ANALELE UNIVERSITĂŢII TITU MAIORESCU

TITU MAIORESCU UNIVERSITY LAW REVIEW

Drept

Serie nouă
2018
– anul XVII –

Editura Hamangiu
2018

Editura Universităţii Titu Maiorescu
http://analedrept.utm.ro
INDEXATĂ: ***HeinOnline***

CEEOL

Editura Hamangiu SRL
Str. Mitropolit Filaret nr. 39-39A, Sector 4, Bucureşti

Editura Universităţii Titu Maiorescu
Bucureşti, România, Calea Văcăreşti nr. 187, sector 4

For any supplementary information and orders, please contact us
by phone (0040)3302141 or by e-mail: drept@utm.ro, anale.drept@utm.ro

ISSN: 1584-4781

TITU MAIORESCU UNIVERSITY LAW ANNALS

Drept

Law

2018

COLEGIUL DE REDACŢIE

Manuscrisele, cărţile şi revistele pentru schimb, precum şi orice corespondenţă se vor trimite Colegiului de redacţie al Analelor Universităţii Titu Maiorescu, Calea Văcăreşti nr. 187, sector 4, cod 040054, Tel. 0213302141; 0213301174; Fax: 0213302141, email: anale.drept@utm.ro, www.utm.ro/anale drept

Manuscripts, books and journals for exchange, as well as all correspondence will be sent to the Editorial Board of the Law Review of the Titu Maiorescu University, Calea Văcăreşti nr. 187, secteur 4, code 040056, Tel. 0213302141; 0213301174; Fax: 0213302141, email: anale.drept@utm.ro, www.utm.ro

CONTENT

THEORETICAL DIFFICULTIES AND LIMITS OF THE MARGIN OF APPRECIATION OF STATES IN EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

Nicolae VOICULESCU[*]
Maria Beatrice BERNA[**]

ABSTRACT
By means of the present paper we pursue to surprise the theoretical-jurisprudential features of the margin of appreciation. The conceptual flexibility of the margin of appreciation resides within its case-law foundation and is undertaken by the lack of clear provisions contained in the European Convention on Human Rights. Our aim does not consist in exhausting the analytical alternatives regarding the margin of appreciation; on the contrary, by way of example, we advance the main coordinates of manifestation concerning the margin of appreciation and we establish a comprehensive mechanism that would lead to the understanding of the control exerted in this field by the European Court.

KEYWORDS: *Margin of appreciation, subsidiarity, the control of the European Court, limitations/restrictions/derogations relating to the rights provided in the European Convention on Human Rights.*

1. Definition-oriented addresses and the difficulty of conceptual homogenization of the margin of appreciation

The doctrine of the margin of appreciation is a diffuse concept. Having *ab initio,* a case-law existence, the margin of appreciation has evolved up to the point of having a possible conventional consecration. First, it is obvious the *substantial* nature of the margin of appreciation: by aiming to grant specific prerogatives to the High Contracting Parties, they have the power to evaluate the circumstances of the cases subjected to solving, the final objective consisting in ensuring the principle of the preeminence of rights at the highest level. Likewise, it is not less true the fact the margin of appreciation of States represents the tool that applies

[*] *Professor Ph.D, Director of the Council of Doctoral Studies*, *University Titu Maiorescu Bucharest, Romania.*

[**] *University assistant phd., Law Faculty, Titu Maiorescu University, Bucharest, Romania.*

the two methods of work that were identified, over time, within the activity of the Court: (1) the standard of consensus- the wide margin of appreciation of States is the immediate consequence of the lack of consensus between High Contracting Parties in human rights matters; (2) natural-types – the Court can construe a certain analytical category as relevant for a determined conflict. In the latter case, it is observed the circularity of the Court's action. For example, in relation to the sphere of rights and liberties of personal nature (art. 8-11 of the Convention), the Court underlines the possibility that States have to breach those freedoms by virtue of waivers provided in article 2 – waivers that take into consideration the aspects that are necessary to a democratic society. In his case, we make the application of *natural types.* For concretness, the Court must establish to what extent the violations of rights and personal freedoms by State Parties *are justified.*[1]

The issues that are connected to the governmental aspects that are derived from the margin of appreciation of States refers to the *correct maner of construing and applying the principle of subsidiarity.* Alike the margin of appreciation of States, subsidiarity did not know a conventional evolution (in the text of the Convention), being consecrated in jurisprudence and subsequently recognized as an official element provided in the preambular part of the Convention by means of the Additional Protocol no. 15 of modifying the European Convention for Human Rights.[2] As it is present within both European law systems, *subsidiarity* has a specific meaning, taking into account the *specific juridical nature of the Union, respectively of the Council of Europe.* If in the case of the Union, the *federal* elements are easily noticeable, *subsidiarity* is understood *in a competitive manner,* in a manner in which the law of the European Union is applied in the sense of facilitating the

[1] Simon Paul, *Governing From the Margins: The European Court of Human Rights' Margin Of Appreciation Doctrine as a Tool of Global Governance,* CYELP 12 [2016], p. 88-94.

[2] Protocol no. 15/2013 to the European Convention On Human Rights, published text in the Official Gazette of Romania, in force at 5 December 2014. Article 1 of Protocol no. 15 adds to the end of the Preamble a new reason that introduces both subsidiarity and the margin of appreciation of States: *Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.*

political integration of Member States, in the case of the European Court of Human Rights, the manner of understanding subsidiarity is *complementary* in the sense that the Court intervenes only in those matters in which national authorities are unable to effectively guarantee the rights comprized in the Convention.[3]

The Izmir Declaration[4] and the Brighton Declaration[5] have served as instruments of re-visiting the role of the subsidiarity principle in the context of wording possible premises upon futures evolutions of the European Court of Human Rights. The Izmir Declaration reaffirms, in point 5 that subsidiarity is a feature of the Convention mechanism, representing a fundamental and transversal principle that both the Court and State-Parties must take into consideration. The Brighton Declaration develops the signification of the margin of appreciation and subsidiarity, by conjugating the two notions in the context of the interaction between the European Court and national authorities. In section B, point 11 of the Brighton Declaration, are explained *in extenso* both the margin of appreciation, subsidiarity and the interconditioning relationship between the two: *The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.*

[3] Gabriel Füglistaler, *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*, Cahier de l'IDHEAP 295/2016 Unité *Droit public,* IDHEAP Institut de hautes études en administration publique, 2016 IDHEAP, Lausanne, p. 7.

[4] Adopted following the Conference undertaken during 26-27 April 2011 at the Turkish initiative in the context in which it took over the Presidency of the Committee of Ministers of the Council of Europe.

[5] Adopted following the Conference undertaken during 18-20 April 2012 at the British initiative in the context in which it took over the Presidency of the Committee of Ministers of the Council of Europe.

The relationship between *subsidiarity* and *the margins of appreciation* is difficult to express in the conditions of observing the *shortcomings connected to definitions and legal status* that are common to both notions. Although it is clear that one of these notions represents the result of the application of the other, a rigid segregation in the sense of identifying the preeminence of one in relation to the other is unlikely.

Doctrinal studies[6] have attempted to overcome these shortcomings by establishing that *the margin of appreciation is the natural product of subsidiarity that gives to national authorities the power of implementing the Convention's guarantees in their domestic regulations, accordingly to the needs and the resources of the community and of the individuals that live on a given territory.* By analysing the conceptual spheres of the margin of appreciation and susbsidiarity, we may identify the relation between those two, by admiting, at the same time, the conceptual autonomy of each of the two: *the margin of appreciation* is translated by means of the freedom granted to the national authorities of the High Contracting Parties of establishing a *modus operandi* that would be adopted in fulfiling the obligations that derive from the Convention, meanwhile *subsidiarity* entails the support granted by European authorities in the matters in which the High Contracting Parties do not exert decisional power in compliance to the spirit of the Convention.

2. The limits of conventional law in identifying the margin of appreciation. The interpretative deduction

Until the elaboration of Aditional Protocol no. 15, the margin of appreciation of States was not foreshadowed *in expresis* in conventional law. Nevertheless, there is the possibility of interpretative deduction and this is a laborious process, that is voided by the expectation of a clear result. In the given context, we advance *the pattern of extracting by means of the interpretative-deduction method the margin of appreciation of States.* Having the primary and coordinator role regarding the Convention dispositions, the margin of appreciation of States results from the conjunction interpretation of articles refering to: the obligation of respecting human rights – art. 1, the right to an effective remedy –

[6] H. Petzold, *The Convention and the Principle of Subsidiarity* in R.St.J.Macdonald/ F.Matscher/ H. Petzold (eds.), The European System For the Protection of Human Rights, Martinus Nijhoff Publishers, 1993, p. 58-59.

art. 13, equitable satisfaction – art. 41 and the safeguard for existing human rights – art. 53.[7] The advanced pattern is one of *synthesis,* counting of the detailed analysis of the content comprized in the previously stated articles, denying their purely expositive character, of descriptive nature, of the given texts.

Article 1 of the Convention, by giving voice to the statutory principle of *the preeminence of rights*[8]*,* brings into discussion the issues that are connected to *jurisdiction* and to *granting the rights and freedoms provided within the Convention to all the individuals that find themselves under the jurisdiction of High Contracting Parties.* From the wording of article 1 of the Convention sheers the *guiding and principial nature* of its dispositions –the latter establishing, *inter alia, the international liability of States in matters of rights and freedoms guaranteed in Title II of the Convention.* In other terms, if the High Contracting Parties recognize the rights and freedoms protected by the Convention to every person found on their jurisdiction and if the violation of these rights and freedoms is undertaken because of the national legislator, it will be applied State's responsability.[9]

The building of a juridical relation between *guaranteeing rights and freedoms provided in the Convention* and the *individuals found under the jurisidiction of High Contracting Parties* reclaim terminological clarifications regarding the notion of *jurisdiction.* The latter restricts the relations to the *victim of human rights violations* and the State organ *that is the author of the violation of human rights.*[10] In its essence, the term "jurisdiction" evokes authority, power, relationships of subordination. These do not resume to the premise of *territorial jurisdiction* although it represents the natural framework of manifesting State power. There is the possibility for an individual to physically find himself on the territory of a State, being excepted from the exercice of authority of the respective

[7] In a similarly pronounced by Gabriel Füglistaler, *cited work,* p. 10-11.

[8] The principle of *the preeminence of rights* is stipulated in both article 1 of the European Convention on Human Rights and in article 3 of the Statute of the Council of Europe.

[9] Corneliu Bîrsan, *Convenţia Europeană a Drepturilor Omului. Comentariu pe articole. Volumul I. Drepturi şi Libertăţi (The European Convention on Human Rights. Comment on articles. Volume I. Rights and Freedoms),* Publishing House All Beck, Bucharest, 2005, p. 126-127.

[10] J.-L. Charrier, *Code de la Convention européenne des droits de l'homme 2000*, commenté et annoté, Litec, Paris, 2000, p. 9.

State (being outside the *imperium powers* of the State); it is also true that, there can be situations in which, an individual, even if it is situated outside the territory of a State, to be liable of the *imperium acts* of the respective State.

Jurisdiction appears, in its concrete exercise, in its two dimensions: (1) territorial jurisdiction (a situation in which the State exerts authority upon the nationals that are found on his territory) and (2) extra-territorial jurisdiction (a situation in which the State exerts authority upon the nationals that are found on the territory of another State by virtue of some specific elements like diplomatic and consular relations). *The establishment, by means of article 1 of the European Convention, of the international liability of States by refering to conventional rights and freedoms, represents one of the premises of officialy recognizing the States margin of appreciation. By recognizing the vertical relations established between States and individuals taken under States jurisdiction, it becomes pellucid the idea according to which national authorities have, first of all, the obligation to respect the dispositions of conventional law as the intervention of the European Court is subsidiary.*

The subordination relation existing between individuals and the States that have jurisdiction over them is developed by means of the provisions of article 13 of the European Convention. *Subsidiarity* and, in correlation, *the margin of appreciation of State Parties to the Convention* result from the text of article 13: in the hypothesis of violating the rights and freedoms provided in the Convention, the first competent authorities are those situated at the national level; in the hypothesis in which the victims' claims are denied in the domestic field, the victim has opened the possibility of addressing the European Court that will analyse the alleged breach of the right protected by the Convention. The content of art. 13 of the European Convention allows divergent interpretations of the juridical nature of article 13, thus anticipating its hybrid nature: *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.* Some observations are necessary required: (1) the right to an effective remedy does not reclaim, *de plano, the violation of conventional rights;* on the contrary, the evaluation of the existence or of the absence of the violation represents the content itself of article 13 and, in these conditions, the right to an effective remedy may be exerted even in the hypothesis of a *claimed violation of the conventional rights and*

freedoms. The effective remedy entails the legal possibility of analysing the *in concreto violation of the rights and freedoms stated in the European Convention;* (2) the right to an effective remedy is, in its essence, a subjective right of procedural nature, because it advances the establishment *of procedures through which cand be evaluated the internal acts and rules of applying the rights provided by the Convention.*[11]

Article 41 of the Convention represents an application of States margin of appreciation and of subsidiarity in relation to conventional law and in relation to the activity of the European Court of Human Rights. According to the Practice Directions of Just Satisfaction Claims[12], the application of article 41 of the Convention is subsidiary as the Court cannot grant an equitabe satisfaction by means of the sole violation of a right enshrined in the Convention or in its Additional Protocols. The coordinates of applying article 41 of the Convention are determined by the cumulative fulfillment of 2 requirements: (1) if the domestic law does not allow an integral reparation of the consequences of the violation; (2) if the European Court deems that it is necessary. The intervention of the European Court is subsidiary to that of the national courts because, according to article 41, an equitable satisfaction is granted only if it was ascertained the fact that there is a violation of the Convention or of its Protocols and only if national law cannot offer anything else than an incomplete removal of the consequences of those violations.

The subsidiary character of human rights protection established according to the European Convention also derives from the dispositions of article 53. The latter recognizes the fact that, the guarantees established by means of the European Convention are *minimal,* as State Parties have the freedom to develop higher standards in the field of human rights protection. Thus, the standards enshrined in the European Convention have *an inspiring* and *corrective* role by refering to national standards. Conventional standards are *inspiring* as they represent a departing point in the process of wording, at the national level, of specific standards; at the same time, they are *corrective* because they express the *minimum level of guarantees* that must be respected in the

[11] Corneliu Bîrsan, *cited work,* p. 870.

[12] Practice Directions issued on 28 March 2007 by the President of the Court, in compliance with article 32 of the Courts' Rules.

field of human rights protection so that national actions would not become abusive.

In the process of extracting *the margin of appreciation of States* from the provisions of the Convention, some problems appear manifestly: (1) to what extent the margin of appreciation is an argument that States can use when derogating from the norms included in the *jus cogens category* (more precisely, we take into account the provisions of articles 2,3, and 4 of the Convention)[13]. Obviously, the waivers from the provisions of the Convention do not operate *per se* but only in the context of the cumulative fulfillment of the requests provided by art. 15: *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

National authorities, being familiar to domestic realities and to those circumstances that are harmful to the population or to the organized life within State community, are the only ones that can evaluate, by virtue of *the margins of appreciation,* if an exceptional and imminent circumstance is able to produce such hurtful consequences so that they cannot be removed in another manner except in the conditions of derogating from the Convention's provisions. It is clear that is to the national authorities the task of evaluating the *extent to which State action may have resonance and pertinence in the context of removing the danger state.* Relating to this aspect, the Court deems that, *being in direct and constant contact with the pressing realities of the moment, national authorities are, as a general rule, better placed than the international judge in order to assess the presence of the danger as well as the nature and the extent of the necessary derogations for eliminating it, article 15 paragraph 1 recognizing to national authorities a wide margin of appreciation*[14].

Just like the rights provided by the Convention, the margin of appreciation given to States with the purpose of evaluating the possibility of derogating from the conventional dispositions does not have an absolute

[13] For further details, see Steven Greer, *The Margin Of Appreciation: Interpretation And Discretion under the European Convention on Human Rights*, Reader in Law, University of Bristol, United Kingdom, Human rights files No. 17, Council of Europe Publishing, 2000, p. 8.

[14] Bîrsan C., *cited work,* p. 921.

character. The margin of appreciation cannot be separated from issues of European law nor from the correlative control that is given to the European Court. The latter has the competence of assessing, according some pre-established criteria (the nature of rights, the duration of the "emergency state", the circumstances within which it manifests itself) the correctness of the application of the margin of appreciation by the High Contracting Parties. In all cases, the margin of appreciation of States cannot determine, in their favour, the waiver of the rights declared by art. 15, paragraph 2 as absolute: the right to life-article 2, the probihition of torture-article 3, the prohibition of slavery and forced labour-article 4, no punishment without law-article 7. The possibility of derogating, provided by article 15 must be applied, in all its cordinates (so, inclusively in the dimension evoked by paragraphs 2 and 3) by all High Contracting parties, the various shades of the margin of appreciation of States being exclusively those permitted by the text of the Convention.

In doctrinal studies[15] were underlined the characteristics of the margin of appreciation of States in the context of exceptional situations that might determine the derogation from the provisions of the Convention: (1) the margin of appreciation represents the power of the High Contracting Party that derogates from the provisions of the Convention to decide in regard to the urgency and the proportionality of the measure that was adopted in order to stop the execptional situation; (2) first, the application of the margin of appreciation presumes the identification of the urgency and the proportionality of a given measure; secondly, the margin of appreciation presumes the control exerted by the European Court in order to verify if the initially established pattern that was established to apply the margin of appreciation is compatible to the provisions of the Convention; (3) the burden of proof relating to the existence of urgency and proportionality of the adopted measure is due to the State that derogates; (4) the verification undertaken by the European Court refers to the reasonable character of the action undertaken by the State that derogates and to monitoring the action that breaches the obligation assumed by the State by virtue of the Convention; (5) because the High Contracting Parties have firstly the obligation of implementing the provisions of the Convention, the European Court is construed as a secondary mechanism; (6) the application of the margin of appreciation

[15] Singhvi A.M., *Judicial Review Of State Derogations From Human Rights Obligations In International Treaties,* p. 10.

in the context of an urgent situation results from the need of a prompt and effective action of the Government.

3. Various ambitus of jurisprudential valorisation of the margin of appreciation

The application of the margin of appreciation in the Court's activity presents itself under different forms of action: (1) weather it is entrusted to the High Contracting Parties a wide power of appraisal in establishing the limits/restrictions or derogations from the rights comprised in the Convention, (2) weather the European Court exerts a thorough control, thus limiting States' freedom concerning the establishment of the effective manner of exerting conventional rights.

In the case *Dudgeon vs. United Kingdom*[16] the plaintiff claimed before the Court that his right to private life was violated in reference to the legislation of Nothern Ireland that criminalized homosexual relations between consenting adults. The Court agreed there was a breach of article 8, affirming that, *the test of what is necesssary in a democratic society* is construed from the perspective of tolerance and opening as well as from the perspective of proportionality with a pressing social need. The fact according to which Nothern Ireland was opposed to the proposition of the United Kingdom of de-criminalizing sexual relations between male consenting adults aged 21 does not represent a sufficient element for validating the test of what is necessary in a democratic society, hence existing a clear violation of article 8 of the Convention.[17]

The evaluation of the manner in which the margin of appreciation of States is exerted by the Court is obvious in the context of applying article 8 of the Convention. The case *Jansen vs. Norway*[18] presents the extend to which has validity the interpretation of the margin of appreciation of States undertaken by the Norwegian State in the context of invoking the violation of article 8. Regarding the situation of separating the mother from its child with the purpose of preserving public order and with the

[16] The Judgement of the Court pronounced in the case *Dudgeon vs. United Kigdom* of 22 October 1981, Section A5.

[17] Steven Greer, *The Margin Of Appreciation: Interpretation And Discretion under the European Convention on Human Rights*, Reader in Law, University of Bristol, United Kingdom, Human rights files No. 17, Council of Europe Publishing, 2000, p. 35.

[18] The Judgement of the Court pronounced in the case *Jansen vs. Norvegia* on 6 September 2018.

purpose of respecting the rights and freedoms of others (the rationale invoked by national courts refers to the risk of kidnapping the child if the latter remained with the biological mother), the Court adopts a contrary opinion.

Thereby, it is assessed that, the margin of appreciation of the Norwegian State in limiting/restricting the right to family life for reasons related to committing a deed that is contrary to public order and that might breach the rights and freedoms of others (the kidnapping of the child) *is not validly exercised, being likely to bring unjustified violations of the guarantees enshrined in article 8.* The case-law argument taken into consideration by the Court relates to *the long-term effects that might have the permanent separation of the child from her biological mother, the more so as both the mother and the child belong to Roma ethnicity and the separation of the mother from the child may lead to their alienation of the Roma culture and traditions.*

On the contrary, in the case *Fröhlich vs. Germania*[19]the manner of exerting the margin of appreciation in reference to the right to private and family life is validated by the Court. In the given case, the refuse of national courts of granting to the potential biological father the right to visit or the refusal to compel the legal parents to provide information on the personal circumstances of the child was motivated by the *test of what is necessary in a democratic society in its dimension concerning the protection of the rights and freedoms of others.* The considered rationale is that, according to which, in order to establish the paternity of the alleged biological father may determine the dissolution of the child's primary family by determining the divorce of the legal parents. Thus one cannot deny the conflict of rights that exists between *the respect for private and family life* and *the rights of the child-that are protected by means of the principle of the best interest of the child.* This conflict of rights is solved by the Court in favor of the child as the European Court acquiesced to the margin of appreciation exerted by the State and thus reaches the conclusion according to which *there is no violation of the right to private life enshrined in article 8.*

The preeminence of the margin of appreciation upon the control exerted by the European Court is obvious in the case *Tuskia and others*

[19] The Judgement of the Court pronounced in the case *Fröhlich vs. Germania* on 26 July 2018.

vs. Georgia[20]. The object of the case is represented by the conduct of university professors who, in the context of an authorized meeting in the Great Hall of the main building of the University, have forced the access into the rector's office asking for his resignation. The plaintiffs were found guilty by committing some deeds that are construed as contraventions according to domestic law. After assessing the circumstances in which was manifested the conduct of the plaintiffs, the Court stated the following: *Although the events happened in a tense situation, there was not established within the internal procedures the violent nature of the conduct of the plaintiffs. The protest of the plaintiffs, assessed as a whole, hadn't a nature nor a degree that would except them from the field of protection of article 11, construed in light of article 10 and their removal and administrative liability constituted an interference within their right to freedom of assembly.* By virtue of the States' margin of appreciation, the Court stated that, although there was an interference in the right to free speech (art. 10) and in the right to free assembly (art. 11), national authorities have pursued by means of their actions a legitim and necessary scope within a democratic society –respectively the protection of public order and of the rights and freedoms of others. Due to the fact that, both the rector and the administration of the University have manifested tolerence towards the actions undertaken by the plaintiffs and the police forces have not applied physical aggressions upon the plaintiffs, the interference with the freedom of speech and with the freedom of assembly is validated and derives from the margin of appreciation of States.

In the previous developed case-law in compliance to articles 10 and 11, the Court exerted a much more thorough control in relation to the margin of appreciation of States, assessing that the justifications of national authorities in the field of restricting/limiting the respective rights are not well founded nor validated by the *test of what is necessary in a democratic society. Exempli gratia,* in the case *Lingens vs. Austria*[21] article 10 was restricted by virtue of the margin of appreciation of States – that was construed by the Court as being exerted in an unjustified manner. The conviction of Mr. Lingens for the defamatory opinions

[20] The Judgement of the Court pronounced in the case *Tuskia and others vs. Georgia* on 11 October 2018.

[21] The Judgement of the Court pronounced in the case *Lingens vs. Austria* on 6 July 1986.

expressed in two newspaper articles against the Austrian Chancellor Bruno Kreisky was assessed by national courts as a necessary act in a democratic society-that was meant to ensure the respect for the rights and freedoms of others. In this particular case, national authorities have construed the conviction of Mr. Lingens as a punitive act that was necessary to re-establish Mr. Kreisky's rights to honour and reputation. The European Court has invalidated the manner in which the German State understood to exert the margin of appreciation in relation to the guarantee of art. 10, thus retaining as disproportionate Mr. Lingen's conviction. Therefore, it was provided that the freedom of political debates represent the very core of a democratic society.

Likewise, in the case of the *The United Communist Party of Turkey and others vs. Turkey*[22] the exercise of the margin of appreciation of the Turkish State in relation to art. 11 was assessed by the European Court as unjustified. By virtue of the margin of appreciation, the Turkish State established that *the measure of dissolving the United Communist Party of Turkey – although represents an interference in the exercise of the right to free assembly, – it is justified by appealing to the rigors that exist in a democratic society (we mainly take into consideration the legitimate purpose of national security).* The European Court has assessed that, although it cannot substitute its opinion to the one already expressed by national authorities and that, even if it cannot evaluate if national authorities have reasonably exerted their margin of appreciation, with due diligence and in good faith, it cannot move away from the evaluation of the proportionality relation between the limitation/restriction of the right enshrined in article 11 and *the legitimate aim that is pursued.* The Court has declared that the limitation of the freedom of assembly by dissolving the United Communist Party of Turkey is an excessive act, in this context, the margin of appreciation of States being able to annihilate the essence of this freedom.

The freedom of thought, conscience and religion provided by art. 9 guarantees primary values that were assessed by States through the margin of appreciation. By bringing into discussion sensible subjects for the national legal framework, *prima facie* the margin of appreciation would be eloquent. Despite all of these, in cases that are comprised in the previous case law of the Court (we mainly refer to the case *Kokkinakis*

[22] The Judgement of the Court pronounced in the case *The United Communist Part of Turkey and others vs. Turkey* on 30 January 1998.

vs. Greece[23]) and in other cases comprised in the recent case law of the Court (we take into consideration the cause *Hamidović v. Bosnia and Herzegovina*[24]) the manner of exerting the margin of appreciation was invalidated by the Court. In the *Kokkinakis* cause the punishment of the plaintiff for proselytism by the mere fact of its membership to a religion constitutes an excessive manner of exerting the margin of appreciation meanwhile, in the case *Hamidović v. Bosnia and Herzegovina* the exercise of the margin of appreciation by convicting a witness on religious grounds is not in compliance to pursuing a proportional and legitimate aim.

4. Conclusions

The margin of appreciation of States is does not resume its juridical nature to *that of a principle or of a juridical concept.* The margin of appreciation represents a mechanism that is laid to the disposition of States with the purpose of assessing, in just conditions, the manner of applying the rights and freedoms provided in the European Convention. If the margin of appreciation is a prerogative of the High Contracting Parties, it establishes, in a correlative way, an obligation for the European Court. Having the advantage of being in contact with the local and regional peculiarities that exist at the domestic level, the High Contracting Parties exert the right to evaluate the circumstances in which are admissible the limitations/restrictions to the conventional rights/freedoms. Within this mechanism, the role of the European Court cannot be denied: it exerts the supervision on the manner in which Nation-States understand to apply the margin of appreciation, acting like a corrective which, finally, weather validates the national interference in the exercise of conventional rights and freedoms, weather it counteracts it, ensuring the preeminence and the integrity of the content of the Convention.

[23] The Judgement of the Court pronounced in the case *Kokkinakis vs. Greece* on 26 September 1996.

[24] The Judgement of the Court pronounced in the case *Hamidović v. Bosnia şi Hertegovina* on 5 December 2017.

5. Bibliography

1. Corneliu Bîrsan, *Convenţia Europeană a Drepturilor Omului. Comentariu pe articole. Volumul I. Drepturi şi Libertăţi (The European Convention on Human Rights. Comment on articles. Volume I. Rights and Freedoms),* Publishing House All Beck, Bucharest, 2005.
2. Gabriel Füglistaler, *The Principle of Subsidiarity and the Margin of Appreciation Doctrine in the European Court of Human Rights' Post-2011 Jurisprudence*, Cahier de l'IDHEAP 295/2016 Unité *Droit public,* IDHEAP Institut de hautes études en administration publique, 2016 IDHEAP, Lausanne.
3. H. Petzold, The Convention and the Principle of Subsidiarity in R.St.J. Macdonald/ F. Matscher/ H. Petzold (eds.), The European System For the Protection of Human Rights, Martinus Nijhoff Publishers, 1993.
4. J.-L. Charrier, *Code de la Convention européenne des droits de l'homme 2000*, commenté et annoté, Litec, Paris, 2000.
5. Practice Directions issued on 28 March 2007 by the President of the Court, in compliance with article 32 of the Courts' Rules.
6. Protocol no. 15/2013 to the European Convention On Human Rights, published text in the Official Gazette of Romania, in force at 5 December 2014. Article 1 of Protocol no. 15 adds to the end of the Preamble a new reason that introduces both subsidiarity and the margin of appreciation of States.
7. Simon Paul, *Governing From the Margins: The European Court of Human Rights' Margin Of Appreciation Doctrine as a Tool of Global Governance,* CYELP 12 [2016].
8. Singhvi A.M., *Judicial Review Of State Derogations From Human Rights Obligations In International Treaties.*
9. Steven Greer, *The Margin Of Appreciation: Interpretation And Discretion under the European Convention on Human Rights*, Reader in Law, University of Bristol, United Kingdom, Human rights files No. 17, Council of Europe Publishing, 2000.
10. The Brighton Declaration, adopted following the Conference undertaken during 18-20 April 2012 at the British initiative in the context in which it took over the Presidency of the Committee of Ministers of the Council of Europe.

11. The Izmir Declaration, adopted following the Conference undertaken during 26-27 April 2011 at the Turkish initiative in the context in which it took over the Presidency of the Committee of Ministers of the Council of Europe.
12. The Judgement of the Court pronounced in the case *Fröhlich vs. Germania* on 26 July 2018.
13. The Judgement of the Court pronounced in the case *Hamidović v. Bosnia şi Hertegovina* on 5 December 2017.
14. The Judgement of the Court pronounced in the case *Jansen vs. Norvegia* on 6 September 2018.
15. The Judgement of the Court pronounced in the case *Lingens vs. Austria* on 6 July 1986.
16. The Judgement of the Court pronounced in the case *Dudgeon vs. United Kigdom* of 22 October 1981, Section A5.
17. The Judgement of the Court pronounced in the case *Kokkinakis vs. Greece* on 26 September 1996.
18. The Judgement of the Court pronounced in the case *The United Communist Part of Turkey and others vs. Turkey* on 30 January 1998.
19. The Judgement of the Court pronounced in the case *Tuskia and others vs. Georgia* on 11 October 2018.

MEASURES TO SOLVE PRISON OVERCROWDING AND IMPROVE DETENTION CONDITIONS

Marieta SAFTA[*]
Beatrice DRĂGHICIU[**]

ABSTRACT
Solving prison overcrowding and improving detention conditions constitute current concerns in many of the world's states. These require a correlation of the legislative and administrative measures, but also the measures of social reintegration of convicts, in order also to reduce the recidivism. The present study draws an account of this issue at at Romania's level, outlining the measures the Romanian state has undertaken to fulfill the constitutional obligations and international commitments in order to raise to the standards of fundamental rights protection imposed by them.

KEYWORDS: *detention conditions, prison overcrowding, pilot judgments.*

1. Introduction

The particularly complex issue of the detention conditions in Romania is neither novel nor restricted to Romania alone. European states and not only are generally confronted with the phenomenon of prison overcrowding and are making sustained efforts to identify solutions regarding this issue, and also to improve detention conditions.

As far as Romania is concerned, the publications at the beginning of the 20th century, specifically the *Penitentiary and Criminal Law Magazine*[1], which began being published starting with 1912, presents in its very first issue, under the title "*Retrospective View on Prisons*" and under the signature if T.I. Cavaroc, a precious historian of the penitentiary system and especially of the measures taken after the Unification of the Principalities, developing the *"Prison Heralding"* which was an integral part of the Ministry of the Interior under the name of the General Direction of Prisons. In the same issue of the journal, we

[*] *Ph. D. Lecturer, University Titu Maiorescu, Bucharest, Romania.*
[**] *Counsellor – Secretary of State Office, Ministry of Justice, Romania.*
[1] Bucharest – The typography and bindery of the "Văcăreşti" central prison.

find the study *"About Prisons. Several of The Evils Observed in Penitentiary Matters and Some Correction Proposals"*, under the signature of Mr. Sim. Em. Niculescu, "head of the statistical office" with a psychological and sociological perspective. We find that in the various diverse historical stages and in diverse forms and proportions, in an evolutionary manner, the preoccupation for *"the establishment of premises", "their provision with relatively good comfort", "the selection of staff according to their requirements"*, as well as the incipient preoccupation for the reintegration of detainees through the organization of workshops where they would work, because, according to the authors quoted, *"only work distracts them from the bad habits."*

The 20th century and the beginning of the 21st century have brought to the fore, along with the exponential development of fundamental rights, protection instruments as well as the guarantees established for enforcing them, the issue of overcrowding and detention conditions, triggering systemic actions at the level of states for solving it.

2. National and international standards of reference that protect and guarantee the right to life, physical and mental integrity, and prohibit torture and inhuman or degrading treatment[2]

Article 22 of the Romanian Constitution provides that: *"(1) The right to life, as well as the right to physical and mental integrity of person are guaranteed. (2) No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment. (3) The death penalty is prohibited."*

Article 3 and art. 5 of the Universal Declaration of Human Rights provides that *"Everyone has the right to life (...)"; "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*.

Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms regulates the right to life, and art. 3 provides that *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

The EU Charter of Fundamental Rights regulates in articles 2-4:

[2] Broadly M. Safta, *Constitutional law and political institutions*. Vol. I, Hamangiu Publishing House, Bucharest, 2016.

– the right to life: *"(1) Everyone has the right to life. (2) No one shall be condemned to the death penalty, or executed."*

– the right to the integrity of the person: *"(1) Everyone has the right to respect for his or her physical and mental integrity. (2) In the fields of medicine and biology, the following must be respected in particular: (a) the free and informed consent of the person concerned, according to the procedures laid down by law; (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons; (c) the prohibition on making the human body and its parts as such a source of financial gain; (d) the prohibition of the reproductive cloning of human beings*".

– the interdiction of torture and of inhuman or degrading treatment or punishment: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

These standards are equally applicable to the Romanian legal system on the basis and through the norms established by art. 20 and art. 148 of the Constitution, which ensure genuine "linking bridges" between the national legal system and the international/ European human rights system[3]. Given that the substance of the study concerns measures imposed on Romania following the judgments of the European Court of Human Rights (hereinafter referred to as ECHR), we shall refer in particular to the Convention for the Protection of Fundamental Rights and Freedoms (hereinafter referred to as the Convention), and the case-law of that Court.

3. ECHR jurisprudence on detention conditions. The situation of Romania

3.1. General considerations. The procedure for pilot judgments

The European Court of Human Rights has developed extensive case law in the application of Article 3 of the Convention, in which context it also tackled the conditions of detention[4]. Much of the complaints to the Court address the material conditions of detention and raise issues such as the overcrowding of cells, the lack of sanitary facilities, of natural

[3] M. Safta, *Ibidem.*

[4] See also Marin Voicu, *ECHR. Pilot judgments delivered by the Court between 2004 and 2016. A summary* https://juridice.ro/essentials/913/cedo-hotararile-pilot-pronuntate-de-curte-in-perioada-2004-2016.

and/or artificial light, minimal hygiene conditions and living conditions in general. Other issues often referred to include the isolation of detainees in cells, the fact that they do not benefit from a program of activities outside of their detention rooms, the behaviour of authorities, of prison staff and other detention centres towards prisoners undergoing sentences of deprivation of liberty[5].

At the level of the European Union, it can be seen that both the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the ECHR case law reveal serious problems with the status of detention centres, the treatment of individuals deprived of freedom or regarding some detention conditions. The systemic problems identified in some cases have led the ECHR to apply the pilot judgment procedure[6]. Its advantage is given by the fact that the Court does not rule solely on whether or not there has been a violation of the Convention but it also identifies the systemic issue and provides the concerned Government with clear indications of the repair measures it must take to remedy the issues. The State concerned is to choose, under the supervision of the Committee of Ministers of the Council of Europe, how it will fulfil its obligations in conformity with Article 46, which legally requires the defendant States to comply with the Court's final rulings in litigations in which they are parties. Another advantage of this procedure is the possibility for the Court to suspend for a certain period the applications that are the subject of the procedure, provided that the concerned Government promptly takes the necessary internal measures to comply with the decision. However, the Court may resume the examination of suspended applications whenever the interest of the administration of justice so requires. The objectives of the pilot judgment procedure are therefore to facilitate the swift and effective resolution of a systemic dysfunction that affects the defence of the conventional right in question within the domestic legal order, to provide those concerned with the possibility of quicker repairs at a national level and to help the Court itself manage its workload in an efficient way. The large number of cases dealing with the issues we are analysing has led

[5] For a systematic presentation of case-law, see the factsheets published on the European Court of Human Rights, https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=, accessed on 25.05.2018.

[6] Thematic sheet:
https://www.echr.coe.int/Documents/FS_Pilot_judgments_RON.pdf.

the European Court of Human Rights to pronounce several pilot judgments.

For example, the January 10, 2012 ruling in *Ananyev v. Russia*, the Court found that the dysfunction of the penitentiary regime is at the origin of the structural problem, recurrent to inadequate detention conditions – the blatant lack of space in cells, the lack of bed space, limited access to light and air, lack of privacy in the use of hygiene and sanitation needs. By the pilot judgment, the Court decided that the State party, in cooperation with the Committee of Ministers of the Council of Europe, within a period of 6 months, should adopt a rigorous timetable for the application of preventive and compensatory measures due to violation of Art. 3 of the Convention.

Also, by judgment of 8 January 2013 in *Torreggiani and Others v. Italy*, the Court condemned the Italian State for violating Art. 3 of the Convention, in terms of the inhuman and degrading conditions. The Court found that the structural and systemic nature of the problem of overcrowding of detention facilities was clear from the act that declared the state of emergency at national level issued by the Prime Minister of Italy in 2010. The structural nature of the problem had been confirmed by the existence at the Court of several hundred requests for verification of the compliance of detention conditions in several prisons in Italy with the provisions of Article 3 of the Convention. The Court has asked the Italian Government to institute, within one year of the final judgment, an effective internal remedy or a combination of such remedies capable of providing adequate and sufficient reparation, in accordance with the principles stated in the Convention, in the cases which the overcrowding of detention facilities is proven to be true. The Italian State has adopted a series of legislative measures to address the structural problem of overcrowding in prisons: it amended the law so that detainees could lodge complaints before a judicial authority on material conditions of detention and introduced repair means consisting of damages paid to detained persons contrary to the Convention (the action plan for resolving the overcrowding of prisons adopted by the Italian Government on 27 November 2013). In essence, the Court considered that the reforms implemented by Italy since 2013 had a positive effect on the reduction of the prison population (see, to that effect, the judgment of 16 September 2014 in *Stella and Others v. Italy*).

Similarly, in the judgment of 27 January 2015 in *Neshkov and Others v. Bulgaria*, it was stated that overcrowding and extremely poor material

conditions in Bulgarian prisons constituted violations of Article 3 of the Convention. The Court found that four of the applicants had been detained under such precarious conditions that they could be considered to have been subjected to inhuman and degrading treatment. In view of the serious and persistent nature of the violations, and finding that there is a systemic problem within the Bulgarian penitentiary system, the Court has set an 18-month period for the Government to implement measures that will, *inter alia*, solve the problem of overcrowding. The measures recommended to the Bulgarian state were the construction of new penitentiaries, the implementation of penalties for short periods of time and the replacement of imprisonment with other sanctions; the introduction of specific legislative measures, such as the establishment of an independent body to monitor detention centres, carry out effective investigations into the complaints lodged by detainees, provide compensation and make binding and enforceable decisions.

Similarly, in its judgment of 10 March 2015 in the case of *Varga and Others v. Hungary,* the ECHR found that there had been a violation of Article 3 (the prohibition of inhuman or degrading treatment) of the Convention, noting, in particular, that the limited personal space available to all the six detainees in this case, aggravated by the lack of privacy during toilet use, the inadequate sleeping structures, inadequate ventilation and shower restrictions or time spent away from their cells, constituted degrading treatment. In addition, by finding that the domestic appeals of the Hungarian law suggested by the Government to complain about detention conditions, although accessible, were ineffective in practice, the Court found that there had been a violation of Article 13 (the right to an effective remedy). In particular, the Court found that the Hungarian authorities should promptly institute an effective appeal method or a combination of appeal methods, both preventive and compensatory, and to ensure effective remedies for Convention violations caused by overcrowding of prisons. According to the decision adopted, the Government should submit, under the supervision of the Committee of Ministers, within 6 months of the final date of the judgment, a timetable for the adoption of the necessary measures and the application of preventive and reparatory appeal methods in case of alleged violations of art. 3 of the Convention due to inhuman and degrading detention conditions. Recently, in its judgment of 14 November 2017 in *Csaba DOMJÁN v. Hungary,* the Court took note of a new law (the "Act/Law of 2016"), which entered into force in Hungary

on 1 January 2017 – following the pilot judgment of the Court in the case of *Varga and Others v. Hungary*, in which a widespread problem was found arising from the malfunctioning of the Hungarian penitentiary system, and considered that this law provides a combination of appeal methods, both preventive and compensatory, guaranteeing, in principle, a real remedy for violations of the Convention resulting from the overcrowding of imprisonment and other inadequate detention conditions in Hungary.

3.2. Romania to the ECHR. The period before the pronouncement in 2017 of a pilot judgment in the matter

The first judgment condemning Romania for violating Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms was pronounced on the 6th of December 2007 in the case *Bragadireanu v. Romania* whereby the Court found that the material conditions of the detention did not meet the European standard.

During the period 2007-2012, other judgments were passed to condemn the Romanian State for violations of Article 3 in terms of overcrowding and inappropriate material detention conditions in both penitentiaries and detention centres and preventive arrest (lack of hygiene, insufficient ventilation and illumination, inappropriate sanitary facilities, insufficient or inadequate food, limited access to showers, the presence of rats and insects in detention cells).

On July 24, 2012, the Court pronounced a semi-pilot judgment in the case *Iacov Stanciu v. Romania*. The Court found that overcrowding in prisons, lack of hygiene and the inadequacy of care and medical treatment constituted for the applicant inhuman and degrading treatment, the problems and difficulties experienced, exceeding the "*inevitable level of inherent suffering in detention and the severity threshold provided for in Article 3 of the Convention.*" The Court therefore found violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, recognizing the existence of a recurring problem and emphasizing the need to introduce effective national remedies enabling national authorities to substantively establish violations of the Convention's provisions; to order the cessation of the infringement and to pay compensation. Recognizing that the matter is a recurring one, the Court has held that, beyond the general measures aimed at improving the prison system, it is necessary to ensure an effective internal remedy to

enable effective compensation for the damage suffered as a result of inadequate detention conditions, both by ending the situation which leads to violation of art. 3 of the Convention, as well as by granting moral damages.

3.3. The pilot judgment of 25 April 2017 in the joined cases of *Rezmiveş and Others v. Romania* (no. 61467/12, 39516/13, 48231/13 and 68191/13)

The cases concerned detention conditions in penitentiaries and detention and pre-trial detention centres near police stations in Romania. The applicants complained, among other things, about cell overcrowding, inappropriate sanitary facilities, lack of hygiene, poor food quality, used equipment, and the presence of rats and insects in cells. The Court ruled that Article 3 (prohibition of inhuman or degrading treatment) of the Convention was violated, finding that the conditions of detention, also related to the duration of the imprisonment, subject the applicants to difficulties which exceed the inevitable level of suffering inherent in detention. Under Art. 46 (binding force and enforcement of judgments) of the Convention, the Court also found that the applicants' situation was part of a general problem caused by a structural dysfunction specific to the Romanian penitentiary system; the situation persisted, although it was signalled by the Court in 2012 (in its ruling in the case of *Iacov Stanciu v. Romania* of 24 July 2012). In order to remedy the situation, the Court has ruled that Romania has the obligation to implement two types of general measures: (1) measures to reduce overcrowding and improve material conditions of detention; and (2) legal ways (a preventive way of appeal and a specific reparatory measures). The Court requested the Romanian State to provide, in cooperation with the Committee of Ministers of the Council of Europe, within six months of the date of the final judgment, an exact timetable for the implementation of appropriate general measures capable of resolving the problem of overcrowding and inadequate detention conditions, in accordance with the principles of the Convention as set out in the pilot judgment. The Court also decided to postpone similar cases that have not yet been communicated to the Government of Romania until the necessary national measures have been taken.

4. Measures taken by the Romanian State to eliminate overcrowding and improve detention conditions

4.1. The period up to the delivery of the pilot judgment in the joint cases of *Rezmiveş and others v. Romania*

Through the Memorandum of August 31st, 2012 on "*The Effects of Romania Determining the Ban on Inhuman or Degrading Treatment in the Case of Iacov Stanciu v. Romania, the Decision of the European Court of Human Rights of July 24, 2012. The proposed solutions "* were identified the problems of the penitentiary system, have set the directions for action". Legislative, budget, management aspects were considered, e.g. increasing the accommodation capacity of the penitentiary system, setting up a new penitentiary, providing medical assistance. At the same time, a pilot judgment was anticipated.

The Memorandum of 19 January 2016 on the *"ECHR's intention to apply the pilot judgment in cases concerning detention conditions"* further elaborated the draft of the Action Plan, which aims to improve the conditions of detention and to reduce the phenomenon of overcrowding regarding the progress in the field/lack of opportunity for a pilot judgment, it is proposed to develop a timetable of measures in the field, including budgetary projections and submitting for approval to the Government and informing the ECHR on the general guidelines contained in the timetable to be approved by Government.

The Memorandum of 26 April 2016 on "*The approval of the timetable for measures to improve detention conditions and the probation system, elaborated on the basis of the Memorandum approved by the Government on 19 January 2016"* establishes directions for action (creation of new accommodations, modernization of accommodations).

As a general rule, for the reference period, the following main developments can be retained[7]:

– a new legislative framework (The Penal Code and The Code of Criminal Procedure) – including measures to strengthen the exceptional nature of deprivation of liberty as a preventive measure during the criminal proceedings, the inclusion of alternatives to the preventive arrest measure (house arrest), the efficiency of judicial control institutions,

[7] See press release of the Ministry of Justice http://www.just.ro/hotararea-pilot-pronuntata-de-cedo-privind-conditiile-de-detentie/

judicial control on bail, regulation of new institutions to encourage the evasion of the penitentiary system (recognition of guilt);

– the extension of the powers of the judge for the supervision of the deprivation of liberty, as well as the establishment in Romania of the National Mechanism for the prevention of torture in the places of detention, by extending the powers of the Ombudsman;

– measures for identifying financial resources for repair and investment works, supplementing the budget of the National Administration of Penitentiaries for this purpose;

– measures to modernize detention facilities and extend accommodation capacity in order to comply with international standards with respect to the minimum area of 4 square meters for a prisoner; (in 2016, in the penitentiary system, 672 new places of accommodation were put into use by transforming existing spaces. In 2017, following the established measures, a number of 170 new places of accommodation were created – made by transforming existing premises and modernizing another 200 places, through the Norwegian Financial Mechanism – The Bacău Penitentiary; in the period 2016-2017: investment works have been initiated for the creation of new places of detention in the following penitentiaries: Deva, Codlea, Giurgiu and Găeşti; rooms have been set up in detention facilities for people with severe psychiatric disorders in the following penitentiaries: Arad, Bistrița, Botoşani, Bucureşti-Jilava, Craiova, Focşani, Găeşti, Giurgiu, Iaşi, Mioveni, Oradea, Constanța-Poarta Albă, Slobozia, The Mioveni Hospital, The Dej Hospital, The Constanța Hospital – Poarta Albă);

– measures for the social reintegration of detainees through the development of a new evaluation and planning system for the execution of punishment, increased participation of detainees in activities.

The measures adopted by the Romanian authorities led, on the one hand, to a decrease in the number of persons in custody of the prison system and to the arrest, and, on the other hand, the increase of the places of detention and the improvement of the general conditions. As a result, the detention deficit has fallen from 18,000 in 2012 to 4,300 in the year 2017.

4.2. The period after the delivery of the pilot-judgment

4.2.1. General framework

The Government of Romania adopted the Memorandum of January 16, 2018 on the *"Approval of the Timetable for Measures 2018-2024 to resolve overcrowding and detention conditions in the execution of the ruling Rezmiveş and Others v. Romania issued by the ECHR on 25 April 2017"*[8]. The Government also decided to transmit the Calendar to the Committee of Ministers and, for information, to the European Court of Human Rights prior to 25 January 2018, for the proper execution of the pilot judgment in the cause of *Rezmiveş and Others v. Romania*, in accordance with the provisions of Government Ordinance no. 94/1999 on the participation of Romania in the proceedings before the European Court of Human Rights and the Committee of Ministers of the Council of Europe and the exercise of the right of regress of the state following amicable settlements and decisions.

The timetable for proposed measures to reduce overcrowding and improve prison conditions sets out five main lines of action: legislative changes aimed at reducing the prison population and improving prison conditions; investments in physical infrastructure of penitentiaries aimed at expanding the number of places of detention and modernizing existing ones; the effective functioning of the probation system to facilitate the application of community sanctions and measures to reduce the prison population; implementing programs and strategies for inserting people from the penitentiary system; legislative measures to ensure an effective appeal for the harm suffered.

The Memorandum also establishes a monitoring mechanism consisting of the organization of a six-monthly evaluation of action plans undertaken by each institution at formal meetings of the Working Group for Monitoring and Evaluation of the Timetable of Measures, including the Ministry of Justice, the Ministry Foreign Affairs – The Government Agent for the ECHR, Ministry of Public Finance, National Penitentiary Administration, National Penitentiary Directorate. The Secretariat of the Group is provided by the Ministry of Justice.

[8] Published on the website of the Ministry of Justice http://www.just.ro/wp content/uploads/2018/01/calendar-masuri.pdf

4.2.2. Legislative measures

During the reference period the state adopted *Law no. 169/2017 regarding the modification and completion of the Law no. 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal proceedings, initiated prior to the pronouncement of the pilot judgment and subsequently enforced*[9]. It mainly establishes a compensatory mechanism for granting a benefit, meaning 6 days considered to be executed for a period of 30 days in custody in inadequate detention facilities; it shall also apply accordingly to the calculation of the punishment actually executed as a preventive measure or punishment in imprisonment and detention centres in inappropriate conditions. Inappropriate punishment is considered to be accommodation in any of the following situations: accommodation in an area less than or equal to 4mp/inmate, calculated excluding the area of sanitary groups and food storage areas, by dividing the total area of detention rooms to the number of persons accommodated in the respective rooms, irrespective of how equipped the space in question is; lack of access to outdoor activities; lack of access to natural light or sufficient air or availability of ventilation; lack of adequate room temperature; the lack of the possibility to use the private toilet and to comply with the basic sanitary standards as well as the hygiene requirements; the existence of infiltrations, dampness and mold in the walls of detention rooms. The day or period when the person was: admitted to infirmary at the places of detention, hospitals in the sanitary network of the National Penitentiary Administration, the Ministry of Internal Affairs or the public health network; in transit, is not considered the execution of the punishment under improper conditions. Settlement provisions do not apply if the person has been compensated for improper conditions of detention by final judgments of national courts or the European Court of Human Rights for the period for which compensation has been granted and has been transferred or moved in a detention facility with inadequate conditions. The period for which days considered as executed to compensate for inappropriate accommodation are calculated starting from July 24, 2012.

As a result of law enforcement, of the total number of 187 accommodation spaces, a number of 156 were established as inadequate

[9] Published in The Official Journal of Romania, Part I, no. 571 of 18 July 2017.

by the Order of the Minister of Justice no. 2773/2017, representing 83%. According to a press release of the ANP, during the period 19.10.2017-26.01.2018, 1031 persons were released from the units subordinated to the National Penitentiary Administration, as a result of expiration of the term of punishment within the timeframe, by granting compensatory benefits stipulated by the Law 169/2017, with the competent courts allowing for the conditional release for 3427 people. Of the 4458 people who benefited from the compensatory measures provided by Law 169/2017, 42 people became repeat offenders, the proportion of repeat offenders standing below the 1%.

Similarly, another law adopted was *Law no. 61/2018 amending and supplementing the Government Ordinance no. 26/1994 on the right to food, in peacetime, of the personnel in the national defense sector, public order and national security*[10], which updates the provisions of the Government Ordinance and took into consideration aspects such as: equalization of the caloric norms of food norms of people detained or preventively arrested with that of convicted persons; setting minimum calorie scales for food standards of people deprived of their liberty, etc.

The following were adopted: Order of the Minister of Justice no. 2772/C/2017 *on the approval of minimum standards on the accommodation of persons deprived of their liberty*[11] (establishes that places intended to accommodate persons deprived of their liberty should respect human dignity and meet minimum sanitary and hygienic standards, taking into account the area inhabited, air volume, lighting, heating and ventilation sources, related to climatic conditions and correlated with the provisions of Law No. 169/2017 regarding the definition of inadequate conditions of detention), as well as *the Order of the Minister of Justice no. 2773/C/2017 for the approval of the centralized situation of buildings which are inadequate in terms of detention conditions*[12] (based on it being calculated for persons deprived of their liberty, the 6 days considered to be executed for a number of 30 days of custody in detention facilities considered inadequate.) Their situation is updated annually or whenever changes which generate a reclassification of accommodation occur).

[10] Published in the Official Journal of Romania, Part I, no. 227 of 14 March 2018.
[11] Published in the Official Journal of Romania, Part I, no. 822 of 18 October 2017.
[12] Published in the Official Journal of Romania, Part I, no. 822 of 18 October 2017.

The timetable for measures is also expected to adopt other legislative measures, namely the introduction of the electronic supervision measure as a measure to reduce the penitentiary population (in order to reduce the prison population) and to grant financial compensation to persons who have pending actions before the European Court of Human Rights or who are called upon to bring an action before the Court (to ensure an effective appeal for repairing the harm suffered)

4.2.3. Administrative measures

As regards administrative measures, it is worth mentioning:

– Government Ruling no. 626/2017[13], approving the acquisition of a feasibility study for the construction of a penitentiary with a capacity to accommodate 1000 persons, namely P47 Berceni;

– Memorandum on the subject: "*Decision on the Opportunity to Financing the Physical Infrastructure of the Romanian Penitentiary System through a project financed by reimbursable external funds",* of December 5, 2017, proposing the concept of a national project – Investments in prison infrastructure;

– Government Ruling no. 791/2017[14] approving the transfer of some buildings, found in the public domain of the state, from the administration of the Ministry of National Defense (MAPN) in the administration of the Ministry of Justice for the NAP, for the purpose of being transformed into penitentiaries, with a capacity of accommodating 900 persons. The procedure for acquiring these buildings from MAPN has been completed and the design and execution stages will be carried out, depending on the moment of contracting the loan in accordance with the Memorandum referred to in paragraph 30;

– Memorandum on the Principal Agreement on a loan of up to EUR 223 million from the Council of Europe Development Bank to support the project *"Investments in Prison Infrastructure"* of 7 March 2018, which provides for the financing of some the measures set out in the Timetable for Measures 2018-2024 to resolve overcrowding and detention conditions in the execution of the pilot judgment of Rezmiveş and Others v. Romania issued by the ECHR on 25 April 2017 approved by the Government of Romania on January 17, 2018. The project

[13] Published in the Official Journal of Romania, Part I, no. 723 of 6 September 2017.
[14] Published in the Official Journal of Romania, Part I, no. 870 of 3 November 2017.

involves the realization of 4 distinct units within the Romanian penitentiary system: Berceni Penitentiary (Prahova County), Unguriu Penitentiary (Buzau County), "Rodbav Job Training and Recovery Center" ("Centrul de formare profesională şi recuperarea capacității de muncă Rodbav") (Braşov County) and "The National Institute of Penitentiary Administration "(Pantelimon). The Memorandum is also in line with the Governance Program 2017-2020, which in the Fundamental Rights section, Measure no. 20 provides for: "*The continuation of the investment project in penitentiaries and modernization and extension where the locations permit"*.

At the same time, it is worth mentioning the measures that are permanently necessary for the maintenance of the accommodation standards: the current repair and maintenance work carried out annually at the level of the penitentiary system is aimed at maintaining the conditions of detention according to the standards, both at the level of the accommodation rooms and at the level of the auxiliary areas (precinct hallways, clubs, dining rooms, medical offices, classrooms, educational spaces, etc.) Also, as of February 2018, following the request of the Minister of Justice, the National Penitentiary Administration carries out an activity of balancing the occupancy level at the level of detention facilities under its control. Thus, in February and March 2018, individual or collective transfer provisions were issued between prison units, which targeted more than 2,000 detainees (~ 8.5% of the total number of people under custody).

Concerning measures of administrative nature, we also take into account the development of the probation system[15], as well as the social reintegration of convicted persons. In this respect, by Government Ruling no. 389/2015 on the approval of the National Strategy for Social Reintegration of Persons deprived of their liberty, 2015-2019[16] a series of actions aimed at reducing the recidivism rate were implemented and the Inter-ministerial Commission was set up and functioning to coordinate and implement the provisions of the National Social Reintegration Strategy for Persons deprived of their liberty, 2015-2019. The Commission is made up of a representative with a leading position in the Ministry of Justice, the Ministry of Internal Affairs, the Ministry of National Education, the Ministry of Labour and Social Justice, the Ministry of Health, the National

[15] Law no. 252/2013 on the organization and functioning of the probation system, published in the Official Journal of Romania, Part I, no. 512 of 14 August 2013.

[16] Published in The Official Journal of Romania, Part I, no. 532 of 16 July 2015.

Probation Directorate and the National Administration of Penitentiaries, the Presidency the Commission is provided by the Ministry of Justice.

5. Conclusions

The issues examined reveal that the problem of overcrowding and improvement of the conditions of detention is very complex, requiring a correlation between the legislative and administrative measures, but also a significant component regarding the social reintegration of convicted persons, also in order to reduce recidivism. Its careful monitoring and collaboration of all the factors involved are essential to the implementation of the established measures and to solving a systemic problem. In any case, the progress made by Romania in this respect, including the field of criminal policy and incidental legislation, is obvious, as is also highlighted in the pilot judgment.

THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE SUBJECT-MATTER OF SMUGGLING OFFENSES

Mihai Florentin BĂRĂSCU*

ABSTRACT
Throughout this paper we aim for a doctrinal analysis, from a theoretical point of view, as well as from a judicial perspective, of the subject-matter of the smuggling offense incriminated by Romanian criminal law, with reference to certain opinions and controversies found in Romanian and foreign specialty literature.

KEYWORDS: *criminal offense, smuggling, incrimination, customs code, subject-matter of the offense, main legal object, secondary legal object, material object.*

1. The subject-matter of the smuggling offense

In doctrine[1], by the subject-matter (or object) of the offense we understand the social value and the social relations created around this value, which are endangered or injured by a criminal act. Any offense is directed against a direct and immediate subject-matter that can be a good or a value. Regarding that property or value, there are social relationships for whose stability and normal conduct protection is established through criminal law. These social relationships whose formation, development and progress are related to the legal protection of important social[2] values form the legal object of the offense.

When analysing the material object of an offense, authors in the field of criminal law refer to the object, property, value or person to which the

* *Ph.D. student, Titu Maiorescu University, Bucharest, Romania.*

[1] Constantin Mitrache, Cristian Mitrache, *Romanian penal Law, General Part, according to the New Criminal Code,* Universul Juridic Publishing House, 2013, p. 85; I. Oancea, *Criminal Law Treaty*, All Publishing House, Bucharest, 1995, p. 166, V. Drăghici, *The legal object of the offense*, Lumina Lex Publishing House, Bucharest, 2004, p. 21.

[2] T. Toader, *New Criminal Code and New Criminal Procedure Code*, 5th Edition, Hamangiu Publishing House, Bucharest, 2015, p. 178; Dongoroz V., S. Kahan I. Oancea, I. Fodor, S. Petrovich, *Crimes against public property*, Publishing House, 1963, p. 70.

action of the author is directed towards (the active subject[3]). Not all crimes have a material object, but only those in which socially protected value is expressed by a material entity, in which case the threat or harm to the protected social value occurs through this entity, which is the material object of the offense[4]. In the case of complex crimes, we encounter a main and a secondary material object, for example in the case of the robbery offense, the main material object is the corporeal movable property owned, possessed or detained by another, and the secondary material object can be the body of the deceived person. The material object of a crime, in some cases, cannot also be the product of the offense. For example, in the case of forgery, the way of counterfeiting, makes it so the product of the offense is the falsified document, not the material object.

Specifically, in the case of smuggling, the legal object of the offense is the customs legal regime as a major social value and the social relations that arise and take place in relation to it[5]. In any state and at any time, the customs legal regime is an expression of sovereignty, an attribute by virtue of which regulations are issued, prescriptions concerning customs control, customs clearance of goods, application of the customs tariff, prohibitions also being imposed.

In the opinion of some reputable judges, the legal object of the smuggling crime is the total social relations that ensure the order of legal crossing of the goods across the customs border[6].

---

[3] Gh. Bică, Gh. Alecu, R. Ifrim, D. Bică, C. Dinu, A. Lupu, A. Sandu, *Criminal Law. General Part*, Romania of Tomorrow Publishing House Foundation, Bucharest, 2016, p. 89; M. Udroiu, *Criminal Law. The General Part and the Special Part*, C.H. Beck, Bucharest, 2014, p. 119.

[4] I. Pascu, P. Buneci, *The New Criminal Code, General Part and Criminal Code in force*, Universul Juridic Publishing House, Bucharest, 2013, p. 157; M. Mitra, *Criminal Law. General Part, Seminar* Book, Vol. 1, Pro Universitaria Publishing House, Bucharest, 2015, p. 148.

[5] Gh. Alecu, International Scientific Symposium: "Forensic Investigation of Organized Crime Offenses", Organizers: Romanian Criminal Investigators Association, Romanian Police Inspectorate General, Public Order Institute of the Ministry of Internal Affairs, Communication: *Contraband - Component of Organized Crime*, Bucharest, 27-28.10.2009; Volume, 2010, p. 142.

[6] Alexei Barbăneagră, Gheorghe Alecu, Viorel Berliba, Vitalie Budeci, Trofim Carpov, Valeriu Cusnir, Radion Cojocaru, Alexandru Mariţ, Tudor Popovici, Gheorghe Ulianovschi, Xenophon Ulianovschi, Nicolae Ursu, Victor Volcinschi in the *Criminal Code of the Republic of Moldova*. Commentary, Sarmis Publishing House, Chisinau, 2009, p. 537

The smuggling offense mainly affects the social relations relating to customs operations, specific formalities and the State's rights in relation to the import or export of goods.

In specialty literature[7], it is emphasized that the customs legal regime constitutes a specific system of rules (prescriptions and prohibitions) established and enforced under the law on the clearance of goods in relation to the purpose of the commercial operation and the destination of the goods.

1.1. The main juridical object of the smuggling offense

We rally to the majority opinion that the offenses provided for in the Customs Code have, above all, a common legal main object, which consists in the social relations that are formed and developed uniformly and non-discriminatory implementation of the customs regime of Romania, in respect to all property entered or taken out of the country by a natural or legal[8] person. The system of social values formed around observance of the customs regime is a major social interest, a reality that gives expression in the final analysis, although there may be other opinions, to national sovereignty, a concept which is invoked as a rule when the state, based on an interest imposes its will[9].

It should be noted, however, that sovereignty cannot be accepted as an absolute and direct basis for the imposition of a particular customs regime, with an important role in this area belonging to the system of international treaties to which Romania adhered. Also, Romania's adherence to the European Union has imposed a reassessment of Romania's interests in the field, knowing that there is already a Community Customs Code[10] in the community and, in addition, there is a

[7] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *Criminal Law of Business*, Issue 6, revised and added, C.H. Beck Publishing House, Bucharest, 2016, p. 270.

[8] A. Ciopraga, A. Ungureanu, *Criminal Provisions in Special Romanian Laws*, vol. VIII, Lumina Lex Publishing House, Bucharest, 1998, p. 667; M.A. Hotca, M. Dobrinoiu, *Offenses under Special Laws*, C.H. Beck, Bucharest, 2008, p. 353; Fl. Sandu, *Smuggling and Money Whitening*, Trei Publishing House, Bucharest, 1999, p. 26; Gh. Alecu, *Institutions of Criminal Law*. *The General Part and the Special Part*, according to *the New Penal Code*, Ovidius University Press, Constanţa, 2010, p. 574.

[9] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *Op. cit.*, p. 270.

[10] A. Fuerea, *Community Law of Business*, Second Edition, reviewed and added, Universul Juridic Publishing House, Bucharest, 2006, p. 55.

conception in the community bodies that the absolute sovereignty of the Member States is replaced by a so-called limited sovereignty, a political concept that materializes in essence through the fact that the decision and the community interest are capable of replacing, in some areas declared and accepted as important, the will of one or other of the states[11].

In another opinion[12], highlighting the complex nature of the common legal object of the offenses provided by the Customs Code of Romania, social relations, economic relations, which appear in the process of formation and realization, in monetary form, of the resources necessary for the state to perform its functions are highlighted.

In the international doctrine[13], it was mentioned that the special legal object of smuggling offenses forms the social relations with regard to the customs security of a state.

1.2. The secondary juridical object of smuggling offenses

Given the aggravated way in which customs offenses can be committed, it is also possible to speak of a secondary, common or adjacent legal object that gravitates and is capable of completing the main one, which takes into account the social relations of trust and security that characterize the proper conduct of economic and social activities in a state governed by the rule of law, the shelter of the joint action of one or more armed persons or two or more persons together. It is believed that it is normal for this illicit conduct to be considered more serious, attracting even greater punishment, because we are dealing with an important disregard for the social order, the suspects being organized and armed in order to be able to finish the activity they initiate, and if necessary, even to effectively repel the forces that would try to thwart their actions[14].

In the case of smuggling, the generic legal object of the offense is, of course, the customs regime as a major social value and the social relations that take into account the normal conduct of the business

[11] G.I. Olteanu, *Investigation of smuggling and other crimes involving the crossing of state border*, AIT Laboratories S.R.L. Publishing House, Bucharest, 2004, p. 57-58.

[12] C. Mladen, *Romanian and Community Customs Law*, Economic Publishing House, Bucharest, 2003, p. 249.

[13] S. Brânză, Vit. Stati, *Criminal Law. The Special Part*, Vol. II, F.E.-P. "Central Printing House", Chisinau, 2011, p. 177.

[14] G.I. Williams G., *Criminal law*, London,1961, p. 159.

activity and are carried out in relation to it[15]. In any state and at any time, the customs legal regime is an expression of sovereignty[16]. By virtue of this attribute regulations are issued, prescriptions concerning customs control, customs clearance of goods, customs tariff application and prohibitions. Therefore, the protection of this social value is of particular importance for the market economy, for the fundamental rights and freedoms of individuals.

The smuggling offense mainly affects social relations related to customs operations, specific formalities and state rights in relation to the import or export of goods (prohibited or forbidden)[17].

At the same time, smuggling also presents an adjoining legal object, namely those social relations that are affected by the violation of Romania's legal regime, as this legal regime is established by O.U.G. no. 105/2001 regarding the state border, modified and completed by Law no. 243/2002 regarding the state border of Romania[18].

Besides the main special legal object, constituted by the social relations that are formed in respect of the customs regime, the offense of qualified smuggling provided by art. 271 of the Customs Code, also presents a *special secondary law (adjacent)* consisting of the social relations characteristic of the legal regime specific to each category of goods regulated by the law[19]. Due to the special danger posed to social life by the possession, use, circulation etc., of these special goods, it was necessary to impose a rigorously regulated regime.

In a different plan, the social relations related to public health endangered by the possession, circulation, trafficking of drugs and psychotropic and toxic substances are located.

Finally, thirdly, there are social relations that concern public order, social security, life and physical integrity of individuals, relationships endangered by violation of the rules that make up the regime of arms, munitions, explosives, drugs, precursors, nuclear materials, radioactive substances, toxic substances, wastes, residues or hazardous chemicals.

---

[15] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *Op. cit.*, p. 270.

[16] F. Sandu, *Contraband and Money Whitening*, Trei Publishing House, Bucharest, 1999, p. 25.

[17] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *Op. cit.*, p. 270.

[18] Gh. Alecu, *Institutions of Criminal Law. The general part and the special part*, according to *the New Penal Code*, Ovidius University Press, Constanţa, 2010, p. 586.

[19] Gh. Alecu, *op. cit., Institutions* ..., p. 574.

Simple smuggling and qualified smuggling committed in the manner described in art. 274 of Law no. 86/2006, committed by one or more armed persons or by two or more persons together, have as a legal object the social relations regarding the regime of arms, munitions, as well as the social relation regarding the public order, the life and the physical integrity of the person[20]. It is worth noting the social danger of smuggling committed by one or more armed persons or by several persons together who participate directly in committing the offense – in the form of co-authoring, simultaneous complicity or instigation that absorbs the latter[21]. In the case of these variants, if armed persons do not have the right to carry guns, there may be concurrent crime offenses[22].

Due to the vast sphere of these relationships, opinions were made that the legal object of smuggling would be complex. Its complexity is determined in the foreground by the fascicle of the social relations of an economic nature that arise in the process of training and realizing in cash the resources necessary for the state to fulfil its tasks and functions[23].

1.3. The material object of smuggling offenses

The offense of smuggling can also bring into question the existence of the object directly, materially or physically represented by the goods (merchandise) which incorporate the social values protected by the rule of incrimination. In specialty literature[24], an opinion was expressed that the offense, a socially dangerous act, is directed against the socially protected social values and not against the material aspect of the object of the offense. However, it has been admitted that the offense incriminated by criminal law is directed at things (goods or other property) from the patrimonial sphere of the perpetrator[25], and the effects affect the social relations protected by the criminal legal norm.

---

[20] Vinciguera Sergio, *Principles of Criminology*, Second edition, CEDAM PADOVA, 2005, p. 99.

[21] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *Op. cit.*, p. 275.

[22] G.I. Olteanu, *Op. cit.*, p. 60.

[23] C. Mladen, *Romanian and Community Customs Law*, Economic Publishing House, Bucharest, 2003, p. 249.

[24] Al. Boroi, *Criminal Law. The General Part. According to the New Penal Code*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2014, p. 316

[25] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *Op. Cit.*, P. 270; Fl. Sandu, *Op. cit.*, p. 29.

In the sense of the provisions of the Customs Code, but also in the view of some authors[26], they constitute goods and means of transport of any kind (road, water, river, air), as well as commercial or non-commercial goods. Regarding the means of transport, some authors[27] also refer to the means of transport used for the international transport of passengers or goods, containers or other transport facilities, which can act as a means of committing smuggling, not of it as a material object.

By definition, immovable property cannot form a material object of smuggling if it is immovable by nature. The immovable property, called immovable property by the Civil Code, and by incorporation (also of the Civil Code), being susceptible to being evaded by the customs regime, may constitute a material object of smuggling if they were taken out of the immovable property in which they were incorporated and then withdrawn from the customs regime by passing them across the border under the conditions provided for in Art. 270-274 Customs Code[28]. Following the same reasoning, the same author rightly considers that all goods that do not belong to the patrimonial sphere of a person ("*res nullius*"), such as abandoned goods ("*res relicta*"), cannot constitute a material objects of smuggling due to their extra patrimonial[29] character.

Prestigious authors[30], unanimously claim that people, human beings are not a material object of smuggling. The smuggling committed under these conditions in fact achieves the conditions of the trafficking in human beings in the terms of Law no. 678/2001 on preventing and combating trafficking in human beings[31] or the trafficking of migrants[32].

---

[26] Fl. Sandu, *Op. cit.*, p. 29.

[27] S. Brânză, Vit. Stati, *Criminal Law. The Special Part*, Vol. II, F.E.-P. "Central Printing House", Chisinau, 2011, p. 178.

[28] Ibidem, p. 30

[29] Idem.

[30] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *op. Cit.*, P. 270; Fl. Sandu, *Op. cit.*, p. 29; M.A. Hotca, M. Dobrinoiu, *Offenses under Special Laws*, C.H. Beck PH., Bucharest, 2008, p. 353.

[31] *Law no. 678/2001 on preventing and combating trafficking in human beings* published in M. Of. no. 783 of 29 December 2001 and amended by Law no. 287/2005 (Official Gazette No. 917 of October 18, 2005).

[32] *O.U.G. no. 105/2001*, as amended by Law no. 39/2003. Article 71 of the Law states: "The racketeering, guidance of one or more persons for the purpose of fraudulently crossing the state border and organizing such activities constitutes the crime of trafficking of migrants and is punished by imprisonment from 2 to 7 years. If the act provided in paragraph (1) is likely to endanger the lives or security of migrants or to subject them to

Thus, as mentioned above, not all crimes have a material object but only those in which social value has a material expression, them even being called material crimes, as a result. Other crimes that do not have a material object are formal or dangerous, distressful.

The material object exists only in relation to the crimes in which the protected social value is based or expressed as a material entity[33].

From this point of view, smuggling is considered a crime based on results, but also of danger[34]. It's based on results when it produces damage to the state budget and of danger when it provokes economical unbalance through the exclusion of legal competition, the essence of market economy, or when prohibitions are not followed, or when it endangers public order and safety,

From this perspective, *the material object* of the smuggling offense is constituted by the goods and merchandise which is subject to the regime (control) at the border and its taxation (goods no matter their form or nature) or the goods that are not allowed entry (weapons, munition, explosive materials, drugs, precursors, nuclear materials or other radioactive substances, toxic substances, waste, residues or hazardous chemicals)

We rally to the opinion of some distinct authors[35], according to which in the case of goods for which the legal regulations in the field establish the fact that some are exempt from paying border tolls, the infraction could be enforced, even if no material damage has been inflicted, because only the customs body have the authority to decide which categories of goods are subject to customs check.

In the version incriminated by art. 270 from Law no. 86/2006, the material object of the smuggling offense can be, in principle, any type of merchandise or goods subject to customs control, brought out or into the country, with no legal right, so through other means than those pre-established by the Customs Body.

In the form of grand theft, incriminated by art. 271 C. vam., the material object is precise indicated in the text, respectively: „weapons,

inhuman or degrading treatment, the penalty shall be 5 to 10 years. If the act provided in paragraph (2) resulted in the death or suicide of the victim, the penalty is imprisonment from 10 to 20 years. The attempt of the facts provided in paragraph (1) and (2) shall be punished. "

[33] Gh. Alecu, *Op. cit.*, p. 170.

[34] Gh. Alecu, *Op. cit.*, Simpozion…, 2010, p. 142.

[35] Al. Boroi, (coordinate), M. Gorunescu, M., I.A. Barbu, B. Virjan, *Op. cit.*, p. 270.

munitions, explosive materials, drugs, precursors, nuclear materials, or other radioactive substances, toxic substances, waste, residue or hazardous chemicals", brought out or into the country with no legal right.

Over this kind of goods ""the act or omission that forms the material element of the smuggling offense is enforced[36]", which offense is committed by the removal or insertion of the goods into the country.

Judicial practice[37] revealed the fact that the suspects hide from custom checks any merchandise that at one time or another, in one place or another presents an increased commercial interest, or it's subject to some prohibive regimes (quotas, interdictions etc...)

In consensus with other authors[38], it can be concluded that: the object of legal-criminal protection in the case of the smuggling infraction is formed by the wishes based on the social order of the Romanian state to protect the inviolability of the Custom's judicial regime, the absolute right (opposable *erga omnes*, to all the subjects of the criminal law in Romanian territory but also to foreigners even outside of Romania's territory under the special terms set by the law) which upon its protection, the existence and safety of other social values is conditioned for the public order in Romania and first of all its existence and safety depends on the use and exertion of fundamental rights and freedoms of Romanian citizens, and of other people under the legal jurisdiction of the Romanian state. This absolute right and the entire gamma of social constructs that is developing around and because of it creates the judicial object, of protection through art. 270-275 Customs Code.

Regarding the adjacent judicial object of the deeds incriminated by art. 270-275 Customs Code, this is formed, possibly, from the Romanian State's right to assure the inviolability of Romanian borders; right, upon which is protection the peaceful and normal way of conducting social relationships on the Romanian frontier is based on. Like all other social relations, it's essential for the public order, for the use and exertion of fundamental human rights and liberties, for the existence and stability of public finances and for the existence and safety of all social values which are essential to our society[39].

[36] Fl. Sandu, *Op. cit.*, p. 29.

[37] G. Tudor, *Smuggling Offense. Judicial Practice*, Hamangiu Publishing House, Bucharest, 2011, p. 112-116.

[38] Ibidem, p. 32-34; Gh. Alecu, *Op. cit., Institutions* ..., p. 576.

[39] Fl. Sandu, *Op. cit.*, p. 33.

Also, we might add that the normal birth and growth of the social relations that are conditioned by the protection of the state's right to the inviolability of the legal regime of precious and semiprecious stones can also form a judicial object adjacent to the deed of smuggling.

In the case of smuggling offenses committed in the normative variants stipulated in art. 272-273 Customs Code, (when the smuggling is committed through the use of "fake identification customs papers") these also have in their contents an adjacent judicial object that refers to the realness and authenticity of documents under private or official signature like an essential social value for the public order of which is protection is conditioned by the good and normal functioning of the social relations in the Custom's domain.

Of course, the importance of knowing the object of infraction consists in the fact that its inexistence leads to the absence of a crime. The object itself is a unique and previous factor to each infraction. In the case of multiple infractions the legal texts do not make direct references to the object, this resulting from the deed's description or from the motive pursued by the offender. A deep and profound knowledge of the object of the smuggling helps: characterise the deed thoroughly and rightfully; with a rigorous establishing of the incrimination norm applied from a situation to another, and at concretely determining the social and individualized[40] danger.

Bibliographic references

1. Boroi Al., *Criminal law. The general part.* In accordance with the new *criminal code*, 2nd edition, Publishing house C.H. Beck, Bucharest, 2014.
2. Amza T., *Criminal Law. General part*, According to the new Criminal Code, Ph. Universul Juridic, Bucharest, 2014.
3. Sobieţki R., *Smuggling, legal-criminal aspect*s. Monographic study, Ph. Totex-Lux, Chişinău, 2013.
4. V. Dongoroz, *Criminal law*, 1939.
5. R.M. Stănoiu, I. Griga, Tib. Dianu, Criminal law. *General part,* Ph. HYPERION XXI, Bucharest 1992.
6. V. Dongoroz, S. Kahane, I. Oancea, Iosif Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Theoretical explanations of the romanian*

[40] Gh. Alecu, *Op. cit.*, Symposium…, 2010, p. 143.

criminal code. General part, vol. I, 2nd Edition, Ph. Academy R.S.R., Bucharest, 1969

7. V. Dobrinoiu, Gh. Nistoreanu, I. Pascu, L. Valerică, I. Molnar, Al. Boroi, *Criminal law General part*, Ph. Atlas Lex, Bucharest, 1996.
8. N. Manole, *Removal of the criminal character of the deed and justifying causes*, Muntenia Publishing House, Constanta, 2017.
9. Gh. Bică, Gh. Alecu, R. Ifrim, D. Bică, C. Dinu, A. Lupu, A. Sandu, *Criminal law. General part,* Published by *România de Mâine* foundation, Bucharest, 2016.
10. Tib. Duţu, *Criminal law. General part,* Ph. Europolis, Constanţa, 2007.
11. C-tin Mitrache, Cristian Mitrache, *Romanian criminal law. General part* according to *The new criminal code,* Ph. Universul Juridic, Bucharest 2017
12. Oancea I., *Treaty of criminal law*, Ph. All, Bucharest, 1995.
13. Drăghici V., *The judicial object of infraction*, Ph. Lumina Lex, Bucharest, 2004.
14. Dongoroz V., S. Kahane, I. Oancea, I. Fodor, S. Petrovici, *Crimes against public order*, Ph. Academiei, 1963.
15. T. Toader, *Criminal law. Special part,* Ph. All Beck, Bucharest 2002.
16. Pascu I., P. Buneci, *The new criminal code. General Part and Criminal Code in vigor*, Ph. Universul Juridic, Bucharest, 2013.
17. M. Mitra, *Criminal law. General part Seminar booklet,* Vol.1, Ph. Pro Universitaria, Bucharest 2015.
18. Alecu Gh., International scientific symphosium: „The criminal investigation of offenses from the domain of organized crime", Organizers: The Romanian association of criminologists, The General Inspectorate of the Romanian police, The Institute of Public Order of M.A.I., Communication: *Contraband – component of organized crime*, Bucharest, 27-28.10.2009; Volume: Bucharest, 2010.
19. Alexei Barbăneagră, Gheorghe Alecu, Viorel Berliba, Vitalie Budeci, Trofim Carpov, Valeriu Cuşnir, Radion Cojocaru, Alexandru Mariţ, Tudor Popovici, Gheorghe Ulianovschi, Xenofon Ulianovschi, Nicolae Ursu, Victor Volcinschi, *The criminal code of the republic of Moldova, commentary* Ph. Sarmis, Chişinău, 2009.

20. Ciopraga A., Ungureanu A., *Criminal dispositions in romanian special law*, vol. VIII, Ph. Lumina Lex, Bucharest 1998.
21. M.A. Hotca, M. Dobrinoiu, *Crimes provided in special laws*, Ph. C.H. Beck, Bucharest, 2008.
22. Fl. Sandu, *Smuggling and bleaching money*, Ph. Trei, Bucharest, 1999
23. Alecu Gh, *Institutions of Criminal Law. General and special part, according to the new criminal code.* Ovidius University Press, Constanta 2010
24. Al. Boroi, (coord-r), M. Gorunescu M., I.A. Barbu, B. Vîrjan, *The criminal right of bussinesses*, 6th edition revised and added, Ph. C.H. Beck, Bucharest, 2016.
25. Fuerea A., *Community law of bussiness*, 2nd Edition, revised and added, Ph. Universul Juridic, Bucharest, 2006.
26. G.I. Olteanu, *Investigation of smuggling and other crimes involving the crossing of the state border*, Ph. AIT Laboratories S.R.L., Bucharest, 2004.
27. C. Mladen, *Romanian and communitary border law*, Ph. Economică, Bucharest 2003.
28. S. Brînză, Vit. Stati, *Criminal law. Special part*, Vol. II, Ph. F.E.-P. "Tipogr. Centrală", Chişinău, 2011.
29. G.I. Williams G., *Criminal law*, London,1961.
30. Vinciguera Sergio, *Principi di Criminologia*, Seconda edizione, CEDAM PADOVA, 2005.

DUBLIN REGULATION III – CONSIDERATIONS ON THE RESPECT OF ASYLUM APPLICANTS 'RIGHTS

Diana BOROI*

ABSTRACT
This Article sets out the provisions of Regulation (EU) No. 604/2013 (Dublin II Regulation), as well as in the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 on fundamental rights for asylum seekers and migrants

KEYWORDS: *asylum seekers, migrants, human rights.*

In the context of the existing European Union level concerns regarding migration issues as well as the envisaged normative and institutional measures, several concerns have been expressed regarding respect for the fundamental rights of asylum seekers both in terms of standards in force and in future legislation envisaged by the institutions of the European Union.

Regulation (EU) No. 604/2013, known as the Dublin III Regulation[1] has an important role to play in framing a common asylum policy, including a Common European Asylum System (CEAS), which is a constituent element of the European Union's objective of creating, gradually, an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union.

The purpose of the Regulation is to determine only one Member State to be responsible for examining an application for international

* *Ph.D. student, University Titu Maiorescu, Bucharest, Romania.*

[1] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. *OJ L 180, 29.6.2013, p. 31–59*. Replaced Regulation (EC) No. Council Regulation (EC) No 343/2003 of 18 February 2003 (Regulation Dublin II) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

protection lodged in one of the Member States by a third-country national or a stateless person (also called the responsible Member State).

The Dublin Regulation only applies when a third-country national or a stateless person has lodged an application for international protection in one of the Member States. In order to understand the applicability of this procedure it is necessary to know the legal provisions in the field.

Among the objectives of the Dublin Regulation, we find ensuring fast access for applicants to an asylum procedure and reviewing the request on the ground by a single Member State.

In this respect, the Regulation proposes to strengthen the system's ability to effectively and effectively determine a single Member State responsible for examining an application for international protection, which has led to the elimination of cessation of liability clauses and a significant reduction in the deadlines for sending applications, replies and transfers between Member States.

It also has the merit of ensuring a fair sharing of responsibilities between Member States by completing the old system with a collective redistribution mechanism, which can be activated automatically in cases where Member States face a disproportionate number of applicants asylum, which was tested and does not seem to have given the expected fruits.

Among the merits of this regulation we also find ways to discourage abuses and prevent secondary movements of applicants across the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry and to remain in the Member State designated as responsible, which was also tested with the wave of migrants, and the results were not what they expected, the system being viable only for relatively small waves of migrants.

According to the provisions of art. 3, Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III of Regulation (EU) No. 604/2013 indicate is responsible.

Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

On the other hand, any Member State reserves the right to send an applicant to a safe third country, subject to the rules and guarantees laid down in Directive 2013/32/EU (Article 3, paragraph 3)[2].

In concreting the provisions of Regulation (EU) No. 604/2013, particular attention is paid to respecting *international standards on human rights*. The Regulation is intended to respect fundamental rights and principles which are recognized by the Charter of Fundamental Rights of the European Union. In particular, the Regulation seeks to ensure full respect for the right of asylum guaranteed by Article 18 of the Charter and the rights recognized under Articles 1, 4, 7, 24 and 47 of the Charter.

At the same time, in accordance with the 1989 United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, *the best interests of the child* prevail over the Member States' application of the Regulation. In the process of assessing the best interests of the child, Member States should in particular take due account of the child's social development and well-being, safety and security aspects, the minor's opinion according to age and maturity, including his history.

In addition, specific procedural safeguards are required for unaccompanied minors, given their particular vulnerability. This is the reason for which it was drafted *the Proposal for a regulation amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State*[3].

[2] The right to send an applicant for international protection to a safe third country may be exercised by a Member State even after the latter has accepted that it is responsible, under that regulation and during the posting, for the examination of an application for protection submitted by an applicant who left that Member State before taking a substantive decision on his first application for international protection. Judgment of the Court (Fourth Chamber) of 17 March 2016.

Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal. Case C-695/15 PPU, paragraph 53.

[3] *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State*/* COM/2014/0382 final – 2014/0202 (COD).

The proposal for a regulation follows the judgment of 6 June 2013 of the Court of Justice of the European Union in Case C-648/11 *MA and others/Secretary of State for the Home Department.* She decided that if an unaccompanied minor, without a family, sibling, sister or relatives across the EU presented multiple asylum applications, including the Member State where the minor is present at the time, the Member State responsible is the Member State in which the minor presented an application and where the minor is at that time[4].

Also, in line with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, *respect for family life* should be a matter for the Member States to apply the Regulation.

In consequence, the processing of applications for the international protection of members of a family together by a single Member State makes it possible to ensure a thorough examination of the applications and coherence of the decisions taken and to avoid the separation of the members of a family.

Any Member State should be able to derogate from the criterion of responsibility, particularly for humanitarian and charitable reasons, so as to bring together family members, relatives or any other family members and to be able to examine an application for international protection presented to that Member State or to another Member State, even if the responsibility for such an examination is not the responsibility of the mandatory criteria laid down in the Regulation.

A number of provisions on the protection of applicants, such as mandatory personal interviews, minor safeguards (including a detailed description of the factors that should underpin the assessment of the best interests of the child) and their extended possibilities with relatives after reunification.

It also regulates the possibility of appealing and suspending the enforcement measure for the period of the appeal, together with the guarantee of a person's right to remain in the territory pending the decision of a court to suspend the transfer until a court decision on the call.

In addition, there is an obligation to provide free legal aid exempt from any tax at the request of the person.

[4] Judgment of the Court (Fourth Chamber) of 6 June 2013. *The Queen, at the request of MA and Others, against the Secretary of State for the Home Department*. Case C-648/11, pct. 66.

Member States shall not *detain* a person on the sole ground that it is subject to the procedure laid down in Regulation (EU) No. 604/2013. Detention, according to art. 28, paragraph 2) is only indicated if there is a high risk of evasion to ensure that transfer procedures are carried out in accordance with the Regulation on the basis of an individual analysis and only if the detention measure is proportionate; if less coercive alternatives cannot actually be applied.

That provision requires the Member States to lay down, in a binding provision of general application, the objective criteria on which the grounds for considering that there is a risk of circumvention of the procedure of the applicant for international protection which is the subject of a transfer procedure.

As European Court of Justice underlined, the absence of such a provision results in the inapplicability of Article 28 (2) of that regulation[5].

It should be made clear that, following the migratory pressures of recent years, the European Commission launched in mid-2016 several legislative initiatives aimed at reforming the Common European Asylum System and the Dublin mechanism and the legal migration package (on issues such as Eurodac, the Asylum Agency, reception conditions, asylum conditions, the Union resettlement framework, the entry and residence of third-country nationals for highly qualified employment). Adoption procedures are progressing rather slowly, taking into account the need for a consensus between the European institutions, but also the main divergences between the Member States of the European Union.

It is important to realize how important it is to set up a coherent system of rules and institutions designed to guarantee the fundamental rights of those who seek to build a new destiny, a system that ensures, in fact, the respect for human dignity.

[5] Judgment of the Court (Second Chamber) of 15 March 2017. *Police of the CR, Regional Office of the Police of the Ústí Region, Alien Police Department against Salah Al Chodor and Others.* Case C-528/15, point 47.

MECHANISMS OF CHANGE RESISTANCE IN CORPORATE GOVERNANCE LEGISLATION

Emil Sorin BUCUR*

ABSTRACT

The legislation on corporate governance has been implemented as a result of the acceptance of the obligation of compliance by the Government of Romania and not as an internal emulation, not as a conscious necessity. In this context, Emergency Ordinance 109/2011 on Corporate Governance of Public Enterprises and Subsequent Regulations were a product of tensions between innovative ideas contained in the Corporate Governance Principles stated by the Organization for Economic Cooperation and Development and the old mentality, methods and practices which were used in the management of enterprises in which the state or territorial administrative units had holdings and were in a control position.

Starting from the hypothesis of resistance to change, a synthetic examination of the entities and mechanisms was made by which the conception to be removed succeeded in perpetuating its existence.

The conclusion drawn from the analysis of the articles in the relevant legislation leads to the need to thoroughly analyse corporate governance legislation and its subsequent regulations with a view to updating, increasing its consistency, simplifying and clarifying it.

KEYWORDS: *Free access to justice, citizenship, the condition of reciprocity, means of proof.*

Introduction

Context

By the commitment made by the Romanian Government in the Letter of Intent to the International Monetary Fund, approved by the Government, by memorandum, on June 7, 2011, Romania has set a national objective to improve the corporate governance of state-owned enterprises. In order to fulfil the accepted obligations Emergency Ordinance no. 109/2011 on corporate governance of state-owned enterprises, hereinafter referred to as Government Emergency Ordinance no. 109/2011.

* *Ph.D. Candidate, Titu Maiorescu University, Bucharest, Romania.*

Thus, although our country is not a member of the Organization for Economic Cooperation and Development[1], the organization that developed the Corporate Governance Principles[2], the national regulation on enterprises owned or controlled by the State or territorial administrative units was implemented with the stated intention to implement the said principles. In the preamble to the Emergency Ordinance, the Government motivates its necessity by requiring the establishment of "levers to guarantee of the objectivity and transparency of the management selection and the members of the administrative bodies (...) and increased accountability to the public"[3]. Also, an important provision regarding the tutelage public authorities, which is practically a market guarantee, is that contained in article 4 of Government Emergency Ordinance 109/2011, which states that "the tutelage public authority and the Ministry of Public Finance cannot intervene in the management activity and governance of the public enterprise". The state, through the article presented, transfers decision-making competence and responsibility for their effects, unequivocally, to boards of administration and directors, respectively to boards of directors and directorates of public enterprises, thus providing the image of independent and professional management and management bodies.

Hypothesis and methodology of the approach

Starting from the idea that any major change inherently encounters opposition, resistance in various forms, we considered that the implementation of corporate governance principles through Government Emergency Ordinance 109/2011 contains elements that obstruct the spirit of the regulations that generated this transformation of the management and administration of public enterprises. Thus, we considered that the shift from the relatively discretionary and subjective way in which the selection and appointment of the members of the boards of directors, the supervisory boards, the directors, the members of the directorate was done to the approach based on transparent procedures, with objective

[1] The Organisation for Economic Co-operation and Development (OECD) - http://www.oecd.org/about/

[2] http://www.oecd.org/corporate/principles-corporate-governance.htm

[3] Emergency Ordinance no. 109/2011 on corporate governance of public enterprises - preamble.

criteria and with sincere intent to bring professionalism to the management of public enterprises, has left signs of resistance to change in the body of regulations on corporate governance of public enterprises. Also, the way of exercising authority and implementing the interest of the state or of the territorial administrative units have undergone a major transformation through the emergence of corporate governance, from direct orders to professional management.

In order to identify the forms of resistance and the ways of manifestation we presented the main entities involved in the selection processes, we briefly highlighted the main elements involved in the selection process (letter of expectations, candidate profile, council profile, candidate profile matrix, board matrix, statement of intention). We gave a brief overview of the processes and mechanisms for addressing selection, regulated by corporate governance legislation, outlining ways in which results can be altered.

At the same time, I have set out to introduce the fact that the tutelary public authority has at its disposal ways to impose and preserve its dominant position regarding the direction of the development and action of public enterprises.

This approach seeks to provide arguments to support the need to re-evaluate current regulations, laws, ordinances, methodological norms, their comparison with the evolution of corporate governance principles in order to eliminate the issues that have contributed to the impediment of the application, or offered the possibility to influence the results of the selection of the members of the governing and administration bodies.

Entities with a significant role, from the perspective of the analysed hypothesis, in the corporate governance of public enterprises

The tutelary public authority

The tutelary public authority is the institution through which the state or the territorial administrative unit exercises its shareholder, control, coordination[4] powers, as defined by art. 2, paragraph 2 of the Emergency Ordinance no. 109/2011 on corporate governance of public enterprises.

[4] Government Emergency Ordinance no. 109/2011 on corporate governance of public enterprises, Article 2 (2): Public enterprises:

The concept of tutelary public authority is completely different from that of tutelary authority that was regulated in the Family Code and was an institution created with local public authorities in order to protect the interests of individuals who fulfilled certain conditions regarding the need for guardianship.

Even if the competences of the tutelary public authorities are presented in Government Emergency Ordinance 109/2011 by categories of public enterprises, they can be grouped by field of application. Thus, summarizing the provisions of Article 3, paragraphs 1, 2 and 3 of Government Emergency Ordinance 109/2011, competencies can be identified regarding:

a) Elaborating of the letter of expectations, negotiation of financial and non-financial performance indicators and conclusion of mandate contracts, setting integrity criteria for the members of the board of directors/supervisory board, directors/directorate, approving the constitutive act for companies set up under Law no. 31/1990, which are not organized as joint stock companies;

b) Appointing the members of the board of directors, representatives in the general meeting of the shareholders, establishing their mandate, proposing or appointing, as the case may be, candidates for the board of directors or supervisors;

c) Monitoring performance indicators and assessing compliance with the principles of economic efficiency and profitability of public enterprises;

d) Observing legal provisions on corporate governance, ensuring the transparency of the state ownership policy, and reporting the issues identified to the Ministry of Public Finance, which is the authority that monitors the implementation of legislation on corporate governance of public enterprises.

An important role of the tutelary public authority is to ensure, in accordance with Article 3, paragraph 5 of Government Emergency Ordinance 109/2011, autonomously or in collaboration with independent experts, the procedure for the selection of directors and drawing up the

a) autonomous departments established by the state or by an administrative-territorial unit;

b) national companies to which the State or a territorial-administrative unit is a sole, majority shareholder or controlling entity;

c) companies in which one or more public enterprises referred to in a) and b) hold a majority holding or a holding that ensures they have control.

list of public company administrators. The provisions regarding the way of selection are complemented by the Methodological Norms[5] for establishing the selection criteria, drawing up the short list of up to 5 candidates for each post, their rankings, the procedure for the final appointments, as well as other measures necessary for the implementation of the provisions of Government Emergency Ordinance no. 109/2011 on corporate governance of public enterprises of 28.09.2016, hereinafter referred to as the Methodological Norms, so that it can be considered that the framework for obtaining a list of managers who can perform within public enterprises is ensured.

Corporate governance structures

By art. 3 of the Law no. 111/2016[6] for the approval of Government Emergency Ordinance 109/2011, the legal framework for the establishment and staffing with public servants of the corporate governance structures within the tutelary public authorities was ensured. As the ministries or territorial administrative authorities are complex entities with extremely diverse responsibilities and the field of corporate governance requires some specialization and continuity in the process of managing specific tasks and processes, the provisions of Government Emergency Ordinance 109/2011 have provided certain competencies for corporate governance structures. One aspect to be highlighted is that the ordinance refers to two types of corporate governance structures, namely those of the tutelary public authorities, but also to those established at the level of the public enterprises, as stated in art. 57, paragraph 4 of the Government Emergency Ordinance no. 109/2011.

From the point of view of the attributions specified by the corporate governance legislation, the corporate governance structures have responsibilities for monitoring and evaluating the financial and non-financial performance indicators included in the annex to the mandate

[5] Approved by Decision no. 722/2016 for the approval of the Methodological Norms for the application of certain provisions of the Government Emergency Ordinance no. 109/2011 on corporate governance of public enterprises. Published in the Official Gazette, Part I no. 803 of October 12, 2016.

[6] Law no. 111/2016 for the approval of Government Emergency Ordinance no. 109/2011 on corporate governance of public enterprises. Published in the Official Gazette, Part I no. 415 of June 1, 2016.

contract[7], correlating the requirements of the letter of expectation with the financial and non-financial performance indicators that are an annex to the mandate contract[8], reporting to the Ministry of Public Finance on this and on the fulfilment of its own powers in applying the provisions on corporate governance of public enterprises[9], regularly monitoring and evaluating performance indicators that have been agreed and included in the mandate contract[10].

The corporate governance structures, with the provisions of Article 45 of the Methodological Norms, have been entrusted with the power to assess the administrators in office, who are requesting renewal of the mandate. Also, Article 8 of the Methodological Norms states that corporate governance structures contribute together with the specialized departments within the tutelary public authority to the writing of the letter of expectations. Some of the mandatory elements in the letter of expectation are: governmental or local strategy, the vision of the public tutelary authority regarding the objectives and the mission of the public enterprise, and the letter of expectation is the fundamental reference in the process of selecting and contracting the mandates of the administration and management bodies.

Corporate governance structures have powers, set out in Article 25, paragraph 2 of the Methodological Norms, for updating contextual data for drawing up the profile of the board and candidates. These profiles include the set of criteria and qualifications, mandatory and optional, which provide the required degree of professionalization and efficiency of individuals and structures. In the case of autonomous regies, the corporate governance structure is empowered, in accordance with Article 21 of the Methodological Norms, to draw up the Board's profile in consultation with the Board or with the support of an independent consultant.

[7] Art. 3 (1) (f) of Government Emergency Ordinance 109/2011 on corporate governance of public enterprises.

[8] Art. 3 (3) (c) of Government Emergency Ordinance 109/2011 on corporate governance of public enterprises.

[9] Art. 3 (4) of Government Emergency Ordinance 109/2011 on corporate governance of public enterprises.

[10] Art. 3 (2) (g) of Government Emergency Ordinance 109/2011 on corporate governance of public enterprises.

Selection committee

The selection committee may be set up, according to the provisions of Article 11 of the Methodological Norms, at the level of the tutelary authority, the public enterprise and the Ministry of Public Finance. The purpose of this committee is to carry out the evaluation or selection of candidates that that public authority will nominate or appoint to the boards of directors or supervisors, directorates or director positions. The selection committee, with the exception of the president, may be made up of members outside the tutelary public authority and may be assisted by an independent expert, a natural or legal person, specialized in the recruitment of human resources. If the management of the tutelary public authority chooses to contract the services of an independent expert, the selection board will only make the final evaluation of the candidates on the short list. At the same time, the selection will be carried out by an independent expert when the public enterprise cumulatively fulfils the condition of a turnover of more than EUR 7,300,000 and has at least 50 employees.

The selection committee may develop the candidate profile matrix and the committee matrix. The candidate profile matrix must be drawn in such a way that it can fit into the committee matrix. The committee matrix contains a set of measurable skills, weighted by the importance of contributing to the achievement of the objectives, features, knowledge, experience and other attributes of committee members that provide the assurance of the performance of the mission of the public enterprise. The matrix of the candidate profile will ensure the complementarity of the sets of features, qualifications, knowledge for each person in the committee so that they can co-ordinate the requirements of the committee matrix.

Nomination and remuneration committee

Conceptually, nomination and remuneration committees are entities taken from the Companies Law 31/1990 (as provided for in Articles 140^2[11] and 153^10[12]), and through Government Emergency Ordinance

[11] Article 140 (2) (1) of the Companies Law no. 31/1990 republished: The Board of Directors may set up advisory committees consisting of at least 2 members of the Board charged with conducting investigations and drafting recommendations to the Board in

109/2011 and the subsequent Methodological Norms, they benefit from extensive regulations and powers in the process of selecting candidates for the management and administration functions of public enterprises. These committees, in accordance with Articles 34 (2) and 35 (5) of Government Emergency Ordinance 109/2011, shall draw up the selection procedure and participate in the selection criteria and may conduct the selection process. In the selection process, the Committee may be assisted by an independent expert, a specialized natural or legal person.

The Nomination Committee of the public enterprise, in accordance with Article 2 (10) of Government Emergency Ordinance 109/2011, may make a short list of candidates, which becomes the list from which the public tutelary authority will select the candidates to be nominated on the boards of administrators or supervisors, as directors. In the case of public enterprises – companies, the nomination and remuneration committees draw up, according to Article 22 of the Methodological Norms, the profile of the committee, in consultation with the corporate governance structure.

Independent expert

Article 29 of Emergency Ordinance 109/2011 on corporate governance of public enterprises, as well as the subsequent Methodological Norms, refers to the possibility or, in some cases, the obligation to use the services of an independent expert, a natural or legal person, to assist the specialization or the selection of the candidates. The complementary aspects presented in Articles 8, 9 and 10 of the Methodological Norms refer to contracting, payment, some conditions to be fulfilled, and the fact that the decision on the use of the services of an independent expert is taken by the tutelary public authority.

---

areas such as auditing, remuneration of administrators, directors, censors and staff, or nominating candidates for the various senior positions. The committees will regularly report to the council on their work.

[12] Article 153^10 (1) of the Companies Law no. 31/1990 republished: The Board of Supervisors may set up consultative committees consisting of at least 2 members of the Board charged with conducting investigations and drafting recommendations to the Council in areas such as auditing, remuneration of directors and supervisory board members, and staff, or nomination of candidates for the various senior positions. The committees will regularly report to the council on their work.

Mechanisms of action that ensure the prevalence of the interest of the tutelary public authority in corporate governance

Promoting the requirements of the letter of expectations in the selection, contracting and evaluation processes

The letter of expectations is the key document for the process of transposing the intentions and interest of the public tutelary authority at the level of public enterprises. This document can be seen as having a double role. On the one hand, it is a test grid used to test the compatibility of the concept of development and the direction of action of the public enterprise desired by the tutelary public authority with that offered by the candidates for the management positions. On the other hand, the statement of intent[13] of the candidates on the short list contains the candidate's vision on the development of the public enterprise, elaborated in the light of the requirements of the letter of expectations. The candidate only has the option of presenting a vision and strategy that includes authority requirements. At the same time, as stated in article 9, paragraph 2, letter b) and article 13 of Government Emergency Ordinance 109/2011, the elements in the content of the letter of expectations will be found in the management plan and the performance indicators of the mandate contracts, and thus, the tutelary public authority determines the direction of action of the management of the public enterprise over which it exercises its authority.

Limiting the options for negotiating of members of management and leadership

Separate from the course taken during the individual selection of candidates, Government Emergency Ordinance 109/2011 created an additional mechanism by which the state secures its dominant position and ability to determine the direction of development of the public enterprise. In this case, the corporate governance structures in the tutelary public authorities constitute a sensor with a self-assessment function because they are required, in accordance with Article 3 (1) (f), to ensure that the financial and non-financial performance indicators, which are

[13] Article 2, paragraph 7 of Government Emergency Ordinance 109/2011 and Articles 2, 3, 13, 14 of the Methodological Norms.

established by the management plan and added as an annex to the mandate contract are observed and reflect the conditions imposed by the letter of expectation. Thus, the board of directors or supervisors, as the case may be, is obliged to negotiate with the tutelary public authority the financial and non-financial performance indicators based on the management plan. According to Articles 13, 22, 30 of Government Emergency Ordinance 109/2011, when, at the end of the negotiation period, which consists of an initial round and possibly an extension of the term, the negotiation is not concluded with an agreement, then the members of the boards of directors or supervision, as appropriate, are revoked without payment of damages. These provisions can be used as negotiating levers, and as a constraint, to achieve compliance with the requirements of the tutelary authority initially expressed through the letter of expectations.

Specific aspects that allow influence on the results of the processes carried out

Exploiting imprecision – a simple scenario to execute

If the information in the candidate's file is insufficient or does not meet the evaluation criteria, the selection boards or nomination and remuneration committees, in accordance with Article 42 of the Methodological Norms, may request additional information relevant to the position for which he/she has filed application. From the perspective of manipulating or influencing selection, it is worthwhile to note that the same committees or boards have contributed to the development of evaluation criteria. Also, the analysis of the files in the long list of candidates is carried out in relation to the minimum criteria set for selection and the decision may be that a candidate does not correspond and for another candidate the information is not conclusive but can be filled in. Thus, the result of the initial analysis of existing data, due to too strict or excessive tolerance, may remove a candidate and may keep another in the nomination race with the amendment to supplement the information in the file. The lack of precision in formulating delimitations to eliminate subjectivity and discrimination in the process of implementing the procedure by the selection committees, namely

nomination and remuneration committees, offers the possibility of influencing the outcome of the selection, intentionally or by mistake.

The complexity of the selection process – a firewall against transparency

The Ministry of Public Finance has implemented the provisions of Article 3^1 paragraph 4 of Government Emergency Ordinance 109/2011 on corporate governance of public enterprises and elaborated the Methodological Norms for establishing the selection criteria, drawing up the short list of up to 5 candidates for each post, their rankings, and the procedure for the final appointments. The selection process governed by the aforementioned acts comprises a multitude of activities, stages, structures that contribute or intervene in the process, so that a candidate can encounter many situations that can substantially improve his/her outcome or can irretrievably harm it.

In order to have insight into the whole chain of events culminating in the conclusion of mandate contracts with members of boards of administrators or supervisors, or directors, it is sufficient to list the constituent elements and structures involved in the selection process.

Thus, from the start of the selection process to the conclusion of the mandate contracts, the letter of expectations is drawn up, the evaluation criteria are established, the profile of the council is drawn up, the profile of the candidates is individualized, the matrix of the candidate's profile, the matrix of the council, then the integrated list are established, the candidate lists are analysed, the shortlist is established, the statements of intent are analysed and compared with the candidate's matrix and the board matrix, the interviews with the candidates are made and then the winning candidates are nominated or named. The implementation of these activities involves corporate governance structures, specialized structures within the tutelary authority, selection boards, nomination and remuneration committees, boards of directors, independent experts.

Because of the complexity of the process and the extremely large number of directly non-quantifiable factors or factors based on interpretation, the unpredictability of the scores, the risk of error, misinterpretation, the possibility of relatively easy concealment of fraudulent tiebreakers, based on a tendentious interpretation of the compatibility of the requirements with the data provided by the

candidates, the results of the selection may be decisively influenced or altered.

Conclusions

The emergence of legislation on corporate governance of public enterprises meant a major change, both at the level of the economy, of the enterprises in which the state had full or majority ownership, the market through the professionalization of the management and administration bodies, as well as at the legislative level, by completing the provisions relating to companies, self-governing regies, credit institutions or insurers with corporate governance regulations.

Government Emergency Ordinance 109/2011 had several modifications and additions, but each of them had the role to solve identified problems or to unlock certain situations that arose in the activity of the tutelary public authorities. Following the analysis of the issues presented, I appreciate that a thorough research into the corporate governance legislation, extended for subsequent regulations, may underpin a review of it.

Eliminating complicated and cumbersome mechanisms and procedures, clarifying some notions and ways of making decisions, facilitating tracking and checking of the accuracy of actions, limiting the possibilities for subjective interpretation of the criteria would lead to the updating of national regulations in line with the spirit of corporate governance principles.

BIBLIOGRAPHY

1. Company Law, edition coordinated by Prof. Univ. Dr. Smaranda Angheni, 20th edition, revised, Bucharest, C.H. Beck, 2017.
2. Company Law no. 31/1990, related legislation and jurisprudence: consolidated legislation and index – October 1, 2015, Bucharest, Universul Juridic Publishing House, 2015.
3. http://www.oecd.org/corporate/principles-corporate-governance.htm
4. Decision no. 722 of September 28, 2016 for the approval of the Methodological Norms for the application of certain provisions of Government Emergency Ordinance no. 109/2011 on

corporate governance of public enterprises, published in the Official Gazette no. 803 of October 12, 2016.
5. Law no. 111 of May 27, 2016 for the approval of Government Emergency Ordinance no. 109/2011 on corporate governance of public enterprises, published in the Official Gazette no. 415 of June 1, 2016.
6. Company Law no. 31/1990, in force since December 17, 1990; republishing in the Official Gazette, Part I no. 1066 of November 17, 2004 (www.lege5.ro).
7. The methodological norms for the establishment of the financial and non-financial performance indicators and the variable component of the remuneration of the members of the board of directors or, as the case may be, of the supervisory directors, as well as of the directors, respectively of the members of the directorate 28.09.2016. Published in the Official Gazette, Part I no. 803 of October 12, 2016
8. Emergency Ordinance no. 109/2011 on corporate governance of public enterprises, in force since December 14, 2011; Official Gazette, Part I no. 883 of December 14, 2011 (www.lege5.ro).

BREXIT – REGULATION OF THE FREE MOVEMENT OF PERSONS

Camelia COSTEA [*]

ABSTRACT

„Nothing is agreed until everything is agreed" is the phrase launched during the negotiations for the signing of the EU withdrawal agreement in United Kingdom of Great Britain and Northern Ireland which sets out the rules applicable during the transitional period, i.e. from 30 March 2019 until 31 December 2020. The draft Agreement was published and so far, has been approved in a proportion of 90% including the right to free movement of persons. What regulations currently apply to the free movement of persons and what rules will apply after the date of entry into force of this withdrawal agreement? What will happen if the Retirement Agreement is not signed and will not enter into force before March 30, 2019? What rules become applicable after the transition period? Analysing the provisions of the UK Retirement Agreement, we will try to answer these questions.

KEYWORDS: *BREXIT, UE, free movement, migration*.

According to the provisions of art. 50 of the Treaty on European Union (TEU)[1], with the announcement of its intention to withdraw from

[*] *Ph.D. student, Titu Maiorescu University, Bucharest, Romania.*

[1] TUE, art. 50: *„1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union. 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure*

the EU, the United Kingdom of Great Britain and Northern Ireland were called upon to negotiate an agreement with the EU setting out the conditions for withdrawal based on future relations with the EU. The TEU ceases to apply to the United Kingdom on the date of entry into force of the Treaty or in the absence of agreement two years after notification of the intention to withdraw, which can only be prolonged with the unanimity of the European Council in agreement with the United Kingdom.

December 2017 saw the first time published the draft agreement on the exit of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, on which basis the negotiations between the parties are to continue in order to establish withdrawal conditions and relations the duration of the transitional period that will run until 31 December 2020.[2]According to the provisions of the agreement, during the transition period the EU legislation is to be enforced in the United Kingdom. The establishment of a transition period has been requested by the United Kingdom and has been established by agreement with the European Union by December 31, 2020. In October 2018, the UK requested an extension of the transition period by another year.

However, the withdrawal agreement does not include provisions on future relations between the UK and the EU after the transition period. In order to regulate post-transition relations, another separate agreement should be concluded, which is probably to be negotiated during the transition period. We believe that the future relations are not provided of the withdrawal agreement both because of the very short time until March 2019 when it should be finalized, especially as the current domestic politics of the UK cannot yet reach an agreement and with regard to future relations.

At the time of the release of the withdrawal agreement, most of the provisions had already been discussed and agreed, but during the Brexit

referred to in Article 49. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M050&from=RO

[2] Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en

negotiations the phrase *"nothing is agreed until everything is agreed"*[3] was promoted to realize that all agreements had to be agreed upon in order to sign the agreement.

Looking at the timing of the negotiations between the two sides, this agreement should have been negotiated and finalized by the end of October 2018 and ratified by the United Kingdom, the European Parliament and the European Council by 30 March 2019 when it should enter into force[4].

We consider that missing the ratification and the entry into force of the agreement by 30 March 2019, respectively within two years of the notification of the intention to withdraw, provided by art. 50 TEU, without the extension of this deadline, would mean for the United Kingdom of Great Britain and Northern Ireland to leave the EU without any withdrawal agreement with the EU, thus without a transitional period. Based on the provisions of art. 217 of the TEU, we consider that the non-signing of this withdrawal agreement is not an impediment for the two parties to conclude other agreements to establish their future relations, including the free movement of persons, on the position of the United Kingdom of Great Britain and Northern Ireland as a third country vis-à-vis the EU. Such an agreement is anyway seen as indispensable for the citizens of the states of both sides to continue their lucrative activities or the projects in which they are already involved.

The effects of the UK withdrawal agreement in force until March 30, 2019 would be that the UK would no longer be a member of the EU, would not have representatives in the European institutions except in exceptional circumstances in which it would invited to participate without decision-making, but the EU provisions on relations governed by the agreement are to be applied in the relations between the parties during the transitional period.[5] The agreement defines "Union law" as all

[3] *https://www.theguardian.com/commentisfree/2017/dec/11/brexit-politics*

[4] *The EU-UK withdrawal agreement*, *Progress to date and remaining difficulties,* p. 6, *http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2018)625110*

[5] *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, art. 30 https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en, Annex 6

EU regulations with subsequent additions and changes to the last day of the transition period.[6]

We believe that the withdrawal agreement could be the starting point and that, during this transition period, the rapports of future relations can be more easily defined.

Analysing the first yet unfinished project of this withdrawal agreement, we find it defining the transition period to which it refers as the period between the entry into force of the withdrawal agreement and 31 December 2020.[7]

We notice that the rules on rights related to the free movement of persons are contained in Title II on Citizens' Rights and Title III on Rights and Obligations.[8] The basis of these regulations is the recognition of the European principle of non-discrimination on grounds of nationality, stated as early as the beginning of the agreement[9] and the principle of equal treatment with host state nationals, with the same rights except social assistance.[10]

The agreement defines the terms of family members, frontier workers, host state, state of work, in a manner identical to European provisions.[11] Regarding the right to free movement, the categories of persons to whom these provisions apply, such as the rights of EU citizens in the United Kingdom and UK citizens of the EU exercising their rights of free movement before the end of the transitional period, are also specified.[12]

---

[6] *Idem*, art. 5

[7] *Idem*, art. 121

[8] *Idem*, later modified and renumbered

[9] *Idem*, art. 11.

[10] *Idem*, art. 21.

[11] *Idem*, art. 8.

[12] Idem, art. 10: „(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter; (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter; (c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter; (d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter; (e) family members of the persons referred to in points (a) to (d), where they fulfil certain conditions…; (f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC"

Analysing the right of residence of the persons to whom the draft agreement refers, we can state that for citizens and their family members already legally residing in the host state at the time of the UK withdrawal, the conditions of the right of residence are the same as those of the current legislation EU and Art. 6 and later. of the Free Movement Directive 2004/38/EC. This means that EU citizens will be able to continue exercising their right to free movement in the United Kingdom, i.e. to enter and leave the country, to settle themselves, to move, to work in an employed or self-employed capacity, and to study just like until now under the rights conferred by EU law, without changing their status to affect these rights. Accordingly, UK nationals will be able to exercise the same rights throughout the EU. The same rights are also recognized for family members who already have a legal right to reside or who will later choose to re-establish their family with the holder of a legal right of residence, namely spouses, children, dependent parents and registered partners, regardless of their nationality.[13] Another category of persons referred to in the withdrawal agreement is that of frontier workers to whom the rights granted by art. 45 TFEU are also recognized[14]. In conclusion, according to the rules of the withdrawal agreement, a right of residence of up to five years is granted to citizens and their family members who are employed or self-employed or who have sufficient financial resources to maintain and have health insurance.[15]

As regards the right of permanent residence, it is recognized by the withdrawal agreement during the transitional period to persons who have been legally resident for five consecutive years, and this continuity is not interrupted by temporary absences that do not affect the right of residence.[16]

Other provisions of the withdrawal agreement relate to administrative procedures, deadlines and documents required to acquire the rights recognized by this agreement.[17]

---

[13] *Idem*, art. 12-13.

[14] TFUE art. 45.

[15] *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,* art. 14, https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en

[16] *Idem*, art. 14-15 and Directive 2004/38/EC, art. 17.

[17] *Idem*, art. 17.

By following the provisions of the withdrawal agreement, we also observe the right to free movement and the regulation of the recognition of professional qualifications according to European norms, for requests made up to the end of the transitional period, in which the states will cooperate for the transmission of information. By way of exception, the United Kingdom will be able to use the internal information system at most 9 months after the end of the transitional period.[18]

As regards the coordination of social security systems, the right to social security is recognized for as long as they continue without interruption in one of the regulated situations involving both the Member State and the United Kingdom at the same time.[19]

Just like the European law, also the agreement applicable to the transition period with the United Kingdom provides for limitations on the right to free movement.

In conclusion, the mutual right to free movement of European citizens on the territory of the United Kingdom of Great Britain and Northern Ireland and that of UK nationals within the EU is regulated as following:

1. Until signing the United Kingdom of Great Britain and Northern Ireland Withdrawal Agreement from the EU, or in the absence of signing this Agreement by 30 March 2019, the EU law shall continue to apply without any modifications,
2. Upon the signing of the United Kingdom's withdrawal agreement from the EU and until 31 December 2020, the EU law will continue to apply with very minor amendments during the transitional period, in accordance with the provisions of the withdrawal agreement until the end of the transition period, ie December 31, 2020.
3. After the transition period, beyond 31 December 2020, the movement of persons shall take place under the conditions laid down in relations with third States.
4. Unless the United Kingdom's Northern Ireland withdrawal agreement is signed by March 30, 2019, then it will no longer be possible to move freely according to the provisions of EU law and the movement of persons will happen without a transition period, under the conditions laid down in relations with third countries.

[18] *Idem*, art. 25-27.
[19] *Idem*, art. 28-31.

We believe that at this moment, in order for the United Kingdom to still take advantage of the EU's relations with the EU, it must take into account the granting of free movement of persons and, in relation to it, has theoretically the following *options*:

1. Returning as a member of the EU, but for which it should go through the accession procedure provided by art. 45 TUE. This option remains theoretically open any time and is supported in practice by liberal political voices seeking a new referendum on the United Kingdom's participation in the EU.[20] The legitimacy of organizing the new referendum is believed to be due to the lack of information from British citizens about the economic consequences of EU withdrawal, and it is hoped that in the knowledge of all the aspects of EU membership, the British people will vote for membership preservation.[21] We also believe that until the date of signing the Withdrawal Agreement or in its absence until 30 March 2019, the United Kingdom has the option of notifying the Council of Europe of the withdrawal of the withdrawal request and thus remaining an EU Member State.
2. Adhering to the Economic Free Trade Association (EFTA) and thereby returning to the European Economic Area (EEA) from a non-EU position may lead in the rapports with the EU to a relationship similar to that of Norway or Iceland with the EU. In formulating this opinion, it should be noted that when the UK withdraws from the EU, it leaves the EEA implicitly – as its participation was an EU member state. If the United Kingdom wishes to continue to participate in the internal market, it can only do so by joining EFTA once again and then become EEA member. We appreciate this possibility as likely only if the UK wants to return to EU law and the jurisdiction of the EU Court of Justice.
3. Accession to the Schengen Area may lead to a similar rapport to the EU as Norway, Iceland or Switzerland.[22] This option is less

[20] Hosp, Gerald, Brexit, *Zwischen Wahn und Sinn*, NZZ Libro, Schwabe AG, 2018, p. 17.

[21] Paul J. J. Welfens, *BREXIT aus Versehen, Europäische Union zwischen Desintegration und neuer EU*, Springer Fachmedien Wiesbaden GmbH 2017 s. 281.

[22] Dr. Paul S. Adams, Between Brussels, Brexit, and Bern, *The European Commission's Power and Interests in Transforming EU Relations with Non-Member*

probable given that it does not involve any economic benefits and that although an EU member, the UK has chosen from the beginning to not to be part of the Schengen area.

4. Signing a new bilateral agreement or a package of bilateral agreements between the United Kingdom of Great Britain and Northern Ireland on the one hand and the EU and the Member States on the other hand for establishing future relations after the UK's withdrawal from the EU[23]. Knowing the basic principles of European Union law, we believe that under this agreement it is also necessary to regulate the free movement of people alongside other areas of interest and this mode of cooperation can lead to relations with the EU in a position similar to that of Switzerland[24].

By analysing all these possibilities in a comparative manner, we appreciate that considering the current situation, for the future of the UK-EU relationship the Swiss model would be the most appropriate one, namely the conclusion of a bilateral agreement or a package of bilateral agreements to regulate on a new basis, all areas of interest on both sides. On the basis of such regulations based on bilateral agreements, according to Swiss practice, there must be a "unitary administration" with the exchange of information at the level of the institutions involved and, on the other hand, a European policy of higher priority than the national policy of immigration.[25]

European States, European Union Studies Association 2017 Biennial Conference Miami, Florida.

[23] Adam Lazowski, *Exercises in Legal Acrobatics*, European Papers, The Brexit Transitional Arrangements vol.2, 2017, no3, p. 859.

[24] *Abkommen zwischen der Schweizerischen Eidgenossenschaft einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten andererseits über die Freizügigkeit*, 21.06.1999,

https://www.admin.ch/opc/de/classified-compilation/19994648/index.html

[25] Andreas Zünd und Thomas Hugi Yar, *Staatliche Leistungen und Aufenthaltsbeendigung unter dem FZA, in Personenfreizugigkeit und Zugang zu staatlichen Leistungen,* Astrid Epiney und Teresia Gordzielik, Schulthess 2015, p. 2010, 2012.

REFERENCES

1. Andrew Goodwin, Brexit and immigration, Oxford Economics, Apr.2016.
2. Dr. Paul S. Adams, Between Brussels, Brexit, and Bern, The European Commission's Power and Interests in Transforming EU Relations with Non-Member European States, European Union Studies Association 2017 Biennial Conference Miami, Florida.
3. David Cameron, Speech on immigration, Chatham-House, 10.11.2015 https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe.
4. Paul J. J. Welfens, BREXIT aus Versehen, Europäische Union zwischen Desintegration und neuer EU, Springer Fachmedien Wiesbaden GmbH 2017.
5. Andrei Popescu, Nicolae Voiculescu, Drept social european, Ed. Fundației România de Mâine, Bucureşti 2003.
6. Ludger Kühnhardt, Das Demokratieproblem lähmt Europas Einheit, 22.02.2017.
7. Hosp, Gerald, Brexit, Zwischen Wahn und Sinn, NZZ Libro, Schwabe AG, 2018.
8. Kern Alexander, Brexit and Financial Regulation, Vortrag Europa Institut an der Universität Zürich, 12.01.2018; Kern Alexander, Catherine Barnard, Eilis Ferran, Andrew Lang & Niamh Moloney, Brexit and Financial Regulation, Bloomsbury 2018.
9. Steven Blockmans, Brexit, Leaving an international organization – particularities regarding the legal status of the EU, Brexit an External Relations, Academy of European Law, Brussels 19-20.03.2018.
10. Ramses A. Wessel, Legal consequences of Brexit for international Agreements concluded by the EU and its Member States, Brexit an External Relations, Academy of European Law, Brussels 19-20.03.2018, Draft paper to be published in Common Market Law Review, 2018.
11. Kenneth A. Armstrong, BREXIT TIME, – Leaving the EU-why, how and when? – Cambridge University Press, June 2017.
12 Thomas Sampson, Four principles for the UK's Brexit trade negotiations, LES 2016.

13. Adam Lazowski, Exercises in Legal Acrobatics: The Brexit Transitional Arrangements, European Papers, vol.2, 2017, no 3.
14. Daniel Thürer, Völkerrecht und Landesrecht, Vortrag über Aktuelle Rechtsentwicklungen in der Schweiz und auf internationale Ebene – aufbereitet für die Praxis, Zürich, 12.08.2016.
15. Andreas Zünd und Thomas Hugi Yar, Staatliche Leistungen und Aufenthaltsbeendigung unter dem FZA, in Personenfreizugigkeit und Zugang zu staatlichen Leistungen, Astrid Epiney und Teresia Gordzielik, Schulthess 2015.
16. Christa Tobler, Auswirkungen einer Übernahme der Unionbürgerrichtlinie für die Schweiz, in Personenfreizugigkeit und Zugang zu staatlichen Leistungen, Astrid Epiney und Teresia Gordzielik, Schulthess 2015.
17. Press conference 31.07.2017, Amid Brexit squabbling, PM May's spokesman says EU free movement to end in 2019, https://www.reuters.com/article/us-britain-eu-may/amid-brexit-squabbling-pm-mays-spokesman-says-eu-free-movement-to-end-in-2019-idUSKBN1AG16X.
18. Aidan O'Neil QC, Trade relations between the UK and the EU, Brexit an External Relations, Academy of European Law, Brussels 19-20.03.2018, chap. 3.
19. Press conference 19.03.2018, EU und Grossbritannien einigen sich auf Übergangsperiode, https://www.srf.ch/news/international/fahrplan-fuer-brexit-eu-und-grossbritannien-einigen-sich-auf-uebergangsperiode.
20. Hau-Kit Man, UK-EU Renegotiation: Quantitative Analysis of Immigration and Free Movement, ETH Zürich, https://www.ethz.ch/content/dam/ethz/special-interest/mtec/necom-dam/documents/Theses/Hau-Kit_Man.pdf

THEORETICAL ASPECTS OF THE LOCATION CONTRACT IN THE OLD AND NEW CIVIL CODE

Adina-Lorena CODEIA[*]

ABSTRACT

In analyzing the differences in the regulation of tenancy in the light of old and respectively of the New Civil Code, we start to mention the fact that the entry into force of the new Civil Code on October 1, 2011 – as approved by Law no. 287/2009, it has made substantial changes to the material contracts, including lease agreement, which is subject of this article.

It should also be noted that those lease contracts concluded before the entry into force of the new code in terms of legal treatment, remain governed by the old rules, but not the same we can say about addenda subsequently concluded that fall under current law. The exceptions to this rule, however, there is provided specifically for the New Code, such as the direct action of the owner against the subtenant contracts of sublease concluded after October 1, 2011, but arising from lease contracts concluded before that date and tacit relocatable to be governed by the provisions of the New Civil Code if the term of lease expires after entry into force of the new Civil Code.

KEYWORDS: *Lease, civil capacity, contract, tenant, lessor, sublease.*

1. PRELIMINARY ISSUES

1.1. Regulatory, notion and kinds of lease

According to art. 1777 of the New Civil Code, the lease is "contract whereby one party, called the lessor, undertakes to provide the other party, called the tenant, the use of an asset for a specified period, for a price, called rent".

However, the enactment expressly mentions lease types, namely rental – concerning movable/immovable property and leasing – in the matter of agricultural goods.

Already, we discuss a new element in the regulation made by the New Civil Code to exclude leases contractor category and introducing the new rental category, respective lease space for the exercise of a professional

[*] *Ph. D. student, Assistant Professor, Faculty of Law Titu Maiorescu University, Bucharest, Romania.*

activity. By "professional" as civil law, understand trader, entrepreneur, operator and any other person authorized to do business or professional.

2. LEGAL ANALYSIS

2.1. Capacity. As shown in the actual definition of the lease, it involves only lease of an asset and not a real right over it, which is why in general we can qualify this agreement as an act of the administration building. So, the conclusion is valid enough as a person gives usage only has limited exercise capacity[1]. However, due to lease concluded for a period longer than five years – that character act doctrine and the New Civil Code mention the lessor shall have full legal capacity when concluding such an agreement.

In such circumstances, the question naturally arises regarding the conclusion of a lease-term greater than five years, by a person with limited legal capacity refers to sanction occurring and specifically mention invalidate the agreement or contractual restriction period for more than 5 years?

2.2. Enforceability of the tenancy with regard to rent and evacuation of the lessee after the term of the lease. According to the rules Code of Civil Procedure, art. 632, enforcement is carried out solely on the basis of an enforcement. Without the power of disqualification, the main enforceable title is a court order, endowed with a law of such power, but the lawmaker recognizes other writings as enforceable[2].

According to the New Civil Code tenancy agreements are considered executory contracts regarding rent and eviction of the occupants from the expiry of lease, taking into account the fulfilment of one of the following requirements: a contract concluded in authentic form before a notary public and registration to the competent tax (obligation incumbent only individuals with rental income for tax purposes).

The amendments to Law 31/1990 provides indeed that if registration of legal or changing their location, the document certifying the right to

[1] www.euroavocatura.ro, Oana Albota, May 5, 2012. The amendments by the New Civil Code to the lease contract.

[2] Writs of execution enforceable decisions (art. 633 Cod of Civil Procedure., meaning judgments on appeal, unless the law provides otherwise and judgments in first instance court without appeal), the rulings provisional enforcement (art. 448 -450 C. of Civ. Proc.) and the final decisions (art. 634 C. of Civ. Proc.).

use the space for the head office must be registered with tax authorities of the National Revenue Agency in whose jurisdiction lies building for head office[3]. Therefore, in case of a tenancy on a building to be used with destination of registered office, registration lease agreement with the tax authority of the National Agency for Fiscal Administration is required, whether the owner is a natural or legal.

In the current legislation in force, it is not apparent solution approved by the legislature on the assumption of a lease agreement by document under private signature, by a lessor legal entity, covering a building with another purpose than to head office, where lessor wishes to receive the enforceability of the lease and the possibility of registration with the tax authority. So, as bodies to ensure that we get the enforceability of the lease is recommended to conclude contracts in authentic form.

The new Civil Code refers to the possibility that the enforcement on rent, under a tenancy without making any reference to other amounts, leaving this way unclear situation maintenance costs, penalties or other categories of amounts resulting from the operation tenancy.

Another question that emerges is related to the possibility of eviction the tenant under the lease – enforceable, but here it should be noted that the New Civil Code refers only to the situation in which the term of the lease has expired, suggesting that cannot be treated as evidence tenancy enforcement evacuation in cases of early termination of the contract (e.g. dissolution).

2.3. The tenant's preference right to a new contract for the lease. Under the influence of the New Civil Code, the tenant benefits from a preferential right to sign a new tenancy under the same conditions as those offered to a third party; law enforcement is limited by the tenant obligations arising under the previous lease. Preferential right applies both between individuals and the rental contracts concluded between professionals.

It is important to note that the preference right is a right depending on the discretion of a party to contract, sui generis and should not be confused with the right of first refusal. In the context of the discussion, the preference right of the tenant in the lease is characterized by the fact that the holder of such rights by manifesting its unilateral will can change a legal situation in which they are interested and other people, and the

[3] Law 31/1990 updated 2018 art. 17 para. (3).

passive subject, namely the lessor, shall observe this interference in the legal sphere[4].

The period for which effective preference right of the tenant to a new contract, the law implementing the New Civil Code no. 287/2009 provides that the existence of this right and after contraction continues, but for a period determined by the duration for which the contract of lease, as follows:

a) no later than three months following the termination of the original contract if the latter has been concluded for a period exceeding one year;

b) within 1 month after the end of the initial contract, if the latter was concluded for a period not less than one month;

c) no later than 3 days from the termination of the original contract, if the latter was closed for more than a month.

2.4. Making repairs. For urgent repairs carried out by the lessor, New Civil Code shorten the period from 40 days to 10 days, the lessor can carry out repairs on the property, without hindering the use responsible for the tenant. Under the regulation, the tenant has the right to terminate the contract in case of emergency repairs to be carried out are as good become unfit for the use given to it.

In light of the old Civil Code regulations, only total loss of the use could be grounds for termination. Moreover, the previous regulation, the tenant cannot perform major repair works (they were for the owner), unless there is a court order was authorized to perform such work or if the parties have so agreed.

By comparison, the New Civil Code provides that the lessee may make such repairs if the owner, although notified to the matter, does not take immediate steps to remedy faults reported; In addition, the owner will be obliged to pay the tenant's repair costs and their related interest calculated from the date of expenditure. In urgent cases, the tenant can begin work immediately, notifying the owner can be made later, in which case, the owner will have to pay interest on repair costs, but interest will run from the date of receipt of the notification.

2.5. The tenant compensation. New Civil Code expressly provides that the lessor is entitled to keep any improvements or work by the tenant

[4] Stoica 2003, p. 55-58. Reghini 2003, p. 236-241. Ungureanu, Munteanu, 2008, p. 269. Sferdian 2013 p. 89- 93, Avram 2006, p. 110-127.

not being the owner and should be approved without being required to pay damages. However, the owner has the option to require the lessee to return the leased property to its original condition and to be paid compensation for any damage caused to property. If the work of improvement were previously approved by the owner, the general rule is that the owner must pay the entire cost tenant work, unless the parties agree otherwise.

2.6. The lessor's privilege on the lessee's property. In regulating the old Civil Code, the owner enjoys a legal privilege over the assets located in rented space lessee. This privilege owner gave priority to recovering the debt resulting from non-payment of rent before other creditors of the lessee.

New Civil Code no longer provides such a privilege lessee. However, inserting a clause in the lease, which establishes a conventional retention on property lessee may be agreed between the parties.

2.7. Owner's action against the subtenant. In the event of the principal's failure to pay the rent, the landlord is entitled to require the sub-tenants to pay it up to the rent that they owe the principal tenant. The owner also has a direct action against the sub-custodians about any other obligation assumed by the subleasing contract.

These new rights granted to the lessor by the New Civil Code are applicable to any sublease contract signed after October 1, 2011, even in those cases where the lease was concluded mainly before that date.

2.8. Duration of lease and tacit relocatable. The duration of the lease can be determined or determinable. If the parties have not specified the duration of the lease based on assumptions determined by the legislature, the lease will be considered completed for:

a) for one year if unfurnished dwellings or spaces to the exercise of a professional;

b) during the corresponding time unit for which the rent calculated in movable assets or in one of the rooms or furnished apartments;

c) the duration of the lease property, in movable assets made available to the lessee for the use of a building.

The former regulation does not expressly provide a certain maximum termination of the lease, while the New Civil Code requires that the

maximum period for concluding a lease period of 49 years. However, the contract may be extended thereafter by mutual consent.

If after the deadline for ending the tenancy, the tenant continues to hold good and to fulfil obligations to the lessor, without the latter to resist, he is considered to have entered into a new tenancy in the same terms as conditions precedent. Changing New Civil Code also provides that the new agreement will also include guarantees provided in the previous contract. The period for which the first contract was signed is not picked up in the second, the latter being considered to be concluded for an indefinite period, but as limiting the duration not exceeding 49 years.

2.9. The rental price. Civil Code in force expressly upheld the view that provisions on the sale price are applicable to the rent. The amount of the rent may be determined or determinable by one or more persons designated in accordance with the parties' agreement. Where persons so designated not determine the rent deadline set by the parties or, in the absence of stipulations within six months from signing the contract at the request of the interested party, the president of the court of the place of conclusion shall appoint an expert to determine its value. If the rent has not been determined within one year from signing the contract, the contract is deemed void, unless the parties have agreed otherwise determining rent.

2.10. Warranty against defects**.** Lessor only guarantee for hidden defects of the leased asset lease and not for apparent defects – just like in sales material. Unless the landlord tenant is informed immediately about the existence of defects, in which the landlord will be held liable.

2.11. Sublease and the assignment of the lease. New Civil Code clarify some controversy arise concerning the interpretation of clauses prohibiting sublease or assignment. If until now the majority opinion supporting a restrictive interpretation of clauses prohibiting sublease (whether prohibiting Sublease total, the partial was allowed), according to new regulations ban to enter into a sublease for the one match and Sublease total and partial, and releasing the prohibition of the transfer of the lease refers to both full and partial to the.

The current Civil Code provides that the tenant may give the lease to another person, in whole or in part, if it was not expressly forbidden. If

the object of the lease is the movable, New Civil Code assignment of existence conditions written consent of the lessor. Following the assignment, the transferee acquires the rights and is bound to execute the assignor's obligations arising from the lease. Compared to the previous regulation, according to the New Civil Code, the former tenant is released from his obligations to the lessor once the transfer takes effect.

2.12. The effects of abolition lessor's title. Just as in the former regulation, the Civil Code in force retains the rule that the law abolishing the lessor determines the termination of the tenancy. However, the novelty is that the effects are long lease to the tenant good, but not exceeding one year from the date of dissolution Title lessor.

3. CONCLUSIONS

Dynamics and social needs often lead to change or adapt the legislation a company. New situations must be properly regulated by the legislative authority. It is legitimate and appearance legislative proposal to change the Civil Code of 1864 whose rules after more than 150 years, were taken only in part by Law 278/2009.

In practice, there are still contracts in progress which are governed by (at least) two laws, one in effect at the time of their completion (before the new Civil Code) and the new Civil Code applicable to contractual modifications made after its entry into force. Therefore, attention must manifest contracting parties in the execution of such contracts is extremely important. When will perform the obligations arising from such contracts will require the parties to return to the previous law applicable to obligations which arose under his or follow the new provisions of the Civil Code on obligations incurred or modified after the entry into force.

Therefore, state that there are sufficient changes to the right regulatory framework of agreements which will thus impact on leases signed under the New Civil Code. Among them we mention rules on contract negotiations (when the contract is deemed to be concluded in good faith, etc.), regulation theory unpredictability, the possibility of a conventional change of the prescription period.

By analyzing the two regulatory perspectives presented, we wanted, on the one hand, to highlight the existing substantive legal differences

and, on the other hand, to contribute to an adequate and correct interpretation of the law on the lease contract.

BIBLIOGRAPHY

1. Albota, O. 2012. *The amendments by the New Civil Code to the lease contract*;
2. Avram, M. 2006. *Unilateral Act in Private Law*. Bucharest
3. Boroi, G., Stancu, M. 2015. *Civil procedural law*. (the 2nd edition, revised and enlarged), Bucharest;
4. Codeia Adina-Lorena. Compared *Aspects on injury and the theory of unpredictability in the New Civil Code*, Revue Europeenne Du Droit Social, Volume XXXIII, Targoviste, 2016.
5. Reghini, I. 2003. *Potestative rights considerations*. Romanian Pandects 4: 236-241
6. Sferdian, I. 2013. *Civil Law. Main real rights*. Bucharest.
7. Stoica, V. 2003. *Atypical economic rights*. Law 8: 33-58.
8. Ungureanu, O., Munteanu, C. 2008. *Treaty of civil law*. *The goods. Main real rights*. Bucharest.
9. New Civil Code – Law 287/2009, lease contract – art. 1777-1835;
10. Code of Civil Procedure – Law 134/2010 – republished 2015;
11. Law of Societies 31/1990 – updated 2018.

THE ABSENCE OF CRIMINAL METHODOLOGY IN THE CASE OF GENOCIDE AND CRIMES AGAINST HUMANITY OFFENCES – POSSIBLE CONSEQUENCES –

Vasile DOANĂ*

ABSTRACT

Starting with 2014, with the entry into force of the New Penal Code, the Romanian judicial authorities initiated penal prosecution and subsequently the prosecution of a series of penal cases, the object of which constituted the act of crimes against humanity, introduced for the first time in the criminal law of our country on 01.02.2014, given that these actions were committed between 1955 and 1989, long before the incrimination itself, in the form presented above.

From the study of this crime it can be seen that it is set forth in art. 439 of the Penal Code, in a chapter which also includes the crime of genocide, thus the legislator wishing to show that these two facts represent a distinct category of crimes.

Studying the specialised doctrine, one can find that there is no criminalistics methodology to be followed by the judicial authorities for this category of crimes, and thus there is a risk of their "slippage" in both the criminal investigation stage and in the trial stage (as discussed in this article).Thus, developing a methodology should be done precisely in order to help the judicial bodies that are dealing with such causes.

KEYWORDS: *crimes against humanity; genocide; lack of forensic methodology; verification of competence; prescription of criminal liability*.

In the New Penal Code, set forth in articles 438 and 439 are genocide and crimes against humanity offences, which can be committed both in peacetime and during wartime.

Judging from the point of view of the consequences of committing such criminal acts, ("immediate consequence") it can be seen that they lead to the destruction (through: man slaughter, physical or psychological injury, torture, deportations, etc.) of a whole group of people, structured on ethnic, racial or religious criteria, or of a civilian population, if the actions are committed against this type of people in a generalised and systematic attack.

Considering the structure of ethnic, racial or religious groups in our country, whose number of members may fluctuate from several thousand

* *Ph. D. student, Titu Maiorescu University, Bucharest, Romania.*

to millions of people, but also the fact that by mentioning the expression "civilian population" provided by in art. 439 of the Penal Code, this may include the population of a city or of another place (as in the case when it included a part of the population of Bucharest in June 13-15, 1990) or even the entire population of the country. We can see that the social values protected by the two texts of law are extremely important at a national level, by having a material element of the objective side as well as a generic and special legal object (in terms of socially protected values) totally specifically and also different from other offences incriminated in the Romanian penal law.

Thus, the two offences form a distinct category of actions incriminated by law (along with the other categories, of which we offer as example: crimes against life, sexual life, forgery and use of forgery, organised criminality, corruption, offences regarding work accidents, offences regarding road accidents, traffic accidents, etc.).

While, for the crime categories already listed, there are already well-established forensic investigation methodologies, after studying specialised papers, we may find that for genocide and crimes against humanity there is no methodology of forensic investigation.

The importance of such a methodology, for any category of offence, is crucial, since it contains and discloses the steps to be followed by the judicial bodies in investigating any type of offence, also establishing their chronological order; failure to comply with these steps or the order in which they are to be done shall result in the failure of any criminal or judicial inquiry.

By asserting that the forensic methodology is typical for the two stages of the criminal trial, we join the Romanian and international majority of doctrinal opinion according to which, the field of action of the science of forensics, and of the forensic methodology, begins with the criminal investigation stage and ends with the judgment.1

Regarding the reasons why, in the Romanian doctrine, there is no such methodology in place, there can be multiple reasons and, without making a detailed and complete analysis in this report, it can be argued that this

[1] E.Stancu: *Criminalistics Treaty* 2015, Bucharest (forth edition, revised), p. 35; C.E. O'Hara and J.H. Osterburg: *An Introduction to Criminalistics*, New York, 1949; H. Soderman and 'CONNEL: *Manuel de l'anquete criminelle moderne*, Paris, 1953; K.P. O'Brien and R.C. Sullivan: *Criminalistics*, *Theory and Practice*, Londra, 1976; B. Holyst: *Kriminalistika*, Varsovia, 1975 and others.

lack of methodology is directly related to the absence, of such criminal cases, until recently in the Romanian judicial practice.

Starting with this point of view, the situation has changed since 2014, as a result of the recent practice of the European Court of Human Rights in the case of the events from June 13-15, 1990, generically called "Miners" files, which happened in Bucharest, therefore we reiterate the following:

– in the Conciliatory Opinion on the judgment of the Grand Chamber of the Court, the judgment of 17.09.2014 in the case "Mocanu and Others v. Romania", the opinion of judge Pinta de Albuquerque, joined by Nebojsa Vueiniae, analyses and explains the rulings of the Grand Chamber, in the sense that the Romanian judicial authorities for 26 years acted "incoherently" by considering the criminal offences committed during the events of 13-15 June 1990 as distinct offences of "common law" which are subjected to prescription, provided that these actions are the constitutive elements of the offence set forth and punished by Art. 439 of the New Penal Code, namely "crimes against humanity";

– in this respect, we cite the following from paragraph 14 of the Conciliatory Opinion: "*Independently of their legal status in national law at the time of the acts, the above-mentioned events constitute mass violations of the right to life, the right to physical and sexual integrity, property and other fundamental rights of Romanian citizens and legal entities, victims of the political repression of the state, against the Government's opponents at that time. There is only one classification in the legal terminology applicable to the facts in question: the events of June 1990 constitute a crime against humanity committed in a generalised and systematic attack launched against a civilian population.*"[2]

– from paragraph 17 of the accordance Opinion, we cite as follows: "*It is now necessary to properly classify the facts of the case, something that the highest judicial authorities and internal prosecution bodies did not make. Handling the legal classification of the events at dispute, so that they may be subject to limitation periods which would not have been feasible if those events were properly defined as an offence, runs against*

[2] E.C.H.R. Grand Chamber, Dec.in 17.09.2014 in the case of "Mocanu s.a. against Romania", Opinion compliance.

the very object and purpose of art. 2 and 3 of the Convention and article 1 of Convention on Imprescriptibility Against Humanity" (3)[3].

– in order to remove any doubt as to the meaning of the conclusions of the two European magistrates, we read out from paragraph 18 of the conclusion: "*The passage of time does not exempt the Romanian state from respecting its international obligations nor the authors of the violations from their individual penal accountability". The procedural obligations arising from art. 2 and 3 of the Convention require a fair trial in order to judge the people responsible for the crimes against humanity committed against Romanian civilians (...)".*[4]

These considerations in the ECHR judgment were clearly taken up by the Order of the Prosecutor General no. 3/C3/2015 of 05.02.2015, ordering the reopening of the prosecution in the present case, in the sense that the violence exercised by the mining groups on the civilian population must be regarded as normative means of committing the offence, crimes against humanity, thus having an imprescriptible character.

For edification, we shall cite the statements of the General Prosecutor, which are found on page 36 of the Order: *"(...) On the other hand, even if for some of these offences the prescription of criminal liability has taken place, these facts will be taken consideration in the course of criminal prosecution as alternative normative ways of committing crimes against peace and humanity from the Penal Code of 1968 and, respectively, the crimes of genocide and crimes against humanity set forth in the current Penal Code. The High Court of Cassation and Justice confirmed the order of reopening this criminal case and the prosecutors decided the commencement of the criminal prosecution for crimes against humanity, then issuing the indictment, the case being currently on the role of the Preliminary Chamber of the High Court of Cassation and Justice.*[5]

From now on, the Romanian criminal prosecution bodies, in particular the civilian sections and the military section of the Prosecutor's Office part of the High Court of Cassation and Justice, recorded several files in the records of criminal cases and alleged criminal offences legally enlisted by prosecutors as crimes against humanity offence were found,

[3] E.C.H.R Grand Chamber, Dec.in 17.09.2014 in the case of "Mocanu s.a. against Romania", Opinion compliance.

[4] E.C.H.R Grand Chamber, Dec.in 17.09.2014 in the case of "Mocanu s.a. against Romania", Opinion compliance.

[5] Ordinance nr.3 of the General Attorney/ C3/2015 din 05.02.2015.

as set forth and punished in art. 439 of the New Penal Code, bearing in mind that the offence was not criminalised in this form and, especially, under that name in the previous criminal codes, those of 1936 and 1968, under which these alleged criminal offences had been committed.

For example, we shall mention some of these cases: the files from December 1989 events, generically called "The Revolution Files", the files from November 1987 events in Brasov, the files of the dissident Gheorghe Ursu who was killed while in the arrest of the Criminal Investigative Directorate, the files of the Ceausescu Spouses murder by shooting, at Târgoviste from 25.12.1989 (and others).

These criminal cases have been or are being handled by the Military Prosecutor's Office, according to the principle of competence according to the quality of the person at the time of committing the offence (military along with civilian persons), stating that in two of these cases the military prosecutors have already issued the indictment (the files of the events that took place in June 15, 1990 and the files of dissident Gheorghe Ursu).

Another "batch" of such cases has been or is being handled by the civil departments of the Prosecutor's Office attached to the High Court of Cassation and Justice, some of them referring to the so-called "torturers", more precisely the former prison commanders from Romania in years 1950-1960, of which we exemplify the following defendants: Colonel (rez.) Visinescu Alexandru, former commander of the Râmnicu Sarat Penitentiary; colonel (ret.) Ficior Ion, former commander of the Periprava Working Colony; Colonel (ret.) Petrescu Gheorghe, former commander of the Galati Penitentiary (and others).

Indictments were issued in the three criminal cases by civil prosecutors and the civil courts have already ordered the conviction of the first two defendants for a twenty-year prison sentence, the two judgments being final; in case of the defendant Petrescu Gheorghe, the judge found the nullity of several evidence which was illegally administered in the criminal prosecution stage, as a consequence, also finding the nullity of the court notification, and as a final result, the case was returned to the Prosecutor's Office, in order to reconstruct the criminal prosecution case.

After analysing the legal provisions of the New Penal Procedural Code, under which these offences were dealt with, the competence of the judiciary bodies according to the military quality of the author (at the moment of the offence) is the following: according to the provisions of

art. 56, para. 4 "the prosecution of the offences committed by a military shall necessarily be carried out by a military prosecutor." Following that, also stipulated at paragraph 6 of the same article, "the military prosecutors within the military prosecutor's office or the military units of the prosecutor's office carry out the criminal prosecution according to the competence of the prosecutor's office to which they belong regarding all the participants in committing the crimes done by the military and after that the competent court shall be notified according to the law ".[6]

The two texts must be read in conjunction with the provisions of art. 48 of the same normative act according to which, in the event of a change in the quality of the defendant, after committing the offence, the competence of both criminal investigation bodies and court shall remain acquired if the act is related to the duty attributions of the author.

Taking into consideration the legal framework presented above, the question that arises is: How legal is the investigation of such causes by the civil sections of the Prosecutor's Office belonging to the High Court of Cassation and Justice, where persons who had the military status at the time of committing the alleged criminal acts are being investigated, the latter having obviously a close connection with the duties of the defendants?

If we also take into consideration Decision nr.302/04.05.2017 of the Constitutional Court, which declares unconstitutional the provisions of art. 281, para. 1, letter (b) Pen. Pr. Code, as this text does not sanction with absolute nullity, in the criminal prosecution stage, the rules of material competence and the quality of the person, we believe that nothing prevents us to launch the hypothesis according to which the criminal prosecution acts carried out by the civil prosecutors in the cases of the so-called "torturers" are affected by absolute nullity.[7]

However, the question remains: Why was this state of non-compliance and even dissociation of the behaviour of the two sections belonging to the same prosecutor office or the same sections within the Supreme Court, in relation to the provisions of the penal procedural law?

In order to be able to respond to such a problem, we must consider the atypical character of this category of penal cases, the lack of judicial practice in the field, as well as the specialised doctrine, the very long time elapsed between the date of the offense and the moment of the

[6] Penal Procedural Code from July 1, 2010 (Act No. 135/2010).
[7] Decision 302/04.05.2017 of the Constitutional Court.

criminal prosecution and judgments (over fifty years duration), etc., these being "classical" factors that usually affect both the quality of the criminal prosecution and the act of judgment and they can also generate controversial procedural behaviour of various judicial bodies.

In such a situation, one of the only possible remedies could only be the development of a forensic methodology for investigating this category of offences, which will help the judiciary by indicating all the steps to be followed in dealing with such causes, but also the logical order in these steps which must be carried out.

We believe that such a methodology should help the judicial bodies in particularly in order to avoid inappropriate procedural behaviours, such as those that have already been mentioned before but also those who are still to be mentioned.

For example, we will put forward some of the first mandatory steps to be followed in the handling of such criminal cases, both by the criminal prosecution bodies and by the court, as soon as they are notified, as follows:

– of course, the first step that should be taken is to verify the competence of each of the notified bodies. We believe that this activity may appear to have a higher degree of difficulty due to the fact that, in some cases, starting from the date of committing the acts to the date of the case investigation, more than fifty years passed, a period of time in which three penal codes and three penal procedural codes succeeded (1936, 1968, 2014); As a matter of fact, it shall always be accounted that in the matter of applying procedural law, in order to establish the competence of the judiciary, the principle that operates is "tempus regit actum", which always determines the application of the law in force at the date of the case investigation;

– another step to be followed is to verify the continuity of the criminalisation of the criminal acts which were committed under the three succeeding penal codes (in the case of the files with the so-called "tortionaries", whose alleged criminal acts were committed during the period 1945-1965), in order to satisfy the principle of "nullum crimen sine lege, nulla poena sine lege".

As far as the genocide crime is concerned, there would be no special problems in verifying the continuity of the criminalisation, because it was provided by the Romanian penal law, continuously and in the same form, starting from 17.06.1960, when Decree no. 212/1960 was issued, amending the Penal Code of 1936 (Carol II), until now.

It is more difficult to verify the continuity of the criminalisation for the criminal act provided by in art. 439 of the New Penal Code, called crimes against humanity, because it was introduced under this name by the current criminal code, which entered into force on 01.02.2014, and has not been incriminated in the other two previous penal codes. To the present date, the solution chosen by the judicial bodies, in the cases which have been already solved, is the "assimilation" of the normative variants of crimes against humanity and the normative variants provided by the previous criminal laws in the case of some offences incriminated by them, which also bearded another name (in particular, the offence of inhumane treatment), regarding which the judiciary judged that it had similar normative content, thus, rendering conclusive conviction decisions.

– just as important for judicial bodies in such cases, with long periods of time between the act of committing the act and the instrumentation of the case, is also verifying the fulfilment or non-fulfilment of the term of prescription, the penal responsibility and a correct determination of the cases of suspension or interruption of the prescription course.

This issue requires the judicial body a thorough investigation of the penal law but also of the penal procedural law, including the international conventions to which Romania adhered, by which such offences were incriminated and subsequently declared imprescriptible (1968). The lack of such type of study may lead the judiciary (criminal prosecution but also the court) to erroneous conclusions. We appreciate that such conclusions have already been drawn by the judicial bodies in the cases of the so-called "torturers", heading to the situation that the defendants, Vişinescu Alexandru and Col. (res.) Ficior Ion are sentenced to the punishment of imprisonment in the penitentiary, even though the offences were barred.

In order to correctly plead the reasons for suspending the prescription of criminal liability in this case, the question should be clarified in the sense as if the mere existence of the communist political regime at the time of such actions may in itself be a reason for suspending the prescription. Therefore, we point out that the judicial bodies already pleaded in that way, concerning this category of criminal cases, although this does not seem to meet the conditions imposed by any of the penal laws that have succeeded throughout this period.

– the judiciary is also obliged to know in detail the national, but also international, legislation, with all its evolution over time, so that it can

correctly apply the "mitior lex" principle; in the same sense, it is necessary to have a good knowledge of all the legal criteria that can be judged, in the case of a succession of criminal laws over time, which of these laws is more favourable to the defendant. In applying this principle, it will be taken into account the Constitutional Court's Decision no. 265/2014, which requires the judicial bodies to apply the more favourable criminal law.

After studying Sentence no. 122/F/24.07.2015, ordered by the Bucharest Court of Appeal against def. Col. (res.) Visinescu Alexandru and also the Criminal Decision no. 51/A/10.02.2016, decisions by which the defendant was definitively convicted to the twenty-year prison sentence, we shall find a situation of incorrect application of the more favourable law, because the courts, although correctly established the succession of criminal laws, precisely 1968 Penal Codes adopted in the following years: 1968 (Carol II), 1968 and 2014, and although in the 1938 code, these criminal acts (or those assimilated to them) had a prescriptive character which lasted until 1968, they considered, erroneously, that the more favourable law to the defendant would be the 1968 Criminal Code, on the basis of which the same criminal action of the defendant had become indefeasible.[8]

According to our opinion, this reasoning is quite wrong as it establishes as a more favourable law for the defendant, the law under which he is sentenced to detention, to the detriment of another law under which the court should have ordered the cessation of the criminal trial, for the reason of fulfilling the limitation period of criminal liability.

– finally, the last step to be taken by the judiciary (referring to the subject of this report) is also based on a good knowledge of the evolution of the legislation that is relevant to such cases, this time referring to all the acts of amnesty and pardon which occurred from the time that the act was committed to the time of the final decision.

Returning to the same case of "Visinescu", it is noticed that his criminal activity ceased in 1963. In 1988, the Decree of Amnesty and Pardon nr.11 was issued. According to the provisions of this normative act, the punishments applied for the criminal actions which happened before its issuance with less than ten years of imprisonment were

[8] Sentence no. 122/F/24.07.2015, pronounced by the Bucharest Court of Appeal against inc. Col. (res.) Vişinescu Alexandru but also the Criminal Decision no. 51/A/10.02.2016.

amnestied and the punishments lasting longer than ten years were pardoned in half. To be mentioned that this normative act of clemency did not exclude any offence in its area of application.

It is obvious that the court, after condemning the defendant Visinescu to twenty years of imprisonment, was obliged to apply the clemency act, and to find that half of the punishment was pardoned, which would cause the defendant to execute only half of it.

Although it seems hard to believe, the only logical explanation that can be issued in this situation is that the courts simply did not proceed to verify the evolution of legislation (regarding clemency acts) from the moment of the criminal act to the moment of the conviction.

Taking into account what was mentioned above it is clear that not even the prosecutor has gone through this stage of the study.

BIBLIOGRAPHY

1. Stancu Emilian: "Crime Treaty", 2015, Bucharest (6th edition, revised);
2. The Romanian Penal Code: 1938 (Carol II), 1968, 2014;
3. Criminal Procedure Code 2014;
4. European Court of Human Rights – 17.09.2014 – Judgment in the case "MOCANU s.a. against Romania" – Grand Chamber;
5. Decisions: 265/2014 and 302/04.05.2017 of the Constitutional Court;
6. Criminal Senate no. 122/F/24.07.2015, pronounced by the Bucharest Court of Appeal against inc. Col. (rez.) Vişinescu Alexandru and Criminal Decision no. 51/A/10.02.2016 pronounced by the High Court of Cassation and Justice;
7. Decree no. 212/1960 amending the Criminal Code of 1936 (Carol II);
8. Decree of the State Council no. 11/1988.

INTERNATIONAL LAW AND EU LEGISLATION IN SECURITY COUNCIL'S COUNTERTERRORISM SANCTIONS – A TROUBLED RELATIONSHIP?

Raisa DOBRESCU[*]

ABSTRACT

If the Security Council was created for states, what is the security regime's sanctioning regime for an individual? The sanctions regime is one of the most controversial due to the UN system is moving to the state rather than to an individual. So, in this case it is interesting to observe how the UN system is challenged to have different approach when there is a country or there is a person. The international legal system is also challenged to face these situations. In the end we have to be sure that the human rights are respected and an individual has the right to challenge a charge even though that impeachment has no remedy at the UN level.

KEYWORDS: *Security Council; sanctions; resolutions; United Nations; terrorism; Blacklisting; European Court of Justice; International Law; European Law; Kadi case.*

Introduction

The death toll among the civilian population caused by the near-total financial and trade embargo imposed by the Security Council (hereinafter the SC or 'the Council') on Ba'athist Iraq on 6th of August 1990 – which was about to last until the 2003 invasion of Iraq by the USA – raised some serious concerns among policy makers and international legal practitioners alike.[1] In light of the dreary situation in Iraq in the first years after the sanctions, legal practitioners have started to advocate and pressure the SC and policy makers to make sanctions more targeted rather than comprehensive to reduce as much as possible the collateral damage.

[*] *Ph. D. student, Titu Maiorescu University, Bucharest, Romania.*

[1] See UN Doc. S/RES/661, 6 August 1990. See also Graefrath, B., 'Iraqi Reparations and the Security Council', *Heidelberg Journal of International Law*, Vol. 55, Issue 1, 1995.

The subsequent sanctions imposed on UNITA[2] in Angola, in 1997 and 1998 were the first targeted sanctions imposed by the Council. Up to 157 individuals, among the members and elite of the UNITA front, were subject to travel bans and asset freeze.[3] The blatant disregard for any fundamental rights of those sanctioned and the lack of a documented reasoning for blacklisting those individuals really inflamed the discussions on respect for fundamental human rights in the practice of sanctions as well as on the need to ensure proper legal safeguards in the administration of the sanctions regimes.[4]

Both issues gained momentum when the first civilians lost their life in Iraq, mostly through starvation, but there were not enough sanctions regimes at that time to properly inform the discussions. Angola, and then later Sierra Leone and Liberia, were to offer plenty of examples of blacklisting done with no legal justification. A number of complaints to the relevant sanctions committees have brought the discussions in the SC at the turn of the millennium.[5] Although the targets of the sanctions were known rebel leaders or government officials, there were no legal instruments to advice on how large or small the circle of government officials/rebels can be. Moreover, there were no rules to help determine what links with the government or rebels could constitute a reasonable basis for placing an individual to a sanctions list.

Although the effects of sanctions, comprehensive or targeted, were visible since the very first instances these were imposed (*i.e.* Southern Rhodesia), there was no serious discussions on the fundamental rights affected or the legal safeguards needed, until the last decade of the 20th century. Human rights, such as the right to life, liberty, health, the right to property, freedom to move and the right to a family life, were always at risk when SC sanctions were imposed.

---

[2] União Nacional para a Independência Total de Angola (English: *National Front for the Total Independence of Angola)*. Today is the second largest political party in Angola.

[3] *UN Arms Embargo on UNITA*, Stockholm International Peace Research Institute (SIPRI), Arms Embargoes. Article available at https://www.sipri.org/databases/embargoes/un_arms_embargoes/angola, accessed on 3 November 2018.

[4] See UN Doc. S/RES/1127, 28 August 1997, UN Doc. S/RES/1173, 12 June 1998 and UN Doc. S/RES/1176, 24 June 1998. The first one was imposing travel bans and asset freeze on UNITA leaders and immediate family members while the last two were imposing financial sanctions on UNITA members.

[5] See UN Security Council Press Release 608, 1 February 2002.

The SC has been designed to be a forum for states and to address issues where states are the main actors. The system of sanctions has also been designed to be directed at states thus leaving "*no room for problems in relation to other actors of international law*".[6] When the Council switched from a state-centred institution to a hybrid mechanism, addressing issues both at state level as well as at individual level, it entered an uncharted area. When sanctions imposed under Article 41 of the UN Charter were targeting individuals, there was no possibility for the people to defend themselves before the Security Council.

When sanctions are imposed upon a state, the Council usually demands a certain behaviour from the state. The latter has, thus, the possibility to decide if it will comply or not with the decision(s) of the Council in order to have the sanctions lifted. In the case of persons – specifically in the case of the listings under the 1267/1373 Al Qaeda Sanctions Committee – there is only a designation made by the Council with no demand or expectation in the change of behaviour and with no 'sunset clause'[7] clearly limiting the conditions under which the sanctions regime can be lifted. The blacklisted persons are only considered to pose a threat to international peace and security and action have to be taken against them. They do not have the possibility to defend themselves and they will not be heard by the Security Council. That is a privilege reserved only for states.[8]

Since persons cannot address the SC and have no other venue for remedying their situation, procedural rights such as the right to a fair trial and the presumption of innocence might be blatantly infringed upon. Under these circumstances, some actors have turned towards national or regional, European courts to seek relief. Since Article 103 of the UN Charter states that "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their*

[6] See Birkhäuser, N., 'Sanctions of the Security Council Against Individuals – Some Human Rights Problems', *European Society of International Law (ESIL)*, Geneva, May 2005, p. 1.

[7] A time frame for implementation and termination of the restrictive measures imposed, that would be provided in the SC resolutions authorizing the sanctions. Opposite of an open-ended system of sanctions, such as the current one.

[8] See Birkhäuser at *supra note* 6, p. 1-2. Some changes have been implemented after the *Kadi II* judgement in terms of allowing relief from sanctions. See Margulies, P., 'Aftermath of an Unwise Decision: The U.N. Terrorist Sanctions Regime after Kadi II', *Amsterdam Law Forum*, Vol 6, Spring 2014.

obligations under any other international agreement, their obligations under the present Charter shall prevail", the cases brought by those blacklisted before the EU courts also brought the Security Council and the judiciary system in the EU at odds. Two landmark cases – Kadi I and Kadi II – will serve as examples of this conflict.

Blacklisting

The practice of sanctions were to gain new momentum in Europe at the turn of the millennium, when the SC adopted resolutions 1267(1999)[9] and 1333 (2000)[10] officially imposing sanctions on the Taliban regime in Afghanistan for its encouragement of opium growing and, subsequently, its refusal of extraditing Usama Bin Laden. The two resolutions were obliging states to freeze all funds controlled directly or indirectly by the Taliban, Usama Bin Laden and his Al Qaeda associates. The 1333(2000) resolution was among the first SC resolution to impose sanctions on the members of a terrorist network.

The failure of the Taliban led Afghanistan to extradite Bin Laden and the World Trade Center attack of 11 September 2001, were to mark a new era in the evolution of counter-terrorism sanctions. The issues of the fundamental rights and legal safeguards in the practice of sanctions were to take a back seat and states were given a blank check by the SC to blacklist anybody with only the presumption of a link to a terrorist organization. On 28 September 2001, in the wake of the terrorist attack on the twin towers, the SC adopted resolution 1373(2001) which imposed – and still imposes – obligations on all states "*inter alia to criminalize acts of financing of international terrorism and to freeze and seize funds used for terrorism*".[11] Unlike the previous resolutions, where there was a time limit and the sanctions were directed at individuals which had some connection to a state or territory, the 1373(2001) resolution had no time limit and was open-ended, which meant that the targets of the sanctions were not linked to any territory or state.[12] As such, by way of resolution

[9] See UN Doc. S/RES/1267, 15 October 1999.

[10] See UN Doc. S/RES/1333, 19 December 2000.

[11] See Cameron, I., 'Targeted Sanctions and Legal Safeguards', Report for the Swedish Foreign Office, March 2002, p. 8. Available at http://pcr.uu.se/digitalAssets/165/165536_1sanctions.pdf, accessed on 3 November 2018.

[12] *Ibid.*

1373(2001), the SC managed to criminalize individuals or groups based on geopolitical, diplomatic or foreign policy interests.[13]

To further enforce the sanctions imposed on individuals by way of the 1333(2000) and 1373(2001) resolutions, a third resolution was adopted by the SC shortly thereafter, on 16 January 2002, which extended an arms embargo and travel bans to those listed under the previous two resolutions as having – or being suspected to have – ties with terrorist organizations. This was the first Chapter VII resolution adopted by the Council with no territorial connection.[14]

What followed was a wave of names being submitted by states (especially the US) to the 1267/1373 Al Qaeda Sanctions Committee for blacklisting. Since there was no provision in the texts of the resolutions for submitting a justification for listing as well as the source of the information, any single person could have been subject to a blacklisting procedure.[15]

Challenges in Court – the role of the European Court of Justice (ECJ)

Although the discussion on protection of fundamental human rights and ensuring legal safeguards/remedies in the practice of sanctions has taken a back seat shortly after the 9/11 terrorist attack, it did not disappear completely. The blatant disregard for human rights was to determine the blacklisted to challenge their listing in court.

The first to challenge it was Yassin Abdullah Kadi and the Al Barakaat International Foundation of Sweden, component of the Hawala system used by Somali citizens to transfer money from diaspora.[16] On 19 October 2001, they were listed by the 1267 Al Qaeda Committee as

[13] Sullivan, G., 'Rethinking terrorist blacklisting', The Guardian, 10 December 2010. The article is available at *https://www.theguardian.com/commentisfree/libertycentral/2010/dec/10/terrorist-blacklisting-un-report-human-rights*, accessed on 3 November 2018.

[14] See Cameron, *supra note 8*, p. 9

[15] See Cameron, *supra note 8,* p. 10. See also van der Broek, M. and Hazelhorst, M., 'Asset Freezing: Smart Sanctions or Criminal Charge?, *Merkourios Utrecht Journal of International and European Law*, Vol. 27, Issue 72, p. 18-27.

[16] Sullivan, G and Hayes, B., 'Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights', *European Centre for Constitutional and Human Rights*, November 2010.

having ties with Usama Bin Laden and the Al Qaeda and, consequently, they became subject to an asset freeze. They were first listed by the US on their national blacklist and the SC just picked up the US listing and subjected it to its own sanctions without seeking any proof or justification on the opportunity or legality of the listing.

In December 2001, Kadi decided to challenge, before the European Court of First Instance (CFI), the European Commission's Regulation[17] implementing the 1267 Committee's sanctions in the European Union on grounds that it breaches their fundamental rights, such as the right to judicial review, the right to be heard and the right to property.[18]

After four years, in September 2005, the CFI issued its decision, holding that it had no jurisdiction to review a SC resolution and that both the European Council and the European Commission had no "*autonomous discretion*" in giving effect in the EU law to the 1267(1999) resolution or any of the other subsequent resolutions. Furthermore, it invoked Article 103 of the UN Charter in order to underline the primacy of the SC resolutions and the lack of jurisdiction of the courts to review such decisions.[19] CFI only acknowledged its jurisdiction to assess the compliance of SC resolutions with pre-emptory norms of *jus cogens* which are binding on all international actors and from which no derogation is possible. Having determined that none of the allegations brought forth by Kadi would amount to breaches of *jus cogens*, the CFI availed itself of the opportunity to dismiss the case.[20]

Despite the setback, Kadi did not quit. Thus, in November 2005, Kadi and the Al Barakaat International Foundation of Sweden filled an appeal with the European Court of Justice (ECJ). In January 2008, the Advocate

[17] Council Regulation (EC) 467/2001, 6 March 2001, "*prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000*".

[18] See *Kadi v. Council and Commission*, Judgement of the Court of First Instance (Second Chamber), case T-315/01, 21 September 2005, para.59.

[19] Macovei, A., *Between the Scylla of Legal Accountability and Charybdis of Political Discretion. The UN Security Council Targeted Sanctions and Human Rights Paradox*, Master Thesis, University of Southern Denmark, 2015, p. 44.

[20] See Kadi v. Council and Commission, at *supra note* 18, ECR II-3742, 3743. Worth mentioning is the difference outlined by the Court – in regards to the right to respect for property – between freezing and confiscation, implying that while the latter could be considered as being contrary to *jus cogens* the former is only a "*precautionary measure*" which does not qualify as such. (para. 248)

General of the ECJ, M. Poiares Maduro, in his opinion presented to the Court, rejected the limited jurisdiction argument set forth by the CFI and stated that EU courts have the jurisdiction to review any contested regulation to determine if there is a breach of fundamental human rights. Furthermore, it requested that the Court should reverse the judgement issued by the CFI in 2005.[21]

The ECJ followed the opinion of Adv. General Poiares Maduro and issued its decision on 3 September 2008. By emphasizing the existence of and elaborating on the dualist relationship between the UN and the EU, the ECJ stated that insofar the hierarchy established by Article 103 of the UN Charter refers to states that are member of the UN, any entity that is not a state cannot be bound by the same provisions. Thus, the hierarchical provisions of the said Article do not bind the EU, as an international organization, which has not signed the Charter.[22] Reviewing the three counts of the Kadi appeal, the Court decided that "*the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected*".[23]

As a result, shortly thereafter, Kadi and Al Barakaat were presented by the Commission with a narrative summary of the reasons for their listing. The Commission has determined the measure to be sufficient to ensure the respect of their human rights but determined that their answers to the reasons outlined are insufficient to justify their de-listing. Consequently, on 28 November 2008, the Commission renewed their listing on the EU sanctions list.[24]

[21] See Macovei at *supra note* 18, p. 45. See also *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Opinion of the Advocate-General Poiares Maduro, Case C-402/05 P, 16 January 2008. "[…] *the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law"*

[22] See Macovei at *supra note* 18, p. 45. See also Arcari, M., 'Forgetting Article 103 of the UN Charter? Some perplexities on 'equivalent protection' after Al-Dulimi', *Questions of International Law*, 16 November 2014, available at *http://www.qil-qdi.org/forgetting-article-103-of-the-un-charter-some-perplexities-on-equivalent-protection-after-al-dulimi/*, accessed on 3 November 2018.

[23] See *Yussuf Abdullah Kadi v. Council of the European Union and Commission of the European* Communities, Judgement (Grand Chamber) of the ECJ, Joined Cases 402/05 P and C-415/05 P, 3 September 2008, para. 334.

[24] See European Council Regulation (EC) No. 1190/2008, 28 November 2008, paras. 6 and 7.

Following the re-listing, Kadi and Al Barakaat filled another suit against the Commission before the General Court of the EU (former CFI) in January 2009. Soon afterwards, the Commission de-listed the Al Barakaat Foundation but Kadi was to remain on the List[25] until 2010 when the GC issued its judgement.[26] As such, the GC found the listing of Kadi to be unlawful and the review of the Commission to be inadequate and "*superficial*".[27] Following the judgement, the GC annulled the decision of the Commission to subject Kadi to SC targeted sanctions.[28]

This was not the end of troubles for Kadi. Shortly after the GC annulled the re-listing of Kadi in the fall of 2010, the UK, the European Commission and the European Council filled an appeal on the decision of the GC. Even though different EU courts had different takes in the Kadi case over the years, the UN Security Council has noticed the complaints put forward by Kadi, and other blacklisted individuals and entities who brought legal actions in national courts, and greatly improved due process for those subjected to sanctions.[29] Furthermore, on 5 October 2012, following a request with the Office of the Ombudsperson, the sanctions review mechanism created at the SC level, Kadi was de-listed. Shortly thereafter, many of the countries, which had Kadi on their blacklists, have also de-listed him. In spite of this, the ECJ, in its judgement on 18 July 2013, has ignored almost completely all realities.

[25] Consolidated Sanctions List where all individuals and entities subject to Security Council sanctions are listed. See the *United Nations Security Council Subsidiary Organs*, Sanctions, Consolidated United Nations Security Council Sanctions List at *https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list,* accessed on 3 November 2018.

[26] See *Kadi v. Council and* Commission, Judgment (Grand Chamber) of the ECJ, case no. T-85/09, 30 September 2010. Also, see the summary of the meeting of the Committee of the Legal Advisers on Public International Law (CAHDI), 'UN Sanctions and Respect for Human Rights', March 2010, available at *http://www.coe.int/t/dlapil/cahdi/Source/un_sanctions/EU%20update%20UN%20Sanctions%20March%202010%20E.pdf*, accessed on 3 November 2018.

[27] *Ibid.*, para. 171.

[28] *Ibid.*, para. 194.

[29] The Office of the Ombudsperson was created by the Security Council in 2009 through the 1904(2009) resolution. This mechanism was to offer "*an independent recourse to individuals and entities on the 1267 Sanctions list*." Since then, the Council has significantly strengthened the Office's mandate. Resolution 1989(2011) has widened the authority of the Ombudsperson and made its recommendations (*i.e.* to de-list an individual or entity) definitive if there was no (justified) opposition over a period of 30 days from the 1267/1989 Committee or the SC.

Unsurprisingly, it upheld the annulment of the EC regulation giving effect to Kadi's re-listing but also determined that EU courts have the jurisdiction to review EU regulations implementing resolutions of the SC as long as a mechanism of review will not exist at UN level.[30]

Undermining Security Council's authority?

Through its last decision in the Kadi II case, the ECJ has completely ignored the progress done by the UN SC in addressing due process concerns in the practice of sanctions. Why has it done that, it is a question still up for speculative answers. Sure-enough is the fact that by doing this it has greatly undermined the legitimacy and the effectiveness of the Office of the Ombudsperson, a mechanism created only four years before to be just that – a mechanism of review at UN level. Oddly enough, it has mentioned the creation of the Office but has deemed it an un-sufficient guarantee of effective remedy.[31] Moreover, the Court has also ignored the fact that Kadi has been de-listed a year before its judgement, following a petition he filled with the Ombudsperson.[32] However, what is more significant about this judgement is the fact that it introduced a very rigid standard of review, which basically implies "*that nothing short of a full-blown court procedure will be enough to solicit the EU courts' deference in favour of review at UN level*".[33]

In order to achieve this standard of review, the Court also underlined that a "*disclosure of information, or evidence, confidential or not* […] *in the spirit of cooperation*" would be necessary in some cases.[34] However,

[30] See *European Commission and others v. Yassin Abdullah Kadi*, Appeal, Judgement (Grand Chamber) of the ECJ, Case C-584-10 P, 18 July 2013. The ECtHR, in a judgement issued several months later in another blacklisting case, also upheld the 'mechanism of review' argument. This time it was formulated as a mechanism of 'equivalent control'. See *Al-Dulimi and Montana INC. v. Switzerland*, Judgement of the ECtHR (Second Section), Strasbourg, 26 November 2013.

[31] See *European Commission and others v. Yassin Abdullah Kadi* at *supra note* 29, paras. 13, 95, 96.

[32] *Ibid.*

[33] See Tzanakopoulos, A., '*Kadi* Showdown: Substantive Review of (UN) Sanctions by the ECJ', *EJIL: Talk!*, 19 July 2013, available at *http://www.ejiltalk.org/kadi-showdown/,* accessed on 3 November 2018.

[34] See *European Commission and others v. Yassin Abdullah Kadi* at *supra note* 29, para. 115.

it never clarified what would be the incentive for a non-EU entity/ state actor to share confidential information with the EU courts/authorities.

The judgement of the ECJ caused some tensions between the EU courts and the Security Council, which brought forth Article 103 of the UN Charter. This provoked a lot of debate among legal practitioners on the hierarchical order set by the UN Charter and the precedent that the ECJ was creating by allowing EU courts to review measures implementing Security Council's resolutions. This situation was creating a certain degree of confusion on the international arena, which was not going to provide any effective remedy to those blacklisted.

Sue Eckert and Thomas Biersteker best described this situation: "*Just as non-compliance with norms of due process has undermined the effectiveness of UN targeted sanctions, an excessively narrow and rigid institutional framework of formal judicial review could impair the ability of the 1267 Committee to take effective decisions in the collective interest.*"[35]

Luckily enough, another EU Court provided a measure of relief from this rigid institutional framework a few years later, by acknowledging the role of the SC Ombudsperson as a mechanism of effective remedy. On 13 December 2016, the General Court of the EU has issued another landmark judgement in the case of *Mohammed Al-Ghabra v. the Commission*.[36] By way of this judgement, the GC sets a hierarchy of solutions providing effective remedy to those subject to sanctions by the Security Council. As such, individuals or entities wishing to challenge their listing by the Council have to exhaust first the Office of the Ombudsperson before going to an EU Court. Although the GC has dismissed Al Ghabra's request for annulment, it gave proper consideration to the fact that he had arguments in favour of having his name removed from the sanctions List. However, it has underlined the fact that he did not seek de-listing through the Ombudsperson before challenging the sanctions in court.[37]

[35] See Eckert, E.S. and Biersteker, T.J., 'Due Process and Targeted Sanctions; An Update of the 'Watson Report'', *Watson Institute for International Studies*, December 2012.

[36] Judgment of the General Court (Third Chamber) of 13 December 2016, *Mohammed Al-Ghabra vs. European Commission,* Case T-248/13, ECLI:EU:T:2016:721.

[37] See 'Open Briefing to Member States', 8 May 2017, p. 1. The paper is available at *https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/20170508_open_briefing_to_ms_8_may_2017_check_against_delivery.pdf*, accessed on 3 November 2018. See also

Conclusion

Although Kadi I and II are widely considered to be landmark judgements which have helped shape the due process and effective review mechanisms and procedures at UN level, the rigid institutional framework they outlined through the last judgement of the ECJ was in danger to undermine the whole progress made by the Security Council in shaping its sanctions policy. The Al Ghabra case hopefully set things straight again but given the fact that legal instruments regulating the practice of sanctions are rather new, we could expect other developments in this regard in the years to come.

What is important to stress out is that although challenges brought in European courts by those blacklisted by the Security Council were fundamental in ensuring a degree of respect for human rights, the decisions of the EU Courts were, in most cases, ignoring the need to keep sanctions effective. Finding the balance between effectiveness and compliance to legal standards will continue to be a challenge on which we might see the Security Council and the EU judiciary finding themselves at odds again.

a presentation made by Natascha Wexels-Riser, Legal Officer supporting the Office of the Ombudsperson: Wexels-Riser, N., *The Security Council's ISIL (Da'esh) and Al Qaeda Sanctions Regime: The Human Dimension*, Max Planck Institute for Foreign and International Criminal Law, Freiburg, 2 December 2017, p. 3.

ASPECTS CONCERNING THE TRANSPOSITION OF DIRECTIVE (EU) 2016/801 IN NATIONAL LEGISLATION GOVERNING THE REGIME OF FOREIGNERS ON ROMANIA'S TERRITORY

Anca-Petronia DRAGOMIR [*]

ABSTRACT

For most migrants, authorizing entry or stay in a state is only the first step in establishing full residence rights. Access to the labour market, education system, social assistance services, and other social benefits may be a difficult exercise. Thus, recognition of the right to enter or stay is normally necessary to access all social rights.

In general, states may differentiate between nationalities when exercising their sovereign right to authorize or refuse access to their territory. In principle, it is not illegal to conclude agreements or to approve national rules by which certain categories of nationalities are granted privileged rights to enter or stay in the territory of those States. Therefore, States may normally introduce differentiated conditions for entry or stay.

However, States must take into account the fact that international and European human rights instruments prohibit discrimination, including on the basis of nationality, in the regulated areas concerned.

KEYWORDS: *Directive (UE) 2016/801, au pair worker, paid trainees, regulation in national legislation, reception agreement.*

Always, when questioning the economic rights of foreigners, a first point of departure is the assertion that according to European Union law, one of the freedoms enshrined in the Charter of Fundamental Rights of the European Union is the right to employment and the right to pursue a freely chosen and accepted professional activity[1].

Thus, in the context of guaranteeing at European level the rights of foreign citizens on the territory of the Member States and in line with the priorities of the Europe 2020 Strategy[2], the European Commission adopted the Directive (EU) 2016/801 of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service,

[*] *Ph.D. student, Titu Maiorescu University, Bucharest, Romania.*

[1] Charter of Fundamental Rights of the European Union, Article 15, paragr. 1

[2] For a general overview, see the Europe 2020 webpage, in short.

pupil exchange schemes or educational projects and au pairing (recast), which has been published in the Official Journal on 21 May 2016.

Article 79 of the Treaty on the Functioning of the European Union (TFEU) confers on the Union the task of developing a common immigration policy designed to ensure the efficient management of migration flows and the fair treatment of third-country nationals who are legally staying in the Member States.

The directive was adopted in the context of improving provisions for researchers, students, pupils, unremunerated trainees and volunteer third-country nationals, as well as the application of common provisions for two new categories of third-country nationals: paid trainees and au pairs workers. This directive is amending and recasting Directives 2004/114/EC and 2005/71/EC. Its overall objective was the need to support social, cultural and economic relations between the EU and third countries, to to promote the transfer of skills and know-how, to promote competitiveness and, at the same time, to provide guarantees to ensure fair treatment of these categories of third-country nationals.

In the context of the above-mentioned aspects, it was intended to establish the conditions for entry and stay for researchers, students, pupils, paid and unpaid trainees, volunteers and au pair workers from third countries on the territory of the Member States for a period longer than three months. The directive introduces the admission conditions for two categories of third-country nationals not currently covered by an EU legally binding framework, namely au pair workers and paid trainees, in order to ensure their protection and guarantee respect for their legal rights. In the case of third-country researchers, conditions for family admission become more favorable, as access to the labor market for family members and their mobility within the EU.

Article 1 of the Directive regulates the conditions of entry and stay of third-country nationals on the territory of the Member States for more than three months for porposes like research, education, exchange of students, remunerated and unpaid training, volunteering and au pair work.

Article 2 sets out the scope of the proposal, which applies to third-country nationals who apply to be admitted to the territory of a Member State for the purposes of research, studies, exchange of students, paid or unpaid training, volunteer or au pair work but also establishes the categories of persons exempted by this Directive.

Article 3 sets out the definitions of twenty-four terms, namely the terms used in the Directive, which are largely the same as those contained in other existing directives in terms of migration, while Article 4 provides more favorable conditions for persons to whom they apply this Directive.

The general principles and also the general and specific conditions that an applicant must fulfill in order to be admitted to another Member State for one of the above-mentioned purposes are laid down in Articles 5-14.

The provisions of Articles 15 to 19 lay down information regarding the authorizations and length of stay, while the grounds for refusal, withdrawal or refusal to renew authorizations are laid down in Articles 20 and 21.

The Directive also provides a specific chapter (Articles 22-26), specifically dedicated to the rights enjoyed by all the categories of persons to whom it is addressed.

Articles 27-32 refer to mobility between Member States, in extenso, establish the conditions under which researchers, students and trainees can circulate between Member States in order to facilitate such mobility.

Procedural safeguards are laid down in Articles 33-36, and the final provisions are covered by Articles 37-43.

In accordance with the rules laid down by European Union law, the Directive is a mandatory legislative instrument for Member States to address the outcome to be attained but, at the same time, leaves them at their discretion, the form and methods of obtaining it. Once adopted, the European directives have to be transposed by each Member State, namely they must be implemented in their national laws.

At national level, Government Emergency Ordinance no. 194/2002, as subsequently amended and supplemented, is the normative act regulating the regime of foreigners on the Romania's territory.

Regarding the employment and detachment of foreigners on Romanian territory, these are regulated by the Government Ordinance no. 25/2014, as amended and supplemented.

At national level, the Annual Implementation Plan of the European Union Directives for 2018 includes, inter alia, the Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (Directive 801/2016).

The institutions responsible at national level for transposition the provisions of the directive, are represented by the Ministry of Internal Affairs, the Ministry of National Education and the Ministry of Labor and Social Justice.

Taking into consideration the deadlines assumed by Romania regarding the transposition into national legislation of the above-mentioned directive, and following the transposition phases, it was concluded the need for elaboration a draft law on the modification and completion of some normative acts regarding the regime of foreigners in Romania.

However, the European Executive decided on 20 July 2018 to send official letters to Romania and to 16 other Member States (Austria, Belgium, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Hungary, Latvia, Luxembourg, Poland, Slovenia, Spain and Sweden) announcing the delay of the communication of their own national legislation transposing in full the provisions of the Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (Directive 801/2016).

The decision came in the context in which Member States had to make every effort to bring their national legislation into line with the Directive by 23 of May 2018, and to inform the Commission accordingly. Member States now have two months to fully transpose the Directive into their national law, otherwise the Commission may consider sending reasoned opinions[3].

Thus, a legislative proposal[4] was drafted in the sense of amending and completing GEO 194/2002 and GO 25/2014 to ensure the transposition, inter alia, of Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

Regarding the GEO 194/2002, it was necessary to introduce new definitions covering the transposition of the provisions of the Directive (eg terms like pupil, student, educational project, host entity, host family,

[3] *http://www.europeanmigrationlaw.eu/en/articles/news/european-commission-action-for-failing-to-comply-with-eu-obligations-migration-and-asylum.html.*

[4] *http://www.cdep.ro/proiecte/2018/400/20/3/em566.pdf.*

trainee) as well as completing existing definitions (eg researcher, first Member State).

Issues related to the exercise of the right of temporary residence for studies and scientific research in the framework of mobility, as well as for their family members, have been regulated. In this respect, for a foreign student who has obtained a right of stay for study purposes on the territory of another Member State, it is no longer necessary to obtain a residence visa for that purpose on the national territory if he or she participates in the courses of an educational establishment higher education programs within the European Union or multilateral programs that include mobility measures or an agreement between two or more higher education institutions.

At the same time, it has been imposed the necessity for finding solutions regarding the right of temporary stay for foreigners carrying out volunteer programs, foreigners conducting scientific research, au pair workers, foreigners undergoing education, vocational training, exchange programs pupils or educational projects, establishing rights to stay on the territory of Romania for these categories.

It was aimed to correlate the provisions regarding the level of minimum gross national salary guaranteed in payment throughout the legislative act regulating the regime of foreigners on the territory of Romania, given that the reference at national level is to the guaranteed gross salary in the country and not the net one, this aspect representing a system of protection for both Romanian citizens and foreign citizens, because the latter category could not carry out lucrative activities on a lower salary compared to a Romanian citizen who would carry out the same lucrative activities. Thus, if a foreign citizen had carried out lucrative activities under these conditions, the Romanian employer would have preferred him to the detriment of the Romanian citizen (salary opportunity).

Consequently, it can be concluded that there is a minimum level of equality in terms of employment conditions for both Romanian and foreign citizens, based on a guaranteed gross salary system, thus respecting all rights and the obligations arising from these aspects. However, nothing prevents the Romanian employer from paying for the lucrative activities carried out by a foreigner more than the limit imposed by the law, thus respecting the principle of the competitiveness of employment.

The procedure for granting long-stay visas for carrying out scientific research activities was regulated by introducing a condition regarding the existence of a reception agreement concluded by the foreign researcher who was accepted to carry out activities within a scientific research project and the research- development in Romania.

The current provisions were correlated with those of the National Education Law no. 1/2011, as subsequently amended and supplemented, in the sense of using the term "form of education with frequency" instead of the phrase "form of day learning".

Given that the actual beneficiaries of the training activities are both the host entities and the pupil, the student or the foreign researcher, the legislator also has established the responsibility of the host entity to respect the duration of the stay term granted to the foreigner who has been accepted within the vocational training contract, the latter bearing the expenses incurred by the removal of the foreigners if they remain on the territory of Romania after finishing their right of stay.

As we mentioned above, besides Government Emergency Ordinance no. 194/2002 regulating the regime of foreigners in Romania, the norms governing the employment and their posting on the national territory, are stipulated in Government Ordinance no. 25/2014.

Given this aspect, it was also taken into consideration the modification and completion of GO no. 25/2014 by defining these phrases and terms, in conjunction with the amendments to GEO 194/2002 and the provisions of Directive (EU) 2016/801, to clarify some aspects of situations in which foreigners may be employed through exemption from obtaining an employment notice, but also clarifying the conditions for the granting of an employment notice to au pairs workers in strict accordance with the provisions of Directive (EU) 2016/801.

Conclusions – Vulnerabilities

By entry into force of *Directive 801 (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast)*, significant progress has been made in addressing the weaknesses identified in Directives 2004/114/EC and 2005/71/EC.

The au pair concept is a new, innovative concept that helps encouraging interpersonal relationships by giving third-country nationals the opportunity to improve their language skills and to develop their knowledge of the Member States and cultural links with it.

However, it is noted that, in national legislation, the au pair worker has been assigned, contrary to the definition provided in Art. (3) (8) of the Directive, characteristics which are more likely to lead to the conclusion of an employment contract of a temporary nature. Thus, although the Directive specifies that Member States may set a minimum amount of money as pocket money to be paid to an au pair worker, this provision is governed by national legislation in relation to the gross minimum wage in the economy by reference to the number of working hours, which distorts the purpose of an au pair worker in an individual work-card worker with part-time work.

The purpose of the au pair worker is to share the language, culture, customs of the Member State in order to make it known to the host State at the social level in exchange of domestic activities carried out within the host family from a particular Member State.

At present, on the national territory are foreign citizens who carry out a lucrative activity following the procedure of employment of foreign citizens as a "babysitter/housekeeper", a procedure that imposes strict conditions (the procedure carried out by the employer in order to obtain a notice of engagement for the foreigner, then a visa for employment and subsequently a right of stay for this purpose), the salary that employer pays is the gross national salary according to the quota of foreign workers established by the Government Decision.

The legal status of the au pair worker, as transposed into national law, creates the opportunity to transfer this type of employee from an employee with an individual work contract (following the procedure above) to an au pair worker, aspect which may have legal consequences affecting both the rights of foreigners and the rights of the host state.

Thus, the Romanian employer can act as a host family in co-opting this category of workers as au pair workers and, in view of the latter's dependence on the host family, to abuse foreign citizens by reducing the remuneration granted and the possibility of movement on the national territory.

As far as concern the interest of the state, the Romanian employer will no longer pay the taxes and duties related to an average wage, and will pay them in relation to the gross minimum wage at a number of hours,

diminished compared to an individual full-time employment contract. At the same time, leaves to the host family (employer) the number of foreign citizens that can be hired, existing the real possibility to overcome the contingent of foreigners employed, as established by Government Decision.

As regards researchers/translators, by transposing the provisions of the directive into national law, I believe that the purpose of introducing it has not been achieved, in the sense that the Romanian state does not really benefit from the competitiveness of these categories of foreigners, in the absence of establishing a productivity framework, because the interest is limited to carrying out research/study activities.

In order to ensure this purpose, after completing their studies, researchers/students should be given access to the labor force by establishing a more permissive normative framework than other foreigners (eg setting a period of stay after the completion of studies in which the foreigner may be employed on the national territory without having to obtain an employment notice in advance by the employer).

Currently, the implementation of the directive in the national legislation is in a first form adopted by the legislative power, so that depending on the problems that will result from its application, there will be made some changes.

BIBLIOGRAPHY

1. *https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016L0801&from=ro*
2. Directive 801 (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast);
3. *http://www.cdep.ro/proiecte/2018/400/20/3/em566.pdf;*
4. Government Emergency Ordinance no. 194/2002 regarding the regime of foreigners in Romania, with subsequent amendments;
5. Government Ordonance no. 25/2014 on employment and detachment of foreigners on Romanian territory, with subsequent amendments;
6. *European Handbook on Asylum, Borders and Immigration, European Union Agency for Fundamental Rights*, Edition 2014.

ACQUISITION IN ROMANIA OF LAND BY CITIZENS OF MEMBER STATES, FOREIGNERS, STATELESS PERSONS AND FOREIGN LEGAL PERSONS

Valentin DRAGOMIR[*]

ABSTRACT
Brief history of national legislation on land ownership, implications of Romania's accession to the European Union in acquiring the right of ownership by foreign citizens, stateless persons and foreign legal persons and legislative issues on acquiring ownership by EU Citizens/EEA, foreigners, stateless persons and legal persons.

KEYWORDS: *land acquisitions, land market, the right to property.*

1. Considerations on the regulation of land acquisitions in national legislation

Immediately after the revolution, with the exception of a brief period when the land was removed from the general civil circuit (July 1990 – February 1991[1]), the legislative power proceeded to the issuance of "abrogation laws", which eliminated some of the restrictions imposed during the communist regime regarding the alienation of land ownership, restoring the principle of free movement of private property[2].

[*] *Ph.D. student, University Titu Maiorescu, Bucharest, Romania.*

[1] On July 30, 1990, Law no. 9/1990 on the temporary prohibition of the alienation of lands by acts between people alive) (with the exception of Article 2, by Law no. 18/1991 of the Land Fund), whereby the lands of any kind located "inside or outside the localities" were removed from the civil circuit. The provisions of the law stated that until the date of the adoption of a new legal regulation on the land fund regime (the deadline set by this law, namely 15 November 1990, was exceeded, Law No 18/1991 was adopted only in February 1991), the alienation through living acts among lands of any kind.

[2] By Decree-Law no. 1/1989 regarding the repeal of some laws, decrees and other normative acts was abrogated Law no. 58/1974 through which the private property was removed from the general civil circuit; The process of reintroducing the land into the civil circuit was continued by the adoption of Decree-Law no. 9/1989 on the abrogation of some normative acts by which the other normative acts adopted by the communist regime through which the legal circulation of land was limited, namely Law no. 19/1968 and

Law no. 18/1991 of the Land Fund (who's Chapter V "Legal Circulation of Land" was repealed by Law No. 54/1998 on the legal movement of land) was the first detailed regulation regarding the legal regime of the land. According to the provisions of art. 45-52, the lands located in the town or out of town could be alienated through legal acts between the livings in authentic form. Thus, by the normative act which was the starting point for the return of the land to the former owners, the legislator considered it necessary to establish the authentic form as a condition of validity for the alienation of the lands situated on the territory of Romania, thus continuing the provisions of the legislation adopted around the 1950s.

The initial text of the Romanian Constitution of 1991[3] establishes the rule according to which the property is equally protected by law, on a non-discriminatory basis, irrespective of the holder, natural or legal person, except foreign citizens and stateless persons, and according to the Constitutional Court's decision no. 342/1997, also foreign legal entities.

From June 1998 until the entry into force of Law no. 247/2005 (July 2005), the legal circulation of the land was regulated by the provisions of Law no. 54/1998 on the legal circulation of land (repealed by Title X of the Law No. 247/2005 on the reform in the field of property and justice).

According to the provisions of this law, the lands that were located inside or outside the town could be alienated and acquired through legal acts between the livings, provided that the authentic form laid down solemnly is respected.

During the period when Law no. 54/1998 was in force (June 1998 – July 2005), the legislator considered it necessary to set a maximum limit of 200 hectares of agricultural land in arable equivalent that could be acquired by a family. The legal acts between the living through which this limit was exceeded, were sanctioned by the "reduction of the legal act to the limit of the legal area" (in fact, the faulty legislative technique hides the absolute partial nullity of the legal act that exceeded the legally established limit of 200 hectares).

Articles 44 to 50 of Law no. 59/1974 (which concerned the legal movement of agricultural land).

[3] Art. 41 para. 2 of the 1991 Constitution, unpublished.

As regards the new wording of the constitutional text on private property[4], the revised version of the Constitution states that "private property is guaranteed and protected equally by law, regardless of the holder, foreign citizens and stateless persons can acquire ownership private land only in the conditions resulting from the accession of Romania to the European Union and other international treaties to which Romania is part of, on the basis of reciprocity under the conditions provided by the organic law, as well as through legal inheritance, "being established, a rule that all possible owners of private property rights can acquire under the law and an exception for foreign citizens and stateless persons (natural persons) who can acquire only under certain conditions the right of private ownership of land.

The legal circulation of land is governed by Title X of Law no. 247/2005 on the reform in the field of property and justice, which stipulates in art. 1 that private property, irrespective of its intended purpose and holder, is and remains in the civil circuit and can be freely alienated and acquired in any of the ways prescribed by law.

Law no. 247/2005 establishes that legal acts between the living which have as their object the alienation and acquisition of land with or without construction, whether located inside or outside the town and irrespective of the destination (whether they are construction, agricultural, forestry, etc.) and the extent must be concluded in an authentic form.

By Law no. 312 of 10 November 2005, which apply the provisions of Art. 44 par. 2 of the Constitution of Romania republished, the acquisition of the right of private ownership of land by foreign citizens and stateless persons, as well as by legal persons, was regulated. By the entry into force of the provisions of the new Civil Code (Law 287/2009), continues to regulate the obligation to conclude, in the authentic and valid form, the legal acts between the livings which have as their object the transfer of the ownership right over the land.

Thus, regarding the constitutive effect of the registration of the land ownership right in the land register, the transfer is legally possible by a notarial act, by a court decision or by another act provided by law.

By Law no. 17/2014 – regarding the measures for regulating the purchase of agricultural land situated in extravilan, the intention of the

[4] *Law on the Revision of the Romanian Constitution no. 429/2003*, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003.

legislator expressed both in the normative act adopted and in the explanatory memorandum was to limit the negative impact caused by the land reform that produced an increased fragmentation of agricultural property, arguing that agricultural holdings on small, fragmented areas do not allow for the performance of a performing farming, introducing certain surface constraints in the acquisition of agricultural land, establishing a pre-emption right in case of sale, necessary procedures land sales (town hall approvals, cadastral documentation), authentic form for the conclusion of ante contracts, etc.

2. Implications of Romania's accession to the European Union regarding the acquisition of the right of ownership by foreign citizens, stateless persons and foreign legal persons

The ultimate goal of applying the acquis communautaire in terms of land acquisition is total liberalization of the land market within the European Union.

The statutory provisions on the free movement of persons and the right of establishment in principle show that any restrictions on the movement of capital between Member States and between Member States and third parties are prohibited.

Until the full liberalization of the land market, this procedure for the full implementation of the European acquis is in the process of transition and thus, taking into account the economic, financial, social and political characteristics, the Member States have maintained/imposed certain restrictions on the acquisition of land by persons other than those of their own nationality.

As regards Romania, the issue of the acquisition of property rights by citizens of the Member States and stateless persons domiciled in a Member State was regulated in the Treaty of Accession of Romania to the European Union[5], and Romania was able to maintain for 5 years at the date of accession, restrictions on the acquisition of land ownership, secondary residences, as well as 7 years from the date of accession, on agricultural land, forests and forestry land.

This solution, which was aligned with Romania in the pre-accession period, represented a mechanism of social and financial protection,

[5] Annex VII to the Treaty of Accession of Romania to the European Union (Law No 157/2005).

limiting for a definite period the sale of land taking into account the discrepancy between the income of the indigenous population and those of the member states, the importance of the land and the degree of ownership of the citizens.

In the absence of this temporary ban, there were the possibility for Member States/third countries to proceed immediately to the massive purchase of existing land with major implications for Romania's property rights and economic interests.

3. Acquisition of land by citizens of the Member States, foreigners, stateless persons and foreign legal persons

In accordance with Art. 27 of the Civil Code[6], Romanian citizens are assimilated with foreign citizens and stateless persons with respect to their civil rights and freedoms, assimilation which also applies to foreign legal persons. However, the assimilation is not total, the cited provisions adding that this is done "under the law".

A good example in this respect is the way in which the acquisition of the right to property by the legal subjects in question was regulated.

The premises of this regulation can be found in art. 44 par. (2) second thesis of the Constitution, and the organic law to which the constitutional provisions refer is the Law no. 312/2005 on the acquisition of the right of private ownership of land by foreign citizens and stateless persons, as well as by foreign legal persons, which came into force on the date of Romania's accession to the European Union, respectively on 1 January 2007.

According to art. 4 of Law no. 312/2005, the citizen of a non-resident Member State in Romania, the non-resident in Romania domiciled in a Member State and the non-resident legal person constituted in accordance with the legislation of a Member State may acquire ownership of the land for secondary residences, respectively secondary offices, at the end of 5 years from the date of Romania's accession to the European Union (1 January 2007). By Member State is meant any

[6] Art. 27 of the Civil Code, (1) Aliens and stateless persons are assimilated, under the law, to Romanian citizens in respect of their civil rights and freedoms. (2) Assimilation shall also apply to foreign legal persons.

Member State of the European Union or the European Economic Area, and this term was fulfilled on January 1, 2012.

Article 5 of the same law also provides for the possibility of acquiring, by the above-mentioned foreign citizens, the right to property on agricultural land, forests and forestry land, a period of 7 years from the date of Romania's accession to the European Union. This deadline was also met on 1 January 2014.

It should be noted that the above restrictions apply only to individuals.

A company, a resident or a non-resident legal person, may acquire any real rights over the immovable property to the extent necessary to conduct its activity, according to the social object, in compliance with the legal provisions regarding the acquisition of the right of private ownership of land by foreign citizens and stateless persons, and by foreign legal entities.

3.1. Considerations on land acquisition by citizens of the Member States, non-resident or resident non-resident citizens in Romania

According to art. 3 of Law 312/2005 enshrines the principle that a citizen of a Member State of the European Union, a stateless person domiciled in a Member State or Romania, and a legal person constituted under the law of a Member State may acquire the ownership of the land in the same conditions as those provided by law for Romanian citizens and Romanian legal persons.

All articles of the law must be interpreted in the context of European legislation and its transposition into Romanian law, so that certain definitions are expanded, taking into account the legislative dynamics after Romania's accession to the European Union.

Law 312/2005 imposed a ban on the protection of Romania's immediate interests over land ownership, being in full transition from a third state of the European Union to a member state of the European Union.

This period of interdiction was a guarantee of respecting the right of private property of Romanian citizens by limiting the interference of foreign capital compared to domestic capital.

It is noted that the legislator has established certain conditions restricting the acquisition of property rights, being constituted as guarantees to the interests of the state, conditions regarding the type of

citizenship, their residence, the nature and the type of the right of ownership, the surface of the building, as well as temporary prohibitions.

These conditions provided by the legislator were established for the purpose of allocating categories of foreign nationals who can accede, as buyers, to land located on national territory.

At the same time, it is noted that the legislator limited the acquisition of the right to ownership of the land taking into account its final destination (secondary premises, secondary land, forests and forest land).

Concerning the temporary limitation of the entry into force of certain legal provisions, it is noted that art. 4 and art. 5 of Law 312/2005 imposed a temporary ban on acquiring land ownership for secondary residences/secondary sites and for forests and agricultural and forest land, namely 5 years from the date of Romania's accession to the European Union (the citizen of a state a non-resident in Romania, a non-resident in Romania domiciled in a Member State and a non-resident legal person constituted in accordance with the law of a Member State wishing to acquire a right of ownership over land for secondary residences or secondary establishments) respectively 7 years (ownership of agricultural land, forests and forest land).

At present, the legal regulations on the temporary prohibition on the acquisition of property rights established for citizens of Member States who are not resident in Romania, non-resident stateless persons in Romania but domiciled in a Member State and legal entities domiciled in a Member State are currently obsolete for secondary residences, respectively secondary establishments, namely the citizen of a Member State, the stateless person domiciled in a Member State or in Romania, as well as the legal person established under the legislation of a Member State on agricultural land, forests and forestry land.

4. Conclusions

Thus, in order to acquire the right of ownership by foreign citizens, they are divided into several categories depending on their citizenship and the right of residence:

a. EU/EES citizen, stateless person who actually reside (live) on the territory of Romania;

As regards foreign citizens from EU/EES countries/stateless persons with domicile in Romania, they have the same rights to acquire land ownership rights with Romanian citizens.

b. EU/EES citizen, stateless person who does not live in Romania (does not have residence)

Starting with 2012, foreign citizens from EU/EES countries can acquire land in Romania for secondary residences. Therefore, at present, a citizen of an EU/EES member state can acquire real estate (house, land, apartment, etc.) under the same conditions as a Romanian citizen through sale, purchase, exchange, donation or other type of act transfer of ownership, but the purpose of the real estate should be that of a secondary residence. (EU, Austria, Greece, Czech Republic, Bulgaria, Italy, Cyprus, Latvia, Slovakia, Denmark, Lithuania, Slovenia, Estonia, Luxembourg, Spain, Netherlands, Germany, Portugal, Hungary).

Also, foreign citizens from European Economic Space countries can buy buildings in Romania for secondary residences (Iceland, Liechtenstein, Norway).

c. Foreign/third-party national (not EU/EES citizens).

As regards third-country nationals (non-EU/EES countries), they can acquire land in Romania only on the basis of a reciprocal international agreement between the Romanian State and their country of affiliation. If there is no such agreement, the citizen of the non-EU/EES state can only buy ownership of the building, acquiring a superficial[7] right over the building land during its existence.

[7] The superficial right is a dismemberment of land ownership, the use of which is attributed to the holder of the superficies right during the period of the building's existence.

REVISING THE LAW OF INSOLVENCY. BENEFIT OF BUDGET CREDITORS?

Ana-Maria GASPAR*

ABSTRACT

By revising Romanian Law 85/2014 on Insolvency and Insolvency Prevention Procedures, the legislator proposed an increase in the collection of claims due to both the central budget and local budgets, taking into account the fact that companies want to continue their activity on the economic market.

This revision of the law has been long awaited, debated and analyzed at the level of the fiscal bodies (in their capacity as budgetary creditors), given that budgetary claims have always been disadvantaged and felt the need to introduce coercive measures for debtor companies and for insolvency practitioners, without departing from the purpose with which this procedure was created.

Thus, in the light of these changes, it is still possible for the debtor companies to recover, but without having to bail out public creditors.

KEYWORDS: *budget creditors, fiscal bodies, tax claims, coercive measures.*

Introduction

The insolvency procedure appeared as a means of protecting creditors against debtors (companies) who were unable to make payments to them as long as debtors did not have available funds to cover outstanding debts.

This can be seen as a forced execution procedure for debt recovery by coercing debtors, just like in the forced execution procedure governed by the Fiscal Procedure Code and the Civil Procedure Code.[1]

Under this procedure, most of the time, the public creditors are not entitled, and their claims are not recovered until the opening of the insolvency proceedings nor after the date of the opening of the procedure.

This problem is common nowadays, especially as the non-payment of taxes and duties due to the local budget or the central budget must represent and represent an effect of the debtor's inability to pay the debt

* *Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

[1] Ion Turcu, *Codul insolvenței Legea nr. 85/2014 Comentariu pe articole*, ed. a V-a, Ed. C.H. Beck, Bucureşti, 2015, p. 8.

with the amounts of money available, these aspects hindering the means of recovering the budget claims and the budgetary creditors are unable to use any means of constraining the debtor company for the payment of the debts due, especially since all the judicial and extrajudicial actions are lawfully suspended.

The budgetary creditors, especially the local budgetary creditors, face one of the most profound problems regarding the recovery of local taxes and fees owed by legal entities having their registered office within the territorial administrative area of territorial administrative units, a situation that may have serious repercussions on the collection rate of due debts.

This makes it harder for the public institutions' databases, not to allow reporting at the end of the year correct data, taking into account the fact that taxpayers do not understand that as long as the company owns the goods (buildings, land, transport, etc.) for these goods are due to taxes and duties.

Due to the lack of information from individual taxpayers as well as due to the fact that any measure of recovery of these debts according to the provisions of Law no. 207/2015 on the Fiscal Procedure Code is difficult or fails for various reasons, such as: maladministration of enforcement acts, establishment of attachments on the debts of outstanding borrowers (but without their being subsequently fed in order to be able to obtain the receivable), etc., it is necessary to find a remedy to enable the enforcement bodies to recover the debts and, if this is not possible, to lead to the dissolution and delisting of the commercial company, in that way it will no longer generate other debts for the possessed goods in the patrimony of society, as long as it does not have available funds.

What has been proposed?

By adopting an emergency ordinance, it was proposed to streamline the mechanisms for recovering the budgetary claims from insolvent companies, taking into account that, in most cases, budgetary creditors are unjustified and the state debt recovery rate is very low.[2]

[2] Memorandum of the Emergency Ordinance for amending and completing some normative acts in the field of insolvency and other normative acts.

The budgetary creditors wanted to adopt these changes taking into account the following issues that made the debt recovery rate difficult (in the past an in the present): the threshold currently set by the law now is 40,000 lei, without making a difference between debtors and creditors and without giving the possibility for the state institutions to introduce such an application under other conditions, especially as most commercial companies own movable/immovable property and the tax owed by them for their possessions is not very high so for the local tax body to be able to introduce such an application it is necessary to wait for a period of at least 5 years in order to be able to request the opening of insolvency proceedings, while we are struggling with another legislative issue, that of the extinctive prescription.

Thus, it was urgently necessary to make certain legislative changes that would lead to an increase in the collection rate of local and central fiscal debts.

The budgetary creditors also wanted to introduce sanctions for those debtors who request the opening of insolvency proceedings, but "forgot" to file with the request to open the insolvency notification procedure to the central or local fiscal body, and in the absence of a constraint imposed by the legislator on the commercial companies submitting such an application for insolvency proceedings, the tax authorities are not aware of the lack of funds or the fact that the company is unable to make payments, and in this way the recovery of debts is difficult, the tax authorities do not manage to recover even a part of the debts due to them.

So, in order to help the budgetary creditor, the legislator proposed that those requests that do not prove the notification of the fiscal body should be rejected in order to allow the tax authorities to be aware of the imminent state of insolvency established at the level of the company.

Another common problem the lawmaker wished to remedy was that of payment claims, given that the law in the current regulation did not provide a deadline for a quick settlement of appeals against measures ordered by the judiciary administrator, and in essence, the insolvency procedure determines that any claim must be resolved as soon as possible.[3]

Although Law 85/2014 on Insolvency and Insolvency Prevention Procedures has improved the mechanism for attracting patrimonial liability of persons who contributed to society's insolvency in comparison

[3] *Ibidem.*

with Law 85/2006, however, the amounts obtained as a result of the patrimonial liability of members of the management and/or supervisory bodies of the company, as well as any other persons who have contributed to the debtor's insolvency, will not always be sufficient to cover the liability.

Thus, even though this mechanism has been improved with the entry into force of the law, there are still issues that have not been fully regulated, issues that lead to a non-uniform interpretation and even the inapplicability of the legal text.[4]

With the current regulation, the legislator tried to cover the legislative gap imposed by the old regulation, but how it could still be expected from the occurrence of Law no. 85/2014, the legislator could not fully cover the issues arising from practice and could not prevent the possibility of interpretations in their benefit from the parties involved in the proceedings, even though the new regulation had waived the condition of admissibility of the claim for the incurring of patrimonial liability (this could be introduced only by the administrator/ liquidator and only if he identified the persons to whom the insolvency status would have been attributable), and was given active procedural capacity to other participants in the proceedings, not all the issues encountered in practice could be covered, as the budgetary creditors were still unjustified even if they were aware of the facts and had discovered the persons responsible for the state of insolvency.

Thus, the current settlement of the liability of the members of the management and/or supervisory bodies of the company as well as of any other persons who have contributed to the debtor's insolvency situation leads to the issuance of several hypotheses that argue both in favour of a tort liability and a contractual liability, which made it necessary to modify the current legal framework in order to be able to harmonize the current non-uniform interpretation and to apply the law as accurately as possible.

In view of the previous reiterates, the legislator considered it necessary to amend and improve the legal framework of the insolvency proceedings, as much as it was not for the benefit of the budget creditor, whose rights had to be protected by adopting new measures that give

[4] Ghe. Piperea, C. Andronache, A. Dimitriu, I. Sorescu, A Răţoi-Pârvu, R. Dan, L. Hagiu, *Codul insolvenţei Note. Corelaţii. Explicaţii. Art. 1-203*, Ed. C.H. Beck, Bucureşti, 2017, p. 831.

them much more rights and do not force them when it comes to recovering debts owed by companies to the state budget.

What has been adopted?

Through this legislative initiative the legislator proposed to increase the collection rate of receivables due to both the central budget and the local budgets, taking into account the fact that the companies want to continue their activity on the economic market considering that they are an important pillar to the foundation of the economic life in Romania, a pillar that is in constant growth and development, which is why after a long analysis of the legislative proposals made by the central authorities and local authorities and after the public debate of the legislative draft, was adopted the Emergency Ordinance no. 88/2018 for amending and completing some normative acts in the field of insolvency and other normative acts.

A first amendment brought by the legislator was that of completing the definition of the threshold value regulated by Law no. 85/2014, by introducing a final sentence that requires the debtor when he is the one requesting the opening of insolvency proceedings, to have the amount of the budgetary claims less than 50% of the declared amount of his receivables.[5]

Also, a long-awaited change by the tax authorities and debated by them was the introduction of a sanction for the debtor even if he is the one requesting the opening of insolvency proceedings, although the law expressly stipulated that the request to open the procedure insolvency must be accompanied by "proof of notification to the competent tax authority"[6], but the lack of such proof of notification does not in any way penalize the debtor.

At the same time, another long-awaited change by the budgetary creditors was that of attracting the patrimonial responsibility of the persons who contributed to the state of insolvency of the debtor company, even though the new regulation had covered the legislative

[5] *"(...) Where the application for the opening of insolvency proceedings is initiated by the debtor, the amount of the budgetary receivables must be less than 50% of the declared amount of the debtor's claims."* – OUG nr. 88/2018 for amending and completing some normative acts in the field of insolvency and other normative acts.

[6] Art. 67 alin. 1 lit. n din Legea nr. 85/2014 on Insolvency and Insolvency Prevention Procedures.

void of Law no. 85/2004, budgetary creditors were legally disadvantaged to introduce such an application, given that in the final sentence of Article 169 (2) of Law no. 85/2014 the introduction of such a request by the budgetary creditor was limited to the holding of the claim representing more than 50% of the value of the receivables registered at the creditor's[7], and the new regulation reduced the 50% of the value of the receivables written at the creditor's mass to the amount of 30% of the value of the receivables registered at the creditor's mass, thus giving the budget creditor the possibility of introducing such a claim.[8]

Through the amendments to Law no. 85/2014 on insolvency and insolvency prevention procedures, the legislator attempted to come to the aid of the budgetary creditor, which has always been disadvantaged in this procedure, but with all these it have not been able to cover all controversial issues in judicial practice.

Impact on budgetary creditors

From a legislative point of view, at first reading of the amendments brought by the legislator to Law no. 85/2014, there is a need to increase the recovery of budgetary receivables (receivables that have always been disadvantaged in practice as well as by the legislator), but also a need of introducing coercive measures on both the debtor and the insolvency practitioners.

As regards of the request for the opening of the insolvency procedure by the debtor, it was necessary to introduce a condition that would limit its indebtedness to the general budget or to the local budget, taking into account that in practice many cases have been encountered which the debtor company applied for insolvency, and its only creditors were central fiscal bodies and local tax authorities.

In most cases, this position of the debtor companies is often found in practice, and in the detriment of the state the debtor company declares its state of insolvency, a condition which had result from the impossibility

[7] *"He may also bring this action, under the same conditions, to the creditor who holds more than 50% of the value of the claims placed on the creditor's mass*." – art. 169 alin. 2 din Legea nr. 85/2014 on Insolvency and Insolvency Prevention Procedures.

[8] *"He may also bring this action, under the same conditions, to the creditor who holds more than 30% of the value of the claims placed on the creditor's mass."* – pct. 15 din OUG nr. 88/2018 for amending and completing some normative acts in the field of insolvency and other normative acts.

of making payments to the local budget and the state budget, and the debts owed by them cannot be recovered considering that they no longer have available funds or goods which could have been subject to recovery in order to recover the debts owed.

Against this background, a pertinent question would be: *"What happens to the assets of society (goods declared for taxation at the local tax authorities where the debtor company has its registered office) and how these were removed from the civil circuit at the expense of the creditor budgetary?"*

The answer to this question can raise many controversies both at the theoretical level and at the practical level. It is difficult to explain how these assets could be removed from the patrimony of company as long as the administrator/liquidator could not identify the person or persons being done guilty of the illicit deeds that led to the state of insolvency of the debtor company, and to the same extent it is difficult to explain whether the person or persons guilty can be held patrimonial.

So, through this modification the lawmaker has streamlined both the mechanism for the recovery of the tax receivables established according to the provisions of Law no. 227/2015 on the Fiscal Code but at the same time compelled the debtors to pay the taxes and duties due in order to prove that the state of insolvency did not arise only in relation to the budgetary receivables but there are other creditors who have not satisfied their claims.

Another beneficial change for the central or local fiscal body was the introduction of the proof of notification of the tax body as a means of rejecting the request for opening the insolvency procedure made by the debtor.

By introducing this legal provision, the debtor companies will be compelled to notify the local tax office in order for their application to open the insolvency proceedings to be allowed.

In the specialized practice, even though in the activity report of the administrator/liquidator it was stipulated that the proof of the notification of the tax body was provided there, often there are cases where the tax authority was not notified about the state of insolvency of the debtor company, and in this way his right to enrol in the credentials being banned.

In the absence of this notification, the budgetary claims were always disadvantaged and could not be included in the debtor's creditor mass, which led to a low collection rate for the debt due to the central budget or

the local budget, especially since the administrator/liquidator does not notify the tax authority about the state of insolvency of the debtor company.

So, through this modification the lawmaker has streamlined both the mechanism for the recovery of the tax receivables established according to the provisions of Law no. 227/2015 on the Fiscal Code but at the same time obliged the debtors to inform the imminent state of insolvency to their tax authorities, in order subsequently to allow the public creditors to enter the creditor mass in order to recover their debts.

With regard to the change in the claim for the patrimonial liability of the persons who contributed to the debtor company's insolvency, it was necessary and useful to settle the cases, given that in present time the tax authorities (especially the local tax authorities) is faced with one of the most profound problems with the recovery of local taxes and dues owed by legal persons having their registered office within their administrative territorial range, a situation which, with the passage of time, could have serious repercussions on the rate of collection of debts owed all the more as the claims for the acquisition of patrimonial liability are rejected by the syndic judge and not all creditors could make such a request.

Moreover, in the specialized practice, there have been encountered many cases in which the administrator liquidator of the proceedings has decided to close the procedure, thus issuing a resolution stating that the persons responsible for the state of insolvency cannot be found for the debtor company, making it even more difficult for budgetary creditors to attract the patrimonial responsibility of the members of the governing bodies.

Through this initiative, public officials can obtain an increase in the collection of claims due to local budgets and the central budget, taking into account that the causal link between insolvency and the members of the governing bodies has existed and will always exist for the company that no longer have sufficient funds to cover outstanding debts.

Moreover, by introducing this legal provision, the tax authorities will be able to attract patrimonial responsibility to the members of the governing bodies of commercial companies and thus to recover their claims. This will make it easier for budgetary creditors to recover their claims and to recover them from those who have been guilty of insolvency, but we must take into account the following question that may arise in practice: *„Do tax obligations owed by a company transfer to individual persons when the insolvency procedure closes, taking into*

account the regulations of Law no. 31/1990?", considering that, according to the provisions of Law no. 31/1990 on companies, since the articles of incorporation of the limited liability companies, it is obligatory to specify the share of each associate in benefits and losses.

Conclusions

The insolvency procedure was created as a forced enforcement procedure, forcing the debtor companies to make payments when they are unable to make payments and no longer have available funds to pay the due debts.

Even though this procedure was also intended to be a mean by which the company could recover and continue its economic activity, when Law 85/2014 on insolvency and insolvency prevention procedures was regulated, it tried to cover the legislative vacuum of the old regulations, but the budget creditors continued to be disadvantaged, which meant that there was a need for a well-grounded change that would make it easier to collect tax claims and recover debts.

So, these changes should lead to an increase in the level of collection of budgetary receivables and lead to a rehabilitation of commercial companies.

In conclusion, the review of the insolvency law is well seen from the point of view of the tax authorities, but it is blamed by insolvency practitioners and debtors given that new coercive mechanisms have been introduced precisely in order not to delay the conduct of the procedure, and in order to redress the debtor company. *Is this in breach of the purpose for which this procedure was created?* No, because it was created as a mechanism for the recovery of companies in insolvency, even if it has common points with the forced execution procedure.

BIBLIOGRAFIE

1. Ion Turcu, *Codul insolvenței. Legea nr. 85/2014 privind procedurile de prevenire a insolvenței şi de insolvență. Comentariu pe articole*, Ediția 5, Ed. C.H. Beck, Bucureşti, 2015;
2. Stanciu D. Cărpenaru, Mihai Adrian Hotca, Vasile Nemeş, *Codul insolvenței comenentat*, Ediția a II-a, revizuită şi adăugită, Ed. Universul Juridic, Bucureşti, 2017;

3. Ghe. Piperea, C. Andronache, A. Dimitriu, I. Sorescu, A Răţoi-Pârvu, R. Dan, L. Hagiu, *Codul insolvenţei Note. Corelaţii. Explicaţii. Art. 1-203*, Ed. C.H. Beck, Bucureşti, 2017;
4. Nota de fundamentare a Ordonanţei de urgenţă pentru modificarea şi completarea unor acte normative în domeniul insolvenţei şi a altor acte normative;
5. Ordonanţa de Urgenţă a Guvernului nr. 88/2018 pentru modificarea şi completarea unor acte normative în domeniul insolvenţei şi a altor acte normative;
6. Legea nr. 85/2014 privind procedurile de prevenire a insolvenţei şi de insolvenţă.

COMPARATIVE ANALYSIS BETWEEN THE CIRCUMSTANTIAL ELEMENTS OF THE ROMANIAN CRIMINAL LAW AND THOSE OF FOREIGN LAWS FOR COIN-FAKES

Roxana MANEA[*]

ABSTRACT
In this article we want is analysed the issue of counterfeiting coins in countries such as England, Spain, Italy, Germany and America, compared to Romania, and its methods of combating.

KEYWORDS: *counterfeiting, special legislation, sanctions, competent institutions.*

To have an overview of this theme, an analytical comparative approach to similarities is required and the differences between the Romanian criminal law and the German, Spanish, Italian, English and American penal law on counterfeits (ones for coins).

In the *German state*[1], the currency is defined as any means of payment, accredited by the state through the authorities suggested by law, as a measure of value for the civilian circulation.

There are two institutions that play an important role in regulating and determining monetary policy rules: Deutsche Bundesbank (Germany's National Bank of Germany), Bundesministium Der Finanzen (Federal Ministry of Finance)[2].

The German state sanctions the offense of counterfeiting as a undermine of the safety and security of financial and the business world.

Art. 146 of the German Criminal Code sanctions the counterfeiting and alteration of money together with the purchase of false money for the

[*] *Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

[1] J. Van der Hulst, *Euro fraud, The legal Protection of the Euro in the EU*, Rotterdam, 2002.

[2] The European Commission. *Germany and the euro*. Link: https://ec.europa.eu/info/business-economy-euro/euro-area/euro/eu-countries-and-euro/germany-and-euro_en#status

purpose of their commissioning. At the same time, the deeds of the fake money are incurred with the intention of "selling" on the market and introducing it into the civil monetary circuit. Thus, according to Article 146 of the German Criminal Code or the persons who: (1) forge the money with the intention of putting them in circulation or modify the money with the intention of attributing it to a greater value, (2) acquire or offer for sale the counterfeit money with intend or (3) puts into circulation money he has intentionally counterfeited is/are punished/punished by imprisonment for a period of at least one year. The punishment is higher, at least two years, for people who are part of a gang or for the offender that falsifies money for commercial purposes[3].

According to art. 147, the attempt is punished[4].

Cause for the removal of criminal liability, according to par. (2) of art. 149 of the Criminal Code, represents: renouncing the falsifier to end the offense; the action of determining the other to renounce the fake; Destruction of counter-management or handing over to the authorities.

In Germany, according to statistical data, about 73,000 counterfeit euro banknotes were recorded in 2017, the value of being 4,1 million euros. However, compared to 2016, this value is less than about 11 percent. The European Central Bank and the German banks in Germany work extensive to make the banknotes safer and to reduce the degree of counterfeiting. According to statistical data, the 50 euro banknotes were most often falsified on large number[5].

In Germany there is a unit whose role is to check fake banknotes. Section 36 of the Bunbesbank Law provides that the German Bank, credit institutions and financial institutions are those responsible for retaining the counterfeit currency or the value that is likely to be counterfeit. If the bank found that the currency is counterfeited, that monetary value will be handed over to the police that will start all the

[3] Codul penal german, art. 146. Link: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1380

[4] *Idem.* art. 147.

[5] Deutsche Bundesbank Eurosystem. *Fewer counterfeit money in Germany.* Link: *https://www.bundesbank.de/en/tasks/topics/fewer-counterfeit-banknotes-in-germany-667548*

necessary procedures. In order to detect counterfeit banknotes, the German Bank subsidiaries offer counterfeit coin[6] detection courses[7].

Since 1990, the Central Bank of *Spain* adopted a monetary policy independent of the existing government legislation, but similar to that of Western states[8].

As a result of the adoption of the euro, national law in the area of the monetary was transposed at national level. Thus, Law 46/1998, a legislative instrument governing the introduction of the euro was adopted. By Law 46/1998, the Bank of España was intrusted with the functions of detecting and analyzing banknotes and counterfeit coins. At national level, the main institution that monitors the phenomenon of coins is the Investigation Brigade of the Spanish Bank; an important role is the cash and release of the Spanish bank. Three institutions are an important role in regulating monetary policy. This is: Banco de España (Bank of Spain), Miniterio de Economia y Hacienda (Ministry of Economy and Finance) and Real Casa de la Moneda – Fábrica Nacional de Moneda y Timbre[9].

Institutions suggested by law centralize the reception of all counterfeiting euro banknotes and found in Spain, analyze the related statistical data and provide them with the investigative brigade of the Spanish bank. CNAM performs similar tasks in terms of falsified euro coins (transmissions and statistical data on counterfeit banknotes and coins counterfeit to the Central European Bank), and then subsequently transmitted to the various authorities and centers involved in the fictional phenomenon.

Spain has a relatively low crime rate compared to other countries around the world. Given this, we will pay attention to what is required in the analysis of the phenomenon of counterfeiting of coins.

The counterfeiting of banknotes and coins is not an unforeseen phenomenon in Spain. At country level there are people who use

---

[6] Deutsche Bundesbank Eurosystem. *Counterfeit money.* Link: https://www.bundesbank.de/en/tasks/cash-management/counterfeit-money/counterfeit-money-623650

[7] Bundesbank Act. Link: https://germanlawarchive.iuscomp.org/?p=833#36

[8] *National Encyclopedia. Spain-Money*. Link: *https://www.nationsencyclopedia.com/economies/Europe/Spain-MONEY.html*

[9] The European Commission. *Spain and the euro.* Link: *https://ec.europa.eu/info/business-economy-euro/euro-area/euro/eu-countries-and-euro/spain-and-euro_en*

methods whereby euro banknotes are counterfeited and then put into circulation.

As regards the procedure for checking banknotes and coins in the Kingdom of Spain, credit institutions and any other institutions involved in the monetary circuit as laid down in Regulation 1338/2001/EC laying down the necessary measures are defined for the protection of the euro against counterfeiting, have the obligation to withdraw from circulation all euro banknotes and coins received, false or presumed to be false and subsequently to make them available to the Bank of Spain (within ten working days of the discovery).

The counterfeiting of banknotes is provided in Title XVIII of the Spanish Penal Code[10], section False. According to Chapter I – Counterfeiting currency and postal effects, Article 386 provides for the imposition of a prison sentence of 8 to 12 years and/or the payment of a fine of 10 times the apparent value of counterfeit coins. The conditions for applying this penalty are: counterfeiting a banknote, introducing a banknote into the country, distributing it individually or in complicity with counterfeiters or distributors.

Holding a false currency for putting into circulation will be punished by one or two classes below the penalty, taking into account the amount of the premium and the degree of complicity with the above mentioned authors. The same punishment will also apply to those who, knowing they are false, purchase currency to put it into circulation.

Anyone in good faith who receives and distributes a false coin or distributes it after being registered as fake will be punished by imprisonment from 9 to 15 weeks and a criminal fine of 6 to 24 months if the apparent value of the coin is more than 50,000 pesos.

Article 387 – For the purposes of the preceding Article, currency means metal and paper money which are means of payment. Credit cards, debit cards and travel checks are considered as currency (as opposed to the other regulations in the states submitted). They are also assimilated to the national currency, the currency of the European Union and foreign currencies.

It is considered to be consumed at the same time when the counterfeit currency passes from the hand of the retail seller to the recipient, referring to the act of sale to an instantaneous delivery, expenses or

[10] *http://www.portaley.com/delitos-informaticos/codigo-penal-386.shtml*, link accesat la data de 11 septembrie 2018

dismantling activity of the fake currency, obtaining this deception a patrimonial benefit.

Italy[11] is a founding state of the European Union, and since January 1, 1999 the euro was adopted at the level of the Italian state. Institutions that have attributions in the regulation of monetary policy are: Bank D'Italy (Italy Bank); Ministro Dell'Economicsia del Element Finance (Ministry of Economy and Finance) and Instituto Pologrаfico Zecca Dello Stato (Italian Mint)[12].

The Italian Penal Code[13], regulates through art. 453, counterfeiting in coins, public credit cards and stamps in the second book entitled 'on criminal offenses', in Title VII – "Crimes against public faith."

The criminal law provides for falsification of coins, spending and statement of state counterfeit coins as a crime and punishes with imprisonment from three to twelve years and fine from € 516 to € 3,098.

By art. 1, of the Legislative Decree no. 125 of 2016, the provision was introduced by which the punishment is reduced by one third when the behaviour mentioned in previous paragraphs refers to currencies not yet the other legal payment and the initial term of the sets.

In the first half of 2018, the bank of Italy recorded 54 770 false banknotes withdrawn from circulation in the country, a decrease of 37.2% versus 87,148 of the second half of 2017.

Falsification, which in accordance with Italian law is an offense, is a phenomenon for which central banks pay for the utmost attention because, if not controlled, may undermine public confidence in the currency, thus endangering integrity. The Bank of Italy cooperates with other Eurosystem National Central Banks (NCBs) and the European Central Bank (ECB) in the fight against counterfeiting of banknotes. This institution actively participates in training on the recognition of counterfeit banknotes for national police forces and other countries, public administration operators and cash-professional managers.

---

[11] h*ttps://www.bancaditalia.it/compiti/emissione-euro/contraffazione/index.html*, link accesat la data de 11 septembrie 2018

[12] *The European Commission. Italy and the euro*. Link: https://ec.europa.eu/info/business-economy-euro/euro-area/euro/eu-countries-and-euro/italy-and-euro_en

[13] Publicat în Monitorul Oficial al Republicii Italiene în 26 octombrie 1930, n. 251, *http://www.diritto24.ilsole24ore.com/guidaAlDiritto/codici/codicePenale/articolo/548/art-453-falsificazione-di-monete-spendita-e-introduzione-nello-stato-previo-concerto-di-monete-falsificate.html?refresh_ce=1*, link accesat la data de 11 septembrie 2018

The banknote that runs to *England*[14] is the sterling pound, and the material from which the banknotes are made is the paper for 20 and 50 pounds, and for the 5 and 10 pounds banknotes the polymer is the one used. Since 2020, 20 billing banknotes is to be made of polymers.

England has adopted an anti-counterfeiting strategy that is based on five main elements[15].

- First of all, the materials from which the banknotes are made have been adopted to the new technologies so that counterfeiting is harder to achieve. This is why cotton paper was replaced by the polymer[16].
- Secondly, the banknotes has been improved, with authentic high-quality banknotes, issued and reputed[17].
- Thirdly, a program for the purpose of the English company was implemented in the whole of society, which provides assistance and support for companies and citizens to identify authentic banknotes[18].
- Fourthly, companies operating with ATMs must have equipment that can detect false banknotes[19].
- Fifth, there is a close relationship with institutions that implement the laws so that the counterfeiting options are eliminated[20].

The British law encompasses the counterfeiting, transferring, offering, teaching, keeping or controlling the currency or bank tickets (Law on counterfeiting and counterfeiting from 1981).

The law crimes the action of the person who manufactures or keeps any object it uses to make the false milling or falsified bank tickets if they were made with the intention of transferring them or distribute as authentic.

An interesting situation we have when art. 15, par. (2) of the law, as mentioned above, shall also criminalize and simply teach or reminder, without a legal or justified express authorization of any object of which it is aware of that it is falsified. The important element is the action of knowledge or the conviction of the author, that the subject under the

[14] Forgery and Counterfeitting - Act 1981

[15] Bank of England. *Counterfeit banknotes.* Link: *https://www.bankofengland.co.uk/banknotes/counterfeit-banknotes*

[16] *Ibidem*

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

transfer is a fake, which is indispensable to be able to find out in the presence of a crime.

So, the currency is a means of obtaining a value reserve by being a treasure character and fulfils the function of payment instrument through its driver's means of exchange.

Crimed-class offenses include virtually any type of document, except banknotes, the main counterfeiting crimes being: the production of a false tool, illicit use, copying and using a fake instrument with intent, with custody or control of specific tools and materials (stamps, passports, identity documents, etc.) and their use for illicit purposes. Practically, all refers to documents or instruments by which they are claimed to be something that is not in the real meaning. So, a person is guilty of fake in accordance with the act of counterfeiting and counterfeiting 1981 (FCA 1981), if he makes a false instrument, with the intention of him or another use it to induce someone in error and accept it as an authentic. The offense is a crime of any kind, with a maximum punishment of ten years in prison and imprisonment six months or a fine not exceeding the legal maximum (currently £ 5,000) or both. For offenses committed in England and Wales on March 12, 2015, or after, there is no superior limit of the fine that magistrates can impose.

The *United States* government plays an important role in protecting monetary integrity. There is a clause in the United States Constitution that a person who falsifies the currency will be punished. Federal law is against the production of counterfeit notes, but also against the possession of banknotes that have been made through illicit means.

In 1992 the Counterfeit Decrease Act was adopted and the penalties applied were increased. The law allows institutions producing money to adopt the most rigorous measures and techniques, so counterfeiting of banknotes is a difficult process. Penalties applied to forgeries are: imprisonment for up to 20 years or a fine of up to $ 250,000. The sentence is applied depending on the value of the counterfeit banknotes[21].

Article 5153 of the Penal Code[22] of the United States of America regulates the counterfeiting of coins under Title 31 "Money and Finance" in Chapter 51 Coins and Currency, Subchapter V Miscellaneous).

[21] Itest Cash. *Your Guide to U.S. Federal Counterfeit Money Laws.* Link: *https://www.itestcash.com/blogs/news/your-guide-to-federal-counterfeit-money-laws*

[22] *http://uscode.house.gov/download/download.shtml*, link accesat la data de 11 septembrie 2018

US Government officials and national bank officers in the money circuit will stamp or mark the counterfeit papers ("counterfeit", "altered" or "worthless") that were intended to circulate as genuine currency.

With regard to Article 312, it is devoted to Terrorism and Financial Intelligence and, in paragraph 4, it covers the functions that include the provision of policies and strategies of the Departmental Operations Division on issues related to combating financial crime, including laundering money, counterfeiting and other offenses that threaten the integrity of banking and financial systems.

As regards the administrative area, Subchapter II, Chapter III of the Title on the Treasury Department, paragraph 9 (b) – the possibilities of the Secretary, par. (4), lit. (C) regulates that Treasury employees have payments made from the credits used to combat counterfeiting and other offenses.

Article 5112 sets out all the details of names, specifications, design of coins and security elements that I have mentioned briefly (the used should be of golden colour, have a distinct margin, identifiable elements of point visually and visually, features that make the denomination of the easy-to-find coin manufactured in the US and similar counterfeit metallic properties such as US currencies in circulation at the time of the entry into force of United States legislation in the field).

At the level of the *European Union*, Article 83 (1) of the Treaty of Lisbon grants the Parliament and the Council the power to adopt directives laying down minimum standards for the definition of offenses and sanctions for particularly serious offenses with cross- border dimensions.

At European and international level specific to the phenomenon of counterfeiting of coins, the following trends are highlighted: rapid technical evolution of reproductive and falsification methods, which has the effect of increasing the number of people involved in this type of act and widening the site area in which these forgeries are produced (clandestine printers); the integration of forgeries in the phenomenon of transnational crime which leads to the increase of the degree of specialization of the international branches; the rise of cases where currency counterfeiting is a "middle crime" of supporting and amplifying large organized crime (e.g. trafficking in human beings, drug trafficking).

At international level, preventing and combating counterfeiting by facilitating the exchange of information generates operational and strategic analyzes, with the support being materialized through financial

support for all cross-border operations in this respect as well as operational aid granted on the ground.

At European level, responsibilities for preventing and combating counterfeiting of the EURO are shared between the European Commission, the European Central Bank, Europol and Eurojust. The Commission is preparing legislative initiatives, and the European Anti-Fraud Office (OLAF), on behalf of the Commission, organizes and finances training and technical assistance to Member States and manages the European Technical and Scientific Center (ETSC) and the European Central Bank (ECB) counterfeit banknotes by storing technical and statistical data on banknotes and coins falsified in a central database. At the same time, it disseminates them to all the other competent institutions involved in combating counterfeiting.

At national level, **in *Romania*** Title VI of the New Criminal Code regulates in the Chapter I the counterfeiting of coins[23].

In the current regulation, the legislator's intention to secure the currency in the civil circuit (the circulating circuit) and the simple issued coin (no circulating value due to the fact that it has not yet been officially introduced into the circuit) is obvious. Obvious is the protection that brings it to any coin and thus extends the range of payment instruments that fall under the law.

At the same time[24], in the old regulation the crime of counterfeiting of coins and other values included falsification of securities or payment instruments, which in the current regulation no longer happens, the latter is regulated as a distinct offense in the art. 311. par. (1) provides for the forgery of securities, securities or instruments for making payments or any other securities or similar values. Alin (2) provides for the aggravating option of counterfeiting an electronic payment instrument.

The National Bank of Romania, as the sole issuer of the Romanian banknote, through the special department "Imprimerie", has the task of organizing the monetary issuance process, with all the aspects arising from it. It is remarkable the effort of the NBR specialists who, over the years, managed to create new coins and banknotes, the monetary measure existent up to 1990 being replaced.

[23] In force from 1st february 2014.

[24] Vintilă Dongoroz and others, *Theoretical explanations of the Romanian Penal Code. Special part,* Romanian Academy Publishing House, Bucharest, vol. IV, 1972, p. 390.

We consider that the close relationship between the National Bank of Romania and the institution that has the task of analyzing suspicious banknotes, in this case the National Analysis Center (NAC), which is present in all the National Central Banks with tasks in coordination of all the ensembles of the "actors" of the system, is extremely important. This also attributes access rights to Third Party Failure Monitoring System (CMS) and the exact definition of the scope for access.

At the national level, the phenomenon of counterfeit currency is characterized by a series of general features such as: the constant level of the criminal interest for counterfeiting of the currency, especially for the national currency; increasing the quality of forgery by using materials, printing techniques and professional printers; for the national currency increasing the number of counterfeits made on the polymer-imitate carrier; for the euro, in terms of circulation, there is a tendency for the introduction of counterfeiting in the country unintentionally by people who were not aware of the quality of the banknotes and who came into their possession as a result of the remuneration received for their activities abroad; specific for the US currency is that it is introduced in the country on various branches, in most cases through the South and North East of the country, the most common counterfeiting being the one of USD 100[25].

Even if Romania did not switch to the euro, at the national level all European provisions were implemented for a good system functionality. Within the General Inspectorate of the Romanian Police, the Central National Office for Combating Counterfeiting works, as it is found at the level of each state, which deals with the centralization of the falsities detected by the police units and through which the banknotes are sent to expertise.

Also, by Regulation no. 8 of 19.12.2002 of the National Bank of Romania regarding some of the procedures to be followed in the event of the detection of counterfeit or counterfeit euro banknotes and coins. Other references to this issue are made in Law no. 39/2003 on preventing and combating organized crime, Law no. 508/2004 on the establishment, organization and functioning within the Public Ministry of the Directorate for the Investigation of Organized Crime and Terrorism, as amended by O.U.G. no. 131/2006 and Law no. 312/2004 on the Statute of the National Bank of Romania.

[25] The explanatory dictionary of the Romanian language – DEX, 1998.

The circumstantial elements taken into consideration in the comparative analysis of the Romanian criminal law and the foreign legislation also apply to the offense concerning coins, stamps, securities or payment instruments issued abroad. As exemplified in the first part of this chapter, each country sets out its own laws and measures and penalties in case of a counterfeit currency.

REFERENCES

1. J. Van der Hulst, *Euro fraud, The legal Protection of the Euro in the EU*, Rotterdam, 2002;
2. V. Dogoroz and others, *Theoretical explanations of the Romanian Penal Code /special part,* Edit Romanian Academy, Bucharest, vol. IV, 1972;
3. *The German Penal Code*, art. 146. Link: https: //www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1380;
4. *The European Commission. Germany and the euro*. Link: https://ec.europa.eu/info/business-economy-euro/euro-area/euro/eu-countries-and- euro/germany-and-euro_en#status;
5. Deutsche Bundesbank Eurosystem. *Fewer counterfeit money in Germany*. Link: https://www.bundesbank.de/en/tasks/topics/ fewer-counterfeit-banknotes-in-germany-667548;
6. *National Encyclopedia. Spain-Money*. Link: https://www.nationsencyclopedia.com/economies/Europe/Spain-MONEY.html;
7. The European Commission. *Spain and the euro*. Link: https://ec.europa.eu/info/business-economy-euro/euro-area/euro/eu-countries-and-euro/spain-and-euro_en;
8. http://www.portaley.com/delitos-informaticos/codigo-penal-386.shtml;
9. https://www.bancaditalia.it/compiti/emissione-euro/contraffazione/index.html;
10. The European Commission. *Italy and the euro*. Link: https://ec.europa.eu/info/business-economy-euro/euro-area/euro/eu-countries-and-euro/italy-and-euro_en;
11. *Forgery and Counterfeitting – Act 1981*;
12. Bank of England. *Counterfeit banknotes*. Link: https://www.bankofengland.co.uk/banknotes/counterfeit-banknotes;

13. Itest Cash. *Your Guide to U.S. Federal Counterfeit Money Laws*. Link: https://www.itestcash.com/blogs/news/your-guide-to-federal-counterfeit-money-laws;
14. http://uscode.house.gov/download/download.shtml;
15. Law nr. 312/2004 of the Romanian National Bank's Statute
16. The explanatory dictionary of the Romanian language – DEX, 1998
17. https://epthin

THE PHENOMENON OF DISCRIMINATION IN LABOUR RELATIONS. PROHIBITION OF DISCRIMINATION ON GROUNDS OF AGE, RELIGION, SEXUAL ORIENTATION OR DISABILITY

Emin MELIS[*]

ABSTRACT

Workplace discrimination is a matter of increasing sensitivity both in national legislation and in Community law, currently seeking effective ways of combating it. Analyzing the statistics at national level, we will notice that a small number of complaints based on the discriminatory criteria applied to the employees at the workplace are recorded on the territory of our country. Employers currently use criteria with objective justification and implicitly proportionate to the purpose they pursue from the employee. Of course, in practice, any employer may be subject to sanctions if it breaches the principle of non-discrimination, and the National Council for Combating Discrimination currently watches any irregularities that may arise in the labour relations. Any interested person who considers him/herself discriminated at the workplace can directly address the Romanian courts, being in no way subject to NCCD notification, within three years from the moment when the deed was committed or from the moment when the person became aware of its occurrence. The most common forms of discrimination are those based on age, religious affiliation, sexual orientation or disability, which I will try to detail in this paper.

KEYWORDS: *discrimination, combating discrimination, non-discrimination principle, discrimination criteria, National Council for Combating Discrimination.*

1. Brief introduction to discrimination within national and Community legislation

Starting from the notion of discrimination found in the Explanatory Dictionary of the Romanian Language, we will try to highlight the discriminatory phenomenon within the labour relations, trying to observe the actions to which the employed persons are subjected and at the same time the aim of such actions. The analysis of this phenomenon is topical both at national and at community level, unfortunately in all areas of

[*] *Lawyer, Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

work, the states pursuing policies to suppress these behaviours that affect first the stability of work.

Thus, strictly terminologically in relation to the explanation given by the dictionary, the verb *to discriminate* refers to distinguishing, and the phenomenon of discrimination embraces in its content the action of discriminating and the result produced by it. This phenomenon has been analyzed over the years both by the legislation of our country and that of the European Union, both of which appreciate the essence of applying differentiated treatment to two workers who are in a similar situation. We wonder, of course, about the result that differentiated behaviour causes in the employment relationship, the answer being the reduction or suppression of some rights that employees have in similar situations at the workplace.

The criteria that circumscribe the discrimination are broad, as any abolition or exclusion of the rights may be considered a discriminatory one, of course, by reference to another comparable employee. The reverse of discriminatory behaviour is also possible in the situation where two persons employed between whom there are differences are treated in the same way in such a situation being in the presence of discrimination, of course in another form.

Going forward in analyzing this phenomenon, we can see without a doubt that it does not just involve differentiated actions or behaviours, but also the desire to raise multiple disproportions at social levels. Concluding the analysis at the terminological level, we will see that discrimination is actually prohibited treatment among the equal or equally standing categories of people, following marginalization, disadvantages or subordination to differentiated treatments, all of which are based on forbidden principles. In analyzing the case law of the European Court of Justice, we will observe a number of causes which are circumscribed to this phenomenon, but it is clear from the analysis of Case C-106/83, *Sermide SpA, Cassa Conguaglio Zucchero and Others*, that the "principle of equal treatment" is highlighted, being generally applicable to employment relationships, comprising as a whole any exclusion of differential treatment for employees in similar positions or, of course, any antagonistic situations which, however, benefit from the same treatment regime.

The analysis of this phenomenon and the correct determination of a fact namely whether it is circumscribed or not is a laborious process, the difficulty being that of finding a "comparable" one within the same

situation from where to extract whether the applied behaviour is discriminatory or not. However, although it would appear that two persons in equal positions or close positions have been treated differently, it is nevertheless difficult to determine the *'suitability for such differentiation'*[1].

The holders of discriminatory actions in the employment relationship can be employers, employers' management bodies and other employees who work in the same unit[2].

Regarding a legal definition of the term of discrimination, we must refer to the provisions of Article 2 of GD no. 137/2000[3] stating that "*any difference, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, HIV infection, affiliation to a less privileged category as well as any other criterion that has the purpose or effect of restricting, abolishing the recognition, use or exercise on equal terms of human rights and fundamental freedoms or rights recognized by law in the political, economic, social and cultural or in any field of public life."* In this context, we will observe that the phenomenon of discrimination relates to differences in treatment applicable to comparable employees in so far as such differentiation is not based on objective criteria.

The main features of the phenomenon of discrimination are inter alia: the differential treatment applicable to twice as many people or the reverse direction of the omission of treating two incomparable situations differently; the absence of any justification for such differentiated treatment or the need to apply it.

The Bucharest Court of Appeal ruled in the context of certain decisions of case law, which are relevant in the matter under discussion, that to find us in the presence of a discriminatory act, it is imperative that the actions taken be able to find an objective or reasonable justification[4].

---

[1] Claudia-Ana Moarcăş Costea, *Drepturile sociale ale lucrătorilor migranți (Social Rights of Migrant Workers),* C.H. Beck Publishing House, Bucharest, 2012, p. 70.

[2] I. Roşca, *Discrimination in Labour Relations*, Revista Română de Dreptul Muncii no. 3/2017.

[3] *GD no. 137/2000 on the prevention and sanctioning of all forms of discrimination*, published in the Official Gazette of Romania no. 166 of March 7, 2014.

[4] Bucharest Court of Appeal, Department VIII civil and labour, social insurance, Decision no. 562R/2010.

The task of proving a discriminatory fact or discriminatory attitude equally belongs to the discriminated person as well as to the person who acted in this respect, but it is very difficult to prove it. The person who feels that he/she has been subjected to discriminatory practices must prove it, being absolutely necessary to show the exact difference of treatment he/she has been subjected to. In defence, however, the person suspected of having committed a discriminatory fact has an obligation to defend him/herself, a defence mainly based on the showing that differentiation is based on objective criteria. The whole practice of the European Court of Justice has highlighted the role of the employer in proving that treatment differences are based on clear situations and justified by objective factors.

It is also very important to emphasize the characteristic based on which the quality of victim in a discriminatory action can only belong to the individual. The Constanţa Court of Appeal stated[5] that "*the legal person cannot be subject to discrimination*". Moreover, the Universal Declaration of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms refer to notions such as "*people*" or "*citizens*".

2. Prohibition of discrimination on grounds of age, religion, sexual orientation or disability

Both Romanian and European Union legislation seeks to combat all forms of discrimination, and these forms also include those based on sex, race or ethnic origin, religion, age or sexual orientation as they are intended in Article 10 of the Basic Treaty of the European Union. Moreover, Directive 78/2000/EC is also seeking to establish the principle of equal treatment among signatory states.

Discrimination or discriminatory actions may be direct or indirect. The first form of direct discrimination occurs most often when people in similar situations are treated in different ways, one of them being disadvantaged, based on criteria such as religious affiliation, beliefs, age, orientation sexual or disability. On the other hand, the second form of indirect discrimination occurs when creating practices that at first seem neutral to discriminate against a particular segment of employees.

[5] Constanta Court of Appeal, Civil Department and for cases involving minors and family, labour disputes and social security, Decision no. 145 of April 13, 2009.

When considering and applying Directive 78/2000/EC, through paragraph 15 thereof it is provided that sanctioning actions of discriminatory practices may be carried out by the national courts, taking into account both the provisions of national law and the Community law, and the obligation to sanction such acts. They should also keep in mind that all Community legislation seeks measures to provide equal treatment among employees, with the first and most important criterion being to ensure equal opportunities and, implicitly, treatment to people, including for those with disabilities. Of course, we should not interpret *in extenso* the legislation at Community level and generalized in the sense that persons working in operational areas such as police, prisons, constabulary police, armed forces and so on may be joined on equal terms by employees who hold for example a locomotor disability, since the specificity of these positions does not allow such recruitment.

As far as age discrimination is concerned, it should be noted that an important element that needs to be clarified is that not any limitation of access to certain work segments taking into account the age of the applicant is considered to be discriminatory, leaving the Member States – the possibility of assessing them on a case-by-case basis[6].

a) Discrimination based on age

The Labour Code states that any form of direct or indirect discrimination against an employee based on age is prohibited. This normative act contains in its content a definition of the notion of discrimination, the legislator considering as discriminatory any facts that lead to the exclusion, differentiation, restriction or preference among the employees, issues that arise due to age, having as a result the total re-assignment, restriction or, of course, the total removal of the use or the exercise of certain prerogatives granted in the legislation.

This form of discrimination occurs both among young workers and older workers, with the exception of being considered as discriminating the employer's requirement that the person to be recruited should be of a minimum or a maximum age. Of course, at the level of the labour market, it is possible to insert by means of normative acts an age

[6] Council Directive 2000/78/EC transposed into Romanian legislation through GD no. 137/2000 on the prevention and sanctioning of all forms of discrimination.

threshold up to which individual employment contracts can be legally concluded.

The Court of Justice of the European Union has, in the context of a case-by-case decision[7], determined the situation of university professors who, after reaching the retirement age, may be able to conclude individual fixed-term employment contracts. The petitioner, acting as professor, asks for the invalidity of the contract which limits the period of employment to one year, asked the court to take note of his/her contract and to find that it had to be of an indefinite duration. Of course, the CJUE institution has considered this issue non-discriminatory and has stated in this respect, which is why we can surely say that no limitation is considered to be discriminatory for the employee.

b) Discrimination based on religious affiliation

This form of discrimination refers to the existence of discriminatory relations with persons who embrace any type of religion or on the other hand to those who have no faith.

The definition of "religion" includes any of the 18 religious cults, being no differences between them and all the branches or sects of a certain religion.

Acts of discrimination may be different from those relating to the non-employment of persons in the employment relationship on the grounds of their religion or, for example, the non-granting of the two free days in case of religious holidays of employees other than Christian ones.

Of course, if the employment involves belongingness to a particular religion or cult, a situation occurred in case of religion teachers or priests, the employment considering these criteria, it is not considered to be discriminatory.

However, employed persons cannot oppose the performance of specific activities in individual contracts on the grounds that religion prevents them from doing so. As an example, we appreciate that the employee's refusal to undergo a medical examination on religious grounds is a serious reason for dismissal.

If an employee of a particular religious cult is treated less favourably and chooses to address the court, he/she is not obliged to disclose his/her

[7] Judgment from 18.10/2010 in joined cases C-250/09 and C268/09 *Vasil Ivanov Georgiev v. Tehnichescki Universitet Sofia, filial Plovdiv*.

religion, because as we know, this is a mental and implicitly internal element, having its own existence in relation to the practices of religious worship that represent external manifestations. In such a situation, it is sufficient to prove that he/she was treated less favourably than a worker in a comparable situation.

c) Discrimination based on sexual orientation

Sexual orientation is considered to be one of the four components of sexuality (along with biological sex, social role of genders, and sexual identity), characterized by an emotional, sexual or emotional attraction to persons of a particular gender.

Such discrimination consists in the fact that a person with different sexual practices (same-sex, opposite sex, or both with same sex and opposite sex persons) is treated less favourably than one person in a comparable situation.

And within this type of discrimination we find it subdivided into: direct and indirect discrimination. The first of these, direct discrimination, is that a person having a different sexual orientation is treated less favourably than another in the same context or in a similar context. As an example, we appreciate being directly discriminatory the deed of an employer who does not receive a woman to work as an accountant as he suspects she is a lesbian.

Indirect discrimination, however, occurs whenever a certain practice among employers puts in an inferior position some people who want to be employed, this discrimination being based on their sexual orientation. For example, the situation of an employee wishing to hire a couple of married young people, and at the recruitment interview a gay man with his partner appear.

Discrimination or discriminatory actions against persons with a particular sexual orientation may continue after termination of employment, for example, when a staff member is not given a recommendation from his/her superiors on the grounds that he/she would suspect he/she is gay or lesbian. This gesture circumscribes the discriminatory actions being condemned at the legislative level both in the legislation of our country and in the European Union.

d) Discrimination based on disability

Such discrimination occurs when a person suffering from a particular disability is treated less favourably than another person who does not suffer from that disability in similar situations and of course if the skills and characteristics of the two persons are comparable.

The comparable person can be represented by either a clinically healthy individual, so one who does not hold that disability or by another disabled employee. In this respect, the law does not exemplify the notion of a person with a disability, but at the doctrinal level it was appreciated that it would be represented by any "*physical, sensory or mental deficiencies that either obstruct or restrict his/her normal access and under equal conditions to social life*"[8].

At European level, Directive 2000/78/EC introduces a number of criteria regarding the situation in which the application of different treatments is not circumscribed to the term of discrimination.

We conclude by saying that the necessary measures to be taken by the employer for the protection of persons with disabilities must not be disproportionate to it and should not make it difficult for the employer to recruit his or her staff.

3. Conclusions

Equal treatment should not be a simple principle, as this is necessary to be a genuine legal arrangement capable of producing the right consequences among people who face such discriminatory practices at the workplace.

As we have seen in the previous paragraphs, not any difference of treatment between two employees is considered discriminatory, and it is imperative to analyze all the aspects related to the specifics of the activity carried out and implicitly to the particular situation in which any individual finds him/herself.

Discriminatory treatment has as its main element the restriction or removal of some of the employees' rights that are conferred by law. If there is objective reasoning within the differentiated treatment applicable

[8] Roxana Cristina Radu, *Discrimination in the Current Society: theoretical considerations, practical manifestations and legal sanctions*, Revista de Stiinte Politice, Bucharest 2010.

to comparable workers, it is easy to understand that we are not in the face of discrimination.

In the context of national jurisdictions, the High Court of Cassation and Justice held that[9] "persons in identical situations have the right to identical treatment, but equality should not mean uniformity."

In order to find us in the hypothesis of a discriminatory type of act, it is imperative that any difference be based on the application of legally prohibited criteria, to be random, to consider persons in comparable situations and, of course, to have the main purpose of excluding or restricting a right conferred by the law. Whenever differentiated treatment is based on reasonable justification, discrimination as an act disappears, and the employer cannot be sanctions in either way by the courts or by the National Council for Combating Discrimination.

BIBLIOGRAPHICAL REFERENCES

1. Claudia-Ana Moarcăş Costea, *Drepturile sociale ale lucrătorilor migranţi (Social Rights of Migrant Workers),* C.H. Beck Publishing House, Bucharest, 2012, p.70;
2. Decision no. 562R/2010 Bucharest Court of Appeal, Department VIII civil and labour, social insurance;
3. Decision no. 145 of April 13, 2009 Constanta Court of Appeal, Civil Department and for cases involving minors and family, labour disputes and social insurance;
4. Decision no. 2227 of April 29, 2010, HCCJ Department of Legal and Fiscal Administration;
5. Council Directive 2000/78/EC transposed into Romanian legislation through GD no. 137/2000 on the prevention and sanctioning of all forms of discrimination;
6. Judgment of 18.10.2010 in Joined Cases C-250/09 and C268/09 *Vasil Ivanov Georgiev v. Technicheskі Universitet Sofia, filial Plovdiv*;
7. I. Roşca, *Discrimination in Labour Relations*, Revista Română de Dreptul Muncii no. 3/2017;

[9] HCCJ, Department of Legal and Fiscal Administration, Decision no. 227 of April 29, 2010.

8. *GD no. 137/2000 on the prevention and sanctioning of all forms of discrimination*, published in the Official Gazette of Romania no. 166 of March 7, 2014;
9. Roxana Cristina Radu, *Discrimination in the Current Society: theoretical considerations, practical manifestations and legal sanctions*, Revista de Stiinte Politice, Bucharest 2010;

THE AMENDMENTS BROUGHT BY THE LAW NO. 165/2013 REGARDING THE PROCEDURES FOR THE ISSUING OF INDEMNITY TITLES (ART. 41 OF THE LAW NO. 165/2013)

Elena Camelia PINTILIE[*]

ABSTRACT

The instability and serious deficiencies in Romania in the matter of the immovable properties restitution abusively taken over by the communist regime created legal, economic and social problems.

In this context Law no. 10/2001 was created in a compromise, which is the framework law regarding the restitution of the nationalized immovable properties.

The incoherence of certain texts in Law no. 10/2001 and the non-unitary practice of the courts with direct impact on the court created the favourable context for the emergence of Law no. 165/2013, which substantially changed the previous restitution and compensation procedures and opened the way of repossessing the immovable properties in a speedy manner and granting reparatory measures.

KEYWORDS: *restitution, compensation, reparatory measures, abusively taken over immovable property, entitled person.*

Incoherent, unstable and dense legislation has created huge problems in its application. It is the main cause of the greatest deficiencies affecting the judicial system, namely the non-unitary character and the improbability of judicial practice, phenomena felt at the level of all the institutions involved in the enforcement of the reparation laws.

From this point of view, the example of Law no. 10/2001, created out of a political compromise, is edifying: hybrid texts, uncorrelated texts, flagrant deviations from many law principles, successive and confusing changes, methodological norms which in many respects have been added to the law.

The adoption of this law was performed extremely late, more than a decade after the fall of the communist regime, when the issue of the goods restitution abusively taken over by the communist state –

[*] *Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

especially the „nationalized houses"- split the political class and civil society, has triggered public polemics and made ink rivers flow.[1]

The problem of restitution of nationalized buildings encountered difficulties. Unlike the former socialist states that have struggled to solve the problem of reparation for goods abusively taken over during the Communist period as soon as possible (in the first years after the fall of the communist regime), Romania has delayed solving this problem, which turned out to be extremely complex over time and the hesitation of the political actors involved in it.

Instead of a clear, firm and of principle solution, it has been preferred to give partial solutions which generated new and difficult legal, economic and social issues.

After long discussions and heated political negotiations Law no. 10/2001 was published in the Official Journal of Romania, part I, no. 75 of February 14, 2001, when it came into full force.[2] At the same time, there were issued by the Government, in application of Law no. 10/2001 and its Methodological Norms, approved by Government Decision no. 614 2001, and by Government Decision no. 950 2001, it was ordered the setting up of the Authority to follow up the unitary application of Law no. 10/2001 on the legal regime of some real estates being taken over abusively from 6 March 1945 to 22 December 1989.[3]

Although Law no. 10/2001 establishes and remains the framework law regarding the restitution of the goods as they are or an equivalent abusively taken over by the state during the Communist regime 1945-1989, the legislation related to the restitution of property has undergone numerous modifications along time due to numerous inadvertencies, meant to speed up the process of restitution to those entitled.

Due to these inadvertencies, it was necessary to amend certain articles of the afore mentioned law in the sense that these changes were more explicit, accessible and pragmatic and helped to explain the solutions the legislator has reached.

---

[1] Flavius A Baias, B. Dumitrache, M. Nicolae, „*The Legal Regime of Abusively Taken Real Estate. Law no. 10/2001 commented and annotated*", Rosetti Publishing House, Bucharest 2002, p. 7.

[2] Law no. 10/2001 was adopted in the legislature passed by the Senate at its meeting on 14 November 2000 and by the Chamber of Deputies in its meeting of 16 January 2001.

[3] E Chelaru, „Law no. 10/2001 on the legal regime of real estates abusively taken over during March 6, 1945-22 December 1989, commented and annotated", All Beck Publishing House, Bucharest 2001, p. 8.

Such amendment was intended to be Law no. 247/2005, which brought about a series of changes in the procedure for settling the files established under Law no. 10/2001 and granting compensation to the entitled persons.

The regulatory scope of art. 1 par. (1) of Title VII of the Law is established only for those damages resulting from the application of Law no. 10/2001 regarding the legal regime of immovable property abusively taken over from March 6, 1945 to December 22, 1989, republished, of Government Emergency Ordinance no. 94/2000 on the restitution of immovable property belonging to religious cults in Romania, republished, of Government Emergency Ordinance no. 83/1999 on the restitution of immovable property belonging to the communities of persons belonging to the national minorities in Romania, republished.

The decisions/orders issued by the entities invested in the settlement of notifications, restitution claims or, as the case may be, the orders of the central public administration directors assigned to perform the settlement of notifications and in which sums to be compensated have been recorded, accompanied by the current legal status of the real estate object of the restitution and all documentation related thereto, including any documents describing the demolished buildings submitted by the entitled person and/or found in personal archives, shall be handed over on the basis of a delivery note to the Secretariat of the Central Commission, by counties, in accordance with the stipulated schedule, but no later than 60 days from the date when the law enters into force.

Notices formulated according to the provisions of Law no. 10/2001 regarding the legal regime of some immovable properties taken over from March 6, 1945 to December 22, 1989, republished, which were not solved until the date of the entry into force of Law no. 247/2005, are handed over on the basis of handover/receiving report to the Secretariat of the Central Commission, together with the decisions/provisions issued by the entities invested in the settlement of the notifications, the requests for restitution or, as the case may be, the orders of the central public administration directors containing the justified proposals, as the case may be, regarding the immovable property current legal situation and all related documentation, including any legal documents describing the demolished building submitted by the entitled person and/or found in personal archives, within 10 days from the date of the decisions/provisions adoption or, as the case may be, of the orders.

Based on the legal status of the property for which compensation was proposed, the Secretariat of the Central Commission proceeds with the examination of the files concerning the verification of the lawfulness of the immovable property restitution rejection.

The Secretariat of the Central Commission proceeds to the centralization of the files, in which the application for restitution was rightly rejected, after which they were sent to the designated evaluator or appointed firm, for the purpose of drawing up the evaluation report.

After receiving the file, the appointed evaluator or evaluating firm appointed for the procedure prepared the evaluation report that was sent to the Central Commission. This report contained the amount of damages within the limits of which the indemnities were granted.

On the basis of the evaluation report, the Central Commission proceeds either to issue the decision on the title of indemnity or to submit the case for reassessment.

If, for drawing up the report it is necessary to have a field assessment, the appointed evaluator summoned the persons entitled to receive compensation by registered letter with acknowledgment of receipt, showing the days and times when the work begins and continues. The convocation was handed over to the person entitled at least 5 days prior to the evaluation. When calculating the deadline, neither the day of the convocation nor the date set for the evaluation were counted. The acknowledgment of receipt was adjacent to the evaluator's work. The persons entitled to compensation were obliged to give the evaluator, at his request, any clarification about the subject of the work. They provided the evaluator with any documents that were able to provide him with information on the value of the real estate object of the work. On the date set for carrying out the evaluation and throughout the course of the specialized procedure, eligible applicants could be assisted by an evaluator elected and remunerated by them. If the evaluators had different opinions, the work had to encompass the motivated opinion of each. The evaluator's report was communicated to the Central Commission as well as to the eligible applicants. To the extent that the latter objected, the evaluator was obliged to respond to them. The objections formulated and the response to them drawn by the evaluator had to be communicated to the Central Commission.

Based on the assessment report, the Central Commission either issued the decision on the title of compensation or referred the case for reassessment.

Upon receipt of the files, the Central Commission proceeds to issue the decision for damages up to the amount of the registered/proposed damages. If, on the basis of the findings of the Secretariat of the Central Commission, the latter established that the immovable property for which, by decision/order or, as the case may be, by order, were recorded/proposed indemnities, can be returned, by motivated decision, according to art. 21 of Title VII of the law, the Central Commission proceeds to its restitution.

The decisions adopted by the Central Commission could be challenged with an appeal under the terms of the Law on administrative contentious no. 554/2004, in contradiction with the State, represented by the Central Commission for Settlement of Compensation. The appeal suspended the exercise the claimant's right of disposal over the title. Appeals were made in the records kept by the entity performing registry and storage functions for the Central Commission for Settlement of Compensation.

Compensation titles are certificates issued by the Central Commission for Settlement of Damages in the name and on behalf of the Romanian State, incorporating the rights of holders of debts to the Romanian State corresponding to the indemnities granted under this law and to be capitalized by their conversion into shares issued by the „Property" Fund and/or, as the case may be, depending on the option of the holder or the holders enrolled in them, by changing them against payment titles, within the limits and conditions stipulated in the present law. Indemnities cannot be sold, bought, warranted, or otherwise transferred, with onerous title or free of charge, except for their acquisition as inheritance. Deeds of titles alienation, with the exception of transmission as a result of inheritance, are subject to absolute nullity. Settlement titles are not units of other collective investment bodies (*AOPC*) and do not fall under the scope of Law no. 297/2004 regarding the capital market, as subsequently amended and supplemented, and the regulations issued by the National Securities Commission in its application.

The entity invested with the settlement of the notification is, as the case may be, the unit of account or the legal entity empowered by the law to resolve a notice about a property that is not in its patrimony (Authority for State Assets Recovery, Ministry of Public Finance, other central public or local authorities involved).

Evaluator is the natural or legal person with significant experience in the real estate evaluation field who knows, understands and can correctly implement recognized methods and techniques that are required to perform a credible assessment in accordance with International Standards on Evaluation, and who is a member of a professional national assessment association recognized as being of public utility as an independent evaluator;

Thus, Law no. 165/2013 regarding the completion of restitution of immovable properties process taken over abusively during the communist period repealed the provisions of Title VII of Law no. 247/2005 and instituted a new procedure for settling the indemnification files.

According to Title VII of Law no. 247/2005, the assessment of claims for equivalent repayment of immovable property, demolished, alienated or other real estate whose restitution is not possible, was the attribute of authorized assessors, randomly appointed by the Central Commission for Settlement of Compensation.

After the entry into force of this normative act (Law no. 247/2005) the consideration of the claims in the equivalent could no longer be established during the administrative procedure provided by Law no. 10/2001, but following the procedure provided by the Law no. 247/2005, Title VII, and after its abrogation, following the procedure provided by the Law no. 165/2013.

Subsequently, by Law no. 165/2013 published in the Official Journal no. 278/17.05.2013 established the National Commission for Compensation of Real Estates, which took over the tasks of the Central Commission for Compensation and works until the restitution process is completed.

According to the provisions of art. 17 of Law no. 165/2013, in order to complete the restitution or, as the case may be, the equivalent of immovable property abusively taken over during the communist regime, the National Commission for Compensation of Buildings disposes „the issuing of the compensation decision" taking over the duties of CCSD[4] (art. 18 paragraph 3 of the Law no. 165/2013).

Previously, „The regime for the establishment and payment of damages related to abusively taken immovable properties" was governed by Title VII of Law no. 247/2005 so that when the Law no. 165/2013 came into force, the restitution process was ongoing, the files on

[4] CCSD - Central Commission for Settlement of Compensation.

individual refund applications registered with the Central Commission for Settlement of Compensation, although not yet completed, being at a certain stage of solving.

For this reason, the legislator considered it necessary to adopt the transitional provisions contained in Chapter VI of Law no. 165/2013, which refers to the completion of the files according to their status, provisions according to which it will continue with the issuance of the Indemnity Titles (and not of the Compensation Decisions by points) in the following situations:

– the files approved by the Central Commission for Settlement of Damages, before the entry into force of Law no. 165/2013;

– the files in which the amount of the indemnities had already been established by final and irrevocable decisions at the date of entry into force of this law;

– the files in which the obligation to issue Indemnification Titles had been established by final and irrevocable court decisions at the time the law enters into force.

Art. 41 from Law no. 165/2013: "(1) The payment of sums of money representing damages in the files approved by the Central Commission for Settlement of Compensation before the entry into force of this law, as well as the amounts established by court decisions, which are final and irrevocable at the date of entry into force of this law, shall be made within 5 years, in equal annual installments, from 1 January 2014.

(3) In order to fulfil the obligations, set out in paragraph (1), the National Commission issues indemnity titles by applying the specific procedure of the Central Commission for Settlement of Compensation.

(4) The payment title shall be issued by the National Authority for Restitution of Properties in accordance with paragraphs (1) and (2) and shall be paid by the Ministry of Public Finance no later than 180 days after its issuance.

(5) Obligations regarding the issuance of titles established by final and irrevocable judgments at the date of entry into force of this law shall be performed according to art. 21."

In the case of the above three hypotheses, the provisions of article 41 (3) require the National Commission to issue Indemnification Titles (not Settlement Decisions), by applying the specific procedure of the Central Commission for Settlement of Compensation (regulated by Title VII of Law no. 247/2005).

According to the new law no. 165/2013, the procedure for settling the damages files established under Law no. 10/2001 is carried out according to its provisions as expressly stipulated in article 4: „*The provisions of the present law apply to the requests formulated and (...) pending the entry into force of the law, the causes (...) pending before the courts pending before the suspended CEDO*."

According to article 17, paragraph 1, letter a. of the normative act cited above, the new Commission (National Commission for Compensation of Real Estates – CNCI) validates/invalidates wholly or partly, the decisions issued by the entities invested by the law containing the proposal for granting remedial measures.

Furthermore, according to art. 21 paragraph 6 of Law no. 165/2013: „*The evaluation of the building is made taking into account the technical characteristics of the building and the use category at the date of abusive takeover and is expressed in points*."

Thus, art. 4 of the Law no. 165/2013 provides three assumptions: „*the situation of the requests formulated and submitted in due time to the entities invested by the law, not solved at the enforcement of the law*."

This hypothesis presents the situation in which the notification provided for by Law no. 10/2001 was submitted within the timeframe for obtaining the restitution or the compensatory measures in equivalent, but this notification was not solved by issuing a provision for the granting of remedies or to reject them by the City Hall.

The entity owning of the immovable property requested by notification or the entity invested with the resolution of the notification, as the case may be, has the obligation to issue a decision/order by which it resolves the notification filed under Law no. 10/2001. This institution, on the basis of the supporting documents submitted by the person claiming to be entitled and on the basis of an analysis of the factual and legal circumstances of the situation relied on in the notification, will issue a provision/decision by which: either rejects the restitution of the immovable property and compensatory measures are established in the form of points, or the notification is rejected because the person entitled did not prove the abusive taking over, the right of ownership and the quality of the heir or did not have the status of a person entitled under the law.

In this case, the file was not finalized by the entity entitled by law with the settlement of the notification, respectively the City Hall, and the Prefect's check-up and legality notification was not submitted to the

SCNCI (Secretariat of the National Commission for Compensation of Real Estate, which took over the CCSD's tasks) to go through the administrative procedure provided by the Law no. 165/2013.

The second hypothesis under article 4 deals with the situation of the applications in the judicial procedure at the time of the entry into force of Law no. 165/2013 unresolved by the issuing of a court decision, whereby the court determines the status of entitled person, the extent of the right or the amount for which this compensation is to be granted.

According to article 17, paragraph 1, letter a. of the law, the new Commission validates/invalidates the decisions issued by the entities invested by the law with the proposal for granting the remedies.

As it results from the reading of article 41 in the Law no. 165/2013, as an exception to the general rule of issuing of point-based compensation decisions, indemnity titles are to be granted in the specific procedure to the Central Commission for Settlement of Compensation in two situations: when, prior to the entry into force of Law no. 165/2013, the Central Commission approved the compensation file, establishing implicitly the amount of money to be paid or when, by court decisions, which were definitive and irrevocable at the date of entry into force of Law no. 165/2013 the amounts to be paid as compensation were set.

Thus, from the above-mentioned facts it results that the main amendment brought by the Law no. 165/2013 to Title VII is that, according to the provisions of art. 1 paragraph 3, the only reparatory measure in equivalent to be granted is the point compensation, and CNCI issues a decision of compensation following the application of the notary grid at the date of entry into force of this law by the Secretariat of the National Commission, except for the two situations mentioned above, in which compensation is granted to entitled persons.

Thus, the title of compensation was replaced by compensatory measures of points granted after the administrative procedure.

The second amendment concerns the evaluation of the building which is the subject of the decision. As we emphasised above, under Title VII of Law no. 247/2005, the evaluation of immovable properties was the attribute of the authorized SCCSD evaluators. Law no. 165/2013 made a series of amendments by introducing art. 21 paragraph 6.

According to the provisions of article 21 paragraph 6: „*The evaluation of the building shall be made taking into account the technical characteristics of the building and the category of use at the date of the abusive takeover and shall be expressed in points*."

In this respect, Constitutional Court of Romania also ruled in its Decision no. 715/2014, which stated: „*regarding the evaluation of the building by applying the notary grid valid at the date of entry into force of Law no. 165/2013, as stipulated by art. 21 paragraph 6, the Court has also held that this is the way in which the legislator has understood to transpose into national law the requirements imposed by the European Court of Human Rights*."

In the continuation of the same statement, the Constitutional Court held that: „*the purpose of the legislator was to introduce, through the new normative act, a unitary and predictable property evaluation system, so that immovable property subject to unresolved restitution claims by reference to the same system*, respectively by applying notary grids at the time of the entry into force of the new law. The Constitutional Court has admitted that, through this new calculation system, it is possible that the value of the indemnities granted in the form of points is lower than that resulting from the application of the previous legislation in the matter – Law no. 10/2001 on the legal status of the immovable properties abusive and Law no. 247/2005 regarding the determination of the market value of the real estate from the date of the notification, by the application of the international evaluation standards. (...)"

However, as stated in the Decision no. 269 of 7 May 2014 of the Constitutional Court, *the legislator has a wide margin of appreciation in determining the most appropriate ways of compensating for the abuses of the communist regime, and the measures adopted must respect the principle of proportionality and therefore be appropriate, reasonable, and offering balance between the individual and the general interest of society*. Thus, if among the examples given by the European Court of Human Rights in the Pilot Decision of 12 October 2010 aimed at making the Internal Restitution Mechanism more efficient, including the capping of damages (paragraph 235), the Romanian State opted in within the margin of discretion at its disposal, to grant full compensation, but only modifying the assessment benchmarking system.

Finally, the Constitutional Court stressed that this measure is not likely to affect the property right in its substance because it does not jeopardize its existence and its legal effects but only affects the amount of money obtained through the capitalization of the right to property

within the permissible limits of Article 44 of the Constitution.[5] Council Decision 618/4 November 2014 of the Constitutional Court.

According to the afore mentioned decision: „(...) Obligation to issue indemnities established by final and irrevocable judgments at the date of the entry into force of Law no. 165/2013 to be executed under the new law, this being precisely the concrete expression *the tempus regit actum* principle and the principle of the immediate application of the new law. *The situation of the author of the exception, who is the beneficiary of a final and irrevocable court decision, which sets out the obligation of the respondent public authority to make or issue a decision which falls within its legal competence, is clearly different from the appropriate one which by the same court sentence has been set the amount due for damages, as a result of the evaluation carried out under Law no. 247/2005*."

The last hypothesis corresponds to that regulated separately by the legislator, in the second sentence of article 41 (1) of Law no. 165/2013, namely: „*the files in which the amount of the compensation had already been established by final and irrevocable decisions at the date of entry into force of Law no. 165/2013*", situation in which the new law only applies to the way of payment of the previously established amounts of money. *Therefore, if the assessment of the value of the building was not performed and the monetary amount was determined by a final and irrevocable court decision on the date of the entry into force of Law no. 165/2013, it is natural, without being obviously discriminatory, that these operations shall be related to the act in force at the time when they occur***"**, that means the assessment shall be made on the basis of the provisions of art. 21 paragraph 6 of the Law no. 165/2013, „*The evaluation of the building shall be done considering the technical characteristics of the building and the category to be used on the date of abusive takeover and is expressed in points*" and the amount of the damages to be made after the classification on the notaries public grid.

The Constitutional Court has stated in its jurisprudence that the observance of the principle of equality of rights established by the provisions of article 16 paragraph 1 of the fundamental law, presupposes taking into account the treatment that the law provides for those to whom

[5] Decision No. 618 of 4 November 2014 was published in the Official Journal of Romania, Part I, no. 75 of January 28, 2015.

it applies, during the period when the regulations it is in force and not in relation to the effects produced by previous legal regulations[6].

Article 41 paragraph 1 of Law no. 165/2013 represents a case of prolonged activity of the old civil law under the conditions of the adoption of the new law which applies exceptionally only to the regulated situations, where there is an irrevocable court decision which determines the value of the indemnities and in the case of files approved by the Central Commission for Settlement of Compensation before the entry into force of Law no. 165/2013.

Another aspect that requires clarification from our point of view in order to better understand art. 41 of the mentioned normative act is the „approved file."

Concerning the notion of „*approved file*", the Constitutional Court ruled on the occasion of settling the exception of the unconstitutionality of the provisions of art. 17, art. 21 paragraph 6 and 8 of the Law no. 165/2013, *that in the case no amounts of money due to damages by court decisions were definitive and irrevocable at the date of the entry into force of Law no. 165/2013 – the hypothesis of art. 41 paragraph 1, second hypothesis – that there is no indemnity issued on behalf of the claimants; and nor that this file corresponds to the state of „file approved by the Central Commission for the Settlement of Compensation" referred to in article 41, paragraph 1, first hypothesis. Thus, it is clear from the documents submitted to the Constitutional Court file that „the approved file means those files that have undergone all the operations prior to the actual issue of the decision containing the title of compensation, but without having issued the title of indemnity in the sense that it has not been drafted the decision on compensation, as an administrative act signed by the Chairman of the Central Commission for Settlement of Compensation. However, no documents or other evidence has been filed among the documents in the file so that to result that (...) the file in question was approved by voting at a Central Committee meeting, including the amount of money set as compensation by the evaluation report."*[7]

[6] See in this respect Decisions No 20 of 2 February 2000, published in the Official Journal of Romania, Part I, no. 72 of 18 February 2000, no. 820 of 9 November 2006, published in the Official Journal of Romania, Part I, no. 39 of January 18, 2007 and no. 1.541 of November 25, 2010, published in the Official Journal of Romania, Part I no. 30 of 13 January 2011.

[7] Decision CCR no. 182/2015.

For the situation where there is a final and irrevocable court decision for the issue of indemnities, there is the provision contained in article 41 paragraph 5 of Law no. 165/2013, which refers to the execution according to art. 21 of the same law. This article describes the procedure followed by the National Commission for the issuing the compensation decision by points for the immovable property taken over.

Thus, there are two ways of solving the indemnification files based on a final and irrevocable court decision, provided by art. 41 of the Law no. 165/2013:

1) in paragraph 1, final hypothesis in conjunction with paragraph 3: court decisions which establish concrete amounts of money representing damages to be paid by issuing the indemnity title.

It cannot be accepted that the courts could not determine the amount of payment because the evaluation of the property exceeds the jurisdiction of the court, and this rests solely with the evaluation of expert evaluators approved by the Central Commission for Settlement of Compensation.

By Decision No. XX of 19 March 2007, issued by the High Court of Cassation and Justice in the interest of the law, pursuant to the provisions of article 26 paragraph 3 of Law no. 10/2001, republished, it was established that the court has jurisdiction to settle not only the appeal against the decision or the provision rejecting the application requesting the restitution of the abusively taken property, but also the action of the entitled person in the case of the unjustified refusal of the entity to respond to the notification.

2) in paragraph 5: the court decisions establishing the obligation to issue titles of

damages to be executed according to the art. 21 of the same law, respectively by issuing the compensation decision by points for the immovable property taken over.

The Constitutional Court, by Decision no. 686/2014 declared unconstitutional the provisions of art. 21, paragraphs 5 and 8 of the Law no. 165/2013, insofar as it would apply to the decisions/provisions of the entities invested in the settlement of the notifications issued in the execution of some court decisions by which the courts have irrevocably/definitively pronounced on the status of entitled persons and

the extent of the property right. These provisions of article 21 (5) and (8) relate to the need for additional verifications by the National Commission for Compensation of Buildings of the documents proving the right of indemnity, respectively to the validation of the decision of the entity invested by the law to propose the compensation.

Another aspect on which we would like to focus is that relating to the procedural quality of the National Authority for Restitution of Ownership (ANRP) regarding the issuing of the compensation title.

The doctrine defines the procedural quality as the existence of an identity between the person making the request and the person who is the right holder in the legal relation to the court (active legal trial quality), and, on the other hand, between the person against whom the claim is made and the person in charge in the same legal relationship. In the case of legal situations for which the judicial route is mandatory, an active procedural quality has the one that can prevail in the interest of their realization, and the procedural passive quality has the one to which the respective interest may manifest.[8]

In the matter of restitution, the procedural quality is given by the powers conferred by the law to each entity involved in the process of restitution of the buildings, as immovable properties or as equivalent, abusively taken over during the communist regime.

It is important to note that the interdependence between the two public entities, namely the National Commission for Compensation of Real Estates and the National Authority for Restitution of Properties, regulated by art. 17 par. 2, 4 and 5 of the Law no. 165/2013 is relevant only structurally, organizationally, in the sense that ANRP (National Authority for Restitution of Properties) ensures the organization and functioning of the Secretariat of the National Commission, but this does not, however, confer passive procedural quality.

Under the previous law (Law no. 247/2005), ANRP (National Authority for Restitution of Properties) has ensured the organization and functioning of the Secretariat of the Central Commission for Compensation, and now, as stated above, it provides the Secretariat of the National Commission for Compensation of Buildings.

[8] Mihaela Tăbârcă, „*Civil Procedure Law - volume I - General Theory*", Universul Juridic Publishing House, Bucharest 2013, pg.182, apud Bucharest Court of Appeal, Civil Section III and for cases with minors and family, Decision no. 2199/2006, Collection of Judicial Practice in Civil Matters for 2006, pg.87-88.

From the point of view of the public institution powers which may actually be obliged to give, to do or not to do anything in administrative litigation, as we have seen above, the institution with prerogatives in matter is not the National Authority for Restitution of Properties at this stage, as it does not issue compensation decisions/partial validation/ invalidation/indemnity titles.

Taking into consideration the attributions attributed to ANRP (National Authority for Restitution of Properties) by art. 2 of GD no. 572/2013 on the organization and functioning of the National Authority for Restitution of Property, it can easily be observed that among them there is no legal prerogative to confer a passive procedural quality.

Article 2 of GD no. 572/2013 stipulates the main attributions of ANRP, namely regarding the application of Law no. 10/2001, in that ANRP provides methodological support and guidance to the local and central public administration authorities as well as to the other legal persons holding immovable property subject to the refund according to Law no. 10/2001, republished.

As stated above, the fact that ANRP ensures the organization and functioning of the mentioned Secretariat does not confer it a passive quality of law, as only the National Commission for Compensation of Real Estates validates/invalidates all or part of the decisions issued by the entities invested by the law, which contain the proposal for granting reparation measures under the provisions of Law no. 165/2013.

Regarding the passive quality of ANRP, in the plenary meeting of the High Court of Cassation and Justice, during the plenary session of the High Court of Cassation and Justice dated 15.02.2010 it was decided on the principle of unification of the judicial practice, which stated that „ANRP does not has a passive quality in litigations having as object the issuing of the decision representing the title of compensation under the conditions of Title VII of the Law no. 247/2005."

In this context, we specify that according to Law no. 165/2013, the National Commission for Compensation of Real Estates, which took over the tasks of the Central Commission for Settlement of Compensations, was set up.

Pursuant to the provisions of article 17 paragraph 1 letters a and b. As well as article 21 of Law no. 165/2013, the procedure for settling the indemnity file shall be finalized by the validation or invalidation wholly or partly by the National Commission of the decision of the entity

invested by the law with the settlement of the notification (respectively the City Hall). Only if the file is validated by CNCI, it issues a decision to compensate by points for the immovable property abusively taken over (art. 21 par. 9 of the Law no. 165/2013). Thus, ANRP does not evaluate the real estate according to the notary grid and does not issue the compensation decisions but only the National Commission for Compensation of Real Estates is able to do it.

The existing legislation on the restitution of property, the vagueness of legal texts in this matter, the lack of legal regulation, their repeated amendment finally led to the adoption of non-unitary solutions with a direct impact on the defendant entitled to restitution and on the judge most often accused of delaying, inconsistency and bad faith.

The solutions of the substantive courts, based on the provisions of the restitution laws in the form existing at the date of the pronouncement, have radically changed as a result of the adoption of the modifying legal regulations, which are immediately applicable. At the same time, the incoherence of some texts has generated different interpretations by those called to apply the law, leading to different solutions in identical situations.

In this context, Law no. 165/2013 ended the inaccuracies of previous legislation, attempting to unify jurisprudence in the matter of restitution of abusively taken property and to complete the process of restitution to the entitled persons.

REFERENCES

1. F.A. Baias, B. Dumitrache, M. Nicolae, *Regimul juridic al imobilelor preluate abuziv. Legea nr.10/2001 comentată şi adnotată*, Ed. Rosetti, Bucureşti 2002.
2. E. Chelaru, *Legea nr. 10/2001 privind regimul juridic al imobielor preluate în mod abuziv în perioada 6 martie 1945-22 decembrie 1989, comentată şi adnotată*, Ed. All Beck, Bucureşti 2001.
3. M. Tăbârcă, *Drept procesual civil. Vol. I. Teoria generală*, Ed. Universul Juridic, Bucureşti 2013, p. 182.
4. Decizia nr.618 a Curții Constituționale din 4 noiembrie 2014 publicată în Monitorul Oficial al României, Partea I, nr.75 din 28 ianuarie 2015.
5. Decizia Curții Constituționale nr.182/2015.

GENERAL CONSIDERATIONS CONCERNING THE NOTION, THE ROLE AND DEVELOPMENT OF THE CONTRACT AND THE LIMITS OF FREEDOM TO CONTRACT

Andreea Gabriela RĂDUCANU (CADAR)[*]

ABSTRACT
Although the current Civil Code explicitly governs adhesion contracts, framework contracts and consumer contracts, and court practice permits forced or compulsory contracts, we consider that the birth, modification or termination of contractual relationships is and must take place freely.
Currently, we consider that the intervention of the legislator in certain contracts is necessary in order to maintain the balance between the services of the contracting parties or to avoid certain negative consequences which would have a particularly serious impact on the entire population, but this intervention must be done in such a way as to respect the freedom manifestation of will.

KEYWORDS: *contract, convention, freedom to contract, public order, good morals.*

1. The notion of contract

According to art. 1166 Civil Code[1] the contract is „*the agreement of will between two or more persons with the intention of creating, modifying, transmitting or extinguishing a legal relationship*".

The old Civil Code[2] defined the contract in art. 942 as being „*the agreement between two or more persons to constitute or extinguish a legal relationship between them*".

---

[*] *Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

[1] The Civil Code (Law No. 287 of July 17, 2009) was published in the Official Gazette of Romania, Part I, no. 511 of 24 July 2009. It entered into force on 1 October 2011, according to art. 220 of the Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of 10 June 2011. The text of the Civil Code in force is that contained in Law no. 287/2009 rectified in the Official Gazette of Romania, Part I, no. 427 of 17 June 2011, as amended and supplemented by Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code.

[2] The Old Civil Code was decreed on November 26, 1864, promulgated on December 4, 1864, and implemented on December 1, 1865.

By comparing the two texts, we note that the definition given by the current Civil Code is complete, defining the contract as an act of will and listing all the effects that a contract can produce, namely: to create, modify, transmit or extinguish a legal relationship.

However, the current Civil Code does not distinguish between convention and contract and thus does not solve controversies in the doctrine regarding the relationship between them. Thus, while the old Civil Code uses alternatively the notion of contract and convention, the current Civil Code only uses the notion of a contract without making a distinction between the two and without denying their synonymy.

2. The role and development of the contract

The contract is one of the fundamental legal institutions of civil law. It emerged from the needs of exchange of activities and, above all, of commodity exchange and was imposed in society both in the field of circulation and production[3].

The analysis of the contract's evolution – as a source of obligations – aims to develop the intervention of the state in economic life. In this regard, we mention that in the modern period (the end of the eighteenth century and the nineteenth century) the economic activity was almost entirely left to the will of the private initiative.

State intervention on contracts was confined to defining the general principles of contracts, the rules of incorporation and operation of commercial companies, the organization of various institutions with a particular interest in economic life.

During this period, the state, as a rule, does not interfere in economic processes.

At that time, the spontaneous production mechanism, based on the free play of supply and demand, on the unrestricted transfer of capital from one branch to another, doubled by the corrective action of the crises, was enough to ensure the necessary balance and increase production.

Hence the conception of the need for free action of economic laws, as an economic equilibrium factor.

[3] Also see, M. Bojincă, *Romanian civil law. General Theory of Obligations*, 2nd Edition revised and completed, Publishing House Studii Europene, Târgu Jiu, 2002, p. 56.

Against the backdrop of the economic conditions specific to the period of economic liberalism, an adequate conception of the contract has developed in Civil Codes in the sense that natural and legal persons have the right to contract freely. Thus, the principle of contractual freedom was established.

The legal doctrine[4] explained the principle of contractual freedom as a consequence of autonomy of will[5], which has led some authors to assert the existence of a contract crisis, at least the contract as it was previously conceived. This defeat of the concept of contractual freedom manifested itself in two main directions:

a) the development of adhesion contracts to the detriment of traditional ones, a process that requires a new system of concluding them. Thus, instead of the lengthy and detailed negotiations that traditional contracts carry, in the new situation a party proposes to the other, in block, a set of clauses, which the party wishing to conclude the contract cannot change, but has only the latitude to say „yes" or „no";

b) the ever-increasing intervention of the State in the contractual field through mandatory rules. This is what the legal literature called "contractual dirigism" and which is felt on multiple and varied plans out of which we highlight four:

– the widening of the notion of public order by enriching with new sides, taking into account the intervention of the state in the economy and, in general, in the social life. Initially, the notion of public order is

[4] Also see, I. Adam, *Civil law. Obligations, Contract in NCC regulation*, Publishing house C.H. Beck, Bucharest, 2011, p. 19 and following.

[5] The theory of autonomy of will was formulated at the end of the eighteenth century and the beginning of the nineteenth century by the Frenchman Charles Dounoulin, which had as a premise the need to find solutions to conflicts of interprovincial laws that had arisen in France. For the first time, the expression "autonomy of will" was used in 1883 in a private international law university course, published in Geneva, after which it finally entered the legal vocabulary. This theory affirms the Kantian ideas, which establish the individual's (person's) prominence over the public power. The autonomy of will is the transposition of this statement into the realm of social life, where the individual is considered the master of his commitments. The basis of the entire social edifice is in the individual. Nothing can be imposed upon him if he does not want because man is free by nature. As such, the limitation or limitation of human freedom lies solely in its will. This is explained by the fact that when people assume contractual obligations they limit their freedom by their own will.

In this conception, the contract is an act of pure and exclusive will, and the will of the individual is everything. Also see, I. Adam, *op. cit.*, p. 19.

limited to the political and moral domain, to the organization of the state, family and individual freedoms. Today, this concept has been enriched with economic issues. In the literature of the Western states, the notion of "social public order" is also included, which includes those measures taken by the state in connection with the regulation of labour, rental, real estate and other contracts;

– the predetermination by law of the clauses to be included in some contracts, which limits the will manifestation of the parties. Thus, in certain areas such as transport, insurance, construction, rental and provision of services, some clauses which are considered mandatory are established by law or by way of jurisprudential interpretation;

– the emergence of so-called "forced contracts" whose conclusion is obligatory under certain conditions. Thus, the law imposes an obligation on some people to conclude a specific contract. It is the case of the obligation to conclude contracts for undertakings that have the monopoly of benefits, or the compulsory extension – in certain circumstances – of the rental contracts for dwellings;

– the manifestation of the tendency of restricting the binding force of the contract, either by permitting its non-execution, or by the possibility of its execution on terms other than those initially established by the parties.

State intervention in the field of contracts has been qualified as an expression of the "socialization tendencies of law", the state being conceived as an arbiter in the service of "social justice"[6].

It is correctly stated that the inaccuracy of one of the components of the autonomy of will concept was preserved, according to which everything that is contractual is considered to be just and legitimate[7].

This statement is based on the righteous equality of contractors, while in reality the parties are often unequal as intelligence, or as economic or social power.

[6] Also see, L. Pop, I.-F. Popa, S.I. Vidu, *Elementary civil law treaty. Obligations under the new Civil Code*, Editura Universul Juridic, Bucharest, 2012, p. 63.

[7] The philosopher Fouille stated: „*Qui dit contractuel, dit juste*" adică, „*Whoever says contractually, says right*". Also see, M. Bojincă, *op. cit.*, p. 60.

3. Limits of freedom to contract

3.1. Preliminaries

Freedom to contract is part of the content of the civilian capacity of natural and legal persons[8], being acknowledged at the legislative level. Thus, the right to conclude legal acts is established and recognized by art. 11 Civil Code which states that: "*It is not possible to derogate by unilateral conventions or legal acts from laws that concern public order or morality*".

Furthermore, the current Civil Code regulates expressly in Art. 1169 the principle of the freedom to contract, stipulating that: "*The parties are free to conclude any contracts and to determine their content, within the limits imposed by law, public order and good morals*".

The principle of contractual freedom complements the principle of binding force of the contract provided by art. 1270 par. (1) Civil Code in the wording: "*The contract concluded in a valid manner has the force of law between the Contracting Parties*".

It follows from the combined interpretation of the two legal texts that the freedom of contract is recognized by all subjects of civil law, subject to the following general limits: public order and good morals.

3.2. Public order – the limit of freedom to contract

Public order is made up of all the regulations that make up public law[9] and which necessarily have to be respected by all individuals. It encompasses all the imperative provisions of public law and private law that defend the institutions and core values of society and ensure the development of the market economy and the social protection of all persons.

With the progress of society, this notion has seen a considerable development, with both a European side and a national one.

Thus, at the level of the European Union, many imperative rules have been adopted which establish the most important freedoms, but also the derogations or restrictions on these principles imposed by European public order. By way of example, we mention: freedom of movement of

[8] I. Adam, *op. cit.*, p. 28.
[9] Also see, I. Adam, *op. cit.*, p. 29; L. Pop, I.-F. Popa, S.I. Vidu, *op. cit.*, p. 65.

goods, freedom of labour, freedom of movement and establishment of persons in the European space, freedom of services and freedom of movement of capital.

The European regulation of each of these liberties is accompanied by reservations which provide that Member States may make exceptions or restrictions imposed by national public policy.

Consequently, European public order is a legal instrument which protects the interests of the national community of a Member State of the European Union against the violations which may result from the play of those freedoms. Derogations or restrictions to these principles form an integral part of the concept of "national public order" and are imposed by a real and sufficiently serious threat affecting a fundamental interest of society.

3.3. Good morals – a limit of freedom to contract

Good morals designate all the rules of conduct that have formed in the community consciousness and whose observance has necessarily been imposed by a long experience and practice in order to achieve the general interests of a given society[10].

In defining good morals, it is necessary to start from the origin of the notion that includes two sides, namely: the religious side and the empirical side.

The religious side addresses the moral aspects of Christian dogma. Thus, morality is regarded as a virtue that plays an important role in educating the individual on how to perceive and experience situations. Morality comes to the aid of the individual, helping him to internalize certain feelings without materializing them in negative conduct that could harm the one who slandered him. Thus, according to Christian morality, it is inhuman to repay evil with evil. More specifically, morality has the role of tempering the vile nature of man and instilling in his conscience the obligation to behave towards others as to himself.

At the same time, morality also has a social dimension that incorporates public morality and personal morality.

Public morality is made up of all the precepts accepted by a given human community as rules of cohabitation and behaviour, and personal

[10] See, I. Adam, *op. cit.*, p. 33; L. Pop, I.-F. Popa, S.I. Vidu, *op. cit.*, p. 69.

morality consists of the convictions of each individual and his behaviour in accordance with these convictions.

Social morality consists of man's attitudes or behaviour through which he or she expresses his inner morality. We cannot ignore the fact that the individual leads his existence into society, in a system of correlations that directly and diversifies him with his fellow men. By structuring his interests and establishing his strategy of action, the individual enters into various social ties. For the purpose of cohabiting of all individuals, they must subordinate to pre-configured purposes in a system of principles and norms.

The empirical side regards those rules of a sociological nature, viewed as natural or acquired through tradition and education of persons and communities, about what is good and what is evil.

The legal doctrine names these rules as habits or customs[11]. In a synthetic formula, we define the habit as a rule of conduct, established in human cohabitation for a long time. Its application is generally achieved through the consensus of the members of the community, in accordance with the belief in the fairness of its regulations. As social norms, habits are patterns of conduct that a social group imposes on its members. The habit is generally embodied in oral formulas, and its authority is based on the fact that it is the result of an old and indisputable practice.

We recognize that the expression "good morals" is booming. It encompasses a series of rules dictated by morality, habits and uses, considered by society as fundamental principles.

Determining or establishing the content of "good morals" is a legal operation for the judges of the merits of the case, who are charged with determining in concrete terms whether a particular conduct conforms to good morals or not.

In the special literature[12], has rightly been noticed that these milestones, due to the progress of society, are constantly changing.

[11] I. Adam, *op. cit.*, p. 34.
[12] *Idem*, p. 35.

BIBLIOGRAPHY

1. Adam, Ioan, *Civil Law, Obligations, The Contract in NCC Regulation N.C.C.*, Publishing house C.H. Beck, Bucharest, 2011.
2. Bojinca, Moise, *Romanian Civil Law, General Theory of Obligations, Second Edition, Revised and Completed,* Publishing House Studii Europene, Tg Jiu, 2002.
3. Pop Liviu, Popa Stelian, Vidu Ioan, *Elementary civil law treaty. Obligations under the New Civil Code,* Publishing house Universul Juridic, Bucharest, 2012.

THE ROMANIAN LEGAL SYSTEM FOR THE PROTECTION OF HUMAN TRAFFICKING VICTIMS

Ionica SARKIS*

ABSTRACT

Today, nearly two decades after the commitment to maximize its efforts in the fight against human trafficking, Romania's concrete actions to prevent and combat this crime, but especially the protection and assistance of the victims of this scourge, are still below the international minimum standard. This article aims at highlighting the successes – both small and great – achieved but also the remaining challenges in protecting men, women and children who have fallen victim to this atrocious crime. This article will also analyse the progress that our country has made in the fight against this scourge, and in particular the way in which it has fulfilled its obligations at European level in the field of victim protection.

KEYWORDS: *trafficking in human beings, victim protection, national legislation.*

1. Introduction

Trafficking in human beings is both a matter that concerns human rights and organized crime, being an internationally recognized crime. In the last two decades, with the increase of mobility among the European Union (EU) states, this criminal phenomenon has become a neuralgic point on the political and legal agenda of more and more governments. Conceptually, trafficking in human beings involves a series of coercive means, such as threats, use of force, fraud, coercion or deception. The offense involves a series of distinct, but interdependent actions, made for the purpose of the exploitation of persons – exploitation that takes place over a longer period of time and not just as a singular event.

As evidenced by the many national and international profile analyses or assessments made in recent years, Romania is – as regards the trafficking phenomenon – a source, transit and destination country for

* *Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

trafficked victims – men, women or children – either for sexual exploitation or for forced labour. As a source country, victims are trafficked from Romania to Germany, Italy, Greece, Spain, the Czech Republic or the United Kingdom for sexual exploitation, begging, or forced labour in various sectors such as agriculture, construction and hotel, domestic, and other services.

In Belgium, Cyprus, Denmark, the Netherlands, Poland, Portugal, Slovakia, Sweden, Turkey or Hungary, Romanian trafficking includes both sexual exploitation and forced labour[1].

Also, Romania is a destination country for a small number of foreign victims, especially Polish and Moldovan women, as well as forced labour victims from Bangladesh or Serbia[2]. Within the state borders, Romanian women, children, and men are trafficked for sexual exploitation, forced labour, forced begging – victims in this respect being especially children or people with disabilities – but also for committing minor offenses, such as small value theft or pick pocketing[3].

A strong role in the proliferation of trafficking in human beings is attributed to criminal organizations. These organized crime groups exploit market opportunities for cheap labour or sexual services – which are the main forms of exploitation, taking advantage of vulnerable social segments such as women or children. TFU is a crime that generates considerable profits and exposes those who practice it to a relatively low risk due to weak control measures and too soft sanctions. For Romania, the groups of traffickers recruiting and exploiting victims of Romanian origin are constituted of Romanian citizens, often known people or even relatives of the victims.

The official data on the prosecution and conviction of perpetrators for the year 2016 revealed that the judicial bodies opened 864 new trafficking files, compared with 858 in 2015 and the prosecutors charged 358 suspects in trafficking cases with 122 less than in 2015. For the same year, 472 people were convicted for trafficking crimes, 141 more than in 2015. Of these, 78% were sentenced to imprisonment – not considering

[1] US Department of State, *Trafficking in Persons Report 2017*, June 2017, p. 43, https://www.state.gov/documents/organization/271339.pdf, accessed on 5 November 2018.

[2] *Ibidem*, p. 44.

[3] *Ibidem*.

non-prison sentences or educational measures – compared with 68% in 2015[4].

With regard to victim protection, over the last two years, the Romanian Government has managed to maintain the minimum standards imposed. For the year 2017, 757 victims were identified at national level, compared to 880 in 2016. Of these, 47% were children, 78% were women, and 68% were trafficked for sexual exploitation[5]. Approximately 42% – i.e. 314 of the victims, including 47 repatriated victims – received assistance from public institutions and NGOs for rehabilitation[6].

In the next sections of the article, we will try to analyse the way in which the Romanian public institutions have regulated the issue of the protection of victims of trafficking in human beings under the national legislation. Thus, we are of the opinion that assistance, rehabilitation and protection for trafficking in human beings victims is an essential element of the relevant legislation, given the very brutal nature of this crime and the harmful effects it has on those who fall victim to it. Although we do not intend to make an exhaustive overview of the legislation governing the problem of trafficking in human beings, we consider useful to make a brief overview of the national normative system that regulates the issue of victim protection.

2. Main legal instruments concerning the protection of human trafficking victims

Over the years, Romania has tried to align with the international and regional standards in preventing and combating trafficking in human beings through the adoption of effective regulatory documents in the field. The goal was to achieve effective results in reducing trafficking in human beings and, ultimately, in eradicating this scourge.

From an international point of view, Romania ratified all the relevant legal instruments in the field of human trafficking. Each of these legal instruments on combating trafficking in human beings provides a set of specific provisions both in the field of preventing and combating this

[4] *Ibidem*.

[5] National Agency Against Trafficking in Persons, *Short Review of Trafficking in Persons in 2017 – A Victim Perspective*, 15 March 2017, http://anitp.mai.gov.ro/analiza-succinta-privind-traficul-de-persoane-in-2017-perspectiva-victimologica/, accessed on 5 November 2018.

[6] *Ibidem*.

crime, and in the protection and assistance of victims. Rising to this initiative, the Romanian Government has become an international partner of organizations such as the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe (EC) and the European Union in protecting human freedom and dignity, ratifying treaties, documents and specific statements in the fight against trafficking. Thus, Romania signed the Universal Declaration of Human Rights of 1948[7], the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[8], the 2000 UN Convention against Transnational Organized Crime[9], together with the Additional Protocols to the Convention[10]. Particularly important is the Action Plan to Combat Trafficking in Human Beings, adopted in July 2003[11] by the OSCE, as it was the legal basis for the first concrete actions against trafficking in human beings adopted by Romania.

Also, regional treaties and instruments to which Romania is a party have led to the adaptation of the national legislation to common norms and standards, but also to specific methods and procedures for the protection of victims. This created the premises for national legislation and policies to reach a common European standard. Among these, we mention Recommendation no. R (2000)11 of the Committee of Ministers to Member States on action against trafficking in human beings for the

[7] *Universal Declaration of Human Rights,* Paris, 10 December 1948, http://www.un.org/en/universal-declaration-human-rights/, accessed on 5 November 2018.

[8] *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, http://www.ohchr.org/EN/ProfessionalInterest/Pages/TrafficInPersons.aspx, accessed on 5 November 2018.

[9] *United Nations Convention against Transnational Organized Crime,* 15 November 2000, https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html, accessed on 5 November 2018.

[10] *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,* 15 November 2000, http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx, accessed on 5 November 2018. *United Nations Protocol against Smuggling of Migrants on the Ground, Sea and Air,* 15 November 2000, https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf, accessed on 5 November 2018.

[11] Organization for Security and Co-operation in Europe, Permanent Council, *Decision No. 557 OSCE Action Plan to combat Trafficking in Human Beings*, 24 July 2003, https://www.osce.org/actionplan?download=true, accessed on 5 November 2018.

purpose of sexual exploitation[12], the 2005 Convention on Action against Trafficking in Human Beings[13] – probably the most advanced European legal instrument to combat trafficking in human beings which at the same time guarantees gender equality and provides an effective legal framework for the protection of victims' rights, Directive 2011/36/EU[14] on preventing and combating trafficking in human beings and protecting victims, Directive 2012/29/EU[15] laying down the minimum standards on rights, and the protection of victims of crime.

The provisions of all these international and regional instruments have found expression in the Romanian domestic law system. Thus, a comprehensive set of normative regulations and national standards have been drafted which make up the current legislative framework on trafficking in human beings and the protection of victims. All national efforts to combat trafficking and victim protection have been aligned with the objectives of the EU Strategy for the Eradication of Trafficking in Human Beings (2012-2016)[16] and the EU Cybercrime Policy Series on Serious Organized Crime (2018-2021)[17], with the aim of designing a national strategy with similar objectives.

[12] Council of Europe - Committee of Ministers, *Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation*, 19 May 2000, https://rm.coe.int/16804fda79, accessed on 5 November 2018.

[13] *Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw,* 16 May 2005, https://rm.coe.int/168008371d, accessed on 5 November 2018.

[14] *Directive 2011/36/EU of the European Parliament and of the Council, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 5 April 2011, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF, accessed on 5 November 2018.

[15] *Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 25 October 2012, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0029, accessed on 5 November 2018.

[16] European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*, Brussels, 19 June 2012, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf, accessed on 5 November 2018.

[17] Council of the European Union, *Council conclusions on setting the EU's priorities for the fight against organised and serious international crime between 2018 and 2021*, Brussels, 18 May 2017, http://data.consilium.europa.eu/doc/document/st-9450-2017-init/en/pdf, accessed on 5 November 2018.

The main normative instrument regulating the fight against trafficking and victim protection at a national level is Law no. 678/2001[18] which transposes into Romanian legislation the provisions of the European *aquis* and the international treaties on trafficking in human beings. The three major regulatory areas under the provisions of the Law refer to the assistance and protection granted to victims of trafficking in human beings, the fight against crime and the prevention of trafficking. Chapter V of the Law contains the protection and assistance measures that victims of trafficking in human beings have access to. These include: accommodation, social housing arrangements, legal assistance, and repatriation assistance. Article 20 explicitly prohibits the prosecution of victims for acts committed during their trafficking (for example, prostitution, begging, illegal crossing of borders), while Article 32 provides for the establishment of shelters for accommodation of victims[19].

Apart from Law no. 678/2001 there are a number of other internal instruments aimed at combating trafficking in persons that contain express provisions on the protection of victims. One of the most important normative acts of this kind is Law no. 682/2002 on the protection of witnesses[20], which establishes the measures for the protection of witness identification data. Due to the provisions of this Law, the identity of the witnesses – often the victims of the offense – is protected until the prosecutor or the judge finds that the danger that threatens the witness has disappeared. A number of specific protection measures are also in place.

Law no. 211/2004 on measures to ensure the protection of victims of crime is a specific legal instrument that integrates into the national legislation the provisions of the European Convention on the Compensation of Victims of Violent Crimes[21] and Recommendation R

[18] *Law no. 678 of 21 November 2001 on preventing and combating trafficking in human beings*, as subsequently amended and supplemented, published in the Official Gazette no. 783 of 11 December 2011.

[19] *Ibidem.*

[20] *Law no. 682/2002 on the protection of witnesses with the subsequent amendments and completions,* rectified in the Official Gazette, Part I, no. 117 of 1 March 2013.

[21] *European Convention on the Compensation of Victims of Violent Crimes*, Strasbourg, 24 November 1983, https://rm.coe.int/1680079751, accessed on 5 November 2018.

(85)11 on Victim Position of Criminal Procedure[22]. Law 211/2004 also harmonises the Romanian legal system on trafficking in human beings with the *acquis* of the European Union[23].

In order to implement the provisions of the listed legal instruments, an institutional system for combating trafficking was also designed. Today, in order to prevent trafficking in human beings, the most important institution is the National Agency against Trafficking in Persons (NATP), which was set up in 2005. The main institutions with attributions in the field of tracing human traffickers are the Agency of Investigation of Organized Crime and Terrorism (DIICOT), organized on the basis of Law no. 508/2004 and the Directorate for Combating Organized Crime (DCCO), which works within to the General Inspectorate of the Romanian Police. Coordination and cooperation at a domestic level in the field of victim protection is guided by the National Strategy against Trafficking in Persons (NSTP) and the Thematic Working Group set up in 2007.

In view of this brief analysis, we can state that the Romanian legal system for preventing and combating trafficking in human beings is a coherent one in its content, in line with European and international policies, norms and strategies. All of the provisions we have made reference identify some concrete measures to protect human rights, ensure the protection and security of citizens, and guarantee freedom and human dignity.

However, the adoption of the new Criminal Codes (CC) has been heavily criticized in terms of significantly reducing sanctions for traffickers. Since their entry into force in 2014, the crime of trafficking in human beings, which was previously part of the Law on Combating Trafficking in Human Beings, is now laid down in Articles 182 (exploitation of a person), 210 (trafficking in human beings), 211 (trafficking in minors) and 367 (constitution of an organized crime

[22] Council of Europe - Committee of Ministers, *Recommendation No. R(85) 11 to the Member States on the position of the victim in the framework of criminal law and procedure*, 29 June 1985, https://polis.osce.org/node/4651, accessed on 5 November 2018.

[23] We consider here - European Commission, *Communication on Crime victims in the European Union standards and action*, Brussels, 14 July1999; *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*, 22 March 2001; *Council Directive 2004/80/EC relating to compensation to crime victims*, 29 April 2004.

group) of the CC[24]. The Code of Criminal Procedure also contains some provisions on serious crime, including trafficking in human beings, which are under the jurisdiction of DIICOT.

3. Defining the status of "trafficking in human beings victim"

Delimitation of trafficking victim status is an essential issue when talking about the victim protection system. Thus, the 2005 Council of Europe Convention defines the term "victim of THB" as "any individual subjected to trafficking in human beings as defined in Article 4 of the Convention"[25]. Thus, the formal definition of the status of trafficking in human beings victim is vital because it is depended on that particular status to assert the right of victims to benefit from the wide range of assistance and protection measures and actions contained in the legal provisions.

Under the national law, before revising and completing Law no. 678/2001 in 2010, the Romanian legal provisions did not contain a definition *per se* of the trafficking in human beings victim. However, in the Common Order no. 335/2007 of October 29th, 2007, we find a definition of the "trafficking victim" as "any individual who is alleged to have suffered physical or mental harm, emotional abuse, economic loss or serious violation of his or her fundamental rights through actions or inaction that violates the criminal legislation in the field of combating and preventing trafficking in human beings"[26]. However, the unclear delimitation of this notion determined, at the request of national NGOs active in the field of trafficking, the identification of a clearer definition of victims of trafficking. This was particularly important in practice where the provision of protection and assistance measures provided by the law system for the victims depended too much on their participation in the criminal procedures.

As a result, in 2010, the Anti-Trafficking Law was complemented with a new article, namely Article 2 paragraph (3) stating that "a victim of trafficking in human beings means any individual who is the object of

[24] *Law no. 286/2009 - Penal Code* published in the Official Gazette, Part I no. 510 of 24 July 2009.

[25] *Council of Europe Convention on Action against Trafficking in Human Beings...*

[26] *Order no. 335 of 29 October 2007 approving the National Mechanism for Identification and Referral of Victims of Trafficking in Human Beings,* published in the Official Gazette no. 849 of 17 December 2008.

the offense described in Article 12 (trafficking in human beings), Article 13 (trafficking in minors), Article 15 (attempted trafficking offense), Article 17 (facilitation of the entry and residence of foreign nationals trafficked) and Article 18 (child pornography), regardless of whether they participate in the criminal proceedings as an injured party"[27]. Thus, the integrated definition of the Romanian Legislature is in line with the European Convention of 2005. The formal delimitation of victim status proves to be extremely useful for officials responsible with identifying victims of trafficking in human beings and with providing assistance and protection, while increasing their access to such measures. According to the legal text, the new definition of the victim of trafficking in human beings contained in Article 2 is applicable to any normative act in secondary legislation (Ordinances, Government Decisions), without the need to amend the existing text.

It is also worth noting that the Romanian legislature did not include in the provisions of the new Criminal Codes any definition of the term "victim of trafficking in human beings" when the offense was criminalized. However, we identify an indirect definition in Article 182 which states that "exploitation of a person is understood to mean: subjection to the execution of a job or the performance of services, forcibly; keeping in slavery or other similar procedures of deprivation of liberty or servitude; engaging in prostitution, pornographic performances to produce and disseminate pornographic material or other forms of sexual exploitation; forced begging; the illegal procurement of organs, tissues or cells of human origin"[28]. This definition has to be taken into account in its close connection with the definition of trafficking in human beings and trafficking in minors under the same Code.

4. Effective measures to protect and promote the rights of trafficking in persons victims

The national legal system for the protection and promotion of the rights of the trafficking in human beings victims includes a series of measures and mechanisms that focus on several lines of action, including identification, assistance of victims, recovery and reflection period,

[27] *Law no. 678 of 21 November 2001 on preventing and combating trafficking in human beings, as subsequently amended and supplemented....*

[28] *Law no. 286/2009 - Penal Code...*

compensation and legal redress, repatriation and return of victims to their country of origin.

The identification of trafficking in human beings victims in Romania before the implementation of the National Identification and Referral Mechanism (NIRM) was made on a case-by-case basis, without there being any formal procedure in this respect or institutions and other actors in charge with implementing this measure. Thus, by the adoption of Order no. 335/2007 of October 29th 2007[29], the set of standards so necessary to help identify and notify victims of trafficking in human beings has been developed. The NIRM established a detailed list of indicators identifying victims, as well as the mechanism by which this would be achieved. Moreover, the NIRM distinguishes between formal and informal identification of trafficking in human beings victims. The first of these was the task of the judicial authorities and resulted in the recognition of the person concerned as a victim of trafficking with all the rights conferred by this status. As well, Law No. 678/2001 stipulates in Article 31 the presence of specially trained officers at all border inspection posts in charge with the detection of potential trafficking offenses, as well as the identification of potential victims[30].

Regarding the assistance and protection of victims, measures are stipulated in Law no. 678/2001, Law on the Protection of Victims of Crime, Government Decision no. 1238 of October 10th 2007 approving national standards for specialized assistance services for victims of trafficking, and of course the NIRM internal status. The problem of assistance to minor victims of trafficking in human beings is regulated by Law no. 272/2004 on the protection and promotion of the rights of the child. Article 27 of Law no. 678/2001 stipulates the responsibility of the National Agency against Trafficking in Persons to monitor the assistance provided to the victims of trafficking. In 2010 some amendments were made to the provisions of Law no. 678 and since then, new rules and procedures have been in place in this area, including: setting up shelters, offering a period of accommodation and recovery between 10 and 90

[29] *Order no. 335/2007 approving the National Mechanism for Identification and Referral of Victims of Trafficking in Human Beings*, published in the Official Gazette no. 849 of 17 December 2008.

[30] *Law no. 678 of 21 November 2001 on preventing and combating trafficking in human beings, as subsequently amended and supplemented....*

days, with the possibility of extending up to 6 months, social services for victims, free medical treatments, psychological and legal advice, etc.[31].

Trafficking in human beings victims are extremely vulnerable as a result of trauma caused to them by the crime they have endured, which is why the law includes a series of measures aimed at recovering, escaping the influence of traffickers or making a decision on co-operation with the jurisdictional bodies[32]. Moreover, at the request of the competent authorities, the Romanian Immigration Office may grant a temporary residence permit during this period for foreign victims under the Emergency Ordinance no. 194/2002. This permit lasts for a maximum of six months and can be renewed[33].

Article 43 of Law no. 678 also provides for the right of victims to receive information on legal and administrative proceedings in the files to which they are parties. Also, Article 4 of the Law on the Protection of Victims of Crime, all judicial bodies have the obligation to provide the victim with complete information on their rights, but also on the state of the case, including the right to compensation, in a language which the victim understands[34]. The Law on the Protection of Victims of Crime provides for free legal assistance for victims of human trafficking if the offense was committed on Romanian territory. Free legal aid is also provided when the victim is a Romanian or foreign citizen residing in Romania, if the offense was committed abroad, but the criminal proceedings are conducted in Romania[35]. In support of this, in 2015, a protocol was signed between the Ministry of Justice and the National Union of Romanian Bar Associations on the granting of financial aid for *ex officio* legal assistance.

Regarding the possibility to obtain some material compensation, victims of trafficking in human beings may become civil party in the criminal proceeding and may claim damages from the offender. Also, according to the provisions of the Code of Criminal Procedure, compensation may also be claimed before a civil court, in accordance

[31] *Ibidem.*

[32] Articles 391, 39^1, 39^2, *Ibidem....*

[33] *Emergency Ordinance no. 194 of 12 December 2002 on the regime of foreigners in Romania* published in the Official Gazette no. 533 of 28 July 2011.

[34] *Law no. 678 of 21 November 2001 on preventing and combating trafficking in human beings, as subsequently amended and supplemented....*

[35] *Law no. 211/2004 on certain measures for the protection of victims of crime,* published in the Official Gazette no. 505 of 4 June 2004.

with the general rules applicable to civil proceeding[36]. Following an amendment to the Law on the Protection of Victims of Crime in 2007, victims of trafficking in human beings may, under certain special conditions, benefit from financial compensation from the Romanian State. Also, Article 249 of the 2010 Civil Procedure Code provides for the possibility of seizure of property during criminal proceedings at the request of the prosecutor or the judge to ensure that the sanction is enforced[37].

On September 3rd 2003, a Memorandum of Understanding was signed between the Government of Romania and the International Labour Organization (ILO) on cooperation in the field of voluntary humanitarian repatriation. In domestic law, this issue is regulated by Government Ordinance no. 25 from August 26th 2014[38], and the repatriation of Romanian children trafficked on the territory of other states is governed by the provisions of the Government Decision no. 1443/2004 on the repatriation of unaccompanied and/or trafficked children[39]. On the other hand, the return of unaccompanied children from Romania to their countries of origin is carried out on the basis of Article 131 of Government Emergency Ordinance no. 194/2002 on foreigners in Romania which determines the legal regime applicable to unaccompanied foreign children as well[40].

5. Conclusions

In order to understand the degree of vulnerability and the multitude of factors that contribute to the proliferation and victimization of human beings through human trafficking, it is necessary first to understand the local context on the one hand and the individual and family context on the other. Today, the forms of exploitation of people are becoming more

[36] *Law no. 135/2010 on the new Criminal Procedure Code* published in the Official Gazette, Part I no. 486 of July 15, 2010.

[37] *Law no. 134/2010 on the Code of Civil Procedure* republished in the Official Gazette, Part I no. 247 of 10 April 2015.

[38] *Government Ordinance no. 25/2014,* published in the Official Gazette of Romania, Part I of 20 November 2014.

[39] *Decision no. 1443/2004 on the methodology for the repatriation of unaccompanied Romanian children ensuring special protection measures in their favour*, published in the Official Gazette no. 873 of 24 September 2004.

[40] *Emergency Ordinance no. 194 of 12 December 2002 on the regime of foreigners in Romania...*

and more varied, and the means used are increasingly versatile and complex, which has generated an equally great difficulty in conceptualizing and effectively tackling by the judicial authorities and other actors responsible for protecting and assisting victims, a legal and institutional system capable of responding to the real needs of vulnerable groups. Hence, the approach taken at national level to develop a forward-looking response strategy that provides the necessary flexibility to act and adapt the assistance services provided to victims according to their individual case and needs.

Another element that has definitely influenced the regulation of the trafficking in human beings problem is the strong migration flow, and implicitly the blockage that the European countries have encountered in managing this phenomenon. More than ever, the events of recent years – whether we are talking about the armed conflicts present at the borders of Europe or about the increasingly frequent terrorist attacks within the EU states – have brought to the fore the capability of the EU countries to provide support and include refugees that are coming from the Middle East and Arab States in integration and asylum programs, as well as to prevent the criminal activities associated with this phenomenon. The recent population migration has also brought about the problem of migratory trafficking that generates a risk for increased trafficking in human beings as well as other related activities such as prostitution, abuse or any other kind of exploitation. This is the context in which the competent Romanian authorities have taken a sustained effort to manage potentially risky situations.

Thus, in 2017, NATP developed a National Strategy for Trafficking in Human Beings (for the 2018-2022 period) together with an action and consultation plan developed in partnership with the relevant governmental and non-governmental institutions. In the field of prevention and combating, data collection, and especially the assistance and protection of victims, the National Strategy formulated several objectives to improve the quality and stability of the services and actions in the field, such as: "improving the quality of protection and assistance provided to victims of trafficking in human beings for social reintegration; strengthening the inter-institutional dialogue and coordinating the assistance and protection of victims of trafficking and trafficking in minors; increasing the capacity of the social assistance system to respond to the specific needs of victims of trafficking in human

beings; providing assistance and protection specific to the main categories of victims identified"[41].

From the previous brief analysis of the assistance and protection system for trafficking victims, we emphasize the need for better planning, as well as the introduction of a concentrated change in the legal and institutional framework adapted to the realities that Romania is currently facing, with the active involvement of both authorities and practitioners and civil society.

6. REFERENCES

1. *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, December 2, 1949;
2. *Council Directive 2004/80/EC relating to compensation for crime victims*, 29 April 2004;
3. *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*, 22 March 2001;
4. Council of Europe – Committee of Ministers, *Recommendation No. R (2000)11 of the Committee of Ministers to Member States on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation*, 19 May 2000;
5. Council of Europe – *Committee of Ministers, Recommendation No. R (85)11 to the Member States on the position of the victim in the framework of criminal law and procedure*, 29 June 1985;
6. *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16 May 2005;
7. Council of the European Union, *Council conclusions on the establishment of EU priorities for the fight against organized and serious international crime between 2018 and 2021*, Brussels, 18 May 2017;
8. *Decision no. 1443/2004 on the methodology for the repatriation of unaccompanied Romanian children ensuring special protection measures in their favour*, published in the Official Gazette no. 873 of 24 September 2004;

[41] http://81.181.207.101/frontend/documente_transparenta/96_1513085656_STRATEGIE%202018-2022.pdf, accessed on 5 November 2018.

9. *Directive 2011/36/EU of the European Parliament and of the Council, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 5 April 2011;
10. *Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 25 October 2012;
11. *Emergency Ordinance no. 194 of 12 December 2002 on the regime of foreigners in Romania* published in the Official Gazette no. 533 of 28 July 2011;
12. European Commission, *Communication on Crime victims in the European Union standards and action*, Brussels, 14 July 1999;
13. European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*, Brussels, 19 June 2012;
14. *European Convention on the Compensation of Victims of Violent Crimes*, Strasbourg, 24 November 1983;
15. *Government Ordinance no. 25/2014*, published in the Official Gazette of Romania, Part I of 20 November 2014;
16. *Law no. 134/2010 on the Code of Civil Procedure* republished in the Official Gazette, Part I no. 247 of 10 April 2015;
17. *Law no. 135/2010 on the new Criminal Procedure Code* published in the Official Gazette, Part I no. 486 of 15 July 2010;
18. *Law no. 211/2004 on certain measures for the protection of victims of crime*, published in the Official Gazette no. 505 of 4 June 2004;
19. *Law no. 286/2009 – Penal Code* published in the Official Gazette, Part I no. 510 of 24 July 2009;
20. *Law no. 678 of 21 November 2001 on preventing and combating trafficking in human beings, as subsequently amended and supplemented*, published in the Official Gazette no. 783 of 11 December 2011;
21. *Law no. 682/2002 on the protection of witnesses with the subsequent amendments and completions*, rectified in the Official Gazette, Part I, no. 117 of 1 March 2013;
22. National Agency Against Human Trafficking, *Short Review of Trafficking in Persons in 2017 – Victimological Perspective*, March 15, 2017;

23. *Order no. 335 of 29 October 2007 approving the National Mechanism for Identification and Referral of Victims of Trafficking in Human Beings*, published in the Official Gazette no. 849 of 17 December 2008;
24. *Order no. 335/2007 approving the National Mechanism for Identification and Referral of Victims of Trafficking in Human Beings*, published in the Official Gazette no. 849 of 17 December 2008;
25. Organization for Security and Co-operation in Europe, Permanent Council, *Decision No. 557 OSCE Action Plan to Combat Trafficking in Human Beings*, 24 July 2003;
26. *United Nations Convention against Transnational Organized Crime*, 15 November 2000;
27. *United Nations Protocol against Smuggling of Migrants on the Ground, Sea and Air*, 15 November 2000;
28. *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000;
29. *Universal Declaration of Human Rights*, Paris, December 10, 1948;
30. US Department of State, *Trafficking in Persons Report 2017*, June 2017.

PROFESSIONAL LIABILITY INSURANCE – MALPRACTICE GUARANTEE

Elena-Cristina SAVU[*]

ABSTRACT

Professional liability insurance or malpractice insurance has been rapidly developed in recent years and has the role of covering the damage caused during or in connection with the pursuing a profession by an authorized and active specialist in that profession. As a rule, malpractice insurance can be found in the legal and medical professions, but also in the technical or financial-economic ones, being mandatory throughout the exercise of the professions.

KEYWORDS: *malpractice insurance, insured risk, physician, lawyer, notary, bailiff, insolvency practitioners, judges and prosecutors.*

Pursuing certain professions may involve special risks, including the risk of prejudicing third parties and thus triggering civil liability. The risk of the occurrence of one's own injuries caused by the practice of a profession – ex the occurrence of a specific illness, accidents at work etc. – is not the subject of the present study because this risk is inherent in the insurance of persons, or "the defining element of liability insurance is that the production of the insured risk consist in causing prejudice to third parties"[1].

If, on the threshold of the new millennium, doctrine[2] reminded these forms of insurance as being specific to societies with a remarkable level of development and tradition in insurance, behold, within a few years professional liability insurance was also legislated in Romania generally as compulsory forms of insurance, provided by the specific normative acts regulating the medical, legal, financial, economic, technical professions.

In addition to the borrowed pattern from evolved societies, we consider that the bases for these types of insurance can be multiple. In

[*] *Ph. D. Student, University Titu Maiorescu Bucharest, Romania*

[1] Savu, E-C, Insurance Contract, C.H. Beck, 2018, p. 197.

[2] Ciurel, V., *Insurance and Reinsurance: International Theoretical and Practical Approaches*, Ed All Beck, 2000, p. 482.

addition to the general need to limit the damage suffered by third parties by means of a guarantee of injury recovery, another reason would be to protect the status of certain professions and to keep their elitism faced to the socially evolved citizen's progressive ideology, which finds in the risks and problems of life a source of compensatory financing[3]. It can be noticed that the professions for which these types of insurance were legalized not only represent occupations/ activities characterized by a practice in relation to the people with developed potential of occurrence and harmful effects towards them, but their specificity consists in the high degree of long-term training and education, continuing and specialized for the acceding and pursuit of that profession, generally old, stable and universal professions. Belonging to an elitist profession gives an anchor to those who come in contact with, that they will benefit from appropriate, professional and specific services as well as the guarantee of recovery of the potential damage caused by the professional. Professional discipline is a foundation for the preservation and prestige of a profession. As has been shown in foreign doctrine, "each profession has its own rules and consequently its disciplinary right whose strength and perfection vary according to the cohesion of the professional association and its economic and social importance."[4] Thus, by professional liability insurance, both the patrimony of the practitioner in the profession, mainly his/her affiliation and/r personal, as well as the professional tagma of the person responsible for the damage, is defended in order to maintain its good reputation and thus, continuity.

Professional Liability Insurance is part of the large family of general civil liability insurance provided in Class 13 of General Insurance[5] and is subject to the provisions of the legislation specific to each regulated profession and, in addition, to the provisions of Art. 2223-2226 Civil code on civil liability insurance and on the common provisions of the insurance contract[6], if compatible.

[3] Conseil d'Etat, Public Report 1998, *Jurisprudence and advice from 1997, Reflection on the right to health.*

[4] J. de Poulpiquet, *Notary's liability*, Dalloz, Paris, 2009, p. 135, no. II.11.

[5] The classes of insurance are in Annex no. 1 of the Law no. 237/2015 regarding the authorization and supervision of the insurance and reinsurance activity (M.Of. 800 of October 28, 2015).

[6] Provisions common to insurance contracts are contained in Art. 2199-2213 Civil Code.

If liability insurance is based on an insured risk consisting of a general fact that causes damage to third parties, the professional liability insurance is tailored to them by the fact that the insured risk comes only from the acts and/or deeds that cause the damages, defective in professional activity by professional/specialist/practitioners authorized in that profession. In this sense, the generic term *malpractice*, derived from malus (Latin – bad, wrong) and praxis (Greek – practice), used in the current speech and universally understood as professional misconduct, error/negligence/omission which generates civil liability.

From a legal point of view, the meaning of *malpractice* may refer to the action or inactivity of a practitioner/specialist/professional in the exercise of his professional activity, in breach of the objective rules governing the profession, prejudice the subjective rights of third parties.

The term *malpractice* has been introduced since 2006 in national medical legislation[7], but the legislator did not just summarize the use of the word *malpractice* to name the action or inaction that is a medical act wrongly performed by medical staff, but also overlapped the medical term in numerous provisions referring to "medical malpractice" or "medical malpractice act"[8], thus taking into account, in its wisdom, the possibility of the existence of other forms of *malpractice* such as *technical malpractice* as a result of diversification and amplification the emergence of risks in the context of technological progress, *legal malpractice* or *liberal professions malpractice*, already recognized in recent Romanian doctrine[9], or even *financial-economic malpractice*, in the context of the financial losses that are often encountered in this sector.

It is precisely for these forms of professional liability or malpractice liability, the professional liability insurance has been legalized for, collectively named malpractice insurance.

As a common provision for all malpractice insurance, the insurer undertakes to pay indemnity (insurance indemnity) for the damages incurred in the course of his professional activity by the insured who

[7] By art. 642 (now Article 653) and following. of Law 95/2006 on Health Reform, originally published in M.Of. 372 of april 28,2006 and subsequently republished in M.Of. 652 of august 28, 2015.

[8] Art. 668, art. 686, art. 689 etc.

[9] See Năsui, G-A, *Medical malpractice. Particularities of medical civil liability. Relevant internal case law. Malpractice of Liberal Professions*, ed. II, reviewed and added, Universul Juridic Publishing House, Bucharest, 2016.

exercises that profession to third parties, as well as for the expenses incurred by the insured person in the civil lawsuit. In particular, professional insurance, the insured, the contractor or the person covered by the insurance must be admitted and active in the profession for which the conclusion of the insurance contract is mandatory.

Most of the times, the conclusion of the malpractice insurance contract is a mandatory condition for practicing the profession, the proof of the contract being required to accede the profession as well as throughout the professional activity, and its lack being drastically sanctioned (suspension or even exclusion from the profession). In case of certain professional liability insurance, the sum insured or the minimum sum insured is set by law, the insured or the contractor being able to opt for a higher insured amount related to the degree of risk to which it is subjected, thus influencing the amount of the insurance premium to which it will be liable.

In return for insurance premiums, the professional active insured guarantees the solvency and the preservation of his patrimony, which, by taking over the insurer's liability for detention, will not suffer any loss, of course, within the insured amount, so that, from this point of view, professional liability insurance is an act of mood, as was also stated in doctrine[10].

In the event of the insured risk occurring, the injured third party, a natural or legal person, who was indefinite at the time of the conclusion of the insurance contract, but determinable at the moment when suffers a damage caused by the insured persons will intervene in the insurance relations. In professional liability insurance, the injured third party is the victim of malpractice, so he's the patient, the client, the beneficiary of professional services provided by the professional insured. In the case of malpractice, such injured persons may turn to professional policyholders on the basis of the contract concluded with them[11] or under their delict liability, but also have direct action against the insurer, permitted by law, but within the limits of the insurance contract concluded between them and the person responsible for the damage. The injured third party does not have the right to claim both of them for the reparation of the damage

[10] Tăbăraş M., Constantin M., *Legislation on Insurance and Reinsurance in Romania, Comments and Explanations*, Ed. C.H. Beck, Bucureşti, 2010, p. 252.

[11] Sferdian I., *Insurance Law*, Ed. C.H. Beck, 2007, p. 280.

suffered because they would be unjustly enriched by a double repair of the same injury.

Professional liability insurance is a claim for damages because it is aimed at compensating third parties for damage caused by insured persons or persons covered by the insurance, limited to the value of the damages and eventually, in case of trial, to the costs of the insured

The extent of compensation is the equivalent of damages incurred during or in connection with the professional activity and is settled by the agreement between the insured, the injured third party and the insured person, and in case of misunderstanding, by court decision. Compensation will not exceed the insured amount, with the surplus being the full responsibility of the person responsible for the damage. By assessing the indemnity by the insured party, the injured third party and the insurer, the insured person who caused the damage can help to determine the causes of the damage, to make judgments, objections, to know the amount of the compensation, to oppose to the injured third party his own fault in the production damage or detention of a joint guilty, in which case the insured will only be liable for the damage suffered by him and as a consequence the insurer will only partially pay the damage.

As regards the expenses incurred by the insured in the civil process, these may consist of lawyers' fees, stamp duties, expert fees. We note that only the costs incurred by the insured in the civil process are borne by the insurer, and no other expenses, such as those advanced by the injured person or the insured person in the criminal proceedings.

Payment of the indemnity by the insurer is made directly to the injured party, if it has not been compensated in advance by the insured, and, in this case, to the insured, within the limits of the insured amount. Thus, the indemnity paid by the insured person to the injured person may be higher than that to which the insurer is obliged, who, through the concluded insurance contract, can assess the compensation according to certain legal criteria limiting the real extent of the damage.

Under the law, for the protection of third parties and the guarantee of the damage suffered, the insured creditors cannot pursue the compensation paid to the injured party. If the compensation is paid to the insured after he pays the damages to the injured party, the creditors of the

insured, under the joint creditors' guarantee[12], have the right to pursue the sums representing the indemnity received from the insurer as it no longer subsumes the intention to protect third parties already compensated. At the same time, if the injured person has his own creditors, they have the right to pursue the indemnity to which their debtor is entitled, because the law does not distinguish.

In principle, the insurer's subrogation to the insurer's rights[13] against the persons responsible for the damage or his own insured is not possible, but provided that the production of the insured risk no longer depends on the hazard but is influenced by the intention of the insured, then there is the possibility of regress against their own policyholders, but only in the cases provided by law.

Under the law, the insurer may oppose all defences based on the insurance contract against injured third parties[14], but may not assign the insurance contract except with the written consent of the insured, except for portfolio assignments between insurers[15].

We note that professional liability insurance ends in principle between professionals in the sense of art. 3 Civil code, respectively between the insurers and the persons authorized to carry out professional activities, so that there will be no incidents in the matter regarding the consumer protection rules and the injured person, the consumer, will not be able to request the finding of the abusive clauses, as it is a third party the insurance contract concluded by the person responsible for the damage, even if the law allows him to pursue a direct action against the insurer with whom he has neither contractual nor tort[16], since the exception provision is strictly interpreted and applied.

[12] The joint guarantee of the creditors is regulated by art. 2324 C.civ. and represents the new provision for the previous general pledge of the creditors on the debtor's wealth provided by art. 1718 C.civ. of 1864.

[13] The insurer 's right provided by art. 2210 C.civ. [(1) Within the limits of the indemnity paid, the insurer shall be subrogated to all the rights of his insured person or the beneficiary of the insurance against those responsible for the damage, except for the insurance of persons. (2) The insured person shall be liable for damages to the insurer through acts that would prevent the realization of the right provided in par. (1). (3) The insurer may give up, in whole or in part, the exercise of the right provided by par. (1/)].

[14] See Art. 2211 C.civ. The opposability of the contract.

[15] See Art. 2212 C.civ. Contract Assignment.

[16] Nemes V., *Insurance Law*, Ed. Hamangiu, 2009, p. 302.

In the **medical** field, professional liability insurance is governed by the provisions of Law 95/2006 on healthcare reform[17], which is called express *malpractice insurance for cases of professional liability for damages caused by the medical act.*

Medical staff, dental practitioners, pharmacists, nurses and midwives, who provide health care both in the public and/or private systems, are required to conclude this type of insurance contract in a specially designated location for medical care, and when it is provided outside of this location, as a result of express request in this regard. Medical malpractice insurance is mandatory and is required at the conclusion of the employment contract. The omission to conclude the medical malpractice insurance or the insurance under the legal limit constitutes a disciplinary offense and is sanctioned with the suspension of the right to practice.

The provision of medical malpractice has a detailed regulation in the special law, in principle the provisions of art. 2223-2226 Civil code, in the light of the particularities imposed by medical terminology and specificity.

Thus, medical malpractice insurance will cover all types of medical treatments that are performed in the professional specialty and competence of the insured. The insurer pays damages for the damages which insured persons are liable under the law to third parties who are found to have been subjected to a medical malpractice act, as well as to the costs of the injured person by medical act, regardless of where healthcare was provided. In so doing, damages are granted for amounts that the insured is obliged to pay as compensation and legal costs to the person or persons injured by the application of inadequate medical assistance, which may have the effect of including personal injury or death. In case of death, the compensation is granted to the successors of the patient who have requested them. Compensation is also granted when medical assistance has not been granted, although the status of the person or persons who have applied for or for whom healthcare was required this intervention. Costs occasioned by an eventual process in which the

[17] Legal framework: art. 653-692 of the Law no. 95/2006 on Health Reform, republished, Order no. 482/2007 regarding the approval of the Methodological Norms for the application of the title XV "*Civil liability of the medical personnel and the provider of medical, sanitary and pharmaceutical products and services*" of Law no. 95/2006 on Health Reform (M. Of. 237 of April 5, 2007).

insured is obliged to pay them will be included within the liability limits established by the insurance policy. Compensation may be settled amicably in cases where the civil liability of the policyholder is certain and where more than one insurance exists, compensation shall be payable in proportion to the amount insured by each insurer. Compensation is paid by the insurer directly to individuals so far as they have not been compensated by the insured and whether or not they have paid the contribution due to the public health system. Compensation may be granted either in the form of a global amount, or by life or temporary payments, and will take into account all the costs of rehabilitation.

Subrogation of the insurer against the person responsible for the damage is possible only in the following cases:

- injury or death is the result of intentional violation of healthcare standards;
- injury or death is due to hidden vices of medical equipment or medical instruments or unknown side effects of administered drugs;
- when the injury or death is due both to the responsible person and to the administrative deficiencies in which the medical unit in which the medical assistance was granted or due to the failure to grant the appropriate treatment established by the recognized medical standards or other normative acts in force, entitled to recover sums paid as compensation from the guilty parties other than the responsible person, in proportion to their share;
- the injured party's or the deceased's medical assistance was made without his consent, but in circumstances other than those due to the emergency situation.

Compensation is not recovered from the person responsible for causing the damage when the healthcare was done in the interest of the injured party or the deceased in the absence of a complete investigation or ignorance of his/her anamnesis due to the emergency situation and the injured or the deceased was not able, due to circumstances, to cooperate when assisted.

Insured persons or their representatives are obliged to notify the insurer about the conclusion of any other insurances and the existence of an action for damages, within 3 working days from the date when they became aware of this action.

The Commission for monitoring and professional competence for malpractice cases at the level of county and Bucharest public health

departments will determine by decision whether or not there was a malpractice. The decision shall be communicated to all persons involved, including the insurer, within 5 calendar days and may be appealed to the court in whose territorial jurisdiction the malpractice was filed, within 15 days of the communication.

We note that for certain medical-related professions, such as dental technicians, opticians, optometrists, prosthetics and orthotics technicians, medical equipment technicians[18] etc. there is no legal obligation to conclude a professional liability insurance, even though they may be liable for civil liability.

In the **legal** field, professional liability insurance is mandatory in most regulated legal professions, being provided by the very rules of the respective professions.

For **lawyers**, professional liability insurance has been introduced since 2000[19], as one of the main duties of the lawyer. Professional liability insurance is mandatory throughout the duration of the activity and renewed annually, under the sanction of not being included in the annual list of lawyers with the right to exercise the profession.

The civil liability insurance policy of the lawyers covers the cash loss that the insured person, in his capacity as a lawyer, has to bear, whenever, during the period of validity of the policy, he has caused damage to a natural or legal person, as a result of acts or deeds committed by him/her in the exercise of his profession, by which he becomes liable under the legal assistance contract concluded with his/her client, the law, the profession status and the deontological rules.

The parties to the insurance contract are free to set the limits of the lawyer's liability, but the minimum amount of the insured amount must be respected, and the total liability exemption is forbidden, being considered unwritten.

The professional civil society and the professional limited liability company may conclude, as a contractor, professional insurance in which all lawyers practicing as associates, employees or employees within the

[18] See Government Emergency Ordinance 83/2000 on the organization and operation of free practice practices for services related to the medical act (M.Of. 291 of June 27, 2000).

[19] Law 231 of 4 December 2000 amending and supplementing Law no. 51/1995 for the organization and pursuit of the profession of lawyer was published in M.Of. no. 635 of December 7, 2000.

profession are covered, in which case they will be insured or persons covered by insurance.

The collaborating lawyer has the right to his/her own clients but, at the same time, has the obligation not to prejudice the form of exercise of the profession to which he/she belongs. To this end, the collaboration contract may provide for a collaborating lawyer to take out professional indemnity insurance to cover possible damage to the profession of the profession to which he/she belongs by treating his/her own clients and specifying the amount of insured risk, liability insurance voluntary vocational training, distinct from compulsory professional indemnity insurance.

And for the profession of **notary**[20], to conclude a professional civil liability insurance contract is mandatory even before starting the activity, but the insurance is done through the Public Notary Public Insurance House established for this purpose[21]. The civil liability of a notary public may be engaged under civil law for violation of his professional obligations when he has guiltily caused damage in the form of bad faith established by a final court decision[22]. Professional Liability Insurance will cover the damages created by the notary in public by acts and notarial acts, except those caused by intentional acts. The value of subscribed annual premiums is the option of each notary public and is between 1,000 and 6,000 lei for the first insured event/year, and for their payment the insurance contract is an enforceable title. The maximum limit for damages granted to the victim or notary, as the case may be, is equal to the value of insurance premiums paid by the insured, multiplied by 40 times but not more than 240,000 lei.

A similar regulation is also found in the legislation specific to the profession of **bailiff**[23], for the compulsory insurance of civil liability of these bodies, functioning Bailiffs' Insurance House (BIH)[24]. Under the

[20] Law no. 36/1995 of notaries and notarial activity, republished in M.Of. 237 of March 19, 2018.

[21] The Romanian Notary Public Insurance House is organized and operates on the basis of the Statute of the National Union of Notaries Public issued in 2014, published in M.Of. 845 of November 20, 2014

[22] Article 73 of Law 36/1995.

[23] Law 188/2000 of bailiffs, republished, in M.Of. 738 of October 20, 2011, as amended and supplemented.

[24] By Decision 2/2014 of the UNEJ Council, the Statute of the BIF, published in M.Of. 462 of June 24, 2014.

sanction of the suspension of office, any bailiff appointed in office and whose quality has not ceased under the law is obliged to conclude an insurance contract with BIH on the date of acquiring the professional quality, for the acts or deeds that make the professional liability for damages caused by professional mistakes in connection with the forced execution activity, and in this respect is obliged to pay the share of the contribution to BIH equivalent to the subscribed premiums[25].

Professional Liability will cover damages caused by the bailiff, by fault, by acts or deeds of his own or his employees, in the exercise of his professional duties or by the bailiff for the values entrusted to the depositary, except for the cases where the disappearance, the destruction or their loss is the result of a fortuitous case or force majeure as well as damages caused by the bailiff as a result of the loss, destruction or deterioration of the original documents given by the clients in the warehouse for the purpose of drawing up the requested documents limited to the cost of restoration of the documents.

Settlement of damages can be made on the basis of the contract between the insured person, the injured person and the Insurance House under the contractual conditions, and/or by a final and irrevocable court decision. The maximum limit for damages granted to the damages or bailiffs, as the case may be, is equal to the amount of insurance premiums paid by the insured, multiplied by 10 times. Compensation is payable only in Romania and only in the national currency, directly to the injured, insofar as it has not been compensated by the insured.

Insolvency practitioners make up a professional tagma which, depending on the type of procedures provided for by Law 85/2014 on Insolvency and Insolvency Prevention Procedures (insolvency, voluntary liquidation proceedings, insolvency prevention, including financial supervision measures or special administration) is made up of judicial administrators, liquidators, conciliators, ad hoc agents.

The law regulating the profession of insolvency practitioner[26] expressly states that practitioners are civilly responsible in the conduct of their business and are required to ensure professional care[27]. Thus, in

[25] By UNEJ Council Decision 12/2018 the value of the subscribed premium is 750 lei/year.

[26] Government Emergency Ordinance 86/2006 on the organization of the activity of insolvency practitioners, republished in M.Of. 724 of October 13, 2011.

[27] Article 42 of GO 86/2006.

order to cover the damage created in the exercise of the profession, the insolvent practitioner is obliged, within 30 days from admission to the profession, to professionally insure by subscribing a valid insurance policy covering the damages caused by the exercise in bad faith or serious negligence of his/her duties, the insured risk being the consequence of the insolvency practitioner's activity during the exercise of his/her quality. The insolvency practitioner who is covered in another Member State of the European Union, the European Economic Area or in the Swiss Confederation by professional indemnity insurance or an equivalent guarantee shall conclude professional indemnity insurance only in addition if the value of the insurance policy is lower than the minimum amount established by the Status of the profession or if the equivalence is only partial.

It is forbidden for the insolvent practitioner, under the sanction of dismissal and reparation of any damage caused, to directly or indirectly diminish the amount insured under the insurance contract.

In case of non-fulfilment of the obligation to insure professionally, the insolvency practitioner will be granted a 30-day grace period, as the case may be, by the subsidiary's management board. Failure to comply with the professional liability insurance obligation or renewal of such insurance will result in the suspension of membership of UNPIR for a maximum period of 6 months, and non-compliance within this period will result in deletion from the UNPIR list.

In the case of the profession of **mediator**[28], which presupposes an activity of public interest, although the possibility of professional civil liability is admitted[29], and the mediator can intervene even in cases of malpractice[30], by law, it does not have the obligation to conclude a civil liability insurance contract professional[31], being probably a leak of the

[28] Law 192/2006 on the mediation and organization of the mediator profession, published in M.Of. 441 of May 22, 2006, as amended.

[29] Article 42 of Law 192/2006 and Art. 2 of the 2015 Statute of the Mediator profession (M.Of. 570 bis of July 30, 2015).

[30] Article 601 of Law 192/2006 related to the Constitutional Court Decision no. 266/2014 (OJ No. 464, June 25, 2014).

[31] Art. 26 para. (5) of the 2007 Regulation on the organization and functioning of the Mediation Council (MOS 505 of July 27, 2007), which allowed the mediator to enter into professional risk insurance covering also any actual damage suffered by the client and resulting from the exercise of the profession was abrogated by Art. I, item 24 of the HG 24/2016 regarding its amendment and completion (M.Of. 527 of July 13, 2016).

legislator. Of course, the mediator can make a malpractice insurance, but it will not be binding, but only optional.

A recent provision is the introduction of professional liability insurance for **judges and prosecutors**[32], in which sense the Superior Council of Magistracy is required to lay down the conditions, deadlines and procedures for the compulsory malpractice insurance of judges and prosecutors. The insurance is to be fully covered by the judge or prosecutor, the lack of which cannot delay, diminish or remove the civil liability of the judge or prosecutor for the judicial error caused by the performance of the position in bad faith or serious negligence, his professional civil liability being regulated in detail by the special law[33]. The risk insured in the professional liability insurance will be the judicial error, assimilated in the doctrine of the notion of injustice[34].

Also in the **financial and economic sector**, the professional liability insurance is mandatory for experts and accountants[35], assessors[36], in joint-stock companies for directors and supervisory boards[37], etc., insurances meant to provide adequate financial protection in the case the customer/beneficiary or other third parties suffers damage as a result of the non-fulfilment or inappropriate fulfilment of the obligations assumed under the service contract or imposed by the incumbent professional rules.

In the **technical field**, professional civil liability insurance is mandatory for technically-professional designers and specialists, such as certified project verifiers, certified technical experts, energy auditors for

[32] Through point 151 of Law 242/2018 for the amendment and completion of the Law no. 303/2004 on the status of judges and prosecutors, published in M.Of. 868 of October 15, 2018 has been completely amended art. 96, introducing in paragraph 11 of this article the obligation of mandatory professional assurance of judges and prosecutors.

[33] Legal framework: art. 94, art. 96 and art. 991 of Law 303/2004 on the statute of judges and prosecutors, republished in M.Of. 826 of September 13, 2005.

[34] Bodoaşcă T. *Opinions on bad faith, serious negligence, serious misconduct and judicial errors in the context of the regulations on patrimonial responsibility of judges and prosecutors* in "Romanian Pandectele nr. 6/2017 ", p. 95.

[35] Art. 13 of the GO 65/1994 on the organization of the activity of accounting expertise and the authorized accountants, republished in M.Of. 13 of January 8, 2008.

[36] Art. 16, 17, 20 of O.G. 24/2011 on some measures in the field of property valuation, published in the M.Of. 628 of September 2, 2011.

[37] Legal framework: art. 153^{12} al.4 of the Law 31/1990 to companies, republished with subsequent amendments and completions (M.Of. 1066 from november 17, 2004).

certified buildings, authorized technicians, certified engineers[38]. They are assimilated to technical engineers and construction engineers and architects. And for these professions, malpractice insurance must be maintained during the whole practice.

As a recently form of guarantee, professional liability insurance is already widespread, largely binding in the core occupations, and continues to grow rapidly, attracting new professions (judge, prosecutor) or activities in the sphere of regulation (IT & C), which justifies us considering that malpractice insurance will be an important pillar of professional civil liability in our society.

BIBLIOGRAPHY

1. Ciurel, V., *Insurance and Reinsurance: International Theoretical and Practical Approaches*, Ed All Beck, 2000
2. Năsui, G-A, *Medical malpractice. Particularities of medical civil liability. Relevant internal case law. Malpractice of Liberal Professions*, Ed. II, reviewed and added, Universul Juridic Publishing House, Bucharest, 2016
3. Nemes V., *Insurance Law*, Ed. Hamangiu, 2009
4. J. de Poulpiquet, *Notary's liability*, Dalloz, Paris, 2009
5. Savu, E-C, *Insurance Contract*, C.H. Beck, 2018
6. Sferdian I., *Insurance Law*, Ed. C.H. Beck, 2007
7. Tăbăraş M., Constantin M., *Legislation on Insurance and Reinsurance in Romania, Comments and Explanations*, Ed. C.H. Beck, Bucureşti, 2010
8. Bodoaşcă T. "*Opinions on bad faith, serious negligence, serious misconduct and judicial errors in the context of the regulations on patrimonial responsibility of judges and prosecutors"* in "Romanian Pandectele" nr. 6/2017
9. Civil Code
10. Law 31/1990 to companies, republished with subsequent amendments and completions in M.Of. 1066 of November 17, 2004
11. Law 303/2004 on the statute of judges and prosecutors, republished in M.Of. 826 of September 13, 2005

[38] Legal framework: art. 6 and art. 31 of Law 10/1995 on quality in construction, republished in M.Of. 765 of September 30, 2016.

12. Law 192/2006 on the mediation and organization of the mediator profession, published in M.Of. 441 of May 22, 2006
13. Law 188/2000 of bailiffs, republished, in M.Of. 738 of October 20, 2011
14. Law 95/2006 on Health Reform, originally published in M.Of. 372 of April 28, 2006 and subsequently republished in M.Of. 652 of August 28, 2015
15. Law no. 237/2015 regarding the authorization and supervision of the insurance and reinsurance activity (M.Of. 800 of October 28, 2015
16. Law 10/1995 on quality in construction, republished in M.Of. 765 of September 30, 2016
17. Law no. 36/1995 of notaries and notarial activity, republished in M.Of. 237 of March 19, 2018
18. Constitutional Court Decision no. 266/2014 (M.Of. No. 464, June 25, 2014)

ASSESSMENT OF KNOWLEDGE AND USE OF ALTERNATIVE DISPUTE RESOLUTION METHODS IN ROMANIA IN THE CONTEXT OF EUROPEAN REGULATIONS ON AREA OF JUSTICE, FREEDOM AND SECURITY

Manuela SÎRBU*

ABSTRACT

Alternative Dispute Resolution methods represent extrajudicial procedures to settle different kind of disputes. They are used at an international level and also at European level. ADR mechanisms are part of the consolidation the access of justice in an area of freedom, security and justice with respect for fundamental rights and different legal systems.

Considering the European provisions regarding ADR mechanism Romanian legislation was amended by regulating mediation as an ADR procedure. After 12 years after entering into force Law no. 192/2006 and 10 years since the European Parliament adopted Directive 2008/52/UE on certain aspects of mediation in civil and commercial matters we conducted a study to assess the use of alternative dispute resolution mechanisms by Romanian people.

KEYWORDS: *ADR mechanisms, mediation, access to justice.*

The alternative dispute resolution methods consist in extra-judicial procedures through which the conflicting parties go to arbitration, mediation, conciliation, etc, for the settlement of the litigations. The issue of the alternative dispute resolution methods has represented a concern for Europe since the beginning of the 1990s, the European Committee being concerned to regulate alternative dispute resolution methods for different disputes on the consumption market, in the conditions of the existence of the domestic unique market according to the Treaty of the European Union.

The existence of the alternative dispute resolution mechanisms at European level has the role to optimize the access to justice in the conditions of the creation of an area *of freedom, security and justice, with*

* *Lecturer Ph. D. University Titu Maiorescu, Faculty of Law, Bucharest, Romania.*

the respect for fundamental rights and the different legal systems.[1] In the European justice area, persons must not be prevented from exercising their rights and the incompatibility and complexity of the legal or administrative systems from the member states of the European Union must not represent an obstacle for this purpose.

The operation of the area of liberty, security and justice involves also the implementation of measures which must ensure: *the mutual recognition between the member states of the judicial and extra-judicial decisions and their execution, cross-border communication and notification of the judicial and extra-judicial documents, the compatibility of the norms enforceable in the member states in the competence and conflict of law matter, cooperation in the obtaining of evidences matter, effective access to justice, removal of the obstacles regarding the good development of the civil procedures, the development of alternative dispute resolution methods, the support of the professional training of the magistrates and the justice personnel.*[2]

The main purpose of the action of the European Union in the judicial cooperation field in the civil matter is to provide a high degree of judicial security for its citizens and to guarantee an easy and effective access to civil justice for the settlement of the cross-border litigations.[3]

Based on the objectives established through the Treaty on the Functioning of the European Union and the competences established and in order to improve the access to justice in cross-border litigations, the European Union has introduced procedure norms, common, facultative and complementary to the national procedures,[4] the judicial cooperation in civil matter involving also the development by the European institutions of the alternative dispute resolution mechanisms.

For the consolidation of the judicial security and for the improvement of the free access to justice, the Directive 2008/52/EC was drafted. The

[1] TFUE Art. 67, Chapter 1, Title V paragraph (1) mentions: "*The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.*"

[2] TFUE, Art. 81, Chapter 3, Judicial cooperation in the civil matter, paragraph (2);

[3] www.europarl.europa.eu, Judicial Cooperation in Civil Matter

[4] For this purpose, see the Directive 2003/8/EC which establishes minimum common norms regarding legal assistance in case of litigations; Regulation (EC) no. 861/2007 for the establishing of a European procedure regarding the applications with reduced value and regulation (EC) no. 1896/2006 regarding the institution of an European procedure for summons for payment

principle of the free access to justice is a fundamental principle and for the facilitation of the access to justice, the European Council has requested the creation and institution, by the member states, of alternative procedures, extra-judicial, for litigation settlement in the civil and commercial matter.[5]

The objective of the European Document, transposed in the national legislation by amending Law 192/2006, is to facilitate the access to litigation alternative settlement and to promote the amicable settlement of conflicts through the encouraging of the use of mediation and the assurance of a balanced relation between mediation and the judicial procedures.[6]

For this purpose, the member states are *invited to intensify their efforts to encourage the use of the mediation procedure in the civil and commercial litigations, including through adequate information campaigns, able to offer the citizens and legal persons adequate and comprehensive information regarding the characteristics of the procedure and its advantages regarding time and financial resources saving and also to ensure a better cooperation between the members of the legal professions for this purpose."*[7]

Considering the European provisions in this matter and the national regulations and considering the fact that a significant period of time has elapsed since the adoption of Directive 2008/52/EC and the amendment of the internal legislation, we have drafted a sociological study to assess the perceptions of the Romanian population regarding the alternative methods for litigation settlement, with the purpose to identify to what extent the Romanian people is familiar with the alternative dispute resolution methods, if Romanian people used such methods, if Romanians trust them and to what extent, the state, through the competent institutions, respectively, the Ministry of Justice, the

[5] Directive 2008/52/EC of the European Parliament and Council, on May 21, 2008, on certain aspects of mediation in civil and commercial matter

[6] Directive 2008/52/EC, art. 1

[7] Report of the Committee to the European Parliament, Council and European Social and Economic Committee regarding the enforcement of Directive 2008/52/EC of the European Parliament and Council with respect to certain aspects of mediation in civil and commercial matter, 2016/2066(INI)

Mediation Council promote the alternative dispute resolution methods in compliance with the European recommendations.[8]

It must be mentioned the fact that in 2014, it was drafted a study[9] to assess the implementation degree of the provisions of the Directive 2008/52/EC, proposing, at the same time, measures for the increase of the number of mediations in the Union.

Within five and a half years from the enactment of the Directive on the mediation in civil and commercial cases, it was not yet settled the so-called "mediation paradox in the European Union."[10] Despite the multiple advantages of this alternative procedure of litigation settlement, the study showed that, in the European Union, mediation is used in less than 1% from the total civil and commercial cases, which could be settled through this extra-judicial procedure. The study has analyzed the opinion of more than 816 experts from the member states and showed the fact that the weak performance in the use of mediation as alternative dispute resolution is caused by the weak policy of promotion and regulation of the procedure in almost all 28 member states. We must mention that the only European country with more than 200,000 mediations per year is Italy, as it results from the performed analysis. This is possible because mediation in Italy became mandatory preliminary to the filing of the actions in the common law court.

In the given context, the authors of the study propose certain amendments in the situation in which, at European level, the purpose is to intensify the efforts to promote the alternative dispute resolution procedures. It is analyzed the importance of amending the Directive regarding the mediation in civil and commercial matter in the sense of the introduction of certain mandatory mediation elements considering the model of Italy. The study revealed that a "mitigated" form of mandatory mediation might be more appropriate to regulate. "*Two mitigated forms of mandatory mediation – namely, compulsory attendance at information*

[8] Manuela Sirbu, *Alternative dispute resolution Methods – The Assessment of Using ADR Methods in the Context of Euroepan Regulations,* Romanian Academy Publishing House, march 2018

[9] Directorate General for Internal Policies, Policy Department Citizen's Rights and Constitutional Affaires, "*Rebooting the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU",* 2014

[10] Idem 9

sessions and mandatory mediation with the ability to opt-out if litigants do not intend to continue the process."[11]

With respect to the analysis of the perceptions of Romanian people regarding the alternative dispute resolution methods, study was performed based on the sociological investigation method at the level of a representative group of persons at the level of the Romanian population, with an error margin of +/- 4.99%.[12]

Based on the collected data and their examination, we can conclude that the common law court represents the best known legal modality of litigation settlement in Romania. A percentage of more than 96% from the interviewed persons answered for this purpose. The reason for which the common law court is preferred instead of mediation or arbitration is represented by the degree of familiarization with it. Unfortunately, the alternative dispute resolution methods are not enough promoted by the competent institutions and, therefore, the persons address to the common law courts for the settlement of the disputes instead of an extra-judicial procedure which they do not know and which operation principles are unknown to them. The availability to use the alternative dispute resolution methods must be analyzed and associated to an adequate promotion in the public space of the information related to these alternative methods. The lack of the official communications regarding the operational mechanisms of the alternative methods of litigation settlement associated with the low level of involvement of the competent institutions for the promotion of these methods determines a very low rate of use of the alternative mechanisms for dispute settlement. If a litigation settlement method is known, the probability for it to be used is higher. This is the reason for which it is necessary to promote these alternative methods if the objective is represented by an increase of the rate of their usage.

The public European policy regarding the alternative dispute resolution mechanisms tend to change and to consider to amend the existing legislation by requiring Member States to set up alternative procedures and ensure participation in them.

Directive (EU) 2016/97 on insurance distribution recast the Directive 2002/92/EC on insurance mediation stipulates that *there is a need for appropriate and effective out-of-court complaint and redress procedures*

[11] *Idem* 9
[12] *Idem* 8

in the Member States in order to settle disputes between insurance distributors and *customers using…* "[13]

Based on the study "*Alternative dispute resolution methods – the assessment of using ADR Methods in the context of European Regulations*" published in 2018 in Romania and the conclusions of the study consisting the analysis of the regulatory framework for mediation in 28 Member States, we can conclude that for alternative dispute resolution mechanisms to work more efficient there is a strong need to amend the legislation with mandatory elements in certain disputes on one hand, and on the other hand to amend the legislation regarding the recognition and enforcement of agreements resulted from such procedures.

[13] Directive EU 2016/97 of the European Parliament and of the Council on insurance distribution

THE FUNCTIONS OF THE PARLIAMENT, THE ENHANCED NATIONAL SOVEREIGNTY AND TERRITORIAL INTEGRITY

Titi SULTAN*

ABSTRACT

The sovereign national state retains too unspoiled right to conclude international treaties (jus tractatum). This right shall be resized in the light of the provisions of Article 307 of the Treaty on European Union, pursuant to which the rights and obligations resulting from previous conventions concluded with third countries shall not be affected, but if they are compatible with the Treaty, be taken to eliminate the incompatibilities recorded. As with all the European and international law grants a considerable joystick action of individuals, it does not go up there that would weaken the relationship from state to state, which is, as a last resort, the key to the adoption of major decisions in the framework of the European Union. By virtue of the role and place of the driving function in foreign policy, the Parliament leads to full compliance with subsidiarity and proportionality principles, the conditions under which the European Union is imposing to exclude or U.N. ought to integrate the national and territorial sea sovereignty, contributing decisively to the realization of the fullness of genuine solidarity between the peoples of Europe.

KEYWORDS: *national sovereignty, territorial integrity, legislative delegation, the competent authority.*

1. The constitutional rules in the field

For the performance of its role of "code the supreme representative body of the Romanian people", The Parliament has been conferred on the general and special powers. They formed the content of the constitutional powers of the public authorities. The material expression of this competence is achieved through the exercise of distinct but correlative functions, which ensure the achievement of the goals of representation and legislative decision.

* *Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

Parliament's functions are numerous and important. It is beyond any doubt that Parliament has and must have legislative functions as well as control functions.

Sometimes it is said that Parliament has unlimited competence, that it can do anything. Moreover, it speaks of its discretionary power.

We are, obviously, in the face of an exaggeration, unwarranted statements that do not meet the requirements of a constitutional, pluralist and democratic order. That is why this wording is correct, showing that the Parliament has an essentially unlimited competence.

This wording is largely accurate. It is based on the way in which Parliament is formed, with its broad and directly representative character, that is, it is invested with empowerment directly by the people[1].

Article 61, paragraph 1 of the Constitution of 1991 (as amended and supplemented by the Law no. 429/2003 review) PROVIDE THAT Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the state. This provision of the fundamental law should be interpreted in close connection with Article 2, paragraph 1, according to which "National sovereignty resides with the Romanian people, who shall exercise it through its representative bodies constituted by free elections, regular and correct, as well as through the referendum".

The same article shall then, in point 2, that: "No group or person may exercise sovereignty in their own name".

Knowing the organizational structure of the Parliament, we relate to the need for removal of the relationship that exists between the internal functions of Parliament and the specific functions, foreign affairs.

The text of the consecrated by Article 61 of the Constitution sets the place and the role of the Romanian Parliament in the Romanian political system, interested in equal measure the affirmation of the sovereignty of the Romanian people internally and to the international relations. It is undeniable that all the organizational structures of the Parliament have finally the role of placing legislative power in the most appropriate positions and, of course, the most necessary for the exercise of its role as the representative of his people, the spokesman of the state sovereignty

[1] Ioan Muraru - *Constitution and political institutions*, Second Edition IX - revised and supplemented, the Publishing House "Lumina Lex", Bucharest, 2001, p. 450-451.

and territorial integrity in relations with others that MPs, and with similar structures parliaments of other states.

Even if in the international life was not yet focuses due on the role and place of the parliamentary structures, the near future urges us to believe that, along with the diplomatic missions "classics", the political role of the parliaments and of domestic and international parliamentary structures will win a prestige and an important, that the representatives of the will of the people that they have entrusted with the ultimate power in the state.

Therefore, the Parliament's exercise in all Member of the world, certain functions, whose tension and content are wider or narrower, depending on the nature of the political regime, the mechanism of relations between Parliament and other institutions of the States, the democratic traditions of each country and adheres to the principles of the rule of law.

It should be noted at the same time that the affirmation of some or some of the functions of Parliament (or their limitation) is the direct result of historical conditions.

Powers of legislative power were expanded, however, and have diversified as the affirmation of democratic ideas, wider acceptance of all of the principle that the parliaments constitutes, in fact, an expression of the exercise of the sovereignty of the people. This theoretical justification offered, as a matter of fact, support the development and gain parliamentary functions and in consensus with the needs of modern society, but also with the growing demands strong to establish appropriate systems to guarantee the rights of citizenship as an expression of the sovereign will of the people.

In contemporary international law, respect for the sovereignty constitutes a fundamental principle of central relevance, responding to requirements generated by the entire deep progressive development of social life and international relations.

Therefore, sovereignty is an essential attribute of the state, and consists of the supremacy of state power internally and externally on its independence, of any other power.

It is considered that the rights arising from the exercise of the sovereignty of the exclusive competence of state power, defining the state that the subject of the law and of international relations.

In the exercise of its sovereignty, the state must behave as a state integrated into the international society and, as such, to comply with the principles and rules of international law which, in particular, the national sovereignty and independence of other states, equal in rights and to do it, as the case may be, and the actions of information and consultation in order to find viable solutions to the problems which will face[2].

Mutual respect of sovereignty and territorial integrity in the report of the states, in the process of cooperation and cooperation between them, shall constitute the sine qua non of the normal gears viable, a climate of peace and understanding between nations.

The sovereign equality of states is the deciding factor of international law that polarizes the other norms and principles of this law and guides the structures of peace as a whole in the sense of maintaining and developing peaceful relations in the world.

Top of Form

In carrying out its functions, in establishing its internal and external policy, the state is acting in an independent manner, without depending on the strength of another state. Any mixture from another member constitutes an infringement of sovereignty. By virtue of its independence, each member state shall have the opportunity to establish, on the basis of its own interests, the domestic and foreign policies. The independence of each member state shall be stated in the framework of international relations in which ensure full respect for the sovereignty of the member[3].

The content of the sovereign equality mainly comprises the following components:

a) States are legally equal;

b) each state enjoys the rights inherent in full sovereignty;

c) each state has the obligation to respect the personality of other states;

d) territorial integrity and political independence are inviolable;

e) each state has the right to freely choose and develop its political, social, economic and cultural system;

[2] Adrian Năstase, Dumitra Popescu - *Public International Law*, "Şansa" Publishing House, Bucharest, 1997, p. 91.

[3] Dumitru Mazilu - *Public International Law, vol. I*, "Lumina Lex" Publishing House, Bucharest, 2001, p. 214-216.

(f) each member state shall have the obligation to pay fully and in good faith its international obligations and to live in peace with other states;

g) the right to establish its own laws, to define and lead free its international relations, may or may not belong to international organizations, to be or not party to the treaties of alliance, the right of neutrality.

One of the main consequences of sovereign equality is the inalienability and indivisibility of the state, territory, IE the inadmissibility of any attack on the territory of a state through acts of aggression or acts of force majeure, dismantling of territory or modification by constraint of state borders[4]. Therefore, states enjoy territorial sovereignty involving not only rights for them, but also obligations for other states to which they are forbidden to interfere.

In the context of this principle and well-defined cases, international law, however, is permitted to take place, with strict observance of the principle of self-determination of nationalities, changes within a state.

On the other hand, in international law, it is considered that the forms in which the will of a person can express themselves in terms of territorial changes are either the adoption of a decision to that effect by the legislative body or a consultation of the whole people through the plebiscite, to ensure full freedom of expression in this consultation[5].

The principle of territorial integrity expressed just load the obligation existing in other Member to comply with this territorial sovereignty of the state.

Therefore, beyond the monopoly of the legislative framework of the Parliament, it is necessary to note that all by the Constitution shall enter the legislative delegation, by virtue of which the government can issue emergency decrees, and the President of Romania may also have recourse to legislative delegation on the path of regulatory decrees, for the purpose of declaring the state of emergency, a state of siege and imperatively total mobilization of the armed forces or state of war, within the limits set by the Constitution.

[4] Florian Coman - *Public International Law*, vol. I, Sylvi Publishing House, Bucharest, 2001, p. 143.

[5] Grigore Geamanu, *The fundamental principles of international law*, Editura Didactică şi Pedagogică, Bucharest, 1967, p. 299.

In our opinion, the delegation of legislative means the transfer of legislative powers to the executive power, by an act of the will of the Parliament, or on the constitutional way in extraordinary situations. In both cases, the transfer is limited and conditioning. Only certain legislative powers can be transferred to the executive power, for a limited period of time and under a well-defined parliamentary control.

As inspired by his philosophizing philosopher and Irish politician Edmund Burke (1729-1797), "The Parliament is not a congress of ambassadors expressing different and hostile interests that everybody wants to preserve. Parliament is the deliberative assembly of a single nation, having only one interest as a whole."

The democratic revival idea and the failure of all forms of totalitarian government have shown, however, beyond any doubt, and the viability of the institution of Parliament, that the enhanced national sovereignty.

Has become generally recognized the idea that the parliaments do not represent today in the world only the longest forums national democratic debate, but efficient and laboratories, the elaboration of laws, a factor of liability of public life, guarantees to any attempt to diminish the democratic rights and the value of the institutions of the rule of law.

In connection with the principle of territorial integrity, point IV, of the Final Act of the Conference on Security and Cooperation in Europe in 1975 has the obligation of Member to refrain from any act incompatible with the purposes and principles of the UN Charter against national sovereignty, territorial integrity of member, as well as to refrain of the territory of the other subject of a military occupation or other measures for use, direct or indirect, of labour conflict with international law.

Having regard to the importance of compliance with the territorial integrity of the member states – the territorial conflict is the most serious of international security – is beneficial to the intensity of relations between states in light of the principles of international law and the role of the United Nations for preventing and resolving these conflicts.

In the preceding, it is clearly with great clarity that national sovereignty and territorial integrity provide parliamentary functions and a true mosaic of functions and powers in many different fields of life economic and social and political, which expresses just reflecting the quality of the Parliament enhanced and the owner of the sovereign power of the Romanian people.

The force of the parliamentary system consists in the principle of national sovereignty and territorial integrity, in the idea that the Parliament represents the people himself, and the MPs are delegated which cannot delegate, in any case, their powers are those of officials of the state.

2. The correlation between the internal and external functions of Parliament

In the international practice of some of the most known evolved democracy on the world, it was gathered that the parliaments, regardless of the political system which exist in the member concerned, have one of the most prominent roles, the central place in the democratic system in question, and absolutely all have the important factor for the identification with the democracies of the states in which legislative function works.

The legislation is thus a form of its general competition, by virtue of which the general political debate on the problems of the nation is completed by the adoption of rules of law, as an expression of general demands in the regulation of social relationships.

The competence of legislation, whereas the result of the Constitution, may not be exercised only within the limits and under the conditions laid down in this. A legislative power unconditional, absolute, would be able to absorb itself all the functions of the state, using the strength and authority of law in order to decide on matters pertaining to the function of the executive or judicial process[6].

Adopting the domestic legislation on the principles of democracy, it is understood that the law which has international in nature cannot exit from the rigors of democratic principles applied to the laws of internal affairs. The quality of the Parliament code legislature, results from the competent authority and legitimacy to the Constitutional Court.

By the Constitution of 1991, the Romanian people decided with regard to the relationship between international and national law within the meaning of that "treaties ratified by Parliament, according to the law, are part of national law" (Article 11, paragraph 2), and in the case in which a treaty to which Romania is to become part contains provisions

[6] I. Muraru, M. Constantinescu, *Romanian Parliamentary Law*, *op. cit.*, p. 122.

contrary to the Constitution, the ratification can only take place after the revision of the Constitution (Article 11, paragraph 3).

Starting from constitutional main components, it is much easier to start looking at the correlation (and that there is no facto) between the laws of the Romania and international activities, PARLIAMENTARY, activities, which in our opinion, it should be convenient to this main component of the constitutional law[7].

The provisions of Article 10 of the Constitution stipulating that "Romania shall establish and develop peaceful relations with all states and, in this framework, good neighbourly relations, based on the principles and other generally accepted norms of international law".

Knowing the organizational structure of the legislative power, we are proud of the necessity of highlighting the relations that exist between the internal functions of the parliament and its specific external functions.

According to the provisions of Article 61, paragraph 1 of the Constitution, the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country". We can infer that this text secure place and the role of the Romanian Parliament in the public authority, but also in the Romanian political system, entertained in equal measure the affirmation of the sovereignty of the Romanian people internally and to the international relations.

Parliament consists of the Chamber of Deputies and the Senate (Article 61, paragraph 2 of the Constitution).

In Article 67 of the Constitution, which stipulates that are legal acts of Parliament, stipulates: "The Chamber of Deputies and the Senate shall pass laws, resolutions and motions in the presence of a majority of the members".

In Article 69 of the Constitution has it that "In the exercise of their mandate, deputies and Senators shall be in the service of the people". This constitutional provision gives the expression of the deepest what connection there is between the (Democratic People voters) and the (representative of the people elected), called upon to pronounce in both the internal problems, and as regards the interests of Romania's international.

In connection with the involvement of the government in international affairs in Romania's relations with other States and international bodies,

[7] Gheorghe Rizescu, *"Parliamentary diplomacy"*, *op. cit.*, p. 66-67.

in accordance with the Constitution and the laws in force in the Member States, it has wide powers, and may negotiate and sign agreements, conventions and other arrangements at government level, but also the international treaties on behalf of the Romanian state, on the basis of the representative's authority to express by the President of Romania.

Of course about how the government shall carry out its tasks in the field of international relations should be informed Parliament through processes, inform them of the reports, records, etc., or by the Parliamentary control over the foreign policy of the government.

The reason of such information lies in the need to ensure the functioning of the legislative authority.

In accordance with the provisions of Article 2, paragraph 1, of the Law No. 590/2003[8], "Romania, the Romanian government and ministries and other authorities of the central public administration, for which this task is specifically provided for by the legislation in force, may conclude treated at the state level, treated at government level, i.e. treated at departmental level".

At the same time, in paragraph 2 of Article 2 of Law no. 590/2003, provide that "the Treaties referred to in paragraph 1 shall be concluded with the compliance with the fundamental principles and calculate mandatory rules of international law, of Community law, the rules customary international, of the Romanian Constitution, in accordance with the provisions of this law."

In connection with the advertising of international documents to which it is party our country, provided that the government, parliament, namely "may decide that certain treaties, agreements, conventions and other international agreements should not be published. Article 31 (5) of Law No 590/2003 stipulates that the provisions of internal law may not be invoked to justify the termination of the Treaty provisions in force'.

Therefore, between the order of the domestic and international order there is a close correlation, in accordance with constitutional provisions to ensure not only compliance with the documents agreed with other States or at world level, but also safe and effective mechanisms for the application in the life of the Treaties, international agreements and conventions.

[8] Published in the Official Gazette of Romania no. 23 of 12 January 2004.

In respect of the correlation between international and national law in 2003, by amending the Constitution, the legislator inserted in Article 11 (3) which provides that 'In the case in which a treaty to which Romania is to become part comprises provisions contrary to the Constitution, the ratification can only take place after the revision of the Constitution."

After the introduction of the new democratic regime in 1990 until today, Romania has become a party to numerous treaties, conventions and international agreements, expressing his willingness to enlist the modern, international standards accepted at the level of the European Community and international.

The quality of Romania, as a member of the European Union, from 1 January 2007, involves (by himself the Accession Treaty) acceptance of all the treaties concluded by the European Community and, at the same time, of the European Constitutional Treaty.

Emphasize, however, that in the framework of the internal correlation with external functions of the Parliament is the epitome of the democratic act of the will of the people to impose a specific type of internal legislation (for example, association at European Union) and to express in a specific way in relations inter-parliamentary and other types of international relations in which are trained Romanian MPs or parliamentary structures.

BIBLIOGRAPHIC REFERENCES

1. Ioan Muraru – "Constitutional Law and Political Institutions", 9th Edition – revisited and completed, "Light Lex" Publishing House, Bucharest, 2001.
2. Adrian Năstase, Dumitra Popescu – "Public International Law", "Chance" Publishing House, Bucharest, 1997.
3. Dumitru Mazilu – "Public International Law", vol. I, "Light Lex" Publishing House, Bucharest, 2001.
4. Florian Coman – "Public International Law", vol. I, "Sylvi" Publishing House, Bucharest, 2001.
5. Grigore Geamănu – "The Fundamental Principles of Contemporary International Law", "Didactic and Pedagogical" Publishing House, Bucharest, 1967.

6. Ioan Muraru, Mihai Constantinescu – "Romanian Parliamentary Law", Actami Publishing [7] Gheorghe Rizescu – "Parliamentary diplomacy, its role in solving international problems", Lumina Lex Publishing House, Bucharest, 2000.
8. Adrian Năstase – Representation of Romania to the European Union in the context of internal and European regulations, Autonomous Publishing House Official Gazette, Bucharest, 2013.
9. Law no. 590/2003 on the Treaties.
10. The Romanian Constitution of 2003.House, Bucharest, 1998.

THEORETICAL ARGUMENTS RELATING TO COMPENSATION OF NON-PECUNIARY DAMAGES

Laura TUDURUT*

ABSTRACT
This study concerns the opinions expressed in the specialized literature and the legal doctrine concerning the concept of non-pecuniary damages, compensation of non-pecuniary damages, theories at the basis of legal institutions and innovations brought by the new civil code relating to remedies for moral injury.

KEYWORDS: *moral, damage, injury, non-pecuniary right, remedy.*

1. Considerations on the concept of non-patrimonial damage and terminological clarifications

Civil liability common law is represented by tort liability, the contractual liability being a liability which derogates from civil liability common law. The possibility of granting financial compensation for remedy of non-pecuniary damages has always been controversial.

The Civil Code from 1864, i.e. articles 998-999 required the obligation by the author to remedy the damages. The terms used by the old Civil Code were general terms; the legal provisions did not differentiate between damages resulting from committing illicit acts. Civil liability took into account both pecuniary and non-pecuniary damages. Non-pecuniary (moral) damages were not expressly regulated in the old Civil Code, but we cannot say that they have been excluded in the light of the relevant case-law and doctrine. Although they were not specifically regulated, recognizing the possibility of a non-pecuniary damage caused by illicit acts, the plenum of the Supreme Court adopted the thesis of inadmissibility of monetary compensation as an appropriate remedy for moral damages, assimilated to bourgeois institutions, limiting the remedy of moral damages exclusively by non-pecuniary means[1].

* *Ph. D. Student, University Titu Maiorescu Bucharest, Romania.*

[1] The Supreme Court, *Decision on guidance no. VII of December 29, 1952*, p. 25-26.

The Romanian case-law highlights the following stages in terms of non-pecuniary damage remedy, as follows: as a general rule, during the period (1865-1944) there was a period of admission of monetary remedy for moral damages; (1944-1952) period of admission by tradition of monetary remedy for moral damages; (1952-1963) period of inadmissibility of monetary remedy for moral damages; after 1963 until 1989, there was the period of directing towards monetary remedy for moral damages in some cases.[2] After 1989, the law resumed the tradition of monetary remedy for non-pecuniary damages, including indirect compensation of the damage, consisting in the indirect harming of the victim's close relatives' affection.

Non-pecuniary damages, along with pecuniary damage, constitute an element of civil liability. "Non-pecuniary damages or moral damages are harmful consequences which cannot be valued in money resulting from being harmed or violation of the rights of the person, that is, those that define human personality and have no economic content"[3].

"Moral sufferings inflicted on a person are added to the harm of moral personal rights in the contents of other definitions"[4].

Other authors have given the following definition: "non-pecuniary or moral damage is the direct harmful result of non-pecuniary nature of an illicit and culpable act, which affect the uneconomical content values that define the human personality; and although this result can not be measured in money, it still creates the remedial right and obligation, according to tort liability rules"[5].

In another opinion, "non-pecuniary damage is the harm caused to the injured party as a result of disregarding, challenge or violation of the subjective rights or extra-pecuniary interests recognized by the law, invaluable non-economic harm resulting from offenses or failure, improper or late performance of contractual obligations"[6].

The Tort liability principle is depicted in art. 1349, the New Civil code (NCC) deriving from article 998-999 Civil Code of 1864; Everyone has

[2] L. Barac, *Liability and legal sanction,* Publishing House Lumina Lex, 1997, p. 122.

[3] L. Pop, *General theory of obligations*, Publishing House Lumina Lex, 2000, p. 200..

[4] I. Pitulescu, E. Dersidan, T. Molea, L. Ranete, *Dictionary of Common Legal Terms*, Publishing House Alex, Bucharest 1996 p.104.

[5] I. Albu, V. Ursa, *Civil Liability for Moral Damages*, Publishing House Dacia, Cluj-Napoca, 1979, p. 61.

[6] C. Jugastru, *The Damage - Romanian landmarks in the European Context*, Publishing House Hamangiu, 2013, p. 164.

the obligation to comply with the rules of conduct laid down by the law or by the local custom and not to harm in any way the rights and the legitimate interests of others. In accordance with article 1381-1395 NCC, the person acting with clear judgment violates the duties specified in para. 1 of article 1349 New Civil Code and causes the other an injury has a legal obligation to repair it in full, i.e. both the injury actually caused – *dammnum emergens,* and the unrealized gain – *lucrum cessans.*

The doctrine has identified more definitions and distinctions between the terms: damage and injury. It has been shown that the damage is the harm caused to the asset, physical integrity of the person, while the damage is the consequence of damage, consequence that can be pecuniary or non-pecuniary. The injury is the subject of compensation. "The damage is thus, a negative effect of an abnormal, unusual behavior, in that it defies, neglects or defeats the rights or grounded interests of a person. More generally, the damage is only the effective consequence of breaking the legal balance established by the order of law and imposed by the commutative justice."[7] "Injury is a legal category that allows patrimonialization of any actual damages (material or not). The legal operation of understanding the damage through injury is done with the goal of making any damage capable of being remedied, by inserting its pecuniary expression into the obligation of remedy"[8].

The terms used in the doctrine and case-law for designating non-pecuniary damages show that they are different: we find "moral damages"[9] "extra-patrimonial damages", "moral damages"[10], "non-pecuniary", "immaterial", "intangible damage"[11] etc.

The concept of "non-pecuniary damage" is found mostly in the case-law with the meaning of compensation or damages claimed by the

[7] P. Vasilescu, *Civil Law. Obligations*, Publishing House Hamangiu, Bucharest, 2012, p. 573, *apud* C. Jugastru, *Civil Law. General Theory of Obligations*, Publishing House Universul Juridic, Bucharest, 2017, p. 202.

[8] *Ibidem*

[9] M. Boeru, *Monetary remedy of moral damages in some Western European countries law*, in Dreptul no. 8/1996, p. 23-35.

[10] C. Stătescu, C. Bîrsan, *Civil Law. General Theory of Obligation*, the IXth edition revised and completed, Publishing House Hamangiu, Bucharest, 2008, p. 147.

[11] I. Albu, V. Ursa, *Civil Liability for Moral Damages*, Publishing House Dacia, Cluj-Napoca, 1979, p. 48.

victim.[12] In common language we can see that the terms used are "damage", "injury", "harm", with the same meaning.

The term of "non-pecuniary damage" is most often used with the meaning and actually expressing the harm affecting the moral values that make up the human personality. As shown by the doctrine, the term of damage presents the idea of remedy for the purpose of compensation and is contained within the concept of moral damage. It has also been shown that this term has some disadvantages, namely that it includes in its content the idea of remedy, compensation.

The term "moral damage" evokes best the reality to which it refers, namely the influence on moral values that make up the human personality. The term of moral damage has the disadvantage that it suggests "compensations claimed by its assertion".[13]

Etymologically, "damage" comes from the Latin *damnum* (bad) and designates a material loss caused to someone, a loss which is a quantifiable effect.

Given that in the case of "non-pecuniary (moral) damages", the subjective civil right violated is a non-pecuniary or extra-pecuniary right, whose content cannot be expressed in money, having no market value, for exchange, the term used is not in direct consistency with the observed effects both physically and emotionally, reason for which the term of *moral injury* is believed to be best. Etymologically, the term of *injury* comes from the Latin "*laesio",* meaning injury, effect that can be found both physically, as is the case of physical injury "but also felt and presumed, without being subject to finding and evidence of its existence, such as pain or health condition".[14] In support of these arguments, we consider the national case-law and in particular that of the High Court of Cassation and Justice of Romania in the sense that direct evidence of moral injury is practically impossible to be brought in certain circumstances, as it is found by the courts and not demonstrated. *[,,In accordance with the national case-law and practice of the ECHR, which has made a number of notable acclaims in respect of evidence of moral injury, the evidence of illicit act is sufficient; the injury and causation are*

[12] I. Turianu, *Tort Liability. Civil Liability for Moral Damages*, Publishing House Dacia, Cluj-Napoca. 2009 - A Summary of Judicial Practice.

[13] S. Neculaescu, *Sources of obligations in the Civil Code*, art. 1164-1395, Publishing House C.H. Beck, Bucharest, 2013, p. 782.

[14] *Ibidem*

to be presumed and the courts will infer occurrence of the moral injury from mere existence of the illicit act likely to cause such injury and the circumstances in which it was committed, the solution being determined by the subjective, internal nature of the moral injury, its direct evidence being virtually impossible"][15]

The French doctrine uses terms such as "*prejudice extrapatrimonial"*[16], *"prejudice moral"*[17], *"dommage moral", "dommage corporel"*[18] etc.

If the *pecuniary damage* can be expressed money, pecuniary or has an economic market value, *the non-pecuniary damage* or appointed *and personal non-pecuniary* can be determined per *a contrario* as that damage cannot be expressed in money, having no market value, exchange. "Thus, the term *non-pecuniary*, in the name of non-pecuniary damage, refers only to the fact that this kind of injury has no economic value that can be evaluated in terms of money but not to the fact that the values that such damage may prejudice would not belong to the person injured."[19]

Considering the matter of civil liability and the use of the terms of damage, loss or injury, the French doctrine has commonly felt the need to differentiate between these terms, which is why some French authors[20] have proposed damage with the meaning of loss, be considered "objective injury, common to all people, while damage should designate

[15] Civil Section I, *Decision n. 153 of January 27, 2016* ruled by the High Court of Cassation and Justice of Romania.

[16] Le Tourneanu Ph., Cadiet, L., *Droit de la responsabilite et des contracts* ("Liability and Contractual Law"), Dalloz, Paris, 2000, p. 357, *apud* S. Neculaescu, *Sources of obligations in the Civil Code*, art. 1164-1395, Publishing House C.H. Beck, Bucharest, 2013, p. 782.

[17] Fr. Terre, Ph. Simler, Y. Lequette, *Droit civil. Les obligations* ("Civil Law. Obligations"), Dalloz, Paris, 1999, p. 643, *apud* S. Neculaescu *Sources of obligations in the Civil Code*, art. 1164-1395, Publishing House C.H. Beck, Bucharest, 2013, p. 782.

[18] Y. Lambert-Faivre, *Droit du dommage corporel d'indemnisation*, Dalloz, Paris, 2000, *apud* S. Neculaescu, *Sources of obligations in the Civil Code*, art. 1164-1395, Publishing House C.H. Beck, Bucharest, 2013, p. 782.

[19] I. Albu, V. Ursa, *op. cit.*, p. 49.

[20] L. Cadiet, *Les metamorphoses du prejudice, dans Les métamorphoses de la responsabilité*, sixièmes Journées René Savatier, PUF, Paris, 1998, apud S. NecuIaescu, *Sources of obligations in the Civil Code*, art. 1164-1395, Publishing House C.H. Beck, Bucharest, 2013, p. 783.

the actual legal consequences produced to each person individually, the impact of injury with the personal situation of the victim."[21]

A distinction between "damage" and "injury" was adopted by the Romanian doctrine as follows: "*damage* seen as any economic loss, whether *damnum emergens* or *lucrum cessans,* without interest to investigate the causes to put on the account and in the charge of someone" and *injury* that would designate the situation created for a subject through injury of material or moral values or, if you prefer, pecuniary or extra – pecuniary".[22]

Having regard to the traditional classification criteria made in specialized literature regarding the subjective civil rights, that mainly interest classification according to their content, namely pecuniary and extra-pecuniary or non-pecuniary (personal non-pecuniary) as well as the distinctions made by the doctrine and specialized literature in terms of damage and injury, arises the question to what extent the new provisions of the Civil Code that came into force regulate their full "remedy" and how.

2. Regulatory developments concerning remedy of non-pecuniary damages included in the new Civil Code

The exposure of the reasons which led to the amendment of the law relating to the new Civil code showed that it was imperative to amend the Civil code of 1864 because its provisions no longer responded to the socio-economic realities.

Book I of the new Civil code also contains a special title (Title V. *Defending non-pecuniary rights*) through specific legal means, absolute regulation for a Romanian civil code. Remedy of the three types of damage: pecuniary, tangible and non-pecuniary is regulated în the new Civil Code with sufficient provisions, actually being the first time that a Romanian civil code makes explicit references to physical damage and non-pecuniary damages to a satisfactory extent. This classification is also found in the Civil Code of Quebec that includes, among repairable

[21] X. Pradel, *Le prejudice dans le droit civil de la responsabilité*, L.G.D.J., Paris, 2004,p.10, *apud*. S. NecuIaescu, *Sources of obligations in the Civil Code*, art. 1164-1395, Publishing House C.H. Beck, Bucharest, 2013, p. 783.

[22] S. Neculaescu, *Sources of obligations in the Civil Code*, art. 1164-1395, Publishing House C.H. Beck, Bucharest, 2013, p. 783-784.

damage: personal injury, pecuniary and non-pecuniary damage, separated for tort liability (art. 1457) and contractual liability (art. 1458).

The new Civil code in article 1387 regulates differently the damage resulting from physical or health injury, while article 1391 explicitly enshrines the remedy of non-pecuniary damage (art. 1391).

Tort liability is carried out pursuant to art. 3357 of the new Civil Code, i.e. "(1) The person who causes harm to another through an illicit act, committed intentionally or through negligence is required to fix it. (2) The author of the injury is liable for the easiest fault."[23] This article replaces art. 998 and 999 of the old Civil code, but tort liability constituents remain the same: the existence of the unlawful act; the existence of the guilt (intentionally or through negligence) – liability is engaged for the easiest fault; the existence of an injury (pecuniary and/or non-pecuniary); the existence of a causality relation (cause and effect) between the illicit act and the injury.

The principle of integral repair in tort civil liability is clear from the wording of art. 1349 para. 2 Civil code [,"the person, who having good judgment, violates this duty shall be liable for all damage caused and is obliged to provide full remedy"][24].

The existence of pecuniary and non-pecuniary damage has never been challenged. The possibility to grant monetary compensation for remedy of non-pecuniary injuries was a constant controversy in the doctrine and in the specialized literature.

Although changes in the new Civil code with regard to the matter of the pecuniary damage were important, some shortcomings of the law have been identified in the sense that the legislator's intentions are not clearly and unequivocally detached in terms of its option regarding type of remedy appropriate to the pecuniary damages; we keep in mind the provisions of art. 253 para. 4 of the new Civil code: (4) "Similarly, the injured person may demand compensation or, where appropriate, pecuniary remedy for the injury, even *non-pecuniary,* caused to it, (...)" and the art. 1391 para. 1 Civil code: "1) in case of physical or health injury, *a compensation for restricting family and social life possibilities,* may be granted". In an opinion expressed in the literature, "the Romanian legislator has two options in this issue: either to admit the principle of damage remedy, regardless of its pecuniary or non-pecuniary nature, or

[23] *New Civil Code* art. 1357.
[24] *Idem*, art. 1349 para. 2.

to provide that pecuniary damage remedy occurs only in cases stipulated by the law (...)"[25].

We believe that the provisions of art. 1391 New Civil Code do not cover all issues regarding non-pecuniary damages, the current regulation being limited to just two of them in terms of physical or health injury and those by failing, without taking into account the other assumptions considering harm to other moral values. "Consequently, we can only speak of compensation for certain non-pecuniary damages and not non-pecuniary damage in general. More properly, the rule should be referred to as special rules concerning certain categories of damages."[26]

How the new Civil code understood to regulate "remedy of non-pecuniary damage", seems to be non very explicit, the legal provisions being deficient in this respect; for this reason we cannot affirm that they took into account the whole sphere of social values whose harm may result into causing a non-pecuniary injury that can be remedied by pecuniary means. We can exemplify such social values in a limiting way, as well as the circumstances or the persons who may seek compensation.[27]

The phrase "Remedy of non-pecuniary damage", art. 1391 New Civil Code does not clearly render the list of damages that are intended to be "remedied", because the term of "remedy" can not be held together with the concept of moral values, as moral values cannot be remedied. Neither the Code of Napoleon nor the Romanian Civil Code did provide for another solution for non-pecuniary damages. The absence of an express regulation in the previous legislation regarding the principle of remediation in kind, has led to the assessment that remedy is only possible through monetary equivalent, under Civil code of 1865. We believe that monetary compensation may occur when the remedy in kind does not cover the totality of the damage, when remedy in kind of the previous situation is no longer possible, or when such remedy is of no further interest to the victim. It is possible that the doctrine and judicial practice in the implementation of art. 1391 New Civil Code proceeds to deepening the positive French and German law that admit compensation

[25] S. Neculaescu, *Sources of obligations in the Civil Code*, art. 1 164-1395, Publishing House C.H. Beck, Bucharest, 2013. p.785.

[26] *Idem*, p. 794.

[27] P. Pricope, *Tort Liability*, Publishing House Hamangiu, Bucharest 2013, p. 124.

for any such damages; however, their scope and extend are carefully analyzed.[28]

BIBLIOGRAPHY

1. Albu I. "Civil Law. Contract and Contractual Liabiliy", Publishing House Dacia, Cluj-Napoca, 1994
2. Albu I., Ursa V. "Civil Liability for Non-pecuniary Damages", Publishing House Dacia, Cluj-Napoca, 1979
3. Anghel I.M., Deak F., Popa M.F. "Civil liability", Publishing House Ştiințifică, Bucharest, 1970
4. L. Barac, "Liability and legal sanction", Publishing House Lumina Lex, 1997
5. Beleiu Ghe. "Romanian civil law", 5th Edition, Publishing House and press Şansa SRL, Bucharest, 1990
6. Boeru M., "Monetary remedy of moral damages in some Western European countries law", in Dreptul no. 8/1996, p.23-35
7. Boilă L.R, "New Civil Code perspectives on tort liability", Publishing House C.H. Beck, Bucharest, 2012
8. Boilă L.R. "Subjective Tort Liability", 2nd edition, Publishing House CH. Beck, Bucharest 2009
9. Boilă L.R "Objective Tort Liability", Publishing House CH. Beck, Bucharest, 2014
10. Bozeşan V., Călin D., Mihăiţă F., Militaru I., Pană D., "Freedom of expression limits: politicians, journalists, magistrates", Publishing House Hamangiu, 2014
11. "Collection of guidance decisions of the Supreme Court" 1952-1965, Bucharest, 1966
12. Eliescu M., "Tort Liability", Publishing House Academiei Republicii Socialiste România, Bucharest, 1972
13. Jugastru C. "Civil Law. General Theory of Obligations", Publishing House Universul Juridic, Bucharest, 2017
14. Jugastru C., "Individuals law. Obligations law", Publishing House Hamangiu, 2013
15. Jugastru C., "Injurt – Romanian highlights in European context", Publishing House Hamangiu, 2013

[28] *Idem,* p. 123.

16. Mangu F.I., "Civil liability, continuance of civil liability", Publishing House Universul Juridic, Bucharest, 2014
17. Mangu F.I., "Objective tort liability", Publishing House Universul Juridic, Bucharest, 2015
18. Neculaescu S., "Tort Liability", Publishing and press house Şansa SRL, Bucharest, 1994
19. Neculaescu S., "Sources of obligations in the Civil Code", art. 1164-1395, Publishing House CH. Beck, Bucharest, 2013
20. Nicolae M., "Civil Law. General Theory. Theory of Subjective Civil Rights", Publishing House Solomon, 2018
21. Pitulescu I., Dersidan E., Molea T., Ranete L., "Dictionary of Common Legal Terms", Publishing House Alex, Bucharest, 1996
22. Pop L., "General theory of obligations", Publishing House Lumina Lex, 2000
23. Pricope P., "Tort Liability", Publishing House Hamangiu, 2013
24. Schmutzer R., Enache M., Av. Tînase I.C., "Non-pecuniary Damages – Case-law 2008 – 2010, ECHR decisions against Romania (damages)", Publishing House Moroşan, 2010
25. Stătescu C., "Tort Liability for the acts committed by another", 2nd edition, Publishing House Hamangiu, 2009
26. Stătescu C., Bîrsan C. "Civil Law. General Theory of Obligations", Publishing House a IX-a revised and reissued, Publishing House Hamangiu, Bucharest, 2008
27. Turianu I. "Tort Liability. Civil Liability for Non-pecuniary Damages", Publishing House Dacia, Cluj-Napoca, 2009 – A Summary of Judicial Practice.
28. Uţă L., "Non-pecuniary damages, legal practice", Publishing House Hamangiu 2017
29. Zeca D., "Non-pecuniary damages în civil and criminal disputes. Judicial practice", Publishing House Hamangiu, Bucharest, 2016.