, une interprétation jurisprudentielle accessible qui devient, par voie de conséquence, raisonnablement prévisible et qui peut s'appliquer immédiatement. D'autre part, une interprétation jurisprudentielle non-accessible, dont les juges doivent mesurer la raisonnable prévisibilité. Cela modifie les règles car les deux conditions ne sont plus cumulatives, mais alternatives. La CEDH associe la notion de raisonnable avec celle de « résultat cohérent avec la substance de l'infraction ». Elle englobe dont parfaitement la jurisprudence aux sources de la légalité du point de vue de la définition et de leur régime juridique, mais marque un arrêt dans l'élargissement des sources matérielles. La CEDH précise que « le fait pour la doctrine d'interpréter un texte de loi ne peut se substituer à la jurisprudence », donc ne peut s'incorporer à la légalité pénale.

Le Conseil d'Etat a affirmé l'application d'une nouvelle règle uniquement pour l'avenir[63]. Ainsi, une jurisprudence nouvelle qui conduit à annuler des actes valablement formés sous l'empire d'une solution jurisprudentielle antérieur ne doit toucher que les actes commis postérieurement à sa formulation. Le Conseil d'Etat limite la rétroactivité d'un revirement de jurisprudence au nom du principe de « sécurité juridique »[64].

Dans ce contexte jurisprudentiel et doctrinal, la Cour de cassation[65] a posé de nouvelles règles et a fixé un cadre légal du revirement pour l'avenir uniquement, en utilisant l'article 6 CEDH et le droit à un procès équitable. La Cour de cassation a décidé que la nouvelle règle ne s'applique qu'aux actes ou aux instances introduites postérieurement à l'arrêt. Donc, le justiciable à l'origine du revirement n'en tire aucun bénéfice, si c'est celui de la gloire et de la satisfaction morale. Le domaine pénal serait le domaine scabreux pour l'application de cette règle[66]. En droit pénal, il conviendrait de distinguer deux types de revirements lorsque la situation de la personne poursuivie se trouve aggravée. Lorsque le changement est perceptible dans l'évolution du droit interne ou international, il peut être appliqué

une précision supplémentaire en indiquant que cette interprétation défavorable relevait de l'analogie et que la principe de légalité commande de ne pas appliquer la loi de manière extensive au détriment de l'accusé par analogie. Elle rappelle l'attachement du droit pénal à l'interprétation stricte.

[63] Conseil d'Etat 11 mai 2004, AJDA 2004, p. 1183, chron. C. Landais et F. Lenica.

[64] CE 14 juin 2004, Dr. adm. 2004, comm. n° 166

[65] 2e Civ. 8 juillet 2004, D. 2004, jp., p. 2956.

[66] MORVAN P., « Le revirement de jurisprudence pour l'avenir : humble adresse aux magistrats ayant franchi le Rubicon », D. 2005, chron. p. 247.

rétroactivement. Si le revirement institue une nouvelle peine ou incrimination et qu'il est totalement imprévisible, il ne peut agir que pour l'avenir et ne peut être appliqué aux faits commis antérieurement à son énoncé par la Cour de cassation. Cette position a tout de même un inconvénient majeur. On accorde au juge le pouvoir créateur d'infraction ou peine.

Afin d'assurer sa prévisibilité à la norme, le juge pénal peut employer trois techniques. D'une part, lorsqu'il sent une évolution important au sein de la répression, il peut procéder par obiter dictum, une affirmation générale en dehors de la cause dont il est précisément saisi annonçant une position générale. Cette technique permet d'assurer une prévisibilité à son revirement et une application rétroactive. D'autre part, ouvrir la voie des avis rendus par la Cour de cassation à cette matière et permettre aux juridictions du fond de poser des questions préjudicielles afin d'assurer la prévisibilité de la règle. Enfin, la technique américaine – the prospective overruling –peut être transposée en droit continental Cette interprétation ne vaudrait que pour l'avenir et elle aurait le mérite de constituer le précédent topique nécessaire à la sécurité juridique en cas de revirement.

La cour de cassation a clairement affirmé son choix dans lequel elle a « couronné » le revirement prospectif[67]. Le fondement retenu est l'article 6 CESDH - l'application immédiate d'un revirement aboutirait à priver la victime d'un procès équitable. Alors que le débat en droit français portait sur la portée de l'article 5 du Code civil et l'interdiction des arrêts de règlement et le principe de la légalité pénale, la CESDH s'invite dans le débat. Les juges français ne font pas référence au principe de « sécurité juridique », principe récent polémique. Le droit au procès équitable garantit « le principe de prééminence du droit » garanti par le préambule de la CESDH. La sécurité juridique n'est pas un principe, mais un objectif. D'ailleurs, le Conseil constitutionnel le reconnaît en parlant de « l'objectif d'accessibilité et d'intelligibilité de la loi » soutenant le « principe de clarté de la loi ». L'application rétroactive est admissible dans un seul cas : pour assurer le respect d'une liberté fondamentale supérieure et par le respect de la dignité humaine.

La cour de cassation a préféré le fondement de l'article 6 CESDH afin d'assurer le respect formel du principe de la légalité pénale dans sa forme traditionnelle. Le pouvoir judiciaire ne peut s'ingérer dans

[67] Assemblée plénière de la cour de cassation 21 décembre 2006, D. 2007, p. 835, note P. MORVAN, JCP 2007, II, 10111, note X. LAGARDE.

l'application d'une loi car il y aurait violation de la séparation des pouvoirs, mais aussi violation du procès équitable. Cependant, un argument permettrait de s'affranchir de cette dernière limite. Le législateur peut adopter des lois interprétatives qui sont rétroactives, car elles font corps avec la loi interprétée. Ce procédé peut être considéré comme déloyal de la part du législateur car il fait échec indirectement à la non rétroactivité, pourtant il est parfaitement admis au titre des exceptions à la non-rétroactivité de la loi pénale de fond plus sévère. Pourquoi ne pas l'admettre à l'égard du juge, alors que son rôle est d'appliquer et d'interpréter la loi ? Son interprétation peut évoluer, mais elle s'incorpore à la loi appliquée et devrait s'appliquer même rétroactivement. Si la règle interprétative peut être reprochée au législateur, elle ne doit pas l'être au juge, ni son application rétroactive, car le juge a le devoir de faire évoluer la loi selon les besoins de la société.

Le revirement prospectif est défini selon le critère de l'équité, caractéristique du procès équitable, qui reçoit une valeur supérieure prééminente par rapport aux autres valeurs. L'équité est utilisée ici comme un correctif de la loi. Le revirement prospectif permet de répondre à deux types de problèmes. D'une part, il prévient une lacune normative susceptible de provoquer une situation de chaos. D'autre part, il remédie à une situation qui réveille un sentiment d'injustice et permet d'adoucir la règle, où « l'équitable l'emporte sur le procès »[68].

Le revirement prospectif émane exclusivement d'une juridiction suprême, ayant vocation à formuler des règles à vocation normative. La solution juridique est applicable strictement aux actions introduites après sa formulation, mais le juge peut repousser le effets du revirement à une date future déterminée ou indéterminée, dépendant de l'accomplissement d'une condition juridique. La chambre criminelle de la cour de cassation ne semble pas se résoudre à cette solution et retarde l'affirmation du principe de revirement prospectif. Ainsi, dans l'affaire PESSINO[69], la cour de cassation déplace le terrain juridique du débat ; Elle ne se place pas sur le terrain de l'application de la jurisprudence dans le temps, qui conduit à l'application de l'exigence de prévisibilité aux textes, ainsi qu'à la

[68] MORVAN P., D. 2007, p. 835.

[69] Ass. Plén. 13/02/2009 ; Dr. Pén. 2009, com. 54, obs. ROBERT J.-H. : Le délit de construction sans permis n'est pas constitué lorsque des travaux ont été continués malgré la décision du juge administratif ayant ordonné le sursis à exécution du permis initialement accordé. Le sursis à exécution ne vaut pas annulation de l'autorisation. Elle casse l'arrêt de condamnation sans renvoi, puisque la poursuite est privée de base légale.

jurisprudence, mais sur le terrain de l'interprétation stricte prévue par l'article 111-4 CP.

L'application des revirements de jurisprudence exclusivement pour l'avenir constitue une atteinte directe au principe de la légalité, reposant sur le postulat de l'assimilation de la règle prétorienne à la règle légale[70]. La Cour de Cassation a franchi le Rubicon[71], en procédant à un revirement pour l'avenir et en reconnaissant, de facto, à son interprétation la même autorité qu'à la loi. La loi pénale de fond plus sévère est soumise au principe de non-rétroactivité. Soumettre l'interprétation judiciaire au même régime d'application de la loi dans le temps aboutit à assimiler le pouvoir normatif du juge à celui du législateur. Si le pouvoir normatif du juge existe, il est d'une essence différente de celui du législateur. Si « le législateur impose l'observation d'une règle en vertu d'un pouvoir, le juge, en vertu de son autorité, dit le juste pour départager les plaideurs »[72]. Il est impossible de souscrire à la consécration du partage du pouvoir législatif entre les représentants du peuple et les magistrats.

L'application des corollaires de la légalité pénale de manière identique à la loi et à la jurisprudence aboutit à une assimilation de ces sources du point de vue de la légalité pénale. Leur qualité s'apprécie au regard de leur accessibilité et de leur prévisibilité.

L'accessibilité se dédouble car elle doit être matérielle (les sites consultables gratuitement en ligne), mais aussi intellectuelle (l'intelligibilité de la règle de droit). Cette dernière s'apprécie in concreto, selon le destinataire de la règle, mais elle doit présenter un seuil minimal. Tout citoyen doit pouvoir prendre connaissance des règles applicables afin d'être prévenu des conséquences de son comportement. Le juge national doit prendre en compte la qualité des destinataires et moduler son appréciation de la qualité de la loi en fonction des destinataires de la règle (des professionnels du droit, comme des citoyens sans formation juridique particulière). En effet, les lois n'ont pas comme unique destinataire l'HOMO ACADEMICUS, mais régulent les rapports de droit au sein de la société.

La prévisibilité s'entend comme la clarté et la précision de la loi. A la lecture de la loi, l'individu doit savoir quels actes et omissions engagent

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[70] DROSS W., « la jurisprudence est-elle seulement rétroactive ? (à propos de l'application dans le temps des revirements de jurisprudence), D. 2006, chron., p. 472.

[71] MORVAN P., « Le revirement de jurisprudence pour l'avenir, humble adresse aux magistrats ayant franchi le Rubicon », D. 2005, chron., p.247.

[72] DROSS W., op. cit. supra note n°.

sa responsabilité pénale. Elle recouvre l'objectif constitutionnel d'intelligibilité de la loi, qui doit être étendu à l'ensemble des sources du droit[73]. La prévisibilité ne doit pas se traduire par une certitude absolue, car la rigidité peut empêcher l'efficacité de la répression. Cette caractéristique de prévisibilité se dédouble aujourd'hui[74]. D'une part, la prévisibilité normative vise les textes de loi. La clarté doit caractériser autant la condition juridique qui exprime le champ d'application de la règle que les effets juridiques énonçant les conséquences découlant de l'application de la règle. La loi du talion est l'exemple-type du droit pénal. La condition juridique (si tu tues) s'accompagne d'une effet juridique impératif (tu subiras la peine capitale). En droit pénal, la condition juridique doit être concrète et faire référence à une qualification juridique précise. L'effet juridique doit être impératif en droit pénal car l'impérativité maximale assure la meilleure prévisibilité à la loi (la durée de la peine, introduction des peines planchers, les périodes de sûreté). D'autre part, la jurisprudence, composante matérielle de la règle de droit, doit être prévisible. Pour y aboutir, deux conditions doivent être remplies. La jurisprudence doit systématiser son interprétation (dégager des critères afin d'apprécier un élément) et stabiliser son application dans le temps (la Cour de cassation est une juridiction à vocation normative qui adope la technique du revirement prospectif).

Il est important de noter que le pouvoir de contrôle de la qualité de la norme pénale est dévolu au juge pénal. En examinant l'accessibilité et la prévisibilité de la loi, il se prononce indirectement sur la qualité du travail du législateur. Cette conception bouscule l'ordre établi et peut aboutir à des conflits inextricables, car il pervertit le système de séparation des pouvoirs. Dans une période d'inflation législative dénoncée comme une dérive importante, cette atteinte au pouvoir législatif peut dégénérer en remise en cause de l'équilibre des pouvoirs mis en place par la Constitution.

C'est la raison pour laquelle cette règle ne doit pas être poussée à l'absurde. Si le législateur doit être précis dans la définition, il ne doit pas

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[73] MALAURIE, Ph., « L'intelligibilité des lois », Pouvoirs 2005, p. 131. « L'intelligibilité est nécessaire à tout le droit: constitutions, traités internationaux, décisions judiciaires, actes administratifs, actes publics et privés. Le droit n'a de sens que s'il est compris de tous et qu'il est ainsi populaire. Les lois, avait dit Montesquieu «sont faites pour des gens de médiocre entendement». N'y voyons pas la condescendance de l'«élite», du pouvoir, des juges ou des juristes: c'est dans leur réalisme populaire que réside la grandeur des lois, peut-être même aujourd'hui leur seule grandeur. »

[74] MUZNY P., « Quelques considérations en faveur d'une meilleure prévisibilité de la loi », D. 2006, chr., p. 2214.

détailler les circonstances de l'acte, car il le viderait de toute substance. La tâche du législateur est de concevoir des textes de portée générale et absolue et l'accumulation des textes techniques et ponctuels ne peut que nuire à la cohérence du système et aggraver « l'indigestion législative du corps social ». Même la CEDH admet la difficulté du travail législatif[75] : « en raison même du principe de la généralité des lois, le libellé de celles-ci ne peut présenter une précision absolue. L'une des techniques de la réglementation consiste à recourir à des catégories générales plutôt qu'à des listes exhaustives …afin d'éviter une rigidité excessive et pouvoir s'adapter aux changements de situation. L'interprétation et l'application de pareils textes dépendent de la pratique ».

CONCLUSION

Cette assimilation de la jurisprudence à la loi, du point de vue des sources de la légalité pénale, trouble en profondeur les principes généraux du droit pénal. Si la reconnaissance d'un pouvoir d'interprétation du juge pénal est nécessaire, elle repose sur la loi et doit être contenue dans les limites de la loi. Si le recours aux objectifs de la loi pénale permet aux juges une certaine liberté d'interprétation, il faut toujours garder présent à l'esprit le fait que la loi est impérative, alors que l'objectif n'est que directionnel. « Objectif n'est point loi »[76]. Le législateur garde le pouvoir de briser[77] une jurisprudence non-conforme à ses objectifs à l'aide d'une loi (la loi dispensant le ministère public de sa présence lors de l'audience d'homologation dans le cadre de la comparution sur reconnaissance préalable de culpabilité contraire à l'avis interprétatif de la Chambre criminelle) et les juges ne peuvent refuser de l'appliquer, sous peine de violer le principe de la légalité pénale.

Il est nécessaire de distinguer au sein du droit pénal entre les techniques constitutives d'incriminations et les techniques déclaratives. La loi pénale crée le droit, alors que la jurisprudence, guidée par la *ratio legis*, en assure l'application. Si « on ne peut nier la parfaite complémentarité de ces deux directions, on doit veiller à toujours respecter le clivage juridique

[75] CEDH 24 mai 2007, Dragotoniu et Militaru-Pidhorni c/ Roumanie, DREYER E., « Un an de droit européen en matière pénale », Dr. pén. 2008, chron. 3.

[76] DI MARINO G., op. cit. supra note n°.

[77] BONNEAU Th., « Variations sur la jurisprudence « Source du droit triomphante mais menacée », in « Ruptures, mouvements et continuité du droit, Autour de Michelle Gobert », Economica 2004, p. 127.

qui les sépare et que l'interprète, dans sa tâche d'explication et d'application du droit, ne peut faire que de traduire »[78]. Le juge est traducteur du législateur, même s'ils participent tous deux à assurer le respect de la règle dans la société. Ce principe essentiel du droit pénal ne saurait accepter de dérogation. Les dérives actuelles de lois déclaratives et d'interprétations prétoriennes constitutives portent atteinte aux fondements du droit pénal. Or, dans cette matière plus que dans toute autre, il faut faire nôtres les mots de Bentham selon lesquels « les paroles de loi doivent se peser comme des diamants ». Le juge interprète doit les manier avec respect, crainte, admiration, mais sans le désir de se les approprier. Toute conduite contraire le conduirait à trahir sa mission et à participer au renforcement de l'adage « traductore traditore »[79]. La jurisprudence est la sagesse appliquée au droit au sens propre du terme. Une bonne interprétation en est la manifestation de base, car de sa source découlent les autres actes fondateurs de la Justice. Le juge utilise en premier sa balance, l'interprétation, avant de sortir son glaive, la décision.

Certains se plaisent à évoquer la « République des juges », fondée sur la prééminence du droit qu'ils sont chargés d'appliquer. Cette analyse risque de créer plusieurs problèmes majeurs. Quels seraient les contre-pouvoirs au « pouvoir » judiciaire ? Si la République des juges a été évoquée, ne devrait-on pas parler plutôt de l'Europe des juges, puisque la jurisprudence de la CJUE et de la CEDH s'impose aux juges français ? L'expérience européenne a été évoquée comme une expérience en laboratoire de ce qui pourrait être demain la mondialisation du droit pénal. Quel sera le droit pénal de demain, soumis aux sources textuelles (trois listes de droits fondamentaux seront opposées au droit pénal – de la Constitution, de la CESDH, de l'Union européenne) et matérielles (la jurisprudence de la CJUE et de la CEDH) multiples ? Comment trouver une cohérence et une prévisibilité confrontée à une complexité qui désarme professionnels et magistrats ? L'histoire nous apprend à tirer des enseignements de l'expérience (heureuse ou malheureuse de nos prédécesseurs). Tacite déplorait déjà «*Plurimae leges corruptissima respublica*»[80], en considérant

[78] MAYAUD Y., « Ratio legis et incrimination », RSC 1983, p. 597.
[79] Le traducteur traître.
[80] Tacite, Annales, L. III 27, expose que les premières lois de l'histoire de l'humanité furent simples «comme il convenait à des hommes d'esprit encore grossier» (Minos pour les Crétois, Lycurgue pour les Spartiates, Solon pour les Athéniens, et surtout les decemvirpour les Romains avec la loi des XITables, «la plus haute expression du droit et de l'équité», puis continue Tacite, vinrent à Rome des lois «imposées par la violence» et l'agitation de la plèbe et il constate qu'«on ne légifère pas seulement pour tous mais aussi contre des

que le signe auquel on reconnaît la décomposition d'un État est la surabondance de ses lois. Montesquieu considérait que « les lois inutiles affaiblissent les lois nécessaires »[81], et Portalis affirmait que « l'histoire nous offre à peine la promulgation de deux ou trois bonnes lois dans l'espace de plusieurs siècles »[82]. Si l'on rajoute au paysage délétère de l'inflation législative, l'inflation jurisprudentielle des décisions de justice rendues par des juridictions à vocation normative devant s'incorporer à la légalité pénale, le phénomène dévient protéiforme et hideux pour la démocratie. La règle de droit est belle et utile lorsqu'elle est simple et claire et qu'elle peut être comprise de tous. Dans un contexte technocratique de multiplication des règles techniques de sources diverses, l'Europe se révèle une complication supplémentaire qui risque d'être fatale à la légalité pénale. Exsangue, vidée de son sens, la légalité se réfugiera dans l'histoire du droit d'où elle nous contemplera en train de nous débattre face à un avenir incertain, car trop complexe. Si nous n'apprenons pas de nos prédécesseurs, apprenons du futur ou de certaines projections, même si elles appartiennent à la fiction. Cela pourrait s'apparenter à un raisonnement ab absurdo. La saga de « Star Wars » dresse le portrait d'une démocratie étouffée par des technocrates s'emparant du pouvoir au détriment de la démocratie. Et si les juges se mouvaient imperceptiblement en censeurs et contrôleurs suprêmes de la démocratie, qu'en resterait-il ? En faisant abstraction des petites créatures vertes en pleine lévitation, l'histoire se produisant dans une galaxie très lointaine semble s'approcher dangereusement de notre Terre. Le nombre de juges se lançant dans la politique n'a jamais été aussi important. Si ce mouvement est sain et souhaitable, car il se fait dans le respect de la répartition constitutionnelle des pouvoirs, la nouvelle définition de la légalité pénale dégagée par l'Europe produira des effets indésirables et dangereux sur le droit pénal. Une vigilance accrue doit être développée à l'égard de ce problème, considéré comme hautement technique, mais qui représente la garantie essentielle de la société démocratique actuelle.

individus» et il conclut par la phrase terrible et célèbre: «Plurimae[…]».

[81] Montesquieu,De l'esprit des lois, LXXIX, ch. 16.

[82] Portalis, Discours préliminaire au Code civil.

THE INTERNATIONAL LEGAL PERSONALITY OF THE EUROPEAN UNION AFTER THE LISBON TREATY

José Manuel SOBRINO HEREDIA*

ABSTRACT

The European Union has its own legal existence. Art. 47 of Treaty on the European Union refers to it when it states that the Union has legal personality. What characterizes this personality and the difference of that of the States is it will be restricted to the objectives and functions bestowed on it by its Member States, as they appear in or can be deduced from its founding Treaties and have been developed in practice and legally interpreted by the Court of Justice of the European Union. This paper examines precisely the scope of this personality and to what extent the Lisbon Treaty has come to add elements of international visibility to the EU. To do this, in the first part of it we study the process leading to the explicit recognition of this personality and, in its second part, it addresses how and in what material and spatial areas the international legal personality of the European Union has deployed.

KEYWORDS:

European Union. International legal personality. International Organizations. "Rules of the Organization". International agreement. European External Action Service. High Representative of the Union for Foreign Affairs and Security Policy.

INTRODUCTION:

The European Union, as an International Organisation, is an international subject. It is therefore not simply a forum in which several European States cooperate on a permanent and institutionalised basis, but also has its own legal existence independent from the group of States that

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constitute it. This enables it to maintain direct and immediate relations with the legal systems in which it acts and to become a clearly differentiate subject under Law.

Thus, and in order for it to fulfil the objectives with which it was charged by its founders, the European Union (henceforth, EU) is to be able not only to display a will of its own whose possible effects will be attributable to it alone, but also to maintain legal relations with other subjects under International Law, not as a mere agent or representative of its Member States, but in its own name by virtue of the powers it possesses.

The fact that it enjoys an international legal personality does not mean that the EU is a State, but rather that as well as the State there are other international subjects in international society that enjoy this personality[1]. However, unlike States, which have a full and general legal personality, that of the Union will be conditioned by the principle of speciality that inspires the whole of its legal system[2]. In other words, it will be restricted to the objectives and functions bestowed on it by its Member States, as they appear in or can be deduced from its founding treaties and have been developed in practice and legally interpreted by the Court of Justice of the European Union.

The EU, therefore, even though its action may be influenced by the presence of its Member State within the very institution, is able to express its own will in the spheres in which it has powers, and in such a way that, regardless of the body adopting a decision, the latter will be attributed to the Union and not to its Member States. This will enable it to take part in international relations as an autonomous body, able to relate with other international subjects, being attributed with international rights and duties as well as the faculty to assert such rights internationally and also to be held liable internationally in the event of a violation of such obligations[3].

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[1] On this point, see SOBRINO HEREDIA, J. M., “El estatuto jurídico de las Organizaciones internacionales”, in DIEZ DE VELASCO, M., *Las Organizaciones internacionales*, 16th ed. (SOBRINO, J. M. coord.), Ed. Tecnos, Madrid, 2010, pp. 56 ff.

[2] Advisory Opinion of the I.C.J., of 8 July 1996, on the legality of the use by a state of nuclear weapons in armed conflict, I.C.J. Reports, paragraph 25, p. 76.

[3] SOBRINO HEREDIA, J. M., “La personalidad jurídica de la Unión Europea”, in J. MARTÍN Y PÉREZ DE NANCLARES (coord.), *El Tratado de Lisboa. La salida de la crisis constitucional”*, Ed. IUSTEL, Madrid, 2008, pp. 333-349.

The Union has legal personality, as stated in art. 47 of the new Treaty on European Union, thereby including one of the main developments introduced by the Treaty establishing a Constitution for Europe in art. I-7. The essential merit of this brief precept is that of expressly stating, at that moment in time, that the EU enjoys such a personality. By doing so it introduces a healthy dose of clarity and transparency into the process of European integration, by putting down in black and white what reality and international practice had been demonstrating: that, in spite of the silence emanating from the TEU, the Union already possessed a *de facto* international legal personality[4].

In relation to this situation, it should be remembered that neither the Treaty of Maastricht establishing the EU, nor the revisions it underwent in the subsequent Treaties of Amsterdam and Nice, included an express mention of the legal personality of the EU. This voluntary silence, since such was the wish of the Member States that subscribed to this succession of international agreements, marks a clear difference with the express affirmation in the founding Treaties of the European Communities that were created in the nineteen-fifties, namely the European Economic Community (which would then become the European Community), the European Atomic Energy Community and the European Coal and Steel Community, that these international organisations did in fact have legal personality.

Thus, arts. 281 TEC and 184 TEAEC, referring respectively to each of these two Communities, stated that "(…) shall have legal personality",

[4] The existence of the EU's legal personality in the face of silence on the part of the Treaty has given rise to widespread discussion. See, for example, and in connection with the process of reform of the said Treaty, amongst others: CEBADA ROMERO, A., "Naturaleza jurídica de la Unión Europea: una contribución al debate sobre su personalidad jurídica a la luz de los trabajos de la Convención sobre el futuro de Europa", *Revista de Derecho Comunitario Europeo*, No 14, 2003, pp. 281 ff.; FERNÁNDEZ SOLA, N., "La subjetividad internacional de la Unión Europea", *Revista de Derecho Comunitario Europeo*, No 11, 2002, pp. 85 ff.; GAUTRON, J.-C, "Article I-7", in BURGORGUE-LARSEN, L. ET AL (dirs.), *Traité établissant une Constitution pour l'Europe. Parties I et IV. Architecture constitutionnelle*, Bruxelles, 2007, pp. 117 ff. ; MARTÍN MARTÍNEZ, M.; LIROLA DELGADO, I., "Aspectos jurídico-constitucionales de la Acción exterior de la Unión Europea en el Tratado por el que se establece una Constitución para Europa: ¿reformulación o reinvención?, in REMIRO BROTÓNS, A.; BLÁZQUEZ NAVARRO, I. (eds.), *El futuro de la acción exterior de la Unión Europea*, Ed. Tirant lo Blanch, Valencia, 2006, pp. 21 ff.; PÉREZ GONZÁLEZ, M., "La cuestión de la naturaleza jurídica de la Unión: el problema de la personalidad jurídica", in OREJA, M. (dir.), *El Tratado de Ámsterdam: análisis y comentarios*, Madrid, 1998.

whilst art. 6 TECSC, referring to the legal personality of this organisation was even more explicit in that it explained that "[i]n its international relationships, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends".

If we now turn our attention to the EC, as the most significant and dynamic of the above-mentioned international subjects, in spite of the brevity of the wording of art. 281 TEC, the fact is that jurisprudence, practice and doctrine have made it abundantly clear that this precept attributes not simply any kind of personality to this institution, but more specifically an international legal personality.

The starting point for this affirmation can be found simply by comparing the content of this precept with the provisions of art. 282 TEC, regarding the "internal" legal capacity of the Community, such that the broad and vaguely-worded formula contained in art. 281 TEC, instead of restricting its scope to the internal ambit, is intended to be a recognition of the said personality in the international sphere.

Furthermore, the Court of Justice of the European Communities (ECJ) has deduced from art. 281 TEC (ex art. 210 TEEC) that "in its external relations the Community enjoys the necessary capacity to establish contractual links with third countries" (ECJ, 31 March 1971, *Commission v Council ("ERTA")*, Case 22/70, point 14), and that this provision, "placed at the head of Part Six of the Treaty, devoted to 'General and Final Provisions', means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty" (*ECJ*, Report 1976, p. 1279)

On the basis of this recognition, it can also be seen that the EC's international practice over a fifty-year period has been extremely intense and, as a rule, has caused no problem regarding the acceptance, by third States or other international organisations, of its presence in international life[5]. In the exercise of this international legal personality the EC has reached an enormous number of international agreements, taken part in international conferences, participated as a full member or observer in

[5] At certain moments, particularly during the nineteen-sixties, the delegates of Soviet bloc countries in international forums rejected the international legitimacy of the EEC's representatives on the basis of the non-recognition of its international legal personality. These differences, however, were soon overcome by the reality of international legal traffic and the finalisation of a succession of international agreements between the EEC and these States.

international organisations, provided assistance to Member State nationals in third countries, exercised the active and passive right of legation and intervened in procedures for the peaceful settlement of differences as well as in relations of international responsibility.

If this was the case of the European Communities, the situation changes with regard to the European Union as it was before the Lisbon Treaty of 2007. In this case, and due to the lack of any express recognition of its legal personality in the Treaties that first established and later modified it, serious doubts arose as to whether or not such a personality actually existed. As a matter of fact, the discussions during the Intergovernmental Conferences held in 1991, 1996 and 2000 prior to the adoption of the respective Treaties of Maastricht, Amsterdam and Nice, despite the existence of various attempts to clarify this situation, failed to bear fruit in the form of a precept explicitly affirming such a personality. This absence gave rise to a diversity of interpretations, going so far as to refer to the very essence of the EU itself (i.e. as to whether it was in fact a true International Organisation), and not just to its international dimension.

Time, I think, put things in their place, and international practice revealed something that on the other hand can be deduced from the general theory of international organisations itself: there is no need for an international organisation to have an express and formal recognition of international personality in order for it to enjoy one.

The non-existence of formal declaration of personality of this nature does not constitute, in the case of the EU as, in general, of that of any other organisation, an obstacle to the admission of the existence of the status of international subject, of a legal personality different to that of its Member States and essential for the performance of its duties[6].

In this regard the EU, even though no legal personality was expressly attributed to it, did however obviously possess the necessary international powers for it to perform its functions and achieve the purposes determined for it by the States that established it, as they were expressed, or could be implicitly deduced, from the internal rules of the EU itself. And some of these functions necessarily required the EU to take part in international life in order from them to be satisfactorily fulfilled.

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[6] Ruling of the I.C.J. of 11 November 1949 on reparation for injuries suffered in the service of the United Nations. (*I.C.J.* Reports 1949, pp. 182-183), and Ruling of the I.C.J. of 8 June 1996 on the legality of the use by a state of nuclear weapons in armed conflict (*I.C.J.* Reports 1996).

All the above leads us to affirm that the EU has enjoyed an international legal personality since the very moment it was endowed with powers that it has to exercise in international life. And this is what in reality occurred, as I have pointed out. However, since the reform of the TEU, and more particularly after Amsterdam, the EU was expressly endowed with competences in intergovernmental pillars so as to be able to take part in international life and conclude international agreements (arts. 24 TEU in the sphere of the CFSC and 38 TEU in that of PJCCM), which, on the other hand, it had been doing with complete normality, this being accepted by third States and international organisations.

The recognition, albeit implicit, of the legal personality of the Union immediately raised a second question: was there, then, a single legal personality common to the EU and the three Communities that existed at that time? Or did each of them continue to enjoy a personality of their own, different to that of the others? In relation to this discussion it is pertinent to recall that during the 1996 IGC that preceded the adoption of the Amsterdam Treaty two proposals were discussed with a view to including in the future Treaty a provision that would expressly state that the Union would have international personality. One of these defended the point of view that the legal personality of the Union should stand side by side with the existing personalities of the various Communities[7], whilst the other proposal upheld that a single legal personality should be established for the Union as a whole, into which those of the Communities would be merged (put forward by the Netherlands Presidency)[8]. In the end, however, as is well known, neither proposal was included in the Amsterdam Treaty. Later, the European Parliament, in its resolution of 14 March 2002 on the international personality of the Union, would propose a merger of the existing legal personalities in order to endow its actions in the international sphere with greater coherence, visibility and effectiveness.

Without denying the interest of such a discussion, the fact is that the Member States were reluctant to merge the different legal personalities, so on the eve of the call for the Convention in which the future of Europe was to be discussed, the situation was as follows: each of the Communities (EC and EAEC) continued to maintain its own legal personality and status as an international subject, whilst the same could be said of the EU.

[7] "Endowing the Union with legal personality", a document submitted by the Irish Presidency to the European Council meeting in Dublin in December 1996. Doc. CONF 2500/96.
[8] Doc. CONF 2500/96 ADDI CAB, 20 March 1997, p. 47.

The terms of the question that would therefore be discussed regarding this issue during the process of the reform of the founding Treaties in the framework of the Convention for the Future of Europe would be the following: the convenience or otherwise of expressly stating the legal personality of the Union, and subsequently to determine whether the latter should stand side by with that of the European Communities, or a single legal personality should be created that would merge them all together, or alternatively, whether things should just remain as they were.

The Convention turned out to be a highly appropriate framework in which to debate and clarify the existence and scope of this international legal personality: progress was made, taking shape in the form of a proposal that would then be incorporated in the text of art. I-7 of the Treaty establishing a European Constitution, signed in Rome in 2001. This Treaty, however, for reasons with which we are all familiar, never came into force, although many of the developments it contained were transferred to the body of the 2007 Lisbon Treaty, this being the case of the EU's international legal personality in particular, and that of its external action in general.

In an attempt to visualise this process and to understand the scope of the affirmation of the EU's international legal personality, in the following pages we will see, firstly, how these questions were progressively resolved during the process of reform of the TEU, particularly within the framework of the Convention for the Future of Europe and that of the Lisbon Treaty (*I*); and then how this personality has materially and specially unfolded, and to what extent this has led to the greater visibility of, and a higher profile for, the EU in international life (*II*).

I. TOWARDS AN EXPLICIT RECOGNITION OF THE INTERNATIONAL LEGAL PERSONALITY OF THE EUROPEAN UNION

A) THE GENESIS OF ART. 47 TEU

Art. 47 TEU, which refers to the legal personality of the Union, harvests the fruit of a *non nato* previous Treaty, the Treaty establishing a Constitution for Europe.

These efforts took place within the framework of the Convention for the Future of Europe, where a Working Group, Group III, was set up

specifically for the purpose of studying the question of legal personality. The group was given a mandate to study the following questions:

- the consequences of explicit recognition of the legal personality of the EU;
- the consequences of a fusion of the legal personalities of the EU and the European Community;
- the consequences for simplification of the Treaties.

This Working Group, chaired by D'Amato, held its first meeting on 18 June 2002, during which it examined the consequences of giving explicit legal personality to the EU (single or a fourth legal personality) and the fusion in such a personality of the existing personalities of the European Communities in the following spheres:

- The delimitation of competences between the Union and the Member States;
- The procedures on negotiation and conclusion of international agreements;
- The system of international representation; and
- The structure in pillars.

During these initial discussions emphasis was placed, from the very beginning, on the fact that explicit recognition of a legal personality for the Union would not in itself imply a modification in the current system of competences nor on the existing procedures for the conclusion of agreements. Concerning the possibility of a merger of the three existing pillars, it was pointed out that rather than a "take over" by the first pillar, it should be a "merger" in the sense that the features of the second and third pillars could remain, and it was also said that such a merger could facilitate the simplification of the Treaties (CONV 132/02).

The Working Group's second meeting took place on 26 June. It was mentioned that the Group's proceedings might concern two sets of issues: on the one hand, the consequences of the attribution of legal personality and of the possible merger of the Treaties for external relations (role of the Council and of the Commission, negotiation procedure for the Treaties, arrangements for the international representation of the Union with international organisations) and, on the other hand, the consequences for the structure of the pillars (take over or merger?) and simplification of the Treaties. Various experts were heard during this meeting, amongst the Juriconsults at the Council and the European Parliament and the Director at the Commission's Legal Service. Their views coincided with regard to the

need of making the EU's legal personality explicit and that the multiplicity of legal personalities for the EU and the EC would pose a problem of coherence and visibility, thereby hindering one of the objectives of the Treaty, this being to affirm the identity of the Union on the international scene, whilst at the same time such a multiplicity could not be reconciled with the idea of merging the former Treaties into a single Treaty. They also agreed that the attribution of legal personality to the Union would affect neither the delimitation of competences between the Union and the Member States nor the institutional balance, and that this "new subject o international law" would succeed the current Union and the EC as regards all their international rights and obligations.

These Working Group discussions soon produced a very broad consensus (in itself of some significance), summarised in the Final Report on Legal Personality it presented on 1 October 2002 (CONV 305/02). This report states that the Union should have its own explicit legal personality, which should be single one that should replace the existing personalities, adding that this would pave the way for a merging of the Treaties.

This fundamental affirmation having been made, the document expresses the idea that the merger of the Treaties establishing the Union on the one hand and the Community on the other would be a logical consequence of the merger of the two legal personalities, and that this would contribute to simplifying the Treaties. This was followed by an examination of the consequences of the attribution of a single legal personality to the Union in a variety of spheres. In this regard, and concerning the procedure for negotiating agreements, it was stated that on the one hand it would be appropriate to include a single article in the new Treaty, to be based on current art. 300 TEC, adding arts. 24 (with certain modifications) and 38 TEU; and on the other, to simplify the procedure for negotiation agreements, particularly when they came under several "pillars' at the same time. This issue was also studied from the standpoint of the external representation of the Union and of the need to establish judicial review in this area and to have regular consultation of the European Parliament.

The Group also dealt with the question of the current structure of the Union in pillars, concluding that neither the merger of legal personalities nor the merger of the Treaties would in themselves have any effect on this structure, although it considered that such a design would be anachronistic, or even obsolete, in a new single Treaty.

The Group also referred to the distribution of competences within the Union, considering that the explicit conferral of a single legal

personality on the union would not *per se* entail any amendment to the allocation of competences between the current Union and Community. Nor, in its view, would it involve any amendments to the respective procedures and powers of the institutions regarding, for example, the opening, negotiation and conclusion of international agreements.

On the other hand, and with a view to providing the EU's external action with the necessary coherence and transparency, the Group proposed the consolidation of the various procedures for concluding agreements in a sole article, without necessarily eliminating the specific nature of the various procedures with regard to the subject-matters concerned.

Another question dealt with in this document, but into which we will not go any deeper, is that of the external representation of the EU. In this regard the Working Group recommends a "single voice", a single delegation, as far as possible, both in its representation before international organisations as before third States.

These reasonings led Group III to present an initial series of general recommendations and a subsequent set of a more technical nature, which due to their relevance I deem it appropriate to reproduce here, albeit in the form of broad brushstrokes. Thus, and in the case of the general recommendations, these can be summarised as follows:

1. The constitutional treaty should contain a new provision at the beginning of the text stipulating that "The Union shall have legal personality". The Union's legal personality will replace the legal personalities of the existing organisations and the Union will take over all their obligations.
2. A single legal personality for the Union is fully justified for reasons of effectiveness and legal certainty, as well as for reasons of transparency and a higher profile for the Union not only in relation to third States, but also vis-à-vis European citizens.
3. The merger of the legal personalities of the Union and the Community will pave the way for merging the Treaties into a single text, which would contribute to simplifying them and could replace them.
4. Neither the merger of legal personalities nor the merger of the Treaties automatically entails merging the "pillars". However, to eliminate that structure would contribute to greatly simplifying the Union's architecture.
5. The explicit conferral of a single legal personality on the Union does not *per se* entail any amendment, either to the current allocation of

competences between the Union and the Member States or to the allocation of competences between the current Union and Community.

For their part, the technical recommendations dealt with aspects concerning the conclusion of international agreements (the convenience of a single article, the improvement of existing procedures for negotiating and concluding agreements, particularly those concerning several pillars, and the usefulness in the case of mixed agreements of the Commission being charged with their negotiation), with the Union's external representation (the interest in the Union speaking with a single voice, expressing a single position, and even being represented by a single delegation), with the competence of the Court of Justice *ex ante* and *ex post* the conclusion of an international agreement (extending the route of advisory opinion and preliminary ruling proceedings, annulment and liability to the fields of the current Titles V and VI of the TEU), and, finally, with the procedure for the consultation of the European Parliament (extending it to international agreements concluded on the basis of arts. 38 and 46 TEU and 133 TEC).

This Final Report was presented to the plenary session of the Convention held on 3 and 4 October 2002, in which the recommendations of the Working Group were widely accepted as the starting point for future work (CONV 331/02).

The Preliminary Draft of the Constitutional Treaty drawn up by the Praesidium, presented by the President at the plenary session on 28 October 2002, contained, as art. 4, the following text "Explicit recognition of the legal personality of the [European Community/Union, United States of Europe, United Europe] (CONV 369/02).

In the Draft of arts. 1 to 16 proposed by the Praesidium to the members of the Convention on 6 February 2003, which reflects the reports of various Working Groups, Group III among them, as well as the guidelines that emerged during the plenary debate, there appears the following: "Article 4: Legal Personality. The Union shall have legal personality". (CONV 528/03).

The Draft Constitution, Volume I, Revised text of Part One, presented by the Praesidium on 24 May 2003 in the light of the comments and amendments received and the discussions in plenary, contains an art. I-6: Legal Personality with the following wording: "The Union shall have legal personality". (CONV 724/03).

The Draft Treaty establishing a Constitution for Europe, submitted to the President of the European Council in Rome on 18 July 2003, contains

an art. 6 with the following wording: “The Union shall have legal personality”. (CONV 850/03).

The final formula chosen was: “The Union shall have legal personality”. And this was the one that reached the IGC 2003, to which the representatives made no changes regarding either its form or its substance. It was thus included as such in the final text of the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004, as art. I-7, with the by now familiar wording “The Union shall have legal personality”.

This Treaty, despite being ratified by Spain following the favourable result of a referendum held on 20 February 2005, did not fare so well in either France or the Netherlands. This led to the process being paralysed for almost two years, a situation that started to improve with the calling of a new Intergovernmental Conference that abandoned the former constitutional terminology and symbols and modified various sections of the said Treaty, but not the one referring to the affirmation of the Union’s legal personality.

Indeed, during the 2007 Intergovernmental Conference the proclamation in the aforementioned art. I-7 of the Union’s legal personality was not discussed, and was thus incorporated as such, firstly, into the Draft Treaty approved by the Heads of State and Government at a meeting of the European Council in Lisbon on 18 and 19 October 2007 and subsequently enshrined in the Lisbon Treaty signed on 13 December 2007. The only change it underwent was its move from Title I “Definition and Objectives of the Union” in which it appeared in the Constitutional Treaty to Title VI “Final Provisions” of the consolidated version of the Lisbon Treaty, where it appears, as already stated, as art. 47.

The Lisbon Treaty, which in reality consists of two separate treaties, one being the Treaty on European Union and the other the Treaty on the Functioning of the European Union, was ratified by Spain on 8 October 2008, but internal differences were soon to emerge in various other Member States that prevented it from being ratified as quickly. A case in point is that of Ireland during the spring of 2008, which made it necessary to hold a second referendum, this time with a favourable result, on 2 October 2009, once it had received guarantees of its sovereignty in fiscal matters. Matters also had to wait in Germany for, firstly, a ruling of the German Constitutional Court, issued on 30 June 2009, this then being followed by the drafting of a modified amendment that would accompany the Lisbon Treaty in order to give the German Parliament more powers in European decisions. And, finally, problems also arose in two of the most recent Member States, Poland and the Czech Republic, due in the main to the rigid

stances adopted by their leaders. These barriers were, however, finally overcome and the countries in question ratified Treaty, which therefore came into effect on 1 December 2009, in accordance with the provisions of art. 54, paragraph 2 TEU.

B) THE SCOPE OF THE EXPLICIT ATTRIBUTION OF LEGAL PERSONALITY TO THE EUROPEAN UNION:

The 2007 Lisbon Treaty led to the creation of new subject of International Law: the EU, an International Organisation that succeeds the other two existing International Organisations, namely the previous EU and the EC. This succession does not occur in the case of the EAEC, which continues to be a separate subject under International Law in its own right[9].

The starting point for our analysis of the scope and substance of art. 47 will thus be the status of the EU as an international organisation, undoubtedly a peculiar one, but at the end of the day having this legal status, created by means of an international agreement voluntarily concluded by States, negotiated and drafted, finally, in an intergovernmental conference, and in which the process of its signing and somewhat bumpy ratification was in full accordance with the provisions of the Law of the Treaties. Through the medium of this international agreement a series of permanent, individual and independent bodies were established, responsible for managing a set of collective interests and able to express a legal will other than that of their Member States, but only in those fields in which they have been given competences. Some of them are intended to reinforce the European Union's international visibility, namely the High Representative of the Union for Foreign Affairs and Security Policy (art. 18 TEU), the President of the European Council (art. 15.6 TEU), the Council, in its Foreign Affairs configuration (art. 16.6 TEU) and a newly-created European External Action Service that assumes, and partly replaces, the function of the more than 100 External Delegations of the Commission, DG-RELEX and other Commission services, thus assuming the role of the EU's operational diplomatic corps (art. 27.3 TEU).

This new international organisation (the uncertainties that weighed on the former EU now having been eliminated) enjoys legal personality, as expressly included, as we have insistently said, in art. 47 TEU. It is true that

[9] SOBRINO HEREDIA, J. M., "El Tratado de Lisboa o la capacidad de la Unión Europea de reinventarse constantemente", *Revista General de Derecho Comunitario*, Ed. Iustel, Madrid, 2009.

this provision does not specify whether this personality is international or not, but as we have said in reference to arts. 184 TECSC y 281 TEC, this is unnecessary, since we only have to compare these provisions with those referring to these organisations' legal capacity at national level (art. 335 TFEU, as far as the new EU is concerned[10]) and apply the ECJ's jurisprudence in this respect, to clearly deduce the obviously international scope of the legal personality referred to in the above-mentioned art. 47.

Furthermore, however, the fact that the Treaty makes no express mention of this legal personality being an international one, or that the reference made to it in the founding Treaties of the European Communities is so brief, by no means constitutes an exception, but rather follows common practice in the sphere of international organisations. Indeed, if we analyse the treaties establishing international organisations we can see that on the whole they make no express mention of the latter's international legal personality, beginning with the United Nations itself. This tendency has only started to move in the opposite direction much more recently, and particularly in the sphere of regional international organisations of an integrating nature, where we can see that they make specific mention of international legal personality or status[11].

The legal personality that is now expressly spelled out in the precept we are analysing qualifies the EU, speaking generally, to act within the

[10] This provision states: "In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation."

[11] There are numerous founding instruments of other international organisations which, like the Lisbon Treaty, contain express reference to the international legal personality of the organisation they establish or, on occasion, mention. Significant examples include those of the U.E.O.M.A. (West African Economic and Monetary Union), the Andean Community, Mercosur and UNASUR. Artcicle 9 of the U.E.O.M.A. Treaty of 10 January 1994 says "*L'Union a la pesonnalité juridique*", a wording similar to that of art. 47 TEU in the case of the EU. However, art. 48 of the Trujillo Protocol of 10 March 1996, amending the Cartagena Agreement and establishing the Andean Community, states, with greater precision, that "The Andean Community is a subregional organization with international legal capacity or international legal status", whilst along the same lines art. 1 of the 2008 Treaty signed in Brasilia in 2008 indicates that UNASUR is "an organisation endowed with international legal personality". Finally, art. 34 of the Ouro Preto Protocol, of 17 December 1994, cannot be any more explicit in this regard when it says that Mercosur "shall possess legal personality of international law".

international framework as such, i.e. as a subject of International Law, succeeding, in this action, the previous EU and the defunct EC. And, on the other hand, the functional nature of the EU, given that we are talking about an international organisation, impedes specific competences in the international sphere from being deduced from a generic affirmation of international personality, but rather only the legal capacity to be able to act on this level as a legal person other than the Member States that constitute it and also assume its own international responsibility. In other words, this personality is circumscribed to the achievement of the objectives and functions with which the EU was charged by the States that established it.

So, in order to determine the true projection of the EU's international personality we have to go to the specific rules of the organisation, which are to be found, as art. 2.1(j) of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations says, within the organisation's constituent instruments, decisions and resolutions adopted in accordance with them, and established practice. In this regard, and as far as the constituent instrument is concerned, the Lisbon Treaty expressly acknowledges in numerous provisions, as we shall see, the EU's international competences (particularly in Chapter 2, "Specific provisions on the common foreign and security policy", arts. 23 to 46 TEU and in Part Five "External action by the Union", arts. 205 to 223, of the Treaty on the Functioning of the European Union); furthermore, however, the ECJ has acknowledged that the EC, and thus, given the succession of international organisations, should also do the same for the EU, has implicit international competences that will enable it to deploy competences of this nature where the TEC, and now the Lisbon Treaty, have only established internal competences. In other words, we would be talking about the application to the new EU's international competences of the theory of parallelism between the internal and external competences of the EC, constructed by the ECJ over a long and repetitive jurisprudence (including, amongst others, Ruling 1/76, the Kramer Ruling, Ruling 2/91 and Ruling 1/94). This jurisprudential doctrine has opened up, first to the EC and now to the EU, the possibility of exercising the competences attributed to them, initially in the TEC (functional personality) and now in the TEU and the TFEU through both purely internal as well as international acts, provided it was necessary in order to achieve the objectives assigned to them.

In this regard we should remember that in its Final Report Working Group VII, during the Convention on the Future of Europe, could not be any clearer when it admits that the Court, in its above-mentioned jurisprudence "has recognised implicit external Community competence when the conclusion of international agreements were necessary for the implementation of internal policies or reflecting its internal competences in areas where it had exercised this competence by adopting secondary legislation" (CONV 459/02, 16 December 2002).

The consequence of all the above, combined with the possible application in this sphere of the subsidiary competences contained in art. 352 TFEU, has been to enable the EU to have an extremely active presence in international relations that has greatly surpassed what is expressly established in the Treaty. In short, as has been graphically stated, this international presence has enjoyed constant growth, running parallel to the EC's internal development[12]. And this presence manifests itself, as we shall see, in numerous spheres and in a wide variety of forms which are, in brief: the conclusion of international agreements, the maintaining of diplomatic relations, intervention in dispute settlement proceedings, participation in relations with international responsibility and the enjoyment of a series of privileges and immunities aimed at guaranteeing the necessary independence for the exercise of its functions. However, and in my view, what should be highlighted is not the wide range of international actions that are thus opened up to the EU, but rather the intensive use it makes of them, converting it into a unique case on the international scene.

On the other hand, the attribution of a single legal personality to the EU need not affect the internal allocation of competences, institutional powers and procedures. There will thus be a single legal personality but there will continue to be different procedures according to the spheres of competence, and with differentiated external representations. Put another way, although it affirms the Union's single legal personality the Lisbon Treaty does not demolish the wall between the fields subject to the Community method and those subject to intergovernmental cooperation. As S. Beltrán and Cl. Jiménez state, when they refer to art. I-7 of the Treaty establishing a Constitution for Europe, we are in the presence of a single legal person, "but one which will have a capacity for action with different

[12] PONS RAFOLS, X., "Definición de competencias y acción exterior de la Unión Europea", in MARIÑO MENÉNDEZ, F. M. (dir.); MOREIRO GONZÁLEZ, C. J. (coord.), *Derecho internacional y Tratado constitucional europeo*, Ed. Marcial Pons, Madrid, 2006, p. 104.

speeds and development according to whether it is a question of Community or intergovernmental ambits, and whether the competences are exclusive, shared or of another nature”[13].

A reading of art. 47 in relation with the provisions of art. 1, paragraph 3 of the new EU Treaty, referring to the succession of the European Union arising from this Treaty of the current EU and of the EC, allows us to speak of a new international organisation that succeeds, as we have said, the previous ones, which would disappear when the Lisbon Treaty came into force. All but the EAEC, since, as has been stated above, it maintains its international personality due to the fact that its founding Treaty remains in force and it has not merged with the EU. In this regard, art. 47 can be seen as a step forward, but one to a certain extent muddied by the fact that the EAEC has been left out of this merger process, since it has not been suppressed, with the result that in certain spheres (although very few in number) international competences will be enacted by Community institutions, but according to those established in the TEAEC rather than on the basis of those of the Treaty we are analysing.

The succession implies, on the one hand, that the new EU succeeds the aforementioned organisations in all existing international rights and obligations, thereby ensuring legal continuity and thus requiring, in my belief, the consent (even if given tacitly) of the third party concerned. And, on the other hand, the new EU becomes an autonomous participant in international relations, being able to enter into relations with other subjects in International Law, and having conferred on it new international rights and obligations as well as the power to assert such rights internationally and also to be answerable internationally in the event of any violation of such obligations.

Art. 47, by bringing together the various facets of external action (diplomacy, security, development, trade, human aid, international negotiations, etc.), will now ensure that the EU is in a better position to express itself with greater clarity vis-à-vis its Member States and international organisations throughout the world and thus to contribute, in consonance with the provisions of art. 3.5 TEU, to upholding its values and

[13] BELTRÁN, S.; JIMÉNEZ, C., “La personalidad jurídica única de la Unión Europea: un avance en la búsqueda de mayor presencia en el sistema internacional”, in ESTEVE, F; PI LLORÉNS, M. (eds.), *La proyección exterior de la Unión Europea en el Tratado Constitucional*, Barcelona, 2005, p. 24.

interests[14] and to contributing to the protection of its citizens. In this regard, the impact of the EU's actions will also be enhanced thanks to the new European External Action Service[15], which will assist the High Representative for Foreign Affairs and Security Policy and Vice-President of the Commission[16], who will also ensure the consistency of the Union's external action[17].

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[14] Art. 2 TEU determines the values on which the EU's action should be based. Art. 21 TEU develops them, and in particular stresses that "1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law (…)".

[15] Art. 27.3 TEU states that "In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission". The new Treaty thus unifies the external services of the Commission and of the Council, with a budget of over 10 billion euros, some 7000 civil servants and 122 external representations. I have already commented on the changes introduced in the EU's diplomatic service in: SOBRINO HEREDIA, J. M., "La cuestión de la representación diplomática de la Unión Europea en los trabajos de la Convención y en el Tratado por el que se establece una Constitución para Europa", in VIDAL-BENEYTO, J. (coord.), *El reto constitucional de Europa*, Ed. Dykinson, Madrid, 2005, pp. 379-402.

[16] The High Representative, although not given the *name* of Minister for Foreign Affairs coined in the Treaty establishing a Constitution for Europe, does however receive a large proportion of the competences and functions assigned to the former in the said Treaty. See SOBRINO HEREDIA, J. M.: "Article I-28. Le Ministre des Affaires Étrangères de l'Union », in *Traité établissant une Constitution pour l'Europe. Parties I et IV Architecture constitutionnelle.* (L. Burgorgue-Larsen, et. al., eds.), Vol. 1, Ed. Bruylant, Bruxelles, 2007, pp. 367 ff.

[17] The responsibility for ensuring the consistency and coordination of external action is a task that is as complex as it is essential, formerly in the hands of the Council and of the Commission and now concentrated, although assisted by this new body that straddles the two institutions. In this regard art. 18.4 TEU is extremely clear, when it states that "The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action (…)". Art. 21.3, for its part, explains that "(…) The Union shall ensure consistency between the different areas of external action and between these and its other policies. The Council and the Commission, assisted by the High

II. THE DEPLOYMENT OF THE EUROPEAN UNION'S INTERNATIONAL LEGAL PERSONALITY AND EUROPEAN VISIBILITY:

A) MATERIAL AND SPATIAL SPHERES:

In order to determine the EU's international projection we must first look at the particular rules governing this organisation, namely the provisions of its founding Treaty, with its protocols and annexes, the acts carried out by its institutions, the Union's practice and, in what is one of the EU's distinguishing features, the interpretation given it by the European Court of Justice, which is rich, plentiful and extremely clarifying, and in which the consultative access route, above all, has developed its full potential.[18]

An analysis of these rules reflects the significant international competences enjoyed by the Union, some of which are expressly included in its founding instrument, whilst others, on the other hand, can be deduced from it. With regard to the former, we observe that the Lisbon Treaty expressly recognises, as we have seen above, the EU's international competences in many of its provisions (particularly in Chapter 2 "Specific Provisions on the Common Foreign and Security Policy", arts. 23 to 46 TEU and in Part Five "External Action by the Union", arts. 205 to 223, of the Treaty on the Functioning of the EU). With regard to the latter, the following are the spheres it envisages**:**

- Common Commercial Policy (arts. 206-207)
- Development cooperation (arts. 208-211)
- Economic, financial and technical cooperation with third countries (ars. 212-213)
- Humanitarian aid (art. 214)
- Restrictive Measures (art. 215)
- International Agreements (arts. 216-219)
- Relations with International Organisations and Third Countries (art.

Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect".

[18] SOBRINO HEREDIA, J. M., "La actividad consultiva del Tribunal de Justicia de las Comunidades Europeas", in AA.VV., *La Unión Europea ante los retos de nuestro tiempo. Homenaje a la Profra. V. Abellán Honrubia*, Ed. Marcial Pons, Madrid, 2009, pp. 1259-1274.

220)
- Union Delegations (art. 221)
- Solidarity Clause (art. 222), etc.

In addition to the above, in many of the EU's 'civil' policies make express mention of the possibility of carrying out an international action, basically through the vehicle of conventions and institutions. In certain cases this action has already reached a high degree of intensity, a case in point being the so-called External Fishing Policy, one of the most striking manifestations of the Common Fishing Policy in terms not only of the number and importance of the various international agreements subscribed to by the Union, but also of its presence in international forums, international organisations (e.g. the novelty of its becoming a full member of the FAO) and the numerous meetings that are shaping a new international Fisheries Law. And what I have said concerning this particular aspect of External Policy, which refers to a matter in which the EU has exclusive competence, is also true, to a greater or lesser extent, of many other policies in which the Union shares competences with its Member States and which, equally, require the EU to have an international presence, such as the environment, food safety and health, amongst others.

More importantly, however, the ECJ, in what constitutes a voluminous and consolidated jurisprudence, has confirmed the theory of the Community's implicit international competences by considerably extending its international projection, since it has indicated the recognition of the existence of a parallelism between the organisation's internal and international competences. This interpretation was confirmed by its Opinion 1/76, of 26 April 1977, in which it established that

> "whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in the connexion" (*ECJ* Reports 1977, p. 755),

An opinion that was repeatedly reaffirmed in a series of further judgments issued during the nineteen-nineties (*ECJ* Reports 1992: I-6079; *ECJ* Reports 1992: I-1061; *ECJ* Reports 1996: I-5267).

Furthermore, these possibilities are given concrete expression in a series of fields in which the EU's activity is strikingly significant, namely:

- The conclusion of international agreements

- Its participation, either as a full member or as an observer, in other international organisations
- The application of sanctions to third countries
- The provision of diplomatic assistance to Community citizens in third countries
- Its participation in international dispute settlement proceedings
- Its exercise of the active and passive right of legation (i.e. its participation in diplomatic relations)
- Its intervention, as either an active or passive subject, in relations of international responsibility

Insofar as the spatial sphere of its international action is concerned, the EU has historically adopted a predominantly regional perspective, rather than a global one, thereby giving preference to certain regions or zones of our planet with which it has maintained particular relations or with which their is a geographical contiguity that facilitates neighbourly relations. In this regard the following should be noted for their high priority in this field:

- Relations with other European countries: EFTA, EEE, Neighbourhood Policy, etc.
- Relations between Europe and the Southern Hemisphere: OCTA-AASM-ACP and others, currently expressed through the 2000 Cotonou Partnership Agreement and in Economic Partnership Agreements
- Relations between Europe and Latin America: Mercosur, CAN, Central America, Chile, Colombia, Peru, etc.
- Europe-Mediterranean relations: Partnership Agreements signed with coastal Mediterranean third countries
- Europe-Asia relations: emerging powers, ASEAN, etc.
- Relations with other international organisations, in particular those forming part of the United Nations System

The Union has carried out numerous international actions in all the above geographical spheres, in many cases over several decades, in a clearly-marked line of continuity, as for example in its development cooperation relations. On other occasions they have occurred as the result of changes in the international context, as in the case of relations with countries arising from the break-up of the former Soviet Union. In most of these zones the EU's presence takes the form of a combination of international actions ranging from permanent diplomatic representation to

occasional international negotiations, and including relations in the framework of conventions, the use of dispute settlement mechanisms and even interventions requiring the use of force, such as those carried out under a variety of the United Nations Security Council resolutions for the purpose of combating maritime piracy in the Indian Nation.

B) IN SEARCH OF GREATER VISIBILITY

The Lisbon Treaty, in my opinion, represents a step forward in the affirmation of the EU's international legal personality and a greater visibility for the Union in international relations. There are various reasons why this should be so, the main ones being the express recognition of its international personality, the reinforcement of the figure of the High Representative for Foreign Policy[19], the European External Action Service, and last but not least, a higher degree of concentration in its legislation and the enhanced legibility of its rules.

The Lisbon Treaty brings with it the creation of a new subject under International Law: the EU, endowed with a legal personality that does not necessarily affect the internal distribution of competences, institutional powers and procedures. In this regard, the Union's competence in matters of foreign policy and common security will cover all areas of external policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might may lead to a common defence. This policy is subject to specific rules and procedures and will be defined and implemented by the European Council and the Council, whose decisions will have to be unanimous except where the Treaties provide otherwise. The adoption of legislative acts is excluded. The Common Foreign and Security Policy will be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and the Commission in this area is defined in the Treaties. The Court of Justice of the European Union shall not have

[19] This is a new and politically atypical post, akin to that of a minister of a non-existent government, member at one and the same time of the Council of Ministers and the European Commission, and intended to be the EU's 'face' before the rest of the world. Its incumbent is charged with the difficult task of reconciling two different dimensions of Europe's external action, the 'civil' and the 'political', which, based on different methods (Community and intergovernmental) and different institutions, have not always functioned in a coherent and coordinated manner.

jurisdiction with respect to these provisions, except for its jurisdiction to monitor compliance with art. 40 TEU and to review the legality of certain decisions envisaged in art. 275, paragraph 2 of the Treaty on the Functioning of the European Union.

The EU's civil policies in the international sphere are to a great extent the subject of a legislative concentration appearing in Part Five of the TFUE. In this regard art. 205 establishes that "*The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union*". And the articles that follow develop, as we have just seen, the various policies, namely: Common Commercial Policy; Cooperation with Third Countries and Humanitarian Aid (development cooperation; economic, financial and technical cooperation with third countries and humanitarian aid); Restrictive Measures; International Agreements; Relations with International Organisations and Third Countries and Union Delegates; and finally, a Solidarity Clause. Different policies whose previous legal bases (and here I refer to the period when the TEC was in force) were scattered the length and breadth of the said Treaty. In this regard, I consider that this concentration of such legislation enhances legibility in this subject matter and improves its visibility.

There still remains, nevertheless, a problem of opacity deriving, in my view, from the plurality of international faces that the EU continues to present to the world. The Lisbon Treaty does indeed establish a multiplicity of external representation for the Union, in the following four provisions: art. 15.6 states that "*The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative…*", whilst art. 16.6 says that "*The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent*", whilst art. 17.1 indicates that *"The Commission (…) [w]ith the exception of the common and foreign security policy, and other cases provided for in the Treaties … shall ensure the Union's external representation. (…)"* and, finally, art. 18.2 adds that *"The High Representative shall conduct the Union's common foreign and security policy (…) which he shall carry out as mandated by the Council. (…)"*.

In this regard, then, the enhanced powers and visibility of the Union's High Representative for Foreign Affairs and Security Policy and his role as a gangway between the intergovernmental and inclusive ambits, combined with the support available to him from the European External Action Service, is a considerable step forward in the EU's international affirmation. And from this standpoint one area in which he assumes significant responsibilities is that of the EU's external representation, since he is now responsible for leading political dialogue in the name of the EU, expressing its position in international organisations and at the international conferences in which it may be a participant, having to assume the none-too-easy role of organising the coordination of the action of the Union's Member States in these international fora.

However, it is also true that the EU's High Representative for Foreign Affairs and Security Policy will not be the only persons responsible, as we have just seen, for the external representation of the Union.[20] In the Lisbon Treaty it is envisaged that this mission will also correspond to the Commission in areas that are not covered by the CFSP. On the other hand, in the sphere of intergovernmental foreign policies the issues arising from this division of labour will have to be resolved with the President of the European Council who is also charged with assuming the external representation of the Union, although, as it is stated, without prejudice to the powers of the High Representative.

All of the above might create difficulties for a third party when it has to identify who can speak in the name of the EU, to whom a complaint should be addressed, in front of whom a right should be affirmed or with whom negotiations should be opened. Practice may perhaps lead to a greater clarification of such situations, but everything will depend on the international profile adopted by the institutions and bodies concerned. The greatest problems will probably arise in the sphere of security, defence and foreign policy, since in these cases the latter will have to compete (in terms of visibility) with the national leaders of the various European governments, and more particularly so of those States that still wish to maintain a prominent and influential international presence. On the other hand, in my opinion these problems will not occur in those international activities related with civil policies, since this has always been the case in the past.

[20] SOBRINO HEREDIA, J. M., "Article I-28 …", *doc. cit.*, pp. 365 ff.

FINAL CONSIDERATIONS

The EU is one of the most dynamic subjects under International Law on the international stage. For many years its international activity was based, from a legal point of view, on a series of provisions that made it difficult for an outsider to appreciate its true international dimension. This, although not preventing it from playing an extremely active role in international exchanges, did create certain complications for third countries in their relations with the Union, although it must be said that this is more from a standpoint of form than of reality.

All this has changed since the Lisbon Treaty came into force. The express recognition of the EU's international personality has undoubtedly had a significant clarifying effect on the Union's presence in international life, improving its visibility before third subjects under International Law. Issues as complex as the existence of three different personalities, which undoubtedly confused these third subjects, have now vanished. The reform ushered in by the Lisbon Treaty can thus be considered a step forward in the question of transparency and simplification, since it will put an end to this and other ambiguous situations, such as the absence of a single international voice or representation, that prejudiced not only the Union's identity and visibility in the international sphere, but also the matter of legal certainty. In short, the explicit conferring of legal personality on the Union will reinforce the impact and cohesion of its external action, making the EU a more effective international subject able to express itself with greater weight, coherence and visibility vis-à-vis its international interlocutors.

Along these lines, the function assumed by the High Representative may simplify the complex organisational chart that has in the past upheld the EU's external action, thereby avoiding the overlaps between institutions that have been such a frequent occurrence. At least, and initially, the introduction of the figure of the High Representative puts an end to the institutional duality that has been a characteristic of the EU's international relations since the Treaty of Amsterdam. This institutional simplification, however, has not been followed, as I have just pointed out, by any corresponding simplification of the procedures and operational practices, which to a great extent continue to be dictated by two different realities, one intergovernmental and the other collective. The question therefore arises as to whether the High Representative will be the 'gangway' connecting them both.

All of which, to sum up, should have a major clarifying effect on the EU's presence in international life, enhancing both its visibility vis-à-vis

third subjects under International Law and legal certainty. It does not, however, resolve all the problems arising from the various methods on which the EU's external action is based, and also raises issues relating to the practical development of such external action through a multi-level external representation.

Furthermore, the development of the EU's external action in practice raises certain concerns at the present time, deriving on the one hand from the low international profile shown by the European figures responsible for such action in the various international situations and conflicts that have arisen since the Treaty of Lisbon came into force, and on the other from the deterioration of certain policies that until recently constituted the spearhead of the Union's presence on the world stage: I here refer, for example, to what is happening in the case of relations with ACP countries or with the calling into question of international fishing agreements.

These and other situations cast a shadow on the international presence of the European Union, which has been further weakened by the recent international financial turmoil. Nevertheless, this is no obstacle to considering, to my mind at least, that the Lisbon Treaty represents a major step forward in setting the process of European integration on the right road as far as its international dimension is concerned.

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IMPLICATIONS FOR ROMANIA OF THE EUROPEAN UNION'S REGULATIONS ON MARITIME BORDERS[*]

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ABSTRACT

The safety of maritime external borders of its Member States represents a major concern for the European Union. The problem of management of external maritime borders of the Union has been embodied relatively recently into the European agenda. But, despite this, it has been experiencing significant diversification, determined primarily by the need for a greater and effective surveillance of maritime external borders to, thus, prevent the unauthorized entry of persons from the sea in the European Union, fight cross-border crime or take other measures against them. This issue gets a new perspective from the accession of Romania and Bulgaria to the European Union in January 2007, because nowadays this International Organization has a part of its Eastern border in the Black Sea. In the heart of the mechanism created by the European Union for the surveillance of external borders is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX). And precisely on the basis of the experience acquired by this Agency since its setting-up – in 2005 – the European Union has published the April 26, 2010 a Decision by which seeks to ensure, as we'll discuss in the first part of this paper, the uniform application by all Member States participating in the operations coordinated by FRONTEX of international standards governing the operations of maritime border surveillance. And, as we'll analyze in the second part of this work, this European Union's binding act also wants to create a common modus operandi for all the Member States participating in the operations of maritime

[*] This paper is framed within the research project entitled "La Convención de las Naciones Unidas sobre el Derecho del Mar frente a los cambios acaecidos en la sociedad internacional: propuestas de desarrollo y de revisión" (DER2010-21732/JURI), which is funded by the Ministry of Science and Innovation from Spain for the period 2010-2013.

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border surveillance coordinated by this European Agency on, among others, the interception of a ship, and guidelines for search and rescue situations and for landing in the context of these operations coordinated by FRONTEX.

KEYWORDS

European Union. Romania. Borders. FRONTEX. Maritime spaces. Law of the Sea.

INTRODUCTION

The security of the external maritime borders of its Member States is a major concern for the European Union (henceforth, EU). With approximately 80,000 km (50,000 nautical miles), of sea borders, of which almost half (34,109 km or 21,199 nautical miles) make up its vulnerable Southern maritime border[1], the EU is faced with the need for a broader and more efficient legal framework that will enable it to manage these borders in order to strengthen its position and be less permeable to the operations of criminal gangs that operate from some of the nations close to its coasts, and thereby prevent the unauthorised entry of persons from the sea within the territory of its Member States, combat cross-border crime or adopt other kinds of measures in this regard.

This concern is felt above all by the EU's Southern Member States, Spain amongst them, for which it is a priority issue. But it also affects Romania and Bulgaria, whose Black Sea waters have formed part of the Union's Eastern border since 1 January 2007[2]. It should be remembered that the Black Sea region is the point at which a number of illegal migration routes to Western Europe converge, namely the Eastern Mediterranean, Balkan, Central European and Eastern European routes[3], and that the Black

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[1] The EU's Southern border is formed by the sea borders of the following Member States: Portugal (including the Azores and Madeira), Spain (including the Canaries), France, Italy, Slovenia, Greece (with over 3,000 islands, it has the longest maritime border of any Member State), Malta (including Gozo) and Cyprus. See "FRONTEX: the EU external borders agency. Report with Evidence", European Union Committee, 9th Report of Session 2007-08, House of Lords, London, 2008, paragraph 34.

[2] Romania and Bulgaria's Black Sea borders are 572 km long, the equivalent of 358 nautical miles.

[3] For a detailed treatment of issues referring to maritime protection in the European Union see SOBRINO HEREDIA, J. M. (coord.), *Sûreté maritime et violence en mer / Maritime*

Sea borders of these two EU Member States are directly affected by the operations of criminal gangs acting from Turkish territory[4].

At the heart of the mechanism created by the EU for the surveillance of its external borders lies the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (henceforth, FRONTEX). The legal basis for this Agency is the former art. 62 TEC (now art. 77 TFEU)[5]. And according to Council Regulation (EC) No 2007/2004[6] by which it was established in 2004, FRONTEX is responsible for coordinating the operational cooperation between Member States to facilitate the application of EU Law with regard to external border surveillance, in order to assist them in circumstances requireing increased technical and operational assistance at external borders, and also to provide them with the necessary support in organising joint return operations[7]. In such external sea border monitoring and surveillance activities FRONTEX shares responsibility with Member States[8].

It was precisely on the basis of the experience acquired by this Agency since its establishment in the sphere of managing operational cooperation on the EU's external sea borders that the Council adopted its Decision 2010/252/EU, supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational

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Security and Violence at Sea, Collection de droit international, Ed. Bruylant, Paris/Bruxelles, 2011.

[4] See "FRONTEX: the EU external borders …, *doc. cit.*, p. 18.

[5] Art. 77 TFEU is part of Title V "Area of freedom, security and justice", Chapter 2 "Policies on border checks, asylum and immigration", and replaces and modifies art. 62 TEC, which was part of Title IV "Visas, asylum, immigration and other policies related to free movement of persons". Thus, art. 77.2 TFEU envisages that *"the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a)[…]; (b) the checks to which persons crossing external borders are subject"*.

[6] Council Regulation (EC) No 2007/2004, OJ L 349, 25.11.2004, p. 1.

[7] *Ibid.*, art. 2.1. FRONTEX's competences were extended by Council Regulation (EC) No 863/2007, establishing a mechanism for the creation of Rapid Border Intervention Teams (OJ L 199, 31.07.2007, p. 30). In this regard, see PUNTSCHER RIEKMANN, S., "Security, Freedom and Accountability: Europol and Frontex", in GUILD, E.; GEYER, F. (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Ed. Ashgate, Hampshire, 2008, p. 29.

[8] On this issue see RIJPMA, J. J., "Frontex: Successful Blame Shifting of the Member States? (ARI)", Real Instituto Elcano, 2010, p. 2; available at http://www.realinstitutoelcano.org/

cooperation coordinated by FRONTEX[9]. This regulatory action was designed to complete the existing legal framework applicable to the matter in question, consisting of the Schengen Borders Code[10], the Schengen Handbook[11], the rules on local border traffic at the external land borders of Member States[12], the establishment of FRONTEX[13] and the creation of Rapid Border Intervention Teams[14], and the External Borders Fund for the period 2007-2013[15].

In our view, the adoption of this Decision was more than necessary given that the EU external sea border surveillance objectives it refers to could not be achieved by Member States acting individually, the operational cooperation performed by FRONTEX in this sphere had until then been both insufficient and ineffective, and operational solidarity had proved to be somewhat lacking[16]. It should also be pointed out that the provisions of the Schengen Borders Code do not include the possibility of this European Agency carrying out coordination operations for interception and disembarkation beyond the EU's external borders. In the light of existing practice in this regard, however, it has been shown that in order for operations of this nature to in fact achieve their objective FRONTEX has to be able to act outside the waters that lie under the sovereignty or jurisdiction of Member States, i.e. on the high seas and even in the territorial waters of third countries.

Within this context, we consider that there was an essential need to introduce common uniform rules applicable to all EU Member States concerning the surveillance of its external sea borders. Thus, as we shall see in *Part I* of this study, Council Decision 2010/252/EU is intended to

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[9] OJ L 111, 4.05.2010, p. 20.

[10] Regulation (EC) No 562/2006, OJ L 105, 13.04.2006, p. 1.

[11] COM (2006) 5186 final: *Commission Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons*, Brussels, 6.11.2006.

[12] Regulation (EC) No 1931/2006, OJ L 405, 30.12.2006, p. 1.

[13] Regulation (EC) No 2007/2004, *doc. cit.*

[14] Regulation (EC) No 863/2007, *doc. cit.*

[15] Council Decision No 574/2007/EC, OJ L 144, 6.06.2007, p. 22.

16 For an analysis of the evaluation of the results obtained by FRONTEX since it commenced operations in 2005, and the recommendations put forward for its future development, see COM(2008) 67 final: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Report on the evaluation and future development of the FRONTEX Agency*, Brussels, 13.02.2008.

guarantee the uniform application by all Member States participating in operations coordinated by FRONTEX of the international rules governing sea border surveillance operations; and also to establish, as we will see in *Part II*, a common *modus operandi* for Member States participating in sea border surveillance operations coordinated by the Agency and concerning, amongst other matters, the interception of a vessel, and the guidelines for search and rescue situations and for disembarkation in the context of such operations.

I. THE RULES APPLICABLE TO SEA BORDER COORDINATION OPERATIONS CARRIED OUT BY FRONTEX.

It must first be stated that one of the most delicate issues regarding FRONTEX's activity since the Agency was first established is that concerning how and to what extent it might be responsible for the operations it carries out at sea, for the possible violation of both the human rights of people it might intercept at sea and refugees' recognised right to enter EU territory in order to request asylum in one of its Member States[17].

In this regard, the Council, by means of the Decision we have referred to and in order to avoid any possible future violation of the international legal framework concerning the protection of human rights and those of refugees[18], is to systemise the rules applicable to FRONTEX during the operations it will coordinate within the framework of the surveillance of the EU's external sea borders[19]. Its purpose, independently of the surveillance operations that Member States might carry out either individually or in cooperation with other countries, but outside this legal framework[20], is to reduce the possible arbitrariness and disparity of the practices of Member States along their borders[21].

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[17] For a commentary on this issue, see PUNTSCHER RIEKMANN, S., *op. cit.*, p. 30.

[18] This international legal framework is formed, in the main, by the United Nations Convention on the Law of the Sea (UNCLOS, 1982), the International Convention on the Safety of Human Life at Sea (SOLAS, 1974), the International Convention on Maritime Search and Rescue (SAR, 1979), the United Nations Convention against Transnational Organised Crime and its Palermo Protocol against the Smuggling of Migrants by Land, Sea and Air (2000), the Convention relating to the Status of Refugees (1951) and its Protocol (1967), the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), etc.

[19] Council Decision 2010/252/EU, *op. cit.*, art. 1 and Annex, Part I, paragraph 1.

[20] COM(2009) 658 final: *Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the*

In this regard we must refer to the principle of *non-refoulement* or the prohibition of return[22] as one of the fundamental guidelines to be respected by FRONTEX during the coordination operations it carries out on the EU's external sea borders. This, as is well known, is a pivotal principle in international law on asylum and refuge[23] and determines that, apart from certain expressly recognised exceptions (the fact that a refugee is considered to be a threat to national security or public order in the country in which he is living at the time), refugees must not be returned to their country of origin or to other countries where their life or liberty may be at risk[24]. This obligation applicable to States is similarly included, one way or another, in other international legal texts when they refer, for example, to the prohibition of torture and other cruel, inhuman or degrading treatment, i.e. the prohibition of those inhuman acts that people found at sea during operations coordinated by FRONTEX might be subjected to if the principle of non-refoulement were not respected. This is the case, amongst others, of the European Convention on Human Rights (art. 3), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights (art. 7).

As far as the operations coordinated by FRONTEX are concerned, one of the cardinal issues is to determine whether Member States taking part in them are or are not obliged to reject or return migrants found at sea. In this regard, Council Decision 2010/252/EU states that *"[n]o person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of non-refoulement, or from which there is a risk of expulsion or return to another country in contravention of that principle […] the persons intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that*

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operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, Brussels, 27.11.2009, p. 6.

[21] On this matter see NEAL, A. W., "Securitization and Risk at the EU Border: The Origins of FRONTEX", *Journal of Common Market Studies,* vol. 47, No 2, 2009, p. 348.

[22] The name of this principle comes from the French verb *refouler*, which translates into English as *return* or *reject*.

[23] This principle was first included in the 1933 Convention relating to the International Status of Refugees (art. 3) and then in the 1951 Convention relating to the Status of Refugees (art. 33.1).

[24] For further information on this topic, see PAPASTAVRIDIS, E., "Fortress Europe and FRONTEX: Within or Without International Law?", *Nordic Journal of International Law*, No 79, 2010, pp. 102-107; GOODWIN-GILL, G. S., "Convention relating to the Status of Refugees. Protocol relating to the Status of Refugees", *United Nations Audiovisual Library of International Law*, 2008, pp. 5-6.

disembarkation in the proposed place would be in breach of the principle of non-refoulement"[25].

Given the above, it is of particular importance to determine whether or not the extraterritorial application of the principle of non-refoulement applies, i.e. whether EU Member States are also obliged to respect it on the high seas. Thus, the "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol" issued in 2007 by the United Nations High Commissioner for Refugees (henceforth, ACNUR) says that *"States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment"*[26].

In other words, although it could be considered that countries that intercept persons at sea would not be obliged to apply the non-refoulement principle to them under, for example, UNCLOS, the situation is entirely different when it comes to the terrain of human rights, since States are bound not to return persons who may be at risk of being tortured or receiving other similar forms of treatment if this principle were not applied to them[27]. As has been expressed in doctrine[28], although the action of a Member State in this context might not represent a violation of human rights, it would be held liable under International Law if through its action it contributed to another State violating the human rights of intercepted persons, as may be the case of those intercepted at sea.

In our opinion, the express mention of the non-refoulement principle in Council Decision 2010/252/EU sheds clarity on the obligation of Member States to apply it since, at first sight, due to it not having initially been envisaged within the FRONTEX framework Regulations, there was some doubt as to whether the application of this principle would be compulsory for EU Member States, in spite of the fact that the said States were well aware of it as a result of their being bound by the existing rules of International Law in this matter, to which reference has been made above.

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[25] Council Decision 2010/252/EU, *doc. cit.*, Annex, Part I, paragraph 1.2.

[26] "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", UNHCR, Geneva, 26 January 2007, paragraph 17.

[27] For an analysis of the relationship between human rights and the Law of the Sea see TREVES, T., "Human Rights and the Law of the Sea", *Berkeley Journal of International Law*, vol. 28, No 1, 2010, pp. 1-14.

[28] PAPASTAVRIDIS, E., *op. cit.*, p. 107.

The fact is that considerations of human rights protection are now gradually acquiring greater importance within the practices not only of Member States, but also of FRONTEX, after a period in which they appeared to have been left to one side, notwithstanding the fact that in reality they should have lain at the heart of the EU's concerns in this matter[29]. It seems highly improbable that the Agency would not be aware of the problems that persons on board vessels intercepted at sea, when obliged to return to their countries of origin, might have to face as a result of being subjected to persecution or torture and other cruel, inhuman and degrading treatment[30]. Proof that the EU was aware of this are, in our view, the cooperation agreements signed between FRONTEX and UNHCR. Agreements that not only consist of an exchange of information between both parties, but also of a greater involvement by the High Commissioner in the operations carried out by this Union's Agency, which is expected to acquire even greater importance in the light of the adoption of the Council Decision that is the subject of analysis in this paper[31].

Furthermore, with its Decision 2010/252/EU the Council has organised and systemised the measures that Member States may take during surveillance operations on vessels or other craft reasonably suspected of transporting persons attempting to avoid EU border checks. It is deemed essential that Member States involved in FRONTEX operations should follow the same surveillance rules, which in turn clarify the division of powers and obligations in the various different maritime spaces[32].

In this regard, it should be emphasised that the above-mentioned Decision establishes the conditions under which these surveillance

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[29] On this point, see JEANDESBOZ, J., "Reinforcing the Surveillance of EU Borders. The Future Development of FRONTEX and EUROSUR", *Challenge, Liberty & Security*, Research Paper No. 11, August 2008, p. 4.

[30] For an analysis of this possible hypothesis, see COM(2006) 733 final: *Communication from the Commission to the Council on reinforcing the management of the European Union's Southern Maritime Borders*, Brussels, 30.11.2006, p. 11, paragraph 34.

[31] In this regard see "Working for refugees on Europe's outer borders", 18.05.2010; available at www.unhcr.org, which contains excerpts from an interview with Michele Simone, UNHCR's senior liaison officer with FRONTEX.

[32] In this regard, reference must be made to the working document published in May 2007 by the European Commission, containing an analysis of International Law instruments dealing with the smuggling of migrants by sea, and also to the setting up, one month later, of a sub-group known as The Law of the Sea / Frontex Guidelines Drafting Group to work on these issues. See SEC(2007) 691: *Commission Staff Working Document – Study on the international law instruments in relation to illegal immigration by sea*, Brussels, 15.05.2007. Also see "FRONTEX: the EU external …, *doc. cit.*, paragraph 145.

operations are to be carried out in the various maritime zones. Thus, in Part I of the Annex to this legislative instrument the EU legislator expressly refers on the one hand to territorial waters and contiguous zone, and to the high seas beyond the contiguous zone, on the other[33]. In the light of these provisions it is evident that no reference is made to Member States' Exclusive Economic Zones nor to operations that may take place in the territorial waters of third countries.

In our opinion, this absence of any reference in this sense should not be interpreted as any kind of legal impossibility preventing FRONTEX from acting in this waters as well. We must not forget, for example, the bilateral agreements already signed by some of the Southern Member States with countries that are the points of exit of a significant proportion of illegal migrants crossing the EU's sea border[34]. We refer, for example, to the bilateral agreements signed by Spain with Senegal and Mauritania in 2006 and with Cape Verde in 2008. Agreements that, in fact, are in line with the provisions of art. 14 of the Regulation establishing FRONTEX, which requires the latter to *"facilitate the operational cooperation between Member States and third countries, in the framework of the European Union external relations policy"*, as well as cooperation *"with the [competent] authorities of third countries […] in the framework of working arrangements concluded with these authorities"*[35]. What Council Decision 2010/252/EU is doing is to attempt to provide a more uniform application, within the sphere of FRONTEX operations, of the activities the latter may carry out in pursuit of the comprehensive management of the EU's external sea borders[36], and to contribute to improved coordination between Member States' authorities and those of African nations in the fight against illegal immigration[37].

Finally, it should also be pointed out that the provisions of Council Decision 2010/252/EU envisage the obligation, within the context of operations coordinated by FRONTEX, to consider the particularly

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33 Council Decision 2010/252/EU, *doc. cit.*, Annex, Part I, paragraph 2.5.

34 For an analysis of the various bilateral agreements signed by several EU Member States with third countries as a means of combating the smuggling of migrants, see PAPASTAVRIDIS, E., *op. cit.*, pp. 87-92.

35 Regulation (EC) 2007/2004, *doc. cit.*

36 These include, for example, authorisation of the coastal State, confirmation of registry, authorisation of the flag State, ships sailing without a flag, etc.

37 On this point see ACOSTA SÁNCHEZ, M. A., "Coopération et sécurité aux frontières extérieures européennes: le cas du Détroit de Gibraltar", *Annuaire Français de Droit International*, No LIV, 2008, p. 205.

vulnerable nature of some of the persons who could be intercepted at sea, and in particular *"children, victims of trafficking, persons in need of urgent medical assistance, persons in need of international protection and other persons in a particularly vulnerable situation"*[38]. This obligation is in our view of particular transcendence, since it attempts to alleviate the effects of the all-too frequent lack of training of border guards who take part in such surveillance operations in the appropriate way to treat vulnerable persons of this kind. The adoption of this decision establishes Member States' duty to everything within their power to provide these guards with adequate training with regard to the respect for human rights and the rights of refugees, whilst at the same time ensuring that they are familiar with the international search and rescue system[39].

And with regard to Romania and Bulgaria, we would like to emphasise the fact that FRONTEX has already started to carry out joint operations in the Black Sea, and that for this reason Council Decision 2010/252/EU is also of particular relevance to this part of the EU's external border. Thus, in 2008 this European Agency carried out the joint operation baptised as "EPN – Euxine 2008"[40], and in the following year it carried out the joint operation known as "Zeus 2009", which concerned the seaports of participating Member States[41]. To these operations we must add the joint operation "Focal Points Sea", within the framework of the "Focal Points" programme, which commenced on 14 September 2009, principally in conflictive areas of the Mediterranean and Black Seas. Finally, as far as FRONTEX-funded projects are concerned, reference should be made to the "Tailored Risk Assessment of the Black Sea as a Potential Route for Illegal Migration",

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[38] Council Decision 2010/252/EU, *doc. cit.*, Annex, Part I, paragraph 1.3.

[39] *Ibid.*, Annex, Part II, paragraph 1.

[40] Romania was the hosting Member State for this joint operation, which lasted for 31 days and involved the participation of 11 EU Member States and a further 2 countries from the Black Sea region, namely: Austria, Bulgaria, Estonia, Finland, Germany, Italy, Lithuania, Portugal, Moldavia, Netherlands, Romania, Spain and Ukraine. It should also be noted that during 2008 FRONTEX carried out 8 sea operations, 10 land operations and 8 air operations. For further information, see "FRONTEX: General Report 2008", FRONTEX, p. 40; available at http://europa.eu

[41] This joint operation took place over a 33-day period and involved 18 States, 17 of which were EU Member States (Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovenia, Spain and Sweden) plus Norway, an EEA country; who in total contributed 35 experts to the operation. It should also be noted that during 2009 FRONTEX carried out 9 sea operations, 8 land operations and 10 air operations. For further information, see "FRONTEX: General Report 2009", FRONTEX, pp. 36-38; available at http://europa.eu

carried out between August 2007 and February 2008, with a commitment of 11,820 euros[42].

Nevertheless, to date the recorded number of illegal migrants entering these two countries by sea is relatively low. In this regard we can refer to the year 2007, in which out of a total of 1134 cases detected of illegal entries in Bulgaria, 8 were by sea, whilst out of the 660 cases recorded in Romania, 5 came from the sea[43].

II. GUIDELINES FOR SEARCH AND RESCUE SITUATIONS AND FOR DISEMBARKATION IN THE CONTEXT OF SEA BORDER OPERATIONS COORDINATED BY FRONTEX.

Part II of the Annex to the Council Decision that is the subject of our analysis contains a series of guidelines concerning, firstly, search and rescue situations directed at persons in distress at sea, and secondly, possible cases of disembarkation of persons intercepted or rescued during operations coordinated by FRONTEX. In our view, the purpose of these Guidelines is on the one hand to extend the operative capacities of this European Agency at sea, and on the other to establish a common *modus operandi* for all Member States in the said possible cases of search, rescue and disembarkation of the people they may find at sea during such operations, whether they be in distress or suspected of wishing to make an unauthorised crossing of the EU's sea border.

The Guidelines are non-binding, but in our opinion, given that they must necessarily form part of the operational plan drawn up for each operation coordinated by FRONTEX[44], we consider that this fact makes them all but compulsory for the Member States taking part in operations of this nature, and that therefore the said States will no longer be able to avoid their duty to search for and rescue persons found at sea. Nevertheless, a certain misgiving arising from the lack of a binding nature imposed on the provisions of Part II of the Annex to Council Decision 2010/252/EU has led some members of

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[42] It took place within the framework of FRONTEX's Annual Programme of Work for 2007. Its aims were the following: to provide an assessment on the situation of illegal migration at the Black Sea including currently used migration routes throughout the region; and to provide information on other cross border offences and their possible link to organised crime gangs. For further information, see "FRONTEX: Frontex General Report 2007", FRONTEX (available at http://europa.eu), p. 42.

[43] "FRONTEX: Frontex General Report 2007", *doc. cit.*, p. 15.

[44] Council Decision 2010/252/EU, *doc. cit.*, Article 1.

the European Parliament to take up a stance against the adoption of this legislative instrument[45].

The provisions included within these Guidelines are many and complex. Given the limited length of this study we will mainly focus our attention on what is, in our view, a particularly controversial question. We refer here to the possible obligation of the Member State hosting the operation coordinated by FRONTEX to receive the persons intercepted or rescued at sea, in agreement with the provisions of International Law and existing bilateral agreements in this matter, rather than to take them to the nearest safe harbour[46]. An obligation that follows the line of the duty of the host Member State or another Member State participating in a maritime surveillance operation carried out by FRONTEX to receive the ship or the persons on board the ship, expressed in Part II of the Annex to Council Decision 2010/252/EU[47].

This possible obligation on the part of the host Member State has led some Member States, such as Malta for example, to take no further part in operations of this nature for the time being[48], in this case because it considers that applying such measures will have an evident and significant adverse effect on it. Thus, as a direct consequence of the publication of Council Decision 2010/252/EU, the start of Operation Chronos was delayed[49]. Faced with this delicate situation, the European Commissioner for Home Affairs, Cecilia Malmström, even went so far as to state, during a visit to Malta on 30 April 2010, that the new FRONTEX guidelines could be the subject of negotiation by each participating Member State before the start of each operation[50]. However, even though this was not expressly ruled out by Council Decision 2010/252/EU, in our view we consider it to be highly unlikely that the aim is to start from scratch each time a new

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[45] In this sense, we can include, for example, the statement made by the Portuguese MEP Rui Tovares. See "Rescuing migrants at sea: Civil Liberties Committee rejects guidelines", European Parliament, Justice and Home Affairs, 17.03.2010.

[46] On this issue, see also COM(2006) 733 final, *doc. cit.*

[47] Council Decision 2010/252/EU, *doc. cit.*, Annex, Part II, paragraph 2.1.

[48] During the years 2006-2009 Malta was the host of two FRONTEX operations: Nautilus (2006-2008) and EPN-Nautilus (2009). In this regard, see "Frontex Press Pack", FRONTEX Libertas Securitas Justitia (available at http://europa.eu).

[49] Operation Chronos was previously known as Operation Nautilus. See "Frontex Operation Chronos Delayed Pending Talks with Malta", *Migrants at Sea*, 15 April 2010; www.migrantsatsea.wordpress.com

[50] "Malmström: Frontex Sea Operation Guidelines May Be Re-Negotiated by Participating Member States", *Migrants at Sea*, 3 May 2010; www.migrantsatsea.wordpress.com

operation has to be planned, since this would reduce or even eliminate the intended impact on this issue of the adoption of the Council Decision we are analysing.

On the other hand, it should also be mentioned that this possible obligation of the host Member State will only exist if *"disembarkation in the third country from where the ship carrying the persons departed or through the territorial waters or search and rescue region of which that ship transited"* were not possible, unless *"it is necessary to act otherwise to ensure the safety of these persons"*[51].

In other words, the objective, in our opinion, is that persons intercepted at sea are to be disembarked in a country where they will feel safe. However, we have to ask ourselves the question of what could be the extent of the idea of a safe country in the opinion of the EU legislator. In our view, a safe country should be considered to be one in which persons intercepted or rescued at sea will not only have their physical integrity guaranteed, but also their psychological integrity, and where their basic rights will be respected[52]. In this context, a factor of particular relevance is the fact that FRONTEX is collaborating with a view to carrying out its operations with third countries regarding which there are doubts about the possible situation of persons who may be returned after being intercepted at sea or after their application for asylum in a Member State has been turned down. A case in point would be that of Libya, undoubtedly a key country in the fight against illegal migration to the EU, but which is not party to certain international treaties in this sphere, referred to in the previous section of this study[53].

FINAL CONSIDERATIONS – A COUNCIL DECISION THAT HAS BEEN THE SUBJECT OF CONTROVERSY WITHIN THE EUROPEAN UNION ITSELF FROM THE TIME IT WAS ADOPTED

In our opinion, FRONTEX has until now to a great extent accomplished the aims with which it was entrusted when it was established. The EU's external sea borders nowadays appear to be less permeable to illegal migration originating, in particular, from Africa. The Agency's actions,

[51] Council Decision 2010/252/EU, *doc. cit.*, Annex, Part II, paragraph 2.1.

[52] Numerous definitions of what constitutes a "safe country" abound. In this regard, see for example "Resolution MSC.167(78). Guidelines on the Treatment of Persons Rescued at Sea", International Maritime Organization, 20.05.2004 (available at http://www.unhcr.org/refworld/docid/432acb464.html).

[53] For example, Libya is not a party to the Convention relating to the Status of Refugees (1951).

however, must be analysed in a broader context, since it does not operate alone, but instead draws on other instruments established by the EU to combat the unauthorised entry by sea of persons into the territory of its Member States and cross-border crime, and which enable other kinds of measure to be adopted.

However, in view of the existence of a number of grey areas in which FRONTEX's activity is not wholly effective and efficient, and in which individual EU Member States are similarly unable to fully discharge their obligations in this regard due, above all, to the differences between national legislation and the practices of the former, the EU adopted Council Decision 2010/252/EU. In some ways the Decision could be considered unnecessary, since the Member State obligations included in this legislative instrument are the same as those they assume within the framework of International Law. But it is also true that many of the said States differ in terms of their practical application and interpretation, and it is precisely in this respect that the Council Decision could serve as a useful legal instrument.

Furthermore, we consider that with this Council Decision the EU has been endowed with a legislative basis enabling one Member State to assume the surveillance of the sea border of another, a further benefit being the harmonisation of Member States' actions regarding interception, search and rescue and disembarkation within the framework of maritime operation coordinated by FRONTEX.

These and other possibilities opened up by Council Decision 2010/252/EU represent, in our view, considerable progress in this matter. However, this does not serve to conceal the fact that from the very outset the Decision has been the subject of legal controversy between various EU institutions. Thus, whilst the European Parliament's Civil and Political Liberties Committee considers that the ordinary legislative procedure should have been followed for the adoption of this legislative instrument, thereby enabling it to give its opinion, the European Commission is of the opinion that its adoption falls within the exercise of the implementing powers conferred on it by the Schengen Borders Code, by virtue of Council Decision 1999/468/EC (the 'Comitology Decision').

In this regard, it should also be mentioned that on 10 April 2010 a motion put before the European Parliament seeking its rejection of the guidelines contained in Council Decision 2010/252/EU failed to prosper. This was because of the inability to reach a sufficient number of votes in the European Parliament, in spite of the fact that a large majority of members present voted for the motion. This, however, did not prevent the European

Parliament from taking the decision, several weeks later (24 June 2010) to request the Court of Justice of the European Union to contest, on procedural grounds, the validity of the said FRONTEX guidelines[54].

Pending the Court's decision, we are of the opinion that the measures contained in Council Decision 2010/252/EU are aimed at reinforcing the monitoring and surveillance of the EU's sea borders on the basis of the obligations and duties imposed on States by International Law for the purpose of protecting human life at sea. These measures are applicable to Romania and Bulgaria, given their condition of Member States of the European Union, the waters under their sovereignty or jurisdiction in the Black Sea now falling under the management of this International Organisation.

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FLEXIBILITY AND SECURITY IN THE NEW LABOUR LEGISLATION

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ABSTRACT

The author examines some of the provisions the Law no. 40 of 31 March 2011 amending and supplementing Law no. 53/2003-Labour Code in relation with the European concept of flexisecurity. A number of considerations are presented concerning the relationship between labour relations flexibility and employee protection under the provisions of the new law in areas such as: the individual fixed-term labour contract, working time, labour standards, vocational training, collective agreements.

KEYWORDS

Law no. 40 of 31 March 2011 amending and supplementing Law no. 53/2003-Labour Code, more flexible labour relationships, protection of employees, flexicurity, individual fixed-term employment contract, working time, social dialogue

By the adoption of Law no. 40 of 31 March 2011 amending and supplementing Law no. 53/2003-Labour Code[1], after heated debates and the assumption of responsibility by the Government, here we are in a situation where we have a law substantially modified to be analyzed not only in terms of intrinsic provisions but also in terms principle.

The trade union confederations and a large part of employers organizations accuse the initiators that the provisions of the new normative act reach to a situation of extreme insecurity for employees, putting them in a particularly disadvantageous to employers.

The government justified its regulatory options by reference to European and international standards.

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[1] Published in Monitorul Oficiail, Part I, nr.225/31.03.2011.

The decision to promote this normative act without the consent is of social partners is evident at least regrettable because such a bill must first af all to obtain the consent of his subjects .

On the other hand, the adoption of a national labour force policy management radically different from the current economic strategy imposes an efficient correlation with a consistent and predictable economic strategy, as well as with operational and effective social security systems. This unfortunately did not happen and, therefore, social and economic effects of the new bills are difficult to predict.

In the following, we present some considerations on the content of the Law no. 40/2011 amending the Labour Code in relation to the primary intention of the initiator, namely the flexibilisation of labour relations in Romania.

Thus, in the explanatory memorandum to the project that led to the adoption of the law amending and supplementing, Government consideres that flexibility and adaptation to the realities of labour relations in relation to current socio-economic developments in the labour market dynamics, that the economic crisis facing many difficulties, is regarded as appropriate and necessary.

It states also that the proposed changes are in line with European Union directives provisions and International Labour Organizations conventions. However, we must mention that Law 53/2003-Labour Code contains no substantive disagreements with international norms invoked in the explanatory memorandum.

The new law aims to establish more flexible labour relationships, ensuring the creation of conditions for business development while ensuring the level of protection of employees. However, the analysis of the provisions, we find that there are no rules that enhance the security and protection for employees, but on the contrary, as we illustrate later, there are provisions which affect their status.

The initiator specifies that the socio-economic reality has shown that the entry into force of latest structural changes of the Labour Code, it was not a driver of national economic development and has created a certain rigidity of labour relations, which had negative repercussions on business performance and on its ability to grow through investment. And this idea is questionable if we consider that until the economic crisis our country has one of the highest economic growth rates. We are inclined to believe that serious economic setback in recent years is the result of inadequate

economic policies of the executive in diminishing the efffects of the economic crisis.

The government also said that the need to speed up the modification Labour Code s arising from thecommitment i established by the Government in agreement with the IMF. It is known however that the policies imposed by the IMF over the world are, according to many experts, far from any criticism.

As the initiator referred to the flexibility of labor relations and employee protection and the need to take into account European standards, we have to remember in this context the concept of flexicurity developed at EU level. To what extent some provisions of law are in line with the European concept of flexicurity we will see below.

1. The concept of flexicurity

As noted in an important European document, flexicurity can be defined as a integrated strategy to enhance simultaneous the flexibility and security on the labor market[2].

Flexibility refers to changes ("transitions") success in life: from school to work at a job to another, between unemployment or inactivity and work, and the work to retirement. It is not limited to greater freedom for companies to hire and fire and does not involve open-ended contracts lapse. This refers to the progress of workers into better jobs, "upward mobility" and optimal development of talent. Also, flexibility refers to the flexible organization of work, capable of quickly and effectively mastering new productive needs and skills and to facilitate reconciliation of work and private responsibilities.

On the other hand, security is more than job retention: this refers to the mediation skills that enable progress in life and support in finding a new job. It also refers to unemployment benefits to facilitate transitions appropriate. Finally, it includes training opportunities for all workers, especially for the low skilled and older workers.

Thus, firms and workers can both benefit from flexibility and security, eg from better organization of labour, resulting from the upward mobility of skills, from investment in training that work for business helping workers to adapt and accept change. Thus, flexibility of labour relations

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[2] See THE COMMISSION TO THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE OF THE REGIONS Towards Common Principles of Flexicurity COM (2007) 359 final: more jobs and better jobs through flexibility and security {SEC (2007) 861} {SEC (2007) 862}

does not refer primarily to facilitate the procedures for dismissal as it seems to be understood in the autochthonous labour administration.

Furthermore, the Commission and Member States, have reached a consensus that flexicurity policies can be designed and implemented through four policy components[3]:

a) flexible and reliable contractual arrangements (from the perspective of employers and employees, persons employed and those who are part of outsiders) by labour laws, collective agreements and modern work organization.
b) Comprehensive strategies for lifelong learning to ensure adaptability and employability of workers, especially the most vulnerable categories.
c) Active and effective policies of the labor market for helping people cope with rapid changes, reduce unemployment spells and ease transitions to new jobs.
d) Modern social security systems to ensure adequate financial support, encourage employment and facilitate labour market mobility. It includes provisions on social protection with a broad coverage (unemployment benefits, pensions and healthcare) that help people combine work with personal and family responsibilities such as childcare.

It is clear that these directions proposed at European level to promote flexicurity should be considered taking into account the specific labor market in each state. During the hearings conducted in adopting the new law, its initiators but stressed the need for increased flexibility of employment and less on preserving or improving the protection of employees, European flexicurity concept beeing thus ignored in its wholly meaning.

This reality is not entirely reassuring if we take into account the economy and local labour market characteristics affected by economic and financial crisis. As such, our perception is that in our country must be made good progress in all 4 directions enemerated above, if it is the desire the the modifications to the Labour Code have the expected effects in social terms.

2. The individual fixed-term employment

The provisions introduced by the new law on individual fixed-term employment contract (increasing the duration of their cases can be

[3] Idem

completed) have raised concerns about giving up the principle conclusion of contracts of indefinite duration.

Comparative analysis of the Romanian law and Directive no. 1999/70/EC of 28 June 1999 concerning the framework agreement ETUC, UNICE and CEEP on fixed-term employment[4] resulting appreciate that these fears are not confirmed. Moreover, unlike the Community rules, the Labour Code limited to art. 81 cases where a contract can be individually fixed-term employment. Legislative solution chosen by the Romanian law is being able to reduce to the Directive, namely ensuring labour mobility in a labour market affected by economic restructuring.

However indefinite duration contracts are and remain the general form of labour relations between employers and workers, which Directive 1999/70 specifies even in its preamble, and the Romanian Labour Code stipulates in art. 12 para. (1) remained unchanged.

Dificulties may be raised but in practice the course of employment, the tendency to resort mainly to individual employment contracts of limited duration. Therefore, at European level "indefinite duration contracts are seen as the main benefit from protection by labour laws and collective agreements. Training opportunities and social security provisions tend to depend on having an indefinite duration contract. Due to attempts to increase labour market flexibility, the number of fixed-term contracts, casual work contracts, work through agencies etc.. Frequently, workers have fixed-term successive contracts over a long period before getting a contract for an indefinite duration. Instead of stepping stones, these contracts are likely to become traps for workers. In these countries, security tends to rely more on job protection than social benefits. Consequently, unemployment benefits are low and social support systems are weak[5]." The individual fixed-term employment can produce full social and economic effects on a dynamics and rich in opportunities labour market. Otherwise, he is able to induce a certain insecurity in employee status.

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[4] Published in OJ L 175 of 10 July 1999, p. 43-48.

[5] See THE COMMISSION TO THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE OF THE REGIONS "Towards Common Principles of Flexicurity COM (2007) 359 final: more jobs and better jobs through flexibility and security" {SEC (2007) 861} {SEC (2007) 862}

3. Working time

Among the provisions challenged by the trade unions and they have made believe that the new provisions turn workers into "slaves" were those relating to working time. Section 106 of the law retained the intention trasnpunerii art. 16 b), Art. 18 and Article 19 of Directive 2003/88 on certain aspects of the organization of working time[6]. These articles cover the maximum duration of working time and exceptions that are allowed and accepted reference periods.

European European standard provisions can be found translated in the new wording of Article 111 of Labour Code.

Transposition of the European standard is correct but not complete. Proving some apprehension towards social dialogue, shown with other provisions of law (eliminating the requirement of the agreement the union or employee representatives in setting labour quotas-art.129, possibility to reject the request for granting employees unpaid training leaves without the consent of the union or employee representatives (art. 150 para. 2), reducing working hours with a corresponding reduction in salary, without the consent of the employee representatives or trade union organization, but only with their consultation (art. 52 para. 3 newly introduced), and in this case fails to adopt properly the European standard.

Thus, art. 18 of Directive 2003/88 is entitled "Exemptions by collective agreements" and explicitly includes provisions that the new Romanian law has not taken in full:"Derogations may be made from Articles 3-5(on daily rest, weekly rest breaks and time), 8(duration of night work) and 16(reference periods) by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level. The derogations (…) shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

Omissions of Romanian law are likely to affect not only the fundamental rights of employees, but to expose them to uncontrollable risks able to limit their level of protection.

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[6] Published in the Official Journal of the European Union no. 299/18.XI.2003

4. Labour Quotas

Art. 129 of Law no. 40/2011 of the Labor Code has been modified so that labour quotas are developed by the employer in accordance with regulations in force. If there are no regulations, labor standards are developed by the employer after consultation with representative trade union or, where appropriate, employee representatives, thus eliminating the condition to their agreement in the old wording.

Challengers of the law to the Constitutional Court considered that in this case the employer has the right to establish himself discretionary the labour quotas for employees. Basically, they felt, the employer is able to achieve an "abusive exploitation of labour to maximize profit without any conditionality relating to social protection of labour.[7]"

In this case, we consider that the new article 129 has a potential risk in terms of employee protection provided that the competent institutions will not cover exhaustively as possible different fields with appropriate regulations.

5. Collective agreements

During completion of the new bill, there was criticism that a number of provisions introduced in the new law would be likely to affect the fundamental principle of collective bargaining and the minimizing the role of collective contacts as a result of social dialogue. The Law of social dialogue nr. 62/2011[8] gathered the provisions previously included in Labour Code on trade unions, employers orgasations,collective negotiation and labour conflits. Thus, in Labour Code remained only few articles.

How this issue is addressed is of particular importance, given that freedom of association and social dialogue are seen all over the world and in prestigious international organizations such as International Labour Organization or the European Union as fundamental components that give measure organization and functioning of a democratic society.

We can fin find this idea and in a European Commission Communication that "the active involvement of social partners is essential to ensure that flexicurity delivers benefits for all. It is also important that all stakeholders involved are prepared to accept and assume responsibility for changes. Integrated flexicurity policies are often found in countries where

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[7] The appeal made by a number of 112 deputies on the unconstitutionality of the Law amending and supplementing Law no. 53-Labour Code, registered number 1626/17.03.2011 Constitutional Court.

[8] Published in Monitorul Oficial al Romaniei, Part I, nr.322/10.05.2011.

the dialogue - and above all, trust - between social partners and social partners and public authorities played an important role. The social partners are best placed to address the needs of employers and workers and to find synergies between them, for example in work organization or in the design and implementation of strategies for lifelong learning. [9]"

But the impression that leaves the provisions of new laws is that the initiators intented to limit the role of social dialogue in establishing conditions for enforcement of labour regulations. This is in obvious contradiction to what is happening at European Union level. In this respect, we have to underline that the most important regulations and directives adopted in the field of labour law include clauses which compel the social partners to information and consultation in enterprises and institutions of the European Union[10].

However, in this regard the Law nr.40/2011 started with the left, including procedural, if we remember the fact that its draft has not obtained the very important opinion of Economic and Social Council.

6. Conclusions

Amendments to the Labour Code are intended to primarily benefit employers, especially for the transnational interested in local labour cheap and easily accessible, in the sense that there are as few legislative rigor and avoid the possible involvement of trade unions.

This regulatory concept was not denied by the Government, the initiator of the law at the request of foreign investors first. The solution would be understandable if we consider the precarious situation of productive units in the Romanian economy and the pressing need to find solutions for increasing employment in an extremely difficult economic times.

On the other hand, just taking into account the difficult situation facing much of the Romanian population, which is first in terms of poverty risk among European Union countries[11], and European policies mentioned in this article on the need for joint measures stimulating the flexibility in

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[9] See THE COMMISSION TO THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE OF THE REGIONS "Towards Common Principles of Flexicurity COM (2007) 359 final: more jobs and better jobs through flexibility and security" {SEC (2007) 861} {SEC (2007) 862}.

[10] See also, Nicolae Voiculescu, Community employment law, Wolters Kluwer Publishing, Bucharest, 2009, p.318-341.

[11] *Combating poverty and social exclusion. A statistical portrait of the European Union 2010*, European Commision, Luxembourg, 2010, p.39.

conditions on security of work places, is necesarry an approach in line with local social reality or implementation of legislative measures such as those contained in the Law amending and supplementing the Labour Code in terms of a stabilized economy and a more generous labor market.

THE CHANGES PRODUCED ON THE FUNCTIONING OF THE EU WITH THE ENTRY INTO FORCE OF THE TREATY OF LISBON

Felicia MAXIM*

ABSTRACT

On 1 December 2009, the Treaty of Lisbon entered into force, thus ending several years of negotiation about institutional issues. The Treaty of Lisbon amends the current EU and EC treaties, without replacing them. It provides the Union with the legal framework and tools necessary to meet future challenges and to respond to citizens' demands. It makes the EU more democratic, efficient and transparent. It gives citizens and parliaments a bigger input into what goes on at a European level, and gives Europe a clearer, stronger voice in the world, all the while protecting national interests.

KEYWORDS

Treaty of Lisbon, reform, legal personality, ***,*** *principles of subsidiarity and proportionality, institutional changes, protection of human rights*

1. Premises of Preparation of the Lisbon Treaty

The fifty years of integration and enlargement have proven that the ideas promoted by the founding fathers of Europe remain as valid as they were in the beginning. Common solutions are the only ways of obtaining adequate answers to Europe, in a globalized world. European Union has the necessary potential to consolidate its policies in all fields, still this potential should not be blocked by antiquated work methods.[1]

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[1] EUROPEAN UNION COUNCIL, Brussels, 13 July 2007- Reformation of Europe for the 21st Century.

The Treaty of Lisbon amending the Treaty regarding the European Union and the Treaty of Establishing the European Community[2] represents the materialization of the intentions of modernization and changing the existent work methods. Still, analysing the evolution of the community from the setting up of the European Communities to the time of adoption and enforcing the Treaty of Lisbon, it can be noted a continuous tendency of adaptation, which is proven by the preparation of an impressive number of treaties and acts aiming at amending, revising or completing the existent community provisions. However, the steps taken by the community construction have been dominated by the compromise between the federal conception and the conception of inter-governmental cooperation, a compromise, considered in our opinion wise, as this way a much better cooperation between the member states is ensured. Since the time of its setting up, European Union has sought to identify the best way of becoming modernized and to better answer the preoccupations and aspirations of its citizens.

The Declaration regarding the Future of European Union or the Laeken Declaration, adopted on 15 December 2001, specified all domains in which the European Union needed reform. This declaration and the prospects opened by it have represented a decisive moment in the process of bring European Union closer to its citizens. Thus, one of the set objectives aimed at clarifying, simplifying and adjusting the competences between the Union and the Member States in the light of the new challenges which the Union has to answer. The simplification of the Union’s instruments was considered an objective of top importance, the purpose being that the various instruments available to the Union should be better defined.

Although the adoption of the Nice Treaty attempted to adapt the institutional structure, so that it could meet the requirements of a European Union comprising 27 member states, its improvement needed to be continued in order to ensure more democracy, transparency and efficiency. The progress of the European Union materialized by the preparation of a document that was to replace the many treaties adopted, called the Constitutional Treaty. In this respect, the European Council decided to convene a Convention bringing together the main parties involved in debating the future of the Union. The Convention was to consist of a

[2] The Treaty of Lisbon was signed on 13 December 2007 by the 27 member states, and on 1 December 2009 it came into effect as a result of being ratified by all the member states. Romania ratified the Treaty by Law no. 13/2008, published in the Official Gazette no. 107 of 12 February 2008.

chairman and two vice-chairmen,[3] 15 representatives of the heads of states and governments of the Member States (one for each member state), 30 members of the national parliaments (two for each member state), 16 members of European Parliament and two representatives of the Commission. The candidate countries at that time were all involved in the discussions of the Convention. [4]

As of 28 February 2008, for 15 months, the Convention analysed all the aspects regarding the future EU and prepared a draft treaty meant to simplify the existent political and legislative European framework. The text of the constitutional draft was presented at the meeting of the European Council in Saloniki on 20 June 2003, however, in order to be adopted, the text of the treaty was subject to debates within the Intergovernmental Conference, which began its works on 4 October 2003. The compromise solution was identified in the European Council in June 2004, and the text of the Treaty regarding the instating of a Constitution for Europe was signed on 29.10.2004 by the heads of states and governments of the 25 member states.[5] The coming into effect of the Treaty was conditioned on ratifying by all member states, a procedure which has not been completed, due to the known rejection by referendum by France and Holland.

The rejection of the Constitutional Treaty determined the rethinking of the process of adapting the community structures and of finding valid solution for the future. There followed the so-called “reflection” period, which lasted more than one year, the results being eventually visible under the German presidency of the EU, in the first half of 2007. Meanwhile, the European Commission launched a new action plan, which benefitted from the support of the informal European Council held in Hampton Court in October 2005, taken over in a double approach defined in “An Agenda for Citizens”.

Upon celebrating fifty years from the adoption of the Rome Treaties, Berlin Declaration was signed in March 2007, reasserting the role of the European Union and its importance in the future development of the European States, in pursuit of the following objectives: maintaining as basis, the opening and intention of its members to consolidate the internal

[3] There were appointed V. Giscard d’Estaing as Chairman of the Convention, and Mr.G.Amato and Mr. J. L. Dehaene as Vice-Chairmen.
[4]The text of the declaration adopted at the meeting of the European Counci in Laeken on 15 December 2001.
[5] Gyula Fabian, *Drept instituțional comunitar*, Ediția a-III-a revăzută şi adăugită cu referire la Tratatul de la Lisabona, Editura Sfera Juridică, Cluj,2008, p.125.

development of the Union; to protect this unification for the welfare of the future generations; continuous renewal of the political form of Europe in order to keep abreast of the times; to promote democracy, stability and prosperity beyond its borders; to combat terrorism, organized crime and illegal immigration; to defend the freedom of its citizens and their civil rights by fighting all that jeopardize these; to peacefully settle conflicts in the world and the requirement of not allowing that people should become victims of war, terrorism and violence; the development in the field of energy policy and climate protection; as well as the prevention of the global threat of climate changes.[6]

Subsequently, the European Council of 21-23 June 2007, decided to convene an intergovernmental Conference whose mandate was to edit a treaty, called "The Reform Treaty", amending the existent treaties in order to consolidate efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. The reform treaty will include two clauses amending the European Union Treaty (EUT) and, respectively, the Treaty of Establishing the European Community (TEC). EUT will keep its title and TEC will be called the Treaty on the Functioning of the European Union. The technical changes brought to the Euratom Treaties and the existent protocols are made under the protocols attached to the Reform Treaty, as agreed in CIG 2004. Mention must be made that the Reform Treaty will introduce in the existent treaties, which remain in effect, elements of novelty which resulted from CIG 2004.[7]

According to the set calendar, it was forecast that the text was to be completed by the end of 2007, its ratification, in 2008 and coming into effect, in 2009, before the election for European Parliament. The reform treaty was signed on 13 December 2007 in the Portugal's capital city, becoming the Lisbon Treaty, but there was not observed, according to the set calendar, the effective date, as a result of the changes in the ratification procedure. Eventually, the ratification procedure was completed in 2009, the treaty coming into effect on 1 December 2009.

The Lisbon Treaty comprises two treaties with equal legal value, resulted from the introduction in the European Union Treaty and in the European Community Treaty (called the Treaty on the Functioning of the European Union) of the provisions adopted by CIG, plus 13 Protocols and

[6] Declarația de la Berlin din martie 2007.
[7] COUNCIL OF THE EUROPEAN UNION Brussels, 20 July 2007.

over 50 Declarations. We point out that the Treaty of the European Community of Atomic Energy remains in force.[8]

The European Union Treaty, as amended comprises a preamble and is structured in six parts: Title I:Common Provisions; Title II: Provisions regarding the Democratic Principles; Title IV: Provisions regarding the Institutions; Title V:General provisions regarding the External Action of the Union and Specific Provisions regarding Common Foreign Policy and Security Policy; Title VI: Final Provisions.

With regard to the structure of the Treaty on the Functioning of the European Union (TFUE), in consolidated version, it comprises seven parts, as follows: Part I :Principles; Part II: Non-discrimination and Citizenship; Part III: Internal Policies and Actions of the Union; Part a-IV-a: Association of Overseas Countries and Territories; Part V: External Action of the European Union; Part VI: Institutional and Financial Provisions; Part VII: General and Final Provisions.[9]

2. Innovative Elements Introduced under the Lisbon Treaty

The Lisbon Treaty is essential to ensuring the efficient functioning of the European Union. Currently, the Union represents 27 member states and over 490 million inhabitants. The reforms proposed by this Treaty, especially the new institutional arrangements and work mechanisms are necessary to ensure a Union able to cope with the global challenges and to answer the expectations of the European citizens, including the Romanian citizens. Romania actively supported the adoption of the Treaty, which included most of the innovations previously stated by the Constitutional Treaty. The main innovations introduced by the Lisbon Treaty include**:** recognizing the legal personality of the European Union; clarification of the distribution of competencies and way of applying the principle of subsidiarity and proportion; strengthening the role of the citizens; the European Council will have a stable president; increasing the role of European Parliament; maintaining the principle of representation in the European Commission; a more powerful role given to national parliaments; extending the fields in which decisions are adopted by the Council with

[8] Ion Jinga, *Tratatul de la Lisabona:soluție sau etapă în reforma instituțională a Uniunii Europene?,* în Revista de Drept comunitar nr.1/2008, p.15-34.
[9] Eduard Dragomir, Dan Niță, *Tratatul de la Lisabona (The Lisbon Treaty),* Editura Nomina Lex, Bucureşti, 2009,p.24.

qualified majority; maintaining the innovations introduced in the field of common foreign policy and security policy of the Constitutional Treaty; setting up the position of High Representative of the Union for foreign policy and security policy; granting the mandatory legal status of the Chart of Fundamental Rights; codification of the vicinity policy of the Union; including the principle of supremacy of the community law a.o.

2.1. Legal Personality of the European Union

In specialized literature, the existence or inexistence of the legal personality of the European Union has been a controversial aspect ever since the setting up of EU. If in case of European Communities, the signatories of the Treaties have recognized the legal personality of them, in case of the European Union, the European Union Treaty has not recognized the legal personality of EU. The lack of the provisions regarding the existence of the legal personality of EU led to two theories in the specialized literature, namely: the theory according to which EU had no legal personality and the theory that supported the existence of the legal personality by invoking the competencies of EU.[10] Irrespective of the arguments invoked, the controversy was eliminated together with the adoption and entering into effect of the Lisbon Treaty, which in art.47 of EUT, states that "the Union has legal personality". This article explicitly recognizes the legal personality of the European Union, being identically taken over from the Constitutional Treaty and resulted from the activity conducted by the vice-president of the Convention on the Future of Europe, Giuliano Amato.[11]Recognizing the legal personality strengthens the capacity of subject of international law of EU, but triggers various discussions on the legal nature. Qualified as an international law entity with specific features, the legal capacity of EU, by virtue of the principle of speciality and nature of competencies, is a functional, specific one. Thus the European Union has the capacity attributed to it by the member states, according to the principle of attributing competencies and based on the constitutive act, community law constituting the internal law of the presented entity.[12] According to

[10] Augustin Fuerea, *Drept comunitar european.Partea generală (European Community Law),* Editura All Beck, 2003,p.35.

[11]Francois-Xavier Priollaud, David Siritzky, LE TRAITE DE LISBONNE, TEXTE ET COMMENTAIRE ARTICLE PAR ARTICLE DES NOUVEAUX TRAITES EUROPEENS, La Documentation francaise, Paris, 2008,p.132.

[12] Ion M.Anghel, *Uniunea Europeană şi poziția (calitatea de subiect de drept internațional) a statelor sale membre,* în Revista de Drept Comunitar European Union and position

Declaration no.24, it is confirmed that the European Union has legal personality, but this aspect shall not authorize it in any way to legislate or act outside the competencies conferred to it by the member states in the treaties.

As subject of international law, EU has a legal personality of internal law, but also a legal personality of international law. According to art.335 TFEU "In each of the member states, the Union has the widest legal capacity recognized by internal laws, the Union can, especially, acquire or sell immobile and mobile goods and can stand justice."[13] In international field, EU has: capacity of presentation (right to active and passive legation), the right to stand justice and to engage international responsibility, capacity to negotiate and conclude international agreements, as well as the capacity of becoming a member of international organizations or a party to international conventions.

Also, the discussions on the legal nature of EU have led to including it into the category of confederations and federations. The conclusions reached further to the analyses made have entitled the authors of international law and, respectively, the experts in EU law, to state that EU has a unique and unprecedented legal personality, being the result of combining the elements characteristic to international organizations with elements of state, which brings it closer to the form of union of states of the confederation and federations state.[14]

As a result, the debates on the legal nature of EU entitle us to say that the invoked entity constitutes of subject of international law of a special nature, the scope of manifestation of the legal personality being determined by the constitutive acts, as amended, completed and revised in time.

(capacity of subject of international law) of its members in the Community Law Magazine no.6/2009, p.74-106.

[13] Mircea Duțu, Andrei Duțu, *Dreptul contenciosului european (European Contentious Law)*, Editura Universul Juridic, Bucureşti 2010, p.21.

[14] I.M.Anghel, *Personalitatea juridică şi competențele Uniunii Europene/Comunităților Europene (Legal Personality and the Competencies of the European Union/European Communities)* , 2nd edition, revised and completed, Editura Lumina Lex, Bucureşti, 2007, p.77; Ion M.Anghel, *Uniunea Europeană şi poziția (calitatea de subiect de drept internațional) a statelor sale membre,* în Revista de Drept Comunitar (The European Union and the Position (Capacity of Subject of International Law) of its Member States in the Community Law Magazine no.6/2009,p.74-106.

2.2. Clarification of the distribution of competencies and way of applying the principles of subsidiarity and proportionality

According to the Lisbon Treaty, the Union pursues its objective by adequate means, according to the competencies attributed to it under treaties. Any competence that is not attributed to the Union by treaties belongs to the member states. The Union observes the equality of the member states with regard to the treaties, as well as the national identity of the member states, inherent to their fundamental political and constitutional structures, including with regard to local and regional autonomy. The Union observes the essential functions of the state, especially those dealing with ensuring territorial integrity, maintaining public order and defending national security. Especially national security remains the exclusive responsibility of each member state. On the basis of the principle of loyal cooperation, the Union and its member states help each other in fulfilling the missions deriving from the treaties. The member states adopt any general or special measure to ensure the meeting of the obligations deriving from treaties or resulting from the acts of the institutions of the Union. The member states facilitate the meeting by the Union of its mission and refrain from any measure that might jeopardize reaching the objectives of the Union. Delimiting the competencies of the Union is governed by the principle of attributions. Exerting these competencies is regulated by the principles of subsidiarity and proportionality. Based on the principle of attribution, the Union acts only within the limits of the competencies that have been attributed to it by the member states, under treaties, to reach the goals set under those treaties. Any competency that is not attributed to the Union under treaties belongs to the member states. Based on the principle of subsidiarity, in the fields that are not of its exclusive competence, the Union intervenes only if and to the extent where the objectives of the planned action cannot be achieved in a satisfactory manner by the member states, either at central level, or at regional and local level, but due to the size and effects of the planned action,. Such objectives can be better reached at the level of the Union. In case where the treaties attribute to the Union exclusive competence in a determined field, only the Union can legislate and adopt acts with mandatory legal power, the member states can do this only if they are allowed by the Union or in order to enforce the acts of the Union. In case where the treaties attribute to the Union a competence that is shared with the member states in a given field, the Union and the member states can legislate and adopt mandatory acts in the respective field from a legal point of view. The member states exert their competence again to the extent

where the Union has decided to cease to exert such competence. The member states coordinate their economic and occupational policy in accordance with the conditions stated by this treaty, for the definition of which the Union is competent. The Union is competent, in accordance with the provisions of the Treaty regarding the European Union, to define and apply a common foreign and security policy, including to gradually define a common defence policy. In certain fields and under the conditions stated by the treaties, the Union is competent to undertake actions to support, coordinate or complete the action of the member states, without, however, replacing by this the competence of the member states in those fields. The acts of the Union, mandatory from a legal point of view, adopted based on the provisions of the treaties regarding those fields, cannot involve the harmonization of the acts having the power of law and of the administrative norms of the member states. The extent and conditions of exerting the competencies of the Union are established under the provisions of the treaties regarding each field.

The competence of the Union is exclusive in the following fields:
(a) customs union;
(b) setting the norms regarding competition as necessary to the internal functioning of the internal market;
(c) monetary policy of the member states whose currency is euro;
(d) conservation of the biological resources of the sea within the common policy regarding fishing;
(e) common monetary policy.

Also, the competence of the Union is exclusive with regard to concluding an international agreement in case where such a conclusion is stated by a legislative act of the Union, or is necessary to allow the Union to exert its internal competence, or to the extent where this could affect the common norms or could change the scope of application of such norms.

The competence of the Union is shared with the member states in case where the treaties attribute to the Union a competence that does not refer to the fields mentioned above.

The competencies shared between the Union and the member states are applicable to the following main fields:
(a) domestic market;
(b) social policy, for the aspects defined in this treaty;
(c) economic, social and territorial cohesion;
(d) agriculture and fishing, except for the preservation of the biological resources of the sea;

(e) environment;
(f) consumer's protection;
(g) transports;
(h) trans-European networks;
(i) energy;
(j) space of freedom, security and justice;
(k) common security objectives in the field of public health, for the aspects defined by the treaty.

In the fields of research, technological development of space, the Union has competence to take actions and, especially, to define and apply programs, without the exerting of these competencies impeding on the member states' exerting their own competence.

In the field of cooperation for development and humanitarian aid, the Union has competence to take actions and to conduct a common policy, without the exerting of these competencies impeding on the member states' exerting their own competence.

The member states coordinate their economic policies within the Union. To this end, the Council adopts measures and, especially, general orientations of these policies. Special provisions are applied to the states whose currency is euro. The Union takes measures to ensure the coordination of the occupational policies of the member states and especially by defining the orientation of these policies. The Union can adopt initiatives to ensure the coordination of the social policies of the member states.

The Union is competent to take actions of supporting, coordinating or completing the action of the member states. By their European purpose, these actions are present in the following fields:
(a) health protection and improvement;
(b) industry;
(c) culture;
(d) tourism;
(e) education, professional formation, youth and sports;
(f) civil protection;
(g) administrative cooperation.

The institutions of the Union apply the principle of subsidiarity in accordance with the Protocol regarding the application of the principles of subsidiarity and proportionality. National parliaments ensure the observance of the subsidiarity principle, in accordance with the procedure stated by the respective protocol. Based on the principle of proportionality, the action of

the Union, in content and form, does not exceed what is necessary to achieve the objectives of the treaties. The institutions of the Union apply the principle of proportionality in accordance with the Protocol on the principles of subsidiarity and proportionality.

2.3. Institutional changes

The Union has an institutional framework that aims at promoting its values, pursuing its objectives, supporting its interests, the interests of its citizens and member states, as well as ensuring coherence, effectiveness and continuity of its actions.[15]

The institutional framework ensuring the functioning of the European Union comprises the following institutions: European Parliament, European Council; Council; European Commission (the "Commission"); European Union Court of Justice; European Central Bank and Court of Accounts. European Parliament, Council and Commission are assisted by the Economic and Social Council and Committee of the Regions, which exert consultative functions.[16]

European Parliament exerts, together with the Council, the legislative and budgetary functions. It exerts functions of political and consultative control, in accordance with the conditions stated in the treaties. European Parliament elects the president of the Commission. European Parliament comprises the representatives of the citizens of the Union. Their number cannot exceed seven hundred and fifty, plus the chairman. Representation of the citizens is ensured in a proportionally decreasing manner, with a minimum number of six members for each member state. No member state is attributed more than ninety-six places in Parliament.

European Parliament adopts unanimously, at the initiative of European Parliament and with its approval, a decision of setting the components of European Parliament, in compliance with the principles mentioned in the first paragraph. The members of European Parliament are elected by direct, universal, free and secret vote, for a term in office of five years. European Parliament elects its chairman and the bureau from its members.[17]

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[15] Art.13 TUE

[16] Augustin Fuerea, *Manualul Uniunii Europene (European Union Handbook),* 4th edition, revised and completed after the Lisbon Treaty (2007/2009), Editura Universul Juridic, Bucureşti, 2010,p.79.

[17] Art.14 of the European Union Treaty, the consolidated version; Anamaria Groza, Uniunea Europeană.Drept instituțional (European Union. Institutional Law), Editura C.H.BECK, Bucureşti, 2008, p.67.

It is worth mentioning that, under Lisbon Treaty, a greater role is given to national parliaments in making the European decisions. Thus, the institutions of the European Union shall have to notify the national parliaments all the legislative proposals made at European level, which can formulate appeals against the bills.[18]

Lisbon Treaty confirms that the European Council belongs into the institutional structure of EU, thus eliminating the controversies determined by the capacity of the institution mentioned above. European Council offers the Union the impulses necessary to its development and defines its general political orientations and priorities; leads the performance of the ordinary review procedures and simplified procedures regarding the treaties of setting up and functioning of EU; appoints the High Representative of the Union for foreign affairs and security policy. It does not exert legislative functions. European Council comprises heads of state or government of the member states, as well as its chairman and president of the Commission. The High Representative of the Union for foreign affairs and security policy participates in the works of the European Council.

European Council elects its chairman with a qualified majority for a term of two and a half years, with an option to renew the mandate only once. In case of serious misconduct or impeding, European Council can terminate the mandate of its chairman in accordance with the same procedure.

The Chairman of the European Council: presides and conducts the works of the European Council, ensures the preparation and continuity of the works of the European Council, in cooperation with the president of the Commission and based on the works of the Council for General Affairs; acts to facilitate the cohesion and consensus within the European Council; presents European Parliament with a report after each meeting of the European Council.

The chairman of the European Council ensures, at their level and from this position, the external representation of the Union in aspects concerning the common foreign and security policy.[19]

European Council meets twice a semester being convened by its chairman. When the minutes of meeting requires it, the members of the European Council can decide to be assisted each by one minister and, in respect of the president of the Commission, by a member of the

[18] Nicoleta Diaconu, *Dreptul Uniunii Europene. Tratat*, Editura Lumina Lex, Bucureşti, 2008, p.51.
[19] Art.15 of the European Union Treaty, the consolidated version.

Commission. When circumstances require, the chairman convenes an extraordinary meeting of the European Council. European Council decides by consensus, except for the case where treaties provide otherwise. In case of vote, each member of the European Council can be delegated by one single other member. European Council decides with a simple majority in cases of procedure, as well as with regard to the procedure regulation. In cases where it is voted by a qualified majority, the rule used within the Council is applied.[20]

The Council exerts, together with European Parliament, the legislative and budgetary functions. It exerts functions of defining policies and coordination, in accordance with the conditions stated by the treaties. The presidency of the formations of the Council, except for the Foreign Affairs one, is ensured by the representatives of the member states in the Council according to an equal rotation system, under the conditions set in accordance with article 236 of the Treaty on the Functioning of European Union. The General Affairs Council ensures the coherence of the works of the various formations of the Council. It prepares the meeting of European Council and aims at fulfilling the measures adopted in cooperation with the chairman of the European Council and the Commission. The Foreign Affairs Council prepares the foreign action of the Union, in accordance with the strategic lines set by the European Council and ensures the coherence of the action of the Union. A committee set up from the permanent representatives of the governments of the member states is in charge of the preparation of the works of the Council and of the execution of the mandates entrusted by it. The Committee can adopt decisions of procedure in the cases stated by the procedure regulation of the Council. The Council is assisted by the General Secretariat under the authority of a secretary general appointed by the Council.

The High Representative leads the common foreign and security policy of the Union. They contribute by proposals to the preparation of this policy and fulfil it as attorney of the Council. They act similarly also with regard to the common defence and security policy. The High Representative presides the Foreign Affairs Council. The High Representative is one of the vice-presidents of the Commission. They ensure the coherence of the foreign action of the Union. They are in charge, within the Commission, of the responsibility bearing with the latter in respect of foreign affairs and the coordination of the other aspects of the foreign action of the Union.

[20] Gyula Fabian, op.cit.,p.165.

The Council convenes in public session when it is debated and voted a bill. To this end, each session of the Council is split in two parts, dedicated to discussions regarding the legislative acts of the Union, respectively activities without legislative character. The Council decides with a qualified majority, except for the case where the treaties provide otherwise. As of 1 November 2014, the qualified majority is defined as being equal to at least 55 % of the members of the Council, comprising at least fifteen of them and representing member states that stand for at least 65% of the population of the Union. The blocking minority must include at least four members of the Council, otherwise it is considered that a qualified majority is present. The other conditions regarding the vote with a qualified majority are established at article 238 para (2) of the Treaty on the Functioning of the European Union (TFEU). Thus, as of 1 November 2014 and under the reserves of the provisions set under the protocol regarding transitional provisions, if the Council does not decide, at the proposal of the Commission or of the High Representative of the Union for Foreign Affairs and security policy, qualified majority is defined as being equal to at least 72 % of the members of the Council representing the participant member states, the stand for at least 65% of the population of the Union. In case where, based on the treaties, not all members of the Council participate in the vote, the qualified majority is defined as follows: qualified majority is defined as being equal to at least 55 % of the members of the Council representing the participant member states that stand for at least 65% of the population of those states, blocking minority must include at least the minimum number of members in the Council, representing more than 35% of the population of the participant member states, plus one member, otherwise, a qualified majority is considered convened. The abstaining of the present or represented members does not prevent the adoption of the decisions of the Council for which unanimity is necessary.

The Commission promotes the general interest of the Union and takes the necessary initiatives in this regard. This ensures the application of the treaties, as well as of the measures adopted by institutions based on them. The Commission supervises the application of the Union law under the control of the European Union Court of Justice. The latter executes the budget and manages the programs. The Commission exerts functions of coordination, execution and administration, in accordance with the conditions stated in the treaties. Except for the common foreign and security policy and other cases stated in treaties, it ensures the foreign representation of the Union. The Commission adopts the initiatives of annual and

multiannual programming of the Union, in order to conclude international agreements. The legislative acts of the Union can be adopted only at the proposal of the Commission, except for the case where treaties provide otherwise. The other acts are adopted at the proposal of the Commission in case where the treaties provide for such thing. The members of the Commission are elected on the basis of their general competence and commitment to the European idea, from the personalities that present all the independence guarantees.

The Commission appointed between the date of the coming into effect of the Lisbon Treaty and 31 October 2014 consists of one national of each member state, including the president and the High Representative of the Union for foreign affairs and security policy, who is one of its vice-presidents. As of 1 November 2014, the Commission consists in a number of members, including the president and the High Representative of the Union for Foreign Fairs and Security Policy, corresponding to two thirds of the number of the member states, as long as the European Council does not decide to change this number, by a unanimous decision. The members of the Commission are elected from the nationals of the member states in accordance with a strictly equal rotation system to reflect the demographic and geographic diversity of all member states. This system is established by the European Council, which decides by unanimity in accordance with article 244 of the Treaty on the Functioning of the European Union.

According to the provisions of the European Union Treaty, as amended under the Lisbon Treaty, the European Union Court of Justice comprises the Court of Justice, the Tribunal and the specialized tribunals. It ensures the compliance with the law in the interpretation and application of the treaties. The provisions mentioned above lead to extending the competence of the Court of Justice and extends its control on the compliance with the fundamental rights.[21]

2.4. Protection of Human Rights after the Lisbon Treaty

Solemnly proclaimed in the year 2000, in the Nice Intergovernmental Conference, the Fundamental Rights Charter acquires mandatory legal value under the Lisbon Treaty.[22] Thus, according to art.6 para 1 of the European

[21] Tiberiu Savu, Objectives and Competencies of the European Union Instated by the Lisbon Treaty in the European Community Law Magazine no.1/2008,p.34-49.

[22] Ion Diaconu, Protection of Human Rights within the European Union in the European Community Law Magazine no. 1/2009, p.56-70.

Union Treaty, the Union recognizes the rights, liberties and principles stated in the European Union Fundamental Rights Charter of 7 December 2000, as adopted on 12 December 2007, in Strasbourg, which has the same legal value as the one of the treaties. The provisions included in the Charter do not extend in any way the competencies of the Union as defined in the treaties.

Also, the Union joins the European Convention for defending human rights and fundamental liberties. The competencies of the Union, as defined in the treaties, are not altered by this joining. The fundamental rights, as guaranteed under the European Convention for defending human rights and fundamental liberties as resulted from the constitutional traditions of the member states constitute general principles of the law of the Union.

3. Conclusions

After decades of armed conflicts, the setting up of the European Union marked the beginning of a new age when European countries settle their disputes by negotiations and not on a battlefield. Currently, the EU members enjoy a great number of advantages: a free market with a currency that facilitate and make more efficient trade, creation of millions of jobs, free circulation of persons and a cleaner environment. The existent norms have been conceived, however, for a smaller Union, a Union that does not have to confront global challenges such as climate changes, world recession and international cross border criminality. EU has the potential and is committed to fight these problems, but it can do that only by improving the way it functions. This is the purpose of the Lisbon Treaty. Under it, EU becomes more democratic, efficient and transparent. The Treaty offers its citizens and parliaments the possibility to contribute even more to what happens at European level and confers Europe a stronger and clearer voice in the world, at the same time protecting national interests.

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SPECIFIC PROCEDURES APPLICABLE TO ACTIONS IN THE FIELD OF INSURANCES

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ABSTRACT

Perhaps one of the most impressive judicial ascension upon the celebration of the 20 years of democratic regimen is that represented by the implementation, development and the continuing improvement of the legislation in the insurance field. In such context, the daily needs of the individuals are those that determined the effervescence of different types of insurances, aspect that inherently has developed and created in the judicial field certain questions related to the conditions, modalities and clauses of the insurance contracts.

At the same time with the diversification of the insurance types, the insurer's liability increased, but there are many situations in which the insurer does not complete the damage file within the legal term of 3 months as from its opening, or refuses, by reasons imputable to the insured, to pay the damage, or the insurance indemnity is challenged by the insurer, aspects that lead to an action for damages initiated by the insured against the insurer either voluntary or as civil liability.

KEYWORDS

Action for damages against the insurer, action against the person culpable for the occurrence of the insured risk, the right for recourse (to institute legal action for compensation) against the insurer of the Third Party Liability Insurance (RCA) of the person culpable for the occurred event, special liability of insurer instituted by the legislator for the formation of the Street Victims

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Within the current context, the action for damages initiated by the insured against the insurer is presented as a veritable legal procedure, determining us to include such demand in justice in the special procedures in the commercial field.

Starting from this aspect, this procedure shall be analyzed in detail, by reference to the classic criteria in the field.

Relevant provisions

Thus, as regards the relevant provisions, the action for damages initiated by the insured against the insurer is regulated by the two frame laws in the insurance filed, i.e. Law no. 136/1995 on insurance and reinsurance in Romania, **Law no. 32/2000** on the insurance activity and the insurance supervision, as well as by Orders issued by the Insurance Supervisory Commission. With respect to the insurer, the frame laws provisions shall be complemented with the provisions of the ***Commercial Code***. Nevertheless, the Civil Code represents the common law which applies in order to complete the norms of the special insurance law in case such norms are insufficient and in case of the tortious liability situation in which an insurance company may be at any time. Furthermore, if we discuss the insurer's liability in the most serious form of the legal liability found in the law, and obviously we refer to the criminal law, the seat of the matter is the ***Criminal Code***, which reinstituted in Romania the criminal liability of the legal person, subject to which any insurer may be in the hypotesis of infringing certain normative requirements of criminal nature.

As regards the elements of processual nature, the relevant special laws do not institute a different procedure from the procedure of civil law, so that shall be applied the procerures of the Code of Civil Procedure.

Nevertheless, a special procedure is instituted by the legislator previous to the moment in which was ului apprised the court of law in the in corpus of the Order no. 21/2009 of the Insurance Spervisory Commission, that is to say, the notification of the insurer by the insured with reference to the occurrence of the insured risk, opening the claim file by the insurer, the 3 months facultative legal time period for the verification by the insurer of the manner in which has occurred the insured risk, the time period of 15 days as from the moment in which has been finalized the claim file for the payment insurance indemnity. Moreover, in case in which the insurer shall deny to pay the insurance indemnity to the insured, the latter may institute an action for damages against the insurer, but no prior to following the direct conciliation procedure provided by the art.720[1] of the Code of Civil

Procedure, considering that the relations between insured and insurer are governed by the provisions of the commercial law.

Categories of actions in the field of insurances

1. In the first place, the insured may institute an action for damages against the insurer whenever the latter, either denies the payment of the insurance indemnity subsequent to the occurrence of the insured risk, or the amount paid by the insurer does not cover the entire damage sustained by the insured. In this case the issued would be slightly differenced, meaning that, if a third party is culpable for the risk occurrence, for the difference between the indemnity granted by the insurer, the insured shall initiate a legal action both against the insured and the culpable third party, the amount exceeding the maximum limit to which the insured may be obligated to pay shall have to be paid by the culpable third party.

2. Wherever the facultative insurer pays up to the insurance indemnity to his insured person, and culpable for the damage occurrence is a third party, then the insurer shall be entitled to institute a legal action against the person culpable for the occurrence of the insured risk.

3. Moreover, if both the person culpable for the risk occurrence and the damaged party were covered by a Motor Third Party Liability Insurance (RCA) but the latter was also covered by a CASCO insurance, based on which shall be repaired the caused damage, the CASCO insurer has the right for recourse (to institute legal action for compensation) against the insurer of the Third Party Liability Insurance (RCA) of the person culpable for the occurred event.

4. Not in the last place, there is a special liability of insurer instituted by the legislator for the formation of the Street Victims Protection Fund and of the Guarantee Fund. In this case, the liability of the insurer, starting from the idea of guarantee, may be detached from the contractual norms and may have only the law as a source and herein we refer to the legal hypothesis provided by art. 61 of Law no.136/1995 on insurances and reinsurances in Romania by which the liability of the insured becomes possible under the hypothesis of the accidents in which the author remained unidentified or the motor vehicle is not insured, by forming the *Street Victims Protection Fund*[1].

[1] Shall not be confused with the Guarantee Fund which the insurers are bound to underwrite in order to protect the insured persons, the beneficiaries of the insured persons and the damaged third parties if it shall be found out the insolvency of the insurer established in

The insurers employing the public liability insurance for damages caused by motor vehicle accidents are bound to contribute to the formation of the fund pro-rata with the volume of the premiums collected for such insurance, starting with 1st of January 2010[2], the insurers' contribution being set to the percentage quota of 0.3 % out of the volume of the gross premiums collected for such insurance.

The contribution are transferred up to the 25th day inclusively of the month following to the expired quarter or up to the next business day, in case that this date is not a business day, and under the hypothesis in which due date has been exceeded the insurer shall due to the Fund certain delay increase, calculated according to the legal regulations on budget debts collection.

The manner of formation, using and investment of the money amounts that are at the disposal of the Fund is set by the norms issued by an order of the President of the Insurance Supervisory Commission, the Fund having the obligation to submit to the Insurance Supervisory Commission, up to the end of the month following to the expired quarter, the report on the contribution to the Fund, as well as the due increases for delay.
Failure to observe this norm actuates the administrative liability of the insurer.

Furthermore, in order to protect the insured persons, the beneficiaries of the insurance and of the damaged third parties, shall be formed the *Guarantee Fund*[3], by contribution of the insurers, fund dedicated to the indemnity payments resulted from the facultative and compulsory insurance contracts, in case that shall be found the insolvency of the insurer.

Conciliation procedure

The legal relationship between the insured and insurer is governed by the provisions of the commercial law; the commercial law shall also apply to the relationships between the insurer and a damaged third party, the High Court of Cassation and Justice being the statutory body, by the Decision no. 23/19.03.2007 pronounced in the appeal in the interest of law that „*the legal*

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compliance with art. 60 of Law no. 136/1995 corroborated with art. 31 paragraph (2) of Law no. 32/2000.

[2] In justified cases, the mentioned contribution level may be modified by an Order of the President of the Insurance Supervisory Commission

[3] The Insurance Supervisory Commission Norm of 14.12.2009 on the percentage quota for the insurers' contribution to the Street Victims Protection Fund, published in the Official Gazette, Part I no. 908 of 23.12.2009

nature of the recourse action exercised by the insurer against the persons culpable of the occurrence of an accident is commercial and not civil”. Considering the commercial nature of the relationship between the insured and the insurer, the occurred dispute shall be always governed by the provisions of the commercial law. In such case, it is necessary that previously to refer to the court of law, the damaged third party or the insurer, as the case may be, to carry out the direct conciliation procedure provided by art.720[1] of Civil procedure code. The referring to the court of law without carrying out such procedure entails any party or even the court of law *ex officio* to invoke the exception on the legal action prematurity, having as consequence the rejection of the legal action as being prematurely filed.

The situation is different in case that the insurer of the person culpable of the risk occurrence refuses to pay the damage. In such case, the damaged third party shall become the initiator of the direct action against the insurer. Therefore, although the damaged person is a third party within the contractual relationship between the insurer and the culpable person, the law grants the possibility to take a direct legal action against the insurance company of the insured culpable of the accident. With respect to such direct action of the damaged person, the legal practice is controversial as regards the qualification of the legal nature of such dispute, in the meaning that, certain courts of law deem that the action initiated by the damaged third party against the insurer of the culpable person is governed by the provisions of the civil law, while other courts of law deem on the contrary that the dispute has a commercial legal nature. Therefore, ”*the action for damages initiated by the damaged persons against the their insurer following to the occurrence of the traffic accident has a civil legal nature and not commercial. This because the dispute between the parties is not the result of a contractual relationship between them, the liability of the insurance company being engaged under the law, so that the nature of the dispute shall result in a civil delict, fact that determines the competence of the civil court of law*[4].” Qualification of the legal nature of the dispute is important regarding the necessity to carry out the prior conciliation procedure provided by art.720[1] of Civil Procedure Code, if the action of the damaged third party against the insurer of the culpable person is a commercial one, as well as regarding the material competence of the courts

[4] Arbitration Court of Alba-Iulia, civil sentence no. 1505 of 11 July 2001, in M.Tăbăras, M.Constantin, op.cit., p.144-145

of law. We deem that the legal nature of certain action is civil and not commercial whereas the damaged third party is not a party of the insurance contract, the obligational legal relationships between the insurer and the damaged third party, by the action of the insured, being connected (by subrogating the insurer in the obligations related to the compensation of the insured person) within the tortious civil liability existing between the insured and the damaged third party as a consequence of the illicit action committed by the insured, the insurer being subrogated to the insured, under the insurance contract. Therefore, the contractual legal relationships only exist between the insurer and the insured, while between the insurer and the damaged third party there are only legal relationships occurred *ex delictu.* Consequently, in such context, the insurer's liability shall be always a tortious civil liability[5]".

The competence for the action for damages/indemnities

From a material point of view, in the field of the claims for damages/indemnities resulted from an insurance contract, shall be applied the provisions of civil law, so that the Local Court of Law shall be competent to settle such litigation if the value of the cause of action does not exceed the maximum limit of 10,000 lei, and if the such value exceeds the amount of 10,000 Lei the competence shall rest with the Court of Law.

From a territorial point of view, the action for damages resulted from the occurrence of the insured/covered risk provided by insurance contract, shall be settled by the Local Court of Law corresponding to the domicile of the plaintiff, by the Local Court of Law in the circumscription of which is located the domicile of the insured person or the goods covered by insurance, as well as the Local Court of Law where occurred the accident, the law instituting an alternative territorial competence. Is proper to mention the fact that, such norms are not applicable for the recourse action of the insurer against the person culpable for the occurrence of the damage, since in the relations existing between the parties of the insurance contract such person is a third party. Under such circumstances, the competence shall be established in accordance with the provisions of art. 5 of the Code of Civil Procedure, thus the competent Court of Law shall that located at the domicile of the plaintiff.

[5] V.Patulea, the legal nature of the civil liability insurance for damages caused by traffic accidents and the procedural position of the insurer, Law no.8/2004, p.43

The time limit for lodging the action for damages/indemnities

The time limit in which the insured person may claim the indemnity payment from the insurer is of 2 years. Under such context, even if the provisions of the article 3 paragraph 2 of the Decree no. 167/1958 do not make any distinction between the contractual or subject to penalty, in the field of insurances referring generically to the *limitation period* of 2 years, the text must be restrictively construed, meaning that the time limit of 2 years shall be applied only to the contractual relations between insured and insurer, the right of the insurer against any third party that is culpable for the occurrence of the covered risk being subject to the limitation period of 3 years, since such an action is not grounded on the contractual liability, but on the liability subject to penalty for its own actions. As a consequence, with reference to the action of the insurer against the person culpable for the occurrence of the traffic accident, such an action shall be limited by the common limitation period of 3 years, calculated from the moment in which have been paid the damages/indemnities to the damaged person, because the action of the insurance company is grounded on the culpable action of the third party and no on the insurance contract.

Procedural capacity of the parties in case of the action for damages

With respect to the active procedural capacity, this belongs to the insured, based on the concluded insurance contract. In case that the insurance has as object the risk of death, and such risk has occurred, the action may be initiated by the beneficiary of the insurance or, as the case may be, by the legal or testamentary heirs of the insured.

In case of the civil liability insurances, the action may be also initiated by the damaged third party against the insurer of the person culpable of the risk occurrence.

The situation is different in case of the recourse action, whereas both the person culpable of the risk occurrence and as well as the damaged person benefited of motor third party liability but the damaged person has also had a insurance CASCO, based on which the caused damaged shall be remedied, the CASCO insurer has a right of recourse against the motor third party insurer of the person culpable of the occurred event.

With respect to the passive procedural capacity, the insurer is the one that usually appears as the plaintiff, but there are certain passive procedural co-participation situations in which the insured initiates a recourse action both against the insurer and as well against the third party culpable of the risk occurrence, in which case the insurer shall be liable within the

maximum limit, while the third party culpable of the risk occurrence shall be liable for the difference exceeding such limit.

The situation is different in case of the criminal trial, as regards the capacity of the insurance company. Therefore, by reference to the provisions of art. 54 and art. 57[6] of Law no. 136/1995, there is no unitary practice of the courts of law, some of them considering that during the criminal trial the insurer intervenes as civilly liable party, while others, on the contrary, grants to the insurance company only the capacity of insurer. In this regard, the High Court of Cassation and Justice pronounced, by the Decision no. I of 28.03.2005, in the file no. 1/2005 in recourse in the interest of law that" *with respect to the provisions of art. 54 paragraph 4 and of art. 57 of Law no. 136/1995, with the subsequent amendments, within the criminal trial the insurance company participates as civil liability insurer and not as civilly liable person or guarantor of the civil damages payment"*.

Starting from the special character of the action for damages, we apparently observe derogation from the parties availability principle within the trial, as regards the introduction ex officio within the cause of the person/ persons liable for the accident occurrence as forced interveners. Considering the special norm (art.54 of Law no. 136/1995), the court of law, contrary to the common law regulations that provide only the possibility of the court of law to cause the parties to discuss over the introduction of a third party within the case, and if the parties refuse to do so the court of law shall not be entitled to introduce the third party by its own initiative, in the insurance field such forced intervention being possible, the special law imposing such obligation, while the failure to introduce the third party within the cause may entail the amendment of the decision under the conditions of art. 304 item 9 of Civil Procedure Code, in case of the initiation of a mean of appeal. Consequently, the provisions of art. 54 of Law no. 136/1995 provide that in case of dispute, the procedural frame shall include both the insurer and the damaged person and as well as the insured – person culpable of the risk occurrence, even if the person culpable of the risk occurrence shall not be held liable of caused pre

judice (if its value is within the liability limits of the insurer), as forced intervener.

Taking into consideration all these elements and reserving the right to develop the issues related to legal actions initiated by the insured against the

[6] Currently abrogated by art. I item 24 of the Government Emergency Decision no.61/2005

insurer during other works, we think that the demands in the insurance field represent the specific difference of the big class of relevant actions in the commercial field, both by the own legislative frame (special laws) point of view and by their settlement modality.

Within the context of the present days, the legal actions in the insurance field acquired a spectacular effervescence, generated by the increasingly sphere of different types of risks covered by the insurers, fact that several times has caused an impossibility of payment of the insurance indemnities under the conditions of the occurrence of the insured risk.

RIGHTS ARISING FROM INVENTIONS

Violeta SLAVU*

ABSTRACT

The article is structured in two parts. The first part analyzes the main means of defending the rights of the invention, according to three categories of defenses such as: administrative means (appeal and dismissal), civil remedies and not least the means of criminal law and in the second, as was natural procedural aspects are settling claims arising from rights covering inventions.

KEYWORDS

Complaint, revocation, infringement, unfair competition

I. Protection of rights on inventions is regulated in chapter VI (articles 51-67) of Law No. 64/1991 republished.

According to the law, the rights of inventors and patent holders are protected by means of administrative law, civil law and criminal law. Depending on the nature of the competent organ to solve the dispute, the defenses are administrative and judicial. Administrative means are appeal and revocation, and the judicial proceedings take the form of action, which may be civil or criminal proceedings[1].

1.1. Administrative arrangements.

Appeal.

According to art. 51, O.S.I.M. decisions can be challenged within 3 months of notification.

The appeal may pursue a limitation of the patent.

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[1]Ioan Macovei, *Intellectual property law treaty*, Publishing. C.H.Beck, Bucharest, 2010 p.144

The appeal shall be decided within three months of its registration with OSIM by a review committee of the Department of OSIM calls in the first instance.

Revocation. Any interested person has the right to make written and grounds, with OSIM, a request for revocation against the grant of the patent, within 6 months after publication for the following reasons:

- if the decision was taken without regard to the provisions of Article 7, 10 and 12 and 13 of Law nr.64/1991 as amended;
- the patent does not disclose the invention sufficiently clearly and completely so that a skilled person may carry it out;
- the patent exceeds the demand

The request for revocation shall be resolved within 3 months after its registration with OSIM by a review committee of the Department of calls from the OSIM.

Failure of one or more conditions on an application form may constitute grounds for revocation of the decision to grant a patent or cancellation of the patent, in whole or in part, unless it is the result of fraudulent intent.

A patent may be revoked or terminated, in whole or in part, without giving the owner the opportunity to comment on the revocation or cancellation and deliver, within a reasonable period of time, changes or adjustments permitted by law and regulations implementing this law.

1.2. Means of civil law

According to art. 63 paragraph (1) of Law 64/1991 republished, are given in the law courts, the disputes concerning:

- quality of the inventor, patent holder,
- rights arising from the patent;
- the economic rights of the inventor arising from assignment contracts and license agreements;
- execute obligation to inform and technical assistance.

According to art. 59 paragraph 3 for caused damages, the holder is entitled to compensations according to law, and may request the competent court to order the seizure or, where appropriate, the destruction of counterfeit products. These provisions shall apply to materials and equipment used directly in the offense of counterfeiting.

Violation of the rights stipulated in art. 33 under paragraph 1 by third parties, attracts for the responsible persons the liability for

compensation under civil law, payment of compensation shall be enforceable after the issuance of the patent.

Also a patent granted by OSIM, as well as a European patent with effects in Romania may be ***waived*** upon request if it finds that:

- the patent is not patentable under Art. 7-10, 12 and 13;
- the patent does not disclose the invention sufficiently clearly and completely, so that a person skilled in the art to carry it out;
- the patent exceeds the demand, as it was filled;
- the protection afforded by patent has been extended;
- the patent holder was not entitled to the patent.

If the grounds for cancellation concern only a part of the patent, this will be canceled in part.

Invalidation of a patent has retroactive effect from the date of filing.

The request for cancellation may be promoted after reaching the period prescribed by law for the exercise of revocation, except for the cases stipulated in art. 54 paragraph (1). let. d) - ***the patent protection was extended*** and e) - ***the patent holder was not entitled to the patent***, situations that can be exercised throughout the duration of the patent. Jurisdiction lies with the Bucharest Court.

Judgments given in first instance by the Court of Bucharest may be appealed to the Court of Appeal within 30 days of the communication and the orders of the Court of Appeal can be appealed to the High Court of Cassation and Justice within 30 days from notification.

Final and irrevocable decision cancellation is registered with OSIM by the interested person. Maintenance of the decision of cancellation shall be published in the Official Industrial Property Bulletin within 60 days after registration of the decision with OSIM.

1.3. Means of criminal law

The unlawful assumption of the status of inventor. According to art. 58 of Law nr.64/1991, unlawful assumption of the status of inventor, in any way, is an offense and it is punishable by imprisonment from 6 months to 2 years or by fine of 5,000 lei to 10,000 lei

The offense of counterfeiting. It is considered to be crime of counterfeiting, manufacturing, using or putting into circulation without right, the object of a patent or any other violation of rights conferred under art. 32, paragraph 2, if the infringement was committed after the publication date of the patent application.

Crime of counterfeiting, the most serious infringement of industrial property right is regulated poorly in current legislation. Criminal Code incriminates counterfeiting the subject of an invention in art.299 and in art.300 circulation of counterfeit products, making totally unjustified reference only to the subject of an invention.

Counterfeiting, the major negative component of modern economic life frequently presents in practice as a sum of illegal approaching of different rights of intellectual property, such as trade marks, industrial designs and copyright that involves systematic unfair competition. It is obviously necessary for all offenses against intellectual property to be regulated only by the Criminal Code and not separately in special laws.

Conditions for bringing an infringement action are:

- existence of a valid patent;
- a breach of the patent owner rights through manufacture, use or release of the patent;
- intention .

Acts of infringement are not relevant in the country where the invention is not patentable. Subject matter, to establish infringement will be compared with the one believed to be counterfeit. A servile reproduction will be counterfeit, but if the reproduction is not servile, it will be infringed if the subject of alleged infringement contains essential elements constituting the invention. As a rule, infringement is judged by similarities, not by differences. Donation of counterfeit items is not covered by the law as well as the small-scale manufacture of products covered by patent.

Industrial property rights can be achieved by introducing an action in unfair competition.***Unfair competition*** is defined in art.301 Criminal Code in the following terms: manufacture or release of products bearing false appellations or indications of origin, and application of false claims of patent on products put into circulation; or use of trade names or trade names of industrial organizations, in order to mislead consumers.

Necessary conditions that must be met are:

- existence of an act of competition;
- unfair act of competition;
- existence of a prejudice.

Action for unfair competition is not subsidiary to infringement action because their foundation is particular. Counterfeiting involves infringement of a right whereas unfair competition involves violation of rules of trade conduct. Consequently, the action for unfair competition may be brought together with counterfeiting action being two distinct,

independent actions so that they may be carried out separately or simultaneously. Moreover the two actions can be aggregated only when infringement of exclusive real right is the result of some unfair, distinct processes of counterfeiting.

Criminal proceedings shall be initiated on complaint by the injured party.

If, before the publication date of the patent application, the facts set out in art. 59. par. 1 continues to be committed after formal notice, the court, upon request, may order the termination of their commission until a final and irrevocable decision of OSIM. This measure may be ordered on payment by the applicant of a bond set by the court.

Disclosure of the information contained therein by OSIM staff. According to art. 62, disclosure by OSIM staff and the persons carrying out work in relation to inventions, of data contained in patent applications before their publication, is a crime and is punished by imprisonment from 3 months to 2 years.

O.S.I.M. responds to the inventor for damages as a result of the offense of disclosure of data contained in the application by its own staff.

Probation of offenses. In case of violation of the rights of the holder of a procedure patent, stipulated in art. 32 par. 2 letter. b) [2], the burden of proof in establishing that the process used to obtain an identical product is different from the patented process shall be the responsibility of the person alleged to have violated this right.

In applying the previous provisions any identical product that was made without the consent of the patent owner will be considered until proven otherwise, to have been obtained by the patented process in at least one of the following circumstances

a). if the product obtained by the patented process is new;

b). if there is a substantial likelihood that the identical product was obtained through that process and the owner of the patent was unable, despite reasonable efforts to determine what process was actually used.

When presenting evidence to the contrary by the patent owner there will taken into account the legitimate interests of manufacturing secrets and commercial secrets of the person alleged to have violated the holder's rights.

[2] Art.32 par.2 letter b) refers to the use of the process, and using, offering for sale, selling or importing for those purposes the product obtained directly by patented process, where the patent is a process

II. Settlement of claims

Settlement of administrative claims

Appeal or, where appropriate, the revocation claim will be settled within 3 months after its registration with OSIM by a review committee of the Department of calls in OSIM.

The decision of the review Commission, motivated, shall be communicated to the parties within 15 days of the pronouncement and may be appealed to the Court of Bucharest within 30 days of notification.

Within 15 days from notification, the Bucharest Tribunal decisions can be appealed to the Court of Appeal.

Decisions to grant a patent for invention, made by the Commission for review and decisions taken by the courts, communicated to OSIM by the person concerned, are operated in national registries and published in the Official Bulletin of Industrial Property within 60 days from the date they became final and irrevocable.

O.S.I.M. operates in national registries, changes due to final and irrevocable court decision and publishes them in the Official Bulletin of Industrial Property within 60 days from the date of registration with OSIM by the person concerned.

According to law, disputes concerning the status of inventor, patent owner or other rights on the patent, including the economic rights of the inventor, the assignment and license agreements, or those referring to non-compliance of provisions under Article 5, paragraph 6, article 37 and art. 44 are the jurisdiction of the courts.

The interested person shall communicate to O.S.I.M. the judicial decision within 30 days from the date it became final and irrevocable, to be entered in the National Register of Patent Applications or in the National Register of Patents and published in the Official Bulletin of Industrial Property . In the absence of publication in the Official Bulletin of Industrial Property decision is not enforceable against third parties.

According to article 64, the patent owner may request the court:

a). ordering of precautionary measures when there is a risk of infringement arising from a patent and whether that infringement is likely to cause irreparable prejudice or if there is a risk of destruction of evidence;

b). ordering, after release, measures to cease violations of rights of the patent, committed by a third person with the introduction into commercial channels of imported goods that involve an infringement of these rights.

The court may decide that the person responsible for the violation of the rights arising from the patent to inform the patent owner on the identity of third parties who participated in producing and distributing goods in question, and on distribution circuits.

Precautionary measures may be ordered to pay the applicant a bond set by court.

For ordering precautionary measures provisions of common law are applicable

The court may require the applicant to provide any evidence he has to prove that he is the holder of the patent violated or whose breach is inevitable.

The customs authorities may, either ex officio or at the request of the patent owner, the suspension of customs clearance of import, export or placing under suspensive customs regime of goods covered by the incrimination of infringement.

Customs powers on border enforcement of patent rights belong to the National Customs Authority, according to law no.344/2005.

If a court decision finds that another person than the one mentioned in the patent is entitled to the patent, OSIM issues the patent to the entitled person and publishes the change of ownership.

If, before O.S.I.M. grants the patent, a court finds that the right to patent is held by someone else than the applicant, the person to whom this right was recognized may, within three months from the date the decision becomes final and irrevocable and under the conditions stipulated by regulations of implementing this Law:

a). continue the procedure for the patent application in his own name in place of the applicant;

b). submit a new application for patent for the same invention. For items that do not extend the initial application submitted in compliance with art. 19, the initial application is declared by OSIM as withdrawn from the date of filing the new application

c). to request rejection of the application.

At the request of the court, O.S.I.M. has to submit papers, documents and information necessary to trial the cause, recovering these acts in the end. Appeal in court shall be made only for this purpose.

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PATIENT RIGHTS - KNOWLEDGE DIMENSION. COMPARATIVE LAW: ROMANIA – MOLDOVA

Natalia-Adriana UDRIŞTIOIU[*]

ABSTRACT

In everyday life, man can have different qualities, in relation to the facts that characterized him at some point. Such a situation is created when his health is compromised, that the physical and psychological well-being is disturbed, and man as a member of society is forced to seek care providers and health care, to improve to healing, where possible. Thus, the human being is now dependent on his actions, assumes the status of the patient and is directly related to the medical professional, medical acts and deeds of its direct consequences and / or indirect effects on his patient.

Essential prerequisite to implementation and to promote knowledge and application of patients' rights, the state remains the fulfillment of the obligation to develop necessary mechanisms and to allocate sufficient resources to create the appropriate legal and socio-professional exercise of the rights of citizens-patients.

Creating the institutional framework conducive Activities: medical, clearly defined and accessible to all members of society allows, on the one hand, patients receive high quality medical act and, secondly, gives medical professionals and guarantees the free exercise of their profession within the limits of care and medical care.

INTRODUCTION

By civilization we mean progress, in the current scientific and technical development of society, human beings are almost suffocated by the many changes taking place in its evolution. It is therefore very important that today are known, understood and enforced accordingly, the legal rules that establish and guarantee the protection of human rights. In this paper we refer to some of these rules, namely the rights of patients.

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In everyday life, man can have different qualities, in relation to the facts that characterized him at some point. Such a situation is created when his health is compromised, that the physical and psychological well-being is disturbed, and man as a member of society is forced to seek care providers and health care, to improve to healing, where possible. Thus, the human being is now dependent on his actions, assumes the status of the patient and is directly related to the medical professional, medical acts and deeds of its direct consequences and / or indirect effects on his patient.

One of the foundations of the state constitution was based on the commitment to protection and care of life and health of all its members. In this sense, human health is not just a defining character for its existence is a fundamental obligation of the state to ensure the welfare of all viewpoints, including public health welfare.

Public health is a fundamental social value for the completion of which the State, through its competent bodies, is obliged to regulate the activity of healthcare. This requires the issuance of regulations necessary and sufficient to consecrate and to regulate legal relationships that developed between patient care - community members, the direct beneficiaries of health services and health care professionals and body with the right of free practice in the field medical.

Creating the institutional framework conducive Activities: medical, clearly defined and accessible to all members of society allows, on the one hand, patients receive high quality medical act and, secondly, gives medical professionals and guarantees the free exercise of their profession within the limits of care and medical care.

From a historical perspective, in 1948 there was given a state constitutional requirement in public health. In time, development of State and Law had beneficial consequences in medical legal regulations, namely the content of the Basic Law of 1965. Currently, the Basic Law guarantees the "right to health" and requires the State to "ensure public hygiene, by developing and adopting the necessary measures.

Thus, the state has developed, adopted and issued to implement a series of acts committed in purpose and to protect public health. They fall into three broad categories:

1. general laws that govern all activities of healthcare
2. special laws or legal norms, regulating medical practitioners
3. special laws or legal norms regulating the rights of participants to act as patient medical

From this point of view the subject of this paper refers to patients' rights knowledge them and a brief assessment of the contents of the Law 46/2003 on patient rights in Romania, compared with 263-XVI/2005 Law on patient rights and responsibilities of the Republic of Moldova and European legislation.

CHAPTER I - PATIENTS 'RIGHTS

I.1. Principles of Patient Rights in Europe - Declaration of promoting patients' rights in Europe

In 1994, Amsterdam, the WHO European Consultation held on Patients Rights aimed at developing a set of basic principles and concepts, to help EU Member States of WHO, to develop and enact national legislation aimed at to promote and implement patients' rights.

These "Principles of Patients Rights in Europe" refers to:

Human Rights and Values in Health Care

Within this segment are referred to a number of principles, in full conformity with human rights, provide a solid basis in the development package of healthcare, namely: the right to respect the right to self-determination, right to physical integrity and psychological and security of person, right to respect for privacy, right to their own moral and cultural values, philosophical and religious right to protect health by preventing disease and maintaining the right to health at the highest possible level.

Information

Within this segment are referred to a set of principles meant to guide legislative vision specifically target the type of information and conduct medical pursuit participants - patients and health professionals, in direct correlation and interdependence, respectively:

- Information on health services and about the best way to use them,
- Information about health, about treatment and care followed during hospitalization,
- Information must be communicated to patients in a manner appropriate to their ability of understanding,
- Information about the identity and professional status of health service providers and any rules and customs relating to residence and care of patients,
- Patients have the right, at their express request, be informed or may not choose who should be informed in their place

- Patients should have the possibility to obtain a second opinion,
- Information may be refused in exceptional patients when there is reason to believe that this information would cause great harm.

Consent

Within this segment is experiencing a series of principles that should be the legal basis of the report as a medical imperative based on "the patient's informed consent" to carry out any medical intervention year

From this basic principle deriving logical flow through other principles which would govern the facts and law known in the medical field, respectively:

- Refusal or stop medical intervention patient desire
- Patient consent in emergency care and conduct legal and medical follow
- Legally represented the interests of patient care and conduct legal and followed
- Interest of the patient in any way legally unrepresented and unable to give consent
- The role and legal needs of the patient's informed consent

Confidentiality

This segment deals in all eight aligned with the knowledge to facilitate the concept of confidential
medical information and its demarcation in space legal and medical society.

It also wants to know the limits of intervention in private life, the patient's family.

Care and Treatment

The fifth segment of the "Declaration of promoting patients' rights in Europe" is perhaps the most comprehensive of all its content which aims at understanding the collective rights of patients: health care - current and terminal, in all its dimensions - availability, accessibility, freedom from discrimination, quality, continuity, human dignity and spiritual and family support, selection for limited treatment and representation of general interests as patients.

Application

Can be considered as the most important segment of the "Declaration of promoting patients' rights in Europe" in legal terms as in its content, are developed for understanding a number of instruments needed in principle, in order fulfillment role in healthcare law. So the first line is repeated four legal rules generally regarding: the establishment of appropriate means of exercising the state of the citizen-patient rights, human rights and freedom

from discrimination, personal and collective representation of individual-patient advertising and access to information.

But the most important principle is referred to in paragraph 6.5, which set the security conditions and patient rights, the existence of statutory instruments special medical field, research opportunities and establish accountability in case of violation of rights people as patients, respectively: the organization and functioning central authority and local health, organization and functioning of professional bodies medical, but also patients' associations and civil society.

To the extent that, the last segment is allocated to explain terms used, it remains as comprehensive concluded that wanted to be the "Declaration of promoting patients 'rights in Europe" essential prerequisite to implementing and promoting knowledge and application of patients' rights remains performance by the state of the obligation to develop necessary mechanisms and to allocate sufficient resources to create the appropriate legal and socio-professional exercise of the rights of citizens-patients.

I.2. Law 46/2003 on patient rights in Romania

Adopted on January 21, 2003, Law 46/2003 is intended patient rights issues in Romania, whilst providing a legal framework for their promotion and exercise of these rights by those concerned.

In its wording, Law 46/2003 refers to:

- Right patient medical information
- Patient consent for medical intervention
- The right to confidentiality and privacy of patient information
- Patient Rights in the field of reproductive
- The rights of the patient and health care
- Sanctions
- Other provisions

The "right to medical information" to say that the legislature has established this right for citizens to be patient - at the same time - a requirement for the body of medical professionals and any other personnel involved in the case.

Also, correlative right to express consent, right to medical information and shall constitute valid basis for the expression of the will of the patient, provided accurate information and complete the appropriate level of understanding on health or disease, risks and consequences the imposition of or refusal to follow prescribed treatment, or conduct the necessary treatment.

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"Consent of medical interventions - important institution of law, consent is reflected in the content provided and Law 46/2003, occupying the highest place in the hierarchy of patient rights. General civil legal criteria, it must be obtained from the patient freely fresh before making any medical intervention, except as provided for the necessary emergency situations that may endanger the life, health or human integrity.

In the literature it is known that there is presumed consent, as is considered implicitly by providing medical services provider, the written consent of the patient or his family is considered necessary only in certain circumstances expressly provided for in other regulations.

Personally I wonder how the person will be considered free when any disorder of health? When applying for a medical service for us is a relationship of dependency, in-person patient care depends entirely professional. Basically you can not believe that in such a case patient person has freedom, she is subject to feeling sick to his health and the need to require a push to help those unable to pay it.

The "confidentiality and privacy of patient information" we can say that the legislature paid particular attention to the rights of privacy law which entails the obligation to medical confidentiality.

As I mentioned above, the legal relationship is a relationship of dependency care of the patient from his therapist.

By their nature, necessarily lead to medical problems need disclosure of the patient's life.

Practically State legislature, through the care he should bear its members had to resolve a positive personal conflict of interest, born of the need of physical and psychological well-person care for the patient and his private life. In other words, this is one of the extensions to ensure fundamental rights - to life and health - by imposing legal accountability on disclosure of professional secrecy. From this perspective it seems that the legislature

devoted considerable attention to this law, in relation to other rights of the patient in that violation or breach of this rule is explicitly sanctioned in several texts of law, both civil and criminal.

On Art. 26-29 - "patient rights in reproduction" consider that in principle ancillary to other rules prescribed by law but, taking into account the socio-political history of Romania before 1989, it is understandable why legiutorul considered necessary to allocated a separate chapter on Women's right to have children and also to offer legitimate methods of contraception.

In art. 29-36 of Law 46/2003, the "rights of the patient and care" of the highest quality to be analyzed by linking the content of these articles with art. Aceeiaşi 2 of the Law, which states that: "Patients are entitled to medical care of the highest quality that the company has, according to human resources, financial and material."

Consider to be crucial bearing on this chapter as Chapter VI of the Act, because it is absolutely clear that the legislature has the highest standards of care, however, as demonstrated in practice, many times what is considered initially as malpractice based on fact, lack of resources necessary to carry out an act in the best conditions for quality care.

Corroborating the very art. Article 2. And Article 30 of Law 46/2003. Article 3. WHO No. 13. 386/2004, health professionals should be at least 80% of cases to provide only medical conditions such as: "(1) the patient's medical interventions can be performed only if there are conditions necessary equipment and certified personnel. (2) exempted from the provisions of par. (A) cases of extreme emergencies situations. "

Another interesting article is mandatory commented Art. 34, which provides: "(1) Medical or non-medical staff in hospitals to submit patient is not entitled to any form of pressure to induce him to lay down rules reward other than legal tender within the unit.

(2) The patient may provide employees or unit where he was cared for additional payments or donations in compliance with law. " At first glance it seems that the rule prohibits receiving undue benefits and / or bribery, criminal law and facts provided (Art. 254 and 256 C. Pen.). However, paragraph 2 of that article make it hard for uniform interpretation of the rule because, basically, the law allows the receipt of "additional payments or gifts" as the health unit as a legal entity, but the employees as individuals.

Therefore, formulation and so extremely generous "is not entitled to subject the patient to any form of pressure to induce him to reward" for testing is nearly impossible because there is nothing to interpret than when accepting bounty: before or after eating episode of care. The interpretation

given by the legislature in record time the words "where he was cared for" is assumed, although the reward is permitted by law, mandatory acceptance must take place after the intervention.

Chapter "Sanctions" is devoted to a single article (Article 37) which is the general rule under which liability may be incurred under any of its forms: civil, criminal, disciplinary, administrative and / or contravention.

CHAPTER II - LAW 46/2003 in Romania vs. LAW 263-XVI/2005 in Moldova - Comparative Law

From the perspective of comparative law, both laws provide for patient rights in Romania and Moldova, it shows clearly that the legislature of both countries considered absolutely indispensable "Declaration promoting patients' rights in Europe" is generic in nature resembling laws principles that govern them.

From a technical standpoint 263-XVI/2005 Law of the Republic of Moldova consists of 19 articles grouped in five chapters to the Romanian Law 46/2003, which is divided into eight chapters and 40 articles. However, contrary to expectations, in terms of content, 263-XVI/2005 Act is far broader in its structure being provided both general rules and special rules and procedures designed to provide information and interpretation as more clearly the rights of patients and be of real help to the medical legal report individuals who are so informed.

In comparison, Law 46/2003 of Romania is a brief and somewhat low content, application and interpretation is left to the general rules and procedural issues are nonexistent there. Unfortunately for the participants in the medical, legal're in a particular (medical), rules of procedure provided by other texts are too many acts in utter chaos and disparity, scattered across various laws, such as civil and criminal, with the same content and let regulators found many practical situations the medical-legal.

Specifically, we want to highlight the positive differences between the two laws, namely Law rules that 263-XVI/2005 RM is complete and a more structured shape than Law 46/2003, respectively:

- Purpose and the basics are complete, comprehensive and clear: the law has provided a public purpose and governing the construction of a number of incidents in 14 terms, compared with Romanian law is not an explicitly stated goal of the participants and explained that a number of only four basic concepts;

- Specification of basic principles of achieving the rights of patients and their interpretation: 263-XVI/2005 Act provided only, not in Romanian law similar;
- Specify the effect of the law: The law provided only 263-XVI/2005 not similar in Romanian law;
- By limiting patients' rights law respecting the criterion of social danger in the medical field, regarding: psychiatric disorders, detection of HIV / AIDS, syphilis and tuberculosis in prisons, hospital and compulsory isolation of persons infected or suspected infectious compulsory medical examination people who donate, and regular medical examinations of workers in some areas
- The existence of the concept of patient responsibility and liability for breach of its rules on: healthy lifestyle, infectious precautions to patients in contact with others (including health professionals), preventive measures (vaccinations, immunizations) declared complete information on the history of infectious or contagious diseases such current, the rules of behavior in health care facilities, excluding use of pharmaceuticals and medicinal substances without prescription, drugs and / or alcohol while performing a treatment in a medical institution, the dignity of other patients and healthcare staff
- Expanding the rules on consent (art.13)

"Article 13.Consimțămîntul and how completing the
voluntary informed consent or refusal medical intervention

(1) A medical intervention is pre-requisite patient consent, except as provided by this law.
(2) patient consent to medical intervention may be oral or written, should be through its inclusion in medical documentation, with the signature required by the patient or his legal representative (closest relative) and your doctor. For high-risk medical intervention (invasive or surgical nature), consent, should be required in writing by completing a special form of medical documentation, called Informed Agreement. List of medical interventions that require written informed consent drawing and model form that is developed by the Ministry of Health. "

- Act to incorporate the rules on the rights of patients in clinical trials (Article 14)
- Existence of rules concerning "protection of patients' rights (Chapter 4, Art. 15-18) liability, terms and deadlines to file infringement

actions on patients, settlement institutions and competent authorities, institutions and authorities responsible.

CONCLUSIONS

From the foregoing perspective, consider the need to issue the following conclusions:

- Review of the Amendments to the Law 46/2003 on patient rights in Romania, taking into account the provisions of the "European Charter of Patients Rights" with the 14 rights defined therein;
  - ➢ Need to revise and standardize medical procedures legally, namely: existence of the National Protocols on specialty¬ practice and by medical personnel, legal charge, the right to free practice;
  - ➢ delimitation of professional skills and develop job¬ descriptions consistent with the type of health facility and the complexity of the medical activities undertaken;
  - ➢ proper organization of hospitals and medical¬ establishment by law of jurisdiction, namely the type of medical services and care they can provide.
- Human resources, and materials necessary to conduct economic and financial best quality medical act, regardless of the competence of health unit;
- Clearly established by law patient rights, the degree of risk which must obtain the written consent of the patient or legal representative;
- Developing guidelines for practice where every action - minor or major the average patient person, to be specified as necessary consent (written or oral), and risks associated with each maneuver objectives;
- Creation of a separate sub-branches of law - the right care, consider that in reality advertising increasingly acute occurrence of such a distinguished field of study and special regulations;
- Not least the need for codification of legal rules in healthcare and the allocation of a separate chapter in its Penal Code, relating to healthcare offenses on both sides: patients and health professionals.

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ADJUSTMENT, COMPLETION AND CLARIFICATION OF ARBITRAL DECISION

Carmen PĂLĂCEAN*

ABSTRACT

Under the provisions of the Civil Procedure Code, Article 362, paragraphs 1 and 3, if by the resolution passed, the arbitral court omitted to make a ruling on a count, each of the parties can require the completion of the ruling. Errors or omissions concerning the name, status, and contentions of the parties, or calculation errors, as well as any other material errors from the arbitral rulings or from conclusions can be put right ex officio or at the request of any of the parties involved. Should there arise the necessity of clarifications regarding the meaning, extent and bringing into force of the enacting terms of the arbitral sentence or should the latter contain adverse orders, any of the parties can require the arbitral court to clarify the enacting terms or to remove the adverse orders.

KEYWORDS

Commercial arbitration, arbitration decision, adjustment and completion of arbitral decision, Rules of Arbitration, Ad-hoc arbitration, Institutional arbitration

Commercial arbitration is an alternative way of settling commercial litigations, a way by means of which the persons who have the full capacity of exercising rights can settle asset litigations, except for those that regard rights in relation to which the law does not allow transactions. Based on their convention, the parties give power of attorney, within the limits set by the law, to one or several private entities to settle litigations, thus renouncing the competence of courts of law and applicability of the national procedures.

The importance and efficiency of arbitration in international commercial relations were recognized under the final Act of the Conference

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on Security and Cooperation in Europe signed in Helsinki on August 1, 1975, which states that "Arbitration is a proper means of settling… rapidly and fairly the litigations that can result from commercial transactions in the field of exchange of goods and services and from the industrial cooperation contracts", being recommended to "…bodies, enterprises and companies in their countries to include, if applicable, arbitration clauses also in the industrial cooperation ontracts or in the special conventions". The UN General Assembly also recommends, in the preamble to Resolution no. 31/98 of December 15, 1976, which adopted the Arbitration Regulation prepared by the United Nations Commission for International Commercial Law, a dissemination and application as universal as possible, thus recognizing the usefulness of arbitration as Cmethod of settling the litigations arising from the international commercial relations. In their turn, the UN regional economic commissions have prepared optional regulations of the ad-hoc arbitration[1].

The institution of arbitration is instated in our law system under the Civil Procedure Code, Book IV, entitled *On Arbitration,* as revised by Law no. 59/1993[2].

The provisions of the Civil Procedure Code are complete with the norms of the Romanian trade chambers, Law no. 335/2007, published in the Official Gazette of Romania no. 836 of December 6, 2007, which abrogated Decree-Law no. 139/1990 regarding the Romanian chambers of trade and industry. Thus, art. 4 letter i) of Law no. 335/2007 provides for the express responsibility of the county chambers of trade and industry of organising the activity of settling the commercial and civil litigations by mediation and ad-hoc and institutional arbitration. The current Romanian laws on arbitration have suffered the influences of the UNCITRAL[3] Model Law of June 21, 1985 on international commercial arbitration, adopted by the UN General

[1] In this regard, please refer to: Octavian Căpățână, *Litigiul arbitral de comerț exterior (Foreign Trade Arbitral Litigation)*, Ed. Academiei Române, Bucureşti, 1987, pg. 5 and the following, T. R. Popescu, *Dreptul comerțului internațional (International Trade Law)*, ed. a II-a, E.D.P., Bucureşti, 1983, pg. 352 and the following.

[2] Law no. 59/1993 regarding the change of the Civil Procedure Code, Family Code, Administrative Contentious Code no. 29/1990 and Law no. 94/1992 regarding the organisation and operation of the Court of Accounts, published in the Official Gazette of Romania, Part I, no. 177 of July 26, 1993.

[3] UNCITRAL Model-Law of June 21, 1985 was adopted by the UN General Assembly, based on the Resolution dated December 11, 1985, which recommends it to the UN member states.

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The provisions of 340 of the Civil procedure Code state the following: "The persons who have the full capacity of exercising their rights can settle by means of arbitration the assets decisions between them, except for those rights that cannot be traded according to the law"[4], and the provisions of art. 360, paragraph (1) of the same code state that: "The arbitral court settles the litigation based on the main contract and on the applicable law norms, taking into account, when applicable also the commercial practices"[5].

The convention concluded between the parties is at the basis of organising and performing the arbitration [art. 341, paragraph (1) of the Civil Procedure Code].

Thus, by commercial arbitration, arbitration can be entrusted to one or several persons, vested by the parties, who, according to that convention can judge the litigation subject to arbitration and pronounce a final and mandatory decision. The arbitration convention expresses that parties' will to address arbitration to settle the disputes between them (art. 340, 341 of the Civil Procedure Code).

The arbitrary convention can be expressed under the form of a *contract clause* (compromise clause) or under the form of a *separate agreement* (compromise), the written form being mandatory. The parties can also state in this clause the number of arbiters and the place of arbitration. In case of international arbitration, they can also state the language of the debates and of the documents submitted, as well as the law applicable to the substance of the litigation.

With regard to the international commercial arbitration, mention must also be made that this presents several jurisdictional forms, namely: ad-hoc or occasional arbitration, institutional or institutionalized arbitration, arbitration in law (or *de iure*) and arbitration in equity (sau *ex aequo et bono*).

Ad-hoc arbitration is considered a primary, traditional form of arbitration, being organized at the parties' initiative in order to settle certain litigation. Its existence ends together with the issuing of the arbitral decision or the expiration of the term within which the arbitral decisions should have been issued.

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[4] Art. 340 of Book IV On Arbitration, Chapter I general provisions of the Civil Procedure Code.

[5] Art. 360 (1) of Book IV On Arbitration, Chapter VII Arbitral Decision of the Civil procedure Code.

Institutional (or institutionalized) arbitration is a form of international trade arbitration whose existence does not depend on the term of certain litigation, it involves the continuous exerting of the jurisdictional responsibilities, being organized in a framework institutionalized under the law and having a character of permanence and continuity. The many benefits of institutionalized arbitration lead to a certain preference of the parties for this form of arbitration, as compared to the ad-hoc arbitration.

In arbitration in law, the arbitral decision needs to include the legal reasons on which the solution is grounded. The legal bases indicated by art. 360, paragraph (1) of the Civil Procedure Code are: the main contract, the applicable law norms and, if applicable, the commercial practices.

With regard to the latest jurisdictional form, namely the arbitration in equity, this is characterized by being performed according to the principles of equity and not of law.

Arbitration in equity does not mean a simple transaction or conciliation of the claims of the parties. Arbiters in equity judge according to norms and principles that can be applied in any similar case, being attached to their own concept of equity. Arbitration in equity can be but legal, as the will of the parties expressed in the arbitration convention is authorized by the law.

Arbitral litigation ends by an arbitral decision. This is the most important act of the arbitral procedure, as it achieves the purpose of arbitration itself, namely to settle the dispute by pronouncing a decision, which is assimilated to, under the conditions of the law, to a court decision. Without such assimilation, arbitration would lack effectiveness and, moreover, would lose the reason of its existence[6].

According to art. 361 of the Civil Procedure Code, arbitral decision is edited in writing and should include:

a) the names of the members of the arbitral court, the place and date of pronouncing the decision;
b) the names of the parties, their domicile or residence or, as the case may be, the name and headquarters, names of the parties' representatives, as well as of the other persons that participated in debating the litigation;

[6] In this respect, please refer to Giorgiana Dănăilă, *Procedura arbitrală în litigiile comerciale interne (Arbitral Procedure in Domestic Commercial Litigations)*, Editura Universul Juridic, Bucureşti, 2006, pg. 277.

c) mention of the arbitral convention on which the arbitration is based;
d) the subject of the litigation and brief presentation of the parties' pleas;
e) the reasons in fact and in law of the decision and in case of arbitration in equity, the reasons on which the solution is based in this regard;
f) disposition;
g) the signatures of all arbiters, except for the case provided for by art.360[2.]

The provisions of art. 362 of the Civil Procedure Coe regulate two distinct trial institutions: adjustment and completion of arbitral decision. The two institutions currently have a corresponding regulation also in the common law.

According to the provisions of art. 362 paragraph (1) of the Civil procedure Code, in the event where the decision pronounced by the arbitral court has failed to pronounce on a request, any of the parties can request, within 10 days of the receipt of the decision, the completion of the decision. The completion decision is pronounced after subpoenaing the parties.

The legal provisions regarding the adjustment of the arbitral decision are included in the provisions of art. 362 paragraph (2). Thus, the clerical errors in the text of arbitral decision or other obvious mistakes that do not change the substance of the solution, as well as the calculation mistakes can be corrected, at the request of any of the parties submitted within the term stated in paragraph (1) or without request, by a decision of adjustment [paragraph (2) of the same article].

The decision to complete or the decision to adjust are integral parts of the arbitral decision [paragraph (3)].

The parties cannot be obligated to pay for the expenses related to the completion or adjustment of the decision [paragraph (4)].

Mention must also be made that the 10-day term, calculated as per art. 101 paragraph (1) of the Civil Procedure Code is imperative, so that disregarding it is punished by losing rights.

In essence, the institution regulated by the quoted text does not differ from the correction of the clerical errors in common law, although certain aspects can be noted from the norm stated in art. 362 paragraph (2) of the Civil Procedure Code. We note from the very beginning a certain inconsistency, residing in the reference made by the law to the possibility of

correcting clerical errors and to making such a correction by a "decision of adjustment". It is obvious that this is about the institution of adjusting clerical errors[7].

On the other hand, the law seems to suggest a certain distinction as well, although the same trial institution is at stake here, between clerical errors and calculation errors. This distinction is not relevant as calculation errors are part of the same category of clerical errors that legitimize the adjustment of the decision.

However, it can also be noted that the regulation included in the aforementioned text sets more precisely the conditions under which the correction of a material error can be ordered. According to the rigour of the law, the adjustment of the decision can be ordered only if the clerical errors invoked are *obvious* and *are not in a position to change the substance of the solution*.

The request for adjustment needs to be formulated by the interested party within 10 days of the receipt of the decision. The law does not include any provision regarding the obligation of subpoenaing the parties, whereas in common law the court can order the subpoenaing if this is necessary for "clarifications". In the absence of an express provision, it might be possible to resort to the norms of common law. There are authors [8] who consider that, although, according to art. 362 paragraph (1) of the Civil Procedure Code, the decision of completion is pronounced after subpoenaing the parties, the law maker aimed at adopting a different solution in case of adjusting clerical errors, as the request can be resolved without subpoenaing the parties.

According to the provisions of the new Civil Procedure Code[9], in case of the procedure of resolving a request for adjustment, the parties can be subpoenaed if the arbitral court deems it *necessary*.

The court decides on the request for adjustment by a decision to adjust, which shall be an integral part of the arbitral decision [art. 362 paragraph (3) of the Civil Procedure Code].

[7] In this regard, please refer to: Ioan Leş, *Tratat de drept procesual civil. Cu referiri la Proiectul Codului de procedură civilă ("Study on Civil Case Law. With References to the Civil Procedure Code Draft")* , Editura C.H. Beck, Bucureşti, 2010, pg. 902-903.
[8] Ioan Leş, op. cit., pg. 903.
[9] Law no. 134/2010 regarding the Civil Procedure Code published in the Romanian Official Gazette no. 485 of July 15, 2010.

The completion of a decision is aimed at remedying mistakes made by the court, before the adoption of Emergency Ordinance no. 138/2000[10] such omissions could not be adjusted unless by an appeal or review.

The arbitral court can complete a decision only if it ascertains that it has failed to resolve a count of request. The legal provisions regarding the conditions under which the completion of the arbitral decision can be ordered are of strict interpretation and cannot be extended also to the cases where the court considers that a count of request has been resolved in a wrong way. Once the decision is pronounced, the arbitral court is disinvested.

A decision can be ordered at the request of any of the parties. The decision of completion is resolved after subpoenaing the parties. The term for introducing the request for completion is of 10 days of the date of receiving the decision.

The arbitral court pronounces a resolution and not a simple decision.

The parties cannot be obligated to pay for the expenses incurred with the completion or adjustment of the decision.

These rules are also applicable in the institutional arbitration. Thus, the Procedure Rules of the International Court of Commercial Arbitration[11] state in art. 80 that errors or omissions regarding the name, position and pleas of the parties or the calculation errors, as well as any other clerical errors in the arbitral rulings or decisions can be adjusted without request or at the request of any of the parties. The request is to be formulated within 15 days of the date of receiving the ruling and in the case of decision, upon the following hearing the latest. The adjustment without request can be made at all times. According to art. 81 paragraph (2) of the same rules, the arbitral court decides on the request in its decision. The provisions of paragraph (3) establish that the parties are to be subpoenaed only if the arbitral court deems it necessary to make clarifications.

According to art. 82 of the rules, in the event where clarifications are necessary with regard to the meaning, extent and application of the decision of the arbitral hearing or if this includes contrary orders, any of the parties can request that the arbitral court that has pronounced the ruling clarify the order or remove the contrary orders within 15 days of the date of receiving

[10] Emergency Ordinance no. 138 of Sepetember 14, 2000 regarding the amendment and completion of the Civil Procedure Code.

[11] The New Rules of Procedure of the International Court of Commercial Arbitration came into effect on March 25, 2010.

the ruling. The arbitral court shall also resolve the emergency application by a decision subpoenaing the parties.

According to art. 83 of the rules, in the event where under its ruling the arbitral court has omitted to decide on a main or accessory count of request or on a related or incidental request, the completion of the ruling can be requested within 15 days of the date of notifying such a ruling. The request is to be resolved as a matter of emergency by subpoenaing the parties by a separate ruling. The provisions of this article are also applicable in the case where the arbitral court has omitted to decide on the requests of the witnesses, experts, translators, interpreters or defenders with regard to their rights.

The decisions pronounced on the basis of art. 81 and 82, as well as the ruling pronounced according to art. 83 (1) can be overruled only by an action to cancel. The parties cannot be obligated to pay for the expenses incurred with the adjustment, clarification or completion of the decision. The arbitral ruling shall be edited and signed in at least one month of the date of being pronounced. For well grounded reasons, the chairman of the International Court of Commercial Arbitration can extend this term by no more than 30 days.

According to the arbitral practice, the criticism to the arbitration hearing, as well as the failure to ground or even the illegality of certain provisions of the Rules of Procedure of the International Court of Commercial Arbitration cannot be subject to a request for adjustment, clarification and completion of the arbitral ruling, so that the Arbitral Ruling is entitled to overrule this criticism as inadmissible[12].

Under arbitral ruling no. 175/2007, pronounced in file no. 305/2006, the Arbitral Court having to settle a request for adjustment, clarification and completion or an arbitral ruling pronounced by the International Court of Commercial Arbitration with the Romanian Chamber of Trade and Industry, the request being made by a limited liability company, "after having examined the reasons for the request has noted that some of them actually represent criticism of the arbitral ruling, as well as claims regarding the failure to ground or event the illegality of certain provisions of the Rules of Procedure of the International Court of Commercial Arbitration, criticism which cannot be subject to such a request and are to be overruled as

[12] Please refer to arbitral ruling no.175/2007 – file no. 305/2006 in Revista Română de Arbitraj (Romanian Arbitration Magazine) no. 3 (7) / July-September 2008, Arbitral Case Law Section, Editura Rentrop & Straton, Bucureşti, 2008, pg. 69-71.

inadmissible". The other so-called "adjustment, clarification and completions" of the arbitral ruling have been overruled as ungrounded.

In file no. 278/2004 of the Bucharest Court of International Arbitration, which requested the completion of the arbitral ruling, the Arbitral Court ascertained that "the legal inadmissibility of using the appeal against arbitral rulings cannot lead, by going around, to changing the limitative provisions of art. 64 of the Rules of Arbitral Procedure, to regulations similar to those, which, in the Civil Procedure Code, instate and govern the ways of challenging by appeal". In such a case, the Arbitral Court overruled as inadmissible the request of completing the arbitral ruling[13].

The arbitral court ascertained that the request for completing the arbitral ruling formulated by the plaintiff was inadmissible. Art. 64 paragraphs (1) and (2) of the Rules of Arbitral Procedure[14] regulates the possibility of pronouncing a ruling/decision of completion if, under the ruling pronounced, the arbitral court has either omitted to decide on a count of request, or in the text of the ruling there are clerical errors or other obvious errors that do not change the substance of the solution or there are calculation errors that can be corrected. Or, in this case, in the arbitral ruling whose "completion" is requested there is no omission of a count of request or clerical errors or other obvious errors or calculation errors.

The solution of adjusting clerical errors is also established by the common law for the rulings by courts of law.

Thus, according to art. 281 paragraph (1) of the Civil Procedure Code, the errors or omissions regarding the name, position and the pleas of the parties or the calculation errors, as well as any other clerical errors can be adjusted without a request or at request.

Paragraph (2) of the same article states that "The Court decides under a decision given in council chambers. The parties are to be subpoenaed only if the court deems it necessary to give certain clarifications"[15], and paragraph (3)states that "In case of decisions, the adjustment shall be made in both copies of the decision"[16].

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[13] Please refer to arbitral ruling no.179/14.06.2005 – file no. 278/2004 in Revista Română de Arbitraj no. 2 (10) / Aprilie-June 2009, Arbitral Case Law Section, Editura Rentrop & Straton, București, 2009, pg. 54-55.

[14] În prezent art. 83 din reguli.

[15] Art. 281 paragraph (2) Chapter IV Decisions, Section VI Adjustment, Clarification and Completion of the decision in Civil Procedure Code.

[16] Art. 281 paragraph (3) Chapter IV Decisions, SectionVI Adjustment, Clarification and Completion of the decision in Civil Procedure Code..

Mention must be made that before the amendment of the Civil Procedure Code by Emergency Ordinance no.138/2000, court decisions did not include the solution of completion for the cases where the court had failed to decide on a count of request, be it main or accessory, or on a related or incidental request. Now, the same as in case of arbitral decisions, they can be completed at the request of the interested party. The only difference is the term for making such a request of ten days in case of arbitral decisions and of 15 days in case of appealing a decision, of the date of being pronounced, for the court decisions given in first instance court after withholding cassation.

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VARIOUS ASPECTS REGARDING DELIMITATION OF THE NOTION OF *"STOCK IN TRADE"* FROM OTHER RESEMBLING NOTIONS

Mihaela ILIESCU*

ABSTRACT

Stock in trade is rarely used by the legislature, in the Romanian Law, as well as in French Law. The notion of "stock in trade" is hard to define, especially because it is very often confused with other similar notions. The stock in trade is qualified as an intangible movable asset, and is subject to the legal regulation specific to movables. In spite of its legal qualification as movable, some rules of stock in trade are inspired from the real estate law techniques.

KEYWORDS

Stock in trade, patrimony, dedicated patrimony, enterprise, universitas facti, intangible movable assets.

It was not until late that the institution of stock in trade was legally instated, so that legal doctrine and case law has assumed the role of configuring its legal regime. Summarizing the various definitions that have occurred in doctrine[1] in a long time, there can be concluded that stock in trade represents the group of mobile and immovable assets, tangible and intangible, that a trader allocates to their business in order to attract clients and, implicitly, profit.

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[1] I.N. Finţescu, *Curs de drept commercial (Course on Commercial Law)*, Bucureşti, 1929, vol. 1, p. 163.; I.L. Georgescu, *Drept comercial roman (Romanian Commercial Law)*, Editura All Beck, Bucureşti, 2002, p. 23.; Stanciu D. Cărpenaru, *Tratat de drept comercial roman (Treatise of Romanian Commercial Law)*, Editura Univers Juridic, Bucureşti, 2009, p. 132.; O. Căpăţână, *Caracteristici generale ale societăţilor comerciale (General Characteristics of the Commercial Companies)*, in *Dreptul (Law)* Magazine, no. 9-12/1990, pg. 23.

The expression "Stock in trade" is seldom used by the lawmaker, both in the Romanian and French law[2]. In the Romanian Law, there are only isolated references in several special laws, such as: art. 2 and art. 42 of Law no. 26/1990 regarding the Trade Registry, as revised, which regulates the obligation of recording with the Trade Registry the assignment, lease, pledge on the stock in trade, as well as Law 99/1999 regarding various measures of accelerating economic reform, which regulates a security interest on stock in trade. Currently, for the first time in our law[3], the lawmaker defines stock in trade in Law no. 298/2001 regarding the amendment and completion of Law no. 11/1991 regarding the combating of unfair competition. According to art. 1^1, letter c) of this normative act, "stock in trade is the group of mobile and immovable assets, tangible and intangible (trademarks, firms, logos, patents, pool of clients) used by a trader in order to conduct their business".

Although this is a most welcome first step in shaping the notion of *stock in trade*, doctrine has reasonably reported that the legal definition is incomplete.

For a better understanding of the notion of *stock in trade*, we will present below in brief the elements that constitute stock in trade.[4]

As we have already pointed out, the definition given by the lawmaker does not clearly show the component elements of stock in trade. However, a complete listing of the constitutive elements would certainly be very difficult to achieve, as the composition of stock in trade varies and is variable.[5] This means, on the one hand, the composition of stock in trade varies according to the specificity of the trader's business and, on the other hand, the elements of stock in trade can be altered according to the business needs, without affecting the existence of stock in trade. In the same respect,

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[2] Please refer to Smaranda Angheni, *Les fonds de commerce en droit roumaine et en droit francais*, in *Revue Internationale de Droit Economique*, Bruxelles, 1996, no. 2, p. 237-255; Idem, *Quelques aspectes, concernant le fond de commerce en droit roumain et en droit francais*, in *Revue roumaine des sciences juridiques*, tome VII, no. 1, 1996, p. 56-73.

[3] In French law, Law dated 17 March 1909 (the Cordelet Law), which includes regulations regarding stock in trade, is limited to merely establishing a few rules regarding the sale, securing and monitoring stock in trade.

[4] In French doctrine, in order to shape the concept of stock in trade, two methods are used, both showing the constitutive elements of stock in trade. Thus, the first method (also adopted by the lawmaker) determines the elements that can be included in the composition of stock in trade. The second one tries to identify the elements indispensable to stock in trade.

[5] See Stanciu D. Cărpenaru, *Op. cit.*, p. 137.

a limitative listing of the elements of stock in trade would not be desirable, because otherwise the trader would not have the option of adding other elements on an ongoing basis.

In the specialized literature and case law, there is generically considered that the elements of stock in trade are split in two main categories: tangible elements and intangible elements. The tangible elements can be: immobile or mobile. Thus, the category of immobile elements includes[6]: buildings that house trading operations and on which the trader may have a title deed or a right to use (store, works, plant, registered office), elements that are added as contribution to the share capital. The category of tangible mobile goods includes: raw materials, materials, equipment, the goods resulted from the commercial activity or purchased with a view to resale.

Without minimizing the role of the tangible elements that are part of the structure of stock in trade, it is unanimously recognized that intangible elements are the main elements of stock in trade. This category mainly includes: the company, the logo, the clients, market share, patents, trademarks and geographical indications, intellectual property rights, drawings and models of the products, know-how (savoir-faire) etc.

Also, mention must be made that most of the authors do not consider receivables and liabilities as elements of stock in trade. The conclusion is supported by a legal argument according to which stock in trade does not constitute a legal universality, but a universality in fact. Receivables and liabilities are components of the patrimony and not of the stock in trade, that is why they are not passed to the acquirer in case of transferring the stock in trade. Nevertheless, there can be taken over by the assignee various utilities contracts (power and water supply, gas, telephone subscription), employment contracts, export licenses, if such contracts have not been terminated. Anyhow, the transfer of such contract does not operate "ipso facto" by the mere assignment of the stock in trade and in all cases the assignment of receivable should be notified to the debtor under art. 1393 of the Civil Code. As the Civil Code forbids the assignment of receivable, the

[6] For a detailed analysis of the categories of immobile that can be included in stock in trade, please refer to Smaranda Angheni, *Câteva specte privind consecințele juridice ale includerii imobilelor în fondul de comerț (Various Aspects regarding the Legal Consequences of Including Buildings in Stock in trade*, in the *Curierul judiciar* magazine, no. 5/2002, p. 2-10. Also see: O.Căpățînă, *Op. cit.*, *Dreptul* magazine, no. 9-12/1990, p. 23; G. Papu, *Despre excluderea imobilelor din domeniul dreptului comercial (On the Exclusion of Buildings from the Scope of Commercial Law)*, in *Revista de drept comercial*, nr. 2/1998, p. 69-85.

transfer of the liabilities can only be made by novation, with the creditor's acceptance, under the conditions of art. 1128, Civil Code. Mention must be made that the new Civil Code (Law no. 287/2009) allows the assignment of a liability and regulates in the text of Book V, Title VI, Chapter III, the institution of "taking over a liability". Thus, according to the provisions of art. 1599, "the obligation to pay an amount of money or to perform some other action can be transferred by the debtor to another person:

a) either by a contract concluded between the initial debtor and the new debtor, with the creditor's agreement,
b) or by a contract concluded between the creditor and the new debtor, under which the latter assumes the obligation".

In French doctrine[7], we always find tangible elements such as materials and goods, and intangible elements such as the clients and the market share (achalandage), the distinctive signs, intellectual property and bail right[8]. There are excluded from stock in trade, receivables and liabilities, as well as buildings.

An important step in the effort of defining the notion of *stock in trade* is the delimitation of stock in trade from other resembling notions, for which it can be mistaken.

First of all, the notion of *stock in trade* should delimited from the one of ***patrimony.*** Mention must be made here that, sometimes, in the doctrine, we find stock in trade under the name of *commercial patrimony*. However, this phrase does not have any legal significant, but a mere economic meaning referring to the goods meant to be used for conducting the business. In legal terminology, the commercial patrimony is also called stock in trade[9].

Although in Romanian law, there is no legal definition of the notion of patrimony, most of the doctrine[10] considers that patrimony is a legal universality of rights and obligations of an economic value[11]. Therefore,

[7] See M. de Juglart, B. Ippolito, *Cours de droit commercial*, Montchrestien Publishing House, Paris,1984, p. 335-343 şi J. Derruppe, *Le fonds de commerce*, Edition Dalloz, 1994, p. 4.

[8] Right to use the space in which the stock in trade is operated.

[9] I.L. Georgescu, *Op. cit.*, p. 462; St. D. Cărpenaru, *Op. cit.*, p. 133.

[10] C. Bârsan, *Drept civil. Drepturile reale principale (Civil Law. Main Real Rights),* All Beck Publishing House, Bucureşti, 2001, p. 6; V. Stoica,*Drept civil. Drepturile reale principale (Civil Law. Main Real Rights),* Editura Humanitas, Bucureşti, 2006, p. 47.

[11] Some reference works include the in the notion of patrimony also the goods to which the rights and obligations of an economic value refer (T. Ionaşcu, S. Brădeanu, *Drepturile reale*

stock in trade represents just a component of the trader's patrimony, as the lawmaker defines stock in trade as comprising a *group of goods,* mobile and immobile, tangible and intangible (trademarks, firms, logos, patents, market share) *used by the trader in conducting their business*. Therefore, stock in trade is a universality in fact, and not in law, of goods united by a common purpose, namely, the business. Being considered a universality in fact, stock in trade cannot include receivables and liabilities, the latter being part of the trader's patrimony. As different from the universality in fact, the universality in law comprises both elements of assets and liabilities, the asset and liability being defining elements for the legal universality. According to the doctrine, we cannot speak about the existence (subsistence) of patrimony, even if it were made exclusively of liabilities.[12] We cannot say the same thing of stock in trade, as the latter cannot subsist in the absence of the elements of liability.

Stock in trade does not include future goods, whereas the inclusion of the latter in the nation of patrimony has to do with the essence of this concept.

Also, mention must be made that the structure of stock in trade includes only the elements of asset "used by the trader in their business"; as a result, patrimony includes, beside liability, other values of asset that are not included in stock in trade.

Considering stock in trade as a real patrimony means that an individual or legal entity acting as trader would have two patrimonies, one civil and another one commercial, which runs counter to the theory of sole patrimony instated by the Civil Code (art. 1718).

Secondly, given that our law has introduced the notion of ***dedicated patrimony***, mention must be made that stock in trade should not be mistaken for it either.[13]

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principale în Republica Socialistă România (Main Real Rights in the Socialist Republic of Romania), Editura Academiei, Bucureşti, 1978, p. 13).

[12]V. Stoica, *Op. cit.*, p. 50.

[13]In the doctrine we find interpretations according to which the legal nature of stock in trade could be characterized as being the one of the dedicated patrimony. In this regard, see Camelia Stoica, Silvia Cristea, *Reglementarea în legislația română a noțiunii de întreprindere, fond de comerț şi patrimoniu de afectațiune (The Regulation in the Romanian Law of the notion of enterprise, stock in trade and dedicated patrimony)*, in *Curierul judiciar,* no. 9/2009, p. 498-499; Gheorghe Piperea, *Pentru o nouă formulă a întreprinderii (For a New Formula of Enterpise)*, in *Analele Universității din Bucureşti*, *Drept (Law) Series*, no. III-IV/2008, p. 58.

In approaching the dedicated patrimony, in order to be able to compare it with and delimit it from the notion of *stock in trade*, we should consider the distinction made by the theoreticians of law between the institution proper of dedicated patrimony (according to the theory of dedicated patrimony) and the concept of dedicated patrimony imagined as a group of assets belonging into the same patrimony (according to the modern theory of patrimony).

Thus, according to the theory of dedicated patrimony, or of patrimony of purpose (weckvermögen) conceived by the German lawyers Brinz and Bekker, the connection between the patrimony and the person of its holder (defining for the notion of patrimony) is broken. The unity of patrimony is related to the purpose allocated to it. As a result, the patrimony does not belong to a person, but to a destination (purpose). It has thus been substantiated the recognition of a patrimony regarded as a legal universality, without a holder, person, "the subject" (holder) of the patrimony being its purpose.[14]

Regarded from the point of view of modern theory of patrimony, the concept of dedicated patrimony is completely different. This is not regarded as a distinct patrimony, but as a group of assets included in the sole patrimony. The modern theory of patrimony manages to reconcile the classical theory of a sole and indivisible patrimony (the personalism theory) with the one of dedicated patrimony, shifting the weight centre of the idea of purpose, which ceases to undermine the indissoluble relation between patrimony and person (together with the possibility of individuals to become partners and set up a legal entity – commercial company, having a distinct patrimony, it has no longer been necessary to multiply the patrimony of an individual by means of the idea of purpose), thus becoming the ground of recognizing the divisibility of patrimony in several groups of assets, with distinct legal regimes.

Thus, there is reached the conclusion that there is no contradiction between the idea of unity of the person and patrimony and the idea of divisibility of patrimony. The latter, although split in several groups of rights and obligations with economic value, remains united and the unity of patrimony is the one that ensures the communication between the various

[14]See V. Stoica, *Noțiunea juridică a patrmoniului (The Legal Notion of Patrimony),*in the supplement to *Pandectele române,* nr. 1/2003, Editura Rosetti, p. 179-180; I. Lulă, *Drept civil. Drepturile reale (Civil Law. Real Rights)*, Editura Presa Universitară Română, Timişoara, 2000, p. 20-21.

patrimonial groups. A reference work shows that "although the formula of the divisibility of patrimony is instated, in reality it is not the patrimony that is divided in fractions, but the rights and obligations in distinct, each having its own distinct legal regime"[15].

Although each group of assets constitutes a distinct entity, both the individual component elements and the universality of patrimony, it cannot be sustained that these represent a legal personality proper, as such an interpretation would infringe on the unity of patrimony. However, the idea of legal universality is to be found, in an improper manner, also in relation with the groups of assets, as the latter borrow certain features of patrimony, understood as *universitas juris*.[16] The extension of the idea of legal universality to the groups of assets is useful for, among other things, distinguishing this legal universality from the universalities in fact. As such, such a group of assets is regarded as a *universitas juris*, and not as a *universitas facti*, as stock in trade is.

Once this proposed distinction is made, mention must be made of the fact that both the provisions of GEO no. 44/2008 *regarding the conducting of businesses by authorized free lancers, individual companies and family companies,* which introduce in the Romanian law the phrase *dedicated patrimony***,** and the provisions of the new Civil Code do not instate the theory of dedicated patrimony, but the concept of splitting the patrimony in several patrimonial groups allocated to performing a profession, according to the modern theory of patrimony.[17] The new legal provisions do not infringe on the principle of sole patrimony and divisibility of patrimony, a principle that can also be found in the provisions of the new Civil Code, art.31.

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[15]Valeriu Stoica, *Op. cit.*, p. 60.

[16]Idem, *ibidem*; Lucia Herovanu, *Dreptul român şi patrimoniul de afectațiune (Romanian Law and Dedicated Paterimony)*, in *Revista de drept comercial (The Commercial Law Magazine)*, no. 6/2009, p. 68.

[17]In this respect, Lucia Herovanu, *Op. cit.*, p.75; Emilian Lipcanu, *Considerații în legătură cu OUG nr. 44/2008 privind desfăşurarea activităților economice de către persoanele fizice autorizate, întreprinderile individuale şi întreprinderile familiale (Considerations regading GEO no.44/2008 regarding the conducting of businesses by authorized free lancers, individual companies and family companies,* in *Law Magazine*, no. 10/2008, p. 19; Contrary, see Cornelia Lefter, O. I. Dumitru, *Reglementarea desfăşurării activităților economice de către persoanele fizice, întreprinderile individuale şi întreprinderile familiale, în baza OUG nr. 44/2008 – între noutate şi controversă*, în *Revista română de drept privat (Romanian Magazine of Private Law)*, no. 1/2009, p. 113-114.

According to the provisions of art.2, letter j) of GEO no.44/2008, the dedicated patrimony represents the totality of goods, rights and obligations of the authorized free lancer, the holder of individual company or the members of a family company, dedicated to the conducting of a business and constituted as a distinct fraction of the patrimony of the authorized free lancer, holder of individual company or members of the family company, separated from the general pledge of their personal creditors. The comparison of this definition with that of stock in trade, included in art.3, letter c) of Law no. 11/1991, as revised, represents only a part of the dedicated patrimony, this including, similarly to the patrimony, both the receivables and liabilities.

Stock in trade is not one and the same as dedicated patrimony in none of its interpretations. Thus, regarded as a distinct patrimony, the dedicated patrimony represents a "real" patrimony, a legal universality in proper sense, with all the consequences deriving from it and the arguments already presented can be used "mutatis mutandis" also for delimiting *stock in trade* from *the dedicated patrimony*. Not even when seen as a set of rights and obligations grouped within the same unitary patrimony, dedicated patrimony is not the same as stock in trade because:

- an asset group represents a legal universality, whereas stock in trade represents a universality in fact;
- as different from stock in trade, which is constituted by the will of their holder, in the specific case of the dedicated patrimony, the will of the holder can be relevant only indirectly, but the resulting asset group originates directly from the law;
- setting up the dedicated patrimony is optional, being left at the trader's choice; as a result, in performing their trade, the trader can set up or not the deduicated patrimony, whereas the setting up of the stock in trade is indispensable to their business.

A third distinction is the one between the *stock in trade* and the one of ***enterprise***. An isolated opinion claims that there would be equivalence between the notion of *stock in trade* and the one of *enterprise*, in the sense that they would be two facets of the same institution: stock in trade would represent their static form, whereas the enterprise would represent stock in trade in a dynamic status[18].

[18]D. Gălăşescu-Pyk, *Drept comercial(Commercial Law)*, Bucureşti, 1948, p. 350.

Currently, the text of GEO no.44/2008, the enterprise is defined as a business conducted in an organized, permanent, systematic, manner, comprising financial resources, attracted labour force, raw materials, logistic and IT means, at the risk of the entrepreneur (art. 2, lit. f)). This definition is compatible with the generally accepted definition of doctrine[19], according to which enterprise represents the autonomous organization of a business, by means of production factors (acts of God, capital and labour) by the entrepreneur at their own risk, for the purpose of obtaining profit. Against this background, mention must be made that under the provisions of art. 3 paragraph 3 of the new Civil Code, the “operation of an enterprise” is defined, not the enterprise, without including in this definition the element of the risk assumed by the entrepreneur, considered an essential, defining element even for the notion of enterprise.

Starting from these definitions and comparing them with the one of stock in trade, we can draw a first conclusion: the notion of enterprise is wider than that of stock in trade. The enterprise also includes elements that are not part of the stock in trade. The organization of the enterprise does not regard only the goods allocated to conducting the business (which are part of the structure of stock in trade) but also the capital and labour. On the other hand, the enterprise is not limited to commercial activities, as there are also civil enterprises, liberal professions, handicraft, in the field of agriculture. The enterprise includes both material and human elements organized by the trader, where stock in trade lacks the human factor.[20]

Regarded from the point of view of its organization forms, the enterprise can be a matter of law, therefore it may have legal independence (the hypothesis of corporate enterprise – the commercial company), whereas stock in trade lacks patrimonial independence, even if some of the goods have a legal regime different from the one recognized for the majority of goods in the trader’s patrimony.

We can thus assert that stock in trade is the central element of the enterprise and the latter cannot be conceived in the absence of stock in trade

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[19]Smaranda Angheni, Magda Volonciu, Camelia Stoica, *Op. cit.*, p. 23; Stanciu D. Cărpenaru, *Op. cit.*, p. 46-47; O. Căpățână, *Op. cit.*, p. 29; Camelia Stoica, Silvia Cristea, *Op. cit.*, p. 498; Gheorghe Piperea, *Op. cit.*, p. 37-39; A. Jauffret, *Manuel de droit commercial*, Paris, 1973, p. 73.

[20]Reasonably considering that in traditional interpretations the focus being on the material aspect, the enterprise being defined as a group of assets, which the entreprenuer allocates to conducting their business, contemporary doctrine proposes a definition, according to which the main element is the subjective one, the enterpise representing a human group coordinated by an entrepreneur for the purpose of conducting a business.

that allows its operation. Stock in trade is the necessary element, the invariable element of the notion of enterprise. After all, an enterprise comes to life thanks to the notion of *stock in trade*.[21] Therefore, the two notions are indissolubly related, but they do not coincide.

Fourthly, the notion of *stock in trade* needs to be delimited from the notion of ***commercial company***.

The commercial company is, from a legal point of view, a matter of law, as it has legal independence, whereas stock in trade comprises a group of companies that belong to a commercial company. Starting from this reality, the doctrine shows that there is a traditional legal connection between stock in trade and the company, namely the connection between person and goods.[22] Stock in trade is a constitutive element of the notion of commercial company, more precisely; it represents an element of the company's patrimony. The same commercial company may have several stock in trades if it performs different production activities (independent fields of activity).

Eventually, the notion of *stock in trade* differentiates from that of ***branch***.

According to the provisions of art. 43 paragraph 1 of Law no. 31/1990, regarding the commercial companies, as revised, "branches are elements without legal independence, taken from and belonging into the commercial companies", being known as secondary offices, the same as agencies, representative offices and other secondary offices. As the term of branch does not have a legal definition, doctrine and case law have tried to make up for this overlooking by the lawmaker. Thus, it has been established that besides the absence of the legal independence, a branch has management independence, within the limits set by the company.[23] For the purpose of conducting the business for which it has been set up, a branch is equipped by a (primary) company with certain goods. A part of such goods constitutes the stock in trade of the branch, distinct from that of the company, but this stock in trade does not identify itself with the branch, as the branch, beside the material elements includes the human factor. In the absence of the legal independence, the legal documents needed for

[21]Yves Reinhard, *Droit commercial,* Edition Litec, 1996, p. 273.

[22]Smaranda Angheni, Magda Volonciu, Camelia Stoica, *Op. cit.*, p. 52.

[23]In this regard, Supreme Court of Justice, Commercial Department, Decision no. 752/1995, in *Revista de drept comercial (Magazine of Commercial Law)*, no. 4/1996, p. 123.

conducting the business of the branch are concluded by the representatives (proxies) designated by the commercial company.[24]

Below, you can find various mentions regarding the legal nature of stock in trade, in order to clarify this concept.

Both the Romanian and French doctrine considers that stock in trade is a universality in fact, created by the will of its holder and within the limits of this will. As different from simple goods, in which the constitutive elements are kept together by a unitary and homogeneous individuality, stock in trade is a complex item whose component elements are united, but not by a physical cohesion, as it happens with material goods (*corpora que ex pluribus cohaerentibus constant*), but by the will of a person that confers them an economic and legal destination (*corpora que ex pluribus distantibus constant*).[25] Given that in this group of heterogenous goods related by a purpose, the decisive element is the will of their holder, stock in trade existing to the extent where the holder's will unites them. Thus, stock in trade is considered an *universitas factis*, as opposed to *universitas juris*, whose existence as an autonomous item does not arise from the will of the holder, but from that of the lawmaker. Each individual item, less the company, can by subject to a distinct legal document: one can sell the logo, goods, but the trader can treat such goods also as a unit. The existence of such universality originates from the will of their holder and to the extent of such will. Seen from the point of view of this theory, stock in trade has an independent identity and is not reduced to its component elements; however, this unit does not have a legal character; but each of its elements has its own statute.

The theory of universality in fact is supported by various provisions of Law 99/1999, regarding security interests. According to art. 10 paragraph 3., a security interest may have as purpose a mobile individualized item or a universality of mobile goods. In case where the item subject to the security interest comprises a universality of mobile goods, including in the stock in trade, the contents and features of such universality are to be determined by the parties before the date of constituting the security interest.

The conclusion that stock in trade is an universality in fact is also grounded on the legal argument that stock in trade does not have its own

[24]See D. A. Dumitrescu, *Valabilitatea împuternicirii acordate sucursalei de a reprezenta societatea primară în relațiile cu terții și în justiție (the validity of the power of attorney granted to the branch to represent the primary company in the relations with third parties)*, in *Revista de drept comercial*, no. 3/2005, p. 102-108.

[25]I. L. Georgescu, *Op. cit.*, p. 471.

asset and liability, the receivables and liabilities being components of the trader's patrimony. Currently, the notion of *universality in fact* is recognized by the lawmaker. Thus, the provisions of art. 541 of the new Civil Code define the universality in fact as being "the group of goods that belong to the same person and have a common destination, set by the will of the respective person or by law".

Regarded as an universality in fact, stock in trade is a unitary item, a summary item, that includes all the goods that are comprised by it, without the stock in trade's losing its individuality. In order to establish the legal nature of this unitary item, case law has generally decided that stock in trade is an intangible movable asset, considering the argument that the elements that prevail in stock in trade are the intangible movable assets. As we have already pointed out, the lawmaker, under Law no. 99/1999, provides for a security interest on the stock in trade, therefore considering it a movable asset. Nevertheless, considering the hypothesis according to which stock in trade also includes immovable assets (as those can also be part of stock in trade, according to the legal definition), no security interest can be applied with regard to the respective immobile goods, but only mortgage, which presupposes certain validity and publicity conditions.[26]

We note that although the Romanian lawmaker includes among the elements of stock in trade also the building in which stock in trade is operated, stock in trade as an universality in fact and as a unitary item that absorbs the building, still the legal regime of the documents regarding the respective immovable asset (sale, lease, donation) is governed by the rules of the immovable assets, differentiated from the legal regime of the stock in trade as universality and from all the other component elements.

The topic of clarifying the notion of *stock in trade,* which naturally involves establishing the legal nature of stock in trade, is a rather complex one and, as such, it cannot be exhausted by this study. The various and contradictory doctrine opinions require as a necessity a regulation that should configure the legal regime applicable to stock in trade.

[26]Smaranda Angheni, *Câteva aspecte privind consecințele juridice ale includerii imobilelor în fondul de comerț (Various Aspects regarding the Legal Consequences of Including Buildings in Goodwill)*, in *Curierul judiciar*, no. 5/2002, p. 7.

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DIVORCE IN ROMANIAN LAW AND COMPARATIVE LAW

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ABSTRACT

The new Civil Code is widely regulated with novelty either concept by doctrine and judiciary practice, either by taking over from compared law, which appears as pliable to the Romanian law system, and tends in its ensemble, to remove procedure dispositions which would delay and hold back the entire process of divorce. To be noted, in this here sense, that some of the provisions of the current Civil Procedure Code, although not having been repealed neither express nor tacit, tend to lose their practical applicability, also due to a tendency of the law practice to reduce part of the rigidity that the special procedure of divorce implies.

KEYWORDS

Institution of divorce, the new Civil Code, divorce reasons, probation, mutual consensus, effects, comparative law

1. THE HISTORICAL DEVELOPMENT OF THE INSTITUTION OF DIVORCE

„Divorce is not a perfect institution, but a necessary evil, as it ends a worse one”. From this assessment made by the great French theorist R. Planiol we consider necessary in the preamble of the present paper to go through a short overview of this very important institution for the civil law.

The concept of „divorce” is found since ancient times, being fully developed in ancient Greece. Thus, one could divorce only with the consent of a magistrate, to whom they would have to present reasons for that

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decision. If given reason would be considered sufficient, the magistrate would allow one to realize divorce and separation.

If in ancient Rome marriage dissolution was possible for whom ever wanted that, Christianization of the Roman Empire would bring restrictions and prohibitions of divorce, beginning with Emperor Constatin.

Thus, divorce appears as a common practice in roman society[1] without being subject to formalities and hardship, marriage dissolution can be the result of a tacit expression of will, such as the new marriage of one spouse.

Later, under the influence of the Catholic Church, divorce was categorically rejected, the church promoting marriage indissolubility.

The French Revolution of 1792 marked the secularization of marriage, restoring the institution of divorce. Marriage regains its contractual nature, assuming expressed consent of both spouses before the civil status officer. Also, for good reason, the spouse was entitled to ask marriage dissolution before the judicial authorities.

Napoleon's Code maintained the institution of divorce, setting the exhaustive grounds for divorce and establishing rules of procedure deliberately cumbersome and long.

[1]In Romanian civil law, divorce is consensual marriage dissolution sine manu; the spouses, having spent together part of their existence, separate, following different paths. Marriage dissolution realized through a simple material separation of the spouses, to that intent. Thus it could be proceeded to the realization of certain papers which would state the will of divorce of both spouses, but these papers would only have a probationary value. For example, one of the spouses could notify the other the will to divorce, the husband would pronounce in front of witnesses certain words of which his will of separation would result, the husband again would be tearing the dowry documents etc. Divorce however wasn't often men in the primitive Romanian society. Basic cell of the production process, the Roman family could not part easily. Nearly the entire republican age, divorce was frown upon by society morale and very difficult to establish by legal order, as those who divorced without good reason would be blamed with nota censoria. After the Punic wars and more inside the Empire, once with the influx of riches brought to Rome, result of province plunder and with the rise in luxury and Hellenistic influence, social contradictions and morale decadence reflect in the family relations too. Being a social reality, the Emperor Iustinian establishing the factual situation, would settle the following categories of divorce : a. Divorce through mutual consent (communiconsensu) which would be allowed limitless; b. Divorce through a fact that could not be attributed to the other spouse is allowed; c. divorce determined by the fault of one of the spouses (as in adultery) is allowed, but there would be a punishment for the guilty spouse; d. Any other form of divorce is declared illicit (sine iustacausa) and punished, but with all punishment towards the spouse that would divorce without given reason, the marriage would still be dissolved.
Hanga,V- Drept roman, Ed. A 8-a, Editura Argonaut, Cluj-Napoca, 1999, p. 131-132

Romanian Civil Code, following the French model, regulated divorce for specified reasons (adultery, excesses and cruelties, insult, attempt on the life of a spouse) and divorce by mutual consent[2].

Over time, restriction and prohibition of divorce and separation would consecrate entire periods in which families were required to continue to exist even if the actual conditions would make it impossible in the normal environment, the society, though, in time, would reinclude divorce in civil proceedings.

It should be noted that while in Romania divorce is allowed under certain conditions, in other countries it is banned, not provided or very difficult to achieve.

1. DIVORCE LEGISLATION IN THE CURRENT CIVIL CODE AND AMENDMENTS TO THE DRAFT CIVIL CODE

The current Family Code presents divorce summary. Thus, Art. 37 states "Marriage dissolution can be attained by divorce", and Art. 38 completes: "The court may dispose marriage dissolution through divorce when, due to thorough reason, relations between spouses are seriously injured and marriage is no longer possible. Divorce can be pronounced by agreement of both spouses, if the following conditions are met : a) there has been at least a period of one year since the spouses got married, when the divorce request is made and b) there are no minor children resulted from the marriage. Either spouse can ask for a divorce when the actual state of personal health makes the marriage impossible to continue."

From the content of legal provisions results that the current Code allows two ways in which marriage can be dissolved: a) by mutual agreement, thus spouses can ask that the Court decision should not be reasoned in any way and b) at the request of either spouse invoking solid ground and managing to prove that "relations between spouses are seriously injured and marriage is no longer possible".

The cited legal text limits to the phrase "solid grounds" for which one could obtain a divorce, leaving thus the Court to asses if there were actually strong enough reasons for the divorce to be justified.

Courts practice over time, accepted a large variety of reasons to be strong enough for marriage dissolution, such as: unwillingness and unduly restraint of the respondent spouse from the obligation to live together, whether, in direct relation to the facts, based on the given evidence, the Court has

[2] Hamangiu, C. , Rosetti-Bălănescu, I, Băicoianu, Al.-Tratat de drept civil roman, vol. III, Editura All, seria "Restitutio", Bucureşti, 1998, p.9

formed the belief that factual separation is final, making it impossible to resume conjugal life; physical or verbal violence acts of one spouse; infidelity; mismatches of physiological order.

Based on administrated prove and invoked, proven reason, the Court may consider fault of one or both spouses in marriage dissolution, divorce could be viewed not only as a sanction against the husband guilty of the marriage dissolution but also as a remedy regarding the spouse that is found in the impossibility to continue normal life, establishing and allocating the fault being relevant also under the terms of the effects of marriage dissolution[3].

In the cited legislation, divorce **may only be pronounced by a Court**, which either takes note of the agreement of the parties to divorce and gives a decision, but only if the cumulative condition laid down by the law are met, namely: a) there is at least one year since marriage was concluded and b) there are no minor children as a result of that marriage, or, being entrusted with the divorce application of one or both parties, considers, as a result of given evidence, if it must grant the request to one or both parties and decides divorce as exclusive fault of one spouse, or both. It should be noted, that the spouse seeking divorce **cannot invoke their own fault as reason for the marriage dissolution**. There is an objective reason exempted by law through Art. 38, such as the health status of one of the spouses which would make marriage continuation impossible, reason that can be invoked by either spouse, thus also by the one which is faulty because of its own health status making the marriage impossible to continue, but in which case we could present a divorce without "fault".

The new Civil Code absorbs in its content institutions which so far were contented separately in the Family Code, unifying thus legislation with the end purpose of legislative coherence, to which purpose introduces also marginal denominations. Legislative seat in divorce matters is to be found in the Second Book – "About family", Second Title, Chapter IV, Art. 373-404.

The new Civil Code is widely regulated with novelty either concept by doctrine and judiciary practice, either by taking over from compared law, which appear as pliable to the Romanian law system, and tends in its ensemble, to remove procedure dispositions which would delay and hold back the entire process of divorce. To be noted, in this here sense, that some of the provisions of the current Civil Procedure Code, although not having been repealed neither express nor tacit, tend to lose their practical applicability, also due to a tendency of the law practice to reduce part of the rigidity that the special procedure of divorce implies.

[3] Florian,E- Dreptul Familiei, Editura Limes, Cluj-Napoca 2003, p.166-167

Thus, although Art. 613 states that "Receiving the divorce request, formulated as described in the 1st paragraph (divorce through common consent), the Court Chief of Justice will verify if the spouses' consent is real, and set a 2 months term for the divorce to be judged in a public meeting", in common law practice, this request, regarding the 2 months term given by the Court, is not being applied since the term is much shortened.

Also, at least in what regards practice of Courts in Gorjcounty, the restrictive conditions stated by Art. 38 are attenuated and the divorce is pronounced by common consent, if there are no minor children resulted from the marriage, even when it has not been one year since marriage completion.

The new Civil Code groups the divorce reasons in Art. 373[4] leaving two of the current provisions unaltered, respectively those found under the a) and b) paragraphs, a) stating not an essence modification but a re-phrase of the original text in order to support judiciary practice, which states that divorce can be obtained through common consent, no matter if the request is made by both spouses or just one of them and accepted by the other. To be noted that in the new Civil Code, divorce can be requested only by the spouse who's health is threatening the marriage and not by the healthy spouse, if the state of health of the plaintiff makes marriage impossible to continue[5].

From the above legal text manner of wording and the topographic analysis, the following conclusion can be drawn : for the new inserted

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[4] New Civil Code states in **Art.373** – Divorce may be given :

a) Through common consent of spouses, at the request of both spouses or either one alone if the other gives consent;
b) When for very good reason, reports between the spouses are seriously injured and continuation of marriage is no longer possible;
c) At the request of any spouse, after a factual separation which lasts for at least 2 years;
d) At the request of that spouse who's health makes marriage impossible to continue.

[5] In the previous form of the final Civil Code draft, Art. 388, „d" paragraph proposed that the current disposition of the Civil Code should be kept, as : „Any of the spouses may ask for a divorce when the state of its health makes marriage impossible to continue" would be completed by Art. 396[5] which would tend to defend the spouse presenting health issues which would make continuation of marriage impossible and thus not allowing an unmotivated divorce. Also, the legal text would restrain the possibility of the healthy spouse to ask for marriage dissolution if by that there would be serious consequences for the defendant spouse which would necessitate the support of the other spouse, and, thus, to force maintaining the marriage.

reason, the code introduces, the one stated in the "c" paragraph, that which requires a factual separation, as a condition of exercitation of the divorce action, of at least two years[6], there is no more a requirement to sustain the divorce request with given reason which would denote that the relations among the two spouses would be irremediably and seriously damaged.

The legislator, thus, found a pertinent path to simplify probation in the divorce trial, parties not being forced to prove given reasons which ground the divorce request, being enough to prove, by any means, that there is a factual separation of more than 2 years.

The 2 years term is considered to be a reasonable one for any to conclude that, in fact, between the spouses that have been separated in this relatively big period of time, there have been exhausted any means of resumption of the marriage, or, in other words, the marriage, under these conditions, "has expired".

We appreciate that the Court should thoroughly analyze the factual separation, as the simple appreciation that the spouses have different domiciles, even when one works and lives abroad, is not enough to lead to the conclusion that the two are factually separated, especially if when they ended living in separate homes was a mutual decision which didn't especially mean a familial separation.

The new Civil Code states two possibilities for marriage dissolution, *when there is mutual consensus*:

A. A first option to require divorce is presented by the 347th[7], that be, *divorce through mutual consensus with the parties' agreement, judicially*[8].

[6]It should be mentioned that the first draft stated that divorce would be requested by any of the spouses after a factual separation of at least 5 years. Debates, though, proved that the 5 years term was too long and it was appreciated that a 2 year term would be more reasonable. To be noted that, even if Romanian legislator over took this divorce reason from international private law, it still shortened it a lot more than other states.Thus, **The Matrimonial Causes Act 1973 of England and Scotland** states that divorce may be required if the spouses are factually separated more than 5 years prior to the divorce request; Irish legislation also allows divorce but only after a 4 year factual separation of the spouses etc.

[7]Art.347- (1) Divorce through mutual agreement may be pronounced at any given time, regardless of the date of marriage and whether there are, or are not, minor children resulted from the marriage.

(2) Divorce through mutual agreement may not be admited if one of the spouses is under legal interdiction.

(3) The Court must verify the free consent of the spouses.

It must be mentioned that the new Civil Code over takes from the actual Civil Code the possibility to present in front of the Court to have a divorce through mutual consensus, yet it disposes of the cumulative conditions prior required which stated that marriage should have been concluded at least for one year and the condition regarding the existence of minor children as a result of that marriage, overtaking thus the course of current judicially practice.

Judiciary practice anticipates, thus, the spirit of the new Civil Code in the matter of attenuating the difficult procedure of divorce, leaving this possibility, required by the social reality, to the parties to divorce on a shorter term, when there is a mutual consensus.

The only condition imposed by the legal text newly introduced, is that of free willing consensus, clearly expressed and fresh of each spouse, as a general condition regarding the validity of a contract, another clue of the will to maintain the contractual nature of divorce.

In order for the parties to be able to express in a valid way their consent in what regards marriage dissolution, it is asked that both parties have discernment, in that sense the 347th article, paragraph 2 states :"Divorce through mutual consensus cannot be admitted if one of the spouses is under legal interdiction".

The new Civil Code brings the possibility of a divorce through a judicially procedure, but, also, through an administrative one, in front of the civil state officer or in a special procedure in front of the public notary.

B. **Divorce procedure through mutual consensus through public notary** is allowed only if there are no minor children as a result of the marriage, or adopted during the marriage. If the spouses insist to divorce, the civil state officer, or the public notary, release a divorce certificate without having to note any reference to any of the spouses' fault. It is saved, this way, the minimum of intimacy which the marriage involved, it makes the long and difficult procedure of divorce easier.

[8]In French law, divorce is not tied to any conditions, but can not be asked during the first six months of marriage. .Divorce by mutual consent can be asked after a possible suspension of the common life of at least six months. Another form of divorce by mutual consent is when the divorce request is accepted. This means that a spouse can get a divorce by proving a series of events leading to the conclusion that it is impossible to maintain the life of both spouses jointly. If the other spouse recognizes the facts before the court, the divorce is pronnounced without establishing fault. Divorce pronounced this way has the effect of a common fault divorce.

For any other reason, divorce can only be given through a trial. Even so, when there are no children as a result of the marriage, the spouses may divorce through a trial in front of a Court.

It might be indicated though that the parties would always divorce through Court decision in any case, as a Court decision has the benefit of the *res judicata*, whilst the documents of the civil state officer or notary may be appealed in the Court for different given reasons. Also, if the public notary or the civil state officer concludes that the marriage cannot be dissolute through the procedure at their disposal, that decision cannot be appealed, and spouses would have to go to Court to resolve the divorce through other given reasons.

2. PROVISIONS IN THE NEW CIVIL CODE REGARDING THE EFFECTS OF DIVORCE

2.1. Effects of divorce upon the non-property reports between spouses

Divorce is considered decided against the spouse whose sole fault was the state where marriage became impossible.

The new Civil Code, on one hand mitigates divorce proceedings and cases where it may, and shortening the time needed to obtain a divorce, on the other hand, the fault divorce is the point of gravity in the terms effects of dissolution of marriage on the spouse's guilt which unfolds marriage. So, if currently in practice, fault is not particularly important, being more a matter of pride among spouses, re asking divorce, new Civil code exclusively links fault dissolution of marriage to the husband guilty of numerous adverse effects. Art. 384 states that "the spouse against whom the divorce was given, loses the rights given by law or conventions concluded previously to the divorce with third parties. These rights are not lost in the case of common guilt or common consensus".

2.2 Effects of divorce upon the property relations between spouses

If the current Civil Code states that matrimonial regime lasts until a final decision, the new Civil Code decides that the matrimonial regime ceases on the date the application for divorce if filed or at the request of both spouses or only of one of them, the Court may state that the matrimonial regime of separation ceased after the fact.

Article 388 of the New Civil Code imposes a new obligation on the husband guilty of divorce, namely indemnify the innocent husband, who suffers an injury through the divorce.

In terms of absolute novelty brought by the modified code *compensatory allowance* which the spouse, whose sole fault of the divorce, must meet so as to compensate as much as possible, a significant imbalance that the divorce would determine the living conditions of a request, that of the complaining husband. Compensation benefit can be granted only if the marriage lasted at least 20 years.

The spouse seeking compensatory allowance cannot also ask from the former spouse alimony, under art. 389. Compensatory benefit cannot be required but at the same time with the divorce. In determining compensation benefits to take into account both the spouse requesting resources and the means of the spouse at the time of divorce, the effects it has or will have on a matrimonial settlement and any other foreseeable circumstances likely to change, such as age and health status of spouses, minor children contributing to the growth it has had and will each have a spouse, training, opportunity to pursue a revenue-producing activity and the like compensatory benefit terminated by the death of a spouse, the spouse's remarriage, creditor and when they get corrupted resources provide living conditions similar to those during the marriage.

In *American law,* where compensation has been employed benefit considerably, it is considered that the compensation benefits is a means to ensure that none of the parties has been the advantages or disadvantages depending on the services to the family during marriage.If one spouse has spent most of her life raising children or taking care of home, the spouse who received the services they must provide compensation for their efforts in that period.The advanced nature of compensation benefits have been several interpretations.Some authors have considered it a continuation of the provision and maintenance after divorce. Other authors see it as a "compensation" or a "penalty" resulting from the marriage contract broken, while others believe that it is a pension or the cost of this fracture. Judicial practice, however, that the stability criterion for the award of such compensation is one of need spouses and the ability to pay the other.[9]

3. DIVORCE IN COMPARATIVE LAW

In Austrian law[10] the Code is strongly influenced by the Catholic religion, divorce being pronounced by the civil courts, but in accordance

[9]Translation by Furtună, C. – Dreptul Statelor Unite ale Americii, Editura Scrisul Românesc, Craiova 1999, p. 174-175.

[10] Through the Imperial Patent of June 1811, Francis II, Emperor of Austria, King of Hungary and Bohemia, the General Civil Code was introduced on 1 January 1812, applying

with religious views bases.Civil marriage is compulsory. Marriage is dissolved only by law given reason, husband is the principle of culpability, which attracts liability for innocent spouse in need.
Although original, ***Civil Code*** was largely a French version of the code.It differed from the French Civil Code particularly in relation to marriage, civil marriage and devote only did not allow divorce, an issue that has long been negotiated with the Vatican. The Agreement Latran of 11 February 1929, revised on 18 February 1984 , Italian State agreed to allow the marriage in accordance with the conditions as Catholics, which implies rejection of divorce. On 1 December 1970, based on a referendum in which 59% of participants approved, the Law Fortuna-Bastini divorce law was introduced in Italy.

In ***England and Wales,*** **The Matrimonial Causes Act 1973 "provides only" breakdown of marriage "(marriage** break) can lead to divorce.This is done not only irretrievable breakdown in the case of **adultery** or the **abnormal behavior of a spouse** who is also impossible cohabitation. Also, divorce may be pronounced if one spouse abandons the other spouse is a period of at least two years prior to action to promote or de facto spouses are separated by more than 5 years prior to promotion action. No divorce application can be submitted sooner than one year period had the marriage.
Divorce is regulated in **Scotland by "Divorce Act of 1976"** which takes broadly the English text of 1973.
A particular situation exists in ***Ireland*** was also in that Irish law did not recognize the institution of divorce.By itself this state Constitution to ban this procedure provide care in that state would take action to protect the institution of marriage with special care the family is founded and thus protect it against attack.Then no special law could not foresee this procedure.However, Irish law recognizes divorce pronounced by a court but as far as the foreign one spouse has resided in a country where divorce was granted.

The conditions for the recognition of divorce pronounced by a court in a foreign country to Ireland are in a **1986** document **titled "Foreign Domicile and Recognition of divorces Act.**

This state of things was interrupted as a result of a **referendum of 24 November 1995 and which resulted in Irish law recognizes divorce procedure itself,** but only after **a period of de facto separation between the spouses for at least 4 years.**

it in Austria without interruption until 1938, when was obsolete. Upon release of Austria, Civil Code was brought back into force and, with some modifications, applies today..

In the ***United States of America law,*** the current trend is to eliminate the fault divorces for no fault divorces. Some states have already rejected the need to obtain a fault divorce, but they still retain the right to determine compensation benefits. Reasons that may constitute grounds for abandonment or desertion of the compensatory benefits. In 1969, California rejected the need divorce. Following the fault in cases of this example, both the District of Columbia and other states have adopted new procedures for granting divorce, such as incompatibility of temperaments, "irreconcilable differences" or separation for a certain period of time.[11]

4. LEGAL SEPARATION – DIVORCE. BOUNDARIES OF THE CONCEPT

Another notion, that divorce is delimited from, is the legal separation,which is considered a legal institution by those laws that prohibit or severely limited divorce[12], ensuring the relaxation of the family relationship under judicial review.

Absent in our legal language, legal separation was defined as a legal institution, under which court or tribunal, at the request of either spouse or their joint request, suspend the obligation of cohabitation..

The difference between divorce and legal separation is that divorce ends the marriage *(quoad divortium vinculuum),* while legal separation **maintains marriage with all the rights and duties of spouses,** less the requirement for cohabitation.
Intermediate situation between marriage and divorce, legal separation was well captured by the French legislature in art.299 Code Civil, which states that " legal separation do not ends the marriage, but only causes termination of the obligation of cohabitation between the spouses. "Art .304 Civil Code states that the consequences of legal separation are subject to the same rules as for divorce.

Also known as the "antechamber of divorce" legal separation is that, if the spouses do not mix, can occur after a certain time, converting separation to divorce.But legal separation can convert not only in divorce, but also in

[11]Translation by C. Furtună – Op. Cit. 1999, p. 174-175

[12]For a long time, legal separation was "Catholic divorce" because marriage was considered indissoluble by the Church. In American law, legal separation is rooted as an institution. For a business difference between divorce and legal separation should be noted that there continues privilegies of marriage during legal separation, although some economic effects, such as managing common-property ceases.

the resumption of conjugal life. The essence of conversion is just the agreement of the spouses that they will continue the family relations.

Swiss states that, according to the interests of spouses, the court upon request shall, where applicable, dissolution of marriage or legal separation .It is noted that the legislature, referring to the divorce proceedings, states every time "or legal separation."The conclusion resulting from this circumstance is that the provisions apply to divorce and legal separation settlement demand, the only difference being that shown at the beginning of the section, namely that "legal separation" does not eliminate the marriage.

If the action leads only to a legal separation divorce is impossible, however, if the action leads todivorcecan be given legal separation if the judge believes it would be possible reconciliation .

According to art.147 **" a legal separationis pronounced on a period of three years or an indeterminate time".** Although the legislature did not use only the phrase "indefinite time" means that it is a time to be fit in three years.

After the expiry of separation ceases completely and, if conciliation did not intervene, a party may request a divorce.Also, you can get a divorce and legal separation when, given an indefinite period, lasted three years and did not intervenereconciliation.

In accordance with the principle of *"nemo auditor propriam turpitudinem "* divorce must be pronounced upon expiry legal separation, if not reconciliation occurred, unless the facts justifying the charge separation is exclusively the husband applicant.Even in this latter case, the divorce will be pronounced if the respondent spouse refuses to resume life in common (148).

However, there are *similarities between divorce and legal separation.*

Both the legal separation and divorce involve a number of consequences.Thus, these consequences, patrimonial regime is generally closed.Parties lose rights and benefits resulting from marriageIt also put an end to mutual succession. If, after the separation, the parties are reconciled, the effects of marriage are still valid.

CONCLUSIONS

The new Civil Code has chosen to regulate the institution of divorce under the laws in force in other countries, as a source of comparison with the French Civil Code, Swiss, Italian, German and Brazilian Civil Code of Quebec and a number of EU directives and jurisprudence as the trend internal.

Although for the most part, it took the legal provisions applicable laws mentioned divorce, it has not taken the concept of legal separation, considering that is a foreign tradition for the Romanian social reality.

We believe that this institution is one that has very interesting aspects and will be assessing the future if domestic doctrine requires its domestic regulation, and that if it could find a practical application in our country.

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LAWFARE: THE USE OF THE LAW AS A WEAPON OF WAR

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ABSTRACT

Undoubtedly, terrorism represents a current, challenging and dynamic phenomenon and issue of our times. Terrorist are constantly engaged in a learning process, not only preparing new and more dangerous tactics and approaches, but also working to understand the counter-measures designed against them.

By anticipating such meaures, terrorists are able to surprise their enemies time after time. It is thus the responsability of experts from every branch and discipline of the field – academia, law enforcement, intelligence community, military and diplomatic circles – to be at least as innovative as the forces they seek to defeat.

One of the last complementary tactic to terrorism and asymmetric warfare is the wrongful manipulation of the law and legal systems in order to achieve strategic political or military ends. As a legal concept, terrorism strikes not only at the political power of states or at the safety of individual citizens, but at the law's own stability as law.

KEYWORDS

Concept of lawfare, the islamist mouvment, UN Resolution7/19

THE CONCEPT OF LAWFARE

The intersection of globalization and the emergence of international law has resulted in a variant of warfare described by some as lawfare. Therefore, lawfare[1] is a form of assymetric warfare, one of several alternative war-making concepts of the 21st century. As a legal concept,

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[1] Although not a new phenomenon, *lawfare* was brought to the attention of the modern world in an essay by Major General Charles Dunlap of the U.S. army - the use of the law as a weapon of war. The definition has since been expanded to include the wrongful manipulation of the legal system to achieve strategic political or military ends. http://www.thelawfareproject.org/141

lawfare denotes the use of the law as a weapon of war, or more specifically, the abuse of the law and legal systems for strategic political or military ends.[2]

Case examples of lawfare are extensive and range from predatory defamation and "hate speech" lawsuits filed against those who speak publicly about terrorism and terror-financing, to Al Qaeda manuals that instruct captured militants to file false claims of torture so as to reposition themselves as victims in the eyes of the law and media. Lawfare includes attempts by terrorist entities to achieve legitimacy by hiring lawyers and instituting "human rights" litigation abroad. It can be seen in the coordinated efforts at the United Nations to exclude attacks on civilians of states labeled "occupying powers" from any international definition of the crime of terrorism. Lawfare actions work to shift legal accountability for the murder of civilians killed as human shields from the terrorists that hide behind them to the soldiers that fight terrorism.

Principles of lawfare can be seen in initiatives that advocate asymmetries, both legal and moral, between terrorist methods and the West's response to terrorism. Lawfare is evident when principles of universal jurisdiction are abused for political purposes and applied to deny states their international due process and equality before the law. The doctrine of lawfare is also evidenced by the overall lack of legal accountability demanded of non-democratic states that, amongst other things, recruit their own children as suicide-homicide bombers and child soldiers.

Lawfare techniques include frivolous and predatory libel and "hate speech" lawsuits brought against authors, politicians, members of the media, and even cartoonists who are brave enough to broach issues of national security and public concern. The cumulative effect of these lawsuits is a culture of fear and a detrimental chilling effect on the speech and opinions of the very people who are supposed to be protecting us.

Lawfare is evident in the deliberate misapplication of human rights language and legal terminology, such as the misuse of the terms apartheid and genocide, so as to dilute their meaning and feed the inability to engage in any type of genuine dialogue about real instances of human right violations. The very existence of

[2] The Lawfare Project, http://www.thelawfareproject.org/

lawfare calls into question universal jurisdictions laws as they are being used to effect "war crimes" prosecutions against democratically elected officials[3].

When little to no legal accountability is demanded of Hezbollah and it's agents remains free to cross European borders, while at the same time Israel's foreign minister Tzipi Livni is threatened with arrest in England (an arrest warrant was granted at the request of Palestinian plaintiffs under the principle of universal jurisdiction, for war crimes allegedly committed during the Gaza assault of 2009), we have a problem, one that evidences bias in the application of the law and a disregard for the concept of equality before the law.

There is no doubt that legal decisions, both at home and abroad, influence the methods we use to fight terrorism and affect our ability to win the war of ideas. Requiring highly restrictive rules of engagement in battle and overly protective legal procedures during the custodial period has systemic effects, both positive and negative, on the millitary's entire approach to war.

Yet, how do we distinguish constructive legal battles and that which is counter-productive lawfare? The question is not who the target is, but what is the intention behind the legal action – is it to pursue justice or to undermine the very system being manipulated?

Lawfare as it is used (via the Western legal system, nationally and internationally) aims to exploit the legal system for three strategic purposes:

- to thwart free speech on issues of national security and public concern
- to delegitimize and diminish the sovereignty of democratic states
- to inhibit the right and ability of democracies to defend themselves against terrorism.

Traditionally, lawfare tactics have been used to obtain moral advantages over the enemy in the court of public opinion, and to intimidate heads of state from acting out of fear of prosecution for war crimes[4].

Yet, lawfare has moved beyond gaining mere moral advantages over nation-states and winning lawsuits against government actors. Over the

[3] Terrorism's Global Impact, WSCT, http://www.ict.org.il/ResearchPublications/tabid/64/Default.aspx

[4] Israeli Minister Avi Dichter cancelled a trip to Britain after being threatened with arrest over a 2002incident. David Byers, '*War Crimes' Israeli Minister Cancels UK Trip*, TIMES ONLINE, Dec. 6, 2007 ,http://www.timesonline.co.uk/tol/news/uk/article3012503.ece

pastten years, we have seen a steady increase in Islamist lawfare tactics directly targeting the human rights of North American and European civilians in order to constrain the free flow of public information about radical Islam.

THE ISLAMIST MOVEMENT

The Islamist movement is that which seeks to impose tenets of Islam, and specifically Shari'a[5], as a legal, political, religious and judicial authority both in Muslim states and in the West. It is generally composed of two wings - that which operates violently, propagating suicide-homicide bombing and other terrorist activities, and that which operates lawfully, conducting a "soft jihad" within our media, government and court systems, through Shari'a banking and within our school systems.

Both the violent and the lawful arms of the Islamist movement can and do work apart, but often, their work re-enforces each other's. For example, one tenet of Shari'a law is to punish those who criticize Islam and to silence speech considered blasphemous of its prophet Mohammad. While the violent arm of the Islamist movement attempts to silence speech by burning cars when Danish cartoons of Mohammed are published, by murdering film directors such as Theo Van Gogh and by forcing thinkers such as Wafa Sultan into hiding out of fear for her life, the lawful arm is skillfully maneuvering within Western court systems, hiring lawyers and suing to silence its critics.

LAWFARE IN EUROPE (AND CANADA)

Islamist lawfare is achieving a high degree of success in Europe and Canada because their judicial systems and laws do not afford their citizens the level of free speech protection granted under the U.S. Constitution. With their "hate speech" legislation, liberal libel laws and virtual codification of "Islamophobia" as a cause of action, European and Canadian legislatures have laid down what could be called the ideal framework for litigious Islamists to achieve their goals. In February of 2006, the European Union and former UN Secretary General Kofi Annan issued a joint statement with the Organization of the Islamic Conference, in which they recognized the need "to show sensitivity" in treating issues of special significance for the adherents of any particular religion, "even by those who do not share the

[5] Shari'a is the sacred law of Islam. Muslims believe Sharia is derived from two primary Sources of Islamic law; namely, the divine revelations set forth in the Qur'an, and the sayings and example set by the Islamic Prophet Muhammad in the Sunnah.

belief in question."[6] In June of 2006, the Council of Europe hosted a "Programme of the Hearing on European Muslim Communities confronted with Extremism," for which a 'Point of View on the Situation of Europe' was presented by none other thanTariq Ramada[7].
Based on a draft resolution and the proceedings of June 2006, the Council of Europe recently released Resolution 1605, asserting widespread 'Islamophobia' and calling all member nations to "condemn and combat Islamophobia."[8]

On May 13, 2008, Dutch police actually arrested a cartoonist using the pseudonym Gregorious Nekschot, "for the criminal offense of "publishing cartoons which are discriminating for Muslims and people with dark skin."[9] After Italian Minister Roberto Calderoli publicly wore a T-shirt depicting Mohammad, he was forced to resign. Upon his re-nomination to Prime Minister Berlusconi's reformed government, thinly veiled threats of "catastrophic consequences" emerging from Libya forced Calderoli to issue a full public apology for his wardrobe1 At the time of her death in 2006, noted Italian author Orianna Fallaci was being sued in Italy,France, Switzerland, and other jurisdictions by groups dedicated topreventing the dissemination of her work.[10]

Because of their libel laws, United Kingdom courts are particularlyfriendly jurisdictions for Islamists who want to restrict the dissemination ofmaterial drawing attention to radical Islam and terror financing.[11]

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[6] Press Release, Secretary General, Joint U.N., European Union, Islamic Conference Statement Shares'Anguish' of Muslim World at Mohammed Caricatures, but Condemns Violent Response, U.N. Doc.SG/2105 (July 2, 2006), *available at* http://www.un.org/News/Press/docs/2006/sg2105.doc.htm

[7] Tariq Ramadan is a Muslim Swiss academic.

[8] Eur. Parl. Ass'n, *European Muslim Communities Confronted with Extremism,* 13th Sess., Doc. No. 1605(2008), http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1605.htm

[9] Thomas Landen, *Dutch Police Arrests Cartoonist*, BRUSSELS J., Mar. 16, 2008, *available at*http://www.brusselsjournal.com/node/3257

[10] The Milli Gazette, *Swiss Muslims File Suit Over "Racist" Fallaci Book* ,http://www.milligazette.com/Archives/01072002/0107200263.htm

[11] Where, in the United States, with our First Amendment rights to free speech, libel plaintiffs not onlyhave the burden to prove that the speech in question is false and defamatory, but where matters of publicconcern are at issue, the libel Plaintiff must also show that the speech was published with a recklessdisregard for the truth. In England, on the other hand, the burden is in exactly the opposite direction: theoffending speech is presumed to be false, and it is up to the defendant to prove that it is in fact true. Whileon the surface the difference may seem trite, UK libel jurisprudence, in direct contrast to US

The most frightening predicament of all is that of Dutch politician, filmmaker and outspoken critic of radical Islam**,** Geert Wilders. After releasing a ten-minute self-produced film entitled "Fitna"[12], Wilders has found himself wound up in a litany of "hate speech" litigation. One such suit wasfiled by a radical Imam featured in the film, who is demanding 55,000 Eurosin compensation for his hurt feelings. Ironically, the film's narrative is primarily comprised of quotes from the Koran and scenes of an Imam preaching death to Infidels. Meanwhile, the Dutch organization "Day of Respect Foundation" issued a booklet for a state-sponsored educational "Day of Respect" that likened Wilders to Hitler. The booklet, which was aimed at school-childrenaged ten to twelve years, was amended to include an inserted page that was not defamatory of Wilders after the Freedom Party successfully argued the matter before Parliament, forcing under-Minister Sharon Dijksma to issue the change.

More disturbing however, is the fact that the State of Jordan, most likely acting as a stalking house for the Organization of the Islamic Conference (OIC), has issued an extradition request for Wilders' to stand in Jordan for blasphemy of Islam, a crime for which Shari'a law declares the penalty to be death**.** If Jordan succeeds in extraditing a democratically elected official to stand trial in a non-democratic country for speech made in the scope of his duties while educating his constituents vis-à-vis their national security, all under the guise of blasphemy of Islam, what kind of precedent would be set?

In January 2009, Wilders was invited by a member of the U.K.House of Lords to privately screen his film Fitna. In response, Pakistani-bornLord Nazir Ahmed declared that he would gather 10,000 British Muslims tophysically block Wilders' entry, after which the invitation was rescinded. Undaunted, in February of 2009, Lord Malcolm Pearson re-invited Wildersto screen Fitna for the United Kingdom Parliament. In response, the U.K.'s Home Office declared him persona non grata on the absurd ground that he represented "a threat to public security and public harmony," and refused him entry when he arrived at Heathrow

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law and dueprocess considerations, effectively operates to declare Defendants guilty before proven innocent and UKcourts have become a magnet for libel suits that would otherwise fail miserably in the US. And so heavy isthe burden of proof put on the defendant that the mere threat of suit in a UK court is enough to intimidatepublishers into silence, regardless of the merit of their author's works.

[12] FITNA (Geert Wilders 2008), *available at* http://www.nmatv.com/video/1132/Fitna

airport[13]. In marked contrast, the U.K. did permit entry to Ibrahim Moussawi, an official of the terrorist organization Hezbollah.

THE INTERNATIONAL SCENE

National lawfare efforts are being complemented with similar International efforts to outlaw blasphemy of Islam as a crime against humanity. Islamist organizations such as the Muslim World League are calling for the establishment of an independent commission to take action against parties who defame their Prophet Mohammed. At the Dakar summit, taking legal action against parties who slander Islam was a key issue debated at length, with the final communiqué adopted by the Organization of the Islamic Conference (OIC) denouncing the "rise in intolerance and discrimination against Muslim minorities, which constitute[s] and affront to human dignity."[14] In May 2007, the Islamic Conference of Foreign Ministers at its thirty-fourth session in Islamabad, condemned the "growing trend ofIslamophobia" and emphasized the need to take effective measures to combat defamation.

Most recently, Muslim states and organizations have successfully lobbied the United Nations' Human Rights Commission to enact Resolution7/19[15].. The Resolution makes reference to the Durban Declaration, and expresses the intent "to complement legal strategies" aimed at criminalizing the defamation of religion. The Resolution "urges States to provide, within their respective legal and constitutional systems, adequate protections against acts of…discrimination," and prohibits "the dissemination of racist and xenophobicideas."[16] Note that it is *ideas* that are prevented here. Not published words butd efamatory *thoughts* against Islam. Resolution 7/19 further expresses its "deep concern at the attempts to identify Islam with terrorism, violence and human rights violations….". What are the chances that this provision will be applied to those who behead journalists in the name of Islam, or to Palestinian terrorist groups that call themselves "Islamic Jihad"? To add insult to injury, signatories to the Resolution take the opportunity to "[*e*]*mphasize* (emphasis not added) that everyone has the right to freedom of expression" but that this freedom may

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[13] Posting of Thomas Landon, Will Geert Wilders be Arrested at Heathrow? http://www.brusselsjournal.com/node/3793

[14] Brooke Goldstein, Abdul Ghafur, *MWL Wants Lawsuits for the Abuse of Islam and the Prophet*,ARAB NEWS, Dec. 28, 2006, http://www.arabnews.com/?page=4§ion=0&article=77639&d=28&m=12&y=2006

[15] H.R.C. Res. 7/19, U.N. Doc. A/RES/7/19

[16] I*dem.*

"be subject to certain restrictions" while stipulating that "the prohibition of the dissemination of *ideas* based on racial superiority or hatred is compatible with the freedom of opinion and expression…."[17] Signatories to U.N. Human Rights Council Resolution 7/19 include China, Egypt, Indonesia, Jordan, Malaysia, Nigeria,Pakistan, Philippines, Qatar, the Russian Federation, Saudi Arabia and SriLanka, amongst others. Resolution 7/19 looks like an initial attempt to establish a body of international law to be used in the future against heads of state who speak out against radical Islam as a threat to national security. Hence, instead of Muslim states unilaterally seeking the extradition of a Geert Wilders – or perhaps, a Donald Rumsfeld – Islamists can now employ UN mechanisms to force politicians to abide by a standard of "sensitivity" to Islam defined solely by Islamists themselves. The European Center for Law and Justice, a not for profit public interest law firm submitted an engaging report to the UN High Commissioner arguing, correctly, that freedom of religion does not entail *carte blanche* freedom to practice your religion absent criticism.[18]

In fact, Resolution 7/19 is itself a violation of international law undermining the inalienable human right to free speech, especially on matters of important public concern such as religion and national security.

The war against Islamism is as much a war of ideas as it is a physical battle, and therefore the dissemination of information in the free world is paramount. The manipulation of Western court systems, the use of Western "hate speech laws" and other products of political correctness to destroy the very principles that democracies stand for, must be countered. Unfortunately, Islamist lawfare is beginning to limit and control public discussion of Islam, particularly as it pertains to comprehending the threat posed by Islamic terrorist entities. As such, the Islamist lawfare challenge presents a direct and real threat not only to our constitutional rights, but also to our national security.

Freedom of expression is the cornerstone of democratic liberty - it is a freedom that Western civilizations have over time paid for with blood. We must not give it up so easily.

[17] *Idem.*

[18] Brooke Goldstein, *'Legal Jihad': How Islamist Lawfare is Stifling Western Free Speech on RadicalIslam*, THE HENRY JACKSON SOCIETY, Nov. 25, 2008, *available at* http://www.henryjacksonsociety.org/

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TRANSFER IN THE LABOR CODE THEORETICAL STUDY

Ion PĂDUCEL[*]

ABSTRACT

In this theme is proposed the need to regulate the transfer, at the request of the employee or the interests of the service, the provisions of the Labor Code, the definitive way to change the individual employment contract.

It was found that, although not covered in the incident in general law, it can be used today, under the principle that everything not prohibited by law is legally allowed and in the private sector.

He noted the author's opinion about the attitude of the legislature to such omissions, since some laws or special laws expressly enshrines it even after developing and implementing the Labor Code as amended and supplemented subsequently.

KEYWORDS

Individual employment contract, collective labor agreement, legal institution, the transposition of legislation, the Community Directive.

Labor Code of 1972 (approved by Law nr.10/1972) regulating by article 69, transfer of employees in the interest of unity or employee as a tripartite agreement between the two units and employee.

Under the old rules transfer (in the interest of the service or at the request of the employee) was a definitive change of the individual employment contract that an employer is replaced with another employer (who is subrogated to the first) the final assignment of this contract. Via transfer of employment, the employee became subrogated to hire the unit that he is directly subordinated to the legal relationship of employment.

The current Labor Code (approved by Law nr.53/2003) amended and supplemented subsequently, there is no institution governing the transfer or on demand, either in their work, the definitive way to change the individual

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employment contract. Evasion of regulation of transfer (at the request of the employee or the employer) on the current labor laws had some controversy in doctrine. In an opinion [1] is the view that the legislation has not regulated the transfer, as generally, the rules of common law given the specific market economy and the reality that the resignation, followed by employment at another employer, this does not result in any negative effect on individual employee. The same author believes that nothing precludes the transfer to be made to all employees, except those subject to special laws, where the transfer is expressly stipulated only for civil servants.

In formulating this view, not clear whether, in the silence Labor Code, transfer of employees is or is not legally possible, and any proposal to include transfer in the Code.

In the literature [2] and expressed the view that the transfer as a way to change the work site employee can not work, the only possibility is the individual employment contract has been terminated by the Parties under Article 55 point b) of the Labor Code and establish a new individual contract of employment with another employer.

Another opinion [3] argue that a transfer is evasion of regulation or the application or in the interest of the service, the definitive way to change the individual employment contract, seems a legislative gap with regard to its practical usefulness in many instances proven and the fact that this transfer is expressly provided for by special laws for several occupational categories.

The transfer is possible and used in practice by the private sector of employers. In the sector transfer is particularly useful, given the coordination relationships between certain employers. Some companies are subsidiaries with legal personality of others.

If the current Labor Code as amended and supplemented not cover the transfer - the possibility of amending the individual employment contract (unless the delegation and deployment), does not mean, in general, and the prohibition of all overall basis, since in a state of law based a market economy, everything not expressly prohibited is legally permitted.

So even if the general law ignores this incident in legal institution, the view that the transfer of employees (at the request or the interests of the service) is legally possible, but fulfilled two conditions: to have the express consent of the parties involved (is, the employer assignor, the assignee employer and employee) on the strict provisions of Article 38 of the Labor Code under which "employees can not waive their rights recognized by law.

Any transaction which seeks waiver of rights recognized by law, employees or limiting such rights is invalid.

Respecting these two conditions would include the principle of the liberty work (referred to in Article 41 paragraph (1) of the Constitution and in article 3 of the Labor Code) and contractual freedom which can be limited only by law. Freedom of contract should be based on the express agreement of the parties, and if the transfer is corroborated by the scope of article 38 of the Labor Code.

In case of transfer within article 38 of the Labor Code is drawn ”ipso jure”, since this transfer constitutes a transfer of existing individual employment contract requires ”eo ipso”, to continue the legal relationship in question and the mandatory rules of article38 of the Labor Code still find application.

Need to regulate the transfer and usefulness of, resulting even in the provisions of article 169-170 of the Labor Code and the provisions of law relating to transfer nr.67/2006 enterprise, unit or parts thereof [4] to another employer. Since the content of these provisions that the transferor's rights and obligations arising from a contract or employment relationship existing on the date of transfer will be fully transferred to the transferee.

Therefore, such a transfer may provide grounds for individual or collective dismissal of employees of the transferor or the transferee.

Clarified that the provisions of Law nr.67/2006 (article169-170din as the Labor Code) are in line with Directive nr.2001/123/CE Council of March 12, 2006 on the approximation of laws of member states relating to the safeguarding of workers in case of transfer business, unit or parts thereof [5]. According to the Directive, can transfer on business, a part of it, part of the undertaking or part of the constituent units, following a legal transfer or merger and transfer this Act shall be considered by the economic entity retains its identity with a group organized by means to carry out an economic activity, which may be essential or ancillary.

According to article 4 letter d) of the Act nr.67/2006, 'transfer' means the passing of ownership of the transferor (the person who loses the employer to employees undertaking or parts thereof which are transferred, is former employer) with the transferee (the person who, symmetrically, becomes the employer to the same persons, is the new employer) to a new company, or parts thereof, intended to further the main and secondary activity, whether intended or not a profit.

So, even if such transfer meets a triangular relationship involving: assignee, assignor and the employee, where by the explicit expression of

this party has held the transfer of employees based on their tripartite agreement.

We noted that the transfer institution, although not covered by the Labor Code, is regulated specifically in the content of specific laws. These are: article Nr.188/1999 on 90 of the Law of the officials, as amended thereafter, article 10 of Law 128/1997 on the Status of teachers, article60 of the Law on the Status of Judges and Prosecutors nr.303/2004, Article 43 and article 44 of Law 123/2006 on the Staff of the Probation Department, Article 46 and Article 47 of Law 360/2002 on the Statute of the policeman, article 56 of Law no. 7 / 2006 on the status of civil servants parliamentary Law 435/2006 on wages and other rights of staff working in the veterinary system. For example, Article 90. (6) of Law no. 188/1999 on the status of civil servants, as amended by Government Emergency Ordinance nr.105/2009 [6] states "If public officials governing the transfer of public functions can be performed on the same level of management or, where appropriate lower level, whose conditions of employment and work experience needed for employment are similar to the function of the means of transfer, subject to the provisions of paragraph (2), (4) and (5). Authorities or public institutions among which is transferred are required to check that the conditions of similarity of conditions of employment and professional experience, Article 43 and Article 44 of Law no. 123/2006 [9] points out that if the probation service staff, the transfer is approved, the request for probation or services concerned, the Minister of Justice, the Director of Specialized proposal. The transfer is a function equivalent to his position, for which specific conditions in the job description. For the transfer is ordered, it should be cumulative: the consent or request of, the opinions of heads of the two probation services involved, to be Director of specialist opinion, according to article60 of Law. 303/2004 on the Status of Judges and Prosecutors [10], transferred from a magistrates' court to another, or from one floor to another or from one public institution to approve the request of those concerned, the Superior Council of Magistracy, article 28 paragraph (2) of Law no. 435/2006 states that persons who transfer to other veterinary institution situated in a location other than the home if the individual employment contract was made that statement. These provisions apply to both employees and budget officials from the scheme. And in this case a transfer occurs, a change of employer, since there are two health institutions - different localities veterinary legally distinct.

As such, if the legal institution of the transfer is specifically provided in the provisions of special laws implemented after the date of

entry into force of this convention Labor Code, is the more necessary to regulate the law from labor law. It is a flagrant violation of the principle of equality and discrimination in the employment relationship within the meaning of article 16, paragraph (1) of the Constitution and the Government Ordinance 137/2000 on preventing and sanctioning all forms of discrimination. We indicated the provisions of Council Directive 2000/43/EC on the principle of equal treatment between persons irrespective of racial or ethnic origin [10] and the provisions of Council Directive 2000/78 / EC establishing a general framework for equal treatment as regards employment and employment [11].

By removing this omission, we consider that the transfer (at the request of the employee or employer) can be stipulated in the collective labor across national single (to be negotiated in 2010) or at branch level, group of units or even in the business, provided that by such stipulations are not in material breach basic principles of collective agreements provided. And Article 238 of the Labor Code article 8 of Law no. 130/1996 (republished in 1998) on collective labor agreement.

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PARTICULARITIES OF CONTRAVENTIONS AGAINST OTHER FORMS OF LEGAL LIABILITY

Mihai Raul SECULA[*]

ABSTRACT

Social responsibility has different manifestations: moral responsibility, religious, political, cultural, legal. Although the traditional concept of responsibility was placed on an absolute moral ground, newer research highlight the need for shaping the concept and the right plan. A reductionist thinking (consisting mainly to reduce the rights of criminal law, only by understanding its role in a protective enforcement) has long held that law would not be characteristic only category of liability. Law could not act until after the deed was committed dangerous. Now addressing the notion of responsibility, we cannot return to the idea that, for liability functioning as specific institution law, can be linked to overall goals of the legal system, we need to have faith that the law – the law right, fair law – can create the mood, the consciousness of its recipients, a sense of responsibility.

Contravention, as distinct from illegal and the only basis of liability offences, are individualized to other illegal acts through its general features stemming from the legal definition and regulatory features of the object. Important distinguishing criteria and procedure are penalty system detection and sanctioning violations, which differs from the procedure applicable to prosecute other illegal acts.

KEYWORDS

Human behaviour, social responsibility, legal liability, contraventional and criminal offences

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CHAPTER 1. LEGAL LIABILITY - GENERAL CHARACTERIZATION

Human behaviour has a diverse range of shows but, despite the complexity of his behaviour, the man is related to some principles, norms, values within the limits of what he considers to be good-bad, allowed-forbidden, right-wrong, lawful-unlawful .

In determining individual choice for the conduct (of all possible) formation mechanism is called its social responsibility. This is due to its ability to choose a rational behaviour, knowledge, or should know that the act falls or not within the generally accepted principles, and will have to bear negative consequences for his conduct.

One of the fundamental principles of law is that of accountability.

Although traditionally, the concept of moral responsibility was claimed by science right to take over the creative features of this concept, adapting it to specific objects or research.

Legal rules have the ability to shape the conduct and behaviour, directing them to the ideals that society has set.

Human behaviour may conform to the prescribed legal standard as we conduct lawful, legal, or be contrary to the established legal rules, the subject of law in this case, unlawful conduct.

Complex regulatory process, the legislature has in mind every time, and may breach, legal rules by citizens.

Those who violate legal rules affect the rule of law, affect the rights and legitimate interests of other citizens, sometimes serious trouble, public order, threatening the important values of society.

Law is created by people and its main mission is to meet human needs. Conduct each of us is in relation to existing social conscience at a time in society. Each company has its level of values, behaviour reporting members of society. Pascal said that "man is a cane, but a thinking reed", and Kant, referring to all humans, show that "it is only being able to act with full moral responsibility for their actions." Man is thus a responsible human being, who has represented his actions. Responsibility is a social phenomenon closely linked to freedom, human possibility to decide in any situation where they are. Only a free man is a responsible man, who only had the opportunity to act unhampered indicating its willingness to be measured and desired guilty, punished, whether perpetrated by what the company violated ethics rules and laws of the country.

For these reasons, right, as a social phenomenon, associated state (the political organization of society), through all the legal rules it contains, has the purpose, to establish a particular behaviour, based on logic, reason stemming from an interest society generally.

As a social being and intrinsic part of society, man, living in society cannot ignore the social values agreed or acquiescence in its general and individual interests of other members of society. Yet, violations of these commands or social needs are a challenge to other members of society and as such may react against the company concerned.

The reaction of society against the individual to determine the behaviour to conform to the interests of society is to be subject to liability at issue. The company sees its values and interests affected and in these situations will take measures to restore normality by law enforcement. This is equal to the legality of normality established by legal rules.

Social responsibility has different manifestations: moral responsibility, religious, political, cultural, legal. Although the traditional concept of responsibility was placed on an absolute moral ground, newer research highlight the need for shaping the concept and the right plan. A reductionist thinking (consisting mainly to reduce the rights of criminal law, only by understanding its role in a protective enforcement) has long held that law would not be characteristic only category of liability. Law could not act until after the deed was committed dangerous. Now addressing the notion of responsibility, we cannot return to the idea that, for liability functioning as specific institution law, can be linked to overall goals of the legal system, we need to have faith that the law - the law right, fair law - can create the mood, the consciousness of its recipients, a sense of responsibility.

Regulating social relations by rules of law, the legislature has carefully considered the conditions under which the rule can and must achieve the ability to shape conduct rule, driving them on a path deemed socially useful. At the same time the legislature has carefully whenever possible rule violations by non-compliant behaviour. Those who break the rules cannot be right than men, and their unlawful conduct carried on in a given social framework, known manifestations are multiple and complex reasons. By the act, who violate legal rules affect the rule of law, good and disturbs the normal conduct of social relations, affect rights and legitimate interests of his fellow men, coexist endanger liberties and social balance. For these reasons it must respond. Trigger liability and setting concrete forms of liability are, always, to forums special skill (with legal jurisdiction

in this area). And extent of liability under this outage is law. Liability is always legal, no one can be self-righteous, no one can be judge in his own case. Liability is in this light, the normative order. Agent perceives and feels the rules, as rules imposed on the expression of that society imposes requirements on the subject. Responsibility to preserve order relations system. Liability arising from a penalty which the legislature provides the content rule. Liability and penalty appear as two sides of the same social mechanism. Penalty, as an essential condition of existence in society, must surrender their faith shaken by anti-social act.

"Did you - ask Socrates - it is possible to prolong and not ruin the state law did not forged any power, but are trampled and destroyed by every individual."

Responsibility as an essential component of all forms of social organization has existed since the primitive society. In this society, individuals, absorbed the social, still undifferentiated, bear moral responsibility outside and this is essentially collective. Political society state innovate new forms of liability. Social, differences in groups and social categories is that the liability to be identified. Become subject to liability not changed its nature. She just changed character, assimilating November characters are social whole of modern civilization. The company, through a "liability-driven, it requires individuals regulatory status. Living in society whom commits a crime, a violation, a civil offense, etc., counted - through its legal rules - such an action as reprehensible. The effect of committing such an action, another person was injured in her being physical or moral, or in his property, rule of law was impaired, general interests were violated.

This is the issue of liability. Accountability is a social fact and is limited to organized response, which triggers an institutionalized deemed reprehensible act, the institutionalization of this reaction, determined within the statutory classification was necessary because the liability and punishment are not (and cannot be) in any an appropriate form of blind revenge, but legal ways to reward (by deed and reward "- people say), the repair order violated, the reintegration of a damaged property and social protection.

"Common sense notion of responsibility - M. Costin notes - whatever form that manifests itself under obligation is to bear the consequences of failure to comply with rules of conduct and obligations borne by the author of the act contrary to these rules and always bearing the stamp of social disapproval of such facts. " This effect has a gift for identifying the liability to penalty. The first objection that can bring such a

vision is that it misses the psychological sides of liability. As emphasized, liability and sanctions are two sides of the same social phenomenon. The penalty covers only one aspect of accountability - the reaction of society. Such reactions in modern societies are not only negative but positive. In both her positions, especially in their positive, sanctions are a strong element of social control.

Sanctions system is based on a harmonized set of values and assessment criteria.

Basically, it can raise the question: What legitimate penalty and the right of people to punish others? The answer might be: nothing but the interests of society to defend itself against those who harm them.

For this reason, committing an act that violates law and endanger human coexistence even cause the company reaction. In this respect, the emphasis is on punishment as reparation - is largely justified. At the same time, liability and sanctions are different concepts, the first being a legal framework for achieving the second. "Legal liability is a legal constraint, and legal sanction is the subject of this report.

As legal advice, legal liability involving legal rights and obligations correlative. Has, in this sense, justice Mircea Costin when defining liability as a complex of rights and obligations related to - the law - are born as a result of committing illegal acts which constitute the performance of state coercion, by applying legal sanctions.

1.1. The concept of legal liability

Meaning commonly attributed to the concept of responsibility is an obligation to bear the consequences of failure to comply with rules of conduct, the author of the act contrary to the rule and always bearing the stamp of social disapproval of such conduct. Liability may be such as: political, moral, legal, religious, etc.. and has a correlative nature, namely political, moral, legal, religious, etc. By triggering liability and bearing the consequences flowing from it to restore the rule of law infringed.

The legislation does not define the concept of legal liability, the legislature setting only in the presence of conditions which a person may be held liable, that liability principles, nature and extent and application of sanctions likely operating limits.

Liability doctrine is defined as an institution of law, consisting of all rules aimed at exercising coercion by the state through legal sanctions those who violate the rule of law.

Considering the need for legal liability as a constraint that arises because of violation of legislation by natural or legal person may be considered is complex liability associated rights and obligations which, by law, are born as Following the commission of illegal acts constituting the state coercion to achieve through legal sanctions to ensure the stability of social relations in society and guiding spirit of respecting the rule of law.

1.2. Liability conditions

For the existence of liability must be fulfilled all the following elements:

- The existence of liability matter;
- The unlawful conduct of the subject;
- The existence of guilt;
- The existence of a causal link between unlawful act and the harmful result.

1.2.1. Topics liability - can be natural and legal persons. For a person to become subject to liability, two conditions must be met: to be able to respond and act freely. Ability to respond primarily involves discernment, ie, the ability to understand the person and the legal and material consequences foreshadowed his conduct.

Ability to respond is a form of legal capacity, with capacity use, exercise, to inherit, etc.. Legal capacity can be defined as abstract and general fitness of the person to acquire or exercise its rights and obligations in a legal relationship, ie to have rights and obligations.

Freedom to act - as a condition of liability, means to act knowingly to act on a fresh and unconstrained decision of someone or something on the way forward selection or mode of action towards illicit purpose proposed pursued and supported.

1.2.2. That unlawful conduct, triggering liability

The human behaviour is defined as a set of facts under the control of individual will and its reason.

Human conduct may be lawful or unlawful by reference to the provisions of the rule of law. Unlawful conduct may consist in an action or omission contrary to legal rules, they are a person's ability to respond to his actions.

Action consists of a number of acts contrary to the rules material, it is directed will, externalized the subject.

The prohibitive rules be established what is forbidden, while the rules of conduct onerative indicate mandatory understood that any action

contrary to its provisions are violated existing rules. Permissive rules are accepted by the conduct, to the extent permitted by law.

Failure is a failure of person to do something, withhold an action that was required, a failure of facts established by law. Failure is in this case, a conscious and voluntary act of doing the right thing to do, under requirements established legal norm.

1.2.3. Guilt - condition liability

Guilt is subjective state that characterizes the author unlawful act when breaches of law, mental attitude of one who commits an unlawful act against the act and its consequences.

Culpability arises forms are intent and guilt (as defined by art. 19 C. pen.).

The intention - as guilt by unlawful action is targeted deliberately, intentionally, to produce the desired effect. It involves:

- Knowing whether antisocial act;
- Acceptance of its negative consequences;
- Subject's desire to obtain illicit goal achievement

Liability will be trained to be externalized to produce dangerous or socially unacceptable outcome.

Guilt - guilt that easy as the author does not provide illegal act consequence of his acts, although it had to provide or, by providing them superficially that they hope will not occur. So the fault does not contain illicit desire for attaining immediate but accepting the possibility or likelihood of occurrence. For acts committed negligence, liability is easier.

Note that Romanian law known and objective forms of legal liability and here I mean the power of example to the situation described and regulated by Art. 1000 par. 3 Civil Code, liability for tort servant principal where the principal is bound to pay damages caused by his agent while the victim chooses to do so. Note however that in this training is conditional upon the existence of liability of the principal fault servant, principal responsibility is a form of protection detrimental.

Also in relation to objective liability in tort have expressed opinions of great prestige in that parental responsibility for the acts of the minor child who lives with them art. 1000 par. 2 Civil Code would be a form of liability is presumed absolutely objective existence of negligence in supervision, upbringing and education of the minor fault of the parent could not shirking the rebuttal.

1.2.4. Causal link between unlawful act and the harmful result

Training is a prerequisite for any form of legal liability when the legal rule infringed by the illegal activity involving the production of a tangible result. Exceptions are crimes or offenses "hazard" where the law punishes conduct itself matter of law, without being required to produce a socially dangerous result.

1.3. Liability forms

In principle, every branch of law known as a specific responsibility. Therefore there are several forms of legal liability: liability of political (constitutional responsibility of the parliament), civil liability, criminal liability, administrative responsibility, disciplinary responsibility. Each form of legal liability is characterized by specific conditions of substance and form (way down, forms of achievement, etc.).

Branch legal disciplines dealing specifically with setting the conditions of liability in each branch. Thus, for example, the liability is triggered under conditions set by the Civil Code, may be contractual or tort. Contractual liability borne by the debtor of a contractual obligation to repair damage caused by failure to comply with this obligation to the creditor (or its execution unduly delayed), as attributable to such default.

Criminal liability is defined as a criminal justice report, instructions, born as a result of the offense, relation that is established between the state and the offender, whose content is formed by state law to hold the offender accountable, to apply the penalty provided by criminal law and to compel to perform, and required the offender to answer for his deed and subject to punishment to restore law and order. Forms of punishment if the offense can be: imprisonment, criminal fines, disqualifications (lifting right to exercise a certain profession, forfeiture of parental rights, etc.), seizures, etc..

Violation by officials to undertake disciplinary service obligations. Such deeds are called violations and punishable with: warning, reprimand, salary reduction, demotion, suspension from office, disciplinary transfer, dismissal.

Through its features, by its nature and consequences it produces, liability arises as a worse form of social responsibility. Whereas antisocial acts that trigger liability cause harm and disturb social values normal conduct of social relations of cooperation, it is natural that liability should be implemented as a punitive nature and enforcement of these measures to return - as service obligation - State of specialized forums.

As seen from above, liability is facing a variety of forms. The

presence of such diversity can still find the existence of principles that emphasizes the presence of common notes characteristic of all forms of liability. These principles are: legal liability ¬ tea (the body which establishes a form of liability and gives a sentence is required to proceed in relation to how to regulate the legal norm of the offense and the punishment) for fault liability principle, the principle of personal responsibility, the presumption of innocence, the principle sanction compared proportionality of seriousness, the circumstances of its commission, etc..

CHAPTER 2. PARTICULARS OF OFFENCES LIABILITY TO OTHER FORMS OF LEGAL LIABILITY

Offense, as distinct from illegal and the only basis of liability offenses, are individualized to other illegal acts through its general features stemming from the legal definition and regulatory features of the object. Important distinguishing criteria and procedure are penalty system detection and sanctioning violations, which differs from the procedure applicable to prosecute other illegal acts.

Next, we try to present the most important and significant differences between the offense and other unlawful acts which it resembles, like offense, offense under criminal law which do not specifically the degree of social danger of a crime and disciplinary.

2.1. Contraventional and criminal offenses

Under the Criminal Code, the offense is defined as "socially dangerous act which, if committed with guilt by the criminal law." In its widest meaning Gerena, offense, like the offense, is a human act, an act outside of its conduct, prohibited by law under a specific penalty, which is punishment.

Both the offense and the offense is committed illegal acts with guilt, which presents a threat to society and each of them is under one of the forms of employment liability. Offense and the offense is under liability offenses under criminal liability. Unlike the offense, which has a higher social danger, the most serious and lasting consequences in time, the offense, this danger is reduced and the consequences are more răstrânse. The general criteria for distinguishing between crimes and contraventions may be intrinsic or extrinsic, as intrinsically related facts or outside them. The criteria fall primarily intrinsic value and associated social relations that are

damaged or threatened by deed. Thus, actions directed against social relations related to the existence of values on which community has the highest degree of social danger. Therefore, the legislature reacts to them by means of criminal law. Compared with them, committing the acts by which threaten the very values that do not depend on society and its components exist, but normal operation of a field or other activity, are violations.

In addition to the subject of legal protection, to establish the degree of social danger and should be considered stems from the fact, that if there was an actual damage or only a danger state. It is noteworthy that some antisocial acts harm or threaten the core values, they are offenses only when committed in a certain way or under certain conditions. In the absence of these circumstances, the act is minor.

Another criterion for intrinsically different social resonance that causes the community among the two categories of antisocial acts. Acts that harm life, liberty, integrity and health of the human person, acts of theft, robbery, embezzlement, treason, acts of sabotage, assault, escape, counterfeiting, drug trafficking or weapons, have a lively social resonance, causing obvious restlessness, social insecurity. Conversely, acts that endanger the values of small importance, had a narrow resonance and causes a tendency to react repressive society members, such as in the road, fishing, etc..

Intrensec last criterion refers to the possibility of restoring damaged social relations, to restore order ridden by the commission that works. If the offense is necessary to apply a penalty, sometimes the execution in prison, while the minor penalty will be applied more easily, making it appeal to a sense of responsibility of the perpetrator.

Extrinsic criteria of differentiation are a consequence of minor crime and reflects the degree of social danger difference between the two types of antisocial acts. Are among the extrinsic criteria: legislative power, ie based legal rules provide two types of illegal sanctions and how the implementation and enforcement of these sanctions. Regarding criminal offenses that regulations may provide only emanate from the supreme bodies of legislative power. Conversely, offenses may be determined not only by law but also by decisions and orders of government and, under certain conditions, limits and materials, by decisions of local bodies. On how the sanctions, penalties offenses only to exceptional cases limited and brief personal liberty.

Compared with criminal penalties, those offenses, even when they are formally similar, are ever lighter, their mode of enforcement

consequences less harsh or products are lower. Specific punishments is that they can not be established and applied only in the courts, when offenses are found and penalties apply to certain persons and bodies of the executive power. The procedure varies, the violations are much simpler rules and increased efficiency in handling cases. Frequently the question is who determines the actual degree of social danger, or who determines whether an act is unlawful or criminal offense. This option belongs to the competent body to declare such acts, which should show discretion in assessing which one is. This is article 10 of Law 61/1991 seminicativ, that if the Agency finds that the penalty assessed fine is plentiful, apply under the provisions of Law nr.32/1968 doing fine. Otherwise, the report of findings shall be sent immediately to the competent court which will decide the penalty to be applied to offenses. On the other hand, when ascertaining body considers that the act was committed in such a manner that constitutes an offense under criminal law it will refer the prosecuting authority. A penalty offenses not criminal liability when later finds that this act is criminal.

In such a case, liability liability offenses take place. Conversely, if the offense was prosecuted as a crime and subsequently established by resolution or ordinance of the prosecutor, or by court order, that it could be minor, the notice of referral or failure to act, together with a copy of the order or decision to send the right body to apply the sanction. In such a case, liability contravention replaced criminal liability. Solution is required in both cases as minor criminal liability and can not coexist. Indeed, it is not possible to apply for the same offense a penalty and a penalty contravenționlă, such as a deed was brought to the same social relationships protected by law.

Differentiation in contravention of crime issues must start from that to decriminalize contrevențiilor held by Decree nr.184/1954, they represented the Romanian law the third category of unlawful criminal believed to be the least serious. The current rules of the offense, this remark can not be sustained as long as many offenses are punished more severely than certain offenses. In the following lines, we try to present the main differences between the offense and offense. Can not start this analysis, without showing that one can not ignore the criminal nature of the offense and there are many similarities between these forms of illegal.

As the European Court of Human Rights noted in several case, the offense, even if it is regulated in law as distinct from illegal, have a criminal side can not be ignored. In essence, the Court established in practice that for a criminal offense to belong, should be considered three criteria:

qualification of the crime under national law, the nature of the offense charged and the nature and severity of the sanction. These criteria is not necessarily to apply cumulatively it is sufficient that one criminal act is legally or be exposed to the Convention on the offender a sanction by the nature and seriousness of his criminal règles, so even if the act is regulated in law as negligence, it can be classified as belonging to the criminal matter to its legal nature and the penalty imposed, unable to recognize a state option to exempt certain facts applying the provisions of Article 6 of the Convention. The three criteria were used consistently Court.

This practice of European Court of Human Rights was received in several decisions of the Constitutional Court. Unfortunately, other decisions constinuant judge, the criminal nature of the offense is not considered adequate, with certain decision ruling that ignores the criminal nature of the offense. Furthermore, although the ECHR handed down a conviction in light of the Romanian state just "criminal nature" of the offense, the Constitutional Court after that decision, the practice keeps ignoring meaning "criminal caractrului" of it. For example, nr.727/2008 decision, the Court held that the objections of European court decision against Romania Anghel are not in the present case, pointing out that unlike the European court, the Constitutional Court shall not conduct substantive examination items which are generally due when handling a vested unconstitutionality. Tasks such as interpretation and proper application of the law upon the exclusivity of courts, which also is invested by law to review judicial or administrative action against alleged to be unlawful. Such judgments of the Court, however, are in total contradiction with the judgments of the courts, the ECHR ordered the cancellation after delivery of minutes of offense just by virtue of the presumption of innocence, characterizing element "criminal matter". In essence, between offense and crime there are other similarities arising from common origin and close legal nature which justify what ECHR calls criminal side that has the offense. Thus, both actions involve violating the general social values and is only illegal acts affecting such values imply guilt and author. Under the latter aspect, it should be noted that the offense usually involves intention as a form of guilt, if the offense is irrelevant degree of guilt. And regarding the applicability of the principle of legality has his offense and sanction setting offense, the same as the essence of the principle of legality enshrined in criminal law criminalization. Unlike criminal law, where the organic law can criminalize only in minor matters and prosecute violations may be established by certain administrative and regulatory framework provided by law. Both offenses are crimes and

offenses expressly covered by certain legal rules. Therefore, it can be considered an act which is provided in a standard criminal offense that could become minor due to the concrete conditions in which it was committed or that a contravention, by the way it was committed to become crime . If the act under the criminal law has in practice a small degree of social danger, it may be liable for any specific art. 18 of the Criminal Code, and if the offense will have very serious contravention liable to a penalty-oriented special maximum. Thus, the question raised is not justified in theory that should find an answer to the question "Who appreciates who determines the actual degree of social danger, or who determines whether an act is unlawful or criminal offense?" Reaching the conclusion that this agent is ascertaining which jurisdiction should show discretion in what he does.

Most authors consider that the agent found no adminitrativ or any other judicial body can not make that assessment, whereas according to the principle of legality, normative acts of criminality or just laying contravention define precisely what constitutes crime and what constitutes violations . If the facts fall within the indictment, will be in the presence of a crime, and if this act made the objective side of a contravention shall be liable cntravențională the person who committed it. Officer found the body of the prosecution or the court need only determine whether the offense committed is a crime or an offense, the social danger can not be a criterion in assessing a specific illegal acts.

The author argues that there Mircea Ursuța such intrinsic differences between the offense and offense can not be justified as a qualitative difference between these illegal acts. In his view, all the differences between these two forms of illicit extrinsic in nature.

In some cases, not easily classified in a certain specific unlawful conduct because of similarities between the contents of crimes and certain violations. Also, in many cases, the difference between a violation and a crime is given a quantitative criterion such as the damage, some indices of value or repeat an act that would be a contravention content. Therefore, taking into account that, in some cases it is difficult to fit the crime committed either offense or crime, GO no.2/2001 accept that the agent stated, if it considers that the act was committed in such a way that constitutes an offense under the criminal law to notify the competent prosecuting authority. This referral is needed especially if the can not accurately determine whether the time finding that offense is offense or crime. For example, if a driver that is collected biological samples showing a blood alcohol that would make the act to be criminal, agent of findings

will be responsible sesiseze prosecution body. Following a forensic expert will be able to reach, however, that blood alcohol was below the limit at the time of committing criminal act, so the offense is minor. When violation of traffic rules on public roads resulting in bodily injury of a person, until the victim is found that requires more than 10 days of care and wishes to make a criminal complaint, can not be known with certainty whether it is an offense of negligence or injury of a minor, so staff will not complete ascertainment minutes, but will forward the file criminal prosecution body. Like similarity, note that the law took minor criminal law that tort cases are not minor, namely: self-defense, if fortuitous, irresponsibility, drunkenness and complete involuntary error of fact, adding the handicap they cause specific exemption misdemeanor law.

The main differences between the offense and the offense consists of system and procedure penalties. Not be omitted and other features that present current legislation infringements, such as minor is not sanctioned in any other form of participation than the author, no attempt is ever punished, the contest involves contravention arithmetic aggregation rule certain limitations and minor relapse framework is provided by law.

Limitation on minor also requires other forms and deadlines than criminal liability, representing a specific institution misdemeanor law. As regards the system of penalties, criminal penalties and punishments are called are: life imprisonment, imprisonment and criminal fines, while committing a contravention may be punished with a warning, fine or performing a community service activities. Government Emergency Ordinance nr.108/2003 were repealed provisions on penalty of imprisonment offenses, taking into account the provisions of Article 23 para. 13 of the Revised Constitution of Romania that the "penalty of imprisonment can only be criminal." And in terms of additional sanctions, they differ from the criminal misdemeanor law. By article 8, paragraph 1, of O.G. no.2/2001 fine to keep the administrative offenses provided for the first time nr.184/1954 Decree, thereby considering that distinguishes criminal fine of administrative fine. In fact, even maintaining the administrative nature of the fine, not too mild a penalty than the criminal fine, since, as noted European Court of Human Rights, in addition to the nature of the sanction is the criterion of differentiation and its severity and that, in essence, is an "indisputable fact" that the fine is a sanction with patrimonial, many offenses are punishable by a fine in an amount higher than criminal fines.

The most important difference between crimes and offenses arising

from the procedure believe that finding and punishing those illegal acts. If the criminal is criminal procedural rules, which provide certain procedural guarantees an accused person and always apply a penalty of an independent and impartial tribunal, in the misdemeanor is a summary procedure, performed by people in the field of public administration, and sanctions are apply in most cases, by administrative bodies, such proceedings are supplementing with the Code of Civil Procedure.

Procedure governed by international law does not provide basic guarantees which should benefit the person accused of committing a contravention. When a person attacks sanctioned by the court complaint Minutes minor penalty, that person standing is the most difficult position because Romanian law, civil procedural rules applying, it will have a true position of plaintiff must rebut the presumption of legality enjoyed Minutes, awarded to the burden of proof under the provisions of the Civil Code art.1169.

As a last point, resulting in differentiation of the two forms of illegal, as both acts causing damage to social values, doctrine believes, rightly, that facts can not be at the same time, offense and offense.

2.2 Disciplinary offense and contraventions

Unlike the offense, between offense and disciplinary essential similarities there. However comparative analysis of these forms of illicit is occasioned only by the fact that the socialist society, the tendency of decriminalization of offenses which are considered less hazardous office, some of which were classified and other disciplinary offenses. On the other hand, has tended "contravenționalizării" disciplinary violations within the meaning of the many facts which by their nature, were genuine and disciplinary sanctions have been provided as contraventions. Notable differences consist of differences in the values protected, system and procedure penalties.

Under the Labor Code, disciplinary violations is defined as "guilt by the violation of employment, regardless of function or position they occupy has its obligations, including rules of behavior." Disciplinary violations is a necessary condition for triggering răspunderiidisciplinare-only basis, as the offense is under trigger liability offenses. Both disciplinary and offense are illegal acts, antisocial, which presents danger to society, committed to guilt. But unlike the offense, presents a risk disciplinary stationed, by its very content, the field of employment in a particular unit. Offense, even if committed in a company by its staff, has a wider resonance beyond its context.

First, the offense affect general social values, while only violates disciplinary certain social relations on labor discipline. Because the features of the offense, the doctrine recognizes overlapping responsibility with disciplinary offenses. It is important to note that it is possible that disciplinary offenses overlapping responsibility without thereby infringing the principle of non bis in idem principle that is not triggering a new judgments on the same offense and same person, if they have been judgments for which a final decision. The reason this solution is within different social relations protected by each of the two categories of rules. Minor sanction a person for an act determined not punish the same person removes, for the same offense, with a disciplinary

Unlike regulations which provide for offenses punishable by describing explicitly these illegal acts, labor law as a rule, does not include the list of disciplinary violations are determined disciplinare.Abaterile showing only default service obligations of employees. Therefore, to determine whether a disciplinary action is necessary to see if satisfied constituents of departure and then to analyze in terms of general features of the crime and the natural order of causality, if harmful consequences on employment relationships of that unit are a direct result of employee crime, and to the extent that the damage has minimum intensity level that would justify disciplinary onset.

In terms of the objective side, both the disciplinary case and if the contarvenționale are in the presence of illegal acts, contrary to legal rules, but different in terms of severity, consequences of the hazards they produce, ie the degree of disruption of relationships social. Same offense may be based on a number of factors such as the importance of protected object, the circumstances in which the act was committed, the type and intensity of guilt, purpose, importance, etc.. Or disciplinary misconduct or violation or both another. Severity and social dangerousness of the result element is in the final analysis the objective side which best express the differences in degree, intensity, placing some facts above or below the threshold that separates the two responsibilities and determine the dosage gradually penalty inside each of them . Meanwhile, according to this index of risk, reflected in its direct consequences, the situation by deed below or above the minimum of regulation and liability in general. A deed whose deleterious effect is imperceptible, as clearly appears irrelevant and not undertake any liability. It is noted that the subject of disciplinary proceedings is always determined, detail, namely a qualified employee or employed under a contract of employment, while an offender, even the author of a

contravention referred to personnel companies may not have that capacity. Indeed, company managers, for example, whether related or unrelated exercises often function only under a civilian report (contract term). In such a case, such a manager will not be liable to disciplinary, but under the rules of office and of course, where appropriate misdemeanor.

Another essential difference stems from how these facts are set out in the object. If the contravention in respect of establishing and operating principle legaltății sanctions violations, disciplinary offenses are not expressly provided in a legal rule, they constituid, violations of labor law. Thus, it is considered that disciplinary occurs whenever the person employed in violation of the act committed with guilt, obligation to respect work discipline imposed on the unit operating.

If sanctions are major offenses warning, fine and performing a community service activities, as provided in the framework law, disciplinary sanctions may be varied provided including specific acts as regulamantele statutes or internal staff. Regarding procedure, if the employer is a disciplinary matter jurisdiction to find violations of labor laws that constitute misconduct disciplinary offenses are always found ascertaining relevant agencies in the Act establishing special regulatory violations.

2.3 Offense and the offense under the criminal law not represent a danger of a crime

The law provides that the act is an offense under the criminal law, whether by reaching minimal (insignificant) made one of the values protected by law in its actual content is clearly devoid of importance, do not have the degree of social danger of a crime. Following analysis and evaluation of actual social danger crime can be established as fact, even under the criminal law, not a crime and not attract criminal liability as missing one of its key features, namely social danger. In such cases the prosecutor or the court applied an administrative nature of the penalties provided by law. Under the procedural aspect, the deed does not have the degree of social danger of a crime is one where the movement or exercise is prevented prosecution is dipune, where appropriate, removal from criminal prosecution phase of prosecution, or acquittal during the trial. It is useful to present the similarities and deosebilire that characterize these two forms of illegal, because if they are committing such acts, undertake two different types of liability: liability for minor offense and a specific responsibility, sui generis, the criminal an action under the criminal law has not specifically social danger of a crime. Otherwise, it was considered that these facts would

constitute a breach or contravention. Can not say exactly if this view is good, because you can not believe that a crime may become a mere violation or deviation lower social danger, as this would cause the principle of legality of criminal offenses.

This sui generis liability doctrine was qualified as a form of liability including adminitrative, other than minor responsibility. Many authors can not agree with this view, considering that in the presence of independent liability which can not be described either as a form of criminal liability nor responsibility adiminitrative shape. On the other hand, can not believe that by committing such acts would prejudge a report adminitrativ of subordination, as long as the objective side is made a criminal offense, bringing it to the general social values.

Institution referred to Article 18 of the Criminal Code is one of the most controversial institutions in Romanian doctrine, may be considered "a specific Romanian criminal law." It was introduced for the first time, by amending Article nr.212/1960 Decree. One of the old Criminal Code, being justified by the fact that social rights considered as the sole criterion of social danger of separation from other forms of illicit crimes. To the extent that you can not replace criminal liability has a responsibility by law Courts of decriminalization, it was considered a social threat assessment can be made through the courts. This institution was not provided in the original form of the Penal Code of 1969, as introduced by Law nr.1/1973 in an improved form of the previous regulators. Facts that attract such liability sui generis facts are practically under criminal law, which would not be considered this degree of social danger of a crime. Therefore, many similarities and differences between offense and offense are similarities and differences between the offense and the offense under the criminal law that does not represent a danger of a crime. For example, on the facts provided by the criminal law which does not represent a danger of a crime of criminal law applies to specific limitation on the liability will prescribe the norms minor misdemeanor law. Penalties provided by law on these two types are similar illegal. Committing an act which does not present the actual social danger of a crime is punishable by one of the penalties provided in 91 of the Criminal Code, not being a sentence, that admonition, reprimand with warning, a fine of 10 lei and 1,000 lei . Unlike minor legislation, which states that only administrative fine in nature, Article 18 of the Criminal Code provides that all penalties provided in 91 administrative nature. Noted the small amount of the maximum fine provided for 91 of the Criminal Code since, due to the reduced amount, in practice can lead to unfair

situations. Thus, assuming that commits an act that meets the objective side of an action under criminal law, but shall not be considered a criminal social danger, the offender will be applied to a fine under the provisions of the Criminal Code 91 , whose amount can not depăşi1000 lei. If, by taking a quantitative criterion or value, tort law is provided in contravention of regulations will be imposed a minor penalty, which will be more than 1,000 lei. For example, applying Art. 18 to an act provided by art.97 of the Forestry Code, a person could be punished with up to 1,000 lei while, if the act could be considered minor by the amount of damages than 5 times the average price of a cubic meter of timber on foot, realizing the objective side of the offense provided for under Article 1 of Law No. 31 / 2000 on the establishment and sanctioning of infringements forestry should be the minimum of 1,000 lei, the penalty can reach up to 3,000 lei.

From a procedural viewpoint, targeted sanctions tort liability not represent a danger of a crime shall be imposed by the criminal court, either as a specific feature of this form of illicit, the prosecutor, under the Criminal Procedure Code, while contravention sanctions are applied or the agent found either by another administrative authority or by the court under the provisions of Ordinance no.2/2001 and special laws, these laws supplementing it with the Code of Civil Procedure. Initial distinction between the two forms is illegal in the way they are set in regulations. Always, as far as social danger of missing an action under criminal law, will be the presence of specific institutions of criminal law can not act in any circumstances constitute a contravention. A minor offense is only when a person's action or inaction circumscribe the conditions set by a legislative act establishing the offense. To the extent that that action or inaction is provided by the criminal law, the act may be appropriate, either offense or an offense provided by Article 18 of the Criminal Code. Obviously, the specific liability provided by Article 18 of the Criminal Code can not be combined with minor responsibility. An unlawful act or omission will be able to attract a penalty contravention or a penalty under the Criminal Code 91.

CHAPTER 3. CONCLUSIONS

The analysis of the legal nature and the characteristic offense, that it is an unlawful act which has its own individuality, the sole basis of a distinct form of liability-liability offense. Along with offense, offense is the only legal form of illicit affect general social values. While it is undeniable that the act has a minor criminal side, arising from the similarities that

characterize these illegal acts, we believe that social development would not allow the offense back into the criminal law, requiring a more rapid procedure of finding and sanctioning the contravention. As noted, can not claim any ownership to the contravention administrative law so requires recognition of a new branch of law-law misdemeanor. On the other hand, can not be argued that current legislation is beyond any criticism, legislation is often confusing and can leave the legislature to determine, based on purely subjective, what works and what acts are crimes are offenses. Also, the framework law there are certain provisions which are extremely difficult to determine the legal nature and features of the offense. To remove these difficulties, it is imperative the development of a Code Offences, whose provisions must be linked to criminal law provisions. It is considered that the designation of Offences Code is better than Code Violations, since confirmed the existence of a new branch of law, entitled Offenses and indicates that the code is little more than a grouping of major single legislative act violations. It is a utopia to believe that particular part of the code will be able to find all offenses, and criminal law since there are many laws, yet systematic contravention legislation would lead to better accessibility and predictability in this area.

We believe that the Code Offences should value an organic law, that can not derogate from ordinary laws, in particular the provisions of the general part and the provisions of Procedure. Because the offense is not only a crime theory in a time of social and cultural development is perceived as less serious contravention the penalty should not exceed in severity the minimum statutory penalty.

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ENVIROMENTAL TACIT APPROVAL PROCEDURE

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ABSTRACT

Due to the specific regulatory provisions, as the competent public authority's decision on their request for issue must always be express, tacit approval inadmissible [one.]

Tacit approval of the administrative procedure was introduced in the Romanian law and practice by Emergency Ordinance no. 27/2003, as an instrument of administrative efficiency in meeting citizens' fundamental rights and interests.

KEYWORDS

Emergency Ordinance no. 27/2003, Community legal system, extension of exceptions on environment

A case recently decided by the Court Gorj talk of Government Emergency Ordinance no. 27/2003 [2] on the tacit approval procedure, as amended by Law no. 486/2003 [3] . 486/2003 [3.]

Rendered in case No. 216/11.02.2009 [4.] 11866/318/2008 appeal was upheld by the appellant-respondent National Environmental - no sentence against the County Commissioner. 8176 dated 27.10.2008 issued by the Court of Targu-Jiu in the file no. 11866/318/2008 and changed the ruling rejecting the complaint offenses.

A court of appeal noted that applications that were required environmental permits, according to Order no. 1798/2007 for approving the procedure for issuing the environmental permit issued by the Ministry of Environment and Sustainable Development [5] (at the time) came into force on 27.11.2007, which repealed Order no. 876/2004 [6] , approving the Procedure for approval of activities with significant environmental impact, not equivalent to the conditions for issuing permits.

In accordance with Order no. 876/2004 art. 9 and Order No. 8. 1876/2007 to start a new activity or at least 40 (45) days before the expiry of

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existing environmental permit, the business owner is obliged to submit to the Environmental Protection Agency documents referred to in (af) release time is 90 days from receipt of complete documentation.

Also to be noted that the Government Emergency Ordinance no. 27/2003 on the tacit approval procedure states that the Act regulates the tacit approval procedure as an alternative to issuing or renewing licenses by government authorities, according to art. 6 considering the authorization granted or renewed if the applicant is not responsible government authority within the period prescribed by law "in this case 90 days."

To obtain the official document which enable work, the applicant may appeal to the authority concerned or directly to the court, specifically the procedure for obtaining authorization is recorded in art. nr. 7 to 12 of Government Emergency Ordinance no. 27/2003. 27/2003. In the case before the appeal, the plaintiff has not proved to undergo these procedures and therefore can not be retained as a defense grounded in the sense that the four forest districts (Polovragi Turceni, Runcu and bighead) permits are issued by tacit consent, nedepunându the official document which allows the provision of art work as required. 7 al. 7. 2. 2.

We specify that the defense, the respondent petitioner RNP ROMSILVA - Targu-Jiu Forestry Department should dismiss the appeal as unfounded, arguing that the deed recorded in the minutes do not exist in the sense that the check was submitted on requests for issuing environmental permits that were parts to be bid or negotiated procedure referred to in art have been met. In art. 19 al. 19. 2 no. 2 of Decree no. 1798/2007, the fund is to file copies of applications submitted. She also claimed that it is guilty of authorizations legal deadline of 90 days and otherwise in accordance with Art. 6 of Government Emergency Ordinance no. 27/2003, could be considered as tacitly permits are granted Gorj EPA failed to deal with requests for authorization within 90 days ordered by law.

This authorization environment held court for judicial review, it was necessary petent authorities that respondent engaged in logging, as will appear in the certificates issued by ORC ascertaining Gorj obligation imposed by the Order no. 1798/2007 art. 19 paragraph 1 and the Government Emergency Ordinance no. 195/2005 [7] on environmental protection, art. 96 paragraph. 2 point 1. In Chapter 5 of the Order no. 1798/2007 included specific authorization and under art. 19 paragraph 1 and 2 owners and / or legal owners of the approved annual operating prosecutors are required to request and obtain environmental permits for logging activity. Submission of application for a permit is made before the auction

or negotiating organization and wood. Given the environmental impact it can have on the conduct of timber operations area managed by the forest districts contained in the minutes of offense in the absence of specific environmental permits court correctly held that the inspector of the individual penalty.

Against that decision - Targu-Jiu Forestry Department has made the review request has been rejected by civil decision no. 1261/2009 [8] , issued by the Court in case No. Gorj. 4582/95/2009. 4582/95/2009.

Without calling into question the correctness of the decision by the court for judicial review, we consider that the reasoning is insufficient, since there was concerned that the provisions of Government Emergency Ordinance no. 27/2003 on the tacit approval procedure as amended by Law no. 486/2003 is not applicable.

In the succeeding dichotomously we intend to analyze this issue.

A. ELEMENTS OF INTERNAL LAW

Due to the specific regulatory provisions, as the competent public authority's decision on their request for issue must always be express, tacit approval inadmissible [9.]

Tacit approval of the administrative procedure was introduced in the Romanian law and practice by Emergency Ordinance no. 27/2003, (approved with amendments by Law no. 486/2003) as an instrument of administrative efficiency in meeting citizens' fundamental rights and interests. According to art. 1 para. 1 of the ordinance is approved, the aims of setting alternative ways that issuance or renewal of permits by government authorities are as follows:

- Removing administrative barriers to business;
- Accountability of government authorities to meet the deadlines set by law for issuing permits;
- Boosting economic development by providing more favorable conditions as entrepreneurs, with costs as low approval;
- Combating corruption by reducing the arbitrariness in the decision of the administration;
- Promotion of quality public services by streamlining administrative procedures tive.

Also, note that under Art. 1 alin. 1 paragraph. 2 of the ordinance, its provisions apply, as appropriate, procedures for issuing permits (lit. a) procedures for renewal of their (lit. b) and renewal procedures due to the

expiry of the suspension of permits or performance measures established by the competent control bodies (lit. c).

The definition of permit is provided by art. 3 of the ordinance approved and amended, in that it is an administrative document issued by the competent government authorities, which allow the applicant an activity, a service or exercise a profession, stating that the terms permit includes approvals, licenses, permits, approvals or other similar administrative operations prior or subsequent approval.

We appreciate that it requires a first remark on the extension of the concept of administrative acts and operations not the legal nature of administrative act themselves irrelevant. In these circumstances the question arises whether in this proceeding, we consider that the legislature proposes a simple convenience of terminology, no specific legal implications of the theory concerning the conditions for issuing administrative documents (prior conditions and concomitant posterior) or not?

We believe that it can not be accepted the argument that "the legislature has attempted to partially remedy the situation" passivity of the government "but only for a narrow category of administrative acts." [10]

We hold, contrary, even if we consider that a simple definition of terminological convention, acts that are covered are numerous [11.]

It is no less true that, through art. 2 in order to restrict the scope of them, but only with respect to: a) documents issued in the nuclear activities of the regime relating to firearms, ammunition and explosives, and drug precursors and the national security permits and b) exceptions established by the Government, by decision in a reasoned proposal by the administration of each authority involved.

In light of the nature of legal and administrative functions thereby conferred on such a definition covers the obvious category of "regulatory acts" in the environmental field, but this procedure is not admissible on their special considerations [12.]

In the field of environmental protection should be exempted from the procedure established by Government Ordinance no. 27/2003 due to its outstanding importance and secondly, because of the definitions in Annex 1 of the Emergency Ordinance. 91/2002 [13] amending and supplementing Environmental Protection Law no. 137/1995 [14] approved by Law No. 294/2003 [15] data issued by the various environmental acts not clear their legal nature, being qualified legal and technical documents: Environmental opinions, integrated environmental authorization, permit, integrated

environmental agreement (in fact, only the agreement and environmental permit is administrative).

On this view the occurrence of [16] he was advised, but with the advent of GEO 195/2005, it has remained somewhat outdated.

According to art. 2 section 9 of the GEO. 195/2005 by environmental authorization means an administrative act issued by the competent environmental authority, setting out conditions and / or operating parameters of an existing activities or new activities may have a significant impact on the environment required to put into operation [17.] As in art. 2 of the Emergency Ordinance 27/2003 expressly provides that no environmental permits are exempted from this procedure I would be tempted to think that per a contrario, those provisions shall apply to such authorizations.

Another argument in support of it is our opinion that Romania has ratified the Aarhus Convention by Law no. 86/2000 [18] . 86/2000 [18.]

The parties to the Convention had in mind that adequate environmental protection is essential for human welfare and the exercise of fundamental human rights including the right to life itself, also, that any person has the right to live in an environment adequate to his health and welfare and that is responsible, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

However it was ruled that citizens to be able to maintain this right and meet the objectives of the Convention should have access to information, be entitled to participate in decision making and to have access to justice in environmental matters. It was noted in this regard that citizens need assistance to exercise their rights and the environment that better access to information through public participation in decision-making improves the quality and implementation of decisions, contribute to raising public awareness of issues environment, it provides the opportunity to show their concerns and public authorities are given the opportunity to take such concerns into account.

It is clear that the area where the Romanian state should be screened this convention into national law by a higher power bill with the Emergency Ordinance. 27/2003, it would be mostly applied under Community law principle that the rules apply immediately.

Under this rule these rules in order of their ranks as a national law Community law, without requiring any implementation procedure, judges of the Member States being obliged to apply the Community institutional rules

of law. These rules are applicable from the time of their entry into force, whether there are rules of national law incompatible with Community law.

The applicability of the principle of primacy of Community law over national legal systems has led a rich jurisprudence of the Court of Justice.

Thus, in a decision [19] the Court reaffirmed that treaties have the force of law in all countries, since they have ratified and that they take precedence in their whole set, the domestic law of states.

Moreover, the Community legal acts have not only a binding law against the states, Community law with a primary character, but they have enforceable for Member States and the decisions of the Court of Justice, which ensure respect for law in the interpretation and application of the Treaty of Lisbon, are binding.

Community legal system includes not only the international treaties concluded between Member States but also other categories of acts of EU institutions and other bodies under the authority delegated to them under treaties and general principles that Union action should be subject.

In this analysis the decisive argument is that what is characteristic for permits (regulatory acts) environment is the need to meet certain procedural requirements of law relating to rights fundamental to a healthy environment, related to advertising, consultation and public participation decision making. According to art. 5 of the Emergency Ordinance. 195/2005 (in accordance with the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters), the guarantees of the right to a healthy and ecologically balanced environment (known in the art. 35 of the Constitution Romania), include access to environmental information [art. 5 lit. 5 letter. a)] and consultation in decision-making process for issuing regulatory acts in the field [mandatory operation procedures for issuing regulatory acts, according to art. 20 para. (3) of the Act regulatory framework].

Exemplifying, in terms of advertising (especially needed to ensure public participation in decision), if such a requirement remains indifferent to the legality and validity of classical administrative act, affecting only its enforceability, if the procedure for issuing the "regulatory acts", the environment, that is an essential element of their legality.

However, to substantiate and issue regulatory acts should be undertaken by individuals or legal persons and legal certificates of environmental impact assessment in the form of environmental impact assessment, environmental audit, report or report site security [20.]

The objective of our analysis, the important fact remains that environmental permits (regulatory acts) are issued by the authorities and is the result from a specific - environmental assessment - with the mandatory elements of environmental impact assessment or risk, public consultation, taking expertise into account the conclusions and results of these consultations in decision making and provide information on the decision - which is reflected in the form of decision - expressly or tacitly.

Must be stated in terms of procedural requirements of law and fundamental principles (including consultation and public participation in decision environment essential element of democracy) and, as such, compliance with the procedural operations that necessarily require an explicit commitment, continuous and decisive competent environmental authorities, who "led the regulatory procedure and issue permits, agreements and permits" [art. 8 alin. Article 8. (1) Emergency Ordinance no. 195/2005] and, accordingly, the exclusion of the silent approval procedure as an alternative to issue or renewal of environmental permits by the government authorities. It is clear that, while the environmental permits have not been expressly exempted from the category of administrative authorizations tacit approval procedure under the current regulations they can not follow the procedure under the Emergency Ordinance. 27/2003. 27/2003.

First, in formal terms, in terms of environmental protection can not and does not set a deadline for issuing the regulations generally (but possibly subsequent periods for various administrative and technical operations related to the evaluation procedure), and at 30 days after filing stipulated in art. 6 (2) of the Emergency Ordinance. 27/2003 can not be operated due to the complexity and nature of the numerous procedural documents included, after which the question put to trigger a silent procedure.

Secondly, consultation and public participation in decision-making on regulatory provisions expressly require the development of procedures conducted by public authorities, which excludes the passive attitude of the administration.

Finally, procedures need to conduct environmental impact assessment under the control of public authorities and persons (natural or legal) certified, independent of the plan, program, project or activity subject to review and approval also eliminates the possibility of silent operation procedure the, field.

B. ELEMENTS OF COMMUNITY LAW

Court of Justice, in its case law has held that an implied authorization system is incompatible with the requirements of Directives 75/442/EEC [21], 76/464/EEC [22, 23] 80/68/EEC, 84/360/EEC [24] 85/337/EEC [25.] Directive. 80/68 provides in art. 4 - among others - that: Member States subject to prior investigation any disposal or storage for disposal of these substances, which could lead to indirect discharge. Based on the results of this survey, Member States shall prohibit such action or issue a permit, provided that all the technical precautions necessary to prevent such discharges.

The proposed directive aims to protect groundwater in the Union effectively establishing a specific and detailed provisions requiring Member States to adopt a series of prohibitions, authorization schemes and monitoring procedures to prevent or limit discharges of certain substances. The purpose of these provisions of the Directive is to create rights and obligations for individuals.

It was stressed that a practice is consistent with the protection afforded under the Directive does not justify a failure to implement the directive into national law through provisions that are likely to create a situation that is sufficiently precise, clear and open to allow people to be aware of their rights enforcement. As the Court stated in its ruling in Case C-339/87 (Commission v Netherlands [1990] ECR I-851, paragraph 25) to ensure full implementation of directives in law and beyond in fact, Member States should establish a specific legal framework in the area.

The Court in Luxembourg has decided on this directive that it "always ask that, after any investigation, according to the results, to have taken an act expressly authorizing or prohibition '[26.] The Court also held that the procedural provisions of the Directive shall, in order to ensure effective protection of groundwater, precise and detailed rules are intended to create rights and obligations for individuals. It follows that they must be incorporated into national law with precision and clarity necessary to fully satisfy the requirement of legal certainty. In addition, the Court has consistently held that administrative practices, which are changed at will by the authorities and are not adequately publicized, can not be regarded as an appropriate compliance with the obligation imposed on Member States for which a directive is addressed by Article 189 of the Treaty.

In turn Directive. 85/337 shall be subject to environmental impact assessment in accordance with art. 5-10, Member States shall take the measures necessary to ensure that the developer supplies in an appropriate manner, the information specified in Annex III.

Member States shall take measures necessary to ensure that the authorities might be interested in the project by reason of their specific responsibilities for the environment have the opportunity to express their opinion on the request, in connection with the application. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case, when the request for authorization. Detailed arrangements for consultation shall be set by Member States.

For this purpose Member States shall ensure that:

- Any request for authorization and the information gathered pursuant to Article 5 are made available to the public;

- Target audience has the opportunity to express your opinion before the project is initiated.

The detailed procedure information and consultation shall be determined by Member States, which may, in particular, according to the characteristics of the projects or sites concerned:

- To determine the public concerned

- Specify the places where they can be consulted;

- Specify the way in which the public may be informed, for example, display a certain radius, publication in local newspapers, organization of exhibitions with plans, drawings, tables, graphs, models;

- Determine how the public will be consulted, for example, through written communications or survey;

- Fix appropriate time limits for various stages of the procedure to ensure a decision within a reasonable period.

When taking a decision, the authority or authorities shall inform the public concerned with:

- Content of the decision and any conditions attached thereto;

- The reasons and considerations on which it based its decision in cases where state law so provides.

Regarding the Directive 85/337, noted that its main purpose is that, before granting a permit, projects likely to have significant environmental incidents, particularly because of the nature, size or location, that they are subject to an assessment on impact [27], which is not possible for tacit approval. The Commission argued that the Court has held that a tacit approval system is incompatible with the requirements of Directive 80/68 (C-360/87, Commission v Italy [1991] ECR I-791, paragraph 31). This law should also apply to the authorizations referred to in Directives 75/442, 76/464, 84/360 and 85/337.

Court held unequivocally that, as shown in the art. 2 alin. 2. (1), the primary objective of the Directive is that before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia,* by their nature, size or location would be subject to an assessment of their effects .

Community law of the court, it not possible that the contradiction is not compatible with the tacit approval of the five requirements of Community environmental directives, since they provide or, in respect of Directives 75/442, 76/464, 80/68 and 84 / 360, prior approval mechanisms, or in respect of Directive 85/337, assessment procedures prior to granting a permit. The national authorities have, therefore, according to all these directives, the obligation to consider requests case by case approval addressed to them [28.]

In line with legal armor (the letter and spirit) of Community law and ECJ case law findings, the national laws of Member States of the European Union supports the exemption rule of environmental regulations or administrative provisions of the tacit approval.

The principle of public participation, widely accepted (as both a procedural right to a healthy and ecologically balanced environment, recognized the constitutional and legislative) is made by the public inquiry procedure such as [29] forms, consultation (discussion) that exclude the public and local referendum to express a decision simply by passing a silent period and competent administration. Evoke the fact that this is true in other branches of law (the right planning, eg [30),] which permits the material is subject of investigation, public projects subject to special rules for the scheme or the historical and archaeological monuments are in a or a natural reserve area to protect the architectural heritage, urban and landscape [31.]

CONCLUSIONS

In light of the foregoing is imperative, consistent implementation of the provisions of Emergency Ordinance no. 27/2003 with legal armor in the field. Once modified internal legislative act, and would avoid inconsistencies arising in case law, especially since the Environmental issues, albeit of cardinal importance, is not known in practice.

Institutional actors such apathy note with regard to the provisions of art. 2 alin. 2 of the Emergency Ordinance. 27/2003 that the Government may, by decision in a reasoned proposal by the administration of each authority concerned and other exceptions to the silent approval procedure. Failure to

use that option - it is really difficult - emit or lack of professionalism or lack of interest.

Ferenda bill on the tacit approval procedure, supplementing the provisions of GEO. 27/2003 approved by Law no. 486/2003 *at least two directions:*

1. Extension of exceptions on environment [32.]
2. Taking the solution stated by the provisions of French Decree 6 June 2001, that suspension of settlement the applicant's application for authorization if the authorization request is incomplete (meaning the actual request complete application and full documentation attached).

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JURISDICTION OF COURTS, NOTARIES PUBLIC AND OTHER BODIES WITH NOTARY RESPONSIBILITIES

Carmen MLADEN[*]

ABSTRACT

With competence, in general, the ability of a public authority or person to solve a specific problem. The concept of competence is the extensive use in legal language, particularly the procedural domain. In civil procedure law in a jurisdiction means the ability of courts to resolve certain disputes or solve specific application. It should be noted that not all civil disputes are a matter for the courts.

The existence of specialized litigation, with a highly technical and need to relieve the courts of some very simple cases require the existence of bodies having jurisdiction outside the court system, which means that judicial authority has a monopoly position to judge Some reasons being given, by law, other jurisdictions. Thus there are disputes shall be settled by other state authorities or other bodies, judicial or judicial activity, rather than the courts.

KEYWORDS

Notion of competence, the rules of jurisdiction, territorial jurisdiction, conflicts of jurisdiction

1. THE CONCEPT OF COMPETENCE. THEORETICAL CONSIDERATIONS

Considering the art. 104 of Law no. That the provisions of Law 36/1995 of public notaries and notary activities shall be completed with the Civil Code and the Code of Civil Procedure, in what follows we will lean out the notion of competence, as governed by these regulations.

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Power can be defined as the ability of law recognized by a court or other judicial[1] body with the task of judging a particular cause. Sometimes wrongly, the notion of competence is the next judge, however, the Code of Civil Procedure are many texts which show clearly that the rules relating to court jurisdiction, and not the panel[2].

In terms Notary Law 36/1995 devotes an entire chapter (II) and notary jurisdiction, as in the above case, there is some inconsistent terminology.

Thus, while Chapter II is entitled "competence of notaries public, and some texts concerning the powers of a notary public[3], however, other texts of the same law concerning the powers of the notary office[4].

In conclusion, we express our opinion that the rules of jurisdiction in notary offices relating to notaries public, notaries public and not as a person making up the respective public authorities.

2. CLASSIFICATION RULES ON JURISDICTION

The rules of jurisdiction are classified into rules of general jurisdiction and rules of jurisdiction, as is done by reference to the delimitation of organs in different systems or organs within the same system (ie, a different court).

In turn, the jurisdiction is classified material competence and jurisdiction, as is the demarcation between the different level courts or between courts of the same grade.

In the civil procedural law material competence material is divided into functional competence (by way of judicial duties) and physical competence standing (depending on the scope, amount or nature of the request).

The local jurisdiction may be of three kinds: a) the territorial jurisdiction of common law, when the application is lodged with the court of common law in territorial terms, that the court of the domicile of the defendant, b) alternative or optional local jurisdiction where applicant has a choice between two or more competent both instances, c) or exceptional exclusive territorial jurisdiction, the application must be brought to a

[1] For example, Art. 105 par. A Civil Procedure Code.
[2] For example art. 1 et seq., Art. 158 et seq., Etc. p.3 art.304.
[3] Article 10. (1). a) Law no. 36/1995.
[4] Article 10. (1). b) Law no. 36/1995.

specific instance[5].

Depending on whether the rules governing jurisdiction, it shall be classified as absolute power (governed by mandatory rules) and relative power (governed by the rules devices). In conjunction art. 159 Code of Civil Procedure art. 19 Code of Civil Procedure, the rule that emerges overall competence, physical competence and exclusive territorial jurisdiction are absolute and relative character is the only reason is the local jurisdiction regarding the property, except as provided by art. 13-16 Code of Civil Procedure, so the ordinary territorial jurisdiction and territorial jurisdiction of alternative relative nature.

3. GENERAL JURISDICTION COURTS

Alin.l Article 125 of the Constitution provides that "justice is done by the Supreme Court of Justice and other courts established by law." Although the text refers only to the courts, it does not mean that they will deal exclusively civil cases, so that no-activity and other judicial organs. Moreover, even art.144 of the Constitution refers to the powers of the Constitutional Court, including those to rule on objections raised before the courts on the constitutionality of laws and ordinances.

The existence of specialized litigation, with a highly technical and need to relieve the courts of some very simple cases require the existence of bodies having jurisdiction outside the court system, which means that judicial authority has a monopoly position to judge Some reasons being given, by law, other jurisdictions.

Currently there is a tendency to give priority to solving courts in civil cases, reducing the number of civil cases within the competence of other judicial bodies.

Civil Procedure Code Article 1, paragraph 1. provides that "courts of first instance judges, all processes and applications, in addition to those given by law in other courts."[6]

It follows that whenever any special law does not expressly provide jurisdiction to another body with judicial activity, the dispute settlement will

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[5] Boroi Gabriel Dumitru Rădescu Code of Civil Procedure, reviewed and annotated, ALL Publishing House Bucharest, 1994, page 15.

[6] According to art. 92 of the Civil Procedure Code adopted by Law no. 134 of 1 July 2010, the courts judged: 1. in the first instance, the following applications whose object is assessable or, if applicable, cash unrated set of points a)-l) 2. appeals against decisions of public administration and judicial activity of other bodies with such activity, in cases provided by law, 3. any other requests by law in their jurisdiction.

return to the courts, which have unlimited jurisdiction in civil (as well as in other subjects).

In probate matters, the criterion for determining the jurisdiction of the court or notary is the contentious nature of the application or non-contentious. Where there is disagreement between the heirs, probate proceedings are conducted before the notary, but as soon as they occur, the notary will suspend court procedures and direct the parties to go to court.

If the beginning there is disagreement between the heirs, the court may act directly, without having to declare their existence as a notary, notary procedure because the law does not give the meaning of a mandatory preliminary proceedings and the request to the court.

In probate matters, but some applications are to be compulsorily settled by the courts, even if the heirs could understand and the procedure would take place before a notary, such as applications for reinstatement of succession within the accepting applications cancellation of the declaration of acceptance or renunciation of inheritance defects of consent applications for the rectification of civil status documents used as evidence of kinship in determining applications which tends to change a person's civil status in order to entrust right to come to a succession of simulation applications for finding of legal documents signed by the deceased and are invoked in the course of succession.

Notary jurisdiction remain even if the procedure takes place before the probate court: taking measures to conserve estate assets, and opening procedure of finding financial situation and mystical handwritten wills, receiving and recording statements of acceptance of succession under benefit of inventory, recording statements The waiver of succession, inheritance taxation, issuance of certificates of inheritance.

In connection with the work of notaries, courts are competent to deal with complaints against the decision rejecting the request to draw up an affidavit and application for annulment of notarial acts.

According to art. 115 of the Civil Procedure Code adopted by Law no. 134 of 1 July 2010 in terms of inheritance, until the exit of individuals, are the exclusive competence of the latter's home court of the deceased: 1. claims regarding the validity or enforcement of wills; 2. claims relating to inheritance and its tasks and those relating to claims that the heirs would have against one another, 3. legatees or creditors claims against any of the heirs of the deceased or against the executor.

Practice shows that the courts are many processes are not definitively resolved due to declining of competency determined by the

amount of material dispute. In the future we believe that number will decrease as a result of the fact that the legislature has stated this time that "in matters of inheritance, jurisdiction is determined by value without lowering debt burdens or heritage."[7]

And talking about the amount of requests, we consider it necessary to mention that Title X, the new Code of Civil Procedure, governs "the procedure on small claims" and according to art. C, paragraph 3 of the 1011 alleged that the inheritance is exempt from this procedure.

4. JURISDICTION OF NOTARY PUBLIC

4.1. Territorial Jurisdiction

Jurisdiction of notary public is determined by the district court where the notary offices operate. Notarial acts shall meet at the notary's office, in its territorial boundaries, notary public documents and notary can complete outside of the notary office, if there is a greater number of stakeholders or the applicant is unable to appear. If the district court are several notary offices, the territorial jurisdiction extends throughout each district. In Bucharest, the territorial jurisdiction of the notary public offices stretching across it.

Law no. 36/1995 established four cases of exceptional jurisdiction[8]:

1. probate procedure is for the notary's notary office in the territorial jurisdiction of the court where the deceased had his last residence;
2. in case of actual successive heirs can choose any notary office of the territorial jurisdiction of the court in which he was last home one of the authors who died at the latter;
3. acts of protest bills of exchange, promissory notes and checks are the notary's office territorial jurisdiction of the court where payment is to be done;
4. issue and reconstitute the duplicates of notarial acts is made by notarial office where the original is of such acts.

4.2. Material competence

In principle, physical competence is general, notaries public can meet any affidavit except those for which there is a special jurisdiction.

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[7] Article 103 Civil Procedure Code adopted by Law no. 134 of July 1, 2010.

[8] Article 10 of Law 36/1995 as amended by Law no. 298 / 28.09.2009, published in Official Gazette no. 645/01.10.2009.

Under Article 8 of Law no. 36/1995 notary public shall have unlimited jurisdiction to perform the following acts:
a. drafting legal documents containing, at the request of the parties;
b. authenticating the documents drafted by the notary public applicant or a lawyer;
c. Notary probate proceedings;
d. certification of facts in the cases provided by law;
e. legalization of signatures on documents, specimens of the signatures and seals;
f. giving definite date documents submitted by the parties;
g. deposit the documents and the documents submitted by the parties;
h. acts of protest of bills, the order tickets and checks;
i. legalization of copies of documents;
j. making and the legalization of translations;
k. issuing of duplicates of notarial acts they drew up the notary;
l. any other operations required by law.

A special case is the jurisdiction of notaries public in matters of electronic notarial acts by Law no. 589/2004[9], but can also perform notarial acts of general competence in the law 36/1995. The following notarial acts in electronic form can be met:
a) the legalization of electronic copies of original documents;
b) giving the specific date stamping documents that meet the requirements of Art. 2.(A) and certification of where they ended[10];
c) receiving and maintaining the electronic archive of documents that meet the requirements of Art. 2. (1);
d) the legalization of translations in electronic form;
e) issuance of duplicate;
f) other prescribed by law.

[9] Published in the Official Gazette. Part I no. 1227 of 20.12.2004 on the legal status of electronic notarial work.
[10] Article 2 (a) refers to the electronic notarial acts handled by the notary public and must, under penalty of nullity, the following conditions: a) be made in electronic form;b) be signed by the notary public's electronic signature, based on a qualified certificate issued by an accredited certification service provider. Certificates issued to notaries public shall contain information on the notary office, established by regulations by the regulatory and supervisory authority specialized in the field, c) meet the basic conditions set by law for legal operation on a record.

4.3. Conflicts of jurisdiction

Conflicts of jurisdiction between notary offices are a relatively small possibility. The explanation lies, in principle, the general nature of the powers of a notary. However, such conflicts may arise particularly in the inheritance proceedings notary. Therefore, the legislature has regulated the procedure for resolving conflicts of competence. This procedure has, however, some peculiarities to those covered by common law (art. 20 to 22 Civil Procedure Code)[11].

The notary matters, Law no. 36/1995 regulates two categories of conflicts of competence (11), namely[12]:

a. between public notary offices in the same district of a court, in which shall be settled by that court, upon notification by the interested party and the court decision is final;

b. between notary offices located in different districts, in which power belongs to the court in whose jurisdiction the office of notary public is the last spot.

As noted in the previous provisions of Law no. 36/1995 shall be completed properly with the Code of Civil Procedure. Therefore, whenever other situations will arise from conflicts of competence, appreciate that the matter will be considered common law provisions apply to procedural matters. In fact, it was and why in article 22 paragraph 4 Code of Civil Procedure provides that where between courts and other judicial activity is occurring in organs with conflicts of jurisdiction, it shall be settled by a higher court proceedings in the conflict, the provisions of art. 21 were applicable[13].

Demand for conflict of jurisdiction shall be heard in camera, without summoning the parties (art. 22 para. Final Code of Civil Procedure [14]). The decision may be appealed within five days of communication.

[11] Under the Civil Procedure Code adopted by Law no. 134 of 1 July 2010 to be implemented, the procedure conflicts of jurisdiction is governed by art.128-131.

[12] For details see I. Deleanu, Treatise of Civil Procedure, Editura Europa Nova, Bucharest, 1995, vol I., p. 455-456.

[13] Under the Civil Procedure Code adopted by Law no. 134 of 1 July 2010 to be implemented, the procedure to resolve conflicts of jurisdiction is governed by article 130 paragraph 3.

[14] Article 130 paragraph 4 of the new Code of Civil Procedure.

5. COMPETENCE OF OTHER ORGANS RESPONSIBLE NOTARY

5.1. The competence of state administration

According to art. 12 of Law no. 36/1995, certain notarial acts may be drawn and secretaries of local councils of municipalities and cities where the notary public office does not work. At the request of the parties mentioned administrative bodies competent to perform the following acts:

a) legalization of signatures on the documents submitted by the parties;

b)legalization of copies of documents, except documents under private signature.

Categories of acts mentioned can be met, and some "institutions or businesses, but only if their deposit is required at these organizations, as shown in the art. 12 para. (2) of Law no. 36/1995.

5.2. Notary jurisdiction of diplomatic missions and consular offices

Romania embassies and consulates can perform a series of operations by ensuring capacity notarial acts performed by the Romanian citizens abroad to their legal effect in Romania and the Romanian authorities.

Notarial acts may be performed by embassies and consulates are as follows:

a) authentication, and proxy statements;

b) legalization of copies of documents;

c) legalization of translations;

d) legalize signatures.

Embassies and consulates can not perform notarial Romania in the conclusion of contracts, agreements, grants or other available documents, settlements, judgments receipts, documents, documents of service, military documents, wills, legacies, legal action or application to the Romanian authorities.

For proxy authentication and statements, the interested parties must appear in person at the Romanian embassy or consulate and to prove identity and status as a Romanian citizen (with valid ID). Attorney or statements are prepared, usually by the applicants, unless those acts are necessary in other consular procedures (obtaining passports, civil status, etc.).

Powers of attorney and declarations should include the identification of principal and agent and specify the exact purpose of the mandate. They

must be written in Romanian. The documents contain details not comply with Romanian law, the legal order or national security can not be authenticated.

Depending on the country, prosecutors and statements made by Romanian citizens can be used in Romania and the Romanian embassy or consulate of the lack of authentication.

In countries that signed the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents[15] (which included and Romania), purchased or statements made by Romanian citizens can be authenticated, in Romanian, a local notary, will then be legalized with Apostille by the competent authorities of that State. The documents certified by Apostille are valid under the Convention on the Romanian territory, without fulfilling any other formalities[16]. However, if the document was written in a foreign language, it will be translated into Romanian in order to be enforceable against the Romanian authorities.

In countries with which Romania concluded agreements on legal assistance in civil matters, attorney or statements made by Romanian citizens are recognized directly by the Romanian authorities, without fulfilling any other formalities. However, if the document was written in a foreign language, it will be translated into Romanian.

In countries that are not signatories to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents or a bilateral agreement on legal assistance in civil matters with Romania, attorney or statements made by Romanian citizens can be authenticated, in Romanian by a local notary, will then be authenticated by the competent authorities of the State and supralegalizated the Romanian embassy or consulate of that country. If the document was written in a foreign language, it will be translated into Romanian in order to be enforceable against the Romanian authorities.

Authentication legalization, and legalization of their embassies and consulates in Romania are subject to consular fees, payable by the applicants at the embassy or consulate responsible[17].

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[15] To help find the signatory countries no. 12/5 octombrie 1961 Hague Convention, you can access the Internet address www.hcch.net.

[16] Apostille - the process of legalization or apostille is a translation of notary authentication signature on the document by the competent tribunal. These procedures are usually required for the recognition abroad of a translated document in Romania.

[17] Attorney to collect pensions in Romania are exempted from consular fees and are valid for a period of 18 months from the date of authentication. Legalization of the consular procedures necessary for obtaining Romanian passports or certificates of civil status can not

Legalization of copies of documents, translation and legalization legalization of signature are subject to consular fees, payable by the applicants at the embassy or consulate responsible.

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be authenticated only by embassies or consulates of Romania (not legalized by the Apostille procedure or the administrative legalization).To legalize the copies of the documents, interested persons must submit official Romanian embassy or consulate of the original document and a copy of which is legalized valid ID.

To legalize the translation into Romanian of a document written in a foreign language, interested persons must submit the original document, accompanied by a translation in Romanian language of a valid identity document. To legalize the signature on a document, interested persons should appear at the Romanian embassy or consulate nearest to sign the document before a consular officer and to present a valid identity document holder's signature bear. Can not authenticate the signature on contracts, deeds of donation, settlement acts or other acts aimed at handing over of goods or other rights.

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CONSTITUTIONAL PRINCIPLES REGARDING THE RIGHT TO PROPERTY AKNOWLEGED TO FOREIGNERS AND STATELESS PERSONS

Andra DASCĂLU*

ABSTRACT

Property is the right that a person has, to rule and enjoy a certain object exclusively, absolute and in the terms of law. Accordingly to the 18th article from the Constitution of Romania, people from other countries and stateless persons which live in Romania enjoys full protection of the persons and their belongings, guaranteed by the Constitution of Romania and other internal laws.

Furthermore, according to the 44th article from the Romanian Constitution, people from other countries and stateless persons can gain the right accordingly to the regulations contained within the adherence treaty of Romania to the European Union same as the conditions provided by other treaties to which Romania is member. If until 2003 wasn't allowed to foreigners and stateless persons to gain the right to a private property, the nowadays Fundamental Low has different regulations.

KEYWORDS

Right to property, constitutional law, legal limitations

1. REGULATIONS CONCERNING THE RIGHT TO PRIVATE PROPERTY

Regulations concerning the right to property are provided as well as in the intern legislation as in the international one, as such: in the internal one **The Civil Code** art.480-643, **Law no. 33/1995** concerning expropriation for public utility, **Law no. 312/2005** concerning acquisition over private land ownership by foreign citizens and stateless persons and also by foreign legal

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persons (M.Of.no.1008 from November 14th 2005); in the international one *The Human Rights Universal Declaration* proclaimed by the U.N. General Council at December 10th 1948, **The Convention for the defense of human rights and fundamental freedoms**, confirmed by Romania through Law no.30/1994(M.Of.no.135 from May 31st 1994).[1]

In art.17 of the French Declaration of the Human Rights and of the Citizen from August 26th 1789, it shows that property, as a sacred and undeniable right that nobody can be deprived of, unless in the case that the legal public necessity states and demands it and under the condition of a just and prior compensation.

In art.17 from The Human Rights Universal Declaration, adopted by the U.N. General Council on December 10th 1948, it states that "Each person has the right to property, by itself or jointly. Nobody can freely be deprived by its property". [2]

In the doctrine certain principles of the property right have been pointed out, which result from the Constitutional Court's competence. These principles could be:

a) the right to property has a fundamental character, as a consequence, its conservation being one of the goals of the state's organized society, and its fundamental features being at a constitutional level and not a legal one;[3]

b) the legal status of the right to ownership is "preponderant of private law";[4]

c) the right to property is one of the fundamental principles of social standings;[5]

d) the right of the former owner will be regained only in the future, by the effect of a new law[6], which is a consecration of the constitutional right of the law's non-retroactivity;

e) by law, according to art.49 of the Constitution, certain barriers of the right to property can be brought fourth, without them touching the basis of this right, meaning not to annihilate it[7]. These barriers can either be

[1] Ioana Muraru, Elena Simina Tanasescu (coordinators) – "Romanian Constitution. Commentary on articles", Pub C.H.Beck, Bucharest, 2008, pag.422;
[2] Gheorghe Iancu – "Rights, Freedoms and Romania's Fundamental Duties", Pub All Beck, Bucharest, 2003, pag.191;
[3] Decision no.4/3, VII 1992, published in CDH 1992-1993, page 25;
[4] Decision no.5/14, VII 1992, published in CDH 1992-1993, page 34;
[5] Decision no.124/21, V 1997, published in CDH 1998, page 129;
[6] Decision no.73/19, VII 1995, published in CDH 1995, page 161;
[7] Decision no.19/8, IV 1993, published in CDH 1992-1993, page 169;

established regarding the right's objective, or as attributes of the right for the defense of general social and economic interests or for the defense of other person's rights. It is essential that through these barriers (restrictions) the basis of this right not to be touched.[8]

The right to property has known an important development along the time through regulations which are stated in the Romanian Constitution as such: in the Romanian Constitution adopted in June 29th 1866, the fundamental rights of citizens are regulated, a special concern being given to property, which is stated to be sacred and undeniable (according to art.19), and as a powerful guaranty it is stated that "no law can establish the penalty of confiscation of assets" (according to art.17). This Constitution has been replaced with the Constitution from March 29th 1938 which includes depositions as those from art.17, which guarantees private property and those from art.15 which forbid the establishment of the penalty of confiscation of assets. As regards to the Romanian Constitution from February 28th 1938, its depositions consecrate royal dictatorship and express, at the same time, the tendency of constraint towards human rights and democratic freedoms. It defends property, containing depositions resembling those existing in previous constitutions.

The 1965 Constitution has noticed itself through the expansion of state and cooperate property, dissolution of private property, emphasis of leadership not only politically but also stately by a single political party, the communist party, which holds the complete power in the state and the society. Limitations of private property have been brought through nationalization. Nationalization was the forced passage in the state's property of lands and constructions without compensations. In most cases the reasons for nationalization were arbitrary.

The current constitution is the most complete as regards to the right to private property according to the depositions mentioned earlier.[9]

2. CURRENT CONSTITUTIONAL REGULATION REGARDING THE RIGHT TO PRIVATE PROPERTY

The right to property is a classic subjective right, consecrated and studied mostly by private law, respectively civil law.

[8] Decision no.147/29, V 1997, published in CDH 1998, page 145;
[9] Ioana Muraru, Elena Simina Tanasescu – "Constitutional Law and Political Institutions", Edition 13, vol.1, Pub. C.H.Beck, Bucharest, 2008, page 86-97;

For the constitutional law, acknowledgement of private property has been and is considered as essential for the person's legal status, but also for the connections between the individual and the community. The principles of this fundamental right are stated in art44, paragraph 1-9 of the Constitution. Through special laws it is regulated the legal content, the manner in which it is exercised and the means of defense and the legal protection of this fundamental right.

The Constitution guarantees the right to property in all its aspects, such as possession, use or disposition. As such, nobody can be deprived of ownership of its assets discretionary and also any person whom its right has been broken abusively can address the courts to confirm its right of ownership and to be compensated. The right to private property and public property are legally equal, being enforced under the law, without any hierarchical distinction between them.

The content of the right to property is established through a special law. As a consequence, the law can establish boundaries regarding the sphere of property or to constitute and administrate the public domain.

The state's obligation is to guarantee and defend the property obtained legally. As such, the debts for and to the state are guaranteed no matter the owners.

The holder of this right can be any person, respectively any individual or legal person, including state officials. The assets which are the object of this right are not necessarily foreseen by the law as such, the right to private property can target any asset except those to which the law gives a different juridical status, being excluded from the civil circuit.

The legal regime enforced in exercising this right is derogatory from common law and is consecrated by rules specific to public law, an exception being administrative law.

The principle of equality applied on private property signifies the fact that there is the same legal regime for the right to ownership no matter the rightful owner, respectively the individual, the juridical person or the state.

The constitutional regulations mentioned in art.44, paragraph (2) of the Constitution refers to situations in which foreign citizens and stateless persons can regain the right to private property on lands in Romania. Under this deposition, stateless persons and foreigners can gain this right according to the regulations in the Romanian Treaty of Accession to the European Union, as well as in the conditions foreseen by other treaties to which Romania is part of, especially those closed within the European Union. Also the condition of reciprocity must be completed. This right can be gained

only in the conditions foreseen through organic law. On the basis of these regulations the Parliament has adopted law no.312/2005 regarding the acquisition of the right to private property on lands by stateless persons and foreign citizens, as well as by legal foreign persons.

By respecting the reciprocity principle, it is acknowledged to Romanian citizens the right to obtain private property on lands in the countries of origin of stateless persons and foreigners. The constitutional depositions mentioned above mainly refer to citizens members of the European Union. The same constitutional depositions acknowledge the possibility for stateless persons and foreigners to own lands in Romania by legal inheritance. It is not possible to gain the right to private property through a testament.

According to art.18 of the Constitution, stateless persons and foreign citizens who live in Romania benefit from the general protection of persons and wealth guaranteed by the Constitution and other laws. The right to asylum is granted and denied under the law, respecting the treaties and international conventions Romania is part of. The explanation for this deposition is in the fact that the population of a state includes, beside its citizens, stateless persons and foreign citizens. So, it is undeniable for stateless persons and foreign citizens to have certain rights and freedoms and, of course, the appropriate duties. As such, stateless persons and foreigners have the following rights: those which they gain as humans (natural rights) but under the law, the subjective ones which, legally, do not ask for the quality of being a citizen of a certain country (or, as in such cases, Romanian citizen).

Stateless persons or foreign citizens must also have obligations foreseen by the Constitution, which is its reason for being, and for them the civil responsibility and especially, the duty to uphold the Constitution, its supremacy and the law.[10]

3. LIMITATIONS OF THE PRIVATE PROPERTY RIGHT

The legal limitations of the private property right target its juridical content, and narrows the exercise of its prerogatives: possession, use (the use and gathering of fruits) and disposition (the juridical one to be the material one). The juridical limitations can be **legal** – which are foreseen by

[10] Gheorghe Iancu – “Rights, Freedoms and Romania’s Fundamental Duties”, Pub. Praxis, Bucharest, page 86;

the law, **judicial** – established through court orders and **volunteer** – which are made at the owner's request, stated in a unilateral act or a contract.[11]

From the first category of limitations is part, for example, the constitutional provision from art.44 paragraph2 which forbids the gaining of lands by stateless and foreign citizens who do not fall under the assumption of this text; from the second one are provisions, like those who establish a **right of pre-emption** or **propter rem obligations**. It cannot be said that limitations are always regulated through prohibitive rules, and the tasks through honorable rules, because the tasks regarding the insurance of neighborliness include **natural and legal servitudes**, and many of these are regulated by prohibitive rules (the interdiction to plant at a certain distance between two properties – art.607 C.civ; the interdiction to built certain constructions near the fence between properties – art610 C.civ; the interdiction to have windows at a certain distance from the neighboring property – art.612 C.civ)

Legal limitations are set either to be in the **public interest** – when they tend to protect a common goal, either in the **private interest** – when they were set to protect an individual interest.

Limitations regarding the right to property over lands can be classified respecting the **gaining of land**, their **juridical circulation**, their exploitation or regarding the unfoldment of economic activities, exc.

The problem with the interdiction to the right to property over lands by stateless and foreign citizens has made the object of extensive debates in the General Council, the radical initial solution (the former art41 paragraph2, thesis2, which did not allow for any stateless or foreign citizen to gain lands in Romania) being substantially modified in the current text. The modifications came as a consequence to Romania's accession to the European Union, in 2003 the review of the Constitution being necessary in order for the fundamental law to coincide with the community acquis.

Art.3 of the law no.312/2005 shows that the citizen of a member state, the foreigner with residency in a member state or Romania, as well as the juridical person constituted according to the laws of a member state can gain the right of ownership over the lands under the same conditions with those foreseen by the law for Romanian citizens and for Romanian juridical persons.

[11] Valeriu Stoica – "Civil Law. Principal Real Rights", vol.1, Pub. Humanitas, Bucharest, page 249-250;

According to art.4 from Law no.312/2005, “the citizen of a member state who does not reside in Romania, the foreigner non-resident in Romania with residency in a member state, as well as the non-resident juridical person constituted according to the laws of a member state, can gain the right of ownership over lands as secondary residences, respectively secondary headquarters, when reaching a 5 year term from Romania’s accidence to the European Union”.

Also the citizen of a member state, the foreigner with residence in one of the member states, as well as the judicial person constituted according to the laws of a member state can gain the right of ownership over farming lands, forests, forest lands when reaching a 7 year date from Romania’s accidence to the European Union.

For the farmers who undergo independent activities and are, as appropriate citizens of member states or foreigners who reside in a member state, who make residence in Romania or foreigners with domicile in Romania, the depositions regarding the 7 years term from Romania’s accidence to the European Union does not apply.

The quality of farmer who undergoes independent activities can be proven according to law 312/2005 with documents emitted or issued by competent authorities from the member state or where they came from. Foreigners with domicile in Romania prove this with a certificate issued by the Minister of Agriculture, Forests and Rural Development.

The persons mentioned above have gained the right of ownership over farming lands, forests and forest lands under the same conditions as those for the Romanian citizens, from when Romania acceded to the European Union.

The destination of farming lands, forests and forest lands cannot be changed during the transition period by these persons.

As the citizens, foreigners and juridical persons belonging to states not part of the European Union are concerned, they can gain the right to ownership over lands, under the conditions regulated by international treaties, on a basis of reciprocity. The foreign citizen, the stateless person and the juridical person belonging to third party states cannot gain the right to ownership over lands in more favorable conditions than those that apply to the citizen of a member state and the judicial person constituted according to the laws of a member state.

Obviously the foreign citizens, stateless persons and juridical foreign persons who do not meet the demands foreseen by Law no.312/2005, cannot

gain the right of ownership over lands in Romania; in the doctrine it has been stated that the dismantle of this law could be gained.[12]

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