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CONTENT

ASPECTS CONCERNING THE CONCEPT OF PATRIMONY

Anca Roxana ADAM *

ABSTRACT

This study refers to the notion of patrimony. The contents of this material are found opinions expressed in the literature on the notion of patrimony, theories that were the basis for substantiating the legal institutions, the legal character of the patrimony and the innovations it brings new civil code on the patrimony.

KEYWORDS: *universal, individual, rights, obligations*

1. Definition of patrimony

While etymologically the concept of *patrimony* originates from the Latin *patrimonium*, in Roman law also synonyms of this notion were used, like: *pecunia, familia, bona, hereditatis, peculium* etc. In Latin patrimony refers to the goods inherited from the parents, *patrius* meaning 'of the father', *i.e.* parental[1], thus patrimonial, representing what is handed down through generations in the same family.

In Roman law patrimony was not defined, the notion evolved in time. While initially patrimony included only material goods, in the classic age also real entitlements and receivable claims appeared, which were also patrimonial rights.

The fact that Roman law used a number of expressions for the same concept shows that under different judicial circumstances a number of goods (rights and obligations) had to be analysed in a global manner *ut universitas*. Up to modern law, the concept used by the Romans found applicability in successions[2].

The Romans referred to patrimony as *bona non inteleguntur nisi deducto aere alieni* (goods does not mean what is left upon deducing the

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[1] *V. Stoica, Drept civil. Drepturile reale principale, vol.I, [Civil Law. Main Real Rights, vol. I]* Editura Humanitas, Bucureşti, 2004, p.41

[2] *I. Micescu, Curs de drept civil [Textbook of Civil Law]*, Editura All Beck - Restitutio, 2000, Bucureşti, p. 197

claims of others). Thus obligations were regarded as the rights of others, as a burden on the patrimony.

In order to explain the concept of patrimony we need to start from the premise of civil rights and obligations[3] with an economic content.

Economically, patrimony represents the totality of goods that constitute the entire wealth of a person[4].

In order to define patrimony as the totality of obligations and rights with economic value belonging to a person, we need to analyse also the process of generalisation and abstracting, of analysis and synthesis, regardless of the personality of each asset and each obligation in part[5].

Patrimony was defined as the totality of all rights and obligations of a person, with pecuniary or economic value, *i.e.* everything that can be measured in money[6]. The same concept defines patrimony as "the accounting expression of all economic powers of a legal subject", as "if a subjective right endows its holder with prerogatives or powers and if these can assume a patrimonial, economic aspect, *i.e.* if they can be represented by an amount of money, it stands to reason to define a person's patrimony as the accounting expression of all these economic powers[7].

Patrimony was first defined as the totality of rights and obligations with economic value, and also of the goods these rights relate to, belonging to a person whose needs and tasks patrimony is meant to satisfy[8].

In doctrine[9] the inclusion of the goods patrimonial rights relate to is deemed as superfluous, as such "goods are implicitly included by the mere reference to rights".

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[3] *I.P. Romoşan, Drept civil - Drepturi reale [Civil Law – Real Rights]*, Editura Imprimeriei de Vest, Oradea, 1996, p. 11

[4] *C. Hamangiu, I. Rossetti - Bălănescu, Al. Băicoianu, Tratat de drept civil român [Treaty of Romanian Civil Law]*, Editura All - Restitutio, p. 521

[5] *I. Lulă, Unele probleme privind noţiunea de patrimoniu [Aspects Concerning the concept of Patrimony]*, in: Dreptul no.1/1998, p.14

[6] *C. Hamangiu, I. Rossetti - Bălănescu, Al. Băicoianu*, op.cit, p. 522

[7] *G. Lulescu - Teoria generală a drepturilor reale. Teoria patrimoniului. Clasificarea bunurilor. Drepturile reale principale [General theory of Real Rights. Theory of Patrimony. Classification of Assets. Main Real Rights]*, Bucureşti, 1947, p. 21

[8] *T. Ionaşcu, S. Brădeanu - Drepturile reale principale [The Main Real Rights]*, in R.S.R., Editura Academiei, Bucureşti, 1978, p. 13

[9] *C. Stătescu, C. Bârsan, Drept civil, Drepturile reale [Civil Law, Real Rights]*, Universitatea Bucureşti, 1988, p. 5

The Civil Code of 1865 utilised the term *patrimonial rights,* which is synonymous to that of *goods*.

Patrimony was further defined as the totality of rights and obligations belonging to a person or burdening that person, sharing the feature of being assessable in money and forming a distinctive whole of component elements[10] or as the totality of patrimonial rights and obligations belonging to a determined individual or legal entity, regarded as a sum of closely interlinked active or passive values[11].

Literature includes also a both simpler and more comprehensive definition of patrimony, namely the totality of rights and obligations with economic value belonging to a person[12].

Thus patrimony is not to be confused with its positive component, namely the assets. Patrimony exists even when the liabilities exceed the assets.

In order to explain the concept of patrimony we need to start from the assumption of the existence of civil rights and obligations with economic content[13].

A generally understandable definition states that patrimony represents the totality of rights and obligations with pecuniary value belonging to an individual or legal entity[14].

2. Theories concerning patrimony

Classic literature has produced a number of *theories* concerning patrimony.

The *theory of patrimony personality* promoted by French jurists Aubry and Rau is well-known as the *classic theory of patrimony*. The French jurists have defined patrimony as a whole of rights and obligations that can be allocated a pecuniary value belonging to a single person, as patrimony belongs to one and the same person.

Thus these authors assume a close link between a person and their patrimony, which is an emanation of their personality, an expression of

[10] *I. Micescu*, op. cit., p. 196

[11] *L. Pop - Drept civil. Drepturile reale principale [The Main Real Rights]*, Editura Cordial, Cluj-Napoca, 1993, p. 7

[12] *C. Bârsan, M. Gaiță, M.M. Pivniceru - Drepturile reale [Real Rights]*, Institutul European, 1997, p. 8

[13] *Ioan P. Romoșan*, op.cit, p. 11

[14] *I. Adam, Drept civil. Drepturile reale [Civil Law, Real Rights]* , Editura All Beck, București, 2002, p.5

the judicial power a person is endowed with[15]. This concept entails that patrimony absorbs the entire juridical personality of man, and that nothing is left outside the patrimony.

A first consequence of the personality theory of patrimony is that patrimony constitutes "the general lien of creditors over the entire patrimony". This is found within the provisions of art. 1718 of the Civil Code of 1865: "Anyone who has personal obligations is held to satisfy their debts with all their mobile and immobile goods, present and future", similar to those of art. 2092 of the French Civil Code and art. 2740 of the Italian Civil Code.

The New Civil Code[16] has regulated at art.2324 the concept of creditors' shared guarantee, as a *function of patrimony*[17]. It is thus provided that "he/she who has personal obligations is liable with all his/her mobile and immobile goods, present and future. They serve as shared guarantee of all his/her creditors."

The *Theory of allocated/affected patrimony* emerged in German law at the beginning of the 20th century, was subsequently assumed in other countries and absorbed by French doctrine.

This theory appeared upon criticism brought to the theory of patrimony personality, concerning the absence of an explanation for the patrimony of fictitious persons and the principle of indivisibility and unity of patrimony.

According to this theory patrimony is separated from the person, patrimony representing *a universality of rights and obligations* allocated or affected to a shared purpose.

Thus patrimony is defined as the socially protected assignment of a certain quantity of valuables to a determined purpose[18].

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[15] *Audry et Rau, Cours de droit civil francais, 5-e, ed. Tome II, revu et mis en courant de la legislation et de la Jurisprudence par G. Rau, Ch. Falcimaique*, Paris, Imprimerie et librairie generale de Jurisprudence Marchal et Billard, 1897-1902, Tome IX, revu et mis au courant de la legislation et de la Jurisprudence par Etienne Bartian, 1917, pp. 333-337

[16] *Law no.287/2009 concerning the Civil Code*, published in Monitorul Oficial [Official Journal] no.511/24 07 2009, republished in Official Journal no.505/15 07 2011, modified by Government Emergency Ordinance (OUG) no.79/2011, published in Monitorul Oficial [Official Journal] no.696/30 09 2011 and by Law no.60/2012, published in Monitorul Oficial [Official Journal] no.255/17 04 2012

[17] For details see *C. Jora, Drept civil. Drepturile reale în noul cod civil [Civil law. Real Rights in the New Civil Code]*, Editura Universul Juridic, Bucureşti, 2012, pp.1-25

[18] *L. August, Traite de droit constitutionnel [Treaty of Constitutional law], ed. a 2-a, Tome III*, p. 309

This theory yields the idea of separating the general patrimony of a person from various distinctive universalities called allocated patrimonies, separation justified by the purposes of the respective person, and which does not exclude the unity of the patrimony.

The supporters of this theory have underlined that the notion of non-transmissibility of patrimony between living persons cannot be regarded as a dogma, as such transmissions are allowed, for example in the case of company mergers. According to this concept transmission between living persons of the mass of patrimonial assets or liabilities is accepted.

According to another theory on patrimony, namely the *universitas juris*, the allocated/affected patrimony is a universality by right[19].

In French literature, that embraces the theory of personality patrimony, the stock-in-trade of business while representing a make-up of elements (equipment, merchandise, patents, registered trademarks, lease rights etc.) each of which can separately be the object of a convention, can be regarded as a whole, subject to rules different than those governing each element in part.

According to German doctrine the stock-in-trade of a business is a mass of goods united by a shared assignation, with an asset and a liability side, respectively, thus constituting an allocated/affected patrimony.

In the opinion of the supporters of allocated/affected patrimony, the stock-in-trade of a business has judicial personality, a residence, a distinctive name, *i.e.* all rights and obligations of a commercial agent.

According to the *universitas facti theory* the stock-in-trade of a business represents a group of elements the union of which is based on a factual relationship in view of achieving a shared purpose, each element keeping its personality[20]. Analysis of the stock-in-trade based on this theory reveals that no explanation can be provided for the possibility of assigning or guaranteeing with the entire stock-in-trade according to rules different than those applicable to the elements constituting that stock-in-trade[21].

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[19] *P.M. Cosmovici*, *Drept civil. Drepturi reale. Obligaţii. Legislaţie [Civil Law. Real Rights. Obligations. Legislation]*, Editura All, Bucureşti, p. 4

[20] For the opinion that the stock-in-trade pertains to *universitas facti* see *St.D. Cărpenaru, Tratat de drept comercial român [Treaty on Romanian commercial Law]*, Ed. Universul Juridic, Bucureşti, 2009, p. 135

[21] For details regarding the stock-in-trade – *universitas facti* see *I. Deleanu, Fondul de comerț - considerații generale [The Stock-In-Trade – General Considerations]*, in: Dreptul no.14/2001, p.73

At present the majority of authors consider that the stock-in-trade represents an intangible mobiliary property right, as do the intellectual creation rights (theory of intangible property)[22].

As in the case of numerous matters of civil law Romanian doctrine has followed the French model of the theory of patrimony personality combined with that of the allocated/affected patrimony. Thus it has been shown that "a more or less strong link of patrimony with its holder"[23] can be established.

The theory of patrimony personality promoted in France was absorbed by Romanian doctrine[24], patrimony being considered an emanation of the juridical personality, "an aptitude of the person entitled to rights to have rights and debts susceptible of economic valorisation". It is asserted that "anyone who has a patrimony has a complex of goods from the viewpoint of universality (…) and any person has a patrimony in this juridical sense of universality, as only they have the possibility of exercising or acquiring subjective rights."

A modern concept of patrimony shows that this is "the framework for the unfolding of the universality of legal relationships of the same subject as to assets and liabilities that can be evaluated in money and are distinctive from the goods they refer to."[25]

3. Juridical features of patrimony

In the light of the regulations preceding the coming into force of the New Civil Code the juridical features of patrimony are: patrimony is a *universitas juri*, any person has a patrimony, the patrimony is *unique*, the patrimony is *divisible* and the patrimony is *inalienable.*

The universality of patrimony resides in the fact that it includes all rights and obligations evaluable in money belonging to a person. The

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[22] *O. Căpățână, Dreptul concurenței comerciale, concurența neloială*, *[Commercial Competition Law, Unfair Competition]* Editura Lumina Lex, București, 1994, p.15, *St. D. Cărpenaru*, op. cit., pp. 112-114, Tribunalul București [Court of Law of Bucharest], Commercial department decision no. 1101/1997, in: *Culegere de practică judiciară comercială [Compilation of commercial judicial practice]* , p. 95, *P. Perju*, *Sinteză teoretică și de practică judiciară a instanțelor judecătorești din circumscripția C. Apel Suceava în materia dreptului comercial... [Theoretical Synthesis and of Judiciary Practice of the Courts of Law of the Circumscription of the Suceava Appeal Court in Matters of Commercial Law...]* , in: Dreptul no. 8/1994, pp. 64-66

[23] *C. Jora*, op.cit, p.14

[24] *F. Sion, Curs de drept civil, vol. IV - Despre bunuri [Textbook of Civil Law, vol. IV],* Iași, Institutul de arte grafice Alexandri A. Terek, 1940

[25] *I. Micescu* - op. cit., p. 216.

existence of patrimony as *universitas juri* is distinctive from its contents, and from the patrimonial assets and liabilities, respectively. The personal value of the rights and obligations constituting the patrimony can fluctuate, these can be added to or removed from a person's patrimony, but the patrimony subsists as an abstract entity. Thus the "permanence and continuity of patrimony as a juridical reality" [26] for the duration of a person's existence is emphasized.

A question raised in literature refers to ways of analysing a person's state of insolvability or of insolvency in relation to the concept of patrimony. It needs be pointed out that insolvability refers to the liabilities exceeding the assets of a patrimony, while insolvency represents a person's lack of financial means to repay its collectable debts. In relation to patrimony the opinion was stated that insolvability and insolvency are "relative and temporary" states[27].

The New Civil Code regulates the concept of *universitas facti* at art.541 as being "the totality of goods belonging to the same person and that share the same destination established by this person's will or by law."[28]

Universitas facti was recognised by the doctrine and jurisprudence preceding the New Civil Code, but was not regulated in the Civil Code of 1865.

In doctrine the issue was raised whether *universitas juri* can be transformed into *universitas facti*.

Thus, one expressed opinion considers that a *universitas juri* can be materialised by a *universitas facti* by volition of the holder (for example, in the case of the testator who devises a particular will referring to several enumerated goods, that can constitute even the entire fortune of the deceased)[29].

Another opinion also acknowledges the possibility of transforming *universitas juri* into *universitas facti*, but shows that in the case of the above example the enumeration of goods in the will excludes

[26] *C. Jora*, op.cit., p.15
[27] *G.N.Luțescu*, op.cit, p.22
[28] For details for *universitas facti* in the light of the new Civil Code see *E. Chelaru Comentariu [Comment]* in *Fl.A.Baias, R. Constantinovici, I. Macovei (co-ordinators), Noul cod civil [The New Civil Code]. Comentariu pe articole [Comments by Article], Art. 1-2664*, Editura C.H.Beck, București, 2012, p.587
[29] *P.M. Cosmovici*, op. cit., p. 2

the testator's intention of constituting *universitas facti*, and that *universitas juri* is not transformed but disappears *mortis causa*[30].

The juridical feature of patrimony referring to each person having a patrimony derives from the aptitude of each person of having rights and obligations evaluable in money, thus from the person's civil capacity.

The uniqueness of patrimony as a juridical feature derives from the theory of patrimony personality, according to that each person that develops a personality has a single patrimony[31].

Divisibility of patrimony results from the fact that a person's patrimony, even though unique, is divisible and can constitute patrimonial masses.

The New Civil Code has expressly regulated the possibility of fractioning the patrimony into patrimonial masses and allocated/affected patrimonies, which aspects will be approached further on.

The Civil Code of 1865 did not comprise any express regulation in this regard, but in literature[32] the opinion was expressed that a person's patrimony is divisible into several categories of masses of rights and obligations with own juridical regimes according to the economic destination of each.

The inalienability of patrimony resides in the patrimony being intrinsically linked to the holder's person, so that the entire patrimony cannot be transmitted but by *mortis causa*. This juridical feature is based also on the theory of patrimony personality.

There are exceptions to this rule, like the situation of legal entities undergoing reorganisation, when the entire patrimony can be transmitted.

4. Elements of novelty concerning the patrimony in the light of the New Civil Code

The New Civil Code has expressly defined the concept of patrimony at art.31 par.1 that provides that "any individual or legal entity is the holder of a patrimony that includes all rights and debts evaluable in money and belonging to this parson".[33]

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[30] *I. Lulă*, op. cit, pp. 16-17

[31] For a contrary opinion see *B. Diamant, Caracterul depășit al teoriei patrimoniului unic [The Obsolete Nature of the Theory of Unique Patrimony]*, in Dreptul no.1/2000, p.116

[32] *I. Adam*, op.cit.,p.15

[33] For details see *Fl.A.Baias, R.Constantinovici, E.Chelaru, I.Macovei, Noul cod civil [The New Civil Code]. Comentariu pe articole [Comments by Article]. 1st edition. Revised*, Editura C.H.Beck, București, 2012, *Authors: Mădălina Afrăsinei, M.L Belu –*

Thus for the first time in internal legislation a definition of patrimony was adopted, the legislator being inspired by the doctrine preceding the New Civil Code.

This legal provision includes however also a feature of patrimony, namely that *any individual or legal entity has a patrimony* regardless of its contents.

According to art.31 par.2 of the New Civil Code the patrimony can be object of *division* or *allocation* only in the cases and under the conditions provided by law.

Hence the legislator of the New Civil Code does not maintain the juridical character of the patrimony established by the former Civil Code, namely the *patrimony is unique*. For this reason the New Civil Code does not further include the *concept of equalitarian competition of creditors* established at art.1718 of the former Civil Code regarding creditors holding non-guaranteed credits.

The New Civil Code introduces the possibility of patrimony *segmentation* into two or more distinctive patrimonial masses, so that the creditors corresponding to each of these distinctive masses do not overlap and thus do not enter equalitarian competition any longer in pursuing the goods of the debtor's patrimony[34].

The legislator of the New Civil Code has maintained the *theory of patrimony personality* (of French origin), establishing that the rights and obligations evaluable in money that compose the patrimony belong to a person, in this way maintaining the link between the goods, the rights and obligations related to the goods and the person of the patrimony holder. However, this theory has been combined with the *theory of allocated/affected patrimony* (of German origin), which has greater applicability in current judicial relations that derive from social relations that require adopting of juridical norms.

Distinctive patrimonial masses within the same patrimony are achieved by *intra-patrimonial transfers*. Thus art.32 par.1 of the New

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Magdo, Al. Bleoanca, D. Călin, I. Cigan, M. Cosma, M. Croitoru, V. Dănăilă, Gh. Durac, M. Eftimie, E. Florescu, Noul cod civil – comentarii, doctrină, jurisprudență [The new Civil Code – Comments, Doctrine, Jurisprudence], Editura Hamangiu, București, 2012, *V.Terzea, Noul cod civil [The New Civil Code], 2nd edition, Adnotat cu doctrină și jurisprudență [Annotated with doctrine and Jurisprudence]*, Editura Universul Juridic, București 2014

[34] *Gh.Piperea, Fracționarea patrimoniului și segregarea creditorilor [Fractioning Patrimony and Segregation of Creditors]*, București, 8 December 2011, www.juridice.ro

Civil Code consecrates a person's right to divide the patrimony by establishing the allocated patrimony. The transfer of rights and obligations from one patrimonial mass to another within the same patrimony is achieved in accordance with the legal provisions. However, such transfer of goods from one patrimonial mass to the other does not represent alienation, what triggers a number of juridical consequences.

An analysis of this legal provision yields another juridical feature of patrimony, namely that *patrimony is divisible*.

As sown, the New Civil Code has established the possibility of patrimony segmentation. This can be the effect of establishing the professionally allocated patrimony for the exercising of a free profession, personally and according to the provisions of law, for a trust or for complete administration of the goods.

According to art.31 par.3 of the New Civil Code "allocated/affected patrimonies are fiduciary patrimonial masses constituted on grounds of the dispositions of title IV, book III, those allocated to the exercising of authorised professions, as well as other patrimonies determined by law."

The holder of a patrimony is entitled - by a unilateral juridical deed or by convention - to constitute a temporary inalienability or immunity from seizure over one of the goods that are part of their patrimony.

Thus, according to art.627 par.1 of the New Civil Code "the alienation of a good can be prohibited by convention or by testament, provided there exists a serious and legitimate interest, but for no longer than 49 years."

The legislator has established that intra-patrimonial transfers that do not constitute alienation in the juridical sense of the term are conducted without affecting the rights of creditors over each patrimonial mass.

The allocated/affected patrimony is constituted by a deed closed by the owner that meets the formal and publicity requirements provided by law. If the deed constituting an allocated/affected patrimony was closed in authentic, notarised form, the income achieved by the transfer of real property will not be subject of taxation. The tariff for real estate

publicity will be established based on a fixed value, as this deed does not represent alienation[35].

Consequently the goods that are part of the patrimony segment created by the holder by separating a part from the totality of goods of a person's global patrimony are no longer pursuable by the debtor's personal creditors, but only by the creditors corresponding to the respective mass of goods. Thus the patrimony holder's creditor cannot pursue the goods allocated/affected to the profession, trust or complete administration.

The creditors corresponding to the patrimonial masses constituted within the same patrimony of goods can pursue the goods from their debtor's general patrimony only if the goods allocated/affected to the patrimonial mass in relation to that the receivable was established are insufficient for covering the entire receivables.

In this respect art.2324 par.3 of the New Civil Code provides: "the creditors whose receivables were established in relation to a certain, legally authorised division of the patrimony first have to pursue the goods of that patrimonial mass. If these are insufficient for satisfying the receivables, the rest of the creditor's goods can be pursued."

The above could lead to the conclusion that this rule applicable to fractions of patrimony is also applicable in cases of insolvency, as the deed constituting the mass of goods is not affected by the debtor's insolvency as long as the debtor is not undergoing bankruptcy procedures or the debtor's administration right was not suspended.

According to art.2324 par.4 of the New Civil Code "the goods that are the object of a patrimonial division allocated/affected to the exercising of a profession authorised by law can be pursued only by the creditors whose receivables were established in relation to that profession. These creditors cannot pursue the other goods of the debtor".

It follows from here that the goods allocated/affected to the exercising of a profession, goods belonging to the patrimony of the person who legally exercises this profession and has set up a patrimonial mass – an allocated/affected patrimony are immune to seizure, *i.e.* cannot be foreclosed by the professional's personal creditors.

The professional allocated/affected patrimony represents the totality of goods that the professional allocates/affects to the profession.

[35] *Uniunea Națională a Notarilor Publici din România [National Union of Notaries Public of Romania], Codul civil al României, Îndrumar notarial [The Civil Code of Romania. Notarial Guide]*, Editura Monitorului Oficial, București, 2011, p.24

These goods can be foreclosed by the debtor's creditors emerged from the exercising of the profession, as provided by law. The creditor holding receivables emerging from the exercising of the profession can also pursue the other goods of the debtor's general patrimony, if the foreclosed professional goods proved insufficient for covering this creditor's receivables.

As regards trust, this is a contract by that the originator endows the fiduciary with administration and disposition rights over a mass of goods, rights and guarantees. The fiduciary pays the originator or a third beneficiary the benefits yielded by the mass of goods, after deducting the fiduciary's fee. Over the duration of the trust that cannot exceed 33 years, the fiduciary acts like an owner of goods. Personal creditors of the originator cannot foreclose these goods, unless they hold a real guarantee over these goods previous to the trust, or unless the trust has been annulled by court decision. The fiduciary can be a counsellor-at-law, a banking company or an investment management company.

The complete administration of the goods is a juridical institution similar to trusts. Complete administration exists when an individual or legal entity endows and administrator with the complete administration of determined goods or of a patrimonial fraction. The administrator of goods is entitled, without express authorisation by the holder to close juridical deeds in relation to the administered goods, and even deeds of disposal, if such a right had been granted to him by contract.

An important distinction between the institutions of trust and complete administration consists in the fact that trust refers to the management of universality, while complete administration of goods generally refers to determined goods.

5. Conclusions

The concept of patrimony has seemingly abstract connotation. For practitioners this concept appears being as ineffective practice. As I belonging to the category of practitioners, but I am also a theoretician, I presented some aspects of interest related to this institution which I believe is the "beginning" for the correct understanding of the concepts of property rights and obligations, which are now in process of transformation.

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THE PLACE AND ROLE OF THE COMMITTEE OF THE REGIONS WITHIN THE EUROPEAN INSTITUTIONAL ASSEMBLY

Mihai Cristian APOSTOLACHE *

ABSTRACT
The acknowledgement of the existence of local and regional communities, in each member state of the European Union, whose specific interests are managed based on the principle of local autonomy, led to the emergence of local and regional authorities. Local and regional authorities are depositary and exponents for the will of the citizens having the right to vote in each administrative-territorial unit of the European Union. In order that the voice of these authorities be louder heard at European level, and the European politics and legislation not affect the interests of local communities, the Committee of the Regions established as an advisory body of the European Parliament and European Council and Commission. The present article analyzes the legal base and status of the Committee of the Regions as well as a series of initiatives taken over the years by this Assembly of the regional and local authorities in Europe.

KEYWORDS: *The Committee of the Regions, European Union, representative democracy, the principle of subsidiarity, local and regional authorities*

Preliminaries

According to Article No. 10 paragraph 1 from the Treaty[1] regarding the European Union, consolidated version, the function of the European Union is based on the principle of representative democracy, pointing out, in this context, within paragraph 3, that the public decision is made as frankly and closed to the citizen as possible. It is one of the

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[1] Treaty on European Union, consolidated version, in Beatrice Andreşan-Grigoriu, Tudorel Ştefan, *Tratatele Uniunii Europene, versiunea oficială consolidată*, Hamangiu Publishing House, Bucureşti, 2013, p. 7.

disposals that value the dimension of one of the basic principles of the European Union, namely the principle of subsidiarity, which proves the importance given to the idea of proximity in making public decisions. But the practical results of such a disposal in the treaty can appear only by the existence of an institutional mechanism. The authorities who are close to the European citizens and apply at the highest level the principle of the representative democracy are the local and regional authorities in each member state of the European Union.

The citizens of each member state elect by vote, according to the legislation specific to each state, the representatives in the local and regional structures of decision meant to represent their interests. Local interests are represented either by collegial bodies, or single-member bodies, having different names varying from state to state. When talking about the European Union we must mention the significant role played by the local authorities in accomplishing the goals of the union[2]. The stronger the administrative capacity of these authorities, the higher is the efficiency of the initiatives of the European Union. The local communities all over the Europe aim, by means of the initiatives of the local and regional authorities, at developing and maintaining a welfare local economy able to offer the citizens high quality public services, but also generate financial resources to modernize the infrastructure and sustain other domains of interests for the citizens. But the performances of the local communities in the member states of the European Union are inextricably linked to the level of local autonomy which involves both the administrative and the financial part. Such problems common to the local administrations in all the member states of the European Union are mentioned in the agendas of the administrations in each member state, as well as in the attention of some structures of organization at European level.

The European institutional reform led to the strengthening of the status of some organizations within the legal assembly of the EU, among which the Committee of the Regions. This Assembly of the local and regional representatives within the European Union gained a stronger status compared to the stage of its establishment, that clearly outlined its role of protecting the interests of the local and regional communities in the European Union and warning in case of breaking the principle of

[2] Mihai Cristian Apostolache, *Primarul în România şi Uniunea Europeană*, Universul Juridic Publishing House, Bucureşti, 2012, p. 253.

subsidiarity and its rights by the Union. The literature[3] outlined the fact that by normative strengthening of the status of the Committee of the Regions we can already talk about a stronger democracy, taking into account that the persons who form this organization come from the local and regional administration of the member states, as the public officials best knowing the needs and expectations of the citizens. In a European Union made of 28 states, the institutions, regulations and their implementation acquire special importance due to the complexity of social events in a continuous dynamics and the need to protect the interests of the union, states, localities and regions and European citizens, as well.

The legal base and status of the Committee of the Regions

The Treaty regarding the European Union, consolidated version, in Title III with the marginal description "Disposals regarding the institutions", article 13, paragraph 4 mentions that the activities of the European Parliament, Council and Commission, as institutions of the Union, are assisted by an Economic and Social Committee and a Committee of the Regions, organizations with advisory functions. These disposals are reviewed and developed in the Treaty[4] on the Functioning of the European Union, consolidated version. Thus, article 300, paragraph 1 regulates again the status of the advisory body of the Committee of the Regions, in relation with the European Parliament, European Council and Commission, and paragraphs 3, 4 and 5 regulate its structure, the nature of the mandate of its members, as well as the decisional competency of the Council regarding the revision of the way of forming the Committee of the Regions. We can find detailed dispositions regarding the Committee of the Regions in the articles 305-307 in the Treaty on the Functioning of the European Union and the Rules of Procedure adopted by its organisation in 2014.

The Committee of the Regions is made of representatives of the local and regional communities who are part of a deliberative or

[3] Mihai Cristian Apostolache, *Administraţia publică locală în sistemul administrativ românesc şi european,* in the volume of the International Conference "Tendinţe actuale în dreptul public. Abordare juridică şi filosofică", Universitara Publishing House, Bucureşti, 2014, p. 253.

[4] Tratatul privind funcţionarea Uniunii Europene, versiunea consolidată, in Beatrice Andreşan-Grigoriu, Tudorel Ştefan, *Tratatele Uniunii Europene, versiunea oficială consolidată*, Hamangiu Publishing House, Bucureşti, 2013, 142.

executive authority at local or regional level. These are holders of an electoral mandate within a local or regional authority or are politically responsible in front of an elected assembly[5]. The office of the Committee of the Regions is in Brussels.

According to the economic, social and demographic evolution of the European Union, The Council is authorized, at the proposal of the Commission, to adopt decisions able to change the way of forming the Committee of the Regions.

According to article 305 in the Treaty on the Functioning of the European Union (TFEU), the number of members in the Committee of the Regions cannot exceed 350, request with legal effects starting with the mandate of the next Committee.

Its structure is made both from holder members and alternate members, the number of the alternate members being equal to the number of the holders. The present Committee includes 353 members. The composition of the Committee is established by the unanimous vote of the Council, at the proposal of the European Commission that is based on the proposals coming from each member state.

The mandate of the members in the Committee of the Regions

The mandate of the members of the Committee of the Regions is exercised independently, in the general interest of the Union, without being imperative. It lasts five years and can be renewed. When a member of the Committee ceases to be elected at local or regional level in the member state he comes from, his quality of member in the Committee of the Regions ceases by law. His place is taken by another person locally elected and proposed by the member state which the person whose mandate ceased according to the procedure provided by the TFEU [6] comes from. The treaty also establishes a situation of incompatibility between the quality of member in the Committee of the Regions and member in the European Parliament.

The mandate of a member or alternate member is exercised from the date his designation by the Council is implemented. Members and alternate members benefit from the privileges and immunities provided

[5] Article 300 paragraph 3 of the Treaty on the functioning of the European Union, consolidated version.
[6] Treaty on the Functioning of the European Union (TFEU).

by the Protocol regarding the privileges and immunities in of the European Union[7].

As for ceasing the mandate of a member or alternate member, it can be done by designation, as a result of death or because of ceasing the electoral mandate in the member state he comes from. The designation must be notified in writing to the chairman of the Committee of the Regions and must mention the date of its implementation. When the chairman receives the resignation, he must inform the Council that observes the vacancy and applies the procedure of replacement.

Organisational structure

The bodies of the Committee of the Regions are *the Plenary Assembly, the Chairman, the Bureau, the Conference of the Chairmen and the Commissions*[8].

Three working structures act at the level of the Committee of the Regions: national delegation, political groups and inter-regional groups. According to Article 7 from the Rules of Procedure, national delegations and political groups contribute equally to organizing the works of the Committee.

The Plenary Assembly is made from all the members of the Committee and meets quarterly. At the request of at least one fourth of the members of the Committee, the chairman can summon an extraordinary plenary session. A plenary session can last one or more meeting days[9]. The plenary session is ended by the chairman of the Committee.

The functions of the Plenary Assembly are contained in Article 13 of the Rules of Procedure and mainly outline the following:

- adopting notices, reports and resolutions;

According to Article 307 from TFEU, the Committee of the Regions adopts notices in the following situations:

a) when it is consulted by the European Parliament, Council or Commission in cases mentioned by treaties and in all cases in

[7] See also the Protocol no.7 concerning privileges and immunities of the European Union.

[8] According to the article 1 of the Rules of Procedure adopted on 31 January 2014 by virtue of art. 306 of the Treaty on the functioning of the European Union, consolidated version.

[9] Article 14 paragraph 1 of the Rules of Procedure, available on http://cor.europa.eu/en/documentation/Documents/Rules-of-Procedure-of-the-Committee-of-the Regions/RO.pdf.

which these institutions consider the consulting appropriate, especially in cases of cross-border cooperation. If the Parliament, Council or European Commission consider it necessary, it can be given a term of at least one month from the date the requirement was addressed to the chairman in order to present the notice, and if the Committee does not present the notice in the specified term, the procedure of adopting the action goes forward.

b) when in case of consulting the Social and Economic Committee according to the Article no. 304 in TFEU, the Committee is informed by the European Parliament, Council or Commission about the notice requirement, and if there are specific regional interests, the Committee of the Regions can deliver a notice.

c) on its own initiative, in all cases in which this is useful.

In all these cases, the notice of the Committee, as well as the record of the proceedings are transmitted to the European Parliament, Council and Commission[10]: adopting the project regarding the estimation of the Committee revenues and expenses; adopting the political program of the Committee at the beginning of each mandate; electing the chairman, the first vice chairman and the other members of the Bureau; constituting the commissions; adopting and revising the Committee Rules of Procedure; the decision of introducing an appeal or a request for action before the Court of Justice of the European Union, adopted, after having verified the meeting of the quorum, with the majority of the votes expressed, either at the proposal of the Committee chairman, or of the competent commission; when such a decision is adopted, the chairman introduces the action on behalf of the Committee.

The General Assembly must function in the regular quorum. The Quorum is met when more than half of the number of the function members is present. The decisions are taken with a majority of votes, except for the cases in which the Rules of Procedure stipulates a different majority.

Article 306 of the Treaty on the Functioning of the European Union stipulates the attribute of the Committee of the Regions to choose the Chairman and Bureau for a two-and-a-half-year mandate. The Committee may be assembled in a session by the chairman at the request of the European Parliament, the Council or the Commission or on its own initiative.

[10] Art. 307, the last alineat from the Treaty on the Functioning of the European Union.

The chairman of the Committee of the Regions leads the works of the Committee and has a representative role of this structure.

The Bureau of the Committee of the Regions consists of the chairman, first vice chairman, a vice chairman for each state member, and other 28 members from the presidents of the political groups. Except for the positions of chairman and first vice chairman and of the seats reserved for the presidents of the political groups, the other places from the Bureau are divided[11] among the national delegations as follows:

- **three** seats: France, Germany, Italy, Poland, The United Kingdom, Spain;
- **two** seats: Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, Greece, Ireland, Lithuania, Portugal, The Czech Republic, Romania, Slovakia, Sweden, The Low Countries, Hungary;
- **one** seat: Cyprus, Estonia, Latvia, Luxemburg, Malta, Slovenia.

The Bureau has the following attributions[12]: it elaborates and presents before the General Assembly its project of political program at the beginning of the mandate and tracks its implementation, and at the end of the mandate, it presents a report regarding the implementation of the respective program throughout the mandate; it organizes and coordinates the works of the General Assembly and of the commissions; it adopts, at the proposal of the commissions, their the work schedule; it disposes of general expertise in domains such as finance, organization and administration, referring to certain members and alternate members, as well as the internal organization of the Committee and the General Secretariat and the bodies of the Committee. Also, the Bureau may constitute work groups made up of the members of the Bureau or other members of the Committee, with the aim of counseling it in specific problems, and inviting other members of the Committee to assist at its meetings. At the same time, it presents before the Plenary Assembly the project regarding the estimation of the Committee revenues and expenses, being the one who employs the general secretary, officials and other agents stipulated in the Rules of Procedure. A key task is the one referring to the decision of the appeals or requests for action before the Court of Justice of the European Union.

[11] Art. 30 from the Rules of Procedure of the Committee of the Regions, version 2014.
[12] According by the art. 37 from the Rules of Procedure of the Committee of the Regions, version 2014.

The Committees of the Committee of the Regions are constituted by the Plenary Assembly at the beginning of each five-year mandate, establishing their structure and attributions, at the proposal of the Bureau. The configuration of the Committee of the Regions, in terms of representation of states, must also be reflected in the composition of the commissions. The members of the Committee of the Regions are part of at least one commission and no more than two[13].

The attributions of the commissions mainly aim at the debate of the Union policies, in conformity with the competences assigned by the Plenary Assembly, and at the drafting of notices, reports and resolutions that are subsequently subject to the Plenary Assembly towards adoption. In accordance with article 40 of the Rules of Procedure, the Bureau of the Committee of the Regions constitutes a Consultative Commission for Financial and Administrative Affairs which is chaired by a member of the Bureau. The chairman of this commission represents the Committee before the EU budgetary authorities. The current commissions of the Committee of the Regions are[14]: The Commission for Citizenship, Governance Foreign and International Affairs; The Commission for Territorial Cohesion Policy; The Commission for Economic and Social policy; The Commission for Education, Youth, Culture and Research; The Commission for Environment, Climate change and Energy; The Commission for Natural Resources; The Temporary Ad Hoc Commission for the Revision of the EU Budget; The Commission for Financial and Administrative Affairs. Romania has 5 seats assigned in each commission.

The Conference of Chairmen consists of the chairman, first vice chairman and the chairmen of the political groups. The Rules of Procedure[15] establish the rule of representation of the chairmen of the political groups by another member of the group to which they belong. The debates within this body are designed to ensure political consensus on issues to be adopted by other bodies of the Committee of the Regions. The discussions at the Conference of Chairmen shall be communicated to the Bureau by the Chairman of the committee.

[13] Art. 49 paragraph 3 from the Rules of Procedure of the Committee of the Regions, version 2014.
[14] http://cor.europa.eu/ro/activities/commissions/Pages/commissions.aspx
[15] Art. 47 from the Rules of Procedure.

As stated in the beginning, at the level of the Committee of the Regions there are three working structures, i.e. the national delegations, the political groups and the interregional groups.

The national delegation is made up of members and alternate members of a member state. Each national delegation shall establish its own internal organisation and elects a president, whose name shall be formally communicated to the Chairman of the Committee[16]. The national delegations reflect the overall political, geographical and territorial administrative balance of each member state.

Romania is represented in The Committee of the Regions by 15 holder persons and 15 alternates. The list with the proposals of holders and alternates shall be sent by the Government to the EU Council, which officially designates the composition of the Romanian delegation at the Committee of the Regions[17]. The proposals are made before the Government, through the Ministry of Regional Development and Public Administration, by the four associative structures of the local and county authorities of Romania. The Association of the Communes of Romania (ACOR) proposes three members and three alternates, the Association of the Cities of Romania (AOR) proposes three members and three alternates, Romanian Municipalities Association (AMR) proposes three members and three alternates, and the National Union of County Councils (UNCJR) proposes six members and six alternates.

The political groups are internal structures consisting of members and affiliates on the basis of their political affiliation. The regulation establishes a minimum number of members to constitute a political group and other conditions specific to these entities with a political dominant nature. Thus, article 9 states that a political group consists of at least eighteen members or alternate members, of which at least half must be holder members representing one-fifth of the member states. It establishes the rule according to which a member or alternate member belongs to only one political group. If the number of members of the political group falls below the minimum, the group is dissolved.

The formation of a political group, as well as its dissolution or any change thereof, shall be notified to the Chairman of the Committee of the Regions in a statement. The statement of formation of a political

[16] *Idem*, art.8.

[17] Currently, the President of the Romanian national delegation is Dolj County Council President Ion Prioteasa.

group must include its name, the name of its members and its offices[18]. In the Committee, *five* political groups shall be constituted.

In addition to the members or alternate members who are part of a political group, there are also unaffiliated members in the structure of the Committee of the Regions[19].

Interregional groups consist of members or alternates, provided that the formation of the interregional group is declared to the chairman of the Committee[20]. A number of *ten* interregional groups operate in the current composition of the Committee of the Regions.

The Competence of the Committee of the Regions

The Committee of the Regions is consulted by the institutions of the Union with the purpose of adopting a notice, throughout the legislative process, in the following domains[21]:

- economic and social and territorial cohesion;
- trans-European infrastructure networks;
- health;
- education, youth and sports, culture;
- employment;
- social policy;
- environment;
- professional development;
- transport;
- civil protection;
- climate changes;
- energy;
- services of general interest.

The Committee of the Regions accomplishes its initial mission by adopting notices, reports and resolutions, and also by organizing certain manifestations with an impact at European level. The notices and resolutions are published in the Official Journal of the European Union.

As noted, *the notices* can be requested by the European Parliament, the Council or the Commission, regarding certain documents, in which case the Committee Chairman distributes them to the competent

[18] Art. 9 al. 4 from the Rules of Procedure of the Committee of the Regions, version 2014.
[19] *Idem*, al. 7.
[20] Ioana Nely Militaru, *Dreptul Uniunii Europene,* Universul Juridic Publishing House, Bucharest, 2011, p. 325.
[21] http://cor.europa.eu/ro/about/Pages/key-facts.aspx

commissions[22]. Also, the Committee adopts notices or reports on its own initiative, when it considers it appropriate, based on a statement, a report or a legislative proposal from another EU institution, submitted to the Committee for information, or upon request of a member state that holds or will hold the next Presidency of the Council, or on its own initiative only in all other cases[23] or it can adopt notices when specific regional interests are at stake[24]. The content of the notice consists of opinions and recommendations and, according to case, of concrete proposals for change made by The Committee of the Regions with respect to the document in question.

An important category of acts adopted by The Committee of the Regions are *resolutions*. Resolutions shall be included on the agenda only when referring to issues related to activities of the European Union, the major concerns of regional and local authorities and if they are up to date[25]. The right to submit proposals for resolutions or requests for drafting a resolution belongs only to political groups or at least 32 members of the Committee. The proposals or requests must be submitted in writing to the Bureau and they must contain the name of the members or of the political group supporting them.

One of the resolutions recently adopted by The Committee of the Regions is the ***Resolution[26] on the Charter for multilevel governance in Europe***. Adopted at the 106th plenary session of this Committee of the Regions, the resolution marks a milestone in the institutional evolution of the European advisory body. Twenty years after its creation, the Committee wanted to make its presence felt in the European space by bringing forth, to the European institutions, the member states and their national regional and local administrations, and their associations, a document that we consider as important as the one adopted by the European Council in 1985, the European Charter of Local Autonomy – a document which has represented an important source of inspiration for this resolution.

Through the *Resolution on the Charter for multilevel governance in Europe*, The Committee of the Regions aims to integrate amongst the EU values a shared common perception on the European governance.

[22] *Rules of Procedure of the Committee of the Regions*, version 2014, art. 41.
[23] *Idem*, paragraph b).
[24] *Idem*, paragraph c).
[25] Ioana Nely Militaru, *quoted opera,* p. 327.
[26] The Resolution was adopted on 3 April 2014 under the 106-plenary session of the Committee of the Regions.

The multilevel governance is already established as a guiding principle in the implementation of the cohesion policy under the new common provisions regarding the Structural Funds[27]. By mobilizing all the levels of governance, the democratic accountability in Europe enhances, as a guarantee for the effectiveness, coherence and complementarity of their actions. It is believed that the implementation of the principles, measures and activities comprised in the Charter will lead to the consolidation of public budgets. Moreover, The Charter emphasizes increased transparency and the establishment of more participatory procedures, aspects that must be considered by all levels of governance (European, national, regional, local), requiring EU institutions to systematically implement the principles of the Charter, in this respect, in the process of development, implementation and evaluation of EU policies and strategies in order to acknowledge the legitimacy and accountability of regional and local authorities. This request is based on the current European reality which unquestionably shows that local and regional authorities are responsible for a third of the public spending and two-thirds of the public investments, as they are best placed to achieve priority objectives of the European Union.

At the same time, 70% of the European legislation holds a direct impact at local and regional level[28]. Given such a context, European citizens must be increasingly involved in the activity from the European level, and this can be best done with the help of their representatives found close to the European citizen.

The Charter for Multilevel Governance in Europe is not mandatory from a legal point of view, but it is believed to contribute to the consolidation of the European integration process, materializing itself, according to the preamble[29] of this document, in the coordinated action of the European Union, of the member states and the local and regional authorities, being based on the principles of subsidiarity and

[27] Article 5 of the Regulation (EU) No. 1303/2013 of the European Parliament and of the Council,17 December 2013, laying down common provisions on the European regional development Fund, the European Social Fund, Cohesion Fund, European agricultural fund for rural development and the European Fund for fisheries and maritime affairs, as well as laying down general provisions on the European regional development Fund, the European social fund, The Cohesion Fund and the European Fund for fisheries and maritime affairs and repealing Regulation (EC) no. 1083/2006 of the Council.
[28] http://cor.europa.eu/ro/about/Pages/key-facts.aspx
[29] http://cor.europa.eu/en/activities/governance/Documents/mlg-charter/ro.pdf, p. 3.

proportionality and on the partnership resulted in a functional and institutionalized cooperation which seeks to develop and implement the European Union policies. The Chart has already received the adhesion of certain local collectivities from Romania situated in the Center, South-Muntenia and South-West-Oltenia regions.

The Committee of the Regions is also the guardian of the subsidiarity principle. In this respect, article 58 of the Rules of Procedure stipulates that the chairman of the Committee or the commission assigned to draft the notice may bring forth an appeal or a request for intervention before the Court of Justice of the European Union for the breach of the principle of subsidiarity against any legislation for the adoption of which the Treaty on the Functioning of the European Union provides consulting the Committee. Given that the draft legislation is justified with regard to the principles of subsidiarity and proportionality, the Committee, through such actions, defends the rules contained both in the Treaty on the Functioning of the European Union, and in protocol no. 2 on the implementation of the principles of subsidiarity and proportionality.

Every year, the European Commission transmits to the Committee of the Regions, the report regarding the implementation of the principles of subsidiarity and proportionality[30].

The introduction of an appeal or request for intervention before the Court of Justice of the European Union can also be done in the case in which the Committee has not been consulted in the situation stipulated in the Treaty on the Functioning of the European Union, case in which the Chairman of the Committee or a commission within proposes to the Plenary Assembly or the Bureau the introduction of an appeal or request for intervention before Court of Justice.

In addition to the adopted notices, reports and resolutions, The Committee of the Regions can sign agreements with other institutions or bodies, through its Bureau, at the proposal of the general secretary[31].

The Committee of the Regions makes its presence felt at European level also through consultations of the stakeholders and the organization of events. Annually, the Committee conducts over 40

[30] Article 9 of the Protocol no. 2 concerning the application of the principles of subsidiarity and proportionality, in Beatrice Andreşan-Grigoriu, Tudorel Ştefan, *Tratatele Uniunii Europene*, versiunea oficială consolidată, Hamangiu Publishing House, Bucureşti, 2013, p. 174.

[31] According to the article 76 of the Rules of Procedure.

consultations with stakeholders and organises over 300 events. Among the most important events there are The European Conference on Public Communication, forums on various topics, Open Days - The European Week of Regions and Cities, exhibitions, summits, etc.

Conclusions

A first conclusion refers the fact that the European institutional reform carried out by the Lisbon Treaty has strengthened the role of the Committee of the Regions. As shown by the performed analysis, the Committee must be consulted during all stages of the legislative process of the European Union and has the right to petition the Court of Justice of the European Union when its institutional rights or the principle of subsidiarity are deemed to have been violated by the initiatives of the European institutions.

Also, through the available power and the manner in which it manifests, the Committee of the Regions plays an important role in the European institutional architecture[32], and its voice sounds increasingly more in European politics, a sign that European policymakers have understood the importance of the local and regional levels in the development and implementation of European policies. As emphasized in the literature[33], as authorities close to citizens, the local and regional authorities should become real partners of the national and European authorities, so as to enable the economy of Europe to become smart, sustainable and favourable to inclusion, while the public sector, in its capacity as a provider of public services, to be dominated by an increased creativity and innovation.

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[32] Mihaela Adina Apostolache, *"Reforma Strategiei 2020 în viziunea Comitetului Regiunilor"*, in *Revista de Drept Public (Public Law Review)* no.2/2014, p. 124.
[33] *Idem*, p. 128.

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GENDER AND CULTURE IN THE LEGISLATION AND CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS. THE CASE OF THE ISLAMIC VEIL

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ABSTRACT
This paper aims to analyse the influence that the cultural factor brings into the legal framework of women's rights. In demonstrating the direct relationship between culture and legislation, we took into account the restrained view of culture- that is connected to the religious factor. The main focus of our argument is built around the ban of wearing the Islamic veil. The two benchmarks of our analysis were the European Convention of Human Rights and Fundamental Freedoms (art. 9 and art. 14) and the case law of the European Court of Human Rights. Our research methodology consisted of the study of documents (bibliographical research) and the main thesis of our paper consisted of emphasising the relationship of interdependence between the cultural conduct (imposed in a context induced by religion) and the legal conduct- stated in the field of women's rights.

KEYWORDS: *culture, legislation, women's rights, case law, The European Convention Of Human Rights and Fundamental Freedoms, gender equity*

Argumentum operis : debating on the relationship between the cultural paradigm and the women's rights paradigm

Culture is primarily an ideological category (a way of thinking and perceiving the world); in these parameters, we may state that, *the cultural factor was taken into account as a factor of influence and final decision* in articulating the system of protection of human's rights in the aftermath of the Second World War. We can state that, in the current context, there are no clear sings that indicate a rigorous segregation between the cultural and the legal paradigm, as the two paradigms are involved with each other, especially if we take into consideration the fact

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that, cultural manifestations which are understood lato sensu (by including the religious factor) influenced the manner of conceptualizing the legislation.

Women's rights were responsive to the formulation of particular normative standards at the international and at the European level, that will lay stress on the protection of the individual. Albeit the fact that, the discussion about *women's rights as human rights* represented a sensitive theoretical question that was fully formulated later in the evolution of mankind, there were always fundamental prerogatives of the individual as the *right to life* or the *freedom of thought, conscience and religion* that were mentioned from the begining in the Universal Declaration of Human Rights (art. 3 and art. 18) or in the European Convention of Human Rights and Fundamental Freedoms (art. 2 and art. 9). In light of the stipulations of the European Convention, *the right to culture* is not stated in *expresis verbis* but, a systematic interpretation of the law text and the need to fully understand human rights as they are specified in the Convention, leed us to the conclusion that, without any autonomous stipulation, the right to culture emerges from *art. 8 – the right to respect for private and family life*, *art. 9 – freedom of thought, conscience and religion, art. 10- freedom of expression.* [1] It is known that cultural rights have a controversial legal existence, given the fact that, their existence as rights is contested. The conventional recognition of the three generations of rights (civil and political rights, economic, social and cultural rights and solidarity rights) has substantially complicated the manner of identifying those human prerogatives included in the category of human rights. If in the case of the first category of rights- civil and political rights- the values of autonomy and self-determination were subsidiary depicted, in the case of the second category – economic, social and cultural rights,- the pattern of analysis was inverted, as these were designed, in particular, as State duties in relation to the individual, thus having more likely, the status of obligations that must be fullfiled by the State and not the status of rights that the individual can claim in order to be liberated from State power.[2] With regard to this last point, we feel the need for some comments. First, the classification of human rights in first

[1] For further detalis see, Research Division of the European Court of Human Rights, *Cultural Rights in the case-law of the European Court of Human Rights* ,Council of Europe, January 2011, page 4;

[2] For further details see, Shivani Verma, *Justiciability of Economic, Social and Cultural Rights. Relevant Case Law,* 2005, International Council on Human Rights Policy, pag. 9-10;

generation rights (civil and political) and second generation rights (economic, social and cultural), has both the merit of distinguinshing fundamental human prerogatives and also the merit of distinguishing the categories of correlative State obligations. Doctrinal studies promptly qualify the obligation that the State undertakes with regard to granting civil and political freedoms as a *in abstinendo* obligation while the obligation that the State undertakes with regard to granting economic, social and cultural freedoms is qualified as positive, being a *in faciendo* obligation.

In another token, women's rights – as an autonomous juridical institution, is influenced by the cultural sphere. Mankind has known situations when the cultural argument *lato sensu* and the religious argument *stricto sensu* were first in explaining and legitimizing violations of women's rights. For this reason, it is appropiate that, the cultural argument enjoys a special regime in relation to women's rights, as the analysis paradigm of existing correlations between the two frameworks resuscitate real challenges. First, the *clash of civilizations* imagined by Samuel Huntington[3] is noticeable not only in external relations (by relating one community culture to another) but also in the process of cultural conceptualization. Cultural tensions that are obvious on both levels underline the egregious fact that culture has a dual structure (as it can be understood both in a static sense – as an overview of fixed belives that give identity to a community and in a dynamic sense- as an overview of rules that evolve and are subject to re-evaluation depending on social changes). [4]

The appearance of the concept of *human rights* wasn't enough for the free manifestation of women's rights in the juridical space because of two main considerations : (1) as feminist studies showed, it was felt the need of a field of application in favour of women's rights as human rights because the legal framework carried the male footprint vue of the world;

[3] We have assumed and implemented in our work the *clash of civilizations thesis* that was argued by Samuel Phillips Huntington in the paper *The Clash Of Civilizations and The Remaking of World Order,* Publishing House Antet, Bucharest, 1997. In the original sense, Huntington's paper presents the clash of civilizations thesis as a source of conflict; according to Huntington, civilization is the highest form of cultural expression and this will constitute, in the evolution of international relations, the most important source of conflict;

[4] For further details see Frances Raday, *Culture, religion and gender,* Oxford University Press and New York University School of Law, vol. I, no.4, 2003, page 667;

(2) beyond the patriarchal world that disseminated the concept of human rights, the application of women's rights was limited by the cultural argument understood lato sensu – as including the religious factor. On the other hand, it is not less truthful that *the imposition of a culture of human rights upon the female segment of the population* was and continues to be felt as a difficult endeavor as, in the European space the slogan *unity in diversity* is not simple to apply. Indeed, diversity is obvious if we take into account the fact that, the European space is not a cultural cupel that merges every culture afferent to the nations of the European space – on the contrary, the European space is a cupel where are rejoined cultures of European peoples and extra-European cultural manifestations (specific to minority communities such as Muslim or African communities). Cultural tensions dictated by the clash of civilizations prescribed by Huntington will bring tensions in the legal framework of women's rights, - an aspect that is noticeable in case-law examples and will be evoked in a special section of the paper.

The debate over the legal framework appplicable in the law system of the European Convention of Human Rights regarding the relation between culture and gender equity

As we have already shown, article 9 of the European Convention of Human Rights is the legal text that is enlightening for the issue discussed in the present paper. According to art. 9- registered under the marginal denomination *freedom of thought, conscience and religion*, anyone can use the prerogatives enunciated – specific to the individual's inner forum. The freedom of thought, conscience and religion includes the individual's freedom of manifest/change his religion or convinction, either alone or in community, in the public or in the private space, by means of worship, teaching or fullfilling rituals. The second paragraph of article 9 expressly states the limitations that may be imposed upon the freedom of religion : *the freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

A simple exegesis of the legal text leads to the conclusion that religious freedom is not an absolute prerogative as it is rigorously framed by the European legislator by virtue of some categories of exceptions that emerge from : *(1) prescribing by law a behaviour contrary to the principle of religious freedom; (2) the legitimate goal pursued by the*

exception; (3) the exception must be necessary in a democratic society; (4) the exception must be necessary for preserving public safety, for protecting order, health or public morals; (5) the exception must be necessary for protecting the rights and freedoms of others.

In order for the action contrary to the religious freedom that is practiced by a state membre to the Convention to be an exception justified by the prescription of the law, it is needed that the law shall be accessible to the individual and formulated precisely enough so that the indivdiual may show the conduct regulated by law.[5] In relation with the exception from religious freedom prescribed by art. 9 of the Convention regarding the legitimate aim, doctrinal studies proved to be generous in ideas. For example, doctrinal studies [6] associated the requirement of the legitimate aim with the requirement of public safety, health, public morals and the rights and freedoms of others. In particular, Kathryn Boustead assesses that, the case law logic of the European Court of Human Rights established the requirement of the legitimate aim as an aspect that must be included within the margin of appreciation of signatory States (given the fact that, problems as public safety, order, health or public morals depend on the local climat of the nation State.

For example, the cause *Kokkinakis against Greece* brings into question the situation when the couple Kokkinakis was accused according to the Greek law of the crime of proselytizing on the occasion of approaching the wife of the theacher of the Local Orthodox Church for discussing religious beliefs. Having as legal basis The Greek Anti Proselytizing Law, the Local Criminal Court condemned the Kokkinakis couple at 4 month in jail. Exerting a legal remedy towards the convinction decision, the sanction was replaced with a fine. Although the legal situation proved to be non-critical for the couple accused of proselytizing, the Kokkinakis couple addressed the European Court arguing that, the legal basis of their convinction (The Greek Anti Proselytizing Law) is unconstitutional. The Kokkinakis couple has opened the subject of the unconstitutionality of the Anti Proselytizing Law in front of the European jurisdiction given the fact that, the Greek constitutional instance has not accepted the request for declaring the unconstitutionality of this legal text. The Greek Government assessed

[5] According to the case *Larissis and others against Greece*, The European Court of Human Rights, 1998, paragraph 40;

[6] Kathryn Boustead, *The French Headscarf Law Before The European Court of Human Rights***,** Journal of Transnational Law and Policy, Vol. 16, no.2, 2007, page 177;

that, the Anti Proselytizing Law is not likely to affect the religious freedom as it is granted by the Constitution because the legitimate aim that is pursued by means of this regulation consists of protecting individuals of the deceptive techniques of those who practise proselytizing. The European Court fully subscribed to the position adopted by the Greek Government – which is that, The Anti Proselytizing Law was utilized as a legal mechanism that violated the rights of religious minorities, contrary to the declared legal scope- that to serve as a balance between the religious majority and religious minorities.[7]

Returning to the aspect of the margin of appreciation consecrated in favour of the signatory States of the Convention, we deem that this is fully circumscribed to the requirement needed in order to derogate from the religious freedom principle- *to be necessary in a democratic society.* Indeed, the nation State is the only one that is entitled to assess wether and to what degree the derogations from religious freedom are fit to facilitate the climate of a society that upholds the various religious options of all its citizens. It is natural that, in relation to the multitude of religious practices disseminated in the European space, every nation State acts as an agent which selects according to its own reality, the scenario that best fits. Doctrinal studies outlined countless scenarios that could be approved by the nation State. A potential scenario that would limit the reserve of the nation State as regards the religious manifestation of wearing the Islamic veil is focused around *orientalism*. The oriental trend is described in detail by doctrinal studies [8] as an analytical trend which emphasizes alterity in the relations between Orient and Occident. More clearly, Oriental values are perceived in negative terms as they are maladjusted to Western values – that represent the standard of conduct for the civilized world.

Reiterating the relation that is the object of our study – *religious freedom-gender equity*, we cannot overlook from our analysis art. 14 of the European Convention of Human Rights and Fundamental Freedoms that establishes the general framework of the equality principle. According to the quoted legal text, *the enjoyment of the rights and*

[7] The case *Kokkinakis against Greece*, The European Court of Human Rights, 1993, paragraphs 7, 9, 10, 16, 29, 40, 42;

[8] Charlotte Skeet, *Globalisation Of Women's Rights Norms : The Right To Manifest Religion And "Orientalism" In The Council Of Europe,* Public Space, The Journal Of Law And Social Justice, Vol.4, 2009, page 36;

freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It was extensively commented in doctrine[9] the fact that, the regulations regarding equality are not independent as they can be invoked exclusively with redarg to the rights and freedoms recognized by the European Convention. Rejoining the same doctrinal review, *article 14 of the Convention describes more likely a juridical guarantee for the non-discriminatory application of the prerogatives stated in the European Convention; it is not an independent verification standard by means of which can be tested discriminatory situations.* From our point of view, the equality concept contained in art. 14 of the European Convention demonstrates by its case law the Aristotelian sense of equality. Follower of the formal theory of equality, Aristotel shows in his work[10] that meeting the suprem good must be acheived by reference to what is legal and to ensuring equality. In the Aristotelian view, are equals/are bound to be treated as equals, those that are in similar situations – idea that is reiterated by the case law of the Strasbourg Court in the sense that, those who are in analogous situations must be treated in the same manner thus, is required a test regarding the comparability of the situations. Nevertheless, the Court's reasoning in establishing discriminatory situations is more elaborated than the Aristotelian reasoning : the European norm bans the differentiated treatment of persons that are in similar situations- except for a reasonable and objective justification; likewise, the equal treatment is proper for individuals that are in different situations exept for the case of a reasonable and objective justification. In turn, the objective and reasonable justification is built around a legitimate aim that assumes a reasonable relationship of proportionality between the means and the aim that is ought to be fullfiled. [11] Besides, by means of case law[12], the Court established an order of preference in applying the criteria for verifying the discriminatory situations : *(1) the verification of differences or similarities in the treatment of individuals or verifying*

[9] Ivana Radacic, *Gender Equality. Jurisprudence Of The European Court Of Human Rights,* Critical Review Of Jurisprudence : An Occasional Series, The European Journal of International Law, vol. 19, no.4, 2008, page 842;
[10] Aristotel, *Nicomachean Ethics*, Publishing House Iri, Bucharest, 1998;
[11] Ivana Radacic, *cited work*, page 843;
[12] The cause *Rasmussen against Denmark,* The European Court of Human Rights, A Series, 1984, no. 87;

similar or different situations in which individuals are found; (2) the verification of the existence of an objective and reasonable justification for each treatment; (3) in the hypothesis in which are verified both the similarity and the objective justification criteria, the problem of assessing the application of a differentiated treatment passes in the margin of appreciation of nation States.

Returning to the issue of wearing the Islamic veil and gender equity, we must indicate the fact that, the wearing of such a religious sign within laic, secular institution cannot be understood otherwise than as an affront brought to gender equity- a principle of Western inspiration that lies at the basis of the moderm conception of human rights. The European Court of Human Rights has officialy recognized the overwhelming importance that the principle of gender equity has in a democratic society proclaimed on the criteria of human rights and human dignity. Therefore, according to western values, the Islamic veil is more than a religious symbol; it demonstrates gender segregation (as only women are bound to wear this distinctive mark and men aren't), the claustration and social isolation of women, denying women equal opportunities and also female oppression caused by a patriarchal society. On the other hand, according to Islamic values, the Islamic veil is nothing else than a form of protection for women, a pledge against violating personal freedom and autonomy.

The issue of reconciling the principle of secularism with theistic rules and its implications upon women's rights

As we set out at the begining of the paper, the religious prerogative may be found under the dome of cultural identity. On the other hand, the *principle of secularism* –consecrated by constitutional means in States that are under European jurisdiction as France – attenuates theistic manifestations that emerge from the religious sphere of the European culture.

The French Constitution of 1958 states, at the begining, that *France is an individsible, secular, democratic and social Republic; (...) it will ensure the equality of all citizens before the law, without any discrimination on basis of origin, race or religion; (...) it will respect all beliefs.* Similar dispositions in favour of laicity are found in the Constitution of Switzerland or in Turkey's Constitution. French constitutional dispositions lead to some ideas linked to the problem of cultural identity and human rights : *(1) secularism dosen't deny religious freedom and freedom of conscience; it merely pursues laying these*

freedoms within a paradigm that accomodates the democratic realities of those European States where the role of the Church is alternative to State intervention; (2) secularism pursues the prevention of extremist/fundamentalist religious manifestations- that are damaging for any given democratic society as well as the ensurance of equality between religious cults and equality between the followers of different cults and the non-belivers.

The two ideas are in close link as the second one is a natural complement of the first one. With regard to the first idea, the discussion framework is much more flexible and complex. Thus, we can affirm that, it is in consensus with the provisions of art. 9 of the European Convention of Human Rights and Fundamental Freedoms. Indeed, secularism preserves the *inner forum* that evoques the intrinsic propagation, within the intrapsihic plan, of the individual's religious beliefs and, on the other hand, art. 9 establishes the external limit of religious freedom – the *external forum*. Similar to art. 9 of the European Convention, the secularism thesis pusues granting the inner forum of manifesting religious belief whilst, the manifestation of religious freedom within the external forum is looked at with caution in virtue of respecting the secular mechanisms necessary for the operation of every democratic society. In concrete, art. 9 paragraph 2 and art. 15 of the European Convention establish the derogations from the principle of religious freedom, strengthening in this manner the secularism thesis. The derogations concern the state of war, threats to human life or to nation, exceptions prescribed by law and exceptions necessary in a democratic society. [13]

In other news, theism is preparing a social organization that is based upon a *transcendental morality* in the sense that, human rights per se seize to represent a priority and the suprem finality consists of the subordination of human values to a higher, divine Court that ensures order. The theism thesis reproaches secularism the concern for human rights and for ensuring the application of human rights within the European democratic society as a sole benchmark whilst theism sustains that human rights represent the alternative standard and not the most important standard. In fact, the most important standard according to theism is given by the spiritual harmonization of the concept of human

[13] For further details see Daniel Barton, *Is the French Burka Ban Compatible with International Human Rights Law Standards?* Essex Human Rights Review, vol. 9, no.1, June 2012, page 4;

rights with the supremacy of the divine Court ensuring in this manner the sustenance of the cultural identity of a certain community. In the words of Richard Fenn, *in secular States, religious sects are often a place of refuge from the social and cultural change; they conserve the ethnic loyality (...) and act as a barrier towards the rationalized and scientifically grounded knowledge.* [14]

Returning to the debate on women's rights and the connection between the legal and cultural paradigm of conceptualizing women's rights, the Committee for Human Rights stated its position concerning the relation between culture, religion and gender in the General Comment on Equality in Rights between men and women in the following manner : *the inequalities that are experienced by women all over the Globe are deeply rooted in tradition, history and culture including in religious attitudes. State Parties must make sure that the traditional, historical, religious and cultural attitudes are not used to justify the violations of women's rights to equality before the law and the equal exercise of the rights prescribed by the Convention On The Elimination of All Forms of Discrimination Against Women.* [15]

In synthesis, laicity strives for human rights in the sense of appreciating autonomy and individualism whilst theism strives for the fullfillment of individual human prerogatives within religious precepts – considered to dictate a parallel law, superior to positive human law. By refering these ideas to the issue of women's rights some questions become legitimate : *(1) considering its transcendent morality, has the cultural-religious norm the legitimacy of confining the recognition and applicability of women's rights by virtue of dogmatic arguments? (2) can the legal regulation – that emerges from human rationality – be so comprehensive that it ensures a more ample protection of women's rights by comparison with the cultural norm? (3) is there the possibility to conciliate legal dispositions with cultural prescriptions in the field of women's rights and if it is so, in this case, the legal protection of women's rights will experience an evolutionary direction?* Regardless the difficulty brought by these questions, the responses are bound to be seriously and rigorously researched. By virtue of the universality of human rights, we tend to respond negatively to the first interrogation; the last two interrogations require en evolutionary study time so, that the

[14] Richard Fenn, *Toward a Theory of Secularization*, Society Of The Scientific Study of Religion, 1978, page 36;
[15] General Comment of the Committee of Human Rights no. 28;

wisest approach is thought to be a flexible one. Given the fact that, legal norms protect both freedom of conscience and religious freedom (that we deem as components of the cultural dimension) and considering the hypothesis of invoking cultural prescriptions as arguments for violating or confining women's rights, in order to solve this conflict, we will refer to the solutions that the European Court of Human Rights prescribed by means of case law. Our attempt of demonstrating the position of the European Court towards the manner in which the legal framework influences the sphere of women's rights will be built around some case law examples that we deem relevant : *the case Dahlab against Switzerland, the case Sahin against Turkey and the case Dogru against France*.

The relevant case law framework

As we predicted, the present section of our paper is intended to be a meditative and reflective endeavor upon the position of the European Court towards the correlation culture-lawfulness and upon the implications that this correlation brings in the field of protecting women's rights. We are bound to mention that, all the cases mentioned above underline the influence of secularism and the manifestation of the religious freedom within the sphere of the external forum.

In the case *Dahlab against Switzerland*, the de facto hypothesis brings into light the situation of a teacher named Dahlab who, as a consequence of converting to Islam, adopted specific clothing items among which the Islamic veil. Four years after converting to Islam (period during which Professor Dahlab respected the Islamic clothing custom), the director of the institution communicated her the fact that, her clothing is likely to violate the principles of religious neutrality and public education as they were prescribed by rules of law widely accepted in the Swiss society. Faced with the objections formulated by Professor Dahlab regarding the indications given by the management of the scholar institution where Professor Dahlab worked, the Court aligned itself to the claims of the scholar management, imposing the standard of the *legitimate aim* arguing in this sense the fact that, maintaining secularism and the principle of gender equity are enough causes for legitimating the ban of wearing the Islamic veil.

The cultural motif of the Islamic veil is reiterated in the case *Sahin against Turkey* – this time, the plaintif, a student at the medicine faculty of the Istanbul University, built her claim in front of the European Court of Human Rights invoking, among others, the violation of art. 9 of

the Convention. In particular, in the year 1998, the University of Istanbul baned the famale students to wear the Islamic veil – the breach of this rule determined the exclusion of Sahin student from attending classes and sustaining exams. Similar to the last cause, the European Court stood innocent in front of the plaintifs motifs, adopting, for the first time, a trenchant position towards the issue of wearing the Islamic veil. In this sense, the Court granted validity to the ban established by Turkey with regard to female wearing the Islamic veil, assuming its position by reference to two coordinates : (1) maintaining the wearing of the Islamic veil is a violation of the principle of secularism – ensured at the constitutional level; (2) maintaining the wearing of the Islamic veil is a violation of the principle of gender equity.

We should not lose sight of the fact that, beyond these two essential premises, utilized by the Court in order to justify its oppinion, lies an elaborate reasoning, which consists of a verification test, upon which we have already leaned, that entails retracing 4 steps : (1) it is necessary to demonstrate if there is any interference with one of the freedoms protected by legal means; (2) we must verify if the confining of the respective freedom is prescribed by law; (3) noticing the legal aim pursued by confining the respective freedom; (4) verifying the need of violating the respective freedom within the frame of a democratic society. [16] By reference to the first point, the Court noticed that, the ban of wearing the Islamic veil confines the freedom of manifesting the plaintif's religious beliefs but in this sense there is the argument of the legitimate aim and by reference to the second point, the court noted that, the religious freedom is stipulated by law. Furthermore, in relation to the second point, the Court stated that, confining the right to manifest religious beliefs is prescribed in domestic law, and it is accessible and predictable for all law subjects. On the other hand, the enclosure of religoius freedom may be justified by means of the legitimate aim pursued – which, similar to the case Dahlab against Switzerland, consists of protecting the rights and freedoms of others and of preserving public order in academic institutions. [17] Finaly, the criterion of confining the prerogative stated by art. 9 of the Convention within a democratic society was explained by the Court by applying an ambivalent standard. We will expplain our position. The Court argued that, the freedom of religious beliefs is not an exclusive prerogative regulated in favour of believers, as

[16] For further details, see Britton D. Davis, *cited work*, page 133;
[17] The case *Sahin against Turkey*, European Court of Human Rights, App No. 44774/98;

it is a prerogative that applies also to non-believers. In other words, confining the expression of the plaintif's religious freedom (by baning the weraing of the Islamic veil) is compatible with the standards of a democratic society given the fact that, religious freedom entails balancing the expression of the beliefs of the followers with the right of non believers to do not engage into religious manifestations. More clearly, religious freedom must simultaneously correspond to both active and passive manifestations of membres of the European democratic society. Thus, in order to ensure an extensive protection, of all the rights contained in the European Convention of Human Rights and Fundamental Freedoms, the signatory States of the Convention must ensure a climat of tolerance and mutual support between the members of society, which can legitimize the State's action of restricting the manifestation of the religious freedom of the individual.[18] We deem that, from the Court's position emerges the premise of the margin of appreciation that is given in favour of member States. Although we have previously analysed the subject of the margin of appreciation, it is important to reiterate the fact that, the nation State is the closest actor to religious communities as it is a keen observer of their needs and peculiarities. In this point of our paper we agree to the oppinion expressed in doctrinal studies[19] according to which, in the religious field, the problem of margin of appreciation gains a double signification : (1) by giving this instrument within the reach of member States, the Court pursues to justly customize each case; (2) the Court dosen't want to affront the status quo that a certain problem (the religious problem) acquires at the level of national community.

In the case *Dogru against France*, the Court's analytic standard regarding wearing the Islamic veil is reiterated and detailed. In the context of non-complying with the ban of wearing the Islamic veil, a student named Dogru was expelled. De facto, the student refused to remove the Islamic veil during physical education classes. In justifying its decision, the Court recognized that, the so called violation of art. 9 of the Convention whose object is religious freedom is a simple restraint imposed upon the exercise of this right. In the Dogru case against France, the Court reiterated the test of verification that was previous advanced in the case Sahin against Turkey, noticing a peculiarity concerning the requirement of stipulating by legal means the restraint of the right to

[18] Idem;
[19] Daniel Barton, *cited work*, page 5;

religious freedom. In this sense, the Court stated that, the legal provision musn't be understood in a formal manner, advancing the idea that, there is a legal stipulation (in the substantial sense of the term) even in the case of violating the following obligations : (1) the duty to systematic attendance of the course; (2) the obligation of preserving safety; (3) the student's duty to dress adequately for the class of physical education. All these duties are found in the decisions of the French Council of State. It is worth mentioning that, subsequently, the ban of wearing the Islamic veil was legally recognized on 15 March 2005 by adopting the Law of the Veil – that stipulated in principal that : *in public schools it is banned to wear symbols or other clothing items by means of which students may obviously express their religious option.* Continuing with verifying the requirements imposed in the Sahin cause against Turkey, the Court recognized that *the legitimate aim of religious freedom – justified by the protection of the rights and freedoms of others and of public order.* At the same time, the Court observed the fullfilment of the criterion of *the need of confining religious freedom in the context of a democratic society*. In order to highlight this idea, the Court underlined the fact that, considering the vocation of the religious freedom by reference to other members of the community, there is the need to restrain it for reasons that relate to *the rights of others, public order and public safety.*

The cases previously evoked demonstrate, in our opinion, the direct link between restricting religious freedom and national values of secularism and gender equity. Restraining religious freedom is customized in the sense of baning the wearing of any clothing items that are ment to express the religious manifestation of a person. The ban of wearing the Islamic veil is not a situation that aleatory may be included in the general framework. Furthermore, associating the wearing of the Islamic veil with religious freedom is a premise that needs some elaboration. First, the relation between wearing the Islamic veil and religious freedom is one of strict dependence as long as the two aspects are mutually assumed, that is, as long as wearing the Islamic veil is assumed by the individual by virtue of his religious beliefs. It is interesting to comment upon the hypothesis in which, wearing the Islamic veil is not dictated by reasons of conscience emerged from the individual's religious freedom but by reasons that derive from other cultural dimensions like education, minimal standards accepted by the community, adaptations. Second, we deem that there is a problem between the principle of gender equity – enshrined in the national legislation of the member States of the Convention and the ban of

wearing the Islamic veil for reasons that are linked with preserving gender equity. From our point of view, the two aspects are conflicting : on one hand, *absolving the female segment that follows Islam of the duty of wearing the veil* by imposing the ban of wearing the veil is not any different from the unilateral obligation of wearing the veil as both are abusive; on the other hand, regulating the possibility of choosing between wearing the Islamic veil and desisting of the veil dosen't provide with real pledges for ensuring gender equity, as it raises the problem of the *real and valid consent of the person.* Beyond the possibility of obtaining the consent of wearing the Islamic veil by means of pure compulsion (violent acts lato sensu form members of the family), there is the situation of unknowingly expressing the consent (the acceptance of wearing the Islamic veil is owed, in this circumstance, to not knowing another culture except for the culture of origin, the Islamic culture, that dictates this specific obligation upon the female segment).

Conclusions

Between religious freedom stated in art. 9 of the European Convention of Human Rights and the egality value contained in art. 14 of the same Convention, there is the need of conciliation. In fact, the need of conciliation subsists within the Western paradigm as the East dosen't bring into discussion the issue of gender equity when analysing religious freedom. As we have shown in the previous section of our paper, the European Court of Human Rights case law stated that, the issue of wearing the Islamic veil is connected with the issue of gender equity. In the case law analysis of the wearing of Islamic veil, gender equity is an element that was introduced *ex abrupto* – without a previous climate for debate and justifications. The reasoning of the European Court is simple, focused on the idea according to which wearing the Islamic veil is a fact of patriarchal inspiration, without proceeding to a thorough demonstration; at the same time, the aspect of intersectional discrimination is not considered. The complexity of the case of wearing the Islamic veil was lost from sight within the analysis, being omitted the fact that, some Muslim women choose to wear the Islamic veil out of conviction. The decision of nation States that bans the wearing of the Islamic veil, although was intended to be liberator for women produces, in concret, an opposite effect, confining the female sphere of manifesting religious freedom, thus bringing in the alternative, discrimination. If the cultural factor creates or not a discriminatory situation in the case of

wearing the Islamic veil and, by default, in the case of prohibiting by law the wearing of the Islamic veil, is a problem that remains opened. We have some reserves in offering a satisfactory solution to the issue considering that, -as the French Council of State stipulated, the equality principle may be invoked in a democratic society against every person that violates it nevertheless, our question is if it can be invoked against the valid consent of the person that is subject to discrimination?

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THE GLOBALIZATION OF CRIME

Bogdan BÎRZU [*]

ABSTRACT

Eliminating the interdependence of states, cultural exchanges, trade liberalization are some of the main landmarks of globalization, viewed as a complex process, which is in a constant dynamic, with implications in all the bearings of a society.

In this context, the criminal activities carried out by classical groups experienced also changes and adjustments thus progressing to an area of the border, characterized by interconnecting criminal activities.

The crime, as part of social reality, adapt quickly and effectively to changes arising from globalization as it benefited from technological and economic development of specific phenomena, managing to achieve expected performance.

KEYWORDS: *globalization, crimes, development, national security*

Section I.
Impact of globalization on crime

In the last decade (1994-2004) "non-military" threats - organized crime, terrorism, drug trafficking, weapons and prohibited substances - have become more important than what occurred in confronting military blocs during the Cold War.

Disregarding borders, fully permeabilized, and ignoring the rule of law, organized crime has the power to destabilize countries and entire continents.

Experts say unanimously that "criminal organizations have adapted to the new order of the world economy and were able to take extraordinary advantage of globalization exchange of goods and capital."

Globalization, a process which is in constant development and transformation, creates the conditions for organized crime to produce "a veritable explosion of all kinds of traffic, the more difficult to detect,

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follow and stop.This new world order allowed the emergence and consolidation of a new criminality, opportunistic and aggressive, transnational and increasingly well organized, thriving advantage of differences between national repressive laws and practices ".

It is clear that today criminality is directly related to economic development, policy development and progress of science. Organized crime exploits with maximum speed and efficiency science and technology progress as well as contradictions and voids resulting from regulatory gaps. Globalization has allowed criminal organizations to optimize their crime activities by relocating stages (preparation, criminal action itself, paying the financial laundering of dirty etc.).

According to Nicolas Queloz globalization of crime is determined by:

- Globalization of economic and financial exchanges;
- Mobility of people and goods;
- Instant communication development;
- New interdependence of nations;
- Abolition of national borders;
- A certain loss of sovereignty on its territory.

Thomas L. Friedman believes that "the central elements of globalization are increasingly faster cross-border flows of goods, services, labor, money, technology, information, ideas, cultures, organized crime and weapons."

Globalization leads professionalization of organized crime, which uses the latest achievements in technology and trade to expand and refine their illegal activities. By using computers, members of criminal networks obtain, protect and process the information they need in improving their illegal operations.

Now we can talk, says Monica Şerbănescu of "a strategic crime which represents a lethal combination between organized crime and terrorism, aimed at usurpation of political power by creating a parallel economy that damages the credibility of the fundamental institutions of the rule of law. To tackle this type of crime authorities must know and understand the complex and mysterious relationship between terrorism and organized crime, the mode of action of the members of these groups becoming more specialized, combined strategies used by criminals to national and international".

The power of organized crime is so great that determines the mobilization of the main countries of the world - says Xavier Raufer presenting European experts views to the Mafia threat materialized in:

- Links between transnational criminal organizations are increasingly powerful and complex;
- Internationalization of criminal groups;
- The activity of these superpowers of organized crime is a threat to strategic national financial systems, even for the strongest.

"Transnational criminal organizations will exploit, increasingly, global spread of computerization, the flow of capital and expanding transport networks. Criminal networks based in North America, Western Europe, China, Colombia, Japan, Israel, Mexico, Nigeria and Russia will expand their scope and objectives. They will form alliances with each other, but also with smaller criminal organizations. They will corrupt leaders of unstable states, economically fragile and will enter the banks and business, influencing or even determining power systems and the nature of political regimes."

According to Professor Nicolas Queloz "challenges of a coordinated and integrated policy to achieve a proper response to organized crime are numerous. On the one hand there is an exaggerated fear to "security deficit" that generates the need for priority defense of public order, put into the equation with the danger of "democratic deficit" and priority defense of fundamental rights of citizens.

The plan to overcome the obstacles presented must be conducted by interdisciplinary legal action against organized crime, the administrative law, commercial, fiscal, banking, competition etc. complement the efforts of criminal law."

Section II.
The most globalized forms of crime

Impact and influence of economic - financial crime in European countries, including those of the European Union, have increased considerably in the past 15 years.

"Financial Globalization, globalization, international trade, financial ethics and compliance, financial scandals (Elf, Enron, Parmalat, etc.), all these terms, concepts or political - financial business determines, in reality, the status of today's society, a society marked by critical mutations in social, demographic, economic and financial ".

Today's society shows a dynamic economic, social and key financial future. Through this dynamic spillover effect causes a further increase in crime.

The magnitude of the crime is only charged with the onset of major financial earthquakes with inventory terrorist acts generously funded by criminal organizations and the collapse of financial empires built from the colorful cardboard of human trafficking, smuggling, money laundering and drug trafficking.

Economic-financial crime characterized not only by the great destructive potential the crime itself contain, but also by being able to seriously damage the confidence of participants in the economy market, confidence in the rule of law, in its ability to ensure economic order and social development.

Overall economic picture paints strong interpenetration between the criminal economy and the formal economy, a situation favored by many geopolitical developments occurring in the world today.

“We can say that before the Maastricht Treaty was established European market murderous joining East and West. In this market several criminal groups operate, such as Italian mafia, Japanese yakuza, Chinese triads, Turkish clans, Russian, Polish, Pakistani groups, Iranian, Nigerian and Cartels in Latin America. These groups do not form a unified super - mafia, but they develop "mottled" relationships ranging from cooperation to conflict."

Global economic and financial system is contaminated by funds from the activities of criminal groups, as they have a real ability to mix legal with illegal activities.

"Globalization has facilitated access (no criminal organizations) to protective havens of capital and people. This raises a crucial question in geopolitical crime: we can accept under the pretext of sovereignty, some very small countries (or some offshore centers, known not subject to any jurisdiction) to thrive "in the shadow" of organized crime and so bring considerable damage global economy?"

Such questions perfectly justified stem from a shocking global reality.

The global economy dominated by commercial business, finance, banking and capital market appears as a vast empire that extended its boundaries beyond our imagination, "an empire that subjugates our lives and makes us all (people, institutions, governments and nations) to depend on the power of money and misery."

Globalization has enhanced the international crime "market" as a response to the demand and offer of products and increasing illegal acts. In the rarefied world of powerful criminal organizations are initiated, conducted and concluded illegal business dimension, so the phenomenon of crime, traditionally placed at the periphery of society becomes an active and aggressive at all levels of society, including the most exclusive, significantly contributing to the reduction of State authority.

The huge stage of the economy and global finance is deliberately protected by a veil of mystery, beyond which it is difficult, often impossible, to penetrate with legal means.

"Forever considered as an area accessible only for super professionals and the rich, the universe of finance and banks has increased aura of impenetrability and worthiness, dictating laws and therefore the rules, all under secrecy breastplate perfect. It is, in other words, the core around which all other components of society gravitate."

The fundamental feature of world economy is enhanced power of international finance. Financial globalization, reflected in a single market of money at planetary level accompanied the globalization of production, trade, services and communications, manifesting most brutal and unpredictable negative effects on regional and planetary scale.

"Global financial markets are largely beyond the control of national and international authorities" - said George Soros.

The effect of globalization of economy and finance materialized in opportunities of transnational industrial and financial companies to borrow or to place unlimited amounts of money where they want and when they can effectively exploit the full range of financial instruments."The capital is the most mobile factor of production. He goes to where it is best rewarded. Each country is keen to attract him."

Financial capital mobility is supported by the rule of three "D":

- Disintermediation
- Deregulation
- Defragmentation

Disintermediation means eliminating intermediary investment or lending operations.

Deregulation is considered the motor of financial globalization. The monetary authorities of the major industrialized countries removed regulations regarding exchanges to encourage the international movement of capital. The outcome of the deregulation initiated by the USA at the late 70s was the faster geographical mobility of capital and a high degree of substitutability between these financial instruments.

Defragmenting markets defines the abolition of borders between traditional markets:

- Money market (short-term money)
- Exchange market (currency exchange)
- Futures market (goods bought and sold to be delivered later)

This defragmentation phenomenon allows the investors to choose the best performance, moving from one title to another, from one currency to another, from obligations in euro at the dollar or vice versa.

Last financial innovation designed to accelerate the movement of capital is SWAP, which is basically an exchange of duties between the two companies which allows each to benefit from the best loan terms in a particular market.

The international financial system has now become a single money mega-market - clean and dirty - characterized by a double drive: location, meaning that markets are increasingly interconnected thanks to modern communications networks, and time, meaning that operate continuously 24 hours from 24, in North America, Europe and the Far East.

Globalization process, conducted on the three coordinates generated an increase in speculative operations, and a strong market instability.

These results were added to a dilation of the financial sphere and a fracture between finance and production: the volume of transactions on the exchange market (where currency changes) increased five times between 1980-2000, reaching over 1,600 billion dollars a day.

According to estimates made by the Bank of International Settlements in Basel – Switzerland, international transaction volume is 50 times the value of international trade in goods and services. This clearly highlights the increasing rift between the financial and real economy activities or the huge amounts of money from criminal economy that are injected in international financial flows.

Specialists emphasizes that financial globalization enshrines the supremacy of market forces for economic policies. Today, markets are those who "decide" if national economic policies are good. The monetary authorities of a country cannot do much to defend the exchange rate against speculation. Large scale speculative operations conducted in the last decade have hit hard the economies of Russia, Mexico, Brazil, Uruguay, Argentina and Thailand. These crises occurred in countries whose economies are undermined by dirty money coming from the intense activity of criminal groups that have targeted actions in the areas

of privatization fraud, drug trafficking, arms and strategic materials, human trafficking, smuggling, tax evasion, manufacture and sale of counterfeit goods etc.

In an extensive study, developed by the Center for Strategic and International Studies in Washington, in early 2000 on organized crime in Russia, highlights the following conclusions:

- A large part of Russian industrial companies transfer 80% of their foreign currency, month after month, often in offshore banks;
- About 65% of the $ 120 billion that Russia has received from Western countries, mainly Germany and international financial institutions, returned to the West, hidden in secret accounts (statement belongs to Zbigniew Brezezinski, former adviser on security issues in the White House);
- Most of the leaders of criminal organizations struggle for respectability, entering the most select western clubs and sending their children to study at expensive schools in Western Europe. Thus, in 2000, over 20% of "La Rosey" school students', in Switzerland, where schooling costs $75,000 per year, were Russians;
- Russian criminal organizations, largely composed of former military and former Soviet security is a direct threat to the national interests of the United States and other countries (over 200 Russian criminal groups are active in 58 countries of the world).

The Marie - Christine Dupuis cites the work to which we have referred, the estimates made by a member of Coopers and Lybrand audit firm in Moscow, which says that "the influence of organized crime on the Russian economy would have expanded to nearly 41,000 properties, 50% of the country's banks and 80% of joint ventures with foreign partners."

Marshall Goldman, director of the Russian Research Center of Harvard University, said in the "Le Monde" newspaper 26-27 March 1995 that "70-80% of the private sector and banking in Russia are under the mob control. Nowhere witness criminal behavior of this magnitude and violence. Inserting into all layers of the economy and the society, organized crime has perverted the whole social system."

Louise Shelley concludes extremely alarming terms: "Organized crime has infiltrated the Russian financial system and financial markets, more than in other countries.

Thus, millions of Russians lost their small savings in pyramid schemes and banks, which subsequently collapsed. Hundreds of banks are in possession of criminal groups or are controlled by them and used in specific operations economic and financial crime. Russian Mafia

controls more than 40% of the economy and consumer sectors, movable and banking, the role is much bigger."

On 13 December 2000, Ralf Mutschke, Assistant Director General of Interpol said: "Unlike Italian and Colombian counterparts, Russian involved in organized crime repatriate only a small part of their profit, the remaining amount being deposited abroad".

Former General Alexander Lebedev, said on June 6, 2001 in the newspaper "Vremya" under the heading "Dirty Money and White Collar", "evasion of capital derived from business operations amounted to 20-60 billion dollars in the period 1995-2000. The lion's share comes from money taken out of Russia as a result of fraudulent created bankruptcies, money from exports, from commercial banks money and the companies' illegal possessed assets in foreign banks accounts.

According to Eric Vernier "the Russian investments in France exceeds 40 billion dollars, mostly achieved through the purchase of luxury properties in the Cote d'Azur".

In mid-June 2005, 22 Russian mafia bosses have been arrested in Spain who created the commercial and financial infrastructure used for laundering money derived from illicit activities in countries of the former USSR.

"The reality of the current organized crime in the former Soviet states is clearly the fruit of the chaste union of thieves and single party system - says Thierry Cretin, quoted study demonstrating that "socio-economic context of the changing offered to over 8,000 criminal groups, the more opportunities for conquer the most profitable segments of the Russian economy and finance."

It is when, breaking the string of opinions about Russian organized crime force, say, the principle of minimum consistent objectivity that must characterize any analysis and study of its kind, the fact that the extension "Russian criminal empire" would not have been possible without the complicity and decisive involvement of partners of the same nature in the USA, Western Europe, South America and countries considered tax havens and banking.

Thus, one of the biggest financial and economic business ran from the bank in New York and criminal groups in Russia. Former Vice President of the bank (Lucia Edwards) and her husband (Peter Berlin) formed the hub for Russian businessmen that helped the giant looting the amount of $ 7 billion, removed unlawfully from Russia and wash under an ingenious scheme. It began in late 1995 when Lucia Edwards was contacted by bank representative DKB Russian who asked her to

participate in the illegal removal of significant funds from Russia. Her husband, Peter Berlin, opened at Bank of New York more correspondent accounts on behalf of three companies (Benex, BECS and Low Land) which served as a cover of Russian companies. These businesses were run by officials DKB Bank, controlled at the time by former Chief of Staff of Russian President Boris Yeltsin. For the services provided, Lucia and Peter Berlin Edwords charged a fee in the amount of $ 1.8 billion.

The collapse of large transnational corporations headquartered in the United States produced in the last period (after 2001) triggered investigations and research after which it was established that respectable companies like ENRON, WORLD COM, XEROX, TYCO arrived in bankrupt due to deception resulting in impressive prejudice. In early October 2002, former accountant general of the American group WORLD COM, Buford Yates pleaded guilty to charges of collusion and fraud, admitting that he falsified records of the company at the behest of his superiors. Fraud size exceeding $ 7 billion.

Falsifying financial results and reporting false transactions aimed at inflating net income and cover acts of misappropriation of huge funds.

In early March 2005, American International Group (AIG) - the largest insurance company in the world – was the subject of an investigation led by the Attorney General of New York and American market monitoring institutions, regarding a "deficit" of $ 2.7 billion recorded due to falsification of accounting records which led to increase revenue fictitious company.

The Interpol report on "Global Crime Threats" stated: "the most important threats are: money laundering in order to obtain financial wealth in a country where legitimate state authority or regulation / control of financial activities is insufficient; corrupt persons occupying strategic positions to facilitate the activities of criminal organizations.

Resorting to corruption and acquiring financial wealth illegally constitute serious threats to global security. Criminal organizations trying to "melt" dirty money in licit economic activity to protect from the action of repressive services and avoid their financial confiscation".

The existence of tax havens and non-cooperative territories and inconsistency in controlling crime legislation determines its very consolidation. This is compounded by excessive bureaucracy and formalism in achieving judicial cooperation between law enforcement authorities and insufficient training and equipping the police and other legal structures for effective response phenomenon.

Cited Interpol report points out that "criminal organizations multiply, they exist and cooperate in different forms and structures, focusing above all same goal: profit. They change their strategies and tactics based on the actions taken by law enforcement authorities. However, they engaged in gathering information to complicate or frustrate law enforcement services work "situation materializes in the fact that they take advantage of globalization and technological advances faster than services and law enforcement authorities (op. cit., pag.89-90).

Globalization offers the ideal criminal activities "multiform" criminal structures consisting of the ability to initiate, develop and combine different operations depending on the emerging opportunities in the market scene.

It is, in our opinion, if the criminal structures that adapt easily and effectively to changes occurring in the global market, giving them the strict specialization (drug trafficking, arms smuggling, etc.) and combining these practices with other, newly emerging marketing human trafficking, sexual exploitation, counterfeiting of means of payment, piracy and counterfeiting of consumer goods, child pornography, trafficking in rare species of flora and fauna, waste recycling, trafficking in stolen vehicles, etc.

Rapid adaptation to changes of criminal structures is illustrated, according to the Interpol, by the high-tech related crime. Cybercrime is one of the main challenges that law enforcement authorities must cope.

Developed countries, which have advanced technology in the field of information and communication, are extremely vulnerable to criminals, easily using leading technology. The most serious of the cybercriminal, in terms of financial loss, is the computer systems viruses and different types of computer fraud.

Internet allows the usurpation of identity, is used to obtain data and information that can be used to defraud commercial, financial, banking and investment companies.

The Federal Trade Commission in the U.S. appreciated in 2003 that over 700,000 customers are affected annually by credit card fraud.

We believe in building a viable strategy to combat crime which must be addressed separately following next steps:

* To be informed → to hold data and information according to specific methods and techniques;
* To know → to have a clear picture of a sequence, a clear basis case;
* Analyze → to have the power to make the necessary connections and

articulate information and data converge to a wider field, more complex criminal activities

* To understand → to view the complete picture of the phenomenon in its various manifestations, detect examinations and their logic and effect (influence) on society in general, the climate of legality, order and safety. Understanding is the step that can predict future manifestations of crime, threats and challenges of the immediate or medium term perspective, magnitude and effects. Understanding translates into the ability of institutions to recognize the limitations of traditional approaches, identify the role of new actors operating in a globalized world methods and unpredictable movements.

Understanding means, according to Claude Silberzahn, former director of the Foreign Intelligence Service of France, recognizing that "the most dangerous, and the closest threat to democratic societies is the money became wild, the moving globally outside any legal control, capable to change at any point the world order.

To understand in depth the phenomenon of economic and financial crime and the type of reaction to the magnitude and dangerousness, is to include the complicated globalized equation of present time, this reality that "today's international order is not an interstate order. Capitalism policy was issued; occurring daily transfers of sovereignty at the expense of the nation - state and supranational bodies profits UN, NATO, the European Union policy; in the economy, in favor of organized markets or large industrial groups, financial or commercial globalized. Of the 100 major economic powers (states and businesses together), 51 no longer states - nations, but multinational companies that require their law the global economy."

In such conditions, reducing the capacity of the state to intervene in the national economy creates enormous difficulties in preventing and combating economic and financial crime. Governments cannot control, or controls a lesser extent, flows of dirty money, becoming powerless in the face of import and export of crime.

Understanding means, obvious in the context of our analysis, the fact that few institutional structures of national, regional, international and supranational and too little anonymous actors from the reality of globalized present date are willing to accept evil dimension resulting from incestuous relationship created between financial capital and dirty power policy.

Conclusions

Globalized crime, and, in our opinion, the most sophisticated of its components - cybercrime and the economic and financial, are phenomena that are given today outstanding importance both at national, regional - continental and international levels.

The most important gain made in the analysis and research of these phenomena is that the authorities have realized that this problem can only occur worldwide, with a global solution type and not regional.

The proposed solutions to revive reaction to globalization of crime should be to:

- Optimize the resilience of correct political decisions and appropriate strategies to fight crime;
- Redefine the tasks of law enforcement bodies and intelligence;
- Cooperate effectively at international level, between intelligence services and investigation and crime structures, enabling worldwide database operations;
- Careful study of criminal and non criminal obstacles existing in the activity of international cooperation and identify new solutions to reduce and eliminate them.

The category of non criminal barriers should be considered: the political, constitutional, administrative and private law and those concerning human rights.

In our opinion it is necessary to strengthen international criminal law, reflected in uniform definition of serious crimes of international nature and the organization of European tax systems to discourage tax evasion and limit economy.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Oana Şt. C. CHICOŞ [*]

ABSTRACT

Globalization, which marks the beginning of the 21st century, has an impact on crime as well, which has acquired new transnational meanings in the recent years.

Freedom of movement of people within the European Union has an undesirable effect on the trans-European crime, due to the lack of effective measures to prevent and combat this phenomenon. If in the past a stress was laid on the mutual support offered among states in extradition proceedings and the concept of "international legal assistance in criminal matters" was used, at present, there is more than mere support, it is a cooperation between judicial and police authorities of the states, such as extradition, the transfer of sentenced persons, legal aid in criminal matters, whereas the keywords in this area are "mutual assistance", "coordination".

This article contains a comprehensive analysis in the field of international mutual assistance in criminal matters, to provide grounded arguments as regards the proof of this area's contribution to the criminal law development. International judicial assistance in criminal matters has to be examined on the one hand, in terms of criminal substantive and procedural norms regulated in international treaties and legal instruments of the European Union, and on the other hand from the point of view of each form of international cooperation.

KEYWORDS: *Cooperation, assistance, convention, framework decision, European arrest warrant*

This paper refers to international cooperation in criminal matters, as fighting crime is an issue of interest to all states. In most of the cases, the effects the crimes perpetrated in one state are reflected one way or another on other states.

There are times when certain offenders, after having committed crimes in a state, take refuge in another state to escape prosecution or sentence, or the enforcement of criminal penalties.

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The unprecedented development of relations in the contemporary society has been accompanied by an increase in international crime, by an outbreak of certain forms of organized crime on several states territory.

The human society development as a whole, as well as that of the states and nations of the world, was possible due to international relations that were established and settled over time. Within bilateral or multilateral international relations, the states of the world have conducted a cooperation in a variety of areas with a focus on economic, cultural, political and legal fields.

The progress made in all areas in the last century have imposed structural changes within the global architecture, an aspect which inevitably led to a new international order, brought about the intensification of political dialogue that promoted peace, the need to observe the human rights and fundamental freedoms, the principles of democracy and the rule of law.

A key element that led to the emergence and further development of international cooperation and without which it could not exist, was the mutual trust in a well regulated institutional framework.

The international judicial assistance in criminal matters is just a field in the specific cooperative activities among the states of the world, an extremely important field that has imposed itself as a necessity since the beginning of the last century. International judicial assistance in criminal matters is not an invented concept in the last century, being known from ancient times. Naturally, at the beginning the judicial assistance was limited to solving interests, most of the times, the monarchs personal interests in their fight with their political opponents.

Delivering an area of freedom, security and justice, a declared goal set by the European Union, cannot be made but in the context of judicial assistance in criminal matters improvement among the member states.

Currently, the most serious threat to humanity is the re-emergence of international terrorism. This phenomenon has gained momentum and affects the states' safety, unsettling national economies, organizations and institutions, being reflected on the civilian population.

The international judicial assistance in the recent years has seen new and diverse forms, some of them enacted by domestic legal norms, others stipulated by various international treaties and conventions. To solve these cases, the institution of extradition was created as being: "the institution designed to ensure the criminal law assistance among states in

order not to make it possible for the criminals in a state, who took refuge in another state, to escape the liability of prosecution or to evade the enforcement of the sanction imposed by a final conviction."

At the moment, in our country, the institution of extradition is granted using only the work of justice. According to art. 19 of the Constitution of Romania: "expulsion and extradition of foreign citizens and stateless persons are to be decided by justice." Therefore, the court decision does not constitute a notice; it is final and binding.

The notion of extradition was used officially for the first time in France – "*extradition", "extrader", "extradite"* on February 19th 1971, when the Constituent Assembly decreed a meeting of the Constitution and the diplomatic Committees to draw up a law draft on the mutual extradition to prevent crimes between France and other European states. The term "extradition" is of a Latin origin and stems from the place "ex", meaning "outside", followed by the verb "traditio" – the action to deliver, to surrender.

In the Romanian law, extradition is defined as a "bilateral, political and legal act, by which the state on whose territory the foreign offender is present, delivers this offender to the state where the offense was committed or to the state whose interests have been harmed by the act perpetrated, or to the state whose citizen the offender is, with view to liability of prosecution or the enforcement of the sanction imposed by a final conviction."

The provisions on extradition are contained in the Constitution under Article 19, in the Criminal Code, under Article 9, under Law. 302/2004 amended by Law no. 224/2006. In the current Romanian legislation, the forms of international judicial assistance stipulated by Law 302/2004 and they are as follows:

- extradition;
- delivering offenders under an European arrest warrant;
- transfer of proceedings in criminal matters;
- acknowledgements and enforcement of judgments;
- transfer of sentenced persons;
- legal assistance in criminal matters;

The international law has a more simplistic vision regarding extradition, stating that it is an act of interstate judicial assistance, which aims at transferring a prosecuted or a convicted criminal, in the field of

judicial sovereignty of a state in another state. According to Law 302/2004, the international legal assistance includes the following forms:

• international rogatory commissions;
• hearings by videoconference;
• spontaneous transmission of information;
• controlled deliveries;
• undercover investigations;
• cross-border surveillance;
• calls interception and recordings.

The extradition institution involves imperatively the participation of two states according to Law. 302/2004, as amended by Law no. 224/2006 as follows: the requesting state is the state requesting the extradition and it may be:

• the state where the offense was committed;
• the state whose interests the offense was committed against;
• the state that the offender is a citizen of;
• the requesting state is the state on whose territory the offender or the convicted is present.

The operation of extradition encompasses two reference points:
• the first consists of drawing up the application requesting extradition, under the title of active extradition;
• the latter consists of delivering the offender which is called passive extradition.

The extradition procedure in Romania includes an administrative and a legal stage. In some states, there can be only an administrative procedure, or only the legal phase. The administrative phase begins with the receipt of the extradition request made in writing by the competent authority of the requesting state, the Ministry of Justice.

In case of the active extradition, law stipulates that the extradition of a person against whom the competent Romanian authorities issued an arrest warrant or a warrant of imprisonment or to whom a safety measure was enforced, will be requested to the foreign state on whose territory this person was localized if the conditions provided by law are met.

Passive extradition procedure is governed by the following principles, under Romanian law:

• *the principle of reciprocity,* according to which, "the foreign citizens and stateless persons may be extradited only in compliance with an international convention or in reciprocal conditions";
• *the principle of double incrimination*: extradition may be granted only if the offense for which the charged or convicted person whose extradition is requested, is stipulated as a crime by the law of both the requesting and the Romanian law. As a waiver, extradition may be granted if the offense in question is not stipulated by the Romanian law, if for this act, the requirement of double incrimination is excluded by an international convention to which Romania is party of;
• *the principle of specialty*: the persons to be rendered as a result of extradition will be neither prosecuted, nor on trial or held for execution of sentence, or subjected to any other restriction of their personal liberty for any act previous to rendition, other than that motivating the extradition, apart from certain cases stipulated by the law,
• *the principle of non bis in idem*, "No one is allowed to be summoned again in court or punished in other criminal proceedings for the same offense for which he has already been convicted or exonerated in accordance with the law and criminal procedure of a state"; "according to which, extradition shall not be granted when the person prosecuted has been judged irrevocably by the competent authorities of the requesting party for the offense or offenses for which extradition is requested.

Conditions regarding the persons: on the conditions for extradition relating to persons, according to art. 22 of Law no. 224/2006 amending and supplementing Law no. 302/2004, there can be extradited from Romania, at the request of a foreign state, those persons who are present on its territory, that are prosecuted or sued for a criminal offense or who are wanted with view to enforcing a penalty or a security measure

in the requiring state. The extradition exempts from Romania, according to art. 5 are as follows:

- Romanian citizens;
- person that have been granted asylum in Romania;
- foreign people who have immunity from jurisdiction.

However, consistent with the rules of reciprocity, applied to foreigners on the territory of another state, which is recurrent in the Romanian law as well, although the national regime is predominant and the Community provisions, Romanian citizens can be extradited from Romania based on multilateral international conventions to which it is party of, on a mutual basis and if at least one condition established Law. 224/2006 is fulfilled.

In order to observe the human rights, the fundamental freedoms and the principle of non-discrimination, extradition is not allowed if it is required for person's punishment out of non-discriminatory reasons.

Extradition any other foreign person may be refused or delayed if their surrender is likely to have particularly serious consequences for this person, especially due to this person's age or health. The refusal to extradite our own nationals or political refugees compels the Romanian state that, at the request of the requiring state, to submit the case to its own competent legal authorities so that prosecution and trial could be exerted, if necessary.

If the Romanian authorities opts for the refusal to extradite a foreigner, charged or convicted of serious crimes in another state or of crimes incriminated by international conventions that do not impose other way of repression, the examination and exercise of its powers, if any, of the criminal action is automatically performed without exception and without delay. The Romanian authorities decide in the same conditions as those stipulated for any serious offense punishable under Romanian law (Article 7 paragraph (2) of Law no. 224.2006).

Regarding the double incrimination, extradition may be granted only if the offense that the person whose extradition is requested was charged or convicted of, is stipulated as a crime by the law of both the requesting and the requested state law.

In case of political crimes:

• Extradition shall not be granted if the offense for which extradition is requested is regarded by the requested State as a political offense or as an offense connected with a political offense.

• the attempt for murder of a Head of State or a member of his family is not considered a political offense.
• The following are not considered political offenses: crimes against humanity and other similar violations of the law of war, as well as no terrorist action.

Military offenses:
• The extradition for military offenses which do not make crimes of common law is excluded from the scope of this law.

Tax frauds :
• In matters of taxes, customs and exchange, extradition shall be granted between the States Parties to the European Convention on Extradition and its protocols.

Looking into the conditions of extradition on deeds in the European context, we have mentioned a new tool conceived in the field - the European arrest warrant - a legal decision issued by the competent judicial authority of a Member State of the EU, with view to arresting and surrendering to another state member, of a required person for criminal prosecution, trial or for serving a penalty or a custodial measure, if issued for one of the 32 deeds settled at the European level and adopted by the Romanian law.

We believe that the main beneficial changes to the European legal system are represented by the significant stepping up of the procedures and the high degree of warrant usage.
The essential condition on the sentence provides that extradition is granted by Romania, with view to criminal prosecution or trial, for the deeds whose perpetration entails, as per the laws of the requesting State and the Romanian law, a custodial sentence of at least one year and for the execution of a sentence, unless it is at least for 4 months, a time limit stipulated by the International law. It is considered that, by way of introducing this requirement, the purpose was that this institution should be intended for deeds of low social hazards, which is a complex measure with many more implications.

As regards the conditions of competence and procedure according to Article 39, rephrased in Law. 224/2006, "extradition from Romania is decided by the court. The passive extradition procedure is urgent and carried out during the judicial recess. The role of the Ministry

of Justice consists in fulfilling the tasks conferred to it, as the central authority by law and the international treaties to which Romania is party of.

In the exercise of responsibilities as central authority, the Ministry of Justice performs the following activities:

- receipt of the request for extradition;
- analysis of the application for extradition and the accompanying applications in terms of international compliance, under the terms stipulated by Article 40;
- extradition request transmission and the accompanying applications to the competent general prosecutor under the terms stipulated by Article 42;
- the grounded restitution of the extradition request and the accompanying documents, in the situations stipulated by Article 40 (4);
- the enforcement, in cooperation with the Ministry of Internal Affairs, of the final judgment ordering the execution.
- communication to the central authority of the requesting state of the solution provided or the request for provisional arrest with view to execution, issued by the competent judicial authority.

As regards triggering the extradition proceedings in Romania, art. 38 of Law no. 224/2006 stipulates the preparation of the application in written form by the competent authority of the requesting State to the Ministry of Justice. Art. 40 of the same law provides: "*the international regular exam aims at verifying the compliance of the application and the documents attached with the dispositions of the applicable international treaties, including the statement made by Romania under international conventions."* The Ministry of Justice, by way of its specialized department, performs within 3 working days of the date of receiving the request, the international regular examination prescribed by art. 40 paragraph (1) to determine whether:

- between Romania and the requesting state, there are conventional norms or reciprocity for extradition, the request and its attached documents are accompanied by translation, according to Art. 17; there is one of the limits of granting legal cooperation, laid down in Article 3. The Ministry of Justice checks for extradition of nationals. Also, within the regular exam, the Ministry of Justice checks for reciprocity also in case the extradition of a foreigner is requested.

CONCLUSIONS:

We consider that extradition represents a way of international legal assistance that facilitates the achievement of justice, making use of the interstate relations established by diplomatic means, whereas, by way of its application, extradition is a legal act of repression on the part of the state called upon, because, most of the times, it implies a criminal arrest whose conviction or trial are not part of its competence.

Only regarded as a legal act, extradition can guarantee the protection of fundamental human rights, the prevention of abuse and arbitrariness, achieving the purpose of the institution of law and production of consequences aimed it. Thus, art. 522 of the Criminal Procedure Code, introduced by Law no.281 / 2003, stipulating that in case extradition of a person on trial and convicted in absence is requested, the case will have the possibility to be judged again by the court of first instance, at the request of the convict, placing thus under discussion the of institution of res judicata, which in close connection with the *non bis in idem* principle, according to which judgments become final acquire res judicata, presumed to reflect the truth (*res judicata pro veritate habitur).*

For res judicata authority to exist in criminal matters, two identical items are required between the case on trial and decided by a final judgment and the case to be resolved and within whose perimeter, the effects of res judicata occur, namely: person identity and object identity.

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MODERNIZATION OF NATIONAL LEGISLATION BY TRANSPOSITION OF EUROPEAN DIRECTIVES IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS

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ABSTRACT

The obligation to transpose European Union (EU) directives is stipulated in art.288 of the Treaty on the Functioning of the EU (TFEU), which specifies that a directive is binding upon the Member States to which it is addressed as to the result to be attained, while form and methods for obtaining it is discretional to the Member States. Regulations issued at EU level should be implemented in a timely, efficient and balanced manner, by appropriate transposing measures adopted by the legislative or the executive of Member States.

KEYWORDS: *European directive, transposition, copyright, related rights, intellectual property*

1. The Directive - source of European Union Law

The Directive is one of the legal instruments available to the European institutions for implementing European policies, used mainly for the harmonization of national laws[1]. The directive forms part of the secondary law of the European Union (EU). Article 289 of the Treaty on the Functioning of the EU (TFEU) specifies that a directive is a legislative act when it is adopted following a legislative procedure. In principle, a directive is therefore the subject of a Commission, after which is adopted by the European Council and the Parliament, in accordance with the ordinary legislative procedure or the special legislative procedure. A directive enters into force once it has been notified to the Member States (MS) or published in the Official Journal. Article 288 TFEU states that a directive is binding. Like the European

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[1] http://europa.eu/legislation_summaries

regulation or the decision, it is binding, in its entirely, upon those to whom it is addressed and, therefore, may not be applied incompletely, selectively or partially.

However, a directive differs from a regulation in that, while a regulation is applicable in member states' internal law immediately after its entry into force, a directive must first be transposed by the member states. The member states are free to choose the form and the means for applying the directive, by a deadline set by the institutions. Furthermore, a directive also differs from a decision as it is a text with general application to all the Member States.

In principle, a directive must be transposed by a deadline set by the institutions (between 6 months and 2 years). Once the deadline has passed, the Commission may ask the Court of Justice to rule against a member state for failure to comply with the obligation of transposition. Under certain circumstances, the Court of Justice may also allow individuals the possibility of redress where directives have been transposed poorly or late (case of *Francovich and Bonifaci* of November 19th 1991).

The Court of Justice considers that a directive has direct effect (i.e. an individual may rely on it in court). However, since the directives address and are binding for member states only, they do not have direct effect against individuals; in other words, they have vertical direct effect once the deadline for transposition has passed (individuals may rely on the text against a member state in court), but do not have horizontal direct effect (i.e. an individual nay not rely on the text against another individual in court). However, the Court of Justice has established several conditions so that an individual may refer to a directive before the courts: the provisions of a directive are unconditional and sufficiently precise; the directive shall not have been correctly transposed by a national measure by the set deadline.

2. Overview of directives in the field of copyright and related rights

Romanian Copyright Office states that *Romania has a legislation on copyright and related rights transposing all ten directives in the field, adopted by the European Council and the Parliament*.[2]

⇨ ***1st - Council Directive 93/83/EEC*** of 27 September 1993 ***on the coordination of certain rules concerning copyright and rights related to***

[2] http://www.orda.ro/default.aspx?pagina=212.

copyright applicable to satellite broadcasting and cable retransmission[3] - deadline: 01 January 1995.

The purpose of the directive is to promote the free cross-border satellite broadcasting of programmes and their cable retransmission from other Member States, and in particular to remove the obstacles arising from disparities between national provisions on copyright and from the legal uncertainty that exists in the field.

Satellite broadcasting requires the authorization of the right holder. The right may be acquired from the right holder only by agreement. Performers, phonogram producers and broadcasting organizations are granted the exclusive rights to: fix, reproduce, broadcast and communicate to the public, as they are provided in articles 6 to 8 of the Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

Where a phonogram is used for satellite broadcast, a single equitable remuneration is to be paid and shall be divided between the performers and the producers of phonograms. On the right to authorize or prohibit broadcasting limits may be imposed, in the case of: private use; use of short excerpts in connection with the reporting of current events; use solely for the purposes of teaching or scientific research.

Member states may establish more far-reaching protection than that required by the Directive. Cable retransmission of broadcasts is governed by national copyright and related rights law, as well as by agreements between copyright owners, holders of related rights and cable operators.

The right to authorize or prohibit the cable retransmission of a broadcast is exercised only through a collecting society, except where it is exercised by a broadcasting organization in respect of its own transmissions.

Where no agreement can be reached allowing cable retransmission of a broadcast, the parties may call upon the assistance of one or more mediators. The mediators have the task of providing

[3] Transposed by: ***Law no. 285/2004*** on the modification and completion of the ***Law no. 8/1996*** on copyright and related (neighboring) rights; ***G.E.O. no. 123/2005*** on the modification and completion of the Law no. 8/1996 on copyright and related (neighboring) rights, adopted with modifications by the ***Law no. 329/2006***: *„The legislative act intends mainly to transpose all provisions of the acquis communautaire in force on 1 May 2005, in particular the European Parliament and Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights.*"

assistance with negotiation and may also submit non-binding recommendations to the parties. The Directive also lays down rules governing the impact of the new provisions on existing situations, with special reference to current contracts and arbitration systems.

⇨ ***2nd - Directive 96/9/CE*** of the European Parliament and of the Council of 11 March 1996 ***on the legal protection of databases***[4] - deadline: 01 January 1998.

With the advent of the information society, the protection of databases assumes an increased importance, given that most services will soon be provided via electronic databases accessible either online or offline. Databases will also have a significant impact on the creation of new multimedia products, therefore should be accorded an appropriate level of protection so as to create an attractive environment for investment while safeguarding users' interests.

The Directive aims to provide protection of copyright in the original selection or arrangement of the contents of a database, as well as the protection *sui generis* of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection of the contents.

The Directive applies to databases, irrespective of their form, as *collections of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by electronic or other means*. The Directive does not apply to software used in the making or operation of the database or to the works and materials contained therein. Likewise, it does not affect the legal provisions concerning in particular copyright, related rights or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, laws on restrictive practices and unfair competition etc.

As respects copyright, as defined by the Agreement on TRIPS[5], protection of a database is conditioned by its nature of author's own intellectual creation, by reason of the selection or arrangement of contents. The creator of a database enjoys a group of exclusive rights to carry out or to authorize certain acts (reproduction, translation, adaptation, distribution, communication etc). The lawful user of a

[4] *Idem*.
[5] Agreement on Trade-Related Aspects of Intellectual Property Rights, adopted at Marrakesh on 15 April 1994.

database may perform - without authorization of the author - the above-mentioned acts, but only if they are necessary for the purposes of access to and normal use of the contents of the database. Member States may provide for limitations on the rights of the author of the database, without prejudicing the right holder's legitimate interest or conflicting with normal exploitation of the database. *Sui generis* rights give the maker of a database the possibility to prohibit retrieval and re-use of its contents. They are pecuniary rights and as such can be transferred, assigned or granted under contractual license.

The lawful user of a database which is made available to the public may extract and re-use, without authorization, non-substantial parts of its contents, without conflicting with normal exploitation of the database or unreasonably prejudicing the legitimate interests of the maker of the database. *Sui generis* rights extend for a period of 15 years, with effect from the first of January of the year following the date of completion / the date when the database was first made available to the public.

⇨ ***3rd - Directive 2001/29/EC*** of the European Parliament and of the Council of 22 May 2001 ***on the harmonization of certain aspects of copyright and related rights in the information society***[6] – deadline: 22 December 2002.

The objective of the Directive is to transpose at Community level the main international obligations under the two treaties on copyright and related rights, adopted in December 1996 within the framework of the World Intellectual Property Organization (WIPO).

Unless otherwise provided, the Directive applies without prejudice to existing provisions relating to: legal protection of computer programs; rental and lending rights and certain rights related to copyright in the field of intellectual property; copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission; the term of protection of copyright and certain related rights; the legal protection of databases.

The Directive deals with three main areas: reproduction rights, the right of communication and distribution rights.

Member States are to provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent, by any means and in any form, in whole or in part: for authors, of the original and copies of

[6] *Idem 3.*

their works; for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixations of films, in respect of the original and copies of their films; for broadcasting organizations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air including by cable or satellite.

Member States are to provide authors with the exclusive right to authorize or prohibit any communication to the public of copies of their works, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. The same applies as regards the making available to the public of protected works: for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixations of films, in respect of the original and copies of their films; for broadcasting organizations, of fixations of their broadcasts, regardless of the method of transmission.

The Directive harmonizes for authors the exclusive right of distribution to the public of their works or copies thereof. This distribution right is exhausted where the first sale or first other transfer of ownership in the Community of a copy is made by the rightholder or with his consent. A mandatory exception to the right of reproduction is introduced in respect of certain temporary acts of reproduction which are integral to a technological process, the purpose of which is to enable the lawful use or transmission, in a network between third parties, by an intermediary, of a work or other subject-matter and which has no separate economic significance. Moreover, the Directive makes provisions for other non-mandatory exceptions to the rights of reproduction or communication. In these cases, they are accorded at national level by the Member State concerned. The exceptions and limitations relating to the rights of reproduction and communication are optional and particularly concern the „public" domain. For three of these exceptions – reprography, private use and broadcasts made by social institutions – the rightholders are to receive fair compensation. The exceptions or limitations to distribution rights are granted depending on the exceptions relating to reproduction or communication.

Member States are obliged to provide legal protection against the circumvention of any effective technological measures covering works or any other subject matter. This legal protection also relates to „preparatory acts" such as the manufacture, import, distribution, sale or provision of services for works with limited uses. Nevertheless, for some exceptions

and limitations, in the absence of voluntary measures taken by rightholders, Member States are to insure the implementation of an exception or limitation for those who may benefit from it. With regard to the exception for private use, Member States may also take such measures, unless reproduction for private use has already been made possible by rightholders. Legal protection must be provided against any person knowingly performing without authority any of the following rights: the removal or alteration of any electronic rights-management information; the distribution, broadcasting, communication or making available to the public of works or other protected subject matter from which electronic rights-management information has been removed.

⇨ ***4th - Directive 2001/84/CE*** of the European Parliament and of the Council of 27 September 2001 ***on the resale right for the benefit of the author of an original work of art***[7] - deadline: 01 January 2006.

Although the Berne Convention for the Protection of Literary and Artistic Works gives the author of an original work of art the resale right, this however is not binding, which means that certain Member States do not apply it. As a result of this, there are barriers to the internal market and distortions of competition within it as well as a lack of protection for the authors of original artistic works. In this context, the Directive intends to generalise and harmonise resale rights in the internal European market, ensuring that the internal market for modern and contemporary art functions properly. For this purpose, a compulsory resale right for the benefit of the author has been introduced in Member States' legislation.

The resale right applies to works of graphic art or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided that they are made entirely by the artist or they are copies considered to be original works of art according to professional usage (limited productions or signed works, for example). The resale right does not apply to original manuscripts of writers or composers. The resale right is normally payable by the seller. Nevertheless, Member States may pass legislation permitting a professional[8] other than the seller to be the sole person responsible for paying the resale right or to share this responsibility with the seller.

[7] *Ibidem*.

[8] According to article 1 para. 4 of the Directive, the professional's sphere includes salesrooms, art galleries and, in general, any dealer of works of art.

Member States may also determine that the resale right does not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10 000.

The term of protection is provided for by Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights and lasts for a period of 70 years after the death of the author. To enable them to adapt to these new requirements, Member States which do not apply the resale right on the date on which the Directive enters into force[9] are not required, up until 1 January 2010 at the latest, to apply the resale right for the benefit of those entitled under the artist after his or her death. This period can be extended for a further two years if appropriate justification is presented.

Member States are obliged to set a minimum sale price as of which sales will be subject to the resale right. This minimum sale price may not exceed EUR 3 000. Artists receive royalties calculated as a percentage of the sale price of their works. However, the total amount of the royalty may not exceed EUR 12 500.

The resale right is enjoyed by the author of the work and, after his or her death, by those entitled under him or her. Authors who are nationals of non-EU countries enjoy the resale right if the legislation in their country permits resale right protection in that country for authors from the Member States. However, Member States may decide to apply this Directive to authors who are nationals of non-EU countries but whose habitual residence is in the Member State concerned. For a period of three years after the resale, the persons entitled to receive royalties have the right to demand of any art market professional any information that may be necessary to secure payment of royalties from the resale.

⇨ ***5th - Directive 2004/48/EC*** of the European Parliament and the Council of 29 April 2004 ***on the enforcement of intellectual property rights***[10] - deadline: 29 April 2006

[9] 13 October 2001.

[10] Transposed by: ***Law no. 285/2004*** on the modification and completion of the ***Law no. 8/1996*** on copyright and related (neighboring) rights; ***G.E.O. no. 100/2005*** on the enforcement of industrial property rights, adopted with modifications by the ***Law no. 280/2005***; ***G.E.O. no. 123/2005*** on the modification and completion of the Law no. 8/1996 on copyright and related (neighboring) rights, adopted with modifications by the ***Law no. 329/2006***.

In October 1998, the Commission presented a Green Paper on the fight against counterfeiting and piracy in the internal market in order to launch a debate on this subject with the interested parties. This consultation exercise confirmed that the disparities between the national systems of intellectual property rights were having a harmful effect on the proper functioning of the internal market. In November 2000, after this consultation phase, the Commission presented a follow-up Communication to the Green Paper proposing an action plan to improve and intensify the fight against counterfeiting and piracy. Among the initiatives proposed in that action plan was a directive that would harmonize national provisions on the means by which intellectual property rights are enforced.

Whilst the principal objective of this directive is to ensure an equivalent level of protection for intellectual property in EU countries, there are also other objectives, such as:

- **promoting innovation and business competitiveness**. If counterfeiting and piracy are not punished effectively, they can lead to a loss of confidence in the internal market. Such a situation would discourage creators and inventors, and endanger innovation and creativity in the Community;
- **safeguarding employment in Europe**. In social terms, the damage suffered by businesses as a result of counterfeiting and piracy is reflected ultimately in the number of jobs they offer;
- **preventing tax losses and destabilization of the markets**. The tax losses caused by counterfeiting and piracy are significant. This phenomenon is a genuine threat to the economic equilibrium since it can also lead to a destabilization of the more fragile markets that it attacks (such as the market in textile products). In the multimedia products industry, counterfeiting and piracy via the Internet are steadily increasing and have already resulted in very considerable losses;
- **ensuring consumer protection**. Counterfeiting and piracy are generally accompanied by deliberate cheating of consumers as to the quality they are entitled to expect from a product bearing, for instance, a famous brand name. This is because counterfeit and pirated products are produced without the checks made by the competent authorities and do not comply with minimum quality standards. When they buy counterfeit or pirated products, consumers do not in principle benefit from a guarantee, after-sales service or effective remedy in the event of damage. These activities may also pose a real threat to the health of the

consumer (counterfeit medicines) or to his/her safety (counterfeit toys or parts for cars or aircraft);

- **ensuring the maintenance of public order**. Counterfeiting and piracy infringe labor legislation (clandestine labor), tax legislation (loss of government revenue), health legislation and legislation on product safety.

The measures provided for by this directive apply to any infringement of the intellectual property rights as provided for by Community law and/or by the national law of the EU country concerned. This directive does not, on the other hand, affect the provisions on the enforcement of rights or those on exceptions contained in Community legislation concerning copyright and rights related to copyright. Furthermore, the directive does not affect Community provisions governing the substantive law on intellectual property; EU countries' international obligations and notably the TRIPS Agreement; any national provisions in EU countries relating to criminal procedures or penalties in respect of infringement of intellectual property rights.

Member States should set up the measures and procedures needed to ensure the enforcement of intellectual property rights and take appropriate action against those responsible for counterfeiting and piracy. These measures and procedures should be sufficiently dissuasive, but avoid creating barriers to legitimate trade and offer safeguards against their abuse.

A request to apply intellectual property protection measures may be submitted by the holders of intellectual property rights, their representatives and all other persons authorized to use those rights in accordance with the applicable law. Wherever they represent intellectual property right holders, rights management or professional defense bodies may also ask to apply these measures.

Under certain conditions, parties may be obliged to produce evidence that is under their control. EU countries should also take the necessary measures to enable the responsible authorities to order, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party.

Where there is a demonstrable risk of an intellectual property right being infringed, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may order prompt provisional measures to preserve evidence.

At the request of the right holder, the judicial authorities may order any person to provide information on the origin of the goods or

services that are thought to infringe an intellectual property right and on the networks for their distribution or provision, if that person was found in possession of the infringing goods for commercial purposes; was found to be using the infringing services for commercial purposes; was found to be providing services used in infringing activities for commercial purposes; was indicated as being involved in the production, manufacture or distribution of the infringing goods or services.

At the request of the applicant, the judicial authorities may serve the alleged infringer with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right; forbid, on a provisional basis, the continuation of the alleged infringements of an intellectual property right; make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder.

In certain cases, the judicial authorities may authorise the precautionary seizure of the fixed and non-fixed assets of the alleged infringer, including the blocking of his/her bank accounts and other assets. At the request of the applicant, the judicial authorities may order the recall of the goods that have been found to infringe an intellectual property right. The goods concerned as well as the materials and implements used for their creation may also be removed from the channels of commerce. Finally, the judicial authorities may order the destruction of counterfeit or pirated goods. Where a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where appropriate, non-compliance with an injunction may be subject to a recurring penalty payment, with a view to ensuring compliance.

The competent judicial authorities may also order pecuniary compensation to be paid to the injured party instead of applying the removal or destruction measures, if that person acted unintentionally and if execution of these measures would cause him/her disproportionate harm. On application of the injured party, the competent judicial authorities may order an infringer to pay the right holder damages in reparation of the loss incurred. The court costs, lawyer's fees and any other expenses incurred by the successful party will normally be borne by the other party.

Unlike the Commission's initial proposal, the directive, as adopted, contains **no provisions on criminal sanctions** against fraudsters. The directive merely stipulates that EU countries are free to

apply other sanctions, which go further than the provisions set out, to prosecute offenders.

⇨ ***6th – Directive 2006/115/EC*** of the European Parliament and of the Council of 12 December 2006 ***on rental right and lending right and on certain rights related to copyright in the field of intellectual property***[11] - deadline: 01 July 1994[12].

The Directive codifies and repeals Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. The directive harmonizes the legal situation regarding rental right, lending right and certain related rights, so as to provide a greater level of protection for literary and artistic property. It asks the Member States to provide for the right to authorize or prohibit the rental and lending of originals and copies of copyright works. It determines who holds these rights and lays down certain procedures for exercising them.

Rental is defined as the making available for use, for a limited period of time and for direct or indirect economic or commercial advantage. *Lending* means the making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.

The holders of the rental right and lending right are the authors, including the principal directors of films, performing artists, phonogram producers or producers of films. Where an author or performing artist has transferred or assigned his rental right concerning a phonogram or an original or copy of a film, he is to retain the right to obtain an equitable remuneration for the rental. This right cannot be waived, but its administration may be entrusted to collecting societies representing authors or performing artists.

Member States may derogate from the exclusive lending right, provided that at least authors obtain remuneration for such lending. Member States are free to determine this remuneration taking account of their cultural promotion objectives. Where they derogate from the exclusive lending right as regards phonograms, films and computer programs, they are to introduce, at least for authors, remuneration.

[11] *Idem 3*.
[12] The repeal of the Directive 92/100/EEC is without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law.

As regards rights related to copyright, Member States shall provide for performing artists, producers of phonograms and films, and broadcasting organizations exclusive rights of fixation, reproduction and distribution. These rights may be limited in certain cases, such as private use, use of short excerpts or use for education or scientific research purposes. Protection of copyright-related rights under the Directive must in no way affect the protection of copyright.

⇨ ***7th - Directive 2006/116/EC*** of the European Parliament and of the Council of 12 December 2006 ***on the term of protection of copyright and certain related rights*** - deadline: 01 July 1995[13].

The Directive codifies and repeals Council Directive 93/98/CEE of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, which was substantially amended by Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society. The term of protection of copyright for a literary or artistic work is set at **70 years** from the death of the author of the work or the death of the last surviving author in the case of a work of joint ownership / the date on which the work was lawfully made available to the public if it is anonymous or was produced under a pseudonym.

The term of protection for a film or audiovisual work is set at 70 years after the death of the last survivor among the following: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work. The term of protection of related rights (performers, producers of phonograms, film producers and broadcasting organizations) is set at **50 years**. This term is to be calculated on a case-by-case basis from the date of the performance, the publication or communication of its fixation. The term of protection begins simultaneously, from first of January of the year following the event giving rise to it. If the work originates in a third country and the author is not a Community national, the protection granted in the Member States ends at the final date of protection in the country of origin, but must not exceed the term set in the Community.

[13] The repeal of Directive 93/98/EEC is without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law.

⇨ ***8th - Directive 2009/24/EC*** of the European Parliament and of the Council of 23 April 2009 ***on the legal protection of computer programs*** - deadline: 31 December 1992[14].

The Directive codifies and repeals Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. In view of the growing role of computer programs in a broad range of industrial sectors, adequate legal protection should be developed, in order to clarify and remove existing differences between various types of legal protection in order to contribute to the proper functioning of the internal market.

The protection provided for in the Directive applies to the expression in any form of a computer program seen as the author's own intellectual creation, except ideas and principles which underlie a computer program or any elements thereof. The author of a computer program is the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, a legal person. If several persons participate in creating a program, the exclusive rights shall be held jointly by these persons. In the event that an employee creates a computer program following the instructions given by his employer, the employer exclusively shall have the rights in that computer program.

The holder of the rights to a computer program may do or authorize the following: the permanent or temporary reproduction of the program, or a part thereof; the translation, adaptation, arrangement and any other alteration of the program; distribution of the program. A person having a right to use the computer program may make a back-up copy in so far as it is necessary for that use. This person may also observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program without the agreement of the rightholder.

In the same way, the authorization of the rightholder is not required where reproduction of the code and translation of its form are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met: those acts are performed by the licensee or another person having a right to use a copy of a program; the information necessary to achieve interoperability has not previously been readily available; those acts are confined to the parts

[14] The repeal of Directive 91/250/EEC is without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law.

of the original program which are necessary in order to achieve interoperability.

Measures must be taken by Member States against persons committing any of the following acts: putting into circulation an infringing copy of a computer program; possession of a copy of a program for commercial purposes; putting into circulation, for commercial purposes, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical protection device. An infringing copy of a computer program may be seized, according to national provisions.

⇨ ***9th - Directive 2012/28/EU*** of the European Parliament and of the Council of 25 October 2012 ***on certain permitted uses of orphan works*** - deadline: 29 October 2014.

The Directive provides the necessary legal framework to facilitate the digitization and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located (the so-called „orphan works"). It is without prejudice to specific solutions being developed in the Member States to address larger mass digitization issues, such as in the case of so-called „out of commerce" works.

It was considered that a common approach to determining the orphan work status and the permitted uses of orphan works is necessary in order to ensure legal certainty in the internal market with respect to the use of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organizations.

The Directive should apply only to works and phonograms that are first published in the territory of a Member State or, in the absence of publication, first broadcast in the territory of a Member State or, in the absence of publication or broadcast, made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders. In the latter case, this Directive should only apply provided that it is reasonable to assume that the rightholders would not oppose the use allowed by this Directive. Before a work or phonogram can be considered an orphan work, a diligent search for the rightholders in the work or phonogram, including rightholders in works and other protected subject-matter that are embedded or incorporated in the work or phonogram, should be carried out in good faith. Member States should be permitted to provide

that such diligent search may be carried out by the organizations referred to in this Directive or by other organizations. Such other organizations may charge for the service of carrying out a diligent search. A diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out.

In the case of cinematographic or audiovisual works which are co-produced by producers established in different Member States, the diligent search should be carried out in each of those Member States. With regard to works and phonograms which have neither been published nor broadcast but which have been made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders, the diligent search should be carried out in the Member State where the organization that made the work or phonogram publicly accessible with the consent of the rightholder is established.

Diligent searches for the rightholders in works and other protected subject-matter that are embedded or incorporated in a work or phonogram should be carried out in the Member State where the diligent search for the work or phonogram containing the embedded or incorporated work or other protected subject-matter is carried out. Sources of information available in other countries should also be consulted if there is evidence to suggest that relevant information on rightholders is to be found in those other countries.

The carrying-out of diligent searches may generate various kinds of information, such as a search record and the result of the search. The search record should be kept on file in order for the relevant organization to be able to substantiate that the search was diligent.

Member States should ensure that the organizations concerned keep records of their diligent searches and that the results of such searches, consisting in particular of any finding that a work or phonogram is to be considered an orphan work within the meaning of this Directive, as well as information on the change of status and on the use which those organizations make of orphan works, are collected and made available to the public at large, in particular through the recording of the relevant information in an online database. If a work or phonogram has been wrongly found to be an orphan work, following a search which was not diligent, the remedies for copyright infringement in Member States' legislation, provided for in accordance with the relevant national provisions and Union law, remain available.

⇨ ***10th - Directive 2014/26/EU*** of the European Parliament and of the Council of 26 February 2014 ***on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market*** - deadline: 10 April 2016.

The Directive improves the administration of collective management organizations, introducing new rules on governance, transparency, ability of members to exercise control over the members and distribution of revenue and preventing unreasonable practices.

Another essential element refers to the possibility for rightholders to grant licenses for non-commercial use. Unfortunately, the Directive does not adequately state that authors may manage their rights individually, for each work, but allows them to reach a wider audience and acknowledges a certain autonomy which until now has been denied by some collective management organizations. Regarding licenses for musical works, online music service provision at EU level should be simpler, since providers will be able to obtain licenses covering more than one Member State and even validated across the EU. These provisions ensure new opportunities for online platforms and technology companies, so that they can provide better services to European citizens.

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A NEW PERSPECTIVE ON CONTRACTS

Diana Deaconu - DASCĂLU *

ABSTRACT

The notion of "contract" becomes a hot area in the context of the new institution of "assignment of contract", raising doctrinal difficulties in order to explain the mechanism by which an agreement (involving a free will subjectively related to the people that express it) can be assigned to another one. This paper proposes a new approach to the concept of „contract", which focuses on objective element, meaning the patrimonial legal relationship established between the parties, in an attempt to see the contract as an economic good that can be transferred .

KEYWORDS: *contract, assignment of contract, agreement*

Specialty doctrine regards contracts, usually, as a free-will agreement which impose judicial consequences for the parties.

The same concept of the contract is found in both the Civil Code of 1864, which in article 942 defines a contract as being "the agreement between two or more parties to constitute or deplete a judicial report among themselves (Civil code, art. 962, 969 and following)", and also within the actual Civil code, which dedicates article 1166 to a definition of the contract, stipulating that "The contract is the free-will agreement of two or more parties with intent to constitute, modify or deplete a judicial report".

From the analysis of the two legal provisions, which appear at a 147 year distance of each other, one may notice that no essential modification is inserted upon the manner in which the contract is presented, but only an adaptation of the expression and an addition which was actually implied under the previous provisioning, in what regards the

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free-will agreement as to "modify" a judicial report and not just to create or deplete.

It is easy to notice that the Romanian perspective of the legislature offers a subjective vision upon the contract, presenting a "free-will agreement" between parties, leaving behind the objective side, meaning the judicial report that has just been created.

It is though appropriate to see the contract as an agreement of free-will and only that?

The answer offered to this question by the specialty literature seems to be an affirmative one, as the contract has always represented an association of two or more volitions set together in order to create, modify or deplete judicial reports among themselves.

Beginning with the subjective element, here the psychological volition, which through externalization becomes a judicial volition in the context of a contractual bond, of any kind, one may reach the objective element, represented yet by the judicial report created.

The legislature and specialty doctrine, based on the continental judicial system, define the contract starting from two elements: free-will, and judicial purpose or cause.

The free will appears thus as an expression of free contractual expressiveness, offering support to an essential principle within the contractual law, meaning the *consensual principle*, which finds its basis within the theory of volition autonomy.

Based on the above, the parties are free to express their intent of engaging, modifying or depleting of a judicial report, creating the necessary frame to fulfill all rights and obligations assumed, without evading the imperative protection of the law or the absolute limits which it imposes.

From the point of view of Hans Kelsen, the contract must be regarded as being a certain situation, clear and objective, from which the judicial provision imposes judicial effects.

Beginning with the above statement, the contract becomes a law between the parties, but only within the boundaries provisioned by the law.

This is also the opinion of those whom support the theory of the pure legislature within the contractual provisioning, which, as Georges Rouhette, state that "the source of legitimacy and effect of the contract is represented by the existence of a positive provision which binds the judicial effects of this objective situation".

Thus the notion of "contract" implies obligatorily not only a subjective element, the volition of the parties, driven by subjective reasons to create judicial reports, but also an objective element, consisting in the judicial situation created by the free will agreements.

The ancient conception within the Romanian law, as to which the contract represents a "bond essentially personal" is also present in the contemporary legislature, as long as the contract is presented as an "agreement of will". It's only natural that this volition will start from parties determined to have contractual bonds, maintaining also the primacy of the subjective object upon the objective one.

The *subjectivist* theory of a contract, having being embraced in the French doctrine by CH. Jamin and M. Billiau, limits to present the essence of the contract as being "a hope directed to another party, who's figure is not indifferent"[1], the contract becoming thus an instrument which "allows always the filling of interpersonal relationships", "within the moment of loyal and efficacious behaviors"[2].

According to the above, the volition agreement between the parties give birth to an interpersonal connection between parties tied, through the created report, of a mutual fidelity obligation, becoming thus irreplaceable within the assumed roles.

It results, from this perspective, that any change of parties would assume a new agreement of will which would modify, create or deplete a judicial report, thus a new contract would be created, which will maintain, if possible, the object and characteristics of the old one, or will bring new different elements.

Regarding the provisioning that exist within the matter of obligation translation, one can only notice the direct contradictions which appear between the subjectivist theorists and the actual provisioning of institutions as the assignment of debt and delegation, or assignment of contract, which suppose the replacement of one of the initial parties with a third, altering thus the initial interpersonal report.

If the subjectivist theory regards the contract as an essentially personal bond, there must be mentioned the fact that the international doctrine does not stop at a unique perspective, but it becomes the creator of many theories connected to contracts.

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[1] C. Jamin, M. Billiau, *„Cession conventionnelle du contrat: la portée de consentement du cédé*" în Recueil Dalloz , nr. 14/1998, p. 146.
[2] *Idem*

One of the theories is represented by the "*contractual solidarism*" theory, sustained in the French doctrine by authors as Chr. Jamin, D. Mazeud, P. Ancel etc., which draws attention upon the importance of the interest followed by the parties at the enclosure of the contract, interest that becomes common to all parties, meaning that of finishing the contractual relationship in best terms.

The formula is simple and presumes that each party whom expressed the consent through the volition agreement will assume the obligation to realize the interest of its partner, the contractual relation becoming a reciprocal dependency, whose purpose is the accomplishment of the interest common to all parties, interest which transforms the relation in one based on "contractual solidarism" as it was denominated by French doctrine.

The "contractual equilibrium", in the vision of these theorists, is possible only if it begins by respecting two head principles: *the principle of proportionality*[3], which has as purpose ensuring of a fair and equitable repartition of risks and advantages that spring from the convention and *the principle of contractual coherence* which underlines the need that contractual clauses, as well as parties behavior, in a solidarity acception, must not contradict and present in an unnatural state of logical and judicial consistency[4].

Analyzing the basic ideas that guide this judicial theory, one may observe that even if the contract continues to be presented as a personal bond between parties, the attention is drawn upon a relatively objective element, the relation of contractual solidarism which leads to obtaining a common interest, represented by the appropriate closure of the contract.

We believe that the above theory might be regarded, in an optimistic manner, as a step, although a small one, towards avoidance of the "agreement of volition" driven by subjective interests towards the goal of the contract, an objective element, meaning the completion of the common interest of the parties, whom for its completion withholds the parties through contractual solidarity.

A different theory upon the contract is presented by the Anglo-Saxon law, from the adepts of the "*law and economics*" school, theory

[3] J. Ghestin, *La formation du contrat*, LGDJ, Paris, 1993, p. 200

[4] A.S. Courdier-Cuisinier, *Le solidarisme contractuel*, Litec, Paris, 2006, p. 218 şi urm., L. Pop, „*Executarea contractului sub autoritatea principiului solidarismului contractual*" în Dreptul nr. 7/2011, p.71 şi urm.

that manages to present in a different manner, much more pragmatic, the notion of contract, notion attached to the idea of economic entity.

The adepts of this theory regard the contract through the perspective of the role that it plays on an economic level, leaving aside the psychological level which is the usual filter of contract definition according to the continental law.

Thus, one of the modalities of mutual interference between the judicial element and the economical element is reception of the acceptance according to which the economic resources have to be assigned to contracts, always following an economic proportionality.

This proportionality presumes the possibility of a party to denounce the contract in the case that through its denounce the party would obtain superior economic advantages, being though compelled to inform the other parties of its intent and with the condition to not damage the economic situation of the other parties.

This procedure of unilateral closure of contract, given the above presented conditions, is called an "efficient breach of contract", as the possibility to breach the contract on a unilateral consent is known as "the option to default".

The reminded theory, which accords the unilateral breach of contract in case of superior economic gain for one of the parties, has been regarded as being a last resort remedy in the case of contract breach.

So the notion of "contract" gains from this perspective an essential economic side, offering to the parties the possibility of obtaining a superior economic gain by denouncing the contract under certain conditions.

Accepting this possibility with economic motivations, one also accepts an important diminishing of the compulsory force of the contracts – *"pacta sunt servanda"* – as the issues now move towards the domain of damages owed in order to compensate for the loss caused by contract breach.

Though this theory has found limited support within continental law, we appreciate that it might be, at least as an ideal level, be considered as a theory that creates a bond between the idea of a contract and the idea of economic interest, creating a "de-personalization" of the contract notion, which, in our opinion, has more a tendency to relate to the idea of profit, as long as the party that may breach the contract would first consider the gain of continuance and the gain of breaching.

The notion of contract and its acceptance in doctrine and specialty practice do not only present a theoretical problem, in direct relation with

legal philosophy, but also a practical importance, certain and overwhelming in the matter of the assignment of obligations, mostly in what regards the new "judicial institution" entitled "contract assignment".

So, as presented by the sustainers of the subjectivist theory presented above, the contract assignment would be possible only by the volition of the three parties involved (transferor, assignee, assigned), assuming two successive agreements, the agreement between the assignee and the assigned engaging the latter in a "new contract, that is being created between the transferor and the assigned, but who's characteristics are identical to the ones of the assigned contract"[5].

Analyzing this theory, the author Juanita Goicovici, stated that "being an interpersonal connection, an obligation of a party upon the other, the obligation is – within this doctrine presentation – not approachable and not accessible *per se* because only assets may circulate through contracts and not interpersonal relationships (…) A translation of this connection would represent the denial of the classic notion of obligation"[6].

Beyond the apparent rigor in denying the possibility of taking over an obligation, not even the adepts of this theory can deny that which the law, doctrine and practice had already admitted to this point, the transmission of a debt through assignment of debt and the perfect and imperfect delegation.

But the most recent institution of "contract assignment" is a new reason of dispute among the contemporary doctrine, and we especially mean the French doctrine, which are far more advanced within the theory of this judicial operation.

In what regards the contract assignment, current doctrine have shared believes: some are being sustainers of a dualist theory, other are being sustainers of a *monist* theory, and as always some voices have tried to conciliate both parties.

The sustainers of the dualist theory regard the conventional assignment of contract as a cumulative operation which assumes a debt assignment – always admitted to have been allowed – and a debt

[5] J. Ghestin, Ch. Jamin, M. Billiau, *Traité de droit civil. Les effets du contrat,* LGDJ, Paris, 2001, n. 691

[6] Juanita Goicovici, *„Utilitarism juridic- contractul înţeles ca valoare patrimonială cesibilă"*, în volumul colectiv „Cesiunea de contract. Repere pentru o teorie generală a formării progresive a contractelor", Editura Sfera, Cluj-Napoca, 2007, p. 76

overtake – which is essentially conditioned by the agreement of the assigned in order to be recognized as possible.

In this perspective, the expression of agreement of the assigned represents the essence of the recognition of this complex operation, becoming in fact the judicial support of the birth of a new type of contract, which "copies" in detail the object of the initial contract, the one that is being "assigned"[7].

Analyzing the disadvantages of this dualist theory, Juanita Goicovici underlines in a just manner that "the contrast between such a judicial technique and the true assignment of contract is clear – the transmission is not of the contract but of the overtaken debt, by the assigned, through a contract with the assignee".[8]

Thus the purpose of the conventional assignment is not only that of a transfer of rights and obligations, the latter having only a subsidiary role, but the main goal would be the "insurance of continuity of the contract", in spite of changing one of the original parties[9].

From the beginning, the object of the assignment would be regarded as a whole and not just as a judicial sum of rights and obligations.

The presentation of L. Aynes is focused on the primordial purpose of the contract, understood as a goal of the contract, an economic goal, which united the contracting parties.

This represents, in the same time, the ration for which it might be admitted the assignment of a contract, as it aims at the continuance of the contract, no matter if one or both parties do not will to be part of the contract, admitting thus that the goal of the contract may be reached by the presence of a new-comer.

But this theory did not escape the doctrine criticism, which imputed to its supporters the fact that the objectifying of the notion of contract would be exaggerated, as the contract may not only be regarded as an "instrument of economic exchange", but must also be regarded as an "instrument of civility and sociability"[10].

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[7] To see M.Billiau, Ch. Jamin, „*L'exigence du consentement du cédé. Note"* în „Le Dalloz. Recueil", nr. 43/1997, Jurisprudence, p. 589 şi urm.

[8] Juanita Goicovici, *op.cit*., p. 79

[9] L. Aynes, *La cession de contrat et les operations juridiques a trois personnes*, Economica, Paris, 1984, citată după J. Ghestin, Ch. Jamin, M. Billiau, *Traité de droit civil*., cit. supra, p. 1124-1125

[10] Juanita Goicovici, *op.cit*., p. 81

The need to adapt legal provisions to economical transformations brought on by the evolution of science and technology has also presented itself in the *assignment* domain.

The judicial practice, not only court practice, had to accept judicial operations that presumed in reality a contract assignment, even if at the time the legal provisioning had no article to regulate the contract assignment.

Often, tradesmen, driven by the desire to profit in a most efficient way throughout the contracts signed, allowed different types of contract assignments, beyond the barriers set by theorists in their trial do define the operation, beginning from the acceptation of the term "contract".

Analyzing the theories that exist within the doctrine, we appreciate that, even if at first glance the notion of "contract" appears as a simple notion, which forms its nucleus around the idea of "volition agreement", in reality it is a complex notion.

We appreciate that it would be a mistake to fall in the trap of subjectivism, induced by the idea of "volition agreement" and thus to ignore the essential, the most important matter from a legal point of view, namely the legal report that is created.

Observing the difficulties confronted by doctrine in its attempt to conciliate the actual definition of the contract as being a "volition agreement" with the operation that is already accepted within legal practice, namely the contract assignment, one may believe that things would be much easier to understand if a new definition of the contract would emerge, rather than an artificial extent, difficult to explain and which cannot be presented in a convincing and coherent manner of the idea of contract.

Thus, civil doctrine would state that "when saying contract" we cannot imagine a more adequate correspondence than "interpersonal connection". To emerge from a contract, is, for an obligation, to have as a ground base the trust relationship with the other party, defined by the volition agreement. And although, contrary to what the classic definition states, the contract may be, given the right conditions, considered by the parties as an asset, a patrimonial value, able to be transferred to third parties"[11].

This way, on one hand there is the recognition of the definition which sets the contract as a "volition agreement" and on the other hand there is a need of change within the manner in which a contract is

[11] Juanita Goicovici, *op. cit*., p. 82

regarded, so that sometimes it may be seen as an economic asset which may be the subject of a transaction.

In the same manner we may admit to contract splitting but only by "keeping the correct proportion between the personal aspects of the contractual and economic, objective connections"[12].

It has been stated that "any contract being (…) both an asset (a judicial report among patrimonies) and a "*nex"* (judicial report among parties), the unforeseen variety of practical situations and commerce imperatives impose "a privilege" within the economic and objective elements of a contract, in detriment of the subjective and personal"[13].

Therefore the same author whom implicitly agrees with the definition of the contract as a volition agreement ends in the end accepting its double quality, as a judicial report – judicial report and judicial-economic report.

In our opinion, once there is recognition of the need to redefine the contract as being *the judicial report, with a global meaning, that emerges, modifies or is depleted following the volition agreement of its parties*, the definition of a contract assignment will be much easier to present.

Because only then the problems met whenever the idea of assignment of contract emerged, not considered being possible to assign a volition agreement (which supposes nothing else but a subjective volition manifestation strictly from the parties within, with no admittance of the possible substitution of a party within the will of another) will be naturally overtaken.

It is a lot easier to regard the contract as an asset within the notion of the civil law, when it is considered a judicial report composed of rights and obligations, than when the objective side of the contract is regarded first. As even if one cannot completely ignore the subjective aspect of the contract, meaning the bond that it creates between the parties and the trust that must be the foundation of its settlement, the contract emerges, produces effects and completes objectively, being guaranteed by clear and objective sanctions in case of breach.

The volition agreement will thus become the *sine qua non* condition which will attract the birth of the contract, in its judicial dimension of obligational report.

[12] *Idem*, p. 85
[13] *Ibidem*

Conclusions

To conclude, we appreciate that a new definition of the notion of "contract" is imposed, to thus underline firstly its objective aspect, the "effect" of the contract, meaning the emerging of rights and obligations, which represent the content of the judicial report, thus the subjective aspect becoming only a subsidiary of it, a sine qua non condition for its birth.

This way, the contract assignment would be easier explained, avoiding the trap of the "assignment of a volition agreement".

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JUDICIAL TREATMENT OF INSOLVENT INDIVIDUALS IN THE EUROPEAN UNION

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ABSTRACT
The new realities of the twenty-first century require an economic and legal system reform to overcome the economic crisis. In addition to the negative effects of the financial crisis, it has also led to a collective effort from specialists in economic and juridical matters in order to adapt domestic legislation with European legislation and to find concrete and immediate solutions to the issues arising from the current socio-economic context.

KEYWORDS: *Debtor, individual, mass credit, insolvent, restructuring*

European legislative regulations

This paper aims to make an objective analysis of the legal treatment that benefits an individual in a state of insolvency, through the regulations of the Member States of the European Union.

In order to achieve the purpose, it is necessary, first, a conceptual definition of the notion of individual insolvency. Who is this person, who qualifies to be analyzed within the concept?

In Swedish law, individual insolvency is defined as the person who was unable to pay its debts properly, this inability is not temporary. [1]

In Greek law, individual insolvency is similar situation in which liabilities exceed its assets to a person, and that person can not pay creditors. [2]

To summarize, we can say that the individual is insolvent individual, called debtor, who was unable to pay its debts certain, liquid

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[1] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_swe_ro.htm
[2] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_gre_ro.htm

and due, either due to the high degree of indebtedness, either due to lack of cash money.

Most European countries have domestic legislation regulated institution individual insolvency.

The first country to introduce such a law was Denmark - in 1984 - after which followed France, Germany, Austria, Belgium, UK, Netherlands, Italy and Spain. Among the new Member States, Estonia and the Czech Republic have a similar legal framework, according to a report by the Council of Europe.

The Council of Europe has developed a European Convention on the international aspects of bankruptcy, signed in Istanbul in 1990, but unfortunately it never entered into force because it was not ratified by a sufficient number of Member States.

United Nations Commission on International Trade Law (UNCITRAL) has developed a standard law adopted in 1997, to promote the adoption of modern legislation applicable in cases where the insolvent debtor has assets in several countries.

This law-type determines the conditions under which a person who handles bankruptcy in a foreign country can have access to the courts of a state to adopt the law-type conditions for recognition of foreign bankruptcy proceedings and indicating measures protection for foreign manager.

It also empowers the courts and law-type receivers from different countries to cooperate more effectively and establishes provisions for coordination of insolvency proceedings conducted simultaneously in different states. It was published a Guide to the adoption of the UNCITRAL law standard to help governments to adopt legislation on the law-type. [3]

The European Union has established a system for coordination of insolvency proceedings.

Thus, on 29 May 2000, the EU adopted a Regulation 1376/2000 on insolvency proceedings, Regulation which entered into force on 31 May 2002.

Particularly relevant for our country is that this regulation includes a special edition in Romanian language, namely Chapter 19, Volume 001, pages 143-160. [4]

[3] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_int_ro.htm
[4]http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32000R1346&from=RO

The main objective of the Regulation is to ensure that the parties (debtor and its creditors) have no reason to transfer assets or judicial proceedings from one Member State to another in order to obtain more favorable treatment.

Regulation is directly applicable in all Member States except Denmark, so litigants are able to support the cause in the national courts. This regulation has a limited range of application, meaning that it doesn`t apply to insurance companies or credit institutions and investment.

To meet the objective, the regulation establishes common rules on jurisdiction of courts, recognition of judgments and the applicable law, and compulsory coordination of open procedures in several Member States.

Courts have jurisdiction to open insolvency proceedings are those of the Member State in which the "debtor's center of main interests". If it is a company, it is usually the company's headquarters.

But it can also open later secondary procedure for liquidating the assets in another Member State. Legislation of the Member State in which such open insolvency proceedings establishes consequences.

Regulation provides that proceedings opened in several Member States are coordinated primarily through active cooperation between different insolvency.

All decisions made by a court of a Member State which is competent on main proceedings are in principle automatically recognized in another Member State without being reviewed later. [5]

Relevant national regulations for proper future insolvency individual institution is that regulation provides in point 9 of the Romanian edition, that "this Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a person legal, a trader or an individual. "[6]

Private ordinary insolvency procedure is a concern of most developed countries in terms of economy. American law allows individual (consumer) to declare "bankruptcy" and put wealth under the control of federal courts to get rid of debt. The procedure is covered by Chapter VII of the U.S. Commercial Code.

[5] http://ec.europa.eu/civiljustice/bankruptcy/bankruptcy_ec_ro.htm

[6] http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32000R1346&from=RO, pct.9

And other states have legislation after the American model, which aims to ordinary insolvency proceedings private. They statutory rules Britain, Germany, Spain, France, all European Union member states.

The World Bank has introduced an initiative to establish principles and guidelines for the management of insolvency proceedings.

In general, this initiative promotes the idea that a functional credit system should be supported by mechanisms and procedures that provide for efficient, transparent, and reliable methods for satisfying creditors' rights by means of court proceedings or nonjudicial dispute resolution procedures. To the extent possible, a country's legal system should provide for executive or abbreviated procedures for debt collection.[7]

In 2005, in New York, the United Nations adopted the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide about an insolvency law.

United Nations Commission on International Trade Law is a subsidiary organ of the General Assembly. This committee develops international legislative texts to support Member States to modernize commercial laws and rules to facilitate negotiations between the parties to a commercial transaction.

Legislative procedures in individual bankruptcy

According to European legislation, companies and individuals can enter into voluntary agreements with creditors to reduce debt. Such agreements are not specifically regulated by law, but are treated in the same way as other types of agreements.

In Sweden, individuals can apply for debt restructuring (skuldsanering) under the Act on debt restructuring.

Conditions which may make such a request are: the person must be resident in Sweden, you must have debts so large that it is possible that it should be able to pay its debts in the near future debt restructuring is the solution required.

The debtor (person or entity) that is unable to pay, namely that the debtor is unable to pay its debts properly without that disability is temporary, may be declared bankrupt.

Application for bankruptcy is filed with the court in whose jurisdiction the debtor resides, and if a company, the court in whose

[7]http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011[FINAL].pdf

jurisdiction the registered borrower. The application may be filed by the debtor or the creditor. The court decides on bankruptcy and appoint a receiver.

Bankruptcy is a legal procedure, so the court is acting initiation or termination of bankruptcy proceedings.

Bankrupt person (directors if a company) has the legal obligation to cooperate with the receiver, the courts and to provide information. Bankrupt person is required to declare in court, under oath, that his statement about his financial situation is correct. After judgment before bankruptcy and bankrupt person to have made the declaration under oath in court, it can not leave the country without permission from the court.

As an immediate effect of the opening of proceedings, all the debtor's assets are included in the list of creditors and should be used as soon as possible to pay debts. However, a natural person declared bankrupt can retain certain personal property under seizure rules in the debt enforcement proceedings can not be confiscated.

A person in bankruptcy can not have a good part of the list of creditors. Consequently, it can not enter into agreements or, for example, can not sell goods or pay claims that are part of the list of creditors. As soon as the judgment declaring bankruptcy, real estate that is part of the list of creditors can not be seized unless the property has been pledged as security for a particular claim.

Employment contracts do not automatically cease if the employer is declared bankrupt, and the receiver has to decide on the termination notice. Employee's claim regarding wages or other remuneration generally receive preferential status for a certain period of time. Basic rule provides that a payment claim submitted within three months before the court has received an application for bankruptcy, and payment application lodged within one month of the judgment declaring bankruptcy have preferential status.

Claims resulting from salary or other remuneration enjoying preferential status are also covered to a point by a "security wage", which means that if the officer did not have sufficient mass goods to pay claims, the employee may obtain payment of compensation from the state. The security wages is limited; such a guarantee can be paid also during the reorganization of society.

Once the decision on the bankruptcy has been issued, the debtor no longer has assets in the list of creditors. If, however, the debtor favors one creditor at the expense of others, it can be sanctioned. Also, the receiver has several ways to cancel a legal act performed by the debtor

before judgment declaring bankruptcy, if this was to the detriment of creditors.

If the debtor favors one creditor at the expense of others, the legal act of the debtor may be canceled if, after this act, the debtor became insolvent, and the favored creditor knew or ought to have known of that question. For these provisions to apply, the transaction must have occurred within five years prior to the date the bankruptcy was filed. However, if the payment was made to a person close to the debtor, such as a family member for five years does not apply.

In certain circumstances, the payment of a debt can be recovered if it was done in a period of less than three months after filing bankruptcy. This applies if the payment was made in an unusual way (ie, without using money) if payment was made before they become due, or if the payment involved an amount of money so large that the debtor's financial situation has worsened dramatically. This does not apply if the payment could be considered a regular payment. This means that payments of debts, as they are due, can not normally be recovered.

Creditor who filed bankruptcy is cited to appear at a hearing to the court swearing. Other creditors are summoned by publication bankruptcy decision. Borrower has the obligation to notify the receiver, the court and the supervisory authority, the identity of creditors.

If it is considered that sufficient assets to pay the creditors who do not have a preferential claim, it is necessary to apply the procedure by which to prove the debt. The receiver calls for the implementation of the procedure and the court issues a judgment on this. The court shall decide on the procedure, it should last between four and ten weeks. Decision on the implementation of the procedure by which proof of debt must be published in the Official Gazette and in one or more newspapers circulating in the region. Subsequently, creditors may submit their applications to the court for payment of debts.

An individual whose debts are so large that it will not be able to pay its debts in the near future may require debt restructuring. A further requirement is that the approval of debt restructuring is adequate in terms of personal and financial situation of the debtor.

Debt restructuring means that the list of creditors debts are reduced or eliminated entirely. Applications for debt restructuring shall be submitted to the executing authority. All creditors affected by the demand for debt restructuring should be given the opportunity to express their views on the proposal. Decision on debt restructuring will provide

part of the debt that the debtor must pay. It will also provide installment plan payments over a period longer,, normally be five years.

In the installment plan payments, the debtor whose debts were restructured must maintain the minimum subsistence amount. If the debtor does not have an income that exceeds the subsistence minimum, it does not have to pay anything; This occurs in approximately one third of cases.

Rules on liquidation of assets in the list of creditors are set out in bankruptcy law. After the sale of goods, the balance is distributed. If at the time of declaration of bankruptcy, the assets are insufficient to cover the costs arising from the bankruptcy, the court shall order the procedure. Where are the remaining goods, the procedure is closed when the court decides on the distribution of assets to creditors in accordance with the priority required by law on preferential debts.

Regulation of individual bankruptcy in Romania

In our country there is legislation at this time of insolvency regulation of the individual institution.

Adopt a law on individual insolvency is necessary, but mandatory due to the fact that Romania is a member state of the European Union and Regulation 1376/2000 requires Member States to extend insolvency and individuals. [8]

There have been several legislative proposals which, unfortunately, have not materialized to this day.

All mentioned initiatives aimed at the establishment of a special collective proceedings against debtors, individuals, which in terms reasonable to download the debt certain, liquid and due to them from various creditors.

In this context emerged bill insolvency individuals submitted to the Senate in November 2009 written by lawyer Gheorghe Piperea and 13 Senators have taken the PDL. The bill was passed in the Senate in March 2010 with 76 votes in favor and three against. In order to adopt an individual insolvency law Piperea scored three main arguments for the reality of legal, social and economic.

From a legal perspective, it was argued that it is contrary to the Constitution as a trader, individual, insolvent, to enjoy the right to the protection of the court, while a natural person of a liberal profession, but is in the same state of insolvency / indebtedness, do not have that right.

[8] Amalia Postu, Journal of Commercial law no. 6/ 2010, p. 83

Finally, contrary to the law of human rights protection as a Frenchman, for example, residing in Romania and enter supraîndatoare state, the court can require protection, while a Romanian, was in the same situation of indebtedness, not to benefit the same right. [9]

Social argument was that a large number of people remain without a job, and utility bills, current expenses of the family, child in school, all these people have become sources înglodare in debt. Last but not least, the economically appreciated as a non-performing debtor, individuals, banks and many other lenders causes additional costs to actual loss. Insolvent banks are not obliged to provisions; debtor is excluded from nonperforming loan term of at least five years from the incident of payment, when passed automatically blacklists Credit Bureau.

The law is necessary for the debtor insolvent, if not fraudulent banks can regain customer. A debtor who has to pay the bank a rate that it can not allow (low income, unemployment, disease, growth rate) may enter into a plan of reorganization to pay a certain amount monthly for three years or, if there is sufficient income to fail. Call for bankruptcy is a very serious thing for the borrower and should be avoided. In case of bankruptcy, the customer loses his house and other properties dispensable. That happens now if enforcement, except that now, if the collateral / assets made not cover the debt, the debtor will still have to pay the bank the difference, that will remain embarrassed for many years, perhaps decades, no chance of resorting to a loan, credit card etc.

A person can go bankrupt / insolvent when its revenues can no longer satisfy creditors. The debtor may request protection of the bankruptcy court will consider whether or not excusable. Banks worry that will give Romanians rush to declare bankruptcy not to pay rates on credit, it is a method by which they meant to evade obligations. Romanian Bankers have expressed opposition to this law since the advent of the project. Radu Gheţea, president of CEC Bank and the Romanian Banking Association - bankers lobby organization - Steven van Groningen, CEO of Raiffeisen Bank Romania and Andreas Treichl, CEO of BCR at the time, had numerous interventions that and- expressed their opposition to this bill. [10]

Beginning collective procedures were applied to traders in financial difficulty, provided the Commercial Code, and the Law.

[9] Gh.Piperea, Journal of business law, no. 2/2009, p73

[10]http://www.economica.net/legea-insolventei-persoanelor-fizice-falimentului-personal-e-pe-mana-celor-care-l-au-votat-la-senat_26613.html

64/1995, in original form, as the "cessation of payments" and OG No. 38/2002 has replaced the notion of "cessation of payments" with "insolvency".[11]

Conclusions:

From the material presented, a definite conclusion emerges: there is now sufficient legal regulation in European law that can form the basis for harmonization of Law no. 85/2014 of the European legislation regarding bankruptcy Institutionalize individual.

The context in which imposes a statutory targets mainly the current political priorities of the European Union to promote economic recovery and sustainable growth, safeguarding jobs, according to the strategy developed in Europe - 2020.

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6. http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32000R1346&from=RO;
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9. Guide législatif sur le droit de l'insolvabilité

[11] Stanciu Carpenaru, Commercial law, Ed. All Beck, Bucharest,2004, pag. 583

EXCESSIVE LEGISLATION – CAUSE OF LEGAL DEVALUATION AND CONSEQUENCE OF INEFFECTIVENESS OF INSTITUTIONS INVOLVED IN THE LEGISLATIVE PROCESS

Ramona DUMINICĂ [*]

ABSTRACT

In current society, which is characterized by an accelerated pace of social progress, frequently radical economic and political change, under pressures from European Union and international law, the law tends to change its purpose. The law no longer appears necessary to establish order in reality and protect the individual and his rights, but has become a solution among many others, a program element required by the party or parties in power. The proliferation of legal norms, their instability generates a devaluation of the law loses its psychological impact on subjects, turning in a fact a matter of fact. The complexity, the large number of laws, the incomprehensibility of these laws to ordinary people leads to a feeling of insecurity. Objectively, the individual entrusts himself to arbitrary forces if often he cannot know or understand the law which he must obey. This creates unbearable legal uncertainty for the person facing the application of the law. Based on these considerations, the present study proposes an analysis of the causes of excessive legislation, its role and functionality on contemporary law and also seeks to propose solutions to mitigate its effects.

KEYWORDS: *law, excessive legislation, legal insecurity, devaluation of laws*

§1. The natural and widespread tendency to excessive legislation

Legislation has now become a huge and complicated field, constantly supporting changes which are more or less necessary. In each session, Parliament passes new law bills created from approximate and

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provisional plans and in quite often uncertain technical conditions, adding to the previous ones, that are not repealed.

Warnings about the negative effects of excess lawmaking have been given since the periods when it was only a bourgeoning problem, for example Montesquieu noted that "unnecessary laws weaken the necessary laws", later, Portalis said that "in history, about two or three good laws are promulgated within several centuries"[1]. Benjamin Constant saw the many laws as a great danger to representative government "this is the ailment of representative states, for in these countries everything is done by law, the absence of laws, the absence of laws is the ailment of unlimited monarchies, where everything is done by people. This reckless multiplication of the laws corresponds to certain natural tendencies of legislators, i.e. the need for action and the pleasure of believing oneself necessary"[2]. Later, Jean Carbonnier added: "This fog which penetrates and amplifies, blinds us, renders us unable to conceive of other relationships between people than the through the law [...], the law spreads a sense of security which numbs action, or at least slows it down [...]; it is the fatality of excess [...] It is a serious problem, more cultural than constitutional, against which the country will have to seriously mobilize"[3] or more accurately "legislative inflation leads to an ignorance of the laws, their inefficiency leads to the devaluation in the public mentality"[4].

Nowadays, the discourse is the same but should be resumed with greater vigour since the negative effects of law inflation still remain, and have been amplified moreover as regulatory excess rates achieved are much higher than in the times when Montesquieu or Portalis were phrasing the fundamental principles of law. Excessive legislation is not just a topic of discussion held in contemporary constitutional "circles", it

[1] J. É. M. Portalis, *Discours préliminaire du premier projet de Code civil* (1801), Préface de Michel Massenet, collection: Voix de la Cité, Éditions Confluences, Bordeaux, 2004, p. 14.

[2] B. Constant, *Principes de politique applicables à tous les gouvernements représentatifs et particulièrement à la Constitution actuelle de la France*, Hachette Pluriel, Paris, 2006, p. 59, available online: http://www.wikiberal.org/wiki/Principes_de_politique.

[3] J. Carbonnier, *Droit et Passion du droit sous la Ve République*, Flammarion, Paris, 1996, pp. 271-273.

[4] J. Carbonnier, *Droit Civil. Introduction*, 27ème édition, collections „Thémis", Press Universitaires de France, Paris, 2002, p. 123.

is also a tangible and quantifiable reality[5].

Through its annual reports submitted to the Romanian Parliament, the Legislative Council of Romania has already drawn attention to the worrying phenomenon of "legislative inflation", which takes the form of a legislative instability and generates legal uncertainty. From these reports we learn that the average annual rate of legal acts adopted was over 1800[6].

Thus, in our country, during the post-revolutionary period (1990-2012) 7223 laws were adopted. Also included are orders and Government ordinances, whose numbers have sky-rocketed since 1996, amounting to 3894 during the period under consideration. The government decisions or other regulations issued by the central or local government were not the focus here, but their number is just as high, which leads us to talk in general about normative inflation. This trend towards law proliferation began in late 1990, reached its peak in 2001 and maintained it in the coming years and recently it is gaining momentum until May 2014 at which point Parliament had passed 66 laws.

Romania is not the only country faced with this phenomenon. Legislative inflation is also present in most normative systems.

In Germany, the number of laws passed annually varies between 120 and 160, without betraying a clear upward trend. However, their length continues to grow, they lack clarity and efficiency and further regulatory excess have all been subject to criticism. In Belgium also the number of bills passed each year in the 1980s that, on average, did not exceed 100, although this has obviously increased since 1996, with maximum rates reaching 200 in 1997, 1999 and 2003, and in recent years, respectively in 2009 they adopted 129 laws and 121 such acts in 2010[7].

Recognized for its legislative inflation, Italy has a little over 200 documents adopted annually. If the statistics for Hungary, the Netherlands and Spain do not show a clear trend of the evolution of legislative output, the situation there resembles more the one in Romania that in France.

Thus, in France, while at the end of the last century, a collection

[5] For a full presentation, refer to: R. Duminică, *Criza legii contemporane*, Editura C.H. Beck, Bucureşti, 2014, pp. 61-64.
[6] S. Popescu, V. Ţăndăreanu, *Securitatea juridică şi complexitatea dreptului în atenţia Consiliului de Stat francez*, în „Buletin de informare legislativă", nr. 1/2007, p. 5.
[7] Refer to: http://www.bundestag.de; www.fed-parl.be.

of legal provisions and usual laws, plus constitutional laws could have been published in a volume of 2500 pages, currently only Labour Code has 2000 pages[8]. It numbered 620 pages and weighed 912 grams in 1970; 632 pages and 1022 grams in 1980; 1,055 pages and 1,594 grams in 1990; 1,663 pages and 2,780 grams in 2000; 2556 grams weighing 3.266 kg in 2004. These figures represent the number of pages (not including ordinances) and the weight of the annual *Recueil de lois* (Collection of laws) published by the National Assembly. As such, the legislative inflation in the French system manifests itself not only through an increase in the number of new laws, but also in the increased volume of each one, talk of "giants" legislation, and economic law (61 pages), followed by e-commerce law (101 pages), the biotechnical law (99 pages), laws on public health (218 pages), on the development of local responsibilities (231 pages), public health reform (119 pages) and organization civilian security (91 pages)[9].

Even though our country has a more pronounced tendency towards excessive legislation, however, as noted, it is not the only one faced with this problem, which leads us to conclude that there is a natural tendency towards multiplication of legal norms in the evolution of legal systems.

Up to a point, standardization is absolutely necessary and normal because social reality determines the regulatory intervention. Society evolves at a galloping pace, and this causes an increase in the pace of regulatory change. Thus, if we refer to the social development, legal inflation becomes unavoidable.

Often, a legal rule determines the need for other rules, being perfectly true to say that "Law begets other law"[10]. For example, the current Romanian Civil Code governs under the pressure of rapid evolutions in medical sciences and biotechnology, medically assisted human reproduction. The Code provisions only trace the general principles in this field and send them to be completed through a special law. This is how a law creates another one. Many examples could be given to illustrate that any new law contains the seed of future laws, like a natural snowball effect.

The law is constantly evolving under the pressure of changes in

[8] Refer to: http://www.conseil etat.fr/media/document//suite_rapport_ce_2006.pdf.
[9] G. Hispalis (pseudonym), *Pourquoi tant de loi(s)?*, in „Pouvoirs. Revue française d'études constitutionnelles et politiques", nr. 114/ 2005, p. 101.
[10] G. Hispalis, *op. cit*., p. 103.

the social and political reality, being forced to rally rules the daily realities.

The multiplication of laws is the result of the growing complication in our social life, with the associate need to coordinate it in order to protect the natural and social environment, the millions of individual decisions[11]. Today, "the traditional relationship between law and reality changes: it is not the law forcing reality, but reality through excessive mobility constraining them law"[12]. This causes a decrease in the quality of laws because, being forced to change too quickly, the law does not have the time needed for real development. This is obviously where the role of the lawmaker comes in, since he will have to accomplish this and to find the best solutions in his legislative work, also try to reach a balance between conservation and innovation, between stability on the one hand and flexibility, on the other hand, since "excessive multiplication of legal texts, instability and degradation of legal rules could compromise the juridical security of individuals"[13].

§2. Searching for causes of excessive legislation

Defined as an abnormal multiplication of legal norms accompanied by a decrease in their quality, excessive legislation seems a natural and fully spread phenomenon. However, like all excesses it has negative effects when the question arises whether this legislative excess is unavoidable, driven by progress social or he comes from a faulty implementation of legislative activity.

Indeed, the complexity of the social life causes legal norms to proliferate, but at the same time, those involved in lawmaking perpetuate "the assumption that when a social system does not function it is the fault is the law behind it and thus it must be changed. This attitude has created an increase in Romanian laws. Changes of laws are demanded every day, and those empowered to bring about such change do so at a normal speed and with a stunning incongruity. Laws never seem to be enough. Because of this inflation of acts, we come to understand nothing in the legal system and the predictability of laws, so dear to the European Court of Human Rights has become an unattainable goal. Breaking the law, even

[11] D. C. Dănişor, I. Dogaru, Gh. Dănişor, *Teoria generală a dreptului*, Editura C.H. Beck, Bucureşti, 2008, p. 213.
[12] J. P. Henry, *Vers la fin de l'Etat de droit*?, în „Revue du droit public de la science politique en France et à l'étranger", vol. XCIII, nr. 6/1977, p. 1213.
[13] J. Chevallier, *La Juridicisation des précepts managériaux*, în „Revue Politiques et management public", nr. 4/1993, p. 143.

by state bodies that do not know which laws apply - so extensive and unclear is their body of law - has become a fact so common that no one is surprised. Only the Court in Strasbourg, which urges us to change laws that are either too dense or inconsistent, is different"[14].

This attitude represents an underlying cause of the legislative frenzy characterizing our legal system today and is found not only in legislature but also the different pressure groups that often see the enactment of new legislation as the means by which they can solve problems. Both Government and Parliament have frequently tended to give in to these normative claims, sometimes deliberately. Also, the multiplication of reforms in key areas (such as has happened in recent years in our country where education, health, justice, etc.), which is only a proof of impotence, attempt to revive a proliferation of norms. The law is transformed from a statutory instrument into a political one[15].

We mentioned above that the development of society prevents the law from evolving rapidly, giving no time for a real and correct development, but parallel to this natural phenomenon and right to the point, has grown in recent years another, illegitimate, that legislating to obtain political capital. Each new minister, every deputy or senator wants to initiate a law that would be linked with their name. The political alternations indirectly favours the multiplication of legal rules because "we live in a democracy, which means that political power can move from one group of politicians with a vision of what needs to happen in Romania to another group of politicians, with another vision, with different intentions and perhaps other interests. To promote them - and this is the rule in a democratic system - they will change the law texts. We will rewrite so that they express the interests, objectives, and their righteousness. And the difference in vision between the parties is greater, the number of texts to be rewritten legislation is greater"[16].

Also, the relationship between politicians and the electorate is usually achieved by means of mass communication that put pressure on the Government to take urgent steps to address certain situations, measures are included in new legislation. In addition, the people love the

[14] D.C. Dănişor, *Democraţia deconstituţionalizată*, Editura Universul Juridic & Editura Universitaria din Craiova, Bucureşti, 2013, p. 12; D. C. Dănişor, *Despre impasul sistemului constituţional românesc*, în „Noua Revistă a Drepturilor Omului", nr. 2/2009, p. 9.

[15] Likewise, refer to: R. Duminică, *op. cit*., pp. 67-74.

[16] V. Babiuc, *Dialoguri despre lege. Legea în tranziţie*, Editura All Beck, Bucureşti, 2005, p. 21.

law and always ask new ones.

Increasingly more often, creating new legal norms is not the result of a genuine need for regulation, but rather appears to meet an acute need advertising its initiators. Moreover, even when regulatory intervention is necessary its legitimacy is hindered by the media circus[17].

Mass media exert indirect influences on legislatives acts by imposing a new style in drafting laws. We could say metaphorically, without exaggerating, that laws are developed increasingly more often on television than in Parliament. Politicians, aware of the benefits of performance media are more concerned with how a bill will be publicized than by the need for future legislation to regulate social reality.

Law-making represents a lucrative performance for politicians, which involves minimum investment and maximum gain. Legislating is in the end the most spectacular political activity. "The law is a kind of electoral campaign photo which tends to solve nothing except its promoter's image problems"[18].

Normative inflation is therefore generated through the political show carried out by the media. For those in power their image in the media matters increasingly more than the actual governance of the state, as it has been stated "that visual disease makes the act of legislating to change the purpose. Law is not used to regulate reality, but to improve the political image. Law-making is more used to build up one's stature in the media than to actually govern. This creates a craze for developing new laws: every politician must make a self regulatory to demonstrate effectiveness; No matter the requirements of reality, but of the public"[19]. Reality is constrained, not regulated, being forced to assimilate more rules than possible. That is why the discussion turns around the regulatory constraints of reality[20].

Another factor in the growth of legal norms is the subsequent integration of Romania into the European Union. With the signing of the Single European Act of 1993 our country undertook to undergo legislative harmonization, which, as already demonstrated practice was achieved largely through the adoption of new laws implemented by

[17] D. C. Dănişor, *De la inflaţia legislativă la trecerea în galop pe lângă Parlament*, în „Pandectele Române", nr. 3/2011, p. 15.
[18] D. C. Dănişor, *Drept constituţional şi instituţii politice*, vol I. *Teoria generală*, Editura C.H. Beck, Bucureşti, 2007, p. 181.
[19] *Ibidem*, p. 183.
[20] Refer to: R. Duminică, *op. cit*., p. 70.

Community. Moreover, the hyper-legislation that characterizes union law now also indirectly generates an increase in domestic legal rules. Every year, the European Union introduced in domestic law more texts than those from national law. In early 2005, Union law arisen from treaties in force consisted of some 17,000 laws, of which the essence was formed of directives, regulations and decisions. To these are some around 3,000 international agreements concluded between the European Union, even Member States on the one hand and third party countries on the other[21].

Understanding the negative effects of excessive legislation in late 2008, thanks to the legislative and work programme of the Commission of the European Union for 2009, entitled "Acting Now for a Better Europe", a new goal was established to better regulations by improving the quality of new proposals through simplifying legislation and reducing administrative burdens.

Obviously, it is extremely difficult to measure with mathematical precision union influence on the dynamics of internal legal regulations, it is clear that inflation generates inflation of Union acts and internal rules as well as adding greater difficulty in adapting the law and the right of judges, especially for the new Member States, as is the case of Romania.

Continuing to identify the causes that generate the multiplication of laws, we add the experimental even ephemeral nature of certain rules that generate a stable legislation as well as rendering laws too technical or specialized.

The existence of laws consisting of rules with a short span of application contributes to the degradation of the concept of law. The "Lifespan" of laws is steadily declining, and the ephemeral law is not respected or applied. It is totally abnormal for the legal text of a law that has just come into force to undergo modifications. There are many examples in our legislation. For instance, Law 571/2003 regarding the Fiscal Code adopted on 22 December 2003, came into force on January 1, 2004 has been amended a total of 10 times in the first year of its being in force, 13 times in 2005, 9 times in 2006, 13 times in 2010 and so on.

Bills are often the product of a more or less obscure process among the various steps of the administration or the result of different ideas the origins of which we do not know and which were sanctioned, enriched or truncated before being submitted for discussion in Parliament. The bill is often the technical work of a specialist in a

[21] J. Maïa, *La contrainte européenne sur la loi*, în „Pouvoirs. Revue française d'études constitutionnelles et politiques", nr. 114/2005, p. 54.

particular field, and the text that is standardized in that area uses a specific language[22].

Thus, the way the bill text is drafted is not characterized by a concise formulation but by one that is very detailed and full of highly technical terms. The error would not be great if, when passing through Parliament, the law would be "cleansed" of the unnecessary details. Unfortunately, most often this does not happen. Parliament under the iron arm of the government and under the pressure of fickle public opinion or at the insistence of interest groups, superficially debate and vote on the text which is presented to them. Subsequently, it becomes necessary to develop new rules to interpret the previous one.

Also, our legislative procedure is characterized by the possibility of free use of the right to amend and sub-amend the contents of a bill or a legislative proposal within articles 74 and 75 of the Constitution. Filing a large number of amendments generates lower quality natural law and normative tendency toward inflation. The time during which these amendments can be debated is often very short. With no physical possibility of relevant debates on them, many were accepted as such. For example, in the case of the draft of Law National Education 1/2011, 1,600 proposals for amendments were submitted or in the case of the National Budget Law from 2012, over 8,000 amendments were submitted to be discussed in just one week in specialized committees.

Excess legislative and regulation caused poor delegated legislation. Let us remember that before every single ordinance an enabling law is adopted, and then there is the exception provided by article 115 paragraph (3) from the Constitution which has become the rule, given that in parliamentary legislative practice includes the practice of passing laws enabling the Government to issue ordinances which must be approved by Parliament so that for each simple order adopted there is a law approving or rejecting the governmental act. The adoption of emergency ordinances has a similar effect, each is followed by a law approving or rejecting the governmental act. These and other cases presented in the content of this paper, generate the uncontrollable proliferation of legal norms and negative effects primarily on individuals. All these shortcomings of constitutional texts dedicated to emergency ordinances have already been reported in other studies[23] which outline

[22] B. Mathieu, *La Loi*, Dalloz, Paris, 2010, p. 79.
[23] T. Oniga, *Delegarea legislativă*, Editura Universul Juridic, Bucureşti, 2009, pp. 359-360.

conclusions to which we adhere, respectively, that a future constitutional reform needs "to proceed to a positive, explicit and restrictive phasing of ordinance text, by stating "situations" in which they can be issued, the fundamental institutions that may be affected and the rights and freedoms whose exercise may be restricted, understanding *per a contrario* that they are not admissible beyond those limits"[24]. As such, we retain the following wording for a *lege ferenda* for paragraph 6 of Article 115 from the Constitution - "Emergency ordinances may not be adopted in constitutional law, may not establish the legal status of fundamental state institutions sanctioned in the Constitution, freedoms and duties stipulated by the Constitution, nor measures of forcible transfer of assets into public ownership".

To all these factors determining excessive legislation and the list of which can be enriched, are added the so-called "aging of social organisms". Due to its growing complication, the social body demands a multiplication of legal norms, entailing a significant increase of means to implement and therefore to develop the administration. This administrative offense has been reported in foreign doctrine since the nineteenth century, showing that "the country's true direction is reflected by ministerial offices. The supervisory power, determination, the decisive spirit missing in society, assemblies and governments find refuge in administration"[25]. The same observation is found in the recent Romanian literature which states that "the administrative mechanism destined to enforce orders at least in principle and apply laws extricates itself from the control of constitutional representative democracy. The Servants, i.e. the government no longer obey the master. Thus, bureaucracy effectively seizes power"[26].

Today, it is becoming increasingly difficult to protect the law from abuse of executive enforcement bodies. Supervision within the administration creates suspicion and the need to establish, without logic, "controllers of controllers and new rules limiting the powers of the controlling controllers over controlled controllers."[27] Meanwhile, the control achieved through the courts is increasingly ineffective due to

[24] I. Deleanu, *Unele observaţii cu privire la constituţionalitatea ordonanţelor de urgenţă*, în „Curierul Judiciar", nr. 6/2006, p. 57.
[25] A. Prins, *La Démocratie et le régime parlementaire (*1884), reprint by Kessinger Publishing, Montana, United States, 2010, p. 23.
[26] I. Alexandru, *Democraţia constituţională – utopie şi/sau realitate*, Editura Universul Juridic, Bucureşti, 2012, p. 200.
[27] J. P. Henry, *op. cit.*, p. 1230.

increasing surveyed bodies and proceedings that are too slow.

§3. Some of the negative effects of excess regulation

Legislative inflation[28], characterized by part of the doctrinaires as a true "legislative orgy" is an abnormal multiplication of legal norms, accompanied by a decrease in quality. The analysis of this phenomenon borrows the most striking metaphors from other sciences and disciplines. Economical influences requires evoking overabundance, overproduction, but very commonly regular inflation. The similarity continues when a distinction between stock and flow laws is proposed. An excessive number of laws is naturally perceived in terms of pathology, diagnostics and therapy. Legislative inflation is unhealthy proliferation, causing society to be completely full[29].

The increase in the number of laws produces certain "soulless laws"[30], especially in the economic-financial and even social area, which are often inapplicable.

Excess regulatory and legislative instability encountered in the current legal system also generates a reduction in the quality of law and confidence in its power to ensure justice and protect the rights of individuals.

Then overproduction of rules gives rise to serious distortions in law enforcement or the impossibility of applying them, leading to them destroying the balance that should exist between rules and their application.

The proliferation of legal texts requires progress in the means of implementation. The administration thus extends its field of action. Legal disputes concerning the application of the laws are multiplied, and, naturally, this increase in the number of disputes requires an increase in the number of courts. Judicial activity becomes ineffective because justice moves too slowly in relation to such development. The increase in a number of rules which is not followed by a proportional increase in its non-traceable means of implementing a multiplication leads to a greater tolerances in applying the law. In the same vein, prolonged failure of the rule makes when it tries applying it to seem an injustice. The law is devalued in the eyes of individuals, even regulating sometimes seems an

[28] A.Viandier, *La crise de la technique legislative,* în „Droits", nr. 4/1984, p. 76.
[29] C. Courvoisier, D. Dănişor, *Idealul legii rare*, în „Revista de Drept Public", nr. 4/2003, pp. 27-39.
[30] Ch. Atias, *Le droit civil,* Press Universitaires de France, Paris, 1984, p. 31.

injustice, and the legislative body loses prestige and sees its central position in the state threatened by the executive branch. Also, accelerating social development should be accompanied by a simplification of judicial procedures, or the courts are characterized by excessive slowness. This phenomenon damages trust in justice and is accompanied by increased tolerance, pushing individuals to create a regulating system of relations on the fringe of the official juridical and judicial circuit or even beyond[31].

It is true that the law cannot evolve without a dose of legislative inflation however we see an excess, occurring risks and negative consequences. Such a phenomenon develops further when the main actors in the legislative process obtain or are convinced that they gain an advantage from this.

All these consequences, coupled with the difficulty of knowing the law even by specialists due to the dynamics of the regulatory system, impossible to follow, must first become aw of this before trying to reduce them.

If our country these negative effects of this phenomenon are not acknowledged by the political class, as in other countries, e.g. in France hyper-legislation situation is discussed in the highest spheres of the state. Recalling a few examples, in 1995, President of the Senate, R. Monorz denounced "regulatory inflation resulting in depreciation and impairment of the lawmakers work." However, the harshest criticism comes from former President of the Republic, J. Chirac, in his first address to Parliament on May 19, 1995. Discussing the abundance of laws and regulations, he recalled the formula that "too many laws kill the law." In the same vein, the Prime Minister, in a circular to ministers on 26 July 1995, stated that "the State in which legislation is ... getting worse". The argument is recurrent. We found in advocacy J.P. Raffarin and J. Chirac's speech (22 February 2000). Likewise, vice-president of the State Council, R. Denoix de Saint Marc declared that "the law is today chatter, insecurity and banality"[32]. Also, in 2006 the Public Report of the State Council warned of the effects of inflation acts[33].

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[31] D. C. Dănişor, *Drept constituţional şi instituţii politice*, vol I. *Teoria generală*, *op. cit*., pp. 182-183.

[32] B. Mathieu, *op. cit*., p. 75.

[33] Conseil d'État, Rapport public 2006, *Bilan d'activite du Conseil d'État et des jurisdictions administrative. Considérations générales: Sécurité juridique et complexité du droit*, France, March 2006 (http://www.conseil-etat.fr/media/document//suite_rapport_ce_2006.pdf).

In Romania, those involved in legislative activities seem totally satisfied, sometimes through their own work giving satisfaction to those who seek to gain the easy vote by criticizing parliamentary institution. There is an attitude among the institutions involved in legislation that it is their duty to regulate everything. Even though denouncing working conditions imposed on them by the alert legislative pace, many lawmakers see this abundance of laws as evidence that Parliament is efficient.

Also, not just members of parliament are seeking to secure their name to a law but ministers also. Each hopes that the law has a major impact and will increase their popularity among voters. The opposition, which plays the role of challenger, sometimes renders the work even more difficult through discussions of a multitude of proposed changes.

Who is still affected by this situation? Who is aware of these effects? There are some lawyers, some academics, magistrates who find it difficult to apply a constantly changing and continually bulky legislation and, not least, the individuals who are unable to fathom the legislative heap. In conclusion, "in a mazelike text of increasing complexity these Theseus-like litigants, aided by a lawyer Ariadne must come to face the legal Minotaur"[34].

§4. Proposed solutions to reduce excessive legislation

A simple solution would be to simplify legislation by excluding unnecessary laws from the system. This exclusion can be achieved by so-called legislative rehabilitation which must be an ongoing process. Thus legislation is "cleaned up" of outdated laws and provisions conflicting with the rules in force or to be adopted, first by using the repeal. This cleansing of unnecessary laws is sanctioned also through the provisions of Article 17 from Law 24/2000 stating that "in the development of draft legislation the express repeal of obsolete laws or aspects which are contradictory to the envisioned regulation must be followed".

An important role in achieving this objective is the Legislative Council. In carrying out its work, it analyzes and proposes the removal from active legislation of about 1,875 acts, which have also been expressly repealed by Law 7/1998, Law 120/2000, Law 121/2000, Law 158/2004, Government Decision 735/1997, Government Decision 474/1999, Government Decision 475/1999 and Government Decision 233/2004. The normative acts proposed for the repeal of the Legislative

[34] B. Mathieu, *op. cit*., p. 84.

Council were added to hundreds of other acts subsequently repealed, with the adoption of new regulations in the respective fields[35].

However, in the process, in order to achieve the desired result it would be necessary to initiate a reassessment of each legislative area, carried out according to the special competence by each ministry and specialized body of the central public administration, possibly based on a proposal coming the Legislative Council. Definitely, winnowing out the unnecessary laws is a difficult and lengthy process, given that as a series of acts considered partly anachronistic cannot be repealed immediately, without the risk of a legal vacuum in that particular field. For this reason, removing them from the legislation should be done in parallel to the legislative renewal.

Legislation is obviously renewed through the development and adoption of new laws and this is normal as long as it leads to no excess, given the rapid evolution of social-economic and political relations in society. In recent years, Romania has faced two major legislative challenges: innovation of laws imposed by new social realities specific to the transition from a totalitarian to a democratic system and that imposed by EU accession. Unfortunately, these challenges have led to legislative inflation, as shown, which proves difficult to diminish and the negative effects are incurred primarily by the subjects of the law producing legal uncertainty. At the same time, it establishes a state of confusion and bewilderment among public authorities entrusted with the application of newly developed laws, something which leads to citizens mistrusting the justice system as well as a significant drop of credibility in political actions. In this instance, new legislation should be done with utmost caution so that the law acquire a constant and consequently comprehensible quality to individuals and thus become easier to put in practice.

Decreasing the normative flow requires increasing the role of the Legislative Council in order to prevent duplication and ensure legislative compliance with Law 24/2000 regarding legislative technique. Endorsement of bills and legislative proposals should aim at not only the formal aspects of the law, but especially the quality of proposed solutions and how they are being integrated in all legislation in force.

The mere existence of the law also does not ensure its

[35] C. Ciora, *Simplificarea legislaţiei în scopul accesibilităţii cetăţeanului la norma juridică*, în Revista „Drepturile Omului", anul XXI, nr. 3, Editura Institutului Român pentru Drepturile Omului, 2011, p. 12.

effectiveness which is why careful consideration of means must be used for the implementation of the law, including the human and material resources of particular importance. The legislator should not just vote for the law, but has to concern himself about the effects it will produce.

For this reason, in some countries, legislative assessment is institutional, particularly in the case of Canada. In Germany, the Constitutional Court considers that legislative review may be a constitutional requirement for judges. In France also, bills constitute the subject of an impact study[36].

Thus, to attain the legal objective and also to increase the effectiveness of the new provisions, a useful measure would be to establish a mandatory preliminary assessment of the impact of regulations, regardless of the origin of the legislative initiative, which shows a clear need to adopt new rules. Currently, the preliminary assessment is not required for legislative initiatives presented by representatives or senators, or for those based on citizens' initiative, as stated in article 7 paragraph 6 of Law 24/2000 regarding the legislative technique. Such obligations, accompanied by a review of initiator compliance with obligations, will in time facilitate the verification of the need to develop a new rule, thus reducing significantly the number of changes that are necessary in the context of current legislation. Improving the quality of projects and law bills through a serious background obviously lead to a reduction of normative instability. Given these issues, we propose amending Article 7 from Law 24/2000 for the purposes of consecrating mandatory preliminary assessments of the impact of new legal provisions and the legislative initiatives of deputies and senators and those based on the citizens' initiative. Meanwhile, the impact assessment is required only for bills of particular importance and complexity of the project and approval of government orders by law for their approval and draft laws on which the Government has committed responsibility should be carried out regardless of the nature of future regulations[37].

Meanwhile, inflation control legislation and enforcement is necessary to use existing before creating new rules and greater resistance to the legislature legislative gaps can be covered by interpretation, using the general principles of law.

[36] B. Mathieu, *op. cit*., pp. 124-125.
[37] R. Duminică, *op. cit*., pp. 167-170.

Last but not least, drafting shorter laws obviously means suppressing unnecessary or superfluous text, an attainable goal through restricting the right to amendments or sub-amendments in the regulations of the two Chambers by removing the over-permissive provisions regarding the formulation of new written or oral amendments during the plenary debate on articles from the law bill or legislative proposal since quite often they only serve to complicate the legislative procedure and unnecessarily "overload" future acts.

Conclusions

This short analysis of excessive legislation in this study leads us to conclude that the multiplication of laws, legislative instability, degradation quality of normative content and uncertainties surrounding the conditions of its application, generate legal uncertainty difficult for a person to bear when dealing with the application of the law, the individual being subjected to arbitrary forces if he cannot know or understand the rules of law which must be obeyed.

In this context, it has become a necessity to recover the characteristic qualities and essential role that the law has lost. In order to reform the law it is simply not enough to improve the work of the legislature and the legislative compliance technique, but it requires strong political will and efforts of all three branches: legislative, executive and judicial.

A fight against excessive legislation is not meant to completely stop the promulgation of laws, but only to try to stem all excesses. The first step is that those involved in the legislative process become aware of the inconveniences of this situation and start a process of upgrading the law through legislative debates geared toward what is essential.

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CONTROVERSY REGARDING THE APPLICATION OF THE MORE FAVOURABLE CRIMINAL LAW UNTIL THE FINAL JUDGMENT OF THE CAUSE

Bogdan Marin GIURCĂ [*]

ABSTRACT

Constitutional Court of Romania established that the application of more favorable criminal law is a true principle, and therefore when the courts are seised of such an issue, the more favorable criminal law will apply in all cases.

Since Romania is a member of the European Union since 1 January 2007, the European Court of Human Rights applies to the detriment of domestic regulations if it is more favorable.

But in practice and doctrine were two dissenting large, long disputed, with the way in which this principle is implemented

KEYWORDS: *global application, autonomous criminal institutions, The High Court of Cassation and Justice of Romania, Constitutional Court of Romania, Decision, transition of criminal law.*

In the specialty literature, regarding the application of the more favorable criminal law until the final judgment of the cause there are two main theories:

a) the global application of the more favorable criminal norm; [1]

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[1] I. Tanoviceanu, Criminal law course, 1st vol., Socec Graphic Workshops & Co, Bucharest 1912, p.171-177; S. Kahane, Theoretical explanations of the Romanian criminal code, 1st vol., Academiei RSR Publishing House, Bucharest, 1969, p.80 - Such a combination of favourable provisions of both laws is hybrid and leads to the creation on a legal manner, of a third law (lex tertia); this is inadmissible, since it would mean that the legal organs to exert an attribute that is not part of these organs (...) between successive laws that are about to be applied to only one of them, with exclusivity; C. Barbu, The application of criminal law in space and time, Scientific Publishing House, 1972, p.195 – The report of criminal law under the old law andare about to receive a new law, will be solved according to the old or new law with all the gear of principles and institutions that each and one contains. And will be applicable to that of laws that in its provisions as a whole creates a more favourable situation to the defendant;

b) the application of the norm according to the autonomous criminal inistitutions; [2]

a) In the theory of specialty, it is mentioned that when a more favorable criminal law is applied, it must be done in its integrity.

However, the doctrine does not completly explain the expression *"lex tertia"* (the third law). In an restrictive interpretation, it is considered that, after setting the more favourable criminal law regarding the legal compliance, this will also be apply in respect to other institutions of criminal law, whether these are autonomous legal institutions.

According to another theory, it is considered that the prohibition of establishing *a lex tertia* only refers to combining the provisions that may not apply independent. According to this concept, applying the more

[2] T.Pop, Criminal law compared, General part, 2nd vol., Institute of graphic arts Ardealu, Cluj 1923 – The issue is controversial, and there are 2 concepts; one sustains the impartible thesis of the competitive laws, and the other sustains the impartible thesis of these laws. After the first design it is not allowed the specified combination, for it would mean that the lenient law does not apply, but a law drawn up by the judge; so always there must be applied only one law, and nowise a combination of several laws. After the second conception the combination is admitted, thus the principle of retro-activity of the lenient law would be valiadated faulty (...) The restriction that is imposed to these combinations- that we also admit- is that the chosen provisions from two or several competitive laws not to be incoherente; V. Dongoroz, Criminal code Carol the second annotated, 1st volume, General part, Bookshop Socec&Co. Publishing house, S.A , Bucharest, 1937, commented, p.9 – The choice of a lenient law implicitly excludes the more severe law. It is not permitted to combine the provisions of a law with the other in order to achieve a more favorable result because it would mean the creation on an application manner of a third law, which is not allowed. However, once established and fixed the penalty under one of the laws it might be applied the institutions who operate independently of other law, if there are favourable to the offender.; G.Antoniu, Criminal Code of RSR commented şi annotated General Part, Scientific Publishing house, Bucharest, 1972, pg.64 – Thus it is loom the possibility that, in chsosing the more favourable criminal law, some legal institutions to be viewed as having relative independence (autonomous character – n.n.) in raport of the articles criminalizing the deed, and the applications of provisions of the art.13 of the Criminal Code to be made distinctly, p.66; Legal practice, 1st vol., General part, Academiei RSR Publishing house, Bucharest, 1988, comment, p. 33; C.Bulai, Textbook of criminal law, General part, All, 1977, p.138 – In other conception, that we consider close to the truth, determination of the more favourable law shall be carried out in relation to each institution that applies independently; F.Streteanu, Criminal law, General part, Rosetti Publishing house, 2003, pg.250 and the following.; Treatise on criminal law, General part, 1st vol., Ed.C.H.Beck, 2008, pg.283 and the following

lenient criminal norm consists in reporting to the legal incident institution, which applies independently (the crimes competitions, the legal classification etc.)[3]

The High Court of Cassation and Justice, United Sections, has pronounced the Decision No 8/2008 which establishes that: "in case of from committing the crime until the final judgment have interfere one or more criminal laws, it is applicable the more favourable law, i.e. as a whole, and not just certain provisions more favourable resulted from the combination of several successive laws."

In 2011, the Constitutional Court of Romania ruled in its Decision 1483 that respecting "the concrete determination of a more favourable criminal law, it is observed that this relates to law enforcement, and not to more lenient provisions, and may not combine provisions of the old and the new law because it would reach a *lex tertia*, who, despite the provisions of article 61 of the Constitution, would allow judges to legislate".

In contradictious with the above mentioned decision, in April 14, 2014 when the High Court of Cassation and Justice for absolution on issues of law in criminal matters ruled that it is permissible to combine the provisions of two or more successive penal laws in order to establish more lenient norm, according to the autonomous institutions.

However, following the Decision of 256 since May 6, 2014, through which the Constitutional Court of Romania ruled the impossibility of combining the provisions of successive laws thus established a global application of legal provisions, have created controversies given that this solution was pronunced a week after the publication of the decision of the High Court of Cassation and Justice in the Official Gazette in which it was established the contrary, thus becoming null and without effect.

It should be noted that following the decision of the Constitutional Court of Romania, article 5 of the new penal Code does not become unconstitutional; the decision refers to the interpretation of article, creating a unique constitutional meaning.

Thus, the Constitutional Court of Romania show by deciding in regard to establish a specific more favourable criminal law that "***it aimes***

[3] This conception was established by the legal practice concerning to the application of the lex mitior rule according with the art. 13 from the Criminal code from 1969. See, for exemple, T. Suprem, Criminal section, decision no. 121/1971, in RRD no. 6/1971, p. 158.

the law enforcement and not the more lenient provisions, and may not combine provisions of the old and the new law because it might reach a lex tertia, who, despite the provisions of article 61 of the Constitution, would allow the judge to legislate".

In the same manner were brought arguments regarding the decisions of the European Court of Human Rights, which establishes that in the case of successive criminal laws their application is done globally.

"*Moreover, the European Court of Human Rights, in a relatively recent case, although it did not mention this in terminis,* ***ruled that the compliance of the provisions of article 7 paragraph 1 of the Convention for the protection of human rights and fundamental freedoms shall require, in the case of successive criminal laws, the election of the more favourable criminal law****. Thus, by Decree of 18th of July 2013, pronounced in Maktouf and Damjanović Cause against Bosnia and Herzegovina, paragraph 70, the Court from Strasbourg, noticing that both criminal codes that succeded from the time when the deeds were comitted and until final judgment (the penal Code from 1976 and the Criminal code from 2003)" provide different ranges of punishment for war crimes", found that there was "a real possibility that the retroactive application of the code since 2003 have been to the detriment of applicants regarding the imposition of punishments ", such that " it cannot be said that they have received, in accordance with article 7 of the Convention, of effective guarantees against the imposition of more severe punishment". Therefore****, the European Court decided, unanimously, that it had been violated article 7 of the Convention, stating at the same time that this decision "must be understood as indicating simply that, as regarding the establishment of sentences, the complainants would have had to apply the provisions of the 1976 code [as a whole] and not the fact that ought to be imposed more lenient punishments".***

In motivation of the decision, it is shown that *"in order to determine which is the lex mitior pursuant to article 7 pargraph 1 of the Convention, should be also carried out in a global comparison of the repressive regime of each criminal laws applicable to the accused (global comparison method). The judge cannot perform a comparison rule with rule (method of differentiated comparison), choosing the more favourable rule from each of the laws being compared. Two reasons are traditionally offered in support of this overall comparison of methods: firstly, every repressive regime has its own logic, and the judge may not destroy this logic, mixing different rules from various successive criminal*

laws; secondly, the judge cannot substitute the legislature and to create a new ad-hoc repressive regime, consisting of diverse rules stemming from different successive criminal laws. Therefore, article 7 pargraph 1 of the Convention requires the establishment of lex mitior in a particular and global manner".

Based on the arguments set out above, it is shown that by combining the provisions of the Criminal Code from 1969 to the present Code, in order to establish more favourable criminal law norm, are violated constitutional provisions regarding the balance and separation of powers in the State, and those stating that Parliament is the only legislative authority in our country.

Taking into account the considerations above, the Constitutional Court finds that the provisions of article 5 of the current criminal Code, in the interpretation which allows in courts, in determining the more favorable criminal law to combine the provisions of the Criminal Code of 1969 with those of the present criminal Code, is contrary to the constitutional provisions of article 1, paragraph (4) concerning the separation and balance of powers in the State, as well as of article 61, paragraph (1) concerning the role of the Parliament of a single legislative authority in the country. According to article 1, paragrap(4) of the basic Law, "the State is organized according to the principle of separation and balance of powers — legislative, executive and legal — in the framework of constitutional democracy," while according to article 61, paragraph (1) "the Parliament is the Supreme representative body of the Romanian people and the sole legislative authority of the country."

At the same time, the Constitutional Court of Romania shows that the expression "autonomous institution" is not provided in the two codes and neither in law enforcement of the Code in force and, therefore, cannot sustain that a provision of the criminal Code with respect to a particular criminal law institution is independent of the law that belong to, regardless of the fact that the legislator established in article 173 N.C.P. that the notion of criminal law is "*any disposition with criminal features contained in the organic laws, emergency ordinances or other normative acts which at the date at their adoption had the force of law*"

This provision does not equate with the idea that the provisions are law, but only separate norms that belong to the law and have its force, the criminal Code representing a unitary law.

The Constitutional Court of Romania may further sustain the argument that by applying the autonomous institutions from successive criminal laws to the defendant would create a privilege in the transition

period of the law. This implies that the perpetrators who have committed crimes under the old law, but prosecuted under the new law, should benefit from an identical treatment of those of convnted under the old law, or according to the criminal law more favorable with that of perpetrators who will commit offences under the new law.

In this way, it is not permitted the third form of legal treatment that combines the provisions of both codes. Thus, in order to comply with the constitutional provisions of article 16 paragraph (1) according to which "Citizens are equal before the law and public authorities, without privileges and without discrimination", it is prohibited to combine the institutions of the two laws, because, otherwise, it would create a privilege to the offender wchich is convicted during the transition of the law, but also positive discrimination towards him.

The Supreme Court, on May 26, 2014 has responded to a request from the Criminal Section of the I.C.C.J., which required a preliminary ruling for the absolution of principle to the problem of law regarding the enforcement of the more favourable criminal law in the case of crime in continuous form whether the crime in continuous form represents an autonomous institution towards the death penalty.

"In application of article 5 of the criminal Code, considering the global appreciation of the more favourable[4] criminal law", it is shown in the Supreme Court decision.

Thus, by decision No. 5/2014 taken by ICCJ, the Court allied to the decision imposed by the Constitutional Court.

Previously, in April 14, 2014, contrary to decision No. 5/2014, the High Court of Cassation and Justice established that judges will have to use more favourable articles in either of the two codes, old and new.

A panel of nine judges from the Supreme Court established then that the criminal statutes are an autonomous institution of the death penalty and has admitted in this way a referral of the Bucharest Court of Appeal throught which this Court demanded explanations regarding the application of the more favourable criminal law in the case of prescription.

On the other hand, as a different concept from the one exposed and sustained by the judges of the Constitutional Court of Romania, we show that art. 173. N.C.P provides that "by criminal law is understood

[4] See Decision no.5/2014 of the High Court of Cassation and Justice from 26th of May 2014

any criminal provision included in organic laws, emergency ordinances or other regulatory documents which at the adoption date had the force of law". Thus, the meaning of the criminal provision defined by the legislator has the meaning of legal provision, and not one of the component elements in the structure of legal rule. Criminal disposition can be part of the same criminal law (criminal Code) or in the content of several special laws. This provision does not necessarily regard the entire regulatory action which can bring changes regarding to the limits of punishment for certain crimes but also with regard to other institutions, for example, those of the relapse, crimes competition etc.

Moreover, the autonomous institutions have a standalone application, distinctive and subsequently in terms of stages. The manner in which the legislature is designing certain institutions, dinstinctive and unconditionally, underlines their autonomous feature.

The legal bodies may apply criminal norms from composition of several criminal statutes which succeed, when they regulate penal institutions which apply autonomously. For example, provisions relating to the limits of sanctions have independence from those relating to the plurality of crimes. Thus, the Panel of judges can fit a crime under a law, with limits of punishment less severe and the provisions relating to the plurality of crimes, to apply them from the content of other law.

In jurisprudence have been applied rules of crimes competition separate from those regarding to the incrimination of the deed, resulting the enforcement of criminal norms, from the content of two laws, without creating a third law.

In conclusion, considering the two interpretations concerning the application of the more favourable criminal law, we bring to the latter, namely, the system of the application of this norm in terms of distinct criminal institutions, because, the global application system is excessive and illegal, that can give rise to unacceptable situations.

For these reasons, when the new criminal code has started "from the principle of application of the more favourable criminal law to the autonomous institutions and a subsequent option of the legislature for the global application of mor favourable might degrade the balance of this code."[5]

[5] C. Rotaru**,** *Applying the more favourable criminal law*, www.juridice.ro

At the same time, the more prominent representatives of the schools of criminal law in our country, T.Pop, Nicolae Buzea) supported the theory of application of more lenient criminal law in report of each autonomous institution.

The professor T. Pop appreciates unreservedly in his paper from 1923 that "*the restriction imposed in these combinations is that the chosen provisions chosen from two or more competing laws must not be incoherent.*"[6]

The profesor Nicolae Buzea "*in truth, these competitions of legal provisions regarding to the same legal institutions are solved by confronting them entirely and by eliminating the harsher provisions. Nothing prevents that the same procedure to be followed for each institute in part by means of applying the provision – with law value for that institute- the more favourable of the competing laws.*" [7]

Subsequent to the entry into force of the penal code of 1969, the majority of Romanian criminal doctrine has continued to support the principle settled out in the interwar period, namely, that of application on the autonomous institutions of the more favourable criminal law.

In the same manner, professor Costica Bulai points out that "*in another conception, determining the more favourable criminal law should be made in respect of every institution that applies independently. Therefore, if the frame action was made after one of the laws, which was more favorable, this does not preclude the application of the provisions of the other law regarding the relapse or crime competition, if they are more favourable*".[8]

Professor G. Antoniu also sustaines: "*the crimes competition is one of those legal and criminal institutions (as the limitation period, the suspension of the sentence and others) whose rules apply, in the case of the succession of the criminal law in time, autonomously, independently of the legal classification of the facts after the new law or the previous.*"[9]

It should be mentioned, however, that during the period in which they were issued, there were these theories and allegations with regard to

[6] T. Pop, *Comparative criminal law*, Cluj, 1923

[7] See N. T. Buzea, *Criminal offence and culpability*, Typography Sabin Solomon, Alba Iulia, 1944, p. 272.

[8] C. Bulai, B. Bulai, *Textbook of criminal law. General Part*, the Legal Universe Publishing House, 2007, p. 139.

[9] G. Antoniu, *Comment* (n. 16), in G. Antoniu, C. Bulai, *Criminal judicial practice*, 1st vol, Academiei Publishing House, Bucharest, 1988, p.37.

the application of penal norms more favourable, is not liable to challenge the theories of the major doctrines (both numerically and of the prestige).[10]

In addition to the doctrine in that period, the jurisprudence of the Court of Cassation has an enlightening role in this regard, which has embraced the same way of successive law enforcement.

- Cas. II, dec. 2154/1937 – *it can be made the cumulative application of two statutes in case of competition of two crimes, whenever the courts find that the punishment for one of the crimes is smaller after one of the statutes, and for the other crime the penalty is less after the other statute.* [11]

- Cas. II, dec. 4021/1938 - *... although the Court of Appeal applied against the defendant in respect of the qualification of the fact and the grading of the punishment, the texts of the old Criminal Code, that some conducted to a milder punishment, she was entitled to make in favor of him, if he discovered that he deserves this treatment and the application of article 65 from the new criminal code (regrading to the conditional suspension, n.ns.) as it contains a principle of law aimed to ease the defendant.* apud V. Papadopol, I. Stoenescu, G. Protopopescu, op. quote**.**, page.21, no. 40.

- Cas. II, dec. 677/1938 - *...the fact that the defendants were punished by applying the provisions of the previous penal Code could not hinder the application of the suspension provision of the execution of the new code, since the suspension of the new code* ***is an institution that operates independently.*** apud N.T.Buzea, ***op. cit.***, p. 272.

- Cas. II, dec. 4486/1940 – *in the matter of prescription, the Court of Cassation act that, if the Court of first instance considered that the prescription provided by each of these statutes makes a unitary whole with the punishment and that, therefore, would not be able to apply the prescription of the penal code of 14 March, 1963 for a crime punished according to the penal code from 186, had misinterpreted and violated the provisions of article 5 and criminal cpde 165, whereas no text in the criminal law doesn't stop to apply the penalty laid down by a specific statute and the prescription of other criminal statute*. (apud V. Papadopol, I.Stoenescu, G.Protopopescu, op. quote., page. 27).

[10] Considerations on the application of the criminal law more favourable in the case of complex laws

[11] V. Papadopol, I.Stoenescu, G.Protopopescu, *Criminal code of RPR annotated*, State Publishing House, Bucharest, 1948, p.23 (no. 48);

After the entry into force of the penal Code in 1968, the jurisprudence of the Supreme Court was reduced regarding to this matter, however, the majority of the published decisions has maintained the general idea of the enforcement of the more favourable law on autonomous institutions. For example, it was decided that if *the competing crimes have been prosecuted with fine according to the more favourable old criminal law, is correct the application of the rules regarding the crimes competition according to the new penal law which provides the merge of new sentences and not their total as in the old law*. T.S., s.criminal., dec. no. 939/1969 apud V. Paşca, *op.quote.*, page. 89.

This conception of the legislature was maintained also in the contemporary period, so that in article 10 of the Law 187/2012 it is stipulated that "*the sanction treatment of plurality of crimes is applied according to the new law when at least one of the crimes of the pluralistic structure was committed under the new law, even if for other crimes the penalty was determined according to the old law, more favourable*." Here is, again, the opinion of the legislature shows unequivocally that, in the event of a succession of laws relating to the plurality of crimes, in the first phase shall be laid down the punishments for acts committed and who have not been judged yet, according to the criminal law more lenient and then it is established the treatment regarding the plurality.

The issue of application of criminal norms in a global manner

a) May result illegal punishments

According to this system, the courts will first apply the old law entirely, and then the new law as a whole, followed to evaluate which solution is more according to the lowest punishment.

Let's take the example of assuming that the defendant is on trial for committing the five crime of qualified theft (art. 209, para. 1; art. 229 C.P. para. 1 N.C.P.). If for each of the five crimes, he applied a penalty of 6 years under the old Criminal Code, (the deed frame is from 3 to 15 years of imprisonment), not taking into account the provisions of the new Criminal Code. As a result of merging it will be applied the heaviest punishment, i.e. 6 years plus a raise of 2 years, the resultant penalty being of 8 years old.

Acting under the new Criminal Code, the Court will apply a penalty of four years in prison for each theft committed, the range being from 1 to 5 years in prison As a result of merging it will be applied the punishment of 4 years, plus an increase of 1/3 of the sum of the other penalties applied, resulting in the punishment of 5 years plus 5.4 years, i.e. 9 years and 4 months.

Examining the results obtained, it is appreciated that the old law is more lenient. Regarding this matter, we consider that such judgment is not legal, since the resulting punishment is of 6 years for an offence whose maximum provided by the law in force is only of 5 years old.

It should be noted that, beyond the 1-year difference between the two punishments resulting from the global application of the two codes, are also related other consequences, such as deadlines for grant of pardon, rehabilitation, etc., that setting penalties which have a rate greater than the maximum provided by the new law it might get to situations that affect the convicted.

b) The impossibility of operation of the global application system in case of separate judgment of crimes under competition[12]

Assuming that the defendant committs two crimes in the competition and that, due to the circumstances, are judged separately, one of the instances using a punishment for a crime under the old code and the other according to the new law, what would happen in the third stage, when the Court is seised with a request for the melding of sentences given that it is not permitted to amend of a definitive punishment? The difficulty arrised is that according to which code will dispose the Court seised by merging punishments? In conclusion, it is inevitable the enforcement of the more favourable criminal law on the autonomous institutions.

Concluding, after exposure of the two theories in doctrine and practice, we allow ourselves to appreciate that in the case of succession of criminal laws the method that ensures the best functionality of institutions of criminal law but also the will of the legislature is that of establishing the penal norm more favourable in report of each autonomous institution, using all the criteria set out above.

[12] F. Streteanu, Criminal law. General Part, 1st vol., Rosetti Publishing House, Bucharest, 2003;

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3. . Supreme, Criminal section, Decision no. 121/1971, in RRD no. 6/1971, p. 158;

4. Decision no.5/2014 of the High Court of Cassation si Justice from 26th of may 2014;

5. C. Rotaru**,** Applying the more favourable criminal law, www.juridice.ro;

6. T. Pop, Comparative criminal law, Cluj, 1923;

7. See N. T. Buzea, *Criminal offence and culpability*, Typography Sabin Solomon, Alba Iulia, 1944, p. ;

8.C. Bulai, B. Bulai, *Textbook of criminal law. General Part*, The Legal Universe Publishing House, 2007, p. 139;

9. G. Antoniu, *Comment* (n. 16), în G. Antoniu, C. Bulai, *Criminal judicial practice*, 1st vol., Academiei publishing House, Bucharest, 1988, p.37.

10. Considerations on the application of the criminal law more favourable in the case of complex laws;

11. V. Papadopol, I.Stoenescu, G.Protopopescu, *Criminal code of RPR annotated*, State Publishing House, Bucharest, 1948, p.23 (n. 48);

12. Mihai Adrian Hotca, *mitior lex* rule in the light of the new Penal Code, www.juridice.ro;

FORMAL RULES COMMON TO ALL WILLS

Diana-Geanina IONAS *

ABSTRACT

At first glance, we could say that testamentary formalism is not as strict as in the case of donations, as the testator has the opportunity to choose between the forms of wills required by law. From another perspective, however, testamentary formalism is extremely strict in the sense that the violation of the form rules established expressly by the legislature is sanctioned by absolute nullity.Testamentary formalism is imposed by the legislature as a guarantee in terms of freedom of expression and preservation of the last will of the testator, in other words, the legislature intended to maintain this strict formalism precisely in order to preserve untouched the last will of the testator, especially considering that we are dealing with a unilateral and exclusive act mortis causa . Regardless of their way, formal rules common to all wills are: incumbency of written form, respectively banning the nuncupative will; incumbency of the separate testament respectively prohibition of joint wills; mandatory registration of the genuine will in the National Notarial Register. So although the New Civil Code expressly establishes in the content art.955 para.1 the principle of testamentary freedom, this freedom is not absolute but subject to certain rigours meant to protect the testator's will and the rights of the heirs.

KEYWORDS: *testament, formalism, rules, testamentary freedom*

At first glance, we could say that testamentary formalism is not as strict as in the case of donations, as the testator has the opportunity to choose between the forms of wills required by law. From another perspective, however, testamentary formalism is extremely strict in the sense that the violation of the form rules established expressly by the legislature is sanctioned by absolute nullity.

Testamentary formalism is imposed by the legislature as a guarantee in terms of freedom of expression and preservation of the last will of the testator[1], in other words, the legislature intended to maintain this strict formalism precisely in order to preserve untouched the last will

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[1] F. Julienne - "Successions et liberalites", Ed. Real, 2012, p. 178

of the testator, especially considering that we are dealing with a unilateral and exclusive act mortis causa .Representing a waiver from the legal order of succession, the will is a serious act, in which the testator's will must be manifested in the form prescribed by law so there is no doubt about its existence and meaning, and to protect it from the uptake and suggestion that can be exercised by other people[2] .

There were also opinions that criticized this formalism as being excessive, saying that, indeed, the solemnity of the will prevents the vitiation of consent by fraud, but in numberless occasions draws on nullity for informality[3] .

Testament forms imposed by the legislature ad solemnitatem are either ordinary, the case of the holograph and genuine will, or privileged when the will is drafted in exceptional situations or other testamentary forms recognized and regulated by law. All these must take the solemn form not be confused with the authentic form as the solemn form is broader in scope in which, beside the authentic form, it includes other ways of the solemn form. The correlation between the solemn and the authentic form is that from gender to species.

Regardless of their way, formal rules common to all wills are:

- incumbency of written form, respectively banning the nuncupative will;
- incumbency of the separate testament respectively prohibition of joint wills;
- mandatory registration of the genuine will in the National Notarial Register.

1. The noncupative will

Known from the Roman law, the verbal testament, also known as the noncupative one, is prohibited and sanctioned with absolute nullity, the written form being mandatory for any kind of will. This writing should be seen as a condition for the existence of the will, quad substantiam and not just a condition related to the possibility of probation or proof of this, *quad probationem*[4].

The reference books have argued that the written form of the will, a condition of its existence can not be supplemented by video or audio

[2] C. Hamangiu, I. Rosetti- Balanescu, Al.Băicoianu - *Tratat de drept civil român*, vol. III, Ed. All Beck, Bucureşti, 1999, p.509
[3] I. Adam, A. Rusu - *Drept civil. Drepturile reale*, Ed. All Beck, Bucureşti, 2002, p.182
[4] S. Ferre-Andre, St.Berre - *Successions et liberalites*, Ed. Dalloz, 2012, p.183

recordings. It was also held that the proof of a verbal will cannot be made by any evidence, no matter if it is the heirs' testimony, the heir or legatee's admittance of the encumbrance that is imposed on him/her by the testator's verbal recommendation or the alleged encumbrance is confirmed by a written document coming from the testator but does not have the solemn form required by law[5].

Although the verbal, oral form represented the original form of will, it is prohibited in the laws of many states, the reason for the ban being that you can not verify the real intention of the testator. However, if after the death of the testator, the heirs verbally acknowledging the latest will, they can validly execute, operating as a transformation of a natural obligation into a civil one[6]. In other words, the expression of the testator's last will, though legally void, can create a natural obligation susceptible to become the cause of a valid civil obligation, without having to do in this case with the existence of a liberality.

The doctrine has often asked the question concerning the fate of a will in case a person, appointed legatee, would claim to be hampered by force majeure or by a third party to present it. The problem of proving the will in case of its loss or destruction can only put in the hypothesis of the holograph testament. Thus, it was considered that in this case there are three situations to be taken into account[7]:

- if the legatee demonstrates that it is impossible for him/her to present a written testament as the testator was prevented by force majeure or by a third party or it was physically impossible for him/her to draw it, then the will does not meet the condition imposed by law, namely to be written, and can not be proved by any evidence[8] , the intention of drawing up a will being equivalent to its non-existence; in this case the alleged beneficiary can only sue the person who would have prevented the deceased to draw a will in his/her favour, thus depriving him/her of the

[5] M. B. Cantacuzino - *Elementele dreptului civil*, Ed. All Educational S.A, Bucureşti,1998, p.336.

[6] Ph.Malaurie, L. Aynes - *Les successions. Les liberalites*, 4 eme edition, ed. Defrenois, 2010, p. 252 (for the opposite view see C. Hamangiu, I. Rosetti - Bălănescu with Al.Băicoianu - op cit, p.510)

[7] L. Stănciulescu - *Curs de drept civil. Succesiuni*, Ed. Hamangiu, Bucureşti, 2012, p.96

[8] I. Genoiu - *Formele testamentului în Noul Cod Civil*, in „Dreptul" no.12/2011
The forms of the will in the New Civil Code in the "Dreptul" No. 12/2011, p.35

chance to be instituted legatee, asking the court to force the person to pay damages-interests[9];

- if the legatee shows that it is impossible for him/her to present a will written by the testator, but which was destroyed by force majeure (or unforeseeable circumstances) or a third party and the testator knew this, then we deal with a tacit revocation of it and its likelihood of the will is inadmissible;
- if the legatee demonstrates that it is impossible for him/her to present a written testament of the testator, but which was destroyed by force majeure (or unforeseeable circumstances) or a third party and the testator did not know it or the destruction occurred after his/her death, then the legatee can prove by any means the existence and contents of the will.

If the disappearance of the will is due to the disappearance of the deed against whom it is invoked, its regularity is presumed until proven otherwise[10] .Therefore, the legatee invoking a lost or destroyed will must prove the following:

- that the will existed and that it was prepared in the form required by the law, which may be proved by any means of evidence[11] ;
- that the loss or damage is due to unforeseeable circumstances, force majeure or the deed of a third party. In this regard, the doctrine held that the legatee will first have to prove the force majeure or the fortuitous event, and only then that the will has disappeared in these circumstances[12] ;
- that the will existed to its testator's death, if it was destroyed during his/her life, that s/he was not aware of the destruction; But if the destruction of the will was made by a third party at the instigation of the testator or by the testator personally, in both cases in a state of complete lack of judgment, the proof

[9] B. Ionescu - *Consideraţii teoretice şi practice asupra reconstituirii testamentului pierdut*, in „Revista Română de Drept Privat" no. 4/2008, p.85

[10] V. Pasca, C. Rosu - *Acte juridice mortis causa întocmite ori atestate de către avocat*, in „Dreptul" no.5/2001, p.82-87

[11] Regarding the burden of the legatee of proving that the will was drawn up in the form required by law, there is no uniform point of view, some authors claiming that the regularity of the will is presumed so that the legatee is spared of the burden of proof

[12] D. Alexandresco - *Explicaţiunea teoretică şi practică a dreptului civil român în comparaţiune cu legile vechi şi cu principalele legislaţiuni străine*, tomul IV, partea 1 și 2, Bucureşti, Ed. Atelierele grafice Socec & Co Societate anonima, 1914, p. 30

regarding the existence of the will shall be admitted as if no damage had occurred[13] ;

- that the will contained provisions for the alleged legatee.

The case law has adopted this theory expressed in the literature, also stating that in case the disappearance of the will is caused by the deed against which it is invoked, its regularity is presumed until proven otherwise[14]. But once the existence of the will proven, it is the duty of the author of the concealment or the destruction to prove that it did not meet the form required by law.

The sanction for failing to keep to the written form was expressly provided under the old Civil Code as being absolute nullity, nullity which could not be removed by the subsequent confirmation of the invalid will, even if the confirmation was made through a will that met the conditions of validity prescribed by law[15]. In the new regulation, the legislature no longer expressly provides this sanction for the violation of the written general form, the verbal will being considered non-existent and consequently impossible to prove.

Notwithstanding, there are systems of law which authorize the oral will. In this respect, the Austrian law recognizes the oral will if done in the presence of three witnesses who, if contesting the will after opening the assets, must confirm it under oath[16]. If their statements are contradictory, the will is invalid[17].

This type of will is admitted by the Swiss law, but only if exceptional circumstances, namely imminent danger of death, epidemic or war, prevents the testator from using another form of will. The validity of this type of will is conditioned by the declaration of the last manifestation of will simultaneously in front of two witnesses that the testator entrusts with the subsequent drafting of the will in written form[18]

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[13] B. Ionescu - *Consideraţii teoretice şi practice asupra reconstituirii testamentului pierdut*, in „Revista Română de Drept Privat" no. 4/2008, p.88

[14] Tribe.Supreme Court Civ, Sector, December. No. 237/1978 in V-Terzea - *Noul Cod civil. Vol. I. (art. 1-1163). Adnotat cu jurisprudenţă şi doctrină*, Ed. Universul Juridic, Bucureşti, 2011. p. 947, Court de Cassation, chambre civile. 1 re 12.Nov. 2009 08-17791, Bull. Civ.I, Cass.Civ. 1 re 13.December 2005, Bull. Civ.I in the Ph. Malaurie, L. Aynes - op cit, p.253

[15] C. Hamangiu, I. Rosetti- Balanescu, Al.Băicoianu - op cit, p.510; Fr Deak - *Tratat de drept succesoral*, Ed. Universul Juridic, Bucureşti, 2002, p.176

[16] Art. 584 Austrian Civil Code

[17] D. Hayton - *European Succession Laws*, Ed.Jordans, Bristol, 2002, p.28

[18] Art. Swiss Civil Code 506-508

2. Prohibition of the Mutual Will (Joint)

The law expressly prohibits two or more people to test through the same act one in favour of the other or for a third party. We can define such mutual wills as that legal act containing manifestations of will of two or more people who test either one in favour of the other, or in favour of a third party. What is seen from the start is that the New Civil Code abandoned the notion of joint will which it replaced with that of mutual will, both referring to the same institution. The doctrine criticized the modern legislator's choice, considering that none of these concepts outlines the contents of the will. It was considered that the joint will covers only the hypothesis of the will in which two people have the same will one in favour of the other, while the joint will regulates the event in which two people have the same act in favour of a third party, finally considering that the most appropriate name would have been "the prohibition of the separate act"[19].

Although the vast majority believes that the prohibition of the mutual will is a formal issue[20] , there are authors who argue that it is a substantial issue. In motivating their opinion, the latter assume that the prohibition is a guarantee of the unilateral and irrevocable nature of the will, or these features are related to the essence of the will, and not to its form[21].

In the French doctrine, we also find different views on this prohibition. Thus, although the vast majority of authors consider that the prohibition of the mutual will is a formal issue, however there were also opinions that have considered that the prohibition should be regarded as a substantive rule because it guarantees the freedom to revoke the will[22].

At European level, the states supporting the qualification of this interdiction as a substantial one, include Germany (which considers the

[19] I. Genoiu - *Dreptul la moştenire în Noul Cod civil*, Bucureşti, Editura C.H. Beck, 2012, p.155

[20] M. Eliescu - *Moştenirea şi devoluţiunea ei în dreptul RSR*, Ed. Academiei RSR, Bucureşti, 1966, p.337

[21] D. Chirică - *Drept civil. Succesiuni*, Ed. Lumina Lex, Bucureşti, 1996, p.91; C. Hamangiu, I. Rosetti - Bălănescu, Al.Băicoianu - op cit, p.506; CS Ricu, GC Frenţiu, D. Zeca, DM Cigan, TV Radulescu CTUngureanu, G. Răducan, Gh. Durac, D. Calin, I. Ninu, Al.Bleoancă - *Noul Cod Civil. Comentarii, doctrină şi jurisprudenţă*, vol. II, Ed. Hamangiu, Bucureşti, 2012, p.153

[22] J-P Waimel - *Les formes du testament olographe et le mention de ces forms jusqu'au deces du testateur*, Paris, Montchrestien Publishing, 1963, p.4

admissibility of the joint wills to the inheritance law from the day when the joint will was drawn), Austria, Belgium and Spain, and among the states that consider these issues as being formal we enumerate Finland, Luxembourg, the Netherlands[23].

The problem of qualifying the nature of the prohibition is a particularly important one, with consequences in practice. In this regard, if the prohibition is considered to be a formal one, then it is subject to the rule tempus regit actum (so the act is valid if it meets the conditions of validity from the date of its elaboration, regardless of when the assets will be open) Instead, if the prohibition is one of substance, then a will signed under the rule of a law which prohibited the mutual will shall have no effect if the assets were opened after the entry into force of the prohibition. Similarly, if the will is drawn up by two Romanian citizens in a state that does not know this prohibition, according to the rule locus regit actum, it will also be available in Romania[24].

Admitted in the Roman law, the joint will was first introduced by Emperor Valentinian in order to enable spouses to establish each other as heirs. The old French law, profoundly inspired by the Roman law, also allowed joint or mutual wills until the Ordinance in 1735. The old Romanian law also admitted these wills, Calimach code or Caragea code not prohibiting them. Subsequently, the Romanian legislator has taken the modern French doctrine and prohibited under penalty of nullity such wills. The doctrine held that this nullity can not be removed through voluntary acknowledgment or performance[25] .

The literature has questioned whether such a will can be presented to the notary public in order to be endorsed for proof of non-alteration and the conclusion of an official report of its financial situation. This question was answered in the affirmative, in that the notary public can initiate at the express request of the parties those formalities subsequent to drawing the will, as they do not confer any legal effects, do not validate the void act, so even if these procedures are met, in the successional debate, whether the contentious or the non-contentious

[23] D.A. Popescu - *Dreptul succesoral în noua reglementare a Codului Civil*, in „Buletinul Notarilor Publici" no.5/2010, Ed. Notarom, Bucureşti, 2010, p.49

[24] Al. Bacaci, Gh. Comanita -*Drept civil. Succesiunile*, Ed. Universul Juridic, Bucureşti, 2013, p.85

[25] S. Ricu, GC Frenţiu, D. Zeca, D.M. Cigan, T.V. Radulescu C.T. Ungureanu, G. Răducan, Gh. Durac, D. Calin, I. Ninu, Al.Bleoancă - *op cit*., p.154

proceedings are chosen, the notary public or the court will be obliged to declare the absolute nullity of the joint will[26]

The reasoning of the prohibition provided by the Civil Code stems from the personal nature of the will, and that of unilateral and essentially revocable act. Thus, it was rightly appreciated that the plurality of parts in the case of the joint will transgresses its unilateral nature, transforming the will from a unilateral legal act into a bilateral act, into a contract, whose validity and effects depend on the common will of the parties. Moreover, since the joint will assumes a plurality of wills united in the content of the same act, the essentially revocable nature of the will through the testator's single will would be removed, since in this hypothesis the will could not have been revoked by unilateral will. Acknowledging the validity of the joint will would give a conventional dimension to the will, incompatible with the principle of its revocability. Everyone's freedom to dispose whenever in another way and to be able to unilaterally revoke the will would be violated, as it involves a mutual commitment of each of the authors, each committing him/herself not to revoke the will without the consent of the other and to allow such a testament to be revoked would mean violating the spouses' mutual trust, while declaring it irrevocable would mean to change the nature of the last will act[27].

The prohibition of the joint will results from the individual character of the will that has to be solely the creation of its author.

But in order to have of a joint will, the literature has found that two cumulative conditions have to be met. The most important is the formal one and it involves that the two wills of the parties be inserted into the content of the same act which bears two signatures. The second condition involves a psychological element and refers to the fact that joint wills express the common will of the two bequeathers[28]. Other authors have found that the joint will implies uniqueness not only of the instrumentum, but also of the negotium.

There are also authors who consider these theories excessive, arguing that "even if the bequeathers speak in a single voice, their wills are separate intellectually, so that we find ourselves in the presence of

[26] D. Negrila -*Testamentul în Noul Cod Civil. Studii teoretice şi practice*, Ed. Universul Juridic, Bucureşti, 2013, p.127-131

[27] D.A. Popescu - *Regimul internaţional al succesiunilor*, in „Buletinul Notarilor Publici" no.4/2010, Ed. Notarom, Bucureşti, 2010, p. 30

[28] Ph.Malaurie, L. Aynes - *op cit*, p.253

two negotia - when two spouses declare each other mutual universal legatees, these are actually two distinct universal legacies which must be considered valid, since only one of them is capable of being enforced "[29].

Consequently, in order to have a joint will, it is necessary that it express one will of its authors, to have two wills in one, which bear two signatures and regulate two assets, for what the law stops is not the material gathering, but the legal gathering of two or more wills[30] .The judicial practice expressed an opinion on the same lines , saying that the document signed by the two former spouses, through which they engage that in the event of one's death, the other is to inherit him/her, is void, representing a joint will[31] .

Thus, it was found that two wills written on the same sheet of paper are valid if they contain provisions different from the last will, followed by the signature of each of the bequeathers, and the wills written on the same sheet of paper, but one on the front and the other on the back . The will regarding the legacy of the couple is also valid, but not the one bearing only the signature of one of them, and vice versa, but the will of either spouse which is signed by both[32], as well as the will bearing the signature of both the author and the legatee or a third party.The reference books also considered that the wills drawn up separately by the bequeathers are still valid, even if they contain mutual and interdependent provisions or provisions in which one of the bequeathers refers to the other[33] .

Although the Romanian legislature prohibited under penalty of nullity joint wills, still there are laws that recognize its validity. Thus, under the Austrian law, husbands or even fiancés, provided subsequent conclusion of marriage, can establish each other heirs or can bequeath by the same act in favour of a third party. The same provisions are found in the German inheritance law which recognizes the validity of the joint will concluded even between spouses or life partners of the same sex. It can be concluded in authentic or handwritten form, in which case it is valid even if it is written by one of the spouses or partners and signed by the

[29] M. Grimaldi - *Droit civil. Liberalites. Partges d'ascendants* , Litec Publishing, Paris, 2011 p.303
[30] D. Alexandresco - *op cit*, p.10
[31] Bucharest Appeal Court, IIIrd Civil Section., min. and fam., December. No.524 / A of 26 October 2009 to the address shown http://legeaz.net/spete-civil/testament-connective-nulitate524-2009 on 08/11/2014
[32] Ph.Malaurie, L. Aynes - *op cit*, p.254
[33] F. Julienne - *op cit*, p.179

other. If the divorce proceedings were initiated, then the common will shall be revoked entirely ex lege. A special form of will is Berlin will through which the spouses declare each other heirs but also stipulates that after the death of the surviving spouse, the common wealth will come to the common child.

There are views expressed in the Romanian literature according to which 'in the same way in which the irrevocability of the donation is not affected by ad nutum revocability of donations between spouses during marriage, so we can accept in the legal Romanian scene a mutual testament (joint) or shared (as in the German law) but which can be unilaterally revoked by either spouse, maybe with the obligation of notifying the revocation act by the other spouse "[34].

3. The mandatory registration of the authentic Will in the National Notary Register

In order to inform the people that justify the existence of a legitimate interest, the notary public authenticating a will has the obligation to register it at once in the National Notary Register kept in electronic form by law. Since the will is an act essentially revocable during the bequeather's life, the information on the will may be given only after the bequeather's death, and only to the people who justify a quality and an interest.

CONCLUSIONS

Although the New Civil Code expressly establishes in the content art.955 para.1 the principle of testamentary freedom, this freedom is not absolute but subject to certain rigours meant to protect the testator's will and the rights of the heirs. The failure to comply with these rigours is sanctioned by the law with absolute nullity.

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GENERAL CONDITIONS OF TORT LIABILITY

Petruţa-Elena ISPAS [*]

ABSTRACT
Tort liability represents, in the Civil Code system, a form of civil liability whereby any person is bound to repair the damage caused to another person by his or her own, or in some cases, to repair damage caused by persons for who is responsible. For an appropriate application, tort liability must meet cumulatively some conditions, these conditions are common to all forms of liability, being called in the literature as the general conditions of tort liability. Through this study, we briefly analyze these conditions, with attention focused on the injury condition because, as is well known, the injury as a general condition for tort liability has been the subject of numerous divergent views expressed in the doctrine and jurisprudence related to the Civil Code above.

KEYWORDS: *civil liability, tort liability, wrongful act, injury, causal link, guilt.*

1. PRELIMINARY CONSIDERATIONS

The legal liability, by all its characteristics and functions represents, undoubtedly, the centre of the entire social liability, a position originating in ancient times continuing to the present[1]. As form of legal liability, the tort liability is represented by a binding relation based on which a person has the duty of compensating the harm caused to another person by his/her deed[2].

The tort liability has continuously evolved during the last centuries, starting from the stage in which one man's deed was a starting point for any type of liability regulated by the Civil Code and up to the present time when focus is placed on the harm which is deemed „the true premise of any assumption of tort"[3].

For the tort to be valid, certain conditions expressly required by the Civil Code should be met cumulatively, respectively: the wrongful

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[1] L. Pop, I.F. Popa, S.I. Vidu, *Tratat elementar de drept civil. Obligaţiile,* Ed. Universul Juridic, Bucureşti, 2012, p. 379.

[2] I.R. Urs, P.E. Ispas, *Drept civil. Teoria obligaţiilor civile,* Ed. Universităţii Titu Maiorescu, Bucureşti, 2012, p. 112.

[3] M. Uliescu (coordonator), *Noul Cod civil. Comentarii,* ed. Universul Juridic, Bucureşti, 2010, p. 162.

act, the injury, the causation relation between the tort and the injury, as well as the guilt of the tortfeasor[4]. There conditions have been described as „*constituents"* of the tort liability[5]. We will briefly describe below the general conditions of the tort liability, by analysing the provisions of the present Civil Code.

2. TORT LIABILITY CONDITIONS

2.1. Wrongful act

In the literature, the wrongful act was defined as the action or inaction contrary to the law resulting in the violation of the substantive rights or the lawful interests of a person[6]. Thus, the wrongful act may appear as an act committed or omitted, and when an action or omission take place by which the substantive rights or the lawful interests of a person are violated, it is considered an unlawful act, giving birth to the tort liability[7].

There are some cases expressly provided by the law when, although an injury occurs as a result of an act, the liability of the tortfeasor cannot be engaged because the wrongful character of the act is removed, consequently the condition regarding the wrongful nature of the act is not met. Unlike the provisions of the Civil Code from 1864 which did not regulate the causes removing the wrongful nature of the act, the Civil Code in force regulates those cases which, the moment they occur, the wrongful nature of the damaging deed is removed. As also mentioned in the specialty literature, these acts which remove the wrongful nature of the deed should not be mistaken with those cases which represent causes of fault removal[8].

The causes which remove the wrongful nature of the deed are regulated, as mentioned above, in the provisions of the Civil Code currently in force. Thus, causes to remove the wrongful nature of the

[4] The law no. 287/2009 regarding the Civil Code, republished in the Official Gazette no. 505 of July 15th 2011, provides in the art. 1357: „*That who, by fault, causes to another a damage by a wrongful act, shall be obliged to compensate it"*.

[5] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 411.

[6] IR Urs, PE Ispas, *op. cit.,* p. 134, L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 423, G. Boroi, L. Stănciulescu, *Instituţii de Drept civil în reglementarea noului Cod civil,* Ed. Hamangiu, Bucureşti, 2012, p. 246.

[7] For a broad description of the wrongful act as constitutive element of the tort liability, see L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,*pp. 423-428.

[8] G. Boroi, L. Stănciulescu, *op. cit.,* p. 247.

damaging deed: self-defence, state of necessity, committing the damaging deed while complying with an activity imposed or permitted by the law or while executing an order of the superior, committing the damaging deed while normally or lawfully exercising a substantive right and the damaged person's consent. When one of these cases occur, under the conditions imposed by the Civil Case, although the deed was committed, the tortfeasor shall not be liable as the wrongful nature of the deed is missing.

2.2. Injury

The injury was defined in the specialized literature as the property or moral damaging outcome, a consequence of trespassing or harming the lawful rights and interests of a person[9]. The doctrine reasonably argued the injury is the most important element of the tort liability, which represents a standalone condition, an essential condition for the tort. Yet, this does not mean that once proven the existence and the extent of the injury, the liability is considered for all the cases; in order to engage the liability, the other conditions required by the law must also be met, and not only the condition of injury.

In the event that an injury was not caused, the tort liability cannot be considered, and this aspect is also supported by the judicial practice even before the entry into force of the new Civil Code[10]. Thus, the conditions required by the Civil Code should be regarded both in their individuality, and overall, as a whole, as this is the purpose of the cumulative regulation of the four conditions necessary to trigger the tort liability.

As regards the injury repair, there is a distinction between the repair of the material damage and the repair of the moral damage.

The material damage is the result of injury of a property interest which can be valued in cash. As structure, the material damage comprises two elements, respectively: the loss suffered and the loss of earning. The loss suffered means the decrease of the heritage asset, „*the injury must be physical, consisting in actual loss, destruction or damage of a good on which a subjective right is exercised, or which is only in the detention of*

[9] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 412.

[10] Civil Decision no. 1516/2000 a C. A. Iaşi, in *Jurisprudenţa pe 2000*, p. 156-157 („The harm brought to the right or to the interest of a person, by itself, cannot give right to the birth of repair , if by such harm no damage was caused…").

the damaged"[11], while the loss of earnings „*consists in depriving the asset of an increase, a possible increase that would have occurred had not been for the wrongful act. The property damage can be explained as earnings not received in case of depriving the victim of the use of a good, in case of total or partial loss of the income from work*"[12].

The harming of non-property personal interests can cause a damage which is capable of repair, subject to compensation. The moral damages cannot be assessed in pecuniary terms, as they always consist of physical or psychological pain of the victim after having trespassed the non-property personal rights able to define the human personality from a tripartite perspective: natural personality, moral personality and social personality[13]. The moral damage was defined as representing *the harmful consequence, of non-property nature, of a wrongful or guilty act, by which damage is caused to the personal rights, without economic content, connected to the human personality*[14].

The repair of moral damages has raised various issues over time[15], but by the entry into force of the Civil Code, this form of repair was, in our opinion, clarified. Thus, the repair of the non-property damage was expressly regulated by the provisions of the Code[16], establishing the possibility of the Court to award damages in case of causing non-patrimonial damages resulted by the committing of wrongful acts leading to injury of a person's body or health[17]. More than the express regulation of the non-property damage repair, the Code also

[11] I.R. Urs, P.E. Ispas, *op. cit.,* p. 128.
[12] *Ibidem.*
[13] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 413.
[14] I.R. Urs, P.E. Ispas, *op. cit.,* p. 128.
[15] For more details about the periods and the solutions in this matter please see, among others, the I.R. Urs, P.E. Ispas, *op. cit.,* p. 130.
[16] As per art. 1391 of the Civil Code: *"(1) In the event of bodily or health injury, can be granted compensation for restricting the opportunities of family and social life. (2) The court may also award damages to ascendants, descendants, brothers, sisters and the spouse for pain caused by the victim's death, and to any other person who, in turn, could prove the existence of such an injury. (3) The right to compensation for the harm caused to the rights inherent to the personality of any subject can be transferred only if it was established by a settlement or by a final judgment. (4) The right to compensation recognized under the provisions of this Article shall not pass to the heirs. They might however exert it if the action was initiated by the deceased. (5) The provisions of art. 253-256 shall remain applicable*". The provisions of the art. 253-256 to which the art. 1391 refers concern the defence of non-property rights.
[17] For more details, see the *Noul Cod civil. Note. Corelaţii. Explicaţii*, Ed. CH Beck, Bucureşti, 2011, p. 517-518.

provides the categories of persons entitled to receive compensation as a result of causing the non-property damage, these categories of persons being „*the ascendants, the descendants, the brothers, the sisters and the spouse, as well as any person who, in his/her turn, could prove the existence of such a damage"*.

The Code also regulates the cases in which the right to compensation may be assigned, as well as the impossibility of transferring to heirs such right, as they have only the possibility of continuing a possible action promoted by the deceased during lifetime. This regulation is not surprising at all if we take into consideration the personal character of the rights whose violation gives right to the moral damage. The rights protected by the legal provisions, being closely related to the person damaged, when violated, only the person damaged can require to be awarded compensation.

In order for the damage, in any of its forms, to be repaired[18], must have certain characteristics giving birth to the right to repair, respectively: the certainty, the direct character, the personal character, the damage should result from trespassing of a lawful right or interest. Thus, as considered in the specialized literature, the existence of a damage is a necessary condition, yet insufficient to give birth to a repair obligation[19].

The certainty of the damage represents that essential condition according to which its existence if undeniable and certain, yet the extent of the damage can be established at present. In the category of the certain damages can also be included the actual and the future damages, the actual damages being already caused the moment they are claimed to be repaired, and the future damages, although not occurred yet, it is certain to occur, being likely to be assessed. Thus, the difference between the actual and the future damages consists in the fact that they occur at the moment the compensation is claimed; the future damage gives right to compensation because even if not occurred the moment the compensation is claimed, with the possibility of assessment, it is possible to be the object of compensation.

Thus, the provisions of the Civil Code also provide that "*compensation may also be awarded for a future damage if the*

[18] According to the traditional classification of injury, it is patrimonial and non-patrimonial. After a modern classification, the damages would have a tripartite classification, namely: property damage, bodily harm and moral damage. For details on damage classification, see L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 414.
[19] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 415.

occurrence is undeniable"[20]. Thus, in case of future damage, the injured party can get compensation if he/she proves it is certain and, consequently, it is possible to be assessed[21]. The loss of the chance to be given an advantage by the occurrence of a wrongful act will be compensated proportionally to the probability of obtaining the relative advantage. The same is true for the loss of opportunity to avoid the occurrence of an injury[22].

As regards the possible injury, whose occurrence is not certain, it cannot be deemed a certain injury, which means it cannot justify a grant of compensation. An example of possible injury is alleged by the victim's parent who on the date of the death did not meet the conditions for the receiving of the alimony. The condition alleged by the parent that he could be incapable of work in the future because of the age, with the right to receive alimony, is a simple possibility, which does not justify the award of the compensation, the injury consisting in the fact that the minor will miss a school year, delaying by one year the employment, or the injury that would be caused to the child of the victim, after turning 18, if under the circumstance of study continuation[23].

The second condition required for the injury to be repaired is that the injury is direct, meaning the existence of a causal link between the wrongful act and the damage caused to the victim. It has been deemed that this direct nature of the injury is valid both for the injuries caused directly, and for the direct injuries indirectly caused. The specialized literature[24] draws the attention that the notion of direct injury should not be mistaken for neither overlapped with the notion of injury caused directly; while the direct injury notion includes both the injury caused by a direct causal link as well as by an indirect causal link, the injury is indirect the moment between the wrongful act and the injury there is no a causation relation[25].

This condition is not considered by the entire doctrine in the matter, but we appreciate its utility given the following condition to analyse, respectively the condition of the causation link between the

[20] Civil Code, art. 1385 alin. (2).
[21] C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor,* Ed. All Beck, Bucureşti, 2002, p. 164.
[22] *Noul Cod civil, op. cit*. p. 514.
[23] I.R. Urs, P. E. Ispas, *op.cit.,* p. 132.
[24] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 418-419.
[25] V. Stoica, „Relaţia cauzală complexă ca element al răspunderii civile delictuale în procesul penal", în L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 419.

wrongful act and the injury. As mentioned before, it is not enough that only one of the conditions of the tort liability is met, the conditions must be analysed both individually as well as in whole, the requirements of the Civil Code concerning the regulation of these conditions cumulatively; the complexity of the tort liability as form of legal liability cannot be objected and the theoretical aspects together with the practical ones lead us to an appropriate interpretation and application of the legal provisions in the matter.

Another character that the injury should meet to give birth to the right to compensation is that the injury was not compensated previously by a third person, natural or legal. As appreciated in the specialized literature, this condition is justified by the fact that, otherwise, the compensation of the injury would only unreasonably enrich the victim. As natural, the injury may be compensated only once, so that whenever a third party compensated the injury caused by the tortfeasor, the victim cannot require the second time the injury compensation.

The rule in tort consists in the obligation of the tortfeasor of compensating the injury caused. However, in certain cases, a third party is the one to compensate the injury caused by the wrongful act. The specialized literature analysed three hypotheses in which a third party pays to the victim the compensations resulted after committing the wrongful act which caused injuries, respectively: the hypothesis in which the victim receives an insurance allowance, the hypothesis in which the victim benefits from pension from the State social insurances and a hypothesis in which the victim receives a sum of money from a third party[26], in all of these cases another person, other than the tortfeasor being the one to pay the compensation to the victim.

Each of these hypotheses has its own characteristics, so that in certain cases the victim of the injury can be obliged to pay a partial compensation of the injury, according to the hypothesis reviewed. According to the characteristics of each hypothesis previously presented, one will establish to what extent the victim has the possibility of requiring compensation also from the fortfeasor.

Another condition the injury should meet to give birth to compensation is the one of personal nature. This condition is only analysed by a part of the doctrine[27], but we consider that short

[26] For more details, see G. Boroi, L. Stănciulescu, *op. cit.,* . p. 241, I.R. Urs, P.E. Ispas, *op. cit.,* p. 133.
[27] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 420-421.

assessments are necessary to the same, under the aspect of the issues raised by the personal nature of the injury.

It was considered that this nature of the injury supposes that only the person, victim of the injury caused, has the right to claim compensation, the civil liability being aimed at the protection of the human person, without reaching the conclusion that the right to require compensation limits only to the injury caused to a person regarded individually. On the contrary, there is a trend in the application of the provisions regarding the tort liability regarding the injuries leading to damage that could harm categories or groups of persons, in case of occurrence of a trespassing of some lawful rights or interests belonging to these categories or groups of persons, the damages caused are called collective damages. The collective damages represent thus, those damages caused to more persons by one and the same event[28].

The last condition the injury must meet in order to engage the liability of the tortfeasor is that the injury should result from the violation or harm of a lawful right or interest. The injury can only be conceived when it occurs as result of violation of a substantive right or a lawful interest, according also to the provisions of the Civil Code providing the obligatory character of a person not to harm the lawful rights and interests of other persons. Thus, each recipient of the civil law is obliged not to harm the rights and the interests of other persons.

As results from the issues concerning the injury, above-mentioned, in order to give birth to the compensation right, the injury should meet those conditions required by the law to be possible to be compensated. In case one of the nature of the injury is not complied with, although the injury occurred or it is certain to occur in the future, this does not give birth to the right to compensation, so that the tortfeasor shall not be responsible according to the provisions of the tort liability.

2.3. Causal link between the wrongful act and the injury

As mentioned in the review carried out during this subchapter, when the tort liability is analysed as civil law institution, all its constitutive elements should be considered and whether they are met according to the legal provisions. The next element of the tort liability is the connection of the causal link between the wrongful act and the injury. It was demonstrated that the causal link is important for at least two reasons: the lack of the causal link between the wrongful act and the

[28] *Ibidem,* p. 420.

injury is equivalent to the inexistence of the tort liability[29] and the nature of the causal link to be the factor that determines the extent of the compensation owed to the victim of the injury[30].

Most of the times, the establishing of the causal report is easy to carry out, between the wrongful act and the injury existing an obvious connection. One example was given in the specialized literature, meaning the case in which using a sharp object to hit in a vital area of the body results in the death of the victim or when a person destroys or alienates another person's good, the causal link between the wrongful act and the injury suffered by the victim is also obvious, without raising problems in establishing it[31].

There are also some situations in which the establishment of the causal link appears difficult; in case the damage is the result of some competing actions and inactions, some having the role of causes and others the role of condition, the selection of the concrete fact that led to the occurrence of the injury appearing as very difficult. In the event that such situations occur, studies have been completed and certain theories have been settled for the establishment of the causal relation, respectively the theory of the conditions equivalence, the adequate causation theory[32], the theory of proximate cause[33], so that subsequently a theory summarizing all the others is developed. This latter theory was developed in the Romanian law by one of the most valuable Romanian authors.

The theory we are referring to was called the theory of the indivisible unity between the cause and the conditions. According to this theory, one starts from the idea that in establishing the causation relation one must take into account that the phenomenon representing the cause does not act by itself, but in the ambience of some external conditions. The competitive circumstances contribute as a whole in the injury production, and the causal efficacy of each of the elements that are incidental should be recognized and treated with due importance.

[29] The same view was supported also by the Supreme Court of Justice, now the High Court of Cassation and Justice in the criminal decision no. 1053/1991, in *Dreptul nr. 1/1992,* p. 84.
[30] I.R. Urs, P.E. Ispas, *op. cit.,* p. 140.
[31] L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 435; I.R. Urs, P.E. Ispas, *op. cit.,* p. 140.
[32] These two theories were established in the German and French doctrine. For details, see L. Pop, I.F. Popa, S.I. Vidu, *op. cit.,* p. 436.
[33] This theory was prepared in the Anglo-Saxon law.

In order to establish the causes represented by the causation complex one must scientifically determine by specialized expertise all the correlations between the facts and the circumstances related to the case, in order to reach the establishment of those facts and circumstances which contributed „directly or indirectly, by means of others or by no other persons means to the occurrence of the injury whose compensation is required. The research is concluded with the determination by the Judge, based on evidence, of the main and secondary, internal and external, competing or associated cases, as well as of the conditions that ensured or facilitated the action of the cases"[34].

Thus, the theory of indivisible unity between the cause and the conditions supposes the analysis of all the factors involved in the occurrence of the wrongful act and the occurrence of the injury; the final role in establishing the causation relation between these two constitutive elements of the tort liability is the Judge's, as also considered in the specialized literature, who, based on the evidence and the concrete case will determine which of the causes contributed to the occurrence of the injury whose compensation is required.

The Civil Code regulated certain circumstances to remove the causation relation between the wrongful act and the injury; in case it is proven the existence of a foreign cause which contributed in the committing of the wrongful act, the tortfeasor shall not be obliged to be liable based on the tort liability. These facts which can exclude the existence of the causation relation between the wrongful act and the injury are: force majeure[35], the fortuitous event[36], the deed of the victim and the fact of a third party[37]. In case one of intervention of one these causes which have the nature of causes excluding the causation relation, one reaches the case of inexistence of the causation relation and

[34] C. Stătescu, C. Bîrsan, *op. cit.,* p. 193.

[35] Art. 1351 para. (2) from the Civil Code defines as novelty in the civil legislation, the force majeure as being "*any external, unpredictable, absolutely invincible and unavoidable event"*.

[36] Art. 1351 para. (3) defines the fortuitous event as being "*an event that can not be predicted nor prevented by that who would be spouse to be liable if the event had not occurred"*.

[37] As per art. 1352 Civil Code: „*the victim act and the third person act removes the liability even if they do not have the major force characteristics, and only the fortuitous event characteristics, but only the cases where, by law or agreement of the parties, the fortuitous event exempts from liability"*.

implicitly the inexistence of the tort liability as a result of lack of a constitutive element.

2.4. Guilt of the Tortfeasor

Characteristic to the tort is, as shown in the art. 1357-1358 of the Civil Code[38] is the principle of the liability based on the culpability of the torfeasor. As regards the application of this principle, it is necessary to mention that the culpability is required as an essential condition in case of tort liability for the own act.

In the specialized literature, the guilt was defined as that mental attitude of the tortfeasor to the relative act and in regard of the consequences of this act[39]. As regards the provisions of the Romanian Civil Code and of the Criminal Code, the guilt is of two types: the intention, which may be direct (when the tortfeasor foresees the result of the act and pursues its occurrence by committing that act) or indirect (when the tortfeasor foresees the result of his/her act and, event if not pursued, he/she accepts the possibility of its occurrence) and the fault, which may take the form of imprudence (when the tortfeasor foresees the results of his/her act yet although not accepted, unreasonably considers it shall not occur) or the form of negligence (when the tortfeasor does not foresees the result of his/her fact, although he/she should /could have foreseen it).

In civil law, the intention is known under the name of deceit, the direct intention representing the direct deceit and the indirect intention representing the indirect deceit[40]. Unlike the criminal law, where the form of guilt with which the deed provided by the criminal law is committed is especially important under the aspect of establishment in the category of offences, in the civil law, the form of guilt does not have a practice interest since the provisions of the Civil Code establish that „*the tortfeasor is liable for the slightest breach"*. Thus, the tortfeasor shall be liable for the injury and shall be obliged to pay compensation whether or not he/she committed the act by intention or by negligence.

[38] As per the provisions of the above-mentioned articles: art. 1357: *„(1) A person who causes to another person an injury by a wrongful act committed with guilt, is obliged to compensate it. (2) The author of the injury is liable for the easiest fault*". Art. 1358: „*In assessing the guilt, we will take into account the circumstances in which the damage was caused, different from the tortfeasor, and, if appropriate, the fact that the damage was caused by a professional in a business operation*".

[39] For further details, see I.F. Popa, S.I. Vidu, *op. cit.,* pp. 448-449.

[40] *Ibidem,* p. 449.

In the civil law, the practical interest is given by the proof of the tortfeasor's guilt, and the evidence of guilt may raise issues depending on its form. In the case of intention, the evidence is easy to demonstrate, as it does not raise any issues, but, in case of fault, the proof of guilt may appear as difficult. In order to clarify the existing issues according to the provisions of the Civil Code from 1864, the Civil Code in force established a criteria to assess the fault as a form of guilt in case of tort liability[41], by adopting a solution according to which, when assessing the fault one takes into account the objective criterion, considering the „*circumstances in which the injury occurred"*, so that shall be taken into consideration, as also mentioned in the specialized literature, only the concrete circumstances representing the external circumstances, the tortfeasor being in fault only in the case it is demonstrated he/she did not have the prudence and the diligence that would have been shown by a person found in the same concrete circumstances[42].

Thus, as regards the tort liability, the form of guilt by which the tortfeasor commits the wrongful act is important not as regards the engagement of the liability, rather as regards the establishment of guilt, according to the above-mentioned considerations.

3. CONCLUSIONS

After generally reviewing the general components of the tort liability, we can conclude its special importance as institution of the Romanian civil law. With great importance both theoretical and practical, the tort liability reached the stage in which it is currently regulated as a result of the contributions of the civil law authors, as well as of the jurisprudence delivered by the Romanian Courts. It is true at the same time that the tort liability generated, under the rule of the previous Civil Code, and it continues to generate up to the present extensive debates, for the delight of the civil law experts.

As far as we are concerned, given we found ourselves at the beginning of unravelling the civil law mysteries, conclude in establishing the importance of this institution, for which reasons we focused our attention to analysing the above-mentioned conditions. It is obvious that

[41] Art. 1358 Civil Code: „*In assessing the guilt, we will take into account the circumstances in which the damage was caused, different from the tortfeasor, and, if appropriate, the fact that the damage was caused by a professional in a business operation"*.

[42] For further details, see I.F. Popa, S.I. Vidu, *op. cit.,* p. 453.

the tort liability should be regarded, in the regulation of the actual Civil Code, also comparatively to the liability for the faulty products. This special form of civil liability was treated as a result of the doctoral research undertaken by us, and in the future we shall come up with an article under the form of a comparative study between the liability forms described.

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THE REGULATIONS ON INSOLVENCY PROCEEDINGS IN THE EUROPEAN UNION'S LEGAL SYSTEM

Florin LUDUŞAN *

ABSTRACT

Council Regulation (EC) No. 1346/2000 of May 29, 2000 on insolvency proceedings was based on articles 61 (c) and 67 (1) of the Treaty Establishing the European Community (in its form following the Treaty of Amsterdam). The Preambles states the purpose envisaged at the time of the issuance of this law. Thus, only a Council Regulation can be an appropriate tool for establishing rules that apply to cross-border insolvency set at Community level.

There have been several projects and proposals before the enactment of this Regulation. The Regulation is not interested in the meaning of the concept of insolvency within the national legal systems of the Member States, but the establishment of conflict rules regarding insolvency.

The Regulation aims to ensure a minimum level of harmonization in the field of private international law of the Member States relating to international insolvency. Such harmonization is necessary due to regulatory differences in insolvency law leading to distortions of international investment. One major difference between the rules of conflict law of the Member States may also influence the development of the internal market.

KEYWORDS: *insolvency, cross-border insolvency, Community law, main insolvency proceedings, secondary insolvency proceedings*

1. History and Purpose.

The Council Regulation (EC) No. 1346/2000 on insolvency proceedings implements article 81 TFUE[1], establishing judicial

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1 (1) The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judicial and extrajudicial decisions. Such cooperation may include the adoption of measures for the approximation of the laws, Regulations and administrative provisions of the Member

cooperation in civil matters between Member States of the European Union to promote the proper functioning of the internal market of the European Union.

The idea of a Community Act establishing common rules applicable to the Member States appeared as early as the Treaty of Rome of March 25, 1957[2], especially as a possibility for the Member States of the European Economic Community to organize insolvency proceedings between them. The Regulation[3] was passed on May 29, 2000 and

States. (See *Tratatele Uniunii europene* [*The Treatises of the European Union*,], Universul Juridic Publishing House, Bucharest, 2013, page 78;)

2 The Treaty establishing the European Economic Community of 1957 (1958) constitutes a "community lex generalis", meaning a document whose provisions may be used in other areas in the absence of specific Regulations by which Member States have set the following objectives: i) creation of a common market for industrial and agricultural products; ii) promotion of a harmonious and balanced development of economic activities throughout the Community; iii) ensure continued and balanced economic expansion; iv) ensure increased economic stability; v) increase the standard of living and quality of life; vi) creation of new relations of solidarity between Member States. To achieve these goals the Community had to undertake the following activities article 3(i) the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect; ii) the establishment of common customs tariffs and a common commercial policy towards third countries; iii) the elimination, as between Member States, of the obstacles to the free movement of persons, services and capital; iv) passing a common agricultural policy; v) passing a common transport policy; vi) establishment of a joint policy in the field of commercial competition; vii) harmonization of the national legislation of the Member States of the Community to the extent necessary for the functioning of the common market; viii) the creation of a European Social Fund in order to improve the possibilities of employment for workers in the Community; ix) the establishment of a European Investment Bank; x) the association of the Community with other states to ensure trade and economic development.

3 The Regulation is the main source of Community law. Is expresses, in particular, the legislative power of the Communities. Article 249 of the European Economic Community Treaty gives its legal effects a complete and unambiguous definition, which gives it a nature and efficacy which are absolutely comparable to the law in national systems. The Regulation, as the laws, has general influence. It contains general and impersonal provisions, acting through abstraction. Its mandatory nature, another feature of the Regulation, makes it different from recommendations and opinions. The Regulation, being mandatory in all its provisions, prohibits any incomplete application. Through this Regulation, the Community authority has full regulatory power. (See Augustin Fuerea, *Drept comunitar al afacerilor,* [*Community Business Law*], Second Edition, revised and updated, "Universul Juridic" Publishing House, Bucharest, 2006, pages 25-26; Gyula Fabian, *Drept instituţional comunitar,* [*Community Institutional Law*], Second Edition, "Sfera Juridică" Publishing House,

entered into force as of May 31, 2002. This Regulation is currently the main source of European Union law on insolvency.

The works that led to the drafting of this Regulation are the result of many years of perseverance, efforts that initially seemed to be in vain, until a favorable climate for this type of Regulation emerged. The initial document, the *Draft of the European Convention on Insolvency Proceedings*, was ratified by 14 Member States by May 23, 1996, but did not enter into force because of opposition to ratification expressed by Great Britain. The EU Council eventually decided to take control of this problem by passing this Regulation, which took over the text of the *Convention*.[4]

The purpose of regulating the insolvency proceeding in Community law is represented by globalization of the open proceeding to a single debtor pursued by interested creditors from several Member States of the European Union, for the impartial notification of all receivables which, in accordance with the principle of proportionality, do not exclude the application of national law governing the proceeding.[5]

2. Regulatory Areas. The Scope of the Regulation.

The crucial regulatory areas on which the Regulation insists are[6]: i) jurisdiction in insolvency proceedings with foreign element; ii) recognition and enforcement of decisions given in other Member States; iii) duties of the liquidator; iv) conflict of laws. The scope of the Regulation is established by article 1, paragraph (1) of the Regulation, which provides that "this Regulation shall apply to collective insolvency proceedings, arising in the context of the debtor's insolvency that entails the partial or total divestment of the debtor and the appointment of a liquidator."

Cluj-Napoca, 2006, pages 123-124; Paul Craig, Grainne de Burca, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină,* [*EU Law. Texts, Cases and Materials*], Fourth Edition, "Hamangiu" Publishing House Bucharest, 2009;)

4 Luiza Cristina Gavrilescu, *Falimentul în relaţiile comerciale internaţionale,* [*Bankruptcy in International Trade Relations*], "Hamangiu" Publishing House,, 2013, page 32;

5 Elena Tănăsică, *Reorganizarea judiciară, o şansă acordată debitorului aflat în procedura generală de insolvenţă,* [*Judicial Reorganization - A Chance Given to the Debtor Undergoing General Insolvency Proceedings*], "Hamangiu" Publishing House, Bucharest, 2008, pages 344-345;

6 Gheorghe Piperea, *Insolvenţa: Legea, regulile, realitatea,* [*Insolvency: Law, Norms, Reality*], "Wolters Kluwe"r Publishing House, Bucharest, 2008, pages 781-782;

The legal doctrine[7] held that in order to ensure that the application of EC Regulation no. 1346/2000 on insolvency proceedings is incidental, it is necessary that the following four conditions are met:

a) Insolvency proceedings must be collective in that the Regulation does not apply if the proceedings were initiated by a single creditor to satisfy his own receivable, or if that creditor carries out several receivables on the same debtor. Thus, there must be at least two creditors involved.

b) The procedure shall be triggered based on the idea of insolvency of the debtor and not for other reasons, such as the idea of general interest existent in English law. Since the text of the Regulation provides no explicit definition of insolvency, it will be governed by the applicable national law, i.e. the law of the State where the procedure is initiated[8], because there can be no further analysis of the state of insolvency than that which is made by the law of the State where the insolvency proceedings were opened.

c) The proceedings must involve partial or total divestment of the debtor. This means that the Regulation will be applied both in case of a judicial reorganization where the debtor was not entirely deprived of his control over his assets, as well as in case of bankruptcy, where the powers of administration were transferred to a liquidator. The territorial reorganization procedure may be subject to conversion into liquidation proceedings, should the liquidator in the main proceedings request it.[9]

7 Ioan Morariu, *Reorganizarea judiciară în cadrul procedurii insolvenței*, [*Judicial Reorganization in Insolvency Proceedings*], Doctoral Thesis presented at the Titu Maiorescu University in Bucharest, 2012, pages 194-195;

8 Article 5 Point 29 of Law no 85/2014 provides that: "insolvency is the state of the debtor's assets that is characterized by scarcity of financial funds available for the payment of certain, liquid and exigible debts, as follows: a) insolvency of the debtor is presumed when he, 60 days the due date, has not paid his debt to the creditor; the presumption is relative; b) insolvency is imminent where it is established that the debtor would not be able to pay outstanding debt on the due date, with the funds available to him on the due date". For a comparative analysis, see Law 85/2006, specifically Article 1, Point 1, in Ion Turcu's publication, *Legea procedurii insolvenţei. Comentariu pe articole,* [*Law on Insolvency Proceeding. Comments on Articles*], "C.H. Beck" Publishing House, Bucharest, 2007, page 55;

9 According to article 37 of the Regulation, "The liquidator in the main proceeding may request that the proceedings listed in Annex A, previously opened in another Member State, be converted into liquidation proceedings if this proves to be in the interests of the creditors in the main proceeding."

d) The proceedings must require the appointment of a liquidator. The liquidator for the purposes of the Regulation, means an entity having both administration and liquidation duties, covering the semantic-legal terminology of judicial administrator and liquidator in Romanian law. According to article 2 letter b) of the EC Regulation No. 1346/2000, liquidator is any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his business.

3. The Recitals of the Regulation.

The ample Preamble begins with the recitals explaining the reasons which led to the passing of the Regulation on the proposal of the Federal Republic of Germany and Finland. The proper functioning of the internal market requires that cross-border bankruptcy proceedings function efficiently and effectively and the passing of this Regulation is necessary to achieve this objective which falls within the field of civil judicial cooperation in the sense of article 64 of the Treaty establishing the European Community. Business activities are increasingly producing cross-border effects and are therefore increasingly subject to the rules of Community law. The bankruptcy of these undertakings also affects the proper functioning of the internal market and therefore a legislative measure is required to regulate the coordination of measures taken on the property of a debtor in bankruptcy. To ensure proper functioning of the internal market, it is necessary that the parties should not be tempted to move assets or procedures from one state to another in order to improve their legal position (forum shopping). Since these objectives cannot be achieved in a satisfactory manner at national level, action is justified at Community level.

According to the principle of proportionality, the Regulation shall be limited to provisions concerning jurisdiction of opening bankruptcy proceedings and making decisions directly concerning this proceeding, including the recognition of these decisions and the applicable law. It is necessary that these rules are embodied in a binding Community document that is directly applicable to all Member States.

The Regulation will be applicable to bankruptcy proceedings, whether the debtor is a natural or legal entity, commercial or noncommercial. Bankruptcy proceedings are listed in Annex A to the Regulation. Insolvency proceedings concerning insurance companies, credit institutions, securities companies and collective investment undertakings are excluded from the scope of this Regulation.

Insolvency proceedings do not necessarily involve the intervention of a judicial authority. Thus, the expression "jurisdiction" in the text of the Regulation should be broadly understood as a person or body empowered by national law to open insolvency proceeding. In order for the Regulation to apply, the proceedings should not only have to comply with its provisions, but they should also be officially recognized and legally effective in the Member State in which the insolvency proceedings are opened and, at the same time, these should be collective insolvency proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator.

The Regulation acknowledges that because of the important differences between the rights of national objectives, it is not practical to bring a sole insolvency proceeding for the entire Community. The application, without exception, of the law of the State where the proceedings were opened, would frequently lead to difficulties, especially as related to the very different guarantees found in the Community States. Moreover, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different.

The Regulation will have to take into consideration the two aspects, on the one hand, providing for special rules on applicable law for certain particularly significant rights and legal situations (e.g. rights in rem and contracts of employment) and authorizing, on the other hand, other secondary national proceedings only on the assets in the State where these proceedings have been opened, besides a main bankruptcy proceedings, with general effects. The main bankruptcy proceedings opened in the Member State where the debtor has the center of his main interests have universal scope and aim at encompassing all the debtor's assets. The secondary proceedings may be opened in the Member State where the debtor has an undertaking, and the effects of the secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings ensure the necessary activity within the Community.[10]

10 See Ion Turcu, *Tratat de insolvenţă,* [*Treatise on Insolvency*], "C.H. Beck" Publishing House, Bucharest, 2006, page 628-629; Ion Turcu, *Tratat teoretic şi practic de drept comercial,* [*Theoretical and Practical Treatise on Commercial Law*], Volume II, "C.H. Beck" Publishing House, Bucharest, 2008, pages 308-309; Ion Turcu, *Falimentul – noua procedură,* [*Bankruptcy - the New Procedure*], "Lumina Lex" Publishing House, Bucharest, 2003,pages 464-465;

4. International Jurisdiction. Subject-matter Jurisdiction of European Courts.

Article 3, paragraph 1 of the Regulation provides us with the relevant criteria for determining the place where to open the main insolvency, stating that the courts of the Member State within the territory of which the center of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal entity, the place of the registered office shall be presumed to be the center of its main interests in the absence of proof to the contrary. The center of the main interests corresponds with the place where the debtor manages his businesses constantly.[11] This place is the most important for the debtor, and therefore the main proceedings correspond to the place of the center of main interests. Third parties are able to ascertain the debtor's center of main interests. Thus, according to paragraph 13 of the Preambles of the Regulation, "the center of main interests should correspond to the place where the debtor conducts his interests on a regular basis and, therefore, he may be verified by third parties."

Given the fact that the debtor is free to choose the place where he will carry out business activities falling within the concept of managing his own interests, being able to change both the registered office and the business activity, the main problem encountered by the Courts was the localization of the center of main interests.

The subject-matter jurisdiction of European Courts shall be determined as provided by article 4 of the Regulation, in accordance with the law of the Member State within the territory of which the insolvency proceedings are opened. According to article 4, paragraph (1) of the Regulation, the law applicable to insolvency proceedings and its effects shall be that of the Member State within the territory of which such proceedings are opened. Simultaneously, according to article 4, paragraph 2 of the same legal act, the law of the Member State for the opening of proceedings shall determine the conditions for the opening, conduct and closure of the insolvency proceedings. Thus, the law of the Member State where the insolvency proceedings are opened determines

11 Laurenţiu Sorescu, *Insolvenţa bancară în dreptul comerţului internaţional,* [*Bank Insolvency in International Trade Law*], "Universul Juridic" Publishing House, Bucharest, 2010, page 386;

the conditions for the opening, conduct and closure of such proceedings.[12]

5. The main insolvency proceeding and the secondary insolvency proceeding.

The main insolvency proceeding shall be opened by the competent court in the Member State where the debtor has the center of his main interests, causes general effects and can be a procedure of complete or partial liquidation or a bankruptcy proceeding. In Romania, in its capacity of Member State, in pursuant to article 41 of Law no 85/2014, such subject-matter jurisdiction belongs to the district court and the territorial jurisdiction belongs to the district court in whose jurisdiction the debtor has had the registered/professional office at least 6 months prior to referral to the court.[13]

The conditions for the opening of insolvency proceedings, of their conduct and closure shall be determined by the law of "State of the opening of proceedings". If a main insolvency proceeding is opened, any proceeding opened later shall be secondary proceeding, since according

12 The law of the Member State for the opening shall determine in particular: (a) debtors that may be the subject of the insolvency proceedings on account of their capacity; (b) the assets that make the subject of devolving and the status applicable to the goods acquired by the debtor after the opening of the insolvency proceedings; (c) the duties of the debtor and the liquidator; (d) the conditions for compensation opposability; (e) the effects of insolvency proceedings on current contracts to which the debtor is party; (f) the effects of the insolvency proceedings on actions brought by individual creditors, with the exception of pending lawsuits; (g) the receivables which are to be recorded on the debtor's liabilities and the status of receivables arising after the opening of insolvency proceedings; (h) the rules governing the registration, verification and admission of receivables; (i) the rules governing the distribution of the money collections resulted from the selling of assets, the ranking of receivables and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through compensation; (j) the conditions for and the effects of closure of insolvency proceedings, in particular by concordat; (k) creditors' rights after the closure of insolvency proceedings; (l) who is to bear the costs and expenses incurred in the insolvency proceedings; (m) the rules relating to the voidness, annulment or unenforceability of legal acts detrimental to the assembly of creditors.

13 Article 41, paragraph 1 of Law no 85/2014 provides: "All proceedings provided for in this chapter, except for the appeal, fall within the competence of the district court or, where appropriate, the specialized district court in whose district the debtor had his registered/professional office at least 6 months prior to referral to the court. If within the court a special section for insolvency proceedings has been created, this has jurisdiction over the conduct of proceedings under this Law.

to this Regulation, opening two main insolvency proceedings is not possible.

Subsequent to opening of the main insolvency proceeding, in order to protect the interests of foreign creditors and for the better management of the debtor's assets, an application for the opening of a secondary proceedings is admissible in the Member State where the debtor has a registered office, as it is about a liquidation proceeding. The liquidation proceeding represents the insolvency proceeding in which the liquidation of the debtor's assets takes place, including the case when the procedure is closed through a concordat or other measure, which ends the state of insolvency or because of insufficient assets.

The second state is no longer allowed to examine the debtor's insolvency. The effects of the decision to open a secondary proceeding are limited to the debtor's assets located in the second Member State. According to article 28 of the Regulation, the law applicable to secondary proceeding shall be that of the Member State within the territory of which the secondary proceeding is opened.

6. Declaration of Receivables.

Chapter IV of the Regulation provides material rules relating to the rights of creditors, regulating their information and the registration of their receivables. In accordance with article 39 of the Regulation, any creditor who has his usual residence, permanent address or registered office in a Member State, other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States shall have the right to register, in writing, the applications for the admission of the receivables in the insolvency proceeding. The creditors shall be promptly informed with regard to the existence of open insolvency proceeding. The right of creditors to register their receivables for admission to the list of creditors is guaranteed by the provisions of the Regulation. The nationality of the creditor is not important, because the Regulation may not discriminate between domestic creditors and creditors from other Member States.

The competent court of the Member State or the liquidator must inform creditors immediately on the opening of insolvency proceedings. The information should be supplied through an individual notification for the registration of the receivables to be effective. The individual notice shall include time limits, the penalties laid down in regard to those time limits, the body or authority competent to register the applications for the admission of the receivables, and the other measures laid down. Such notice shall also indicate the possible obligation of the creditors with

guaranteed receivables or privileged creditors to register the application for the registration of their own receivables.[14]

Article 41 of the Regulation mentions the contents of the application for the admission of the receivable. The application of the admission of the receivable must have a specific content, provided for by the Regulation. The creditor shall send copies of the supporting documents, shall indicate the nature of the receivable, the date on which it arose and its amount, as well as whether there is a privilege, real guarantee or a reserve of the property right in respect of the receivable and an enumeration of the assets covered by the guarantee invoked. The application for the admission of the receivable shall be provided in the official language or one of the official languages of the State where the creditor is located.

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CONSIDERATIONS ON THE POLITICAL AND JURIDICAL CONCEPT OF SELF-DETERMINATION

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ABSTRACT

Many examples are given in the humanity history about how the states dominate powers use different elevating slogans in order to motivate the sacrifices needs to be done by the those human communities leaded by them, often implied in sanguinary conflicts in the name of the general wealth of the people. Many nuances were brought by the national emancipation, which undermined general concepts as raison of state or realpolitik, because it has been proved that theories as each state is a nation or all sovereign states are national too, lead without any doubts to big confusions related to understand the political realities. From the concepts contributing to this unclear understanding, some times intentional maintained, it is the self-determination. The loose way of their definition and their different tackles has given the possibility to have selective ways of implementing in practice, often leading to deep conflicts between different ethnic communities or between these and the states which belonging to. This article brings some clarifications, both regarding to the substance of the self-determination concept and juridical regulations which determine also their application domains.

KEYWORDS: *nation–state, nationalism, sovereignty, self determination, ethnic community, decolonisation, independence*.

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Conceptual outlines

Out of the frequently used concepts referring to self-determination, the term *nationalism* holds an important role, if not even a defining one. While the sovereignty concept has evolved through its translation from the leader's sovereignty to the state one, the nationalism was highlighted as a reaction against the states and empires which did not answer to the requirements of the communities form where they aroused. From this standpoint, the nationality theory has proved one of the most well-known and strongest and acknowledged also by the contemporary society, where all OAU member states have "to observe the exiting borders as result of the national independence gained".[15]

The concept of *nationalism* ought to be defined in compliance with the nowadays international society paradigm, where *sovereignty* is the cornerstone, concept which triggered and continues to generate different opinions and standpoints, not only in the international law specialists' debates, but also in those coined by the researchers who tried to analyse the nationalist movements. The first appearance of the word *nationalism* may well be remarked in the Oxford dictionary after 1844, by presuming that the term couldn't have appeared before the European "*paşoptist"* (which is a abbreviation for the society of 1848, the "paşoptişti", as they are called in Romanian, is the name given to a participant in or a supporter of the 1848 Revolution *(in Walachia and Moldavia*)* movements, and unknown until the 18th century[16].

Broadly speaking, the term of nationalism was used especially in the early European region to describe the efforts undertaken by a linguist, religious and ethnic group with a view to winning the political power, position that might help them subsequently to sort out their nation's needs. The political-historical reality highlights that especially after 1945 the *nationalism* has come to be mistaken for the *anti-colonial movements*, which corresponded only to a small degree to the paradigm of homogenous community as it does in the 19th century.

The philosophical theory according to which every state is a nation or all sovereign states are national states has contributed to a high degree in people's disorientation to comprehend the political realities. A state is a legal-political entity which holds the right to claim loyalty and respect for the national law from its citizens, while a nation is a

[15] OAU Resolution 16(1) July 1964

[16] F.H. Hinsley, *Sovereignty* , New York, Basik Books, p. 45-158

* (author's note)

community of people whose members are united through solidarity, common culture and national conscience[17]. If the everyday use of the nation-state term by philosophers or sociologists may be broadly accepted, its use by the legal specialists and in the legal texts is not recommended, because it may create confusions with effects on the citizens' rights matter. In this regard, the Romanian Constitution and the legal texts referring to the Romanian citizenship distinguish between the terms of citizenship and nationality and for a particular delimitation we use for instance the terminology of Romanian citizenship of German nationality belonging to the German minority.

There are legal-political instruments that may help us to delimit very clearly the concept of *nationalism* as a phenomenon which describes a claim of the political power by a homogenous group from the ethnical point of view and the concept of *statism* which represents also a claim of the power by a certain group, that defines itself this time mainly in terms of the existing political and/or territorial borders, not in the personal meaning of solidarity. In this regard, *the statism* would be a more adequate concept to describe the fight against colonialism, even if the references to the *nation building* – improper from the point of view of the real meaning of terms – are frequently used in the states that won their independence recently and that seeks to build a homogenous society politically, with a view to replacing or completing the already existing ethnical communities.

It is easy to demonstrate that the nationalism represents only one of the multiple instruments that help to gain the political power, and it actually represents a search for the political identity and not a reaffirmation of the cultural identity[18]. If we can asseverate that it represents a claim of the political power based on the group identity, we cannot asseverate that all nationalist movements have as main goal to gain the political or governmental power, the latter configuring the dissatisfactions expressed in a critical manner against the political power regarding those human rights discriminatory or violating acts.

The critics of such events may represent an instrument that helps to the development of the group identity. Such a phenomenon is frequently found in the case of some minorities which want to restore viable social entities, with certain inheritances, but also to outline a new

[17] H. Seton-Watson, *Nations and States*, London, Methuen, 1977, p.1.
[18] *The Vienna Convention on the Law Treaties*, Manchester, Manchester University Press, ed. 2-a, 1984, pp 185-202

identity. In this case, the *nationalist movements* hide the fact that the respective social entity does not have the invoked coherence and dynamism but the unity ideology serves rather to a restoration, from the political point of view, as new conditions for the possibility to legitimate the instituted practices for identity creation.

Referring to the self-determination, any analysis will start with the identification of its components, with the definition of its substance and of the modality in which its fate can be determined. The substance of this concept comprises the objective and subjective components that legitimise group members to think about themselves as a distinctive group. The *objective essence* of the concept presumes the identification of some common, objectively determined characteristics, such as *ethnicity, language, history* and *religion.* From this standpoint, every person belongs simultaneously to several different groups, while the relevant groups are hardly to be ranked with a view to observing the principle of self-determination.

The geopolitical analysis seldom defines clearly the borders between those groups. During the peace negotiations after the First World War not only the racial groups mixture had created problems in the effort to find acceptable solutions for all involved parries, but also the *historical rights* of the *nationalities*, which proved to be more dangerous for peace than their *natural rights*. Every nation claims its right to delimit its frontiers they had during their largest historical expansion, claims which did not take into consideration the ethnical and historical development during the past centuries. The conceptualization of the nation idea had raised collective passions for some communities, which became in the "post-pasoptist" period (namely the period after the year 1848) one of the strongest factors in stirring hatred and triggering wars. [19]

The classic example of difficulties encountered in delimiting the relevant borders between the elements which form the essence of the right to self-determination is that of Ireland and the United Kingdom. Thus, the relevant essence can be any of the followings: the both islands taken together, in spite of the ethical mixtures of English, Scottish, Welsh and Irish; each island, taken separately, regardless the fact that the Great Britain comprises English, Scottish, Welsh and Ireland is inhabited by Scottish and Irish; the two existing states or every ethnical or

[19] H. Kohn, Nationalism, Its Meaning and History (Nationalismul, sensul şi istoricul lui), Princenton, N.J.,
Nostrand, ed. rev, 1965, pp 45-46

geographical group which would include separately at least four entities: England, Scotland, Wales and Ireland, and in the Northern Ireland a new separation between the Irish Catholics and protestant Brits. Similar examples may substantiate the conclusion that the emergence of one of the self-determination political *essences* involves inevitably the negation of another smaller or larger *essence.* Akin to the minority's case, the essence can never be eliminated completely.

International regulations of the matter

Self-determination gained relevance internationally up to the point where the people taking part in the modern state formation did not create discomfort to the geopolitical and strategic interests of the Great Powers. This way of solving ethnic-based conflicts was used for the first time during the First World War only for the peoples living in the territories of the defeated empires, while at the same time being irrelevant for the territories across the ocean. Self-determination proves to be a concept with a significant political component, reason for which its judicial regulation faced a series of obstacles when trying to codify it, finding it hard to be recognised as a fundamental principle of international law.

Despite the catalysing role that self-determination had throughout time, on one hand, before the United States entered the First World War, when it represented one of the strong arguments of President Woodrow Wilson in his speech in front of the American Congress, on the other hand, during the peace negotiations, this method of regulating conflicts is not part of the constituting act of the League of Nations. The acknowledgement of self-determination can be recognised only in a few international treaties, which do not represent a judicial argument consistent enough to place the principle among the other rules of international law.

The international law evolution, as well as the practice following the end of the First World War, demonstrated that using the concept of self-determination requires the desire of a national group to separate from the state it is currently part of. As observed even during the peace negotiations, the simple desire of a national community was not enough, the decision regarding a potential secession and the formation of new states belonging at that time to the will of the Great Powers to consider or not the request of that people. Even more so, as was the case of the Aland Islands, but other cases as well, the will of the national community did not count for the Great Powers, when the argument of self-determination

appeared. This historic reality proves that the legitimacy of claiming rights to self-determination belongs not only to the national communities affected, but also to other states which could ask for a separation of the territory occupied by that communities and the state it was part of.

International law makes no distinction between subjects of international law that have the right to request the secession of national community from the state it is part of, legitimizing with the same judicial force both the people involved, as well as the states with great decisional power in the international community, registering cases in which the right to self-determination was applied selectively by the international community, ignoring this way the will of the national community.

Contemporary evolutions of the self-determination law, together with the appearance and crystallisation of some fundamental concepts regarding the subject, recognizes that accepting or refusing an expressed will by a minority group to determine its own political destiny, through a referendum or any other procedure stipulated in the national Constitution, represents an attribute of any state's sovereignty. This practice can be found in international jurisprudence, which highlights that the simple will of a minority – regarding the language, religion or any other aspect, of withdrawing from the community it is part of, implies destabilization, both of that state, as well as of the international society. Recognizing the right to secession of a minority would support the incompatible concept of the state as a territorial and political union[20] .

Self-determination does not imply the unconditioned right to political independence. The League of Nations prescribed for the protection of national minorities a wide plan for what could be called cultural self-determination, for those groups whose claims to be politically recognised were denied by the Great Powers. This approach could not satisfy the fundamental request for the theoretical concept of nation-state, which marked the end of First World War rhetoric.

As the father of this ideological construction remarked, Woodrow Wilson, in his declaration regarding the inclusion of the self-determination principle in the UN Charter '…the Contracting Powers are united in mutually guaranteeing political independence and territorial integrity, but agreed that territorial regulations, if they appear, and which could prove useful for the future, (…) according to the principle of self-determination, (…) can be requested by the wellbeing and can represent

[20] Aland Islands - *Report presented to the Council of the League by the Commission of Raporrteurs*, nation League's documents B.7.21/68/10691921), p.27

the interests of the peoples involved, can become effective if they are agreed on by those peoples (…). The Contracting Powers accept without reserves the principle that world peace is more important than any other problem of political jurisdiction or regarding guarantees'[21].

The obstacles that stood in the path of self-determination concept emancipation and its universal application in the context of the Versailles Treaty are similar to those related to the protection of minorities (limited application to defeated or new states of the post-Versailles treaties, the failure of the process of eliminating minorities by changing borders, political instability in Europe from the interwar period).

Apart from the common causes, there were also specific reasons, especially the difficulty, if not the impossibility, of identifying the criteria that a national group must respect to legitimate its aspiration to self-determination and statehood. This situation comes from the essence of the self-determination concept and the way in which this can be used.

Regarding the *essence,* this should explain which the necessary elements are for the members of the community to regard themselves as being a separate group, which are the common characteristics of that group, objectively determined, such as ethnicity, language, history or religion. At first all seem relevant and each of them alone could define a group that would strive for self-determination. Regarding this aspect there are several comments that should be made.

Firstly, it should be observed that in geopolitical analysis seldom are borders well defined. Also, it is important to acknowledge the difficulties that appear when trying to find an acceptable solution for all the parts – at the end of the First World War -, not only because of the mix of race, language and religious groups. A lot more dangerous for peace than natural rights of nationalities were and continue to be the historic rights. This is due to the subjectivity in choosing the reference point in time, since each nationality requests the borders corresponding to its largest historical spread. Many times this claim has nothing in common with ethnical and historical development of those nations across the past centuries.[22]

[21] K. Vasak și P. Alston, *The national Dimensions of Human Rights*, Paris, UNESCO și Westport, CT, Greenwood Press, 2 vol, 1982, p.63

[22] H. Kohn, *Nationalism. Its Meaning and History*, Princeton, N.J., Van Nostrand, ed rev 1965, p. 45-46

Regarding its usage, the concept of self-determination does not imply the right to political independence unconditionally[23]. Even the intention of the League of Nations concerning the protection of national minorities was that of ensuring what can be called cultural self-determination, for those groups whose political claims were stepping over the acceptability line of the Great Powers. This subjective approach could not satisfy the fundamental request for the creation of the nation state, which dominated the interwar rhetoric around 1919.

Also related to subjective interpretations, but constantly used in the international jurisprudence, we can also include the view according to which the right of nations to self-determination implies only the rights to independence in a political sense, which does not mean independence but only a political separation from the dominant nation in the same people. Starting from this interpretation, the freedom to debate the problem of political secession becomes obvious – the creation of present autonomies, interpretation in which the decision to solicit secession from the national authorities – which can be granted or not, according to the Fundamental Law of the state – must belong to the secessionist state, through plebiscite. Thus, this request does not represent a secession demand, fragmenting the state and forming smaller states, expressing only a way of manifesting the fight against any forms of national oppression.

We find this interpretation developed by the soviet leaders after 1919, which tackled the idea of self-determination in the context of a national issue, debated around the First World War and applied at the Peace Conference. It is necessary to observe that their point of view supported national self-determination selectively, only as long as it was promoting the interests of the class struggle. In this way, the secession, as main mean to obtain self-determination in the period coming right after the year 1919, was going to be promoted as a tactics to disorganize dominant nations and not with the intention of supporting the national bourgeoisie of those countries. In this way, the communist support offered to self-determination and decolonization had a tactical connotation and not at all philosophical, appreciating that the fundamental interests of the proletariat solidarity was the only reason to foster a firm and not superficial attitude regarding the national problem.

Bearing in mind all the above, it can be argued that exactly the inconsistent manner and the varied approaches acted such that self-

[23] A. Cobban, *The Nation State and National Self-Determination*, New York, Thomas Y. Crowell, ed rev 1969, p.36

determination would not win its place among the fundamental principles existing in the UN system after 1945. Not only legal experts, but also scientists agreed that regardless of the political meaning of self-determination, this could not obtain the statute of international law norm during the elaboration of the UN Charter. The self-determination chapter is mentioned more as a means of solving litigation than as a principle, in the context of developing friendly relations between nations and in correlation with the principle of *equal rights of peoples*[24].

The concept of self-determination was not mentioned in the Universal Declaration of Human Rights of 1948 either, where it could have very well fitted due to the internal aspect of this concept, respectively personal self-determination, as an individual right of the human being.

The evolution of historical events needed the conceptualization of some reference terms for the moral and political imperative of decolonisation, such as self-determination, in its international sense, of the right of peoples to decide for them. In this sense, there is a first codification in the Declaration on granting independence to countries and colonial states, adopted by the General Assembly of the UN, in the year 1960. Having as bases, among others, the need for stability, pace and respect for human rights, this document proclaims 'solemnly, the necessity to stop, rapidly and unconditionally, colonialism in all its shapes and manifestations', continuing with the affirmation that 'all peoples have the right to self-determination; due to this right, they determine freely their political status and they follow freely economic, social and cultural development'[25]. It is stipulated, also, that 'insufficient political, economic, social and educational preparation should never serve as pretence for postponing the independence'[26].

Directly connected with those mentioned above is paragraph 6 of the Preamble of the Declaration, that highlights another principle which we will always find invoked together with the self-determination term, at least in UN rhetoric: 'Any attempt regarding partial or total desegregations of national unity and territorial integrity of a state is incompatible with the objectives and principles of the UN Charter". In

[24] *UN Charter*, art. I (2), 55
[25] *G.A. Res. 1514*, 15 UN GAOR, Sup (16), UN Document A / 4684 (1961) to Preamble, paragraph 2
[26] I*bidem*, paragraph 3.

the 7th paragraph it is reiterated "the right to sovereignty of all peoples and their territorial integrity".

This first codification of the self-determination concept has raised also a series of problems such as the definition of the term of nation or the mentioning of the spectrum for the use of the right to self-determination, in the sense when it can be or not used outside the decolonisation context. Even though there were not clarified enough, these concepts found themselves also in the second resolution of the UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

This document reiterates principles like non-interference in the state's domestic affairs, observance and promotion of the human rights in compliance with the Charter and the principle of states' sovereign equality. In the matter of self-determination it is mentioned that *the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Compliant to the principle of equality of rights and of nations' self-determination, enshrined in the UN Charter, every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State, and each state has the duty to defend this right, in accordance with the Charter's provisions.*

Every state has the duty to promote the achievement of the principles of equality of rights and nations' self-determination ... in order to:

a) *To promote friendly relations and co-operation among States; and*
b) *To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;*

....and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or

impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

In it obvious that all subsequent, bi and multilateral, norms of international law were to follow the Charter's provisions and implicitly the regulations regarding the self-determination matter. Disputable was the way in which some notions directly linked to the crystallisation of the self-determination concept were interpreted.

In this regard, in the context of the decolonisation process that followed after 1945, the definition used to describe a nation was that of the non-European inhabitants from the former colonies, regardless of their language, ethnicity, religion or objective characteristics of those colonised populations, thus altering mostly the initial meaning coined for decolonisation. One can say on basis of concluding proofs that the decisive factor was the territory and not the statehood.[27] In spite of the UN declarations regarding "the need to observe strictly the national unity and the territorial integrity of a colonial territory at the moment of its access to independence"[28], there were a series of exceptions, when the division and redefinition of identities were acknowledged.

There were cases of colonial territory annexations such as Hyderabad and Sikkim by India, of Western Iran and Eastern Timor by Indonesia, as well as Hong Kong and Macao by China. It is difficult to understand why the peoples from these well defined territories did not have the right to self-determination. In these cases it was suggested to apply limited rules in exerting self-determination for the colonial *enclaves* when "the respective territory is given back to the sovereign territory from vicinity", without defining clearly which are the criteria for according the "enclave status".

International jurisprudence has kept though in principle the approach regarding the decolonisation process when "consulting those

[27] M. Pomerance, Self-*Determination in Law and Practice*, Haga, Martinus Nijhoff, 1982, pp 18-19.

[28] *G.A. Res. 34/91*, GAOR,Supl (no 46), UN Docuemnt A/34/46 (1979), p.82

who are waiting for the decolonisation is an inevitable necessity, regardless the fact that the used method is either the integration or the association or the independence (…). In this way, even if the territory integration was asked by an interested state, (…), this thing cannot be achieved without establishing the freely expressed will of the population, which is a *sine-qua-non* prerequisite of the decolonisation process.[29] The International Court of Justice has revalidated in many cases the self-determination principle without expressing explicitly its existence as an international law rule[30], recommending "prudence regarding the forms and procedures through which this right is to be put into practice. "[31]

From the above it results that the decolonisation was regarded as a fundamental framework (proximal type) and self-determination as the most important relevant principle. Expressing this idea from another standpoint we can assess that the decolonisation principle is made up to a high degree of the self-determination principle, while the self-determination was applied especially in the decolonisation process.

No matter from what prospect we analyse the issue regarding the identity definition, present in the UN new right to self-determination, we cannot remove the Wilsonian dilemmas.

Except the most obvious decolonisation cases, there were not identified or applied objective criteria regarding the preference for a certain type of claim in disfavour of another or the delimitation of a certain population which belong to a certain territory.[32]

It can be mentioned in that regard the resolution adopted in 1541 by the UN General Assembly, which establishes in the Annex "the principles that have to guide the members to decide if there is or not the obligation to transmit the information in compliance with art.73e of the Charter", namely if a territory is or not autonomous.

It is obvious that once identified the identity, the independence is considered the normal result of the self-determination result. To the same extend, one can say that it likewise clear that the independence is not a necessary result. This resolution clarifies the way how a territory, which is not autonomous, can gain "full autonomy" , according to the UN Charter, chapter IX, by behaving like autonomous state, through free

[29] *Western Sahara, Advisory Opinion*, I.C.J. Reports, 1975, pp 12-81
[30] M. Shaw, *The Western Sahara Case* , 49 Brit. Y.B., Int'l.L 119, 123 (1978)
[31] *Western Sahara, Advisory Opinion*, I.C.J. Reports, 1975, p.36
[32] *M. Pomerance, Self-Determination in Law and Practice*, Haga, Martinus Nijhoff, 1982, p. 23

association with an independent state or integration to an independent state.[33] The way of expression of any freely determined political status by a nation represents concrete modalities for implementation of the right to self-determination of that nation, the only one that has the right to pronounce in favour of independence and sovereignty, free association or integration.

Other documents with universal legal value which refer to the nations' self-determination principle are the two International Pacts adopted by the UN General Assembly in 1966, comprising regulations for the human rights matter, representing the first code with legal effects for the member states regarding the individual rights of human beings as grouped in two categories: civil and political in the first convention and economic, social and cultural in the second. In the UN system a mechanism was established to monitor the observance of the rights assumed by the states, regarding the human rights, called the Human Rights Committee (by provisions of art.40 from Covenant on civil and political rights),whose member states are to present periodical reports drawn up by experts.

Although the activity field of the Commission was represented by the individual rights, there were debates and comments regarding the issue of nations' self-determination, given some provisions from the Convention. Therefore, one of the comments of the Human Rights Committee's President says that the right to self-determination is one of "the most difficult to define, since abuse of this right may put in danger the international peace and security".[34] Neither the European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force in 1953) not the American Convention on Human Rights (entered into force in 1978) comprise the particular recognition of the self-determination right.

The only document in the human rights matter which refers to the self-determination rights the African Charter on Human and Peoples' Rights (that came into force in 1986) whose art. 19 highlights that "nothing can justify the domination of a nation over another nation" and art. 20 regulates the right to self-determination as follows:

> 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination.

[33] R.S.Clark, *Self-Determination and Free Association – Should the United Nation Terminate the Pacific Island Trust ?,* 21 Harvard International, L.J.1 (1980)
[34] UN Document CCPR/C/SR 108 (1900), p.4

> They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
> 3. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

As result of the above mentioned, it is relevant the different approach of self- determination in different documents and international treaties, while worldwide legal experts' divergent opinions carry on whether there is or not a *right* to self-determination in the usual international law, more precisely if the right to self-determination belongs to *jus cogens* or is just a peremptory norm of the international law. It is difficult to say which is the correct status of the self-determination right, because, in spite of that fact that the UN General Assemblies Resolutions are not compulsory, the impressive number of states signatory of Resolutions 1514, 2625, as well as of many others that outline the right to self-determination reveals the trend of this right acceptance in the international law context. The same thing is deduced also from the fact that a great number of states adhered to the International Conventions on Human Rights, where the right to self-determination is acknowledged.

In another train of thoughts, given the fact that the notion of peoples still represents a controversial topic in the contemporary law, it results that the means which may assure observance of the right to self-determination will remain controversial in specific situations.

The problem which can be though clarified in this confused context is if the right to self-determination is applicable outside the decolonisation sphere. Notwithstanding the already mentioned international regulations with universal or regional legal value, where it is stipulated expressly the right of peoples to self-determination, the practice has proved that this right was limited to colonial situations, to colonial peoples. No state accepted the right of *all* peoples to self-determination. On the other hand, the historical events which followed after the fall of the Iron Curtain led to the break up of multinational states like Yugoslavia, USSR or Czechoslovakia and to the emergence of new nation-states on the world map, on basis of peoples' right to self-determination.

Certainly this phenomenon knew different forms of manifestation, more peaceful (the case of Czechoslovakia secession into Czech and Slovakia) or wars (the former Yugoslavia, some states form former USSR). Recently, separatist conflicts take place in Ukraine, starting from the application of the same right to self-determination.[35]

It is obvious that the clear expressed acceptance in pertinent resolutions of the UN of the principles of national unity and territorial integrity of the state leads inevitably to the rejection of the secession right. Also, peoples' right to self-determination, as regulated in all UN documents, belongs only to the peoples under colonial pr foreign domination, which cannot be organised as a state in its legal form. The right to secession from a UN member state is not to be found as such in the instruments or practice of the Organisation, because it would lead to a contradiction of principles: in case of invoking the right to separation, with the aim at breaking up the national unity and territorial integrity of a state would involve an erroneous application of the self-determination principle, opposite to the UN Charter objectives.

It has been established that the right to self-determination implies that the existing states and their peoples have the right to independence from under the foreign domination, either in the situation they are invaded or it proved they are controlled by foreign powers. In other words, they have the right to banish the invaders and re-establish the independence. It does not mean that any national non-colonial community or minority from an existing state has automatically the right to independence or self-determination, in compliance with the international law.

Contrary to some authors' theoretical opinions, according to whom the secession right is recognised as part of the self-determination right, the international practice denied this approach, by recognising only a very limited international right to external self-determination – defined as the right freely gained from a previous colonial power – and to internal self-determination- defined as the independence of the population of an entire state as against any foreign influence or intervention.

Contrary to this limited definition of the right to self-determination, which was created first by the states, the self-determination will remain a political tool for solving some international and internal conflicts.

[35] M. Pomerance, Self-*Determination in Law and Practice,* Haga, Martinus Nijhoff, 1982, p. 68

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GRAPHOSCOPIC EXPERTISE OF HOLOGRAPHIC WILL. STEPS TOWARDS EUROPEAN ACCREDITATION

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ABSTRACT
This article focuses on the necessary steps in terms of functionality and structure for rallying the expertise of holographic will to EU requirements. The article focuses on issues to be considered and expert forensic responsibilities, especially moral.
KEYWORDS: *holographic will, expertise, handwriting, expert , research report, expert*

Forensic handwriting investigation in order to identify the author as well as to determine the authenticity of some documents and signatures is called graphoscopy. This way of forensic investigation is specific to an autonomous genre of expertise, called "graphic expertise"[36].

Besides other genres of expertise (medico-legal, psychiatric, technical, etc), the forensic expertise, under different forms, brings an important contribution to the scientific investigation of material evidence, especially by identification of persons and objects that created them.

History regarding graphoscopy

Forensic research dates since Antiquity, representing one of the oldest means of evidence admitted in the judicial process. More specifically, it begins its history in the times of Romans, because litigations regarding authenticity of certain documents have become usual fact.

The expertise of writing appears in the year 1569, when researches were carried out to determine the way in which it has been falsified the signature of King Charles IX.

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[36] L. Ionescu, Handwriting Forensic Expertise, Editura Junimea, Iași, 1973, p.7

In Romania, there are numerous methods of study of writing, materialized in writing forensic expertise.

It must be emphasized the fact that the handwriting forensic expertise had no unitary regulation. For example, in the year 1946, the graphical experts have been constituted into a body[37], the only organization of this kind in the world at that time.

After the dissolution of this body of experts, the forensic expertise of this kind is carried out in the profile laboratories of the Ministry of Justice and the Ministry of Home Affairs.

Like in the countries of the member States of the European Union, in Romania also the most used methods are graphology, the calligraphic method as well as the descriptive graphometric method.

Harmonization with the European Union

At present, the forensic research activity is carried out by specialists within the National Institute of Forensic Expertise – I.N.E.C., institution subordinated to the Ministry of Justice, as well as in the Forensic Institute within the General Inspectorate of Romanian Police.

Also, at territorial level, there are the Inter-county Laboratories of Forensic Expertise, in the subordination of I.N.E.C. and forensic services within the Police County Inspectorates. The above mentioned institutions, as well as a part of the territorial structures, are accredited according to European and international standards ISO 17025, and at present efforts are being made so the process continues.

The laboratories are equipped with modern equipment, allowing the carrying out of handwriting forensic expertise, of papillary impressions, the persons may be identified based on distinguishing marks, polygraph expertise, fire arms are identified by their bullets.

Handwriting expertise. Identification of persons by their handwriting

The handwriting, defined as communication, reproduction system, by graphic signs, of thoughts and speaking, it is an intellectual skill, a complex of conditional reflexes formed by a learning process carried out in a period of time.

The main object of the forensic expertise of handwriting is the identification of person by the handwriting, as well as the determination of authentication of that handwriting. The identification by the

[37] Recognized by Law 498/1946, repealed by Decree no. 472/1957

handwriting has as scientific ground the existence of some particular elements, present in the handwriting of each person.[38]

The scientific ground of the identification of person by his/her handwriting is constituted by its two properties : individuality and stability.

The individuality of handwriting is determined by its characteristics, meaning the force, balance and mobility of superiour nervous processes, to which may be possibile to be added other exterior factors, first of all the described concrete conditions.

The individuality is accentuated as the handwriting is used in different activities, along with its evolution, getting characteristics own for each person. Even if some graphisms are similarly written, their combination and binding is unrepeatable.

Another particularity of handwriting is its stability, by which it is understood the keeping, during the whole life, of general and formation characteristics of graphisms after they consolidated in the handwriting of a person.

This stability is a relative one, as it may be changed[39]. The modifications do not suffer notable repercussions on the possibility to identify the author. These must not be confused with the variability of handwriting, met in persons with high graphic availabilities, manifested in their capability to intentionally execute many variants of writing.

The main modifications of handwriting are: modifications occurred during the evolution of writing, which appear as the person practices in the current activity the skill of continuous writing, modifications due to the psychosomatic condition of the author, as result of affectation of normal physiologic condition (acute or chronic diseases, mental illness), modifications resulted from the guidance of the hand by another person (situation in which the dynamic stereotype of the author is not manifested but partially, sometimes being totally altered), modifications caused by drunkenness, (situation in which the movements are not so well controlled, the balance and the rate of reaction being decreased), modifications determined by sudden causes (the support on which is executed the writing, the used instrument for writing, the position of the author).

[38] A. Athanasiu, Handwriting and personality, Editura Științifică, Bucharest, 1970,p.22
[39] A. Frățilă, R. Constantin, Graphic expertise and reasoning by analogy, Ed. Tehnică, Bucharest, 2001, p. 84

In relation to the classification of the characteristisc of a handwriting, the specialty literature mentions as folows: the language specific to the author, the way of placing the text, the form of general aspect of writing, the construction particularities[40] .

The particularities of used language or the characteristics of the spiritual content of the text are elements which are not actually part of the category of identification graphic elements, being of extragraphic nature. They are still included in this category, as they serve to identify the author.

A handwriting may be characterised by a poor, limited or rich language, and the exposure style may be an usual, familiar, literary, scientific one.

In order to determine if a person is the graphic author of a writing, its comparative examination and that of the model of comparaison are carried out. The comparative examination has as purpose to determine the similarities and differences between the handwriting in dispute and that of comparaison, having two phases: the examination of general characteristics and then the individual ones.

The general characteristics of handwriting are known in the specialty literature as graphic dominances and have the following technology: characteristics of language, of configuration, of form, of movement.

These handwriting qualities determine their general aspect, which separately taken may be met in the writing of many persons.

The individual characteristics of handwriting are those particularities conditioned by the specific technical skills of a certain person and which are obviously and constantly manifested in the construction of graphic signs.

The particular elements of handwriting are reflected in the multiple forms of construction of a graphic sign, of each component element which enters its structure.

In order to carry out a comparative examination between a handwriting in dispute and a model of comparaison regarding individual characteristics, it must be studied each letter and its construction, the variety of graphic signs in relation to the placing in the word.

The letters are graphic signs in the alphabet of a language, generally corresponding to each sound, formed of different features,

[40] E. Stancu, *Treatise of forensics*, 2nd edition reviewed and added, Editura Universul Juridic, Bucharest, 2002, p. 270

which are differentiated by form and placing. The basic features in the construction of a letter placed in vertical plan are called grammes, and the horizontal features binding two grammes are called ducts.

The examination of the manner of construction of writing, also called the graphotechnique of graphic sign makes possible the avoidance of erroneous identification conclusions, determined by the casual similarities of two handwritings.

Holographic will. Request and carrying out of graphoscopic expertise

The technical research of written deeds, along with the graphic research of deeds and the investigation of fake banknotes, stamps or other values are meant to emphasize the role of forensics not only in solving criminal causes, but also in solving civil causes.

Where during judicial debates in a civil trial it is put into question the reality of the data comprised in a written deed, the court is obliged to suspend the judgment of the cause and to send the deed to prosecution bodies for investigation.

The exact definition of the notion of deed, of course as forensic deed, needs some specifications. In the field of Criminal Law, including the procedural law, the term of deed, both in its capacity of evidence and as material object of the offences of forgery in deeds - must be interpreted in a scientifically rigorous manner, according to the meaning given by criminal legislation provisions in force.

Criminal procedural law gives to the term of deed a more restrictive sense, this not meaning any manner of materialization, expression of thinking and will in a material object, but only the expression in writing, which represents the expression by graphic signs of sounds and words[41].

The direct connection between graphoscopic expertise and civil law is through deeds, which this time, as opposed to criminal law, have the basic sense, that of documents, respectively covenants, contracts, transactions, title deeds, inheritance certificates, authentic wills, holographic wills, etc.

The legal relations of private law are ensured to natural persons and legal persons by notary activity[42].

[41] I. Stoenescu, S. Zilberstein, *Civil procedural law* – General theory, Editura Didactică şi Pedagogică, 1977, p. 346

[42] I. Popa, A.A. Moise, *Notarial Law*, Edtura Universul Juridic, Bucharest , 2013, p.28

The ground of notary activity is the law on notaries public and notary activity no. 36/1995, amended and republished with subsequent alterations and completions, as well as the Enforcement Regulation of the Law on notaries public and notary activity no. 36/1995, which, beginning with the year 2013, bring important legislative novelties and amendments regarding the possibility of the notary public to order the carrying out of a graphoscopic expertise of the holographic will in certain situations stipulated by law.

Thus, according to article 106 (4) the Law on notaries public and notary activity no. 36/1995, amended and republished with subsequent alterations and completions,

"(4) the Notary public will order the carrying out of a graphoscopic expertise when:

a) the inheritors expelled from the inheritance, although summoned, do not appear;

b) the inheritors declare that they do not know the handwriting of the deceased;

c) the inheritors contest the handwriting of the deceased, bringing evidence in this respect;

d) the deceased has no legal heirs.

(5) In case in the graphoscopic expertise it is found that the handwriting does not belong to the testator, the notary public will continue the inheritance procedure."

The Civil code also makes very clear specifications. According to art.1041 – Under the absolute nullity sanction, the holographic will must be entirely written, dated and signed by the testator's hand.

The will is absolutely void if these validity conditions upon its drawing up are not met. The holographic will has multiple disadvantages as compared to the will authenticated at the notary public, but the juridical literature also mentions some advantages.

Thus, this may be drawn up where and when the testator wants, without the help of a third part, as opposed to the authentic will when the testator must appeal to a notary public services.

The holographic will is free of charge or, at least, the costs with its writing are almost inexistent. However, the holographic will considerably increases the costs of the testamentary inheritor during the inheritance debate, as there are situations when it must be carried out a graphoscopic expertise.

In case of authentic will the expertise will not be necessary anymore. The holographic will is subject to the simplest formalities, but

this will make it easier to be attacked, as opposed to the authentic will. This may be revoked immediately and without respecting formalities (even by physical destruction), but this makes it unsafe, as compared to the notary will.

The holographic will may ensure the secrecy regarding the last will orders of the testator, if it is kept in an adequate manner (the notary testament will be kept all the time in an adequate manner, in the archive of the notary public, being also registered in the notary electronic registers kept at national level).

In regard to the "advantages" indicated above such as are mentioned in the juridical literature, the holographic will has more disadvantages, just because it is subject to such simple formalities.

The testator's will may be easily influenced by suggestion or capture by the interested persons. Thus, there is the risk that the testator tests totally or partially against his/her will.

The holographic will is much easier to be attacked in court as compared to authentic will of which contestation is more difficult, as the document authenticated by the notary has public authority and beneficiates from the legal presumption of authenticity and validity.

In the case of the request of an expertise for the holographic will, the law provides that the related expertise report comprises three main parts as follows: the introductory part, a part where are described the operations carried out and the findings made, and finally are exposed the conclusions.

Also, the expertise report must contain the interpretation of the will's content, of documents and exterior circumstances, regarding the intention of the testator.

Taking into account the principle according to which the testator's intention is principally looked for in the will's content and subsidiary in the documents and exterior circumstances, it is examined by the expert the relation between the will's content and the exterior circumstances (the exterior circumstance of knowing the orthographic and grammatical rules by the testator[43], the exterior circumstance of knowing the juridical terminology and the forms of manifesting the testamentary will by the testator).

When formulating the conclusion, the expert must have an objective attitude, considering in his/her appreciations only the data established in real manner.

[43] It is taken into account the narration of the testator's correspondence

Thus, its conclusion may be certain (categorical), positive or negative, when the expert unequivocally answers to the question, having the value of "yes" or "no". If the expert draws a conclusion of this kind, it means it formed the intimate conviction that the total of examined characteristics is enough to exclude any error.

The conclusion may be probable, when there is a certain degree of incertitude, determined by the decreased volume of data emphasized by the material subject to expertise.

The conclusion may also be of impossibility, in case of insufficiency of characteristics which may be emphasized with the equipment, the working techniques and the specialty knowledge of the criminologist.

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INTERNET GOVERNANCE

Adrian Cristian MOISE *

ABSTRACT

Internet growth caused various problems for the information society which refers to technical, management or public policies aspects, thus showing that Internet needs better governance in order to be able to control them.

This research proposes to unitarily present and analyze problems related to Internet governance. Internet governance is analyzed from the point of view of fundamental principles of Internet Law, democracy, self-regulation principle and organizations involved in Internet governance.

KEYWORDS: *Internet; Governance; Internet law.*

1. Introduction

Development of Internet caused various problems for the information society such as: spam, identity theft, viruses, infringement of rights of intellectual property, domain names, infrastructure problems regarding access and interconnectivity. These problems related to technical, management or public policies aspects show that Internet needs better governance in order to be able to control them. Internet governance is an initiative to manage these problems to make the Internet safer and more useful for the future.

Internet governance refers to standards, rules, practices, processes and institutions which at international, regional and national level determine the way in which Internet works and the way in which is

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used[44]. Also, Internet governance may be defined as the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet[45].

There is a tension, even a contradiction, between the existing institutions for regulating communications and information, and the technical capabilities and processes of open internetworking. Existing institutions are organized around territorial, hierarchical nation-states. The process of internetworking, on the other hand, provides globalized and distributed interoperation amongst all the elements of an increasingly powerful and ubiquitous system of digital devices and networks[46].

2. Internet Law

Initially, Internet has not been regulated by juridical norms, namely by rules with compulsory character. Subsequently, it became a real phenomenon which influences all the society's domains.

Internet is more than means of communication. This led to the occurrence of a virtual space, where users present a specific behaviour. This virtual space (cyberspace) began to interact with the real world in domains such as: fundamental rights and freedoms, right to private life, use of personal data, etc.

Having regard to the idea of full freedom of Internet, there are partisans of it. Thus, in the year 1996, John Perry Barlow proclaimed the independence of virtual space[47], asserting that cyberspace is a free world, beyond the control of States[48].

There is also a tendency of overregulation of this virtual space. Some States intend to extend the jurisdiction also over cyberspace and thus parts of it tend to become parts of the territories of these States.

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[44] Gokturk, Beyza (2005). Master Thesis, *Importance of International Cooperation on Internet Governance*, The University of Oslo, Faculty of Law, p.9. Retrieved 27 July 2014 from https://www.duo.uio.no/handle/10852/20430.

[45] United Nations, Working Group on Internet Governance (WGIG), *Report of the Working Group on Internet Governance*, 2005, p.2. Retrieved 27 July 2014 from www.wgig.org.

[46] Mueller, Milton (2010). *„Imagining the Future of Global Internet Governance"*, in Berin Szoka, Berin, Marcus, Adam (eds.), *The Next Digital Decade: Essays on the Future of the Internet*, Washington, D.C.: TechFreedom, p.307.

[47] Perry Barlow, John (1996). *A Declaration of Independence of Cyberspace*, Retrieved 27 July 2014 from https://projects.eff.org/~barlow/Declaration-Final.html.

[48] Cimpoeru, Dan (2012). *Dreptul internetului*, Bucharest: C.H. Beck Publishing House, p.11.

Consequently, a series of new behaviour rules with compulsory character which regulate social relations regarding Internet, *the Internet Law,* appeared.

Internet Law represents the „totality of juridical rules which regulate in a specific manner the social relations which are established through Internet"[49].

3. Principles of Internet Law

As for the principled of Internet Law two approaches are known in specialty literature:

- The Principles of Internet Law drawn up by the Internet Rights & Principles Dynamic Coalition[50]-;
- The Principles of Internet Law analyzed by professor Robert Uerpmann - Wittzack in a specialty study[51] from the perspective of international law.

3.1. Principles of Internet Law drawn up by the Internet Rights and Principles Dynamic Coalition

The ten rights and principles which underlie the Internet Law have been drawn up by the Internet Rights and Principles Dynamic Coalition - IRP, which is an international open network convening individuals and organizations working to support the observance of human rights in online environment and in the entire range of domains of elaboration of policies on Internet. Internet Rights and Principles Dynamic Coalition is based on the United Nations Internet Governance Forum [52], this one being an open forum for Governments, business environment, civil society groups, convening to discuss common points of interest which are encompassed in the column „ Internet governance".

The principles of Internet Law have their origins in international standards regarding human rights and derive from the Charter of Human Rights and Principles for the Internet, which has been developed by the Internet Rights and Principles Dynamic Coalition and inspire from the Association for Progressive Communications' Internet Rights Charter and other pertinent documents.

[49] Idem, p.12.

[50] The official website of The Internet Rights and Principles Dynamic Coalition, Retrieved 27 July 2014 from http://internetrightsandprinciples.org/site/.

[51] Uerpmann-Wittzack, Robert (2010). *Principles of International Internet Law*, German Law Journal, Vol.11, No.11, p.1245-1263.

[52] United Nations Internet Governance Forum, Retrieved 28 July 2014 from http://www.intgovforum.org/cms/dynamiccoalitions/72-ibr.

The general goal of the Charter of Human Rights and Principles for the Internet is to provide a recognizable framework anchored in international human rights for upholding and advancing human rights for the online environment. Thus, taking into consideration the general goal, three main objectives are defined:[53]

- a reference point for dialogue and cooperation between different stakeholder priorities for the Internet's design, access, and use around the world;
- an authoritative document than can frame policy decisions and emerging rights-based norms for the local, national, and global dimensions of Internet governance.
- a policy-making and advocacy too for governments, businesses, and civil society groups committed to developing rights-based principles for the Internet.

The Charter of Human Rights and Principles for the Internet is based on WSIS Declaration of Principles of Geneva and Tunis Agenda for the Information Society, who recognized that information and communication technology presents opportunities which allow to natural persons, communities, peoples to fully obtain their potential in promoting their sustainable development and improvement of their lives. This Charter interprets and explains the standards of human universal rights within a new context, which is Internet. The Charter also emphasizes the fact that human rights are applied *online* and *offline*, and the standards regarding human rights as defined in international law are not negotiable.

The Charter of Human Rights and Principles for the Internet identify the principles of Internet policy which are necessary to observe the human rights in Internet era, to support the extension of Internet capability to be an environment for cultural, social, economical, political and civil development. According to international law, the States have the legal obligation to observe, protect and fulfil the human rights of their citizens. The Governments have the main obligation to observe the human rights within jurisdictions. The obligation of protection imposes to Governments to defend the citizens from the violation of human rights committed by other actors, including corporations. The States are obliged to take the necessary measures to investigate, punish and to remedy the abuses over human rights which are committed in their jurisdiction.

[53] The Charter of Human Rights and Principles for the Internet (2014). The Third Edition, May 2014, Retrieved 28 July 2014 from http://internetrightsandprinciples.org/site/.

The Universal Declaration of Human Rights requests that each individual and each body of the society promote and observe the human rights. Thus, while the main responsibilities on the grounds of the Charter remain of Governments, the Charter also provides guidance to Governments regarding the way in which they must ensure the respect of human rights by the private companies as well as guidelines for companies about the way they should behave so that human rights for the Internet are respected.

The Internet offers unprecedented opportunities for the realization of human rights and plays an increasingly important roe in our everyday lives. Within this context, it is essential that all actors, both public and private, respect and protect human rights on the Internet. Steps must also be taken to ensure that the Internet operates and evolves in ways that fulfil human rights to the greatest extent possible.

To help realise this vision of a right-based Internet environment, the 10 Rights and Principles are:[54]

1. Universality and equality

All humans are born free and equal in dignity and rights, which must be respected, protected and fulfilled in the online environment.

2. Rights and social justice

The Internet is a space for the promotion, protection and fulfilment of human rights and the advancement of social justice. Everyone has the duty to respect the human rights of all others in the online environment.

3. Accessibility

Everyone has an equal right to access and use a secure and open Internet.

4. Expression and association

Everyone has the right to seek, receive, and impart information freely on the Internet without censorship or other interference. Everyone also has the right to associate freely through and on the Internet, for social, political, cultural or other purposes.

5. Privacy and data protection

Everyone has the right to privacy online. This includes freedom from surveillance, the right to use encryption, and the right to online anonymity. Everyone also has the right to data protection, including control over personal data collection, retention, processing, disposal and disclosure.

[54] Ibidem.

6. Life, liberty and security

The rights to life, liberty, and security must be respected, protected and fulfilled. These rights must not be infringed upon, or used to infringe other rights, in the online environment.

7. Diversity

Cultural and linguistic diversity on the Internet must be promoted, and technical and policy innovation should be encouraged to facilitate plurality of expression.

8. Network equality

Everyone shall have universal and open access to the Internet's content, free from discriminatory prioritisation, filtering or traffic control on commercial, political or other grounds.

9. Standards and regulation

The Internet's architecture, communication systems, and document and data formats shall be based on open standards that ensure complete interoperability, inclusion and equal opportunity for all.

10. Governance

Human rights and social justice must form the legal and normative foundations upon which the Internet operates and is governed. This shall happen in a transparent and multilateral manner, based on principles of openness, inclusive participation and accountability.

3.2. Principles of Internet Law from the perspective of international law

The law principles represent those leading ideas of the content of all juridical norms being an essential element in jurisprudence. Although the Internet Law is a quite new domain, the problem to identify principles specific to Internet began to be approached with interest in the specialty doctrine[55].

The principles of Internet Law from the perspective of international law are presented and analyzed by Professor Robert Uerpmann - Wittzack in a specialty work. Thus, this author analyzes the principles of Internet law from the perspective of international Law, appreciating that Internet is as social phenomenon is a study component of the international law branch. These analyzed principles refer to Internet Law on the whole as law branch.

The principles of Internet Law from the perspective of international law are the following: the principle of Internet freedom; the principal of

[55] Cimpoeru, Dan (2012). *Dreptul internetului*, Bucharest: C.H. Beck Publishing House, pp.17.

privacy; the modified principle of territorial jurisdiction adapted to cyberspace; the principle of interstate cooperation; the principle of multi-stakeholder cooperation.

- **The principle of Internet freedom**

The freedom of Internet communication, part of the fundamental human rights, is at the core of Internet freedom. The principle of Internet freedom is analyzed from two points of view: freedom of Internet communication and freedom of Internet business.

1. Freedom of Internet Communication

Freedom of expression is the essential freedom of the Internet. Article 19(2) of the Covenant on Civil and Political Rights[56] guarantees this freedom on a universal level: „Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice". In Europe, a similar right is dedicated in the content of article 10 of the European Convention on Human Rights referring to the freedom of expression:

„1. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and idea without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

[56] *International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and ratified by Romania by Decree No.212 of 31 October1974, which was published in The Official Legal Gazette, Part I, No.146 of 20 November 1974, Retrieved 28 July 2014 from http://www.oportunitatiegale.ro/pdf_files/Coventia%20internationala%20drepturi%20civile%20si%20politice.pdf.*

I notice that article 19(2) of the International Covenant on Civil and Political Rights expressly refers by using the expression „through any other media of his choice", to freedom of expression, including through Internet. Although the article 10 of the European Convention of Human Rights makes no reference to this, I notice the fact that to the same extent the European Convention of Human Rights protects the freedom of expression on Internet. In a more recent case, *Times Newspaper Ltd. v. United Kingdom*[57], the European Court of Human Rights found that archives on Internet comes under the application domain of article 10 of the European Convention of Human Rights.

Article 11 from the Charter of Fundamental Rights of the European Union[58] referring to the freedom of expression and information stipulates that:

„1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information an ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected".

We notice the fact that the text of article 11 Charter of Fundamental Rights of the European Union does not expressly refer to the freedom of communication on Internet, this freedom being protected also when the expression is realised through Internet.

Unlike rules, the principles do not need a strict observance. Because of their large domain of application, they collide with other principles or interests. In this situation, the principle must be understood, to the extent it is possible, under the in law and in fact conditions.

2. Freedom of Internet Business

Internet freedom is more than freedom of expression. The Internet, as a means of communication depends on the functioning of its infrastructure. Therefore, Internet freedom should comprise the freedom

[57] European Court Of Human Rights, *Times Newspapers Ltd v. United Kingdom (nos. 1 and 2)*, Judgment of 10 March 2009, Application 3002/03 and 23676/03, para. 27, Retrieved 29 July 2014 from http://www.echr.coe.int/Pages/home.aspx?p=home.

[58] The Charter of Fundamental Rights of the European Union, Journal of the European Union, 30.03.2010, C 83/391, Retrieved 28 July 2014 from http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33501_ro.htm.

of Internet providers, at which point commercial freedoms come into play[59]. International human law hardly grants commercial freedoms.

In contrast to national law and European Union law, the international law neither guarantees the freedom to choose an occupation nor the freedom to conduct a business. Thus, articles 15 and 16 of the Charter of Fundamental Rights of the European Union provide as follows:

Article 15. Freedom to choose an occupation and right to engage in work**:**

„(1) Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

(2) Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

(3) Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union".

Article16. Freedom to conduct a business:

„The freedom to conduct a business in accordance with Union law and national laws and practices is recognised".

Nevertheless, providers of Internet services enjoy the freedom of expression based on the International Covenant on Civil and Political Rights, even if their activities are commercial and, consequently, may invoke freedom of expression against interferences regarding content.

We consider that, although the European Convention of Human Rights does not protect the *per se* business activity, the providers of Internet services are based on the provisions of article 1 of the First Additional Protocol to the European Convention of Human Rights[60]. At the same time, the same article also protects the rights of property on

[59] Uerpmann-Wittzack, Robert (2010). *Principles of International Internet Law*, German Law Journal, Vol.11, No.11, pp.1249.

[60] Article 1 from the first Additional Protocol to the European Convention of Human Rights which refers to the protection of property provides: „Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.".

Internet for the names of registered domains[61] (DNS-Domain Name System-).

Freedom of transnational Internet commerce might find a basis in World Trade Law. By prohibiting quantitative restrictions on import and export, article XI of the General Agreement on Tariffs and Trade - GATT grants free market access. Trade on Internet with hardware products enter the application domain of the General Agreement on Tariffs and Trade.

In contrast, economy on Internet does not have as object of activity the exchange of goods, such as physical products, but the service trade which is regulated by the de General Agreement on Tariffs and Trade.

- **The principle of privacy**

The principle of privacy is comprised in the international legislation on human rights. Thus article 17[62] of the International Covenant on Civil and Political Rights protects the privacy, family, home, correspondence, honour and reputation of the person.

The article 8[63] of the European Convention on Human Rights refers to the right to respect for private and family life, home and correspondence of a person.

The article 7 of the Charter of Fundamental Rights of the European Union stipulates that everyone has the right to respect for his or her private and family life, home and communications.

Taking into account the text of these articles mentioned above, it results that also the electronic mail enters the scope of the right to respect the correspondence of a person. Other information data which is transmitted or accessed through Internet care belong to the private life of a person, except for the case when this information data are destined to the access of the public. Consequently, the simple collection and storage

[61] European Court Of Human Rights, *Paeffgen GmbH v. Germany*, Judgment of 18 September 2007, Application 25379/04 et al., subThe Law 1, Retrieved 29 July 2014 from http://www.echr.coe.int/Pages/home.aspx?p=home.

[62] Article 17 from The International Covenant on Civil and Political Rights provides: „1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks".

[63] Article 8 from The European Convention on Human Rights provides: „1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

of personal data related to electronic correspondence represent an interference of a public authority in exercising the right referring to the respect of private life and secrecy of correspondence[64].

Privacy on Internet is threatened not only by public authorities, but also by private persons and firms. Private companies may store large quantities of private data pot, which could affect or compromise a person in case this data is stolen or used in an abusive manner. Moreover, a person may be affected by the publication on Internet information related to him/her. In such cases, the States have the positive obligations to protect the privacy. Thus, this obligation becomes enough clear according to article 17(2) of the International Covenant on Civil and Political Rights, which stipulates that everyone has the right to juridical protection against interferences or attacks to his/her privacy.

Although the freedom of expression may be limited in favour of the rights of other persons, especially of the right to privacy, any restriction must be proportional to the pursued goal. Therefore, I consider that State must find a fair balance between the protection of privacy, on the one hand, and the freedom of Internet, on the other hand.

- **The modified principle of territorial jurisdiction adapted to cyberspace**

The negative obligations arising of human rights norms limit public authorities in their scope of action. They create and guarantee an area of individual freedom, which is protected against State intervention. Jurisdiction, by contrast, deals with the relationship between States. Under a regime of sovereign equality, as laid down in Article 2(1) of the United Nations Charter[65], the jurisdiction of one State finds its limits in the jurisdiction of others. In consequence, the exercise of jurisdiction requires a genuine link. A State may exercise territorial jurisdiction over its State territory and personal jurisdiction over its citizens.

The principle of territorial jurisdiction is well established in public international law. However, two modifications may be distinguished in

[64] European Court Of Human Rights, *Copland v. United Kingdom*, Judgment of 3 April 2007, Application 62617/00, paras. 41-42.

[65] Article 2 point 1 from The Charter of the United Nations provides: „The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: 1. The Organization is based on the principle of the sovereign equality of all its Members"; The Charter of the United Nations was published in The Official Gazette of 26 June 1945, Retrieved 29 July 2014 from http://www.anr.gov.ro/docs/legislatie/internationala/Carta_Organizatiei_Natiunilor_Unite_ONU_.pdf.

relation to cyberspace. First, the jurisdiction of a State is exercised also over the acts and facts of a foreign person, if they produce effects within the territory of that State. Thus, I appreciate the fact that in this case the classical principle of territorial jurisdiction must be adapted to the ubiquitous nature of Internet.

Second, the jurisdiction to a State's country code top-level domains which has the significance of a cyber territory. For example, the country code *.ro* gives to that site the membership of the Romanian territory in the cyberspace.

- **The Principle of Interstate Cooperation**

As the Internet defies the national borders, it is obvious that problems created by this phenomenon cannot be solved by one State alone. For instance, Internet fraud offences are frequently committed by offenders and through Internet servers located outside the State of the victim. Prosecuting such offences in the information field requires investigations in different States, which means an effective international judicial cooperation a in the field of fight against criminality in cyberspace. An important instrument in the field of judicial cooperation at European and international level in fighting against criminality in cyberspace is the Convention of the European Union on cybercrime. Besides this important juridical instrument, at the level of the European Union are also other legislative acts (for instance, directives, regulations, recommendations) which contribute to an effective judicial cooperation in the fight against cybercrime.

- **The Principle of Multi-Stakeholder Cooperation**

Civil society and the private sector traditionally play an important role in Internet governance. Although the development of the Internet was financed by the US Government, its structures were determined by the scientific community[66].

When it became necessary to find stable structures to for the administration of the Internet Domain Name System - DNS, these tasks were neither conferred upon a State authority nor an international organization, but upon the private non-profit organization -I.C.A.N.N.[67].

[66] Cimpoeru, Dan (2012). *Dreptul internetului*, Bucharest: C.H. Beck Publishing House, p.22.

[67] *Internet Corporation for Assigned Names and Numbers* is an organization responsible for assigning Internet addresses for higher level (for example, **.**org, **.**com, **.**biz) and for domain names registers control.

Initially, I.C.A.N.N. was created under the authority of the US Department of Commerce, with the declared purpose that in time this body will become completely independent.

It is important that Internet governance is carried out through a continuous cooperation of all stakeholders in this phenomenon, whether they come from the public domain or from the private domain of social life.

4. Self-regulation of the Internet

Self Regulation of the Internet is an Internet governance system where development and enforcing of norms and regulations on mechanisms and activities on Internet are based on the market forces and the private sector[68].

After commercialization of Internet, when business conduct began to increase, it was felt the need for an Internet better controlled by punishment mechanisms referring to security systems, infringement of the rights of intellectual property and cybercrimes, known as Internet-related public policy issues.

The Internet created an alternative dimension where behaviour is more informal and uncontrolled than in real world. In offline world certain activities, such as trade and business, dissemination of information are subject to different control mechanisms through State regulations or international regulations, while in the online world the same activities are let to be self-regulated, as well as the punishment mechanisms[69].

Public policy issues are generally under the responsibility of State Governments. In the offline world, a Government may regulate a public policy issue or may be allowed to self-regulate. On the Internet, where there is no intervention from any Government body, the self-regulation punishments cannot be enough in order to prevent undesired behaviours, such as cybercrimes.

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[68] Gokturk, Beyza (2005). Master Thesis, *Importance of International Cooperation on Internet Governance*, The University of Oslo, Faculty of Law, pp.5. Retrieved 27 July 2014 from https://www.duo.uio.no/handle/10852/20430.

[69] Poullet, Yves, (1999). *How to regulate Internet: New Paradigms for Internet Governance Self-Regulation: Values and Limits*, paper presented at the International Conference *Erosion of Sovereignty in the Age of Digital Media* organized by the University of Torino (Italy) and the University of Yale (United States of America) on days 25 to 26 October 1999, pp.88-91, available on the website of the Research Centre Law and Informatics from the University of Namur (Belgium), Retrieved 31 July 2014 from http://www.crid.be/pdf/public/4656.pdf.

Enforcement of law must be supported by sanctions in order to be effective, self-regulation not being in the condition to provide this. Moreover, the fact that Internet has no clear jurisdiction, it is an important obstacle so that self-regulation is effective.

The State institutions of law as part of these jurisdcitions, such as courts having the power of a legitimate State, have punishments that could be established and imposed by these. The jurisdiction, the punishment mechanisms and the institutions imposing these punishment mechanisms are not clear in the online world as they are in the offline world.

Self-regulation on Internet has several objectives:[70]

- Enforcement of law; detection and elimination of illegal content by voluntary cooperation of provider of Internet services which include: protection of child by prevention of profit gain from distribution of infantile pornography and prevention of distribution of neo-Nazi materials, materials inciting to hatred;
- Child protection by preventing child exposure to inappropriate materials, such as materials with pornographic or violent content;
- Child protection by preventing dangerous contacts or online harassment of minor children (grooming).

Self-regulation on Internet comprises:

- Codes of conduct for providers of Internet services;
- Codes of conduct for Internet content providers[71], which include application of existent codes of conduit to press, broadcasting, video games;
- Regulation structures imposing obligations according to the legislation in force regarding the organizations in the industry.

Involvement of Governmental institutions and other bodies in encouraging and developing codes of practices and other mechanisms of self-regulation eliminate the spontaneity of self-regulation and raise the question if industrial organizations or firms have the motivation to follow self-regulation on long term, when no regulation supervision and no financial support are in force.

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[70] *Internet Self-Regulation: An Overview* is a research project achieved through the *Programme in Comparative Media Law and Policy* funded by the European Commission at the University of Oxford, Retrieved 29 July 2014 from http://www.law.uni-sofia.bg/Kat/T/IP/T/PM/DocLib/Internet%20Self-Regulation%20An%20Overview.htm.

[71] Internet Content Providers refers to websites or organizations that aim to distribute online content, such as, for example, blogs, videos, music and files.

5. Organizations involved in Internet governance

Issues related to Internet governance are managed by a series of international, intergovernmental, regional and national organizations.

5.1. Intergovernmental organizations

There is a large range of types of international and intergovernmental organizations involved in governance agreement on Internet. The members of intergovernmental organizations usually are only representatives of national Governments who have full rights in decision-making process. These organizations have procedures and rules that allow other interested groups to participate in their activities as observers.

Intergovernmental organizations involved in Internet governance are the following:

- **The United Nations and the World Summit on Information Society**

The United Nations Organization (UNO) encompasses organizations such as the International Telecommunication Union[72] -I.T.U.- whose mission is to enable the growth and sustained development of telecommunications and information networks and to facilitate universal access so that people everywhere can participate in, and benefit from, the emerging information society and global economy[73]. The International Telecommunication Union plays an important role in the development and standardization of telecommunications, as well as in problems of information security.

Also, UNO involved in the organization of the World Summit on the Information Society-WSIS, which took place in two phases: Geneva, Switzerland, 10-12 December 2003 and Tunis, Morocco, 16-18 November 2005.

Other intergovernmental organizations involved in Internet governance are: the World Trade Organization[74]-W.T.O.- and the Organisation for Economic Co-operation and Development[75] -O.E.C.D.-.

5.2. Non-governmental organizations

[72] The Official website of The International Telecommunication Union, Retrieved 30 July 2014 from http://www.itu.int/en/about/Pages/default.aspx.
[73] Retrieved 30 July 2014 from http://www.itu.int/net/about/mission.aspx.
[74] World Trade Organization, Retrieved 30 July 2014 from http://www.wto.org/.
[75] The Organization for Economic Cooperation and Development, Retrieved 30 July 2014 from http://www.oecd.org/about/.

Non-governmental organizations are involved in management and technical Internet governance. The main international non-governmental organizations involved in Internet governance are the following:

- **Internet Corporation for Assigned Names and Numbers (I.C.A.N.N.)**

I.C.A.N.N. is an international non-governmental organization which has as responsibility to allocate Internet Protocol (I.P.) address spaces, to assign domain names (generic top-level domains-gTLDs; -country code top-level domains-ccTLDs) and the management of functions of root name servers which transform domain names into an I.P. address, allowing information to circulate in the network.

I.C.A.N.N. is not a body of Internet governance in the broad sense, but only administrates important aspects of the entire framework of Internet governance. It does not have as goal the public policy issues. The issue regarding governance of I.C.A.N.N. is that its legitimacy and responsibility are questionable. I.C.A.N.N. was created without the help of an international cooperation and without the involvement of national States.

Initially, the States were not interested in issued related to Internet governance, but in time, along with the growth of Internet, they became more involved. Although I.C.A.N.N. takes care of issues relating to technical governance of Internet, this one involves in other activities, such as granting of licenses, trade marks and solving of litigations, activities which currently should be of the competence of national Governments[76]. More than this, I.C.A.N.N was created also to carry out its activity in compliance with the legislation of the United States of America, aspect which confers upon the US Government a privileged status than the other national States in terms of Internet governance. Contrary to the idea that Internet governance should be regulated at international level by equal participation of all countries in the entire world, in compliance with the legislation in force in the United States of America, I.C.A.N.N. also controls the Domain Name System-D.N.S-.

Within the sessions of Working Group on Internet Governance-WGiG- in the last years, the Governments of developing countries roughly criticized I.C.A.N.N. and suggested that I.T.U. should take on the responsibilities of I.C.A.N.N.-.

[76] Gokturk, Beyza (2005). Master Thesis, *Importance of International Cooperation on Internet Governance*, The University of Oslo, Faculty of Law, pp.20. Retrieved 27 July 2014 from https://www.duo.uio.no/handle/10852/20430.

- **Internet Engineering Task Force (I.E.T.F.)**

I.E.T.F. is a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet. The importance from the legal perspective is that I.E.T.F. is an international organization working under the coordination of Internet Society Organization (I.S.O.C.), which is a non-profit organization created in 1992 to promote the standards, the education and the policies based on which Internet works. The mission of I.S.O.C. is to promote the open development, evolution, and use of the Internet for the benefit of all people throughout the world[77].

I.E.T.F. is open to each stakeholder and may be considered more transparent than the part of management governance of Internet.

6. Democracy and Internet governance

Democracy is the most important aspect taken into account while is analyzed the legitimacy of Internet governance. A model of successful Internet governance must be legitimate, and in order to be justified it must be first of all democratic in order to be accepted as being legal by the society.

6.1. Democracy and international organizations

In a simple definition, democracy may be defined as governance exercised by the people, whether directly or through their elected representatives, being used the rule of majority. In a group of people where the rule of majority decides, it is thus believed that the best result is the decision of majority for the common good of the group. A person having the group conscience accepts the democratic result of the group he/she is part of. If we look at today world from this perspective, national States represent the most important groups, where individuals feel themselves as being members of the group. Consequently, the feeling of citizenship helps people to accept and respect democracy.

The concept of democracy at the level of international organizations is much different than the concept at the level of national States. Even if an international organization has the characteristics of transparency, equality, equal representation to be democratic, on this structure there is no group conscience, as it is the citizenship in a national State. Therefore, I notice the fact that it will not be easy, as it is the case

[77] The Official website of The Internet Society Organization, Retrieved 30 July 2014 from http://www.isoc.ro/prima-pagina/despre-noi/.

in a national State, for people to accept and respect the decisions from international organizations.

One step forward as compared to representation in a national State is the condition that national States be represented in international organizations. The countries not participating in a democratic way in Internet governance will not be able to easily accept the decisions of international organizations which create rules and laws in order to govern on Internet.

Nevertheless, the conditions that the population access Internet governance as being legitimate is the logic objective of the international organization, such as having an Internet safer and better for users in the entire world.

6.2. Democracy and digital divide

A concept closely related to democracy is the equal participation. However, equal participation from all countries in the world on a common platform has not been completely reached.

The concept of *digital divide* refers to social-economic divide between communities having access to computers and to Internet and those which do not have access[78].

Also, the term refers to divides between groups referring to their capacity to effectively use information and communication technology, because of different levels of alphabetization and technical skills, as well as to divides between groups having access to quality, useful digital content, and those who do not have access.

Digital divide may take place between countries as well as between people from the same country or community.

A clear reason for the existence of digital divide is the absence of financial resources. Few people in developing countries have financial resources to have access to new technologies, such as Internet.

Another reason related to financial problems is represented by the absence of technical expertise necessary to introduce information and communication technology in these countries. The absence of financial resources together with the absence of technical expertise determines the telecommunication infrastructure which is very important for Internet to be considered expensive for population.

[78] Gokturk, Beyza (2005). Master Thesis, *Importance of International Cooperation on Internet Governance*, The University of Oslo, Faculty of Law, pp.27. Retrieved 27 July 2014 from https://www.duo.uio.no/handle/10852/20430.

Culture and education play an important role in extension of digital divide. When development by using technology is not part of culture or education, people simply would not feel the divide of technology from their daily life.

The innovative force of Internet comes from developed countries. The languages of these countries, especially English, dominated Internet still from its beginning. Thus, I find the fact that there is an imbalance in using the language in favour of developed countries.

Censure, religious faiths and governmental control play an important role in extending the digital divide.

Information and communication technology, in general, may provide opportunities to improve basic services, such as health, education, by promoting transparency and governmental responsibilities and by stimulation of democratic governance.

7. Conclusions

Taking into account the research carried out, I find that there are two aspects referring to Internet governance: a technical and a legal aspect.

The technical aspect aims the manner in which Internet may be administered in order to continuously develop. To this effect are involved a series of international organizations: United Nations Organization, I.C.A.N.N. and I.E.T.F.

The second aspect refers to the manner in which is governed Internet from the legal point of view. This task remains in the responsibility of the Government of each national State from the entire world connecting to Internet.

Internet provides opportunities without precedent to exercise human rights and play a more important role in our everyday lives. Within this context I emphasize the fact that it is essential that all actors, both public and private, respect and protect human rights on Internet. Also, I think that there must be carried out actions to guarantee the fact that Internet works and evolves in a manner which allows to be exercised and respected the human rights.

To support the carrying out of this vision over an Internet which is based on human rights within the carried out research, the principles of Internet law elaborated by the Internet Rights and Principles Dynamic Coalition and the principles of Internet law from the perspective of international law were defined and analyzed. Following the carried out analysis I found that both categories of principles regarding Internet law have the same objective, which is the respect and promotion of human

rights in the online environment and the entire spectrum of domains for elaboration of polices on Internet.

The issue of Internet governance is an aspect of globalization and needs international cooperation and regulation and harmonization of international legislation.

Internet governance has a global dimension, characterized by multiple territorial links. Given the fact that Internet does not take into account national borders of States, it is clear that issues caused by this phenomenon cannot be solved but by a cooperation between States.

TRADE UNION LAW, A DISTINCT BRANCH OF LAW

Ioan MORARIU *

ABSTRACT

The legal reports created by the regulation of the legal norms of the social relations in the trade union field, have generally been considered and treated within the context and in connection with legal reports of the labour law, established by concluding individual contracts of employment, being considered legal relations related to legal reports of labour.

The complexity and the importance of the social relations created and in course of progress in the trade union sphere or in link with this field, including, on one hand, the intra-trade union relations, that include the relations between the members of the trade union organizations and between them and the leading organizations, on the other hand the inter-trade union relations, that oblige at this moment to an analyse of these from the perspective of their integration in an autonomous branch of law.

KEYWORDS: *Trade union, trade union law, system, legal report, law branch.*

1. ***General notions about the legal system***

Is known and fully accepted the fact that the national law system, as notion and maximum generality institution at national level, means and is formed by all the standards of law in a State, and that this system of law regulates several legal institutions.

The assembly of legal standard presents a certain unit in their assembly being linked and grouped together into a unique and unitary system, but at the same time, in an example of legal dialectic, shows certain elements of differentiation, being classified by branches of law.

In this unit of law, the legal standards are divided according to different criteria, in distinct groups called legal institutions or branches

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of law[79].

Legal institutions and branches of law are not standards groups completely separate because they are assembling in the general system of the law and therefore all legal norms appear as a single unit, and the principles that each of them reflect are coordinated and sub-ordinate to the general principles of law.

The most extensive grouping of legal standards is the *branch of law*, known as the assembly of legal standards governing the social relations within a particular field of social life, regulation which is carried out on the basis of certain specific methods and common[80] principles.

The causes that make the law to be penetrated by a unit as a whole and that between the legal standards to be an internal compliance are mainly determined by the unitary economic structure of a society determine the principles of law.

The criteria underlying the division of law in the areas of law and legal institutions are: ***subject*** to the legal ***regulation***, ***the regulation method*** used the ***common fundamental principles*** of these standards in the groups[81].

In the doctrine speciality, the fundamental criterion of division of the law branches is considered to be subject to legal regulation [82], which, without being an absolute criterion, is a determinant one for the delimitation of a branch of law, so that they can appreciate that social relationships within a domain, that are regulated by a specific group of legal standards, forms a branch of law.

The object of the juridical regulation, which is the sphere of social relations governed by legal rules, constitute an objective criterion for the formation of branches of law, but along with this criterion is used as a secondary criterion the method of regulation used, according to which will group into a distinct branch of law those standards where there is a specific way in which the State acts on social relations. Therefore, the regulation approach is the way in which the state interferes in the context of social relations.

Common law principles that govern a certain group of legal standards

[79] Gh. Bobos, *General theory of law*, Dacia Publishing House, Cluj-Napoca, 1994, page. 165.
[80] N. Popa, *General theory of law*, Bucharest University, Bucharest, 1993, page. 240-241; Gh. Bobos, *quote*, pag. 167.
[81] N. Popa, *quote* pag. 241
[82] Gh. Bobos, *quote.*, pag. 172.

also constitute a secondary criterion in order to make the distinction between branches of law and legal institutions. The branch of law is defined as a set of distinct legal standards, organic related, which regulates social relations and has the same specific and uses the same method of settlement. A branch of law represents the unity of several legal institutions linked by their object, the regulation method and their common principles. The legal institution comprises a legal standard that regulates a particular unitary group of social relationships which constitute a special category of legal reports.

The Law system evokes the *law unit and it's differentiating* through this latter understanding of division of the Law on *branches* of law and legal institutions.

2. ***Legal reports in the field of Trade Union.***

Social relations created and currently in progress within the union sphere or in connection with this area are some complex, involving on the one hand intra-union relations, that include relations between the members of trade unions and between them and the leading organization, and on the other hand, extra-union relations including the inter-union relations and relations between trade union organizations and third parties.

The legal reports created by the regulation of the legal standards of the social relations in the trade union, have generally been considered and treated within the context and in connection with legal reports of the labour law, established by concluding individual contracts of employment, being considered legal relations *related* to legal reports of labour.

The labour law is seen in the vast majority of opinions from a strict perspective, as a branch of law that concerns and includes the legal standards regulating the relations that are born between employees and employers in relation to the provision of work, being for example defined the doctrine as "*that branch of the law system of our country made up of all the legal standards governing collective and individual relations between employers and employees*[83]".

On the other hand, it was also considered that the field specific for the labour law and legal reports in connection with the conclusion of

[83] S. Ghimpu and A. Ticlea– *Labour Law*, 2nd Edition, Allbeck Publishing House, Bucharest, 2001, page 6

a contract of employment (protection and hygiene at work, organization, functioning and responsibilities of trade unions and employers, labour jurisdiction, social insurances), being considered that the labour law has as object not only the reports generated by the conclusion of a contract of employment, but from the same branch are also part the regulations of other social relationships, closely linked to the labour that they serve to their organization or derived from them.

These latter reports were accepted by the specialized law literature as being related reports or derived and incorporated as such in labour law[84], being referred to as such because they derive from the conclusion of the contract of employment or are grafted on it, serving in labour organisation and insure the conditions for conducting it.

This perspective was, moreover, doctrinally valued also under the conceptualizing aspect, for the purpose of the definition of a wider and global manner of labour law, as " *the totality of the rules applicable to individual and collective relations which arise between employers and employees working under their authority, in connection with the provision of labour on the basis of an individual contract of employment, as well as those regulations that overlap or condition the labour*[85] *relations".*

In the panoply of definitions doctrinal outlined it is found the intermediate version, which includes only some of the judiciary reports in connection with the conclusion of a contract of employment: "*that branch of the law system of the legal standards that regulate individual and collective working relations, trade union organizations and employers ' attributions, labour conflicts and the control of applying the labour* [86] *legislation*".

With particular reference to legal relations which are established in the field of trade union, was appreciated in the sense that they have towards the legal relationship of employment, as stated above, a *derivative position*, for the grounds that are grafted on the latter, which is

[84] V.I. Campianu, *Labour Law***,** Didactic and Pedagogical Publish House, Bucharest, 1967, page 18; S. Ghimpu, I.T. Stefanescu, S. Beligradeanu, Gh. Mohanu, *Labour Law. Treatise,* 1st Volum, "Scientific and Encyclopedic" Publishing House , Bucharest, 1978, page 13.

[85] L. Filip – *Labour law course*, Venus Publishing House, Iasi, 2003, page 5

[86] A. Ticlea – *Labour law. University Course*, Global Lex Publishing House, Bucharest, 2007, page 9-10.

the basis of their own[87] .

In this context, naturally and logic, the trade union law has been recognized only as a sub-branch of the labour law, and not as a standalone branch in theoretical understanding of the concept of branch of law[88].

Such a way to classify the judiciary the legal reports in the field of trade union- *as legal reports related to labour legal reports and so studied by the labour law* – could have corresponded to the configuration of our law system corresponding in the period of the totalitarian State and centralized economy of the State, when the centralized *"etatist" vision (**the theory that the primary role of the State is in the organization and management of economic and social life*) included into a unified whole both labour relations between employees and the single employer state as well as the relations related to trade union activities, organized in fact also by State or under the control of the state.

After the transition to a pluralist political system and a market economy and even more so at this time, we appreciate that the formulation of such theoretical considerations and supporting character derived and subsidiary of reports of the trade union does not have a factual or legal basis.

3. The autonomy of trade union law

Currently, the legal rules under which runs the trade union relations have evolved and outline increasingly accentuated the idea of acquiring their own particularities that gives them individuality required to establish a freestanding branch of law.

If so, how judicial was pointed out, the criteria *under which the branches of the law unitary system are structured are the object of to legal regulation*, *the method of regulation and* common principles[89], *in the current stage of regulation of trade union activity and of* associated trade union *relations,* it is possible to sustain*,* with appropriate justification and rationality*, **that we are in the presence of a trade union, as a distinctive branch of law in the Romanian unitary legal***

[87] See the note 6 from above; in the same way A. Cornescu – *Trade union Law. Monography*, Hamangiu Pub. House, Bucharest, 2010, page 171.

[88] A. Cornescu – the same; I. T. Stefanescu - *Theoretical and practical treatise on labor law,* 2nd Edition revised and enlarged, Bucharest, 2012, page 103.

[89] See the note; in the same way N. Popa, M.C.. Eremia, S. Cristea, *General Theory of Law*, All Beck Publishing House, Bucharest, 2005, page 68.

system.

Thus, it can be argued in the sense of trade union autonomy even in relation to the three criteria mentioned above, the arguments of the particularity and specificity of these elements with the value of the criterion within the trade union matter.

The object to legal regulation in the case of trade union law *is represented by the totality of social relations that are formed within the framework of the general system (general concept) in connection with the organization and conduct of trade union relations*.

These social relations do not have quasi-total dependence towards social labour relationships, arising from the conclusion of the individual labour contract, having a distinct and autonomous character toward the first ones.

Thus, at present, the organization, activity and trade union relationships are applicable *to other categories of persons* who do not have the legal status of employees, within the meaning of labour law, not having as the employers labour reports, but service reports[90], which are reports of public law, in the public force regime, *what does make no longer to be sustained the idea of a derivative legal position (accessory) of social relations of the trade union field, strictly against the labour relations of the execution of an individual contract of employment (the main).*

Moreover, lately the doctrine and jurisprudence have put the issue of application of **relations of trade union type** and the possibility of establishment in unions of other categories of persons engaged in gainful activity, other than employees and public officers or certain categories which do not carry out gainful[91] activities.

Also, after December 1989, have emerged new economic agents with private[92] capital, what make the issue of regulation of social relations in the trade union field, even for employees, to be addressed in an entirely different manner compared to the approach of the period in

[90] We refer, in this respect to the public officials, subjects to the Law 188/2000 system and public officials with special status, subject to special laws in this matter.

[91] We consider here the Romanian Orthodox Church staff; Plastic Artists; writers; artisan cooperative members; craftsmen with their own shops, military in reserve and retreat, students.

[92] see Gh. Brehoi, *Employment law in the perspective of economic and social development of Romania,* „Labour and social progress" magazine no. 3/1990, page 3-8; Gh. Brehoi, A. Popescu, *Collective labour contract and strike.* Forum Publishing House Bucharest, 1991, p. 43.

which the judiciary labour reports arising from the conclusion of individual contracts of employment were passed, in their huge majority, in the sphere of relations with Socialist state units, public and cooperative or were placed in the sphere of public law.

More specifically, once at this point, both the employment relationships as well as trade unions are located in the sphere of private law and run between subjects of private law, can no longer be a question of subsidiary or accessory between the two categories of relationships, but a relationship of connectedness between categories of distinct and autonomous relations specifically of a mediation relation of middle type purpose

The regulation method, known as the way of influencing the behaviour of subjects of law within constant social relations, is typical to the trade union, what distinguishes him- also from this point of view, of the labour law, excluding in our opinion, the analysis of these legal reports as being related legal reports to the labour legal report employment established as a result of concluding the individual labour contract.

In this respect, of the method of regulation, the legal reports of the labour law, based on concluding individual employment contracts, it is based on two main guidelines, namely the equality of the parties to the conclusion of the employment contract and the specific subordination of the employee towards the employer for the duration of the legal relation of labour, so a subsequent functional inequality.

Instead, the analysis of the method of regulation of the conduct of legal reports subjects of trade union law, it is highlighted the fact that, although these are complex legal reports, assuming inter and intra trade relations, but also relations with third entities, all these reports are founded and governed only by the idea of equality of the parties, to establish legal relations and the duration of any of them, with the exception of any subordination.

The common principles criterion, also contributes, in our opinion to the shaping and supporting the idea of autonomy of trade union law and of trade union reports.

Trade union law is governed by common principles of law standards that comprise it up specific to this branch, and what does recommends it in this respect also, thus having a stand-alone configuration in a unitary system of Romanian law.

Thus, the universality of the trade union system, representation and representativeness of the trade union, the principle of collective decision,

fair and democratic, pluralistic trade union principle, or the principle of social dialogue and ensuring social peace, are some of the most important *principle*s of union law.

These principles are specific to the trade union law or in any case without being found in its current form in labour law.

On the basis of the three criteria to which we have referred to- the object of legal regulation, the method of regulation and common principles- can be sustained, without reservations and at the refuge of any contra-arguments, that to the legal standards governing social relations in the trade union field must be recognize, their establishment in a distinct branch of law, component of the Romanian law unitary system.

In the same direction, toward the conclusion of a trade union law shaping as an autonomous branch of law, converge and O.I.M. provisions of the Convention No. 87/1948 *concerning union freedom and the protection of trade union*[93] *law*, which, even in its title clearly articulated the idea of the existence of a trade union, idea resumed by the provisions of the art. 11 of the Convention [94]. In the same train of ideas, art. 2[95], 3[96] and 7[97] of the Convention, regulates the unconditional right of any person to establish or affiliate to trade union organizations, without limitations or constraints specific to public law or formal standards of labour law.

It is true, the trade union law is a branch of the new law which has shaped its identity by improving the interest for the trade union activity, the protection of relations of the trade union field and ensure the proper

[93] Adopted by The General Conference of the international labor organization in San Francisco, at 17th June 1948.

[94] art. 11 –"*Any member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure the workers and employers the free exercise of* ***trade union law***".

[95] Art. 2- "*Workers and employers, without distinction, have the right without prior authorization, to form organizations of their choice and to join to these organizations, with the only condition to comply with the latter's statutes*".

[96] Art.3-" 1. Organizations of workers and employers shall have the right to elaborate their statutes and administrative regulations, free to choose their representatives, organize their administration and activity and to formulate the programme of action.
2. Public authorities must abstain from any intervention likely to limit this right or to block the exercise of lawful."

[97] Art.7 – " *The acquisition of legal personality by workers and employers organizations, federations and confederations IOT cannot be subject to conditions that would put into question the application of the provisions of articles 2, 3 and 4 above*".

functioning of these relations, by the importance of adopting and application of normative acts in this area and, last but not least, through the goal that he aims: that to ensure that certain categories of person in difficulty to defend their individual rights, framework and necessary tools for collective defence and organised of the rights.

Trade union law set up in a new branch of law it subsumes the problems of improve the social partnership, which is considered a priority at the European Union[98] level and confirms a requirement of the development of the legal system, marked by the emergence of new branches, their appearance being the unquestionable proof of dependence of law system of evolution of social[99] relations.

4. The scope and the content of the trade union law

In previous doctrinal views, which, we remind you, regarded the trade union law as a sub-branch of the labour law, an attempt was made to define the trade union law, but obviously from a synthetic and global perspective, with reference both to enter and inter-union reports and relations with trade unions organizations with the employers and or third entities, by way of example remembering the following variant: "*The assembly of all legal rules governing the organization and functioning of trade unions, their role within the company, particularly in relations with employers ' organizations and with public*[100]*authorities*".

We appreciate that the delineation of the trade union law as an autonomous branch of law in the sphere of purely trade union legal relations must be excluded the relations with employers and business organizations (which are the classic reports of employment law) and those with third law topics, which have the legal nature of the type of concrete relation where the trade-union organisation is engaged (civil law, administrative law, tax law, etc).

By exclusion, within the scope of the trade union and the right to trade union law reports, *intra-union relations regarding the establishment and trade union organization, the relationships between the members of the trade union, the relationships between trade union*

[98] N. Voiculescu, *European Labour Law: Guide to social partners*, Partener Publishing House, Bucharest, 2011, page 254.
[99] N. Popa, *General Theory of law*, Bucharest University, Bucharest, 1992, page 157.
[100] I. T. Ștefănescu, quote , pag 102

members and trade union governing bodies, inter-union relations, but also the relations regarding the trade unions rights to representation and representatively and those relating to the role of corporate social responsibility of the trade unions organizations (as a reflex of a necessary social solidarity and inter humane, which is spoken about in the doctrine[101] .

As such, seeking a definition of trade union law, as a distinct branch of law, we appreciate that it represents ***the whole of the legal norms governing the organization and functioning of trade unions, their role within the company, relations between members of the union and between them and the leadership of trade unions, inter-union relationships, the way from representation and trade union representativeness and the trade union social responsibility***

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[101] N. Voiculescu, *European social law, Universitary course*, Universul Juridic Publishing House, Bucharest, 2014, page 24.

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GLOBALLY ADOPTED RULES ON THE PROTECTION OF WORKERS RIGHTS

Vasile NEAGU *

ABSTRACT

In the commercial and financial globalization conditions, more consistent concerns of international organizations of universal jurisdiction to initiate indicators and standards for the protection of employees are visible globally. The aim is to determine the economic actors to organize their operational activities so as not to affect internationally recognized standards in the field of labour relations and human rights in general.

The author reviews the two most important documents that state globally the rights of employees, upon which the companies conduct on their fairness in their economic and social behavior is monitored, namely the United Nations Global Compact and the United Nations Guiding Principles on Business and Human Rights.

KEYWORDS:

In the commercial and financial globalization conditions, more consistent concerns of international organizations of universal jurisdiction to initiate indicators and standards for the protection of employees are visible globally. The aim is to determine the economic actors to organize their operational activities so as not to affect internationally recognized standards in the field of labour relations and human rights in general.

In particular there are concerns about how multinational companies succeed to realize mechanisms of self-control, so that the concern for maximizing profits does not occur by affecting the status of employees used in the countries where their subsidiaries operate.

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We intend further to go over the most important documents that state globally rights of the employees upon which is monitored the conduct of companies on their social and economic fairness behavior.

Global standards are tools for evaluating the results of the implementation of European Union standards, their importance being expressly mentioned in the documents of the European institutions.

Our approach is coming to compensate for the lack of national doctrine approaches on these important international rules which can become sources to supplement national legislation, not far from any criticism and unrevised for years.

United Nations Global Compact

On 26 July 2000 the United Nations General Secretary urged enterprises heads to join an international initiative - the Global Compact - bringing together companies, UN agencies, the world of labour and civil society around nine universal principles of human rights, labour and environmental protection standards. As of June 24, 2004, the Global Compact includes a tenth principle on the fight against corruption[102].

Global Compact is currently the main global initiative that includes thousands of participants from over 100 countries (business, civil society representatives and academia) which has the primary objective to promote the social legitimacy of business and markets. Entities adhering to the Global Compact share the conviction that business practices based on a set of universally recognized principles contribute to the emergence of more stable, fair and open global market, and of dynamic and prosperous societies.

The fundamental idea of the pact is that businesses, trade and investment are essential elements of prosperity and peace. But in many regions, companies often face serious dilemmas such as exploitation generating practices, corruption, income inequality and various other obstacles that discourage innovation and entrepreneurship.

Responsible business practices are those that promote confidence and development of "social capital" and thus contribute everywhere to the viability of the markets and development

Backed by the power of collective action, the Global Compact seeks to promote social responsibility, so that the business world can participate in finding solutions to the challenges of globalization. In

[102] http://www.unglobalcompact.org/AboutTheGC/index.html

partnership with other social actors, the private sector can help to achieve the desideratum of a global economy more sustainable and inclusive.

The Global Compact is *a voluntary initiative, with non-binding nature* aiming to promote sustainable development and social citizenship.

Businesses are asked to support and implement a total of 10 fundamental principles, principles that are drawn from international notoriety documents such as the Universal Declaration of Human Rights, the International Labour Organisation Declaration on Principles and fundamental Rights at Work, Rio Declaration on Environment and Development, the UN Convention on corruption.

The 10 principles are grouped thematically as follows[103]:

Human Rights

1. Businesses should support and respect the protection of internationally proclaimed human rights; and

2. make sure that they are not complicit in human rights abuses.

Labour

3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

4. the elimination of all forms of forced and compulsory labour;

5. the effective abolition of child labour; and

6. the elimination of discrimination in respect of employment and occupation.

*Environmen*t

7. Businesses should support a precautionary approach to environmental challenges;

8. undertake initiatives to promote greater environmental responsibility; and

9. encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

10. Businesses should work against corruption in all its forms, including extortion and bribery.

Businesses that sign the Global Compact should strive to implement the ten principles. However, whether small or large, they do not yet know exactly how to proceed. In fact, the implementation of these principles is a continuous learning process. Assertion also applies to business in Romania where the culture of socially responsible behavior is

[103] Stated at http://www.unglobalcompact.org/Languages/french/dix_principes.html

not very mature[104].

The effective implementation of the principles of the Global Compact requires to act in ways such as:

• Their integration in the strategy and business operations;

• A clear commitment from the management of the company;

• Informing personnel of the company, staff and employees for the principles to be applied by all;

• Development within the company of a favorable environment for new ideas and innovation;

• Defining measurable objectives and establishing a transparent system of communication on progress;

• Willingness and ability to learn and adapt;

• Determination to take concrete measures;

• Willingness to cooperate and dialogue with other stakeholders.

In January 2003, the Global Compact Office introduced a provision on "*Communication on Progress*" (Guidelines for communication on the progress achieved). This provision requires participating companies to communicate with stakeholders (customers, employees, unions, shareholders, the media, public authorities etc.) annually on the progress made in integrating the Global Compact principles, using their annual report, sustainability report or other public reports, their website or other media. Companies that do not have annual communication are removed from the list of participants in the Global Compact.

From the list of 10, we can see that *principles 3-6* cover issues related to *labour law* and thus directly relate to our research theme[105]. In terms of their content and their interpretation there were highlighted a number of universal ideas. Here are some of them:

Principle 3. Businesses are encouraging freedom of

[104] On the organization's site there are listed as partner business from Romania only OMV Petrom, OSF Global Services SRL, Romradiatoare S.A., SIVECO România S.A., Responsabilitate Socială SRL. They are extended with a number of 9 NGOs as well as The Institute of International Relations and Economic Cooperation.

[105] For detailed analysis of these principles, see *Les principes du travail du Pacte Mondial des Nations Unies. Guide pour les entreprises*, Bureau International du Travail, Genève, 2010 *ISBN : 978-92-2-221823-3 (print) ; 978-92-2-221824-0 (web pdf) http://www.unglobalcompact.org/docs/issues_doc/labour/the_labour_principles_a_guide_for_business_fr.pdf*

association and recognize the right to collective bargaining

Given that in Romania, due to specific economic conditions trade union movement is in obvious decline, it should be recalled that the UN global organizations and ILO emphasized the value of axiomatic truth according to which the freedom of association is a principle that profoundly affects the development and consolidation of democracy. It is a right without which a truly independent civil society cannot exist. Important representatives of civil society, trade unions and organizations, ensure to other stakeholders the space to interact freely with the governments and operate without interference. Industrial relations are a significant element of "self-adjusting", independent of the state. For all these reasons, and others, freedom of association underlies and supports the other nine principles of the Global Compact [106].

Freedom of association allows workers and employers to work together to promote not only their economic interests but also civil freedoms such as the right to life, security and integrity as well as individual and collective freedoms. This principle, closely dependent on the existence of democracy is essential to comply with all other principles and fundamental rights at work.

Principle 4. Elimination of all forms of forced or mandatory labour

According to international regulations[107], forced or compulsory labour means all work or service which is obtained from any person under the menace of any penalty and for which the person has not offered himself voluntarily. The fact that the worker receives a salary or other form of remuneration does not necessarily mean that work is not forced or compulsory. Work must be given freely and employees should be free to leave their jobs after granting a reasonable notice.

This principle, does not have an obsolete or outdated content, as it seems at first. In many places in the world, the work performed has forced or compulsory nature, and those who are providing find themselves at the limit of slavery. Most victims receive insufficient pay, sometimes not at all, and work well over the legal hours limit in and poor

[106] *Idem*, p.17.
[107] ILO Convention. no. 105/1957 on abolition of forced labour.

safety and health conditions[108]. Forced labour is a truly global problem, present including in developed countries, which mainly affects migrant workers. Under these conditions, respect of fundamental rights at work remains a simple desiderate. To such economic "behavior" many Romanian citizens have fallen prey, even in developed European countries[109].

Even if some companies operate legally and normally do not use such practices, however can be accomplices by their trade links with other companies, including subcontractors and their suppliers from countries where such behaviors occur and affect including disadvantaged groups (people with disabilities, children[110], etc.).

Principle 5. Actual abolition of child labour

Distinction should be made between child labour and youth employment. The minimum age at which young people can shut an individual contract of employment is provided in international standards and national laws of the various states (15 years for Romanian Labour Code). However, young workers should have decent working conditions to protect their health and to continue training.

However, child labour is a form of exploitation that constitutes a recognized violation of human rights and defined by international instruments (most notably being the ILO Convention no 182/1999 on forbidding the worst forms of child labour and immediate action for their elimination), that the international community and almost all governments have committed expressly to abolish.

The association of a company to child labour is likely to affect its

[108] In extreme cases the workers are deprived of food, they are not paid their wages, they are subjected to physical violence or sexual abuse, their freedom of movement is restricted, or they are even locked.

[109] Among the states "nominated" recently in the media are: Gemany (http://www.ziare.com/articole/romani+sclavi+germania), Italy (http://www.ziare.com/articole/romani+sclavi+italia), the Czech Republic (http://www.realitatea.net/romani-sclavi-in-cehia-ne-bateau-cu-picioarele-si-cu-pumnii-daca-nu-faceam-ce-ni-se-spune_1248187.html), Denmark (http://danemarca.dk/sclavie-romaneasca-pe-santierele-din-danemarca-14-romani-angajati-ai-firmei-care-construieste-noul-metrou-la-copenhaga-dezvaluie-conditiile-si-salariile-de-mizerie/), sites accessed on August 22, 2014.

[110] According to Save the Children, in the world there are 215 million working children and 115 million of them perform hazardous work. http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6192517/k.9ECD/Protecting_Children_from_Exploitation.htm, accesta 22 august 2014.

image in the community. This is true for transnational corporations using extended services and supply chains, where there may exist trading partners that exploit child labour. Therefore they must exert pressure on subcontractors, suppliers and other business partners so that they conform to standards for fighting child labour.

Enterprises need to propose action plans, to adopt codes of conduct to prevent child labour and even effectively support children and their families to help them have a normal path in society[111].

Principle 6. The elimination of discrimination in respect of employment and occupation

Discrimination can occur in various activities related to work, and relate in particular to issues such as access to jobs, in certain occupations, training and career counseling, and social security benefits. It may be related also to the terms and conditions of employment, such as recruitment, remuneration, working time and rest and paid leave, maternity protection, job security, standardization of work, performance evaluation and advancement, vocational training, safety and health at work, termination of employment.

Businesses should conduct themselves as to reduce inequalities and disadvantages that a person may face based on race, sex or age. At the same time they are called to help remove stereotypes and prejudices underlying discriminatory attitudes.

On the other hand, as correctly outlined[112] discrimination is meaningless. It causes social tension and is a potential source of interference in the company and the society itself. An enterprise that uses discriminatory practices in employment and occupation is missing a large potential benefit of talents and skills. In addition, moral suffering and resentment caused by discrimination will inevitably affect individual and collective performance in the enterprise.

[111] See, in this regard, Anne Brit Nippierd, Sandy Gros-Louis, Paul Vandenberg. *Employers and Child Labour. Guide Two: How employers can eliminate child labour*, International Labour Office,Geneva, 2007

[112] *Les principes du travail du Pacte Mondial des Nations Unies. Guide pour les entreprises,* Bureau International du Travail, Genève,2010, p.33.

Guiding principles of the United Nations on business and human rights

Guiding Principles on Business and Human Rights: implementing the reference framework "To protect, respect and remedy"[113] of the Unied Nations includes 31 principles, with comments on the meaning and scope, in order to operationalize the UN framework. They were adopted unanimously in June 2011 by the Human Rights Council of the United Nations.

The framework is based on *three pillars*. First, the obligation to protect incumbent on the State when third parties, including business, violate human rights, involving policies, rules and appropriate appeals.

Second, the corporate responsibility to *respect human rights*, in other words to prove a reasonable diligence to ensure that does not infringe the rights of others and to counter the negative effects they might have.

Third, the need for more effective measures to ensure effective access to *repairing measures* both judicial and non-judicial as well.

Each pillar is an essential component of an interdependent and dynamic system of prevention and repair measures.

Guiding Principles apply to all states and to all trading companies, transnational or others, regardless of their size, sector of activity, their location, ownership and structure.

Guiding Principles on Business and Human Rights do not create new international legal obligations, they are designed to indicate the consequences of rules and practices for states and businesses, to integrate these rules and principles in a global-scale logical and coherent model and to highlight the cases where the existing regime proves insufficient, and to explore the possibilities of its improvement.

The purpose of these principles is to obtain tangible results for individuals and corporate bodies involved, and in this way, to contribute to a "socially sustainable globalization"[114]. The phrase used is important, revealing more widely the existing concerns at international

[113] *The United Nations Guiding Principles on Business and Human Rights*, http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf

[114] Conseil des droits de l'homme, *Principes directeurs relatifs aux entreprises et aux droits de l'homme:mise en oeuvre du cadre de référence «protéger, respecter et réparer» des Nations Unies*, 21 mars 2011, p.7.

organizations level to report economic relations and activities to their social effects and to the responsibilities that the economic agents is desirable to assume in this way.

Guiding principles should be applied in a non- discriminatory manner, paying particular attention to the rights and needs, as well as difficulties belonging to groups or populations very likely to become vulnerable or marginalized, giving all the consideration to different risks men and women are exposed to.

For our research, this document of the United Nations is important because the rights of employees, as they are perceived and regulated internationally, belong to the category of fundamental human rights.

From its text results, as in the others of its kind adopted by other international organizations, the crucial role that states, in fact public authorities and institutions with responsibilities in ensuring the regulatory and organizational functional framework, so that the recommendations in the principles to be embodied in the social and economic reality. This requires, of course, consistent political will and appropriate strategies to be implemented rigorously and systematically.

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CRIMINAL LIABILITY IN COMPARATIVE LABOUR LAW

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ABSTRACT
There are a lot of similarities concerning the criminal liability in comparative criminal labor law, from Romanian law, with legislation from French, Spanish, Japanese law etc, but there are also many differences. Regulatory differences can cause, as a big necessity, the emprovement of our legislation, to give more rigour to work raports and to strengthen discipline and responsability of the social partners.
Harmonisation of the states legislations is a necessity which make good social relations, contributing to a greater extent to the protection of the rights of employees.

KEYWORDS: *responsability, code, offenses, terms, low, justice, injury*

Regulation of criminal liability in labor law

Criminal liability is governed by the Labor Code in a separate chapter , from Title XI called "Legal Liability".

However, there are also other regulatory acts governing the offences which might be committed by parties to employment relationships, otherwise:

-Law No. 76/2002 on the unemployment insurance system and employment stimulation;

-Law No. 319/2006 on health and safety at work;

-Law 62/2011 on social dialogue.

-Government Ordinance 29/1997 concerning the Aerial Code;etc.

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Regulation of criminal offences to the Labour Code, as well as to other normative acts justifies the reality of existing, in theory, of the criminal law of labor.

The peculiarities of criminal liability in labor law

Criminal liability in the above mentioned field shows some particular features which customizes with the classical criminal liability.

There are a number of specific issues related to the illicit deed, topics, content and subject matter of the report of criminal responsibility.

Finding that the act meets both the objective and subjective conditions, stipulated by the incriminating norm for the existence of the crime, represents the necessary and sufficient condition for justification of criminal legal liability.

The subjects of criminal liability in the field of work, are the State, on one hand, and the offender, on the other hand. The State is the active subject, engaged in legal constraint by applying and ensuring legal and criminal sanction, and the offender, who is called the passive subject, must bear the consequences of criminal act, meaning the application and enforcement of the sanction.

The particularity of the State, as an active subject of criminal liability, is that its action of coercion, always necessary for the disposal of criminal liability report, is not possible without the intervention of the judicial authorities, which are both the prosecution and justice organs. The only exception is the crimes which stipulates the complaint of the injured person, in which case if s/he doesn't fill the complaint within a given period of time, or does not withdraw it, the criminal conflict languishes.

The passive subject of criminal liability in the field of labor customizes itself in that it can be a person who has the status of an employee or than of an employer. It follows that in both cases, the passive subject is always qualified. The labor code and other normative acts set measures to the criminal liability of the employer, which, as a rule, is a legal person.

It provides: "the legal person, with the exception of the State and its public authorities, is responsible for criminal offences committed in achieving the goal of activity, interest or on behalf of a legal person".

Likewise, it says: "the criminal liability of legal person does not exclude criminal liability of an individual who was instrumental in committing the same acts".

Thus, the penal law settles a double punishment for the same offence, applicable to both legal person and the employee (employee, officer, etc.)

guilty of committing the same acts. The main penalty which may apply to legal entity is the fine.
However, there are also provided:
-main punishments (imprisonment, life imprisonment, fines, etc.);
-accessory penalty consisting of a prohibition in making use of certain rights or having a job that involves the State authority;
-supplementary punishments , consisting, for example, in prohibiting the right to hold the position, exercise the profession , craft or activity for which the person in question made use for committing the offence.
Additional punishments are provided in the case of individuals, including employees. The contents of the legal relationship of criminal responsibility consist of correlative rights and obligations of the parties. The State, as an active subject, has both the right to bring the criminal to book for the offence committed and to coerce him to sanction, and also the obligation to punish the perpetrator only if their guilt was proven and only within the limits provided by law.
The offender, as passive subject the criminal liability, has the obligation to answer for the crime committed and the right to respond and to be punished only within the limits of the law. The object of criminal responsibility generally is the sanction applied by the State to a person who has committed the wrongful act. It differs from other forms of legal liability through the specific conduct that is appropriate to the subject, namely that of suffering the penalty prescribed by law, i.e. the punishment.
Work offences and other crimes that may be committed in the workplace.
Considering the existence of infringements in the workplace, we look at the most frequent ones.
Embezzlement consists in acquiring, using or trafficking by a public servant in his or another's interest, money, values or other goods, for managing or administrating them. Abusive behavior is defined as the use of offensive expressions against a person in the performance of job duties and is punishable by prison.
Threat or hitting or other acts of violence perpetrated in the above conditions shall be imposed with penalty prescribed by law. The abuse in the service is the Act of civil servant who, in the performance of job duties, does not comply with the act or performs it inadequate and thereby causing damage or harm to legitimate rights or interests of a person or a legal person. The offence is punishable by imprisonment.
Negligence in service represents violation of guilt by a public official of any service charges, through its failure to comply or its faulty fulfillment

or, if by doing this, some damage or harm to legitimate rights or interests of a natural person or a legal person could happen.

Misuse of a job in sexual purposes lies in the act of public functionary, who, in order to perform, not perform, to speed up or delay the carrying out of an act in respect of his service duties or in order to do an act contrary to these charges, claims or obtains favors of a sexual nature from a person directly or indirectly interested by the effects of that act of service.

Job usurping represents the deed of the public functionary who, during the service, meets an act which does not fall within its duties, if through this one of the sequels produced.

Conflict of interest represents such a crime and is the act of the civil servant who, in the performance of job duties, has fulfilled an act or participated in making a decision by which it was obtained, directly or indirectly, a proprietary benefit for himself, for her husband/wife, for a relative or another person with whom s/he has been in the commercial reports in the last 5 years or from whom s/he received or is receiving benefits of any kind.

Violation of secrecy of correspondence is cleared by the labor code and consists in opening, evasion, destruction or retention, without the right, of some correspondence addressed to another person, as well as divulging of its contents, even when it was sent open or was opened from an error. Moreover, the interception without right, of a call or a communication made by telephone or by any electronic means of communications is punished by law.

Disclosure of State secrets by one, who knows them, due to his job duties, if that affects the interests of a legal person, shall be punished in accordance with the legal norms. The possession, without right, of a document containing some State secret information, shall also be punished, if it may affect the activity of legal persons.

Negligence in keeping the information consists both in having as consequence the destruction, tampering, loss or theft of a document containing State secret information, as well as in the negligence of another person who has jeopardize finding out such information.

Obtaining illegal funds lies in the use or presentation of false, inaccurate or incomplete documents, for receiving approvals or guarantees required for granting of financing obtained or guaranteed by public funds. Diversion of funds is governed by legal norms through "changing the money destination or resources allocated to a public authority or public institution."

Fraudulent management is defined: "To cause damage to a person, while administrating or conserving his goods, by the one who should take care of them." The rip-off public auction is the deed "to remove, by coercion or corruption, a participant at a public auction or understanding between participants in order to distort the price."

Acceptance of financial transactions, fraudulently done, consists in accepting a cash withdrawal, loading or unloading of a tool of electronic funds transfer, knowing that it is carried out through the use of a forged electronic payment instrument or used without the consent of the proprietor.

Abusive investigation: "the use of promises, threats or violence against a person pursued or prosecuted in a criminal case, by a competent criminal investigator, a prosecutor or a judge, to determine him not to give statements, misleading statements or to withdraw them".

Taking the bribe is the deed of public functionary who, directly or indirectly, for himself or for another, claims or receives money or other benefits that he should not take or accepts the promise of such an advantage, connected with the fulfillment, non-fulfillment of any legislative delay which are within his duties or connected with the performance of an act contrary to these duties.

Body injuries and manslaughter through negligence are a killing offense, being retained in the event of an accident at work, having as consequence personal injury or murder of an employee in the workplace. In this case, the employer will be responsible for ensuring safety and health at work or the culprit of the accident.

With regard to criminal liability in comparative law of labor, there are some significant issues related to it. We will take into account the Canadian, French, Spanish, and Japanese ones.

Giving evidence of the similarities, but especially the regulatory differences, we hope, in the near future, our legislation to be improved in order to give more rigour to employment relationships, to strengthen discipline and responsibility of the social partners and to contribute to a greater extent, to protect the rights of workers and all those who perform the underlying work.

Criminal liability in France

In this country, there is acknowledged the existence of a notion of criminal law of labor: the idea is justified since the French employment code impleads many culpable conduct offenses, punishing, as a rule, employers and their representatives.

Crime represents:

-the conclusion of a fixed-term contract, having as its object or effect the exercising of some professions related to normal business and Enterprise;
-the non-conclusion of a contract, or the lack of handing out a copy of the official contract of that employee;
-the recruitment of a temporary employee with the conclusion of a contract of employment, which does not mention the terms of release available or mention them inaccurate;
-user's deed to conclude a contract of making it available, having as purpose or effect the administration of a work related to normal and permanent job;
-dismissal of employees without consulting the staff or delegates of the company committee when the law provides for such consultation;
-carrying out collective dismissal without noticing it to the competent administrative authority;
- The deed of preventing the formation of company committee;
-the wage-setting discriminatory on grounds of sex;
-conducting training activities without authorization;
-minors in work, without an individual administrative permit;
-crimes of discrimination, as well as those related to the working conditions, which are contrary to human dignity;
-offences connected with the prohibition of smoking in public places;
-offences related to the entry and stay of foreigners in France;
-offences related to consumer protection
Criminal penalties are extremely severe in France, with a fine of at least 3,750 Euros. In the case of legal persons, the penalty consists of a large fine, up to a million Euros and some additional punishment.

Criminal liability in Spain
There is similarity between the regulations of this country and those in France. Only that in Spain there is not a labor code itself, but a law no. 8/1980, concerning the status of workers. Crimes are defined by a particular regulatory action - Royal Decree No. 5/2000 on the social crimes, which substantially modified the law no. 8/1980.
The crimes are qualified in three categories, as: light, serious or very serious crimes.
Light crimes include:
-lack of displaying work schedule in a visible place;
-failure of presenting, in writing, of the contract essential elements to the employee;

-failure in communicating over the decision for termination of the contract in the legal time period;
-the lack of cleanliness in the company, without bringing any threat to employees' health.

Sunt *infracţiuni grave*:
- neredactarea în scris a contractului de muncă;
- încălcarea normelor şi a limitelor legale sau contractuale referitoare la ziua de muncă, la turele de noapte, la orele suplimentare, la orele compensate, în general la timpul de muncă;
- modificarea substanţială a condiţiilor de muncă impusă unilateral de către angajator;
- asigurarea unor condiţii de muncă inferioare celor stabilite prin contract;
- nerespectarea egalităţii în drepturi a salariaţilor;
- neevaluarea riscurilor în materie de sănătate şi securitate în muncă.
Serious crimes are:
-failure in typewriting the employment contract;
- Violation of rules and legal or contractual limits on the working day, night shifts , overtime , the hours offset, generally working time ;
- Ensuring working conditions inferior to those established by contract;
- Violation of equal rights of employees;
- Untimely assessment of risks to health and safety.
- Substantial change in working conditions, unilaterally imposed by the employer;
Very serious offences are:
-non-payment of salaries or repeated delays in their payment;
-unlawful dismissal;
-the closure or termination of the business, temporarily or definitively, without the consent of work authority;
-violation of the rules relating to child labor;
-failure to comply with the rights of unions in collective work agreements;
-moral harassment at work;
-Non-compliance with the provisions regarding the minimum number of employees employed for an indefinite period.
Criminal liability in Japan
There is the Labor Code-Act No. 19/1947, which subsequently underwent certain changes.

In Japan, more offences related to employment are regulated, equality in treatment, working hours and rest periods, remuneration, protection of young people and women, control exercised by the Labor Inspectorate.

Criminal responsibility belongs to the legal representatives of the enterprise, other people guilty of breaking laws that establish various obligations borne by employers.

The punishments that may be imposed are community service work for up to six months or fined up to 500,000 yen.

Offences are:

-employment of children under the age of 15, young people under 18, and women in underground work;

-non-inclusion in the employment contract of salary, working hours and other conditions of employment of the employee;

-deed of the employer to force employees to work against their will by means of violence, intimidation, threat or other unlawful restrictions on mental or physical freedom;

-deed of the employer to treat discriminatory the workers, respect to wages, working hours or other working conditions on grounds of nationality, creed, sex, or social status;

-establish a schedule of work more than 8 hours per day and 40 hours per week;

-the provision of overtime without the written consent of the representatives of the employees or the Union;

-distribution of young people aged up to 18, and women out of legal exceptions, at night from 22-5;

-Using pregnant women or those who have recently given birth.

Criminal liability in Canada

The same as in France and Japan, offences in connection with labor relations, are governed by the Canadian Labor Code.

The difference is in a low number of offences; they concern: violation of employees' rights, failure to take measures in the field of safety and health of workers, illegal dismissal, the refusal of reintegration into work, the control of public authorities, etc.

Offences are:

-failure of respecting the employees' rights — salaries, sick leave, holidays etc.
-violation of the provisions on health and safety in the workplace that can cause death, illness or serious injury of a worker;
-failure to keep the register or complete records of wages, overtime, etc
-lack of providing the Minister or the Labor Inspectorate with the requested information, with respect to wages, working time, annual leave, or working conditions of employees;
-refusal of labor inspection;
-unlawful dismissal or threat of dismissal;
-failure to comply with the judgment of reintegration into employment;
- Lock-out statement or strike with non-compliance of the legal provisions.

Criminal liability, where necessary, falls in charge to administrators, directors, managers, officers, agents, representatives, other persons who ordered or authorized, consented or participated in committing the offences incriminated by law.

There is concern of the legislator from the above mentoned countries to incriminate as many facts and punish with sufficient harshness on those guilty of perpetrating the offences deriving from the employment relationships.

It ensures better protection to employees, a legal exercise of their rights, a pledge firm discipline at work, a greater responsibility on the part of employers.

In Romania, it is constantly improving, pursuing the adaptation and harmonization of legislation concerning criminal liability in comparative labor law, in line with the needs and social issues.

INSIGHTS IN THE APPARITION AND EVOLUTION OF THE SOURCES OF LAW ON THE ROMANIAN TERRITORY UNTIL THE MODERN PROCESS OF CODIFICATION

REZERVA

Mihail NIEMESCH *

ABSTRACT

Geto-Dacians, our ancestors, who were the northern branch of the Thracians, occupied starting with the Iron Age the Carpathian-Danubian-Pontic space. It is well known that the Geto-Dacian tribes populated a larger space than those of the current Romania. Once with the formation of the Geto-Dacian state, juridical norms emerged, some of them replacing the customs of the military democracy age. The unification of the Dacians in a big and strong state coincided with the elaboration of the ***Belagines dar*** *laws which unfortunately were not preserved.*

In the Roman province Dacia the commerce flourished and evidence in this regard is offered by the "Transylvanian triptychs".

As regards the ***early Romanian states****, the customs and the juridical norms, we specify the fact that the territories occupied by the Romanian population were organized institutionally and were governed by written and unwritten laws, all being animated by lawful and moral spirit.*

In the late Middle Ages, in the Phanariot time in Walachia and Moldavia continued the legislative work initiated by the autochthonous princes Matei Basarab in Walachia and Vasile Lupu in Moldavia. These two rulers, with many accomplishments for the benefit of the Romanian nation gave written laws of Byzantine inspiration.

KEYWORDS: *Dacia, juridical norms, custom, code of laws.*

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Geto-Dacians, our ancestors, who were the northern branch of the Thracians, occupied starting with the Iron Age the Carpathian-Danubian-Pontic space. It is very well known that the Geto-Dacian tribes populated a larger space than those of the current Romania.

The first mentions regarding this brave people date from 514 BC, from Herodotus, the Greek historian. The climax of the Geto-Dacian space was reached during Burebista, when the Geto-Dacian state lay from the wooded Carpathians to the Haemus Mountains (Balkans) and from the Middle Danube to the Black Sea, the Pontic seaside from Olbic (Bug), to Pontic Apollonia (Sozopol-Bulgaria). "Feared even by the Romans" (Strabo), Burebista interfered in the civil war of the Roman state.[115]

Once with the formation of the Geto-Dacian state, juridical norms emerged, some of them replacing the customs of the military democracy age. The unification of the Dacians in a big and strong state coincided with the elaboration of the **Belagines dar** laws which unfortunately were not preserved. As it was stipulated, "Belagines appeared thus as a creation of the Dacian state, and their name of Laws suggest that they are not a Code, but rather a collection of norms of the pre-state justice, those in connection with the traditional social values of the Dacian people, but also with the interests of the new state... although the text of the Belagines Law was not preserved, undoubtedly they existed and were applied.[116] Strabo and şi Jordanes show that the Geto-Dacian laws were adopted during Burebista, being of divine inspiration. As professors Emil Cernea and Emil Molcuţ notice, they were transmitted from generation to generation, in written form and were kept until Jordanes' time (6th century BC).[117] The divine source of laws had in those times a prevailing character in most of the civilizations, being a major foundation for the natural law, whose predecessors included also Plato[118].

[115] F. Constantiniu, *O istorie sinceră a poporului român (A Sincere History of the Romanian People)*, Univers Enciclopedic Publishing House, Bucharest, 1999, p.32-33

[116] E. Cernea, *Legea ţării (Law of the Country)*, Universul Juridic Publishing House, Bucharest, 2008, p.38

[117] E. Cernea, Emil Molcuţ, *Istoria statului şi dreptului românesc (History of the Romanian State and Law)*, second edition, Casa de Editură şi Presă Şansa SRL, Bucharest, 1992, p. 15

[118] C.R.D. Butculescu, Considerations regarding Natural Law Principles in Medieval Europe. Systemic Approaches to Law, Revue européene du Droit Social, vol. XIX, issue 2, 2013, Ed. Bibliotheca, Târgovişte, p. 154

Formal sources of law in the age of the Geto-Dacian centralized state

As Cosmin Dariescu showed, "In this age the formal sources of Geto-Dacian law are:

- *custom*, crystallized still the previous age and which continues to be the main juridical source;
- *written laws* (called by Getae *belagine*) that contain legal norms issued by the state authorities."[119]

The custom is the oldest source of law and was called in the past *custom of the land* as it emerged through the repetition of a juridical idea by the members of the community in a high number of successive individual cases, by creating some precedents that aimed at satisfying the needs of the members of the same entities, without causing any personal or collective harm.[120]

The commerce in Dacia was extremely developed, being strongly supported by the Greek settlements on the Black Sea shore: Tomis, Histria and Callatis. The Roman denarius circulated intensely and that is why the existence of the legal norms regarding obligations is assumed.

As regards penal law, the Romanian specialists in doctrine show that the Geto-Dacian punishments were extremely harsh, the main provisions regarding the defence of the state and of the private property[121], and as punishments were mentioned the private revenge and the judicial duel.[122]

The other aspects of the social life were also regulated. As Professor E. Cernea, "the property was mutual both in community and in the domestic households. The main object of the mutual property was the land... a modality of transmission in case of death was the oral testament called "on the deathbed"… The Dacians used to conclude various agreements, transactions as regards the exchange of own products,

[119] C. Dariescu, *Istoria statului şi dreptului românesc din antichitate până la Marea Unire (History of the Romanian State and Law from Antiquity until the Great Union)*, C.H. Beck Publishing House, Bucharest, 2008, p. 8

[120] E. Ciongaru, *Usages – the legal regime in new Civil Code*, in volume of International Conference – CKS 2013 – *Challenges of the Knowledge Society,* Nicolae Titulescu University, ProUniversitaria Publishing House, Bucharest, 2013, p.206.

[121] E. Cernea, Emil Molcuţ, op.cit., p. 16

[122] C. Dariescu, idem, p. 19

similar to some contracts, they were verbal, based on the free consent and on the good faith, without sacramental, rigid forms".[123]

It is obvious that this state was organized and functioned on the basis of some rules, of some strict norms meant to ensure the stability. At the same time with the formation of the Geto-Dacian state, legal norms emerged, some customs being taken over and sanctioned by the state. In parallel, corresponding to the new requirements of the economic and social life, the state established new juridical rules so that besides the existent unwritten law under the form of customs, in the Geto-Dacian state a system of laws was also elaborated, which although they were not preserved, are mentioned by the old authors.[124]

After Burebista's death, the Geto-Dacian state had some fall. None of his followers, such as Deceneus, Comosicus, Duras, reached his performance. Yet, there was an exception: king Decebal, whose state, even if smaller than Burebista's, enjoyed respect and consideration from the part of the Roman authority.

The expansionist tendencies of Rome could not be eliminated by Decebal, so that after two fierce wars in 101-102 AD and 105-106 AD Dacia was transformed in Roman province.

Sources of law in Roman Dacia

After the instauration of the Roman rule in Dacia, besides the local unwritten law, the written Roman law was also introduced. According to the Roman views, the local customs could be applied, unless in contradiction with the general principles of the Roman law.[125]

During the Roman conquest, an important dimension of the public administration in Dacia, a Roman province, regarded the legal norms of the Roman and autochthonous law. The Roman law emerges in this province under the form of the civil law and of the law of the nations, the law applied in Roman Dacia had a statutory character, in the sense that each category of people had a well defined juridical status. Thus, the Roman citizens had:

- *ius civilae*, plenitude of political and civil rights;
- *ius commercii* (*commercium*), the right to sign juridical acts according to the Roman civil law;

[123] E. Cernea, *Legea ţării*, p.28-30
[124] E. Paraschiv, *Izvoarele formale ale dreptului (Formal Sources of Law)*, C.H.Beck Publishing House, Bucharest, 2007, p. 40
[125] E. Cernea, E. Molcuţ, *op.cit*, p. 24

- *ius cannubii* (*cannubium*), the right to conclude a marriage according to the Roman laws;
- *ius militiae*, the right to be enrolled in the Roman legions;
- *ius sufragii*, the right to elect;
- *ius honorum*, the right to candidate to a function of magistrate in the settlements.[126]

The Dacian state, a strong military democracy, was governed by norms that the autochthonous population complied with. Certainly, in case of incompliance, the coercive force of the state intervened. At the beginning, immediately after the conquest of Dacia, the two juridical regimes functioned in parallel, but over the time the two systems mingled and the Dacian-Roman system of law appeared. According to this system, in Roman Dacia there were many forms of property, i.e.:

1. provincial property, which was exercised by the autochthonous over the fields distributed from *ager publicus* (public field);
2. *quiritare* property was exercised by the Roman citizens who, to be able to benefit from it, created *ius italicum*, a special right, according to which the soil belonging to some settlements in provinces was assimilated with that in Italy and was thus free of taxes;
3. pilgrim property was exercised by the pilgrims.[127]

This fusion is especially interesting as in most of the systems of law, the juridical culture and thinking are based on juridical ethnocentrism[128].

The marriage and the family of the Roman citizens were governed by the Roman regulations[129]. The marriage and the family of

[126] O. Matichescu, M. D. Voicilaş, *Istoria statului, a dreptului şi a administraţiei publice româneşti (History of the Romanian State, Law and Public Administration)*, Semne Publishing House, Bucharest, 2008, p.47

[127] O. Matichescu, M. D. Voicilaş, op. cit., p. 53

[128] C.R.D. Butculescu, Consideraţii privind influenţa culturii juridice asupra codificării în România în perioada 1864-2009 (Considerations regarding the influence of the juridical culture on the codification in Romania in 1864-2009), in volume *Ştiinţă şi Codificare în România (Science and Codification in Romania)*, Universul Juridic Publishing House, Bucharest, 2012, p. 367.

[129] E. Ciongaru, *Teoria Obligaţiilor în Dreptul Roman (Theory of Obligations in the Roman Law)* second edition, revised and completed, Scrisul Romanesc Publishing House, Craiova, 2012, pp.6-7

Geto-Dacians continued to be governed by the Geto-Dacian customs[130] , and *ius connubii* or *connubium* was the right to conclude a valid marriage according to the Roman laws.[131]

In the Roman province Dacia the commerce flourished and evidence in this regard is offered by the "Transylvanian triptychs". These are waxed slates dating from the 2nd century AD, discovered in the gold mines near Roşia Montană. Twenty-five pieces were discovered, out of which fourteen are legible, twelve are of interest for the current paper, as they refer to contracts.

The twelve slates regarding contracts indicate the application of the classical Roman law, but in simplified forms. In the agreement for borrowing, the parties use only one stipulation both for the borrowed sum and for the interest, although the classical law asked for two stipulations. In the rental agreement for the labor force, the parties establish that the risk of force majeure belongs to the worker and not to the employer (like in the classical law).[132]

Formal sources of law in the early Romanian states

As regards the **early Romanian states**, the customs and the juridical norms, we specify the fact that the territories occupied by the Romanian population were organized institutionally and were governed by written and unwritten laws, all being animated by lawful and moral spirit. Professor Florin Constantiniu showed that according to *Gestahungarorum* (The Deeds of the Hungarians) the Hungarian population met in the 9th century AD three Romanian early states, led by princes-voivodes, as it follows:

- Menumorut had his residence "Byhor" walled city, so "Ţara Crişurilor";
- Gelu, whose early state was named in the above mentioned document *Terra Ultrasilvana*, Professor Constantiniu placing this principality on the Transylvanian plateau;
- Glad with the residence at Keve, in the Serbian Banat.[133]

As regards this historical source, the great scholar Nicolae Iorga specifies that "from this story can be preserved only the fact that when

[130] V. Hanga, *Istoria Dreptului românesc, Drept cutumiar (History of the Romanian Law. Unwritten Law)*, Fundaţia Chemarea Publishing House, Iaşi, p.24
[131] E. Cernea, E. Molcuţ,op.cit., p. 24
[132] C. Dariescu, op.cit., p. 19
[133] F. Constantiniu, op.cit., p.58

entering the territories beyond Tisza, the Hungarians found an autochthonous Romanian-Slavic population, led by voivodes or even by princes:"[134]

C.G. Dissescu, at the question how our state was formed, takes over multiple opinions out of which I retain here the one of A.D. Xenopol, who believed that Radu Negru, prince of Făgăraş, founded Wallachia (Muntenia). The same author considers that at the foundation of our early states there was Hungarian-Catholic oppression.

C.G.Dissescu thinks that the founders of the Romanian state are Assanids, who founded the Romanian-Bulgarian Empire at 1186.[135] He also mentions that the old juridical rules of the Romanians belong to two categories: written and unwritten.

The written legislation is represented by the church laws (canons) and the norms These words remind of the Greek *nomakanon*. The church canons send to the notion of *kanones*, i.e. Church laws and the term *norm* to *nomos*, law with social-civil character.

In all this period of time, on the territories inhabited by the Romanians, the Law of the Country functioned effectively, being a collection of unwritten rules of law, of Dacian-Roman inspiration.

As regards the church laws, the most important are those of 1578 - Putna Monastery, 1618 - Suceava Metropolitan Church and 1636 - Bistriţa Monastery.

As Elena Paraschiv showed, the most important sources of our written law in the feudal age were „Cartea românească de învăţătură" (The Romanian Book of Learning) and „Îndreptarea legii" (Guide of the Law). Other sources of written law are found in the history of the Romanian provinces as follows:

- Matei Basarab's Small Law (1640);
- Vasile Lupu's Law (1646);
- Matei Basarab's Great Law (1652);
- Unio Trium Nationum (1540) fundament of the public law in Transylvania, discriminatory act towards the majority Romanian population and through which the representatives of this ethnic group are excluded from the administrative activities.

[134] N. Iorga citat de F. Constantiniu, op.cit., p.59

[135] See C.G.Dissescu, *Originile dreptului roman (Origins of the Roman Law)*, Tipografia lucrătorilor asociaţi Marinescu & Şerban, Bucharest, 1899, p.12-13, 27 şi 57

In the feudal age, as Professor Dissescu shows, the law established in the Romanian principalities two categories of property:

1. those of the boyars conceded by the prince;
2. the free ones (allodial) of the freeholders.

In the Middle Ages the principality of Transylvania continued the tendency of autonomy. The Romanian districts that included a certain number of villages and that were usually at the borders of the Royal walled city had within the principality of Transylvania autonomy, which was larger or smaller according to the period of time. These were led according to the Romanian law, which the rulers also complied with. O. Matichescu and M.D. Voicilaş specify that the Romanians had their own administrative, judiciary and military organizations, some of them, local principalities formed in parallel with other administrative and judicial ones, with the counties, with the Saxons and Szekely Lands (*scaune*), receiving the name of *scaune*. [136]

In the late Middle Ages, in the Phanariot time in Walachia and Moldavia continued the legislative work initiated by the autochthonous princes Matei Basarab in Walachia and Vasile Lupu in Moldavia. These two rulers, with many accomplishments for the benefit of the Romanian nation gave written laws of Byzantine inspiration. We specify that the custom of the land was also applied.

For justice modernization the Protocol was introduced, which established in writing in the Royal Register the prince's judge and sentence.[137]

Also in the Phanariot time ample codices of laws were issued, systematized and adapted to the needs of the time. Thus, during Alexandru Ipsilanti in Walachia was issued *Pravilniceasca Condică* (Register of Laws) considered by C.G. Dissescu a "civil code". But the first manual of laws in the Romanian language was done by Andronache Donici, famous jurisconsult. This collection taken over shortly from the imperial laws, printed at Iaşi (1814), is a kind of repertoire of the jurisprudence matters, with reference to the laws of *Basilicale* and Roman law.[138]

In 1818, in Walachia, under the Caragea's reign Caragea's Laws were issued, which we can qualify as a code with general character, because included four specialized codes, i.e.:

[136] O. Matichescu, M. D. Voicilaş, op.cit., p. 82
[137] F. Constantiniu, op.cit., p.175
[138] A se vedea C.G.Dissescu, op.cit, p.62-63

- civil (parts I-IV: People, Things, Negotiations, Gifts);
- penal (part V Guilt);
- penal procedure (part VI About Trials);
- civil procedure (part VI About Trials).

Caragea's Laws, brought in the penal field kinder provisions, especially as regards punishments. In exchange, the situation of the bondsmen worsened and the relationships between them and the landowners were regulated in the favour of the latter. The sources of inspiration were *Basilicale*, the custom of the land, *Pravilniceasca Condică*, French Civil Code of 1804 (to a short extent).

Some provisions of the Caragea's Code were applied until 1943 by the Court of Cassation.

In Moldavia, in 1817 prince Calimach's Code of Laws was issued. As C.G. Dissescu shows, the boyars in a national assembly decided to gather from the royal books the most useful parts that merged with the custom of the land in order to form an improved register of laws. This code of laws, issued at the wish of prince Scarlat Calimach, had the following sources of inspiration:

a. Romanian custom;
b. Byzantine law;
c. French Civil Code (1804);
d. Austrian Civil Code (1811).

Calimach's Code, uses as principal model of inspiration the Austrian Civil Code, second edition of 1811, without being a simple translation of it, was characterized by the great jurist Zachariae von Lengenthal a simple law-making, faithful to the Byzantine law.[139] Besides the Byzantine laws (*Basilicale*), the custom of the land and all the customs in civil and penal matter were also taken into account. Calimach's Code embraced the noble ideas of the time, regulating the inferior situation of women, considering slavery "against the natural right", but without abrogating this institution, retaining that "the slave is not considered in everything like a thing".

[139] *Codul Calimach*, The Publishing House of the Romanian Academy, Bucharest, 1958, p. 1, cited in Vladimir Hanga, *Codul civil austriac şi Codul Calimach (Austrian Civil Code and Calimach Code)*, in Studii de drept românesc (Studies of Romanian Law), 10 (43), no. 1-2 (January-june)/1998, The Publishing House of the Romanian Academy, Bucharest, p. 13

In 1825, in Moldavia, under Ioniţă Sturdza's reign, the Penal Code of Moldavia was issued.

Starting with 1821 also on the territory of the Romanian Principalities the process of feudalism disintegration took place, concomitantly with the beginning of the capitalism. Obviously, that period of transition emphasized other needs of the society, regulated by special laws and new codes. Also, as certain common rules still corresponded to the social needs, the law-makers decided to register them in the written form. Other customs that did not correspond anymore to the needs were removed.

In the Romanian Principalities, Moldavia and Walachia, a new phase of the codification of the norms of law began, the sources of inspiration being especially the French, Italian and Swiss legislations etc.

Conclusions

The history of the Romanian law attests that our ancestors were animated since the oldest times by a high spirit of justice and morality. The juridical rules they elaborated and complied with demonstrate the Romanian wished to live in an organized manner. Over the historical evolution, the leaders of the early Romanian states (voivodeships, principalities) did not hesitate to inspire from superior legislative sources, trying thus to improve the own juridical regulations.

Obviously, there were registered many cases of high injustice in the sources of the old Romanian law, injustices that generated great sufferings to the common people. But our history talks also about *Belagines*, *Legea Ţării*, *Basilicale*, *Îndreptarea Legii, Pravilniceasca Condică*, Calimach's Code, Caragea's Laws which certify that over the time in the Romanian Principalities chaos or anarchy did not prevail, but law and order.

Important law-makers such as Vasile Lupu, Matei Basarab, Andronache Donici, Vodă Caragea, Calimach Vodă animated our legislative past, opening the way towards A.I. Cuza under whose reign were issued our modern codes of law that lay at the basis of the current legislative codification.

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SHORT CONSIDERATIONS REGARDING THE CONDITIONS OF BUSINESS MANAGEMENT FROM THE PERSPECTIVE OF THE NEW CIVIL CODE

Oana Cristina NIEMESCH *

ABSTRACT
Combining harmoniously the elements of novelty, some taken over from the European legislations (for example from art. 1372 of the French Civil Code: the possibility that the managed should be aware of the management, but should not be able to appoint a trustee or to take care in any other way of his business), with the solutions of doctrine and jurisprudence as regards the business management from the perspective of the Civil Code 1864, the legal provision of art. 1330 of the New Civil Code represents obviously a progress as regards the regulation of the conditions of business management, facilitating thus the activity of the law theoreticians and practitioners.
Certainly, the new regulation of the definition of business management is far from perfect, reminding in this regard of the fault of the express regulation of the object of the business management, the simultaneous use of the terms "without being obliged" and "voluntarily", respectively the improper use of the terms "opportune", respectively "restitution", but it is important as it explains expressly a part of the conditions of business management.

KEYWORDS: *business management, conditions, art. 1330 of the New Civil Code, elements of novelty*

The juridical act was admitted as an express source of obligations by art. 1165 of the New Civil Code. Thus, according to these legal provisions, the obligations derive from contract, unilateral document, business management, unjust enrichment, undue payment, illicit deed, as

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well as from any act or deed to which the law connects the emergence of an obligation.

The regulation of the business management in the New Civil Code is retrieved in art. 1330-1340.

Detailing the knowledge of the differences between the previous regulation and that in the New Civil Code as regards the conditions of the business management is relevant from the perspective of the transitory law. Thus, being a juridical act there must be taken into account the provisions of art. 103 in Law no. 71/2011 for the application of Law no. 287/2009 regarding the Civil Code that establishes the obligations emerged from the extra-contractual juridical acts are subject to the law in force at the date of the occurrence or, according to the case, of their commitment, as well as those of art. 118 of the same normative act that specifies that the extra-contractual obligations emerged before the entry in force of the Civil Code are subject to the ways of extinction stipulated by it.

As regards the business management there is an express provision that resumes this rule: art. 110 of the same normative act that stipulates that the provisions of art. 1330-1340 of the Civil Code are not applicable to the business management started before the date of the entry in force.

In conclusion, in the case of business management is applied the law that was in force at the date when the management began, i.e. as it was shown in the doctrine[140] is applied the law in force at the date of performing the first material or juridical act with the intention to manage the interest of another person. In exchange, as regards the extinction of the obligations emerged on the grounds of business management, these are subject to the law in force at the date when the extinction happens; in this regard it was shown[141] that if such obligations are extinguished after the Civil Code entered in force in 2009, then its provisions, inclusively those regarding the return of the undue payment, are applicable.

Notion

The definition of business management is provided in para. 1 of art. 1330 of the New Civil Code that stipulates that there is business management when, without being forced, a person, called manager,

[140] G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil (Institutions of Civil Law in the Regulation of the New Civil Code)*, Hamangiu Publishing House, Bucharest, 2012, p. 11.
[141] *Loc.cit.*

manages voluntarily and opportunely another person's business, called managed, who is not aware of the existence of the management or, being aware of it, is not able to appoint a trustee or take care in any other way of his business.

First, it can be noticed the tendency in the new regulation to explain the notion of business management, tendency manifested through the express but partial presentation of the conditions of business management, unlike the old regulation of art. 987 in the Civil Code 1864 where the law-maker mentioned only that the manager is that who willingly manages another person's interests, without the knowledge of the owner, and the other articles presented the obligations of the manager and of the managed.

The literature[142] showed that the provisions of art. 1330 para. 1 of the New Civil Code provide the necessary conditions to be in the presence of this juridical operation (business management – author's note), in a manner that leads us to a so-called "legal definition".

The conditions of business management

Thus, if in the old regulation the conditions of the business management were wholly identified by the specialists in law through the common action of the judicial doctrine and practice, in para. 1 of art. 1330 in the New Civil Code these are partially listed (except for the condition concerning the object of the management)[143] as it follows:

[142] I. Adam, *Drept civil. Obligaţiile. Faptul juridic – în reglementarea NCC (Civil Law. Obligations. The Juridical Act – In the Regulation of the New Civil Code)*, C.H. Beck Publishing House, Bucharest, 2013, p. 17.

[143] In a recent opinion were retained as conditions of the business management: management of another person's interests, the intention to work for another, the opportunity of the management and the impossibility for the managed to deal with his own business. Within the conditions regarding the management of another person's interests are distinctly analyzed the content of the business management and the initiative of the managed. See in this regard C. Jugastru, *Faptele juridice licite - surse de obligaţii (The Licit Juridical Acts - Sources of Obligations)* in Studia Universitatis Babeş-Bolyai Iurisprudentia no. 4/2013, www. studia.law.ubbcluj.ro, last accessed on 30.07.2014. According to another opinion, the identified conditions aimed at the object of the business management, the way of management, as well as conditions regarding the managed and the manager, analyzed as intention to manage another person's interests (*animus gerandi*). See in this regard S. Neculaescu, *Izvoarele obligaţiilor în Codul civil art. 1164-1395, Analiză critică şi comparativă a noilor texte normative (The Sources of Obligations in the Civil Code art. 1164-1395*, *Critical and Comparative Analysis of the New Normative Texts),* C.H. Beck Publishing House, Bucharest, 2013, pp. 559-563.

- The object of the management;
- The usefulness of the management;
- The parties' attitude as regards the acts of management.

1. The object of the management

Without making express specifications as regards the object of the management, respectively the types of operations belonging to the content of the management, the new law-maker confirms the diverse and permanently updating character of the possible forms of business management.

The solutions presented in Civil Code 1864 are still of interest in the literature[144] in the sense that the object of the management can consist of material acts and juridical act, and as regards the latter, the manager could conclude only acts of preservation and acts of management.

The notion of act of management within the business management must be related to the whole patrimony of the managed, so that can be admitted also the performance of an act of disposition regarding an *ut singuli* good if this juridical operation, related to the whole patrimony of the managed, has the character of an act of management. Certainly, the appreciation on the character of an act of management is to be done distinctly, according to the concrete case.

The extension of the range of activities that the manager can carry out within the business management led to the inclusion in the object of management of the execution of some personal obligations with patrimonial character established in the charge of the managed in compliance with the law.

The corroborated interpretation of the provisions of para. 1 of art. 1330 with those of art. 1336 emphasizes the circumstance that the juridical acts can be done by the manager on his own behalf (but in the interest of the managed) or on the behalf of the managed, respectively acts concluded without representation and acts concluded with representation.

It has to be specified that the manager cannot perform acts of management that take the form of the juridical acts in which the managed cannot be represented, regardless of these are acts of preservation, of management or of disposition (for instance the revocation of a donation).

[144] See in this regard C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor (Civil Law. General Theory of Obligations)*, All Educational Publishing House, Bucharest, 1998, p. 104.

Even if, in principle the juridical and the material acts done by the manager have a patrimonial character, in practice there are numerous cases when the content of the management is to a high degree non-patrimonial. The law-maker does not exclude these cases, does not limit the sphere of the juridical and material acts to those with patrimonial character, but emphasize the conditions of opportunity and usefulness of the actions done by the manager, who, without being forced, manages voluntarily another person's business[145].

Essential in the qualification of these acts of business management is the specific intention of the manager, i.e. *animus gerandi*.

2. The usefulness of the management

The use in the new regulation of the term "opportune" whose source of inspiration was the recent French doctrine was considered debatable by an article in the literature[146]. First of all, it must be taken into account the meaning of the legal terms, operating the necessary differences. "Opportune" evokes what is done at the proper moment, suitable to the situation, to the circumstances, while "useful" means what is necessary, utile, what happens in time, at the opportune moment. Opportunity suggests rather that the intervention of the manager took place at the opportune moment, than that it was useful. A useful act is simultaneously a necessary, a utile act and an act done at the opportune (proper) moment. It is commonsense that a behavior is useful if it was done at the opportune moment, otherwise it could not be useful. The term "opportune" is yet too narrow to include the usefulness, while the term "useful" incorporates opportunity. The management has to be profitable, useful to the managed, as this is the essential characteristic of this juridical act, which counts on the spontaneous initiative of the manager.

This condition of the usefulness derives from the use by the law-maker of the phrase "manages... opportunely another's business", which according to most of the theoreticians equates to avoiding or to the decrease of a patrimonial loss in the patrimony of the managed.

It can be asked the question if only the avoiding of such a loss reveals the usefulness of a management or if aiming at a patrimonial increase fulfills equally the requirements of usefulness of the

[145] I. Adam, *op.cit.*, pp. 25-26. In this regard see also L. Pop, I.-F. Popa, S.I.Vidu, *Tratat elementar de drept civil. Obligaţiile (Elementary Treatise of Civil Law. Obligations)*, Universul Juridic Publishing House, Bucharest, 2012, pp.348-349.

[146] C. Jugastru, *op.cit.*, www. studia.law.ubbcluj.ro last accessed on 30.07.2014.

management.[147] Obviously, the answer will be nuanced because on the one hand the law-maker does not limit the appreciation of the usefulness of the business management to avoiding a patrimonial loss, and on the other hand not all the acts that belong to the object of the management can lead to patrimonial increases for the managed.

If the voluntary intervention, from the manager's initiative, to avoid a loss in the patrimony of the managed appears justified by the necessary and urgent character of the acts that have to be done, in the second hypothesis the appreciation on the necessity of obtaining a patrimonial profit should belong to the managed, and in this regard another's person intervention could be considered inadequate.

As concerns the acts belonging to the object of the management, it can be noticed that the essence of the acts of preservation is the prevention of a loss of a subjective right, while the act of management aims at a normal valorization of a good or of a patrimony. In this case the act of management can include inclusively acts which related to a certain good represent alienation acts, i.e. acts of disposition, but which related to a patrimony represent measures of normal use or capitalization of that patrimony.

Starting from the definition of the act of preservation, it is obvious that such an act could not lead to an increase of a patrimonial loss. Thus, it remains in discussion only the performance of acts of management to the extent to which the normal valorization of a good can lead to a patrimonial increase. It is not excluded that the intervention of a professional through the performance of an act of management related to the patrimony of the managed should lead to a patrimonial increase, due to his specific knowledge and skills, but most of the times such a professional intervention takes place within the regulated framework, with the agreement or even at the request of the owner of the patrimony.

As regards the hypothesis of the acts of management taking the form of the material acts, it cannot be excluded the possibility that these should be concretized in a patrimonial increase, maintaining thus the statement concerning the fact that the appreciation on the necessity of

[147] In the literature it was identified a relatively isolated opinion according to which the management is useful if through it the loss of a patrimonial value was avoided or the value of a good in the patrimony of the managed was enhanced. See in this regard Fr. Deak, *Curs de drept civil. Dreptul obligaţiilor. Partea I-a, Teoria generală a obligaţiilor (Course of Civil Law. The Law of Obligations. Part I. The General Theory of Obligations)*, Tipografia Învăţământului, Bucharest, 1960, p. 294 and L. Pop, I.-F. Popa, S.I.Vidu, *op.cit*, p. 349.

obtaining a patrimonial profit should belong to the managed and that the practice should identify concrete cases in this regard.

Certainly, according to the new regulation the usefulness of the management is to be appreciated at the moment of carrying out the acts of management, the possible modifications (decreases) of the patrimony of the managed after this moment being without relevance for the fulfillment of this condition.

It was also stated[148] that the usefulness of the management should be judged also according to the importance of the act fulfilled by the manager. Thus, the acts of simple readiness to oblige could not lead to compensations.

3. The parties' attitude as regards the acts of management

From the point of view of the managed, the final thesis of art. 1330 para. 1 of the New Civil Code stipulates that the managed is not aware of the existence of the management or, being aware of the management, is not able to appoint a trustee or to take care of his business in any other way.

Unlike the old regulation that imposed the condition that the managed should be completely alien to the operation of management, the new regulation took into account not only the hypothesis in which the managed is not aware of the existence of the management, but only that in which he is aware of it.

In this last situation it is considered that the conditions of business management are met and implicitly are incumbent the rules applicable to business management, if being aware of the existence of the management, the managed is not able to appoint a trustee or to take care in any other way of his business. As the text of law does not make the distinction, I consider that the impossibility to appoint a trustee can be both physical and juridical. It should be noticed that the legal provision does not limit the possibility of the managed to take care of his business only by the means of the institution of trust, but refers also to his impossibility to take care in any other way of his business (for instance, by the means of the institution of managing another's person goods).

As regards the statement according to which the managed was aware of the acts of management, but was not "able" to appoint a trustee or to take care of his business in any other way, in the literature[149] it was

[148] I. Adam, *op.cit.*, p. 25.
[149] L. Pop, I.-F. Popa, S.I.Vidu, *op.cit*, p. 349, footnote 8.

considered that the use of "able" does not necessarily mean an absolute but a relative impossibility to appoint the trustee. For instance, to this hypothesis belongs the case in which the situation to manage has an urgent character and the managed is hospitalized or in detention for the execution of a penal sentence etc. (absolute impossibility). Yet, it can be stated that the managed is not able to appoint a trustee also when the effort of such an appointment is disproportional as regards the nature of the acts or deeds subject to the management. For example, the managed is at a great distance far from the closest notary public's office (relative impossibility).

It was also shown that in the hypothesis of the indifference of the managed – if the managed was aware of the existence of the management and did not "bother" to appoint a trustee although he could have done it, we deal in fact with a tacit proxy. On the other hand, the simple awareness of management does not eliminate the value of business management.[150]

According to another opinion[151], the formulation of art. 1330 para. 1 of the New Civil Code – which aims at defining the business management (by specifying its conditions) –, operates with an amalgam that overshadows the true physiognomy of this juridical licit act. Only the first of the two legal hypotheses signifies – in the sense of the most rigorous juridical language – business management. The first thesis of art. 1330 para. 1 consists of managing another person's interests, totally alien to the operations fulfilled by the manager, so that he does not have the possibility to express neither the agreement nor the opposition. The second thesis of art. 1330 para. 1 brings into the equation a tacit proxy (for juridical acts), as long as the managed is aware of the existence of the management, but does not oppose. There are not relevant the reasons for which the managed, being aware of the management, allows it. Especially because in art. 1331 Civil Code it is stipulated the manager's obligation to inform the managed of the intervention and the awareness of management is subject to the rules of proxy. It was also stated that, when the managed is aware of the acts of management and does not oppose, the spontaneity of the intervention differentiates the management from the trust. Or, the trust is an agreement and the knowledge of management and its toleration (through the lack of opposition) evokes

[150] *Ibidem*, p. 350.
[151] C. Jugastru, *op.cit.*, www. studia.law.ubbcluj.ro consultat ultima oară la data de 30.07.2014.

exactly the agreement, tacit in this case. In conclusion, the knowledge of the manager's initiative and the lack of opposition from the managed can mean only a tacit proxy.

In the situation when the managed was not aware of the management, the legal relationship emerges regardless of the fact if the managed has or does not have legal capacity. If the managed was aware of the existence of the management, being in the impossibility to appoint a trustee or take care in any other way of his business it can be assumed that in certain situations this impossibility of the managed can derive from the lack of civil capacity asked to the managed which is appreciated according to the nature of the juridical act that is to be concluded through the trustee or any other type of the trustee (for instance, administrator of another person's goods), act that can be of preservation, of management or of disposition.

From the perspective of the manager the legal provision established that the manager act from his own initiative with the intention to manage another person's interests, intention that has to be clearly expressed.

According to a recently expressed opinion[152] the characterization of the way of management as "voluntary", to which is added the fact that the person called manager manages "without being obliged", is meant to emphasize the lack of any convention between the two parties, the fact that the manager acts unilaterally. Yet, it is shown that not even the characterization as "voluntary" of the modality of management is not the most specific because it does not express what is essential for business management, i.e. the fact that the manager acts spontaneously and from his own initiative. That is why, instead of characterizing only as "voluntary" the way of management, is preferable the phrase "benevolent".

We consider that the formulation of art. 1330 in the New Civil Code according to which the rules of business management are incumbent when "...without being obliged, a person, called manager, manages voluntarily..." is subject to criticism because of the simultaneously use of the phrases "without being obliged", respectively "voluntarily". In fact doing something voluntarily means doing something without being constrained in this regard. Thus, we consider that the legal text can be rephrased as follows "There is business

[152] S. Neculaescu, *op.cit.*, p. 560 and p. 562.

management when a person, called manager, manages voluntarily... the business of another person, called managed...".

The condition of the manager's awareness of the circumstance that he works for another person's interest seems to be the essence of the business management, otherwise it is not justified the regulation in para. 2 of art. 1330 according to which that somebody who without being aware works for another person's interest is not subject to the obligations, according to the law, incumbent to the manager, being entitled to restitution in compliance with the rules applicable to the unjust enrichment.

Yet, it has to be specified that it is not compulsory either that the manager should have met effectively the person of the third party whose business he manages or that the managed should be a determined person, being enough to admit the fact that he works for another person.[153]

Consequently, when the person who performs acts of management was not aware of the circumstance that he worked for another person's interest, the rules of business management are not incumbent as concerns the manager's obligations, and as regards the obligation of restitution of the person for whose interest the acts of management were performed, this is subject to the rules of unjust enrichment.

On the other hand, like in the old regulation, we consider that it is not required to the manager to work exclusively for another person's interest, being subject to the provisions of the business management both in the case when he works for his own interest and for another person's interest (for instance when the good in relation to which the act of management is performed represents the object of the mutual property with another person).

It was considered[154] that the formulation of the second sentence of para. 2 of art. 1330 is not the most appropriate. As not only the useful expenses done by the manager are concerned – the only ones subject to the restitution –, but also his compensation for the prejudices suffered on the occasion of the management, the most appropriate legal term is "indemnity" and not "restitution", taking into account the fact that sometimes it is raised the problem of compensation of the manager for all the personal prejudices suffered during the management.

[153] J. Flour, J.-L. Aubert, *Droit civil. Les Obligations, volume II. Sources: Le fait juridique*, Ed. Armand Colin, Paris, 1981, p. 13.
[154] S. Neculaescu, *op.cit.*, p. 563.

An aspect of novelty as regards the regulation in art. 1330 of the New Civil Code is represented by the express requirement that the acts of management should be performed by the manager with the intention to force the managed to return the expenses caused by their fulfillment, i.e. the manager should not carry out gratuitous acts. Thus, according to para. 3 of art. 1330 in the New Civil Code there is no business management when somebody who manages another person's business acts with the intention to gratify.

The literature[155] showed that the case when a person performs an act because this is imposed by law or private norms of a contract does not belong to the field of business management.

It should be specified as regards the conditions of business management that the literature[156] considered that it should be also taken into account as a condition of the management the capacity of the manager to make contracts, a condition that would seem to result from the provisions of art. 1136 para. 1 in the New Civil Code. We support the opinion[157] according to which the condition of the capacity of manager is a relative one and that it is required only if the juridical object of the management involves it: if it involves juridical acts, the capacity of the manager is necessary; if it involves material acts, in principle capacity of the manager is not necessary.

Conclusions

Combining usefully the elements of novelty, some taken over from the European legislations (for example from art. 1372 of the French Civil Code: the possibility that the managed should be aware of the management, but should not be able to appoint a trustee or to take care in any other way of his business), with the solutions of doctrine and jurisprudence as regards the business management from the perspective of the Civil Code 1864, the legal provision of art. 1330 of the New Civil

[155] I. Adam, *op.cit.*, p. 27.

[156] See in this regard L. Pop, *Drept civil. Teoria generală a obligaţiilor. Tratat (ediţie revizuită) (Civil Law. General Theory of Obligations. Treatise – revides edition)*, "Chemarea" Foundation Publishing House, Iaşi, 1994, p. 145; T. Bodoaşcă, S.O. Nour, I. Puie, *Teoria generală a obligaţiilor (General Theory of Obligations)*, Universul Juridic Publishing House, Bucharest, 2010, p.153; P.M. Cosmovici, *Drept civil. Drepturi reale. Obligaţii. Legislaţie (Civil Law. Real Rights. Obligations. Legislation)*, All Publishing House, Bucharest, 1994, p. 164 and P. Vasilescu, *Drept civil. Obligaţii (Civil Law. Obligations)*, Hamangiu Publishing House, Bucharest, 2012, pp.207-208.

[157] L. Pop, I.-F. Popa, S.I.Vidu, *op.cit*, p. 352.

Code represents obviously a progress as regards the regulation of the conditions of business management, facilitating thus the activity of the law theoreticians and practitioners.

It can be noticed the attempt of the law-maker of the New Civil Code to provide in the definition of the business management the conditions that have to be fulfilled so that this juridical institution should be incumbent. Capitalizing solutions of doctrine and jurisprudence identified under the Civil Code 1864, the new legal provision, entitled marginally "Conditions", managed to provide expressly two out of the three conditions, i.e. the usefulness and the attitude of the parties towards the acts of management, but it did not make specifications as regards the object of management, letting open to the specialty debates the sphere of the acts that belong to the content of business management.

As regards the attitude of the managed towards management it can be noticed that the Romanian law-maker took over the solution from the French Civil Code and from Civil Code Quebec, admitting the existence of business management also in the cases when the managed was aware of the management, but he was not able to appoint a trustee or to take care in any other way of his business sale. Although this new legislative solution has already been criticized in the literature[158], according to an opinion that supports that fact that in reality this is the case of a tacit proxy, it should not be ignored the fact that on the one hand it is about the impossibility, even if it is relative, to appoint a trustee, and on the other hand, the notion of proxy covers only the field of the juridical acts, and in this regard supposing that the object of management requires the performance of material acts from the legal point of view a proxy cannot be concluded. Also, in the second situation (impossibility to take care in any other way of his business) we cannot talk, in general, about a tacit proxy, because this "taking care of" can cover different forms (for example, the management of another person's business) and can regard the performance of material acts that exclude *de plano* the institution of the proxy.

As concerns the manager's attitude towards management, the law-maker of the New Civil Code, taking over another solution resulting from the old regulation, emphasized expressly the necessity of him being aware, at the moment of the performance of the acts of management, of the fact that he works for another person's interest, otherwise being

[158] See C. Jugastru, *op.cit.*, sursa Internet, www. studia.law.ubbcluj.ro consultat ultima oară la data de 30.07.2014.

entitled to restitution on the basis of another juridical institution, i.e. the unjust enrichment. Also, it was excluded the notion of business management in the case in which a manager would work with the intention to make a liberality, emphasizing thus the essential character for this institution to manage another person's interest (*animus gerandi*).

Certainly, the new regulation of the definition of business management is far from perfect, reminding in this regard of the fault of the express regulation of the object of the business management, the simultaneous use of the terms "without being obliged" and "voluntarily", respectively the improper use of the terms "opportune", respectively "restitution", which we have discussed over, but it is important as it explains expressly a part of the conditions of business management, capitalizing the provisions of other European legislations and taking over solutions of doctrine and jurisprudence identified under the Civil Code 1864.

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MOTION OF NO CONFIDENCE AND MOTION RAISED – A LEGAL SYSTEM COMPARISON

Mariana OPRICAN *

ABSTRACT

The analysis of the constitutional provisions reveals that both motion of no confidence governed by the provisions of art. 113 of the Constitution of Romania, and the motion raised, resulting from committing Government's liability, governed by the provisions of art. 114 of the Basic Law, align on the coordinates of parliamentary control over the activity of the executive, being legal instruments wherethrough the legislature withdraws confidence from a Government that failed to meet the political aspirations bore by the government programme.

While the general regulation of motion of no confidence is found in the provisions of art. 113 of the Constitution, the provisions of art. 114 of the Basic Law govern particular aspects of this institution, through par. (2) and par. (3) which describe the motion of no confidence filed in the proceeding of committing Government's liability as being a motion raised, without differentiating, in terms of legal nature and the purpose sought, with respect to the motion of censure regulated by art. 113 of the Constitution.

KEYWORDS: *Government, motion of no confidence, legislature, Constitution, Constitutional Court*

The significance of institutions provided by art. 113 and art. 114 of the Constitution of Romania - comparative analysis

Under the provisions of **art. 113 para. (1) of the Constitution of Romania**, republished "*Chamber of Deputies and the Senate, in joint*

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session, may withdraw confidence from the Government by adopting a motion of censure by vote of majority of deputies and senators."

The motion of no confidence is the most eloquent form of expression in legal terms of parliamentary control over the activity of the executive.[159]

"*This is established in a dual nature institution, both political and legal; in legal terms it expresses the most severe form of sanction that can be applied to the Government by the Parliament and in political terms it gives expression to the political accountability of the executive to the legislature."*[160]

This constitutional procedure is a challenge to the Members of Parliament to discuss government's business, against dismissal thereof. The significance of the motion of no confidence is significant and determinant both in providing stability of democratic forum, and in the change of parliamentary majority, since, hypothetically, when a motion of censure is triggered, Government's chances are maximum, and when it is subject to voting, they are suppressed, as far as the parliamentary majority no longer supports the Government.[161]

The motion of censure, provided by art. 113 of the Basic Law was conceived as an "*act symmetrically opposite to the vote of confidence granted by the Parliament to the Government.*"[162] Since the legislature is the only authority that grants the vote of confidence for Government formation, it is natural and legitimate that it also be the one which is able to withdraw confidence from an executive which has not respected its commitments at the time of its investiture.

The reasons underlying the initiation and adoption of a motion of censure may be different. If **it was promoted by the parliamentary opposition** its purpose is likely to be **political power takeover**. The result crucially depends on the stability of the parliamentary majority and the opposition can take advantage of moments of tension between the parties that make up the ruling alliance, which may be the seeds of its breaking, fact which opposition may contribute to by an aggressive motion of censure. Also, **the motion may be the natural result of breaking the ruling alliance within it**, in which case the promotion of

[159] E. S. Tănăsescu, in *Constitutia Romaniei, comentariu pe articole*, coordinators I. Muraru, E.S. Tănăsescu, p. 1060
[160] *Ibidem*, p. 1060
[161] Marian Enache, *Controlul parlamentar*, Polirom Publishing House, Iași, 1998, p. 187
[162] Ioan Muraru, E. S. Tănăsescu, *op.cit*., p. 1062

censure motion appears as a natural consequence of the new balance of forces whose accurate mirror must be the new Government.

The motion can be initiated by the parliamentary majority itself when it lost confidence in the Government and decide change thereof as required. In this case, **the aim of the parliamentary majority is to strengthen popular support and gain political capital**.

Dismissal of Government by the Parliament will result in the birth of a governmental crisis and its extension for more than 60 days may result in a major political crisis in the context of the dissolution of Parliament by the President of Romania as provided by art. 89 of the Constitution. Consequently, we find how Government's stability has a positive influence over the whole state activity, including the work of the legislature, the constitutional spring of this stability being confidence of the parliamentary majority.

The reasons that may cause the initiation and adoption of a motion of censure may be different. From an institutional perspective, the government programme, under which the Government provides leadership of domestic and foreign politics of the country **is in a poor state of implementation and execution**, with no proper coordination between state institutions, in conducting operations required for optimal governance. During the last 20 years and more, since the Constitution was adopted, i.e. in December 1991, **motions of no-confidence initiated addressed various topics**; from national politics considered important for the country, to the legality of decisions of the executive and members thereof, to foreign politics and NATO or EU integration process. The EU accession process influenced censure motions filed by the fact that it was a topic often discussed but also a reason to blame the executive in the exercise for its method to implement the community acquis.

The significance of institutions provided by art. 113 and art. 114 of the Constitution of Romania - comparative analysis

1. **In comparison with the institution regulated by art. 113 of the Constitution, the content of which does not specify the reasons wherefore a motion of no confidence may be initiated,** considering, by analogy, that they can cover the entire activity of the executive, **art. 114 of the Basic Law sets exactly in par. (1) the object on which the Government may commit its liability and, consequently, the grounds on which a motion of censure is initiated.**

Under the provisions of art. 114 par. (1) of the Basic Law, committing Government's liability must bear on "a programme the statement of general policy or of a draft law."

Also, Government commits its liability before the two Chambers of Parliament, meeting in joint session, and, according to par. (2) of art. 114 of the Constitution "*Government shall be dismissed if a motion of censure, filed within three days from the submission of the programme, of the general policy statement or of the draft law has been passed under art. 113*." We see, in this case, that the motion of censure **cannot be initiated except with Government's committing its liability**, so it is the fruit of executive committing its liability to the legislature, therefore this type of motion has been termed in the literature as **raised**[163]**or forced**[164] motion.

From the interpretation of the constitutional text, we understand that what makes the object of liability is not the object of parliamentary majority's manifestation of will, as if a motion will be filed, contents thereof and not of the program, of the general policy statement or of draft law for which the Government has committed its liability, **will be discussed**. **The motion of no confidence is voted, not the government "document".**[165] Naturally, references may also be made within the debate of the censure motion to the document submitted by the Government, but these references are not compulsory when among the reasons of the censure motion said document is also retained.[166]

Political relations between Parliament and Government and hence the political responsibility of the latter have special connotations for this procedure.[167]

Committing Government's liability is a **complex parliamentary procedure** involving "*mixed relations, as in terms of its contents it is an act of government which can cause the onset of parliamentary control*

[163] M. Constantinescu, A. Iorgovan, I. Deleanu, I. Muraru, F. Vasilescu, I. Vida, *Constituția României comentată și adnotată*, R. A. „Monitorul Oficial" Publishing House, Bucharest, 1992, p. 253

[164] Tudor Drăganu, *Drept constituțional și instituții politice, Tratat elementar*, vol. II, Lumina Lex Publishing House, Bucharest, 1998, p. 175

[165] A. Iorgovan, Tratat de drept administrativ, vol. I, ediția a III-a, restructurată, revăzută și adăugită, colecția curs universitar, All Beck Publishing House, Bucharest, 2001, p. 216

[166] A. Iorgovan, in Constituția României comentată și adnotată, authors M. Constantinescu, A. Iorgovan, I. Deleanu, I. Muraru, F. Vasilescu, I. Vida, p. 254

[167] M. Preda, Drept administrativ, Partea specială, ediție revăzută și actualizată pe baza legislației în vigoare, Lumina Lex Publishing House, Bucharest, 2001, p. 88

over it, and through its effect, whether produces a legislative act, or results in Government's dismissal."[168]

Committing Government's liability on its own initiative is the constitutional procedure whereby "*under a parliamentary regime and expressing its essence, the Government places the Parliament in constraint to choose between accepting its opinion or dismissal*."[169]

The institution provided by art. 114 of the Constitution is based on the argument that "government contract" also allows, as any other contract, an initiative from the Government for withdrawal.[170] This procedure **is designed to resolve a political conflict which may arise between the executive and the parliamentary majority**, which executive paradoxically, enjoys the confidence of the parliamentary majority, however, fails to realize the governance programme and legislative programme, since it does not work or is unwilling to work. Committing liability of the Government to the Parliament is the expression of the fact that Government investiture is achieved by legislature and withdrawal of confidence can only take place through a symmetric procedure. Thus, by committing its liability the Government assumes the risk of being dismissed if, according to art. 114 par. (2) a censure motion filed within three days of the submission of the programme, of a general policy statement or of draft law, was adopted under art. 113 of the Constitution.

a. **Another aspect of the difference between the two institutions,** as we affirmed, lies in the fact that while **the motion provided by art. 113 of the Constitution is a motion that comes from the will of members of parliament, the motion provided by art. 114 par. (2) of the Basic Law is a motion raised by the Government,** in order to overcome an emergency situation, whether political or legislative.

Through committing its liability, the Government places the Parliament in front of an alternative; either to maintain it in office, forcing it to give

[168] A. Varga, Angajarea răspunderii Guvernului, o procedură parlamentară specială de legiferare și control, in Despre Constituție și constitutionalism, Liber amicorum Ioan Muraru, Hamangiu Publishing House, Bucharest, 2006, p. 221

[169] Ion Deleanu, Instituții și proceduri constituționale în dreptul român și în dreptul comparat, C. H. Beck Publishing House, Bucharest, 2006, p. 655

[170] A. Iorgovan, in Constituția României revizuită, authors M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, All Beck Publishing House, Bucharest, 2004, p. 216

what it asked, or not to grant the requested in order to act by committing liability of its dismissal.[171]

As **Pierre Avril and Jean Giquel** judged, unlike states where independence of public authorities is subject to "strict separation regime", - as in USA - in other states modern parliamentary regime is characterized by "*mutual solidarity of Government and parliamentary majority*."[172]

According to the same authors, placing under responsibility the relationship between the parliamentary majority and the Government is inappropriate because it is based on the idea of fault and sanction, borrowed from the civil law, without taking into account the fact that in these situations we are in presence of a political agreement by which the loss of parliamentary confidence will lead to the resignation of the Cabinet. Concurrently, liability cannot be associated with the idea of subordination, it will "*derive from own role of subject of law*."[173] **In practice, it is noteworthy that Government is either available to the parliamentary majority, or to a ruling coalition** which, in a situation where it would not support the executive, initiating several successive no-confidence motion, will cause the erosion of the government team.[174] Adopting a motion of censure appears as the result of a collaboration between the majority and the opposition, the opposition's role being to initiate no-confidence motion, while the parliamentary majority comes at the end, playing a decisive role in the rejection or adoption of the motion.

Using the procedure regulated by art. 114 of the Constitution, the Government intends to specifically verify what support it can count on in Parliament, because, if no motion of censure is submitted, its position is reinforced, increasing the legitimacy granted. In fact, rarely a Government in service would commit its liability to the legislature, without enjoying the support of the parliamentary majority, unconsciously risking dismissal. We believe that as long as a Government received investiture vote in a parliamentary majority, the latter shall be in the best position to assist it in achieving its aspirations.

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[171] Dana Apostol Tofan, in *Constituția României, Comment on articles*, coordinators I. Muraru, E. S. Tănăsescu, C. H. Beck Publishing House, Bucharest, 2008, p.p. 1067-1080

[172] Pierre Avril, Jean Giquel, *Droit constitutionnel et institutions politiques*, Paris, 1996, p. 22

[173] Idem, p. 221

[174] Pierre Avril, Jean Giquel, *Droit parlamentaire*, 2 edition, Montchrestien, Paris, 1996, p. 221

But in parliamentary practice, situations may arise when the majority itself have initiated a censure motion which lead to the dismissal of the Government. In these cases, the majority whether pursued by its gesture to cause early elections, or wanted, as a result of an agreement between it and the parliamentary minority "*to relocate the majority and opposition on more certain bases.*"[175] It is believed that the supporting a Government by a parliamentary majority becomes more difficult in certain circumstances when the parliamentary majority is the result of a political or electoral alliance and where Government is supported only by a minority in Parliament, being forced to take different junctions or flash political alliances in order to achieve its objectives.

From the analysis of art. 114 par. (1) of the Basic Law we find that the Government is not bound to commit its liability, the initiative and the purpose of the initiative being left to its discretion. Government is not bound to incur liability, but if it does so, it will check its parliamentary support and determines the poles of interest within Parliament; it obliges Parliament that "*by a tacit and global vote - as an alternative to filing a motion of censure- it make a value judgment on various issues contained in a programme or a statement and which would otherwise be probably been solved in a graded way; if the object of commitment is a draft law, the tacit vote of ordinary legislative procedure shall be substituted; when no motion is filed Government consolidates their position*."[176] We are in the presence of an "**ingenious contrivance**"[177], **of a political game** the Government plays with the risk of being dismissed, given that a motion of censure shall be initiated and adopted. However, if the censure motion will not be initiated, or although initiated, is not adopted, the Government consolidates its position fortifying its confidence it enjoys in Parliament.

This control and sanctioning procedure[178] of the Government by the legislature, contains several elements that define it:

A) The Government may **commit its political liability in the joint session of both Chambers;**
B) **executive may commit its liability for a programme, a general policy statement or a draft law;**
C) **The Government shall be dismissed if a motion of censure, filed within three days from the submission of the**

[175] Ioan Muraru, E. S. Tănăsescu, works cited p. 1064
[176] I. Deleanu, works cited, p. 655 and the following.
[177] I. Deleanu, Revizuirea Constituției. Temele revizuirii, in R.D.P. nr. 2/2003, p. 35
[178] Ibidem

programme, of the general policy statement or of the draft law, was passed by an absolute majority;

D) If the **censure motion was not adopted, the Government is not dismissed, and the draft law introduced, amended or supplemented, where appropriate, with amendments accepted by the Government, shall be deemed adopted and the programme or the general policy statement become binding on the Government.**

Regarding the initiative of committing liability before the legislature, it is incumbent on the entire team of government, Government as a collective and joint body, which requires the adoption of a Decision by the executive. Committing liability does not require "*prerogative of Prime Minister but the chance or risk of the entire Government*."[179]

The doctrine in this case considers that **this procedure presents a major risk to the normal course of parliamentary democracy in Romania**. Thus, if the majority on which Government is supported in Parliament would be fragile and threatened to decompose, the Government could be tempted to use its political liability proceedings **to exert moral pressure on lawmakers,** less compatible with the independence ensured to their mandate. As they would be placed in alternative to vote against a government proposal or to lose seats in Parliament as a result of its eventual dissolution, some members of Parliament could, against their beliefs, oppose by their vote to the motion. In conclusion, **art. 114 of the Constitution** "*include a process which seeks salvation of Government stability, but may sacrifice the freedom of opinion of lawmakers*."[180]

According to **Tudor Drăganu** by the procedure laid down in art. 114 of the Basic Law, th**e role of the Senate**, conceived by the constituent legislator as an equal partner in the legislative work with the Chamber of Deputies, **is significantly reduced** due to the fact that the motions of censure are adopted in joint session of the two Chambers, sessions in which "*small number of senators can not counterbalance the weight of votes of the deputies*."[181]

2. **Another juridical contrast between the two procedures governed by the provisions of art. 113 and 114 of the**

[179] I. Deleanu, *Instituții și proceduri constituționale în dreptul român și în dreptul comparat,* p. 655
[180] Tudor Drăganu, op. cit., p. 175
[181] *Ibidem*

Constitution – i.e. the censure motion and the motion raised – consists in that the **motion raised, in addition to maintaining the Government in service or dismissal –** effect caused by the censure motion provided by art. 113 **–** has another result **in the acceptance or rejection by MPs and senators of a programme, of a general policy statement or of a draft law.** This is a complex parliamentary procedure because, although by its content is an act of the Government, it produces through its effects a legislative act or engages the dismissal of the Government.

When **the commitment carries over a programme or over a statement of general policy,** the programme or statement of general policy, complementing or, where appropriate, changing government programme accepted by Parliament on investiture, once approved, are binding on the Government. It was judged, in theory, that being **exclusively political acts** and Government interest being to strengthen the confidence it enjoys in Parliament, nothing stops it to accept certain amendments and modify to this end the contents of the programme or of the general policy statement, unless no motion of no confidence was filed and amendments were made, and if a motion of censure was filed but it was not adopted, and during its debate amendments resulted.[182]

Procedure of committing liability for a draft law is an indirect legislative method of adopting a law, i.e. "*not by debating it in the ordinary legislative procedure, but by discussing eminently political issues related to staying or dismissing the Government*."[183] In this case, the Government committing its liability, will try to realize the governmental will through a global tacit vote in Parliament or assumes the risk of being dismissed.[184]

Constitutional Court defined the Government's committing liability on a draft law as a "joint parliamentary oversight procedure, as it allows to initiate a motion of censure and regulation, because the draft law on which the Government assumes responsibility shall be considered adopted if such a motion was not filed or, being initiated, it was

[182] A. Iorgovan, in Constituția României revizuită-comentarii și explicații, authors M. Constantinescu, A. Iorgovan, I. Muraru, E. S. Tănăsescu, p. 219 and the following.
[183] Idem, p. 219 and the following.
[184] I. Deleanu, Instituții și proceduri constituționale-în dreptul român și în dreptul comparat, Servo-Sat Publishing House, Arad, 2003, p. 571 and the following.

rejected.[185] *By the same Decision, the Constitutional Court also held that "adopting a draft law by committing Government's liability is a parliamentary legislative procedure. Adoption of the draft law prepared by the Government, by means of this procedure, complies with the rules of ordinary specific procedure of adopting the law, with some exceptions (suppression of debates in committee and in plenary), which does not lead to the governmental characterization of mechanisms to promote the draft law"*[186], stating through another **Decision** that "*the role of this procedure is to coagulate a parliamentary majority, but also to overcome obstructionist opposition papers during legislative debates*."[187]

The procedure established by art. 114 of the Basic Law is **a simplified way** for the adoption of a law that aims to bypass the normal legislative procedure. This method should be used **in extremis**, only when adoption of the draft law by the usual procedure or emergency procedure is no longer possible. It is believed that the Government would resort to such a procedure where it would be sure of the parliamentary majority and would like to quickly promote a law which it considers essential to its government programme.[188] It is estimated that, in such cases, the only chance of the Government to promote a draft law is that related to the adoption of an emergency ordinance or committing Government's liability on that draft law.[189] Where it would choose to adopt an emergency ordinance, the Parliament, by law, within the control over delegated legislation, may amend the provisions of the ordinance or even to reject it. But either in the case of committing Government's liability for a draft law risks do not disappear, because lawmakers can initiate and adopt a motion of no confidence, resulting in the dismissal of Government.

Through committing its liability, the executive assumes full risk of governmental instability, the role to deal with a possible dismissal being incumbent upon it. Consequently, the procedure of committing Government's liability for a draft law is the only one in which "*the particular form of liability of public law has also direct legal*

[185] Constitutional Court Decision no. 34/1998, published in the Official Gazette no. 88 of February 25, 1998
[186] Idem
[187] Constitutional Court Decision no. 1415/2009, published in the Official Gazette no. 796 of November 23, 2009
[188] Dana Apostol Tofan, Angajarea răspunderii Guvernului, in R.D.P. nr. 1/2003, p. 8
[189] Idem, p. 8

consequences, since it can be completed with the adoption of a law or executive dismissal."[190]

Adoption of a law by committing Government's liability is **an accelerated system of adopting laws, which gives the executive discretionary powers**. Thus, whenever it would be sure of a parliamentary majority, the Government could use this procedure, eviscerating the constitutional provisions relating to regulation, except those relating to the enactment and enforcement of laws.[191] Thus, in a **deliberative authority**, in which the standing committees, deputies and senators play an active role in drafting laws, especially by right to submit amendments, **Parliament** would turn "*into a forum of simple approach of governmental draft laws*."[192]

On the other hand, we find that by using this procedure, ultimately, what lawmakers vote is not a draft law but a motion of censure. If there is no motion of censure, there is no political debate in Parliament, and if the motion is filed, its content is discussed and not the content of draft law.[193] At first glance, the only method available to the legislature to influence the fate of the draft law, would be initiating and passing a motion of censure. However, analysing in detail the text of the Constitution, **art. 114 par. (3) and par. (4)** pass to the legislature several duties in connection with the draft laws adopted by committing Government's liability, **namely the involvement of the legislature in determining the final shape of the draft law. According to art. 114 par. (3)** deputies and senators **may submit amendments** to the draft laws, the Parliament also has the opportunity **to review the draft in question at the request of the President of Romania.**

By Constitution Review Act[194] changes were made to par. (3) of art. 114 of the Basic Law, in that the formulation of amendments was accepted, but, as we are in the presence of an institution that is based on the Government's initiative, only amendments accepted by the Government will be included in the content of the law. If the Government does not accept the amendments made by failure to file the motion of

[190] Elena Simina Tănăsescu in *Constituţia României, Comentariu pe articole*, coordinators I. Muraru, E. S. Tănăsescu, p. 1065
[191] Tudor Drăganu*, op.cit*., p. 175
[192] *Idem*, p. 175
[193] *Ibidem*
[194] *Romania's Constitution Review Act no. 429/2003*, published in the Official Gazette no. 758 of October 29, 2003

censure or by dismissal thereof, the original text to which the Government has assumed responsibility shall be maintained.

Although by Review Act, the opportunity to intervene in the actual content of the draft law was given, and initially it was claimed that the Government may accept any amendments thereof, state practice outlined in the application of this institution, the text of the law remained always that promoted by the executive.[195] Therein lies the distinctiveness of the institution, the Government obtaining a law without Parliament theoretically "be legislated."[196]

Under paragraph (4) of art. 114 the President of Romania may refer the law passed as a result of government's liability commitment to the legislature for review, where he considers that it presents issues of **political inopportunity[197],** and according to the provisions of the same paragraph, **the law review should take place in the joint session of the Chambers**.

Exceptional procedure envisaged by art. 114 of the Constitution, in terms of adoption of a law, is not provided for review of the law also, complementary legislative procedure remaining to be governed by common rules, with one exception, expressly provided, i.e. that of reviewing in joint session of the Chambers.[198]

Constitution of Romania, in art. 114 makes no reference concerning the **legal quorum** for passing the law, after review, even if a quorum is different, as law is organic or ordinary. In doctrine, taking as reference art. 113 par. (1) of the Constitution, which provides that for the adoption of a motion of censure absolute majority is required, and since the law was adopted by the failure to file the motion or the motion falling at vote, its re-adoption - this time – would involve absolute majority vote, whether it is an organic law or ordinary law.[199] According to the opinion expressed by **Professor Ioan Deleanu**, as the law could implicitly be rejected by the admission of a no-confidence vote by at least an absolute majority, it could not be adopted now, explicitly, with a majority below

[195] Dana Apostol Tofan, *op. cit*., p. 12
[196] A. Iorgovan, *op. cit*., p. 419
[197] Verginia Vediaș, *Drept administrativ*, ediția a VII-a revăzută și actualizată, Universul Juridic Publishing House, Bucharest, 2012, p. 311,
[198] Genoveva Vrabie, *Organizarea politico-etatică a României. Drept constituțional și instituții politice*, vol. II, ediția a 3-a revăzută și adăugită, Fundația pentru Cultură și Știință ,,Moldova" Iași, Cugetarea Publishing House, Iași, 1999, p. 190
[199] Dana Apostol Tofan, *op. cit*., p. 10

that required on rejection.[200] Another author[201] considers that, in the opinion expressed, the above author does not take into account the fact that the rejection of a motion of censure, filed due to Government's liability may not be the consequence of forming a favourable majority of a draft law, but of the inability to reunite the number of votes needed to adopt the motion. As a result, we could consider that the draft law for which the Government has assumed responsibility was adopted by a majority of the members of Parliament. "*In fact, it would be strange that a draft law passed by highly expedient procedure, of art. 114 of the Constitution, become an organic law, even if its object is reserved social relations through art. 73 of the organic law*."[202]

Concurring with the view expressed in the literature by some authors,[203] we consider that after reviewing in joint session of both Chambers of Parliament, the law is to be passed, **either by a simple majority or by an absolute majority,** as it is an **ordinary law or an organic law.**

Another issue raised during **the review of the law concerns the possibility of formulating law amendments by members of Parliament** likely to be debated, adopted or rejected by vote. It is natural, as considered in the doctrine,[204] to allow the formulation of amendments by members of Parliament, otherwise law review itself would be meaningless; Moreover, after review the law can be dismissed in its entirety, as laws adopted under Government's liability do not enjoy special treatment. In another opinion[205] it is estimated that amendments may be made but only to the idea of specifying the position of Parliament to President's review request, not to the idea of blocking the effects of Government's liability operation in the legislating plan. From this perspective, we believe that admitting possibility of rejection of the law in its entirety, by lawmakers' right to make amendments during the review of the law, would lead to the conclusion that the entire proceedings of committing Government's liability for a draft law would be devoid of content.

[200] Ion Deleanu, works cited, p. 292
[201] Tudor Drăganu, works cited, p. 176 şi urm.
[202] Idem, p. 177
[203] Dana Aposol Tofan, works cited, p. 10
[204] Ion Deleanu, works cited, p. 293
[205] Antonie Iorgovan, works cited, p. 420

CONCLUSIONS

From the analysis of constitutional provisions we found that both **censure motion governed by the provisions of art. 113 of the Constitution of Romania, and the motion raised, resulting from the commitment of Government's liability, governed by the provisions of art. 114 of the Basic Law align on the coordinates of parliamentary control over the activity of the executive**, being legal instruments wherethrough the legislature withdraws confidence from a Government that failed to meet the political aspirations bore by the government programme.

By **Decision no. 1525/2010** Constitutional Court held, inter alia, that between the two constitutional procedures, one set out in art. 114 of the Constitution and the other governed by the provisions of art. 113 of the Basic Law, there is a connection in that the provisions of the Constitution "***do not regulate two types of motion of censure, on the contrary, the motion of censure, as legal institution is one, governed by art. 113*** *of the Constitution; specific elements aimed at no-confidence motion in the assumption of Government's assuming liability reveals only two* ***procedural features*** *(initiation context - after submission of the programme, of the general policy statement or of the draft law subject to the liability commitment – and constitutional initiation ability, - whether signatories have initiated during the same parliamentary session a motion of censure, according to art. 113 of the Constitution) and a* ***feature substantial in nature*** *(in case the motion is rejected, the programme, the general policy statement or draft law are considered adopted)* ***which cannot qualify the motion of no confidence provided in art. 114 of the Constitution as an instrument of parliamentary control different from the motion of censure regulated by art. 113***"[206]

While the **general rule** of censure motion is found in the **provisions of art. 113** of the Constitution, the provisions of **art. 114 of the Basic Law govern particular aspects of the institution, through par. (2) and. (3)** which describes the motion of censure filed in the proceeding of committing Government's liability as being a motion raised, without differentiating it in terms of legal nature and the purpose sought from the motion of censure regulated by art. 113 of the Constitution.

[206] Constitutional Court Decision no. 1525/2010

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INSOLVENCY -THE EVOLUTION OF THE CONCEPTS REGARDING THE TREATMENT OF PROFESSIONALS IN DIFFICULTY

Mihaela Cristina PAUL *

ABSTRACT

The bankruptcy procedure is not a creation of modern legislation, but the result of a process of adaptation of the right to the reality of time, of an evolutionary process that begins with ancient Roman law and still continues at a faster pace than ever.

The crystallization of bankruptcy meant a diversification of the terminology. On the one hand the modern law distinguishes several types of procedures depending on the seriousness of the debtor`s situation, distinction which operates at the terminology level: liquidation by the Court, reorganization, bankruptcy.

In the last two decades, a lot of specialists in commercial law, as well as economists interested in the legal framework of the economic processes were directed to analyze the concept of bankruptcy. This analysis has resulted in a significant number of papers focused on the functionality of bankruptcy procedures and on the reform process of insolvency.

KEYWORDS: *insolvency, bankruptcy, procedure of insolvency, creditors, debtors*

Since ancient times, the rules of law have governed human relations. Lawmakers of the world, have created over the years, regulations to satisfy the necessities of the moment and to insure the creditors` protection against the debtors who are unable to pay the exigible debts.

The legal regulation of insolvency comes from the **Roman law**, where, in the primordial era, *„legis actions „* , the creditor was entitled

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to detain the debtor, in a private prison, to sell him as a slave and even the right of life or death over him. The debtor could remove the rights of the creditor against him, only to the extent that a third party accepted to pay to the creditor the debt instead.

Over time, these executions on a person were replaced by execution of the entire patrimony held by the debtor.

Creditors could obtain, „missio in possesionem "(vesting of possession) through which the debtor was relinquished by his goods, subsequently being sold.

The possession was exercised in the interests of creditors by a trustee, the debtor being unable to have his wealth at his disposal. For the goods to be sold, a publicity for all creditors was made in order to be aware that the debtor's assets are going to be sold and to interfere to make the distribution of the obtained price.

Creditors had, therefore, the right of life and death over debtors who do not pay their debts. The creditors, in the last stage of the procedure provided by law, if the debt was not paid, the debtor could be sold over the Tiber or to be killed.

If there were several creditors, they could divide the corpse of the debtor, but only proportional to their claims, thus wer committing a *fraud*, as it was mentioned by, **"the Law of the XII tables ".**

Hacking the corpse signified a warning to others, in an era still with strong reminiscences of magical practices available according to which debtors torn and left unburied, will have no peace in the afterlife.

Such atrocities rarely happened, the debtors were kept near the house, as slaves, paying their debt by their work until death[207].

After 120 years, around 326 BC year , the provisions of the Law of the XII Tables were removed by the new law enacted from the initiative of Poetelia and Papyri Consuls , whose name it bears.

The debtor's obligation to pay the debt was in force further. The new law abolishes also the "nexum" contract used hitherto for loans of money and goods.

If, "nexum" was translated as "enslaving a person for an unpaid debt," the noun, "nexus" meaning "chaining" signifies the fate of the debtor "fallen into slavery untill the debt is paid[208]. "

[207] V.Hanga, *Drept privat roman,* Ed. Didactică și Pedagogică, București, 1978, p.125
[208] G.Guțu, *Dicționar Latin – Român,* Ediția a II a, revăzută și adăugită, Ed. Humanitas, București, 2003, p.865

The new law, was born as a sequence of the pressure coming from the middle class who could not pay their debts, especially due to the high interest rates charged by moneylenders, establishes a new procedure namely the debtor declares by oath its solvency, so he could save his freedom by disposal of property[209].

The open procedure was a true **collective procedure of** creditors **to recover the debts** from debtors[210].

The bulk sale of debtors` goods disappeared in **the imperial era**, being replaced with the detailed sale.

As mentioned above, the goods were sold in bulk, this method of selling the insolvent`s goods proving less practical, because the goods sold in bulk were low prices.

Another form to help the debtors was, "the delays" given by the Roman emperors and which were equal to the modern moratorium[211].

The Roman procedure of the detailed sale of debtor`s goods was taken over and applied by the medieval fair law, the castles law and later on by the merchants` corporations law, all across the Western Europe.

This process of taking over or reception of the Roman law in the field has broadened since the twelfth century, in the cities of northern and central Italy[212].

In the **Middle Ages**, the Roman law was adapted to the needs of the times, the enforcement followed the Italian cities status, the same procedure applied with respect to the debtors` profession, the bankrupted were treated more harshly.

In the statutory legislation appears the principle of binding the bankruptcy to the ceasing of payments (payments termination), the majority agreement settlement and distinction between the debtors who have excuses and those culpable (fraudulent).

The first legislative regulation of bankruptcy, perceived from the Romans by their Italians follower, was taken by the French, through

[209] A.Negoianu, *Insolvabilitatea în vechile legiuiri romane,* Institutul de arte grafice „Vremea", Bucureşti, 1931, p.14

[210] A.Avram, *Procedura insolvenţei. Partea generală,* Ed. Hamangiu, Bucureşti, 2008, p. 4

[211] A. Negoianu, op. cit., p. 17

[212] M.Paşcanu, *Dreptul falimentar roman cu legislaţia teritoriilor alipite*, Ed.Cugetarea, Bucureşti, 1926, p.16

"*the Regulation of exchange markets* ", appeared in 1667 in Lyon, in the time of, Louis XIV, King of France.

The legal regulation of bankruptcy was made through The Order of 1673 in the XII th Title dealing with "bankruptcy and crashes".

The initiation of procedure inspired by the Italian law, was determined by the cessation of payments, the insolvent being imposed the obligation to submit the records and a summary statement of assets and liabilities[213].

The first comprehensive and systematic coding of "the bankrupt law" appears, also in France, in 1807, being included in the legislative work called **The Commercial Code.**

"Insolvency" enjoyed a great attention of Emperor Napoleon Bonaparte.

The new regulation had two purposes, one to ensure the payment to creditors and the drastic punishment of the insolvent, the latter had as purpose to improve commercial activity in general[214].

The French Commercial Code provided, in the insolvency field, that all of the debtor`s goods were seized. Therefore, the new regulation, pursued the collective and equal defense of the creditors ` interests and harmonize their interests with those of the credit in general.

In the old Romanian law, the most common bankruptcy provisions are contained in Caragea`s Codes and Calimach Code of 1817.

In the **Calimach Code**, bankruptcy was called, "obligations", the asset of bankruptcy "statement of affairs" and bankrupt creditors were called, "the creditors of the statement of affairs" "and were represented by, "the committee of creditors ".

The initiation of the procedure was made by decision taken by the court, inviting the creditors to submit their debts.

In the **Caragea law settlement** it was stipulated that if the debtor, "crashes" meaning he goes bankrupt, he must be given, its creditors' mercy[215].

[213] M. Pașcanu, op. cit., p. 17-18

[214] St. D.Cărpenaru, *Drept commercial. Procedura Falimentului,* Ed. Global Print, București, 1998, p. 526

[215] St.D.Cărpenaru, op. cit., p. 527

If it wasn`t obtained the creditors` agreement, the debtor was considered, "turned pauper" 'or "broke". The pauper had at his disposal his goods cession to creditors by "giving away his wealth ".

The first bankruptcy Romanian law was, "**Kondica pentru Komerciu** " of 1840, translated from the 1838 French law .

In Romania, the French Commercial Code was first taken over in Wallachia, through **the Commercial Code of 1840**, and then in Moldavia, through **the Commercial Code of 1864**. These codes have been replaced by **the Code of Commerce of 1887**.

The Commercial Code of 1887 sets the measurements of bankruptcy in the IIIrd Book , "About Bankruptcy " art. 695-888. This code excludes from applying to procedure the non-merchandisers, showing a harsh attitude on the distressed merchandiser.

According to the art.695-888 C.com., bankruptcy was an enforcement procedure, being characterized by unitary, collective and egalitarian character, aiming the debtor`s goods to satisfy the legal interests of its creditors[216].

From the moment the bankruptcy was proclaimed, the insolvent lost the right to manage and dispose of its assets, the individual debts became enforceable, the rate of the interests and the individual consequences of creditors being suspended[217].

The insolvent could be arrested or forbidden to leave home without the permission from the syndic judge, with the termination of his professional and civil rights.

The bodies involved in the bankruptcy procedure were The Court, The syndic judge and The Creditors Union.

The Commercial Code of 1887 established both the moratorium and the agreement as ways of suspending and avoiding the consequences of bankruptcy.

The Romanian Commercial Code as subsequently amended, for the last time in 1944, was suspended from the establishment of communism in Romania, the new socialist economic relations requiring a different kind of law with respect to the commercial field. However, the Commercial Code of 1887 was used in the communist era as well, being the basis of the foreign trade contracts of the Romanian

[216] I.N.Finţescu, *Curs de drept comercial,* vol. III, Bucureşti, 1930, p. 7. Încă din acea perioadă, în alte legislaţii, falimentul se aplică şi necomercianţilor

[217] St. D.Cărpenaru, op. cit., p. 528

commercial units called foreign trade enterprises, with economic and commercial partners outside the socialist system.

In 1990, the old Commercial Code was reinstated.

Since the IIIrd Book of the Commercial Code, the one regarding bankruptcy, had fallen into desuetude, the Romanian lawmaker modified it by **Law 64/1995**, entitled "the judicial reorganization and liquidation procedure".

The Law 64/1995 marked the transition to a modern regulation in Romania, its structure being taken up and developed, with some additions and amendments to **Law 85/2006.**

The Law 64/1995 was **the first major reform for the traders insolvency procedure** introducing the reorganization concept as a priority way to attain the objective of the procedure, the recovery of the debtor and the payment of liabilities[218].

The law established the traditional concept followed by the Commercial Code, regarding only the professionals, that is those who exercised professional nature business. But it suppressed the moratorium and the agreement, being replaced with the reorganization procedure.

According to the Law 64/1995, the procedure of reorganization and judicial liquidation was a procedure which was carried out under the control and supervision of the Justice, applied only to traders who were in cessation of payments for their commercial debts, correlative to some certain, liquid and exigible debts[219].

Law 64/1995 amended by Ordinance 38/1996[220] and subsequently by GEO 58/1997, which amended the title of the law – The judicial reorganization and bankruptcy procedure[221].

The Law 64/1995 with all subsequent amendments, was amended by Law 149/2004[222], which operated 122 changes, the most

[218] I.Turcu, *Procedura insolvenței în permanență reformă legislativă*, în RDC nr. 1/2005, p. 9 și urm.

[219] Tribunalul București, Secția a VII comercială, sentința comercială nr. 590 din 17 mai 2004, I.I.Dolache, C.H.Mihăianu, *Reorganizarea judiciară și falimentul. Practică judiciară,* Ed. Hamangiu, București, 2000, p. 34. Curtea de Apel București, Secția a VI a comercială, Decizia comercială nr. 167 / R din 17 februarie 2005, idem, p. 38

[220] M.Of. din România nr. 204 din 30 august 1996

[221] M.Of. nr 265 din 3 octombrie 1997. OUG 58/1997 a intrat în vigoare după 30 de zile de la publicare și a abrogate OG nr. 38/1996

[222] M.Of. nr. 424/12 mai 2004. Prin Legea 149/2004 a fost abrogată OG 38/2002. În temeiul dispozițiile art VIII alin 1 din Legea 149/2004 s-a republicat Legea în M.Of. nr 1066/17 noiembrie 2004, dându-se textelor o nouă numerotare.

important being the development of the procedure to the non-commercials as well, respectively to agricultural associations and economical groups.

It was established the presumption of insolvency, in shifting the onus of proof, it has simplified the procedure by reducing the number of notifications, reduced the deadlines, etc, thus trying to answer the practical needs arising from the application of the procedure.

Another important measure which was ordered by the changes made is the establishment of Register of procedures, which publishes all summons, convocations and notifications.

A further amendment was made by **Law 249/2005**, which completed the enlargement of debtors to whom it was applied the procedure to "any other legal entity with private right which runs economic activities ", having as target the associations and foundations that carry out economic activities.

Practical needs and general interests of the proper conduct of economic business in harmony with EU legislation led to the adoption **of the Insolvency Procedure Law no. 85/2006[223].**

The new law keeps the expanding, made through successive amendments of the Law 64/1995 concerning the application domain of judicial reorganization procedures and of bankruptcy to other categories of people than the traders.

Key innovation of Law 85/2006 is the fusion of all the above procedures into one, the procedure of insolvency.

Law 85/2006 stipulates the general procedure and a simplified insolvency procedure as well, introducing the notion, of "observation period ", drawing inspiration from French law.

Another innovation of the Law 85/2006 consisted in the regulation of special administrator institution, as a mean of protecting the interests and the views of the members or debtor`s shareholders legal person.

The new law, Law 85/2006 regarding the procedure of insolvency[224] starting from the acquis communautaire in the field and

[223] M.Of. nr. 359 din 21 aprilie 2006

[224] Legea 85/2006 privind procedura insolvenţei a fost publicată în M.Of. Partea I, nr 359 din 21 aprilie 2006 şi potrivit alin. 1 al art 156 a intrat în vigoare la 90 de zile de la data publicării. Ulterior ea a fost modificată prin OUG nr. 86/2006 privind organizarea practicienilor în insolvenţă – M.Of. nr. 944 din 22 noiembrie 2006, prin OUG nr. 173/2008 – M.Of. nr 792 din 26 noiembrie 2008, şi respective Legea 2777/2009 –

valuing the principles of international law (UNCITRAL Law) and the assets in the field, introduced as new elements, among others, a simplified procedure as alternative to the general procedure, the reduction of the syndic judge of responsibilities that exceed the scope of litigation and the verification of legality of the procedure, broadening the legal administrator responsibilities / liquidator, increasing the role of the Commission and of the creditors' committee, simplifying the procedures for citation, notification and communication[225].

On April 15, 2014, the Chamber of Deputies, as the decision chamber, adopted **the Law on the procedure to prevent the insolvency and of insolvency, Law 85/2014.**

It entered into force 3 days after its publication in the Romanian Official Gazette and will apply to the requests submitted after this date.

The Law 85/2014 is a revision of GEO 91/2013 of 2nd October 2013 on the procedure to prevent insolvency and of insolvency, **declared unconstitutional on November 1st, 2013** by the Constitutional Court, through Decision no. 447 of October 29th, 2013 on the plea of unconstitutionality of Ordinance 91/2013 regarding the procedures to prevent the insolvency.

According to the Ministry of Justice, the new law follows the general principles valid in the European Laws with respect to insolvency, and also the new approaches of the European Commission in the field.

It aims to maximize the degree of improving the assets and the recovery of claims, granting a real chance of recovery to the honest debtors, transparency and predictability in the procedure, to ensure equal treatment of creditors of the same rank.

The New Insolvency Code brings a number of positive elements in the recovery of claims by creditors.

New definitions are introduced, such as *current creditor*, *activity report statement, surveillance*, which was interpretable in the old law - as well as clarifying items *on the special administrator, the indispensable creditor, the private creditor third party*, the claims enjoying a question of preference.

M.Of. nr. 286 din 14 iulie 2009, prin Legea 25/2010 – M.Of. nr. 145 din 5 martie 2010, şi prin Legea 169/2010 – M.Of. nr 505 din 21 iulie 2010

[225] I.Morariu, *Reorganizarea judiciară, mijloc de salvare a activităţii şi patrimoniului debitorului*, Ed. Hamangiu, Bucureşti, 2014, p. III

Other new elements have as target the beginning of the inventory of all assets of the debtor within 30 days from the initiation of procedure, "superiority" funding during the observations of the debtor - meaning that the amounts received by the debtor are returned within 5 days to the banks and the treatment of claims arising from leasing contracts.

The sale of goods is more flexible, without constraints on the bulk sale. For the first time regulations regarding the insolvency of groups companies are submitted.

Conclusions

In the general context of insolvency, the judicial reorganization began to earn a first-place, but the process is not yet completed, with premises for future developments.

The very evolution of Romanian society in general and of business environment in particular call for the evolution of judicial reorganization and the redefinition of its status in the sense of imposing as mandatory procedure or rule within the procedure of insolvency.

We believe that, the bankruptcy law had a prompt response to the economical needs of the legal persons in Romania, predicting any possible difficult situations imposed by the financial crisis, covering many of these situations through methods of judicial reorganization.

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ROMANIAN LAW FOR HEALTH REFORM – CERTAINTIES AND EXPECTATIONS

Diana Loreta PĂUN [*]

ABSTRACT
A real reform of the health system must first harmonize Romanian legislation in the field of healthcare with the European lawframe, so that the health system in Romania will always provide quality health services in the patient receiving health care needs and various forms at all levels of care. Incoherence and legislative instability do nothing but threatening the system which must ensure improved health status of the population of Romania.
KEYWORDS: *Health system, legislation, reform*

INTRODUCTION:

Health system are all independent elements that affect health on both the individual and population level (community) and includes health determinants and health care system.

Health involves individual welfare function, the body's ability to adapt to varying conditions of life and work and the human condition that makes one creative. Achieve the highest standard of health is one of the fundamental rights of every human being, regardless of race, religion, political belief, economic and social status.

Human health appears to be threatened by many factors, which induce problems for each individual and for human society as a whole. Even if the progress of medicine and the natural development of the civilization of mankind led to the increase in life expectancy at birth in the world, we are facing a sharp decline in the birth rate for civilized countries and a decrease in fertility, with obvious consequences for society.

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As a result, each State must have promoted a health system to ensure the health of the population as an essential component of increasing longevity and quality of life. Thus, decision makers at all levels must be aware of the importance of health as generating labor and health insurance to become not only a subject of social policies but a long-term investment objective. This requires a solid and stable legislative framework and objective measurement of health system performance.

There is a wide variation in terms of health results for countries with similar level of civilization, with some differences due to the performance of the health system. The differences are of a legislative nature, form, or content management and translate the differences in social outcomes such as morbidity assessed, responsiveness to people's expectations, equity.

An important problem on highest level of national health care strategies for Romania is to reduce the gap between its system and similar European countries.

The Romanian health system, similar to other European systems, will have to increase its transparency, to provide enough information to the patients in order to take informed decisions when they are choosing a health care provider, hospital or alternative treatment. This should include information on system performance regarding medical safety, evidence-based practice and patient satisfaction.

For a proper allocation of the diagnosis and treatment methods, all medical decisions taken by the health system will be based on the best scientific knowledge available at the time. Thus, a better fit of health care needings for population is achieved, in the same time with direct accountability of the decision makers.

Evolution of the health services system in Romania

The health care system includes all the human, material, financial, and symbolic information used in various combinations to produce the care and services that aim to improve or maintain health.

Health care system in Romania has undergone in the last two decades a transition from the integrated model, in which health care providers were public property under the Ministry of Health to the model of contractual healthcare providers, private or public, binding the health insurance funds with the basic legislative framework contract which regulates medical assistance.

This process of replacing the integrated health system with a contractual one, was made possible by legislative changes. The most important legislative changes have been Law 74/1005 regarding the organization of the Romanian Medical College, Law 145/1997 on health insurance, Law 100/1997 on Public Health, Law 146/1999 regarding the organization of hospitals. The wide relaunch of the health reform process, reviewing all legislation healthcare, was obtained by The Law 95/2006.

Analysis of the Romanian population health:

Romania's population has declined substantially in the last decade, from 21.6 million people (2002) to 20,100,000 people (2011), due to negative balance of births and deaths and due to external migration. Life expectancy at birth was a positive development in the past 20 years, reaching 70.1 years for men and 78.2 years for women – however, it is much smaller than that of Western European countries[226].

The general trend of population is to get old by reducing the share of young population and increasing share of the population over 60 years to 20.8% in 2012.

The patterns of morbidity and mortality in Romania have also undergone important changes in recent decades to increase the prevalence of chronic disease and mortality in these cases, because the growth of the elderly population, coupled with the action of multiple risk factors, biological, environmental, behavioral, and socio-economic impact and healthcare. However, in terms of health, the Romanian population presents some of the most unfavorable indicators across Europe.

The morbidity and mortality data show a mixture of specific indicators for developed countries, such as increased mortality from cardiovascular disease and cancer with specific indicators in developing countries such as infectious diseases, from tuberculosis to sexually transmitted diseases. Although infant mortality - one of the most suggestive indicators of health - has declined, reaching a value of 9.4 deaths per 1,000 live births, this health indicator remains the highest across the European Union[227].

[1] Eurostat, 2011

[227] Europeristat, EUROPEAN PERINATAL HEALTH REPORT, Health and Care of Pregnant Women and Babies in Europe 2010

The health of our population is influenced by both social-economic and behavioral factors in the physical environment and working life and individual characteristics. Behavioral factors known to impact on health (smoking, alcohol, diet, obesity and physical inactivity) greatly influences the health of the Romanians, with different impacts by gender.

A great influence on health indicators has but health care system performance, which can be appreciated through improved health, increased capacity to respond to the expectations of the people and ensuring equity in terms of financial contribution[228].

The indicator used to assess the comparative ability to meet the needs of the beneficiary is the percentage of self-reported unmet medical needs which Romania is 11.1% in 2011, compared to 0.4% in Norway and Austria and 7% in Bulgaria[229].

Romania is among the last places in Europe from a consumer of health services related to the financial allocation to health per capita. Expenditure in the health sector in Romania were traditionally lower than the European average. However, in recent years health budgets have increased in absolute terms from about 90 Euro / capita at over 200 Euro / capita. Despite this growth, Romania remains one of the last places in the European Union on health resources.

Romanian health system problems:

Current problems of the health system in Romania are multiple and related legislative sphere, organizational, financial, and not least of human resources.

Law governing current healthcare system is the Law 95/2006 on healthcare reform, which at the time of publication, its has undergone many amendments, changes and additions, which argues instability in the system and prevents shaping a coherent long-term health care. In 2006 Act 95 brought the breath of real reforms in the system, each chapter addressing a whole new perspective of medical services.

Numerous attempts to amend the legislation, some of them contradictory, decreased over time not only the confidence of both patients and stakeholders in system but the ability of decision makers to initiate and implement real reform oriented and patient's needs.

[228] Murray, Christipher JL, Frenk J – *A framework for assessing the performance of health systems* – Bulletin of the World Health Organization, 2000, 78 (6)
[229] Eurostat, 2013

At that moment, instability of the legislative and multiple direction changes in the structure and role of the health system is the issue of principle that we can identify in the Romanian health sector. To this is added: institutional centralization and lack of real autonomy of hospitals which lowers their ability to respond to social conditions and changing market, the lack of national and regional plans related to health services and lack of a financing of hospital activity to stimulate efficient use of allocated funds and increase quality of care.

Health reform in Romania can not be achieved as long as there is no continuity. The 25 ministers who have led the health system over the past 20 years have never continued a program started by his predecessor, each warrant making changes sometimes contradictory and incomprehensible.

In fact the crisis of health care reform consist of little restructuring, excessive bureaucratization, overloaded, lack of a coherent strategy and consistency of the real needs of people and resources.

We can add legislative issues, organizational, financial and staffing problems: significant deficits in terms of total number of health professionals imbalances on territorial distribution of health personnel required and in terms of the division between different professions and specializations lack of an adequate health staff motivation which leads both to decreased attractiveness for entry into the system and increase the number of those who leave.

Lack of adequate health staff motivation leads to informal payments, currently known as pervasive in the health sector. They limited and difficult access to certain services, particularly hospital medical servicies.

International experience in the problem of informal payments in the health system shows that an increase in staff salaries is a necessary but not sufficient. To eradicate or reduce the phenomenon are necessary legislative measures to impose sanctions against those who clear the medical condition of an informal payments, the introduction of mechanisms to formalize some informal payments, stimulating the development of the private health sector, both private health insurance, the provision of health services and changing service payment systems to encourage efficient and professional performance.

Health system issues inevitably lead to deterioration of health of the nation and as such we appreciate that failure to correct these problems has direct consequences for national security.

As a result, Romania's health system needs structural reform to ensure all citizens, especially vulnerable groups equitable access to quality services and cost effective.

Expectations on healthcare reform in Romania:

The strategic goal of a real health reform should be increasing the quality of life of citizens by improving the health of the population. Romanian legislation should support economic and organizational efficiency of the medical system. The legislative framework should provide encouraging professionalism and dignity of the medical profession by rewarding performance, allow diversification of financing methods depending on the performance and quality of care but also to enforce transparency in the use of public funds.

The Ministry of Health, as a specialized structure of the central public administration is the central authority in the field of public health care. Ministry of Health develops policies, strategies and action programs in the field of health, in accordance with the Government Programme, coordinates and controls implementation of policy, strategies and health programs at the national, regional and local level. The principle underlying the strategy to achieve the objectives in health care refers to placing the patient at the center of health system decision-makers with responsibility before it.

According to the National Health Strategy 2014-2020, Ministry of Health mission is to establish strategic directions and work in cooperation with relevant actors in the system to ensure equitable access to quality health services, cost-effective, as close as possible individual and community needs.

Basic principles of the Health Strategy, strategy that both patients and professionals have a legitimate expectation system are: equitable access to essential services, cost-effectiveness, reliance on evidence, optimizing health services, focusing on services and preventive interventions, decentralization, partnership with all institutions that can contribute to improving health, said the aim is to improve the health status of the population of Romania comunităţii[230].

Core values on which the Ministry of Health supports its vision for the future are[5]:

• communication and transparency

• commitment to national strategic directions

[230] National Health Strategy 2014-2020 "Health Prosperity"

• value for money invested
• equity
• continuous improvement
• health decentralization and community empowerment and involvement
• empowering staff health
• professional ethics
• raising awareness and empowering the individual.

Supporting these values involves the principles in: decision on national health priorities and develop health services must be made openly, in consultation with key stakeholders in the system and communication to medical staff and community motivation; is necessary to involve intersectoral and interdisciplinary firm of Government, Ministry of Health, health staff and local communities in the implementation of strategies in the system; have provided an optimum between health expenditure and the benefit obtained while increasing access to health services for all, especially for the vulnerable; value, rewarding, and adequate training of medical personnel must be followed by an attitude and professional and ethical conduct of medical staff to the patient.

National Health Strategy Ministry of Health proposes a series of ambitious targets, such as the development of new services such as the health community, strengthening the role of primary care and outpatient care for older people in response to demographic changes expected, but and improving quality and efficiency in healthcare through solutions related to investments in human resources, high-performance technologies and infrastructure. A robust infrastructure, including both medical and communications network and related information storage is a necessity for the collection, dissemination and effective use of health information. Promoting an efficient information system should be seen as a central factor in the decision making process and planning of health services, which must be based on quality information, received in a timely manner.

On certain priority areas necessary strategies to the needs existing in Romania, beyond assumptions or our obligations in the European context, assumptions that come to potentiate the overall strategy in the health sector.

Adapting to European legislation requires health care services but that quality assurance becomes fundamental, safety will become a basic

feature of the health system. Thus, reducing risk and ensuring patient safety should be supported by information systems and procedures and quality monitoring system, which will help to recognize, prevent and reduce errors.

The efforts of the whole society must always be directed towards health promotion aimed at increasing people to be healthy, fit to participate in society and is achieved by developing sanogenetic measures the contribution of all sectors of the community and social groups.

Such health system reform will improve health indicators nationally and close the gap in health status compared with the EU average.

Thus, a national long-term care services on a system of financing medical sector to stimulate efficient use of allocated funds, the presence of clear criteria for assessing the performance of health professionals especially setting a clear direction on the structure and role Romanian health system will make it an effective and sustainable health system, seamlessly integrated into Europe.

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PARTICULARITIES OF THE RESEARCH OF INFRACTIONS AGAINST THE ENVIRONMENT

Ninel PEIA *

ABSTRACT

Environmental protection is one of the big actual challenges of Romania, considering the prejudices brought to the environment by the pollution. The wastes produces count more than 350 million tons per year, the figure getting 10% higher each year, and those are affecting the quality of the inhabitant's life, especially in the urban areas. Romania was often criticised for putting economic development and commerce before the environmental issues, thing that lead to a view change. In present, the Romanian development model which is not based on the environmental deterioration and the depletion of natural resources is recognised as an advanced one.

In order to manage and to administrate issues of environmental protection and development, and also to coordinate the actions developed at different levels it is imperatively necessary the creation and permanent perfection of organisational structures using the legal norms.

Therefore, in the instrumentation of infractions with impact on the environment are relevant two aspects: one related to performing some factual findings, determinations, laboratory tests or other specialty examinations and respectively taking the measures to neutralise the affected areas, when the situation requires so and establishing the fulfilment of the obligations by all the authorities, according to the legal norms in the field.

KEYWORDS: *environmental protection, infractions against the environment, intelligence structures, particularities of infractions.*

1.- Principles forming the base of environmental protection laws

The regulatory act significant in the field of environmental protection is "OUG (Government Emergency Order) regarding the

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environmental protection"[231] which establishes the principles and the strategic elements[232] forming its base on the purpose of assuring a sustainable development of the society.

Among those principles we pass in review:

- Preventing ecologic risks and damages occurrence;
- Conserving the biodiversity and the ecosystems specific to natural biogeographic environment;
- Caution while taking decisions;
- "the pollutant pays" principle;
- Prevalently removing the pollutants directly and seriously compromising people's health.
- Creation the national system for integrate monitoring of the environment;
- Sustainable use of the environment;
- Maintaining, improving the environmental quality and reconstructing the damaged areas;
- Creating a participation contest of people and of the nongovernmental organisations for the elaborating and applying the decisions;
- Developing the international collaboration in order to assure environmental quality.

The connection between the economic development and ecologic problems is definitive while appreciating the action possibilities for environmental protection.

The national development strategy is an attribute of the sovereignty and state independence that must take into consideration its specific conditions, the resources and its capacities.

Often used in the general development contest, the term of "strategy" designates the preoccupations of economic science to define the general lines for a long term development, the most effective methods and forms in order to reach its objectives.[233]

World Commission on Environment and Development (composed of United Nations' auspices) concluded that the exigencies of national strategy are the following:

- Regenerated economic growth;
- Changing the growth quality;

[231] EMERGENCY ORDER NO. 195/2005 regarding the environmental protection modified through OUG no. 164/2008.
[232] By the Ministry of Environment and Climatic Changes.
[233] Petre Tănase – International Ecology, Ed. Hyperion XXI, Bucharest, 2012, pg. 18.

- Satisfying essential needs of work places, food, energy, water, health
- Assuring a population level appropriate for its fundamental requirements;
- Conserving and developing the resource base;
- Reorienting the technology and managerial risk;
- Combining the economic science with the ecology while making decisions.

The problems on development and economic growth cannot be separated by the ecologic ones. The economy and the ecology are overlapping more and more – locally, regionally, nationally and globally – in a network of causes and effects.

The relation development – environment is a relation between the present and the future.

The development follows satisfying the needs of actual generation, environmental protection being an investment for future generation.

1.2.- Authorisation procedure

The authorities for environmental protection[234] lead the authorisation procedure and issue environmental agreements and licences according to the legislation.

The request for environmental agreement is mandatory for new investments, for modifying the existent ones and for the activities foreseen in the addendum no. II at the Government Emergency Order no. 195/2005, modified through Government Emergency Order no. 164/2008.

The request for licence is mandatory when implementing new objectives that have environmental agreement and within one year from the entrance in force of environmental protection law, for existent activities.

The activities that do not involve constructions and fitting works require only environmental licence, except from the clearing of forest vegetation outside the forest and the import-export of plants and animals from spontaneous flora and fauna.

The environmental agreement and/or licence is issued after obtaining all the other necessary notices, according to the legislation.

The validity of the environmental agreement and licence is of maximum 5 years, but they can be reviewed within this period if there

[234] National Agency for Environmental Protection

are new elements or elements suspended for non-conformation with the regulations mentioned by them.

The review is also made in case of renewal of environmental agreement or licence when the re-elaboration of the report regarding the impact study on the environment can be required.

The suspension is made after a preliminary summons, including a term, and is maintained until the removal of the causes that determined the suspension, but no more than 6 months.

After expiring this term, the authorities for environmental protection dispose the stop of project execution or the cessation of the activity.

For the existent activities that do not fulfil the authorisation requirements, the authority for environmental protection disposes the elaboration of environmental balance and establishes the programme for conformation on mutual agreement with the holder. After expiring each conceded term, in case of non-conformation, the authority competent for environmental protection disposes the cessation of that activity. The disposition of cessation is mandatory. If there appear conflicts regarding the issue, the review and the suspension of environmental agreement or licence, they are solved according to the Law of Administrative Contentious.

The procedure for the assessment of the impact on the environment[235] includes the following phases: preliminary one, the actual one and the analysis and validation one.

1.3.- Collaboration of information structures with other organism with responsibilities on the line of environmental protection

In order to manage and administrate environmental protection and development problems and also to coordinate actions developed at different levels it is absolutely necessary the creation and the permanent perfection of the organisational structures using the legal regulations. Hereby, are established and judicially function the structures necessary for identifying the analysis, the decision and elaborating different measures regarding the solution of complex ecologic problems. However, in Romania, a lack of responsibility in environmental problems and people safety can be ascertained.

[235] EMERGENCY ORDER NO. 195/2005 regarding the environmental protection modified through OUG no. 164/2008.

Governmental authorities allowed different racketeers to bring in the country big quantities of noxious substances and to transform some area of Romania in real cesspools of Europe.

The authorities for the import of food with expired periods of liability, counterfeited, toxic, dangerous for people's health and environment have the same blame.

The national forests are daily knocked off, the air, water and earth pollution has become more serious, the insalubrity level in the cities also has become higher.

Ministries and other specialty organs within central public administration

Govern Emergency Order no. 195/2005 regarding environmental protection modified through Govern Emergency Order no. 164/2008 establishes the following general obligations for the authorities of central public administration: to assure within their organisational structure departments with responsibilities in environmental protection, enclosed with specialty staff; to develop, with the support of central authority for environmental protection, restructuring programmes according to the national environmental strategy and to assist subordinated economic agents while implementing conformation programmes; to elaborate specific norms and regulations in their activity on environmental protection line and to present them for approval to the central authorities for environmental protection; to report as some regulations can prevent any authority to efficiently act for environmental protection and, in the same time, to show the progress made by applying the environmental law.

The responsibility for environmental protection vests to Ministry of Environment and Climatic Changes as central body of specialty public administration and to its territorial agencies. This ministry has general main responsibilities and responsibilities specific for each activity.

Among specific responsibilities we mention those one from the field of water management, forest management and environmental protection.

Environmental protection law also foresees a series of duties in the field for Ministry of Agriculture, Food and Forests, Ministry of National Defence, Ministry of Home Affairs, Ministry of Health and Family, Ministry of Transportation, Ministry of Education and others.

Ministry of Home Affairs together with Ministry of Transportation assure, based on the regulations approved by the central authority for environmental protection: the control of exhaust gas, of the intensity of

noise and vibrations produced by vehicles, of the material transportation, etc.

Ministry of Health and Family [236] controls the evolution of people's health in relation to the environmental quality; controls water and food products quality; elaborates in collaboration with central authority for environmental protection, environmental hygiene norms and controls their observance; periodically reports about environmental influence on people's health and collaborates with central authority for environmental protection while establishing and applying measures regarding the improvement of life quality, report published every year; collaborates with other ministries with its own sanitary network in respect of knowing exactly the people's health state and environmental protection from the activities.[237]

2. CAUSALITY AND PREVENTION OF ECOLOGIC ACCIDENTS

2.1.- Causes and conditions enhancing some ecologic accidents[238]

Lately, ecologic accidents have taken a special scale seriously affecting people's life and health and ecologic balance from the affected areas.

With the occasion of activities developed by information structures it was mainly followed clearly establishing the holders with any titles of toxic or dangerous substances, deposed or kept in inadequate conditions presenting a possible ecologic danger. It was also considered tracing and preventing all the situations in which, after buying the major package owned by the state, the buyers begun the disaggregation and the disaffection of some equipment, installations or means of transport containing toxic substances. Among the causes and the conditions that could enhance ecologic accidents, we pass in review:

[236] According to art. 70 from EMERGENCY ORDER NO. 195/2005 regarding the environmental protection modified through OUG no. 164/2008.

[237] Governmental Resolution no.22/2001 regarding the organisation and functioning of Ministry of Health and Family modified by Government Order no. 537/2002.

[238] According to Art 2. Government Emergency Order 95/2005, ecologic accident – event produced as a consequence of contingent discharge/ emission of dangerous/ pollutant substances or materials, in liquid, gas, steams or energy forms resulted by developing some uncontrolled/sudden anthropic activities through which natural and anthropic systems are damaged or destroyed.

- The cessation of the activity of some economic agents and junking the installations lead to the accumulation of important amount of toxic and dangerous substances, deposed in recipients, and the majority presents advanced state of depreciation, representing an imminent danger of accidents.
- The problems of liquidation and disaffection of former chemical or petrochemical combines represents a permanent danger of ecologic accidents seen the fact that advanced state of depreciation of installations, equipment and means of transportation can determine accidental discharges of contained substances.

In order to neutralise them, either we do not dispose of financial resources or by now technical solutions have not been identified.

- Shared control actions made on environmental protection line, they also ascertained the defective method of highlighting and managing the toxic and dangerous substances, establishing that in some case, existent quantities were not registered in the accounting evidences of the societies.

2.2.- Infractions prevention – priority activity of information structures

The activity of infractions prevention on environmental protection line includes: the sum of measures taken by the information structures in order to avert from committing infractions and other facts that harm the environment; continuous reduction of the number of those who can be dragged along to the laws inobservance; supporting the economic units and institutions while organising and developing guard activities and maintain own values and goods; people's education regarding the environmental protection.

As we can see, from the point of view of information structures work, the prevention includes four fundamental aspects, meaning:

a.- averting from committing infractions and other facts that harm the environment. Those aspects points to information structures intervention on people being in pre-criminal situations in order to make them quit committing infractions and other facts that harm the environment and to efficiently find them so as they have no more the possibility to commit other infractions.

b.- continuous reduction of the number of those who can be dragged along to the laws inobservance. This aspect refers to the preventive general measures applied by the police and also to knowing

the legacy by people with different responsibilities on environmental protection line.

c.- supporting the economic units and institutions while organising and developing guard activities and maintain own values and goods. This activity supposes a complete set of measures taken by information structures for the organisation and functioning of security and goods guard systems.[239]

This is an activity developed both for knowing and observing the law in the field by the citizens and for protecting them from becoming criminal's victims.

In order to elaborate this content of preventive actions, the organs with information structures take adequate measures and use all the means, methods and procedures resulted from the practice and positive experience, with the condition of them observing the letter and the spirit of the law. To prevent, is more beneficial than re-establishing the broken order, it is more useful for the society to fight against serious facts and consequences, some of them being irreparable.

The prevention activity developed by the information structures has a scientific character, based on knowing very well and multi-laterally the operative situation.

There is a close connection between the prevention activity and fighting the infractions. Parallel to preventive action it is imposed the intensification of disproof activity (discovery, disproof and research) of the infractions, of suiting and catching the criminals, of ascertaining the contraventions and applying the sanctions, making sure this way of decisive observance of legacy.

2.3.- Information structures responsibilities in environmental protection field

In the contest of main responsibilities that vest to information structures as fundamental State institutions while defending the fundamental human rights, it is also included developing specific activities for environmental protection, as an indispensable component of life's existence.

In the information structures in which do not activate specialized information formations, the responsibilities for infractions preventions regarding the environmental protection will be made by the other bodies within the information structures, according to territorial competence,

[239] Please see Law no. 18/2006 regarding objectives, goods and values guard.

under the management, direction and control of sub-unity head and his deputies.

The prevention and infractions research activities on labour line regarding environmental protection in the competence region will be the responsibility of deputy head of inspectorate within information structures coordinating the economic-financial information formations.

According to the law, Romanian Intelligence Service also controls the observance of legal dispositions regarding environmental protection, informs the Ministry of Home Affairs about contravention sanctioning and about ruling criminal research, depending on the case, in the situations expressly given in competence.

It analyses the evolution of operative situation at national level and elaborates disposition project of information structures in order to make more efficient the information activity on prevention and disproof of negative phenomena line in the environmental protection line.

Economic-financial information structures, through specialized department, organise, coordinate and execute different concrete activities and actions – at national level, or partially depending on the situations, in certain economic sectors – in order to trace environmental protection infractions[240] and to take reparatory measures as a consequence of effects produced by pollution or other ecologic disaster acts.

Based on its experience, it participates at meetings, conferences, symposiums or other manifestations with specialty character, internally and internationally, for elaboration a complete documentation, experience exchange and making the collaboration efficient in preventing and fighting facts that affect environmental protection.

It organises and develops its own informative-operative activity for preventing and tracing the infractions regarding the environmental protection.

It develops activities of control, support and specialty guidance of information structures territorial units on labour line.

Based on the conclusions taken by judicial practice and informative-operative, Romanian Intelligence Service formulates normative acts motions and observations on legislative projects in environmental protection field.

[240] EMERGENCY ORDER NO. 195/2005 regarding the environmental protection modified through OUG no. 164/2008.

It drafts analysis and synthesis materials regarding the causes generating the law inobservance facts regarding the environmental protection and informs the factors responsible in the field.

It participates at officers' profile professional training by drafting education materials and by popularizing the positive experience based on prevented cases or those researched through which ecologic disasters could happen or actually happened.

3. PARTICULARITIES OF THE RESEARCH OF INFRACTIONS AGAINST THE ENVIRONMENT

3.1.- Forms of committing infractions that affect the environment

Because of the big number of methods and means through which infractions with impact on environment are committed, I will further present the most important ones, according to the normative act in which are also regulated criminal actions. Therefore:

Infractions included in the Criminal code can be committed through the following methods and means:

- Infesting by any mean the water sources or networks, if it harms people's health, animals or plants;
- Producing, owning or any other operation regarding the products or toxic circulation with no right;
- Receiving, owning, using, ceding, modifying, alienating, dispersing, exposing, transporting or embezzling nuclear materials or any other radioactive substances;
- Any other operations regarding the circulation with no right of nuclear materials or any other radioactive substances;
- Taking or destroying nuclear materials or any other radioactive substances;
- Introducing by any method or their transition in the country wihout observing the legal dispositions;

Infractions regulated by EMERGENCY ORDER NO. 195/2005 regarding the environmental protection modified through OUG no. 164/2008 can be committed through the following methods and means:

- inadequately applying or not taking intervention measures in case of nuclear accident;
- refusing the intervention in case of accidental pollution of water and coast area;

- consciously provoking the pollution by evacuating of diving in natural water, directly or from the boats or floating platforms, of dangerous substances or wastes.
- Not taking measures to limit the impact on the environment of dangerous substances or wastes;
- Continuing the activity after the disposition of its cessation;
- Omitting to promptly report the admitted overlimit increase of environmental contamination;
- Provoking, because of not monitoring the ionizing radiations sources, the environmental contamination;
- Producing, delivering and using dangerous substances or not authorised pesticides;
- Depositing in subteran spaces dangerous wastes or substances;
- Installing, without permit, subteran or surface deposits for dangerous wastes;
- Incinerating the dangerous wastes in non-omologated installations;
- Omitting to promptly report any major accident;
- Pesticides, dangerours substances or wastes transportation or transit without authorisation;
- Not testing any new substance in the country or abroad;
- Presenting false conclusions and information in the impact studies and analyses;
- Issuing the environmental agreement and/or licence without mandatory and complete documentation.

The following methods of committing infractions[241] must endanger human, animal or vegetal life or health:

- Not monitoring or not insuring wastes deposits and dangerous substances
- Continuing the activity after the suspension of the environmental agreement or licence;
- Infringing the restrictions and interdictions on hunting and fishing protected or temporary stopped by law species and in the area with integral protection regime;
- Producing noises over the admitted limits, if by this is seriously endangered the human health;

[241] EMERGENCY ORDER NO. 195/2005 regarding the environmental protection modified through OUG no. 164/2008.

- Washing in natural water pesticides or any other dangerous substances packages, and also the equipment used to transport or apply them;
- Using dangerous baits and electric means for killing wild animals and fishes on the purpose of consumption or trade;
- Causing the pollution through willing evacuation in the water, atmosphere or on the earth of some wastes or dangerous substances;
- Causing accidental pollution because of not monitoring the execution of new works, the functioning of installation, technologic ecquipment and for treatment and neutralisation, mentioned in the regulations of environmental agreement and/or licence;
- Wood vegetation clearance outside the forest stock, situated on fields with very abrupt cliffs or at the superior limit of forest vegetation.

The following methods and means are specific to the infractions foreseen by the Law of waters no. 107/2006, modified and completed through the Government Resolution 948/2009:

- Evacuating, throwing or injecting in surface or underground water, in the interior maritime waters or in the territorial sea waters, wastewaters, wastes, rests or any kind of products containing substances in liquid, solid or gas form, bacteria, virus, in quantities or concentrations that could change water characteristics, making it harmful for people's health an body integrity, for animals' life and environment, for the agricultural or industrial production or for the fishing stock.
- Executing, modifying or broadening the constructions or installations on waters or that are related to the waters, without the waters utility permit or without modifying this kind of works and offering for exploration units without putting into operation the sewage networks and of the stations and installations for wastewater treatment, according to the regulations of the waters utility authorisation.
- Exploiting or maintaining works built on waters or that are related to the waters, developing activities of retting the linden, hemp or any other textile plants, of tanning of hides and skins and of extraction of mineral aggregates without waters utility authorisation.
- Using without water utility authorisation minor beds and also beaches and seas coasts on other purposes than those of bathing or walking;
- Continuing the activity after losing the rights obtained by law;
- Polluting in any way the water resources if it has systematic character and produces damages to the water users from the downstream;
- Depositing and using chemical fertilizers, pesticide or any other dangerous toxic substances in the protection areas;

- Depositing in the major bed nuclear fuel or wastes resulted from using it;
- Destroying, deteriorating and managing by not-authorised natural people of penstocks, grillages, fillet, other hydro-technical constructions and installations;
- Making diggings, graves or channels in dams, walls or in the protection areas of those works and also extracting earth or other material from the defence works, without water utility authorisation or by not-observing it.

For the infractions foreseen in the Forest Code, the criminals use the following methods and means:

- Cutting or getting out of roots, with no right, trees, tillers or sprouts from the national forest stock or from the field with forest vegetation;
- Totally or partially occupying with not right, some forests, field or waters from the national forest stock and also destroying, damaging or moving border signs, fencings or mark benches;
- Stealing chopped trees, or broken by natural phenomena, or trees, tillers or sprouts that have been cut or got out of roots, with or without right, from the national forest stock or from the field with forest vegetation;
- Falsifying the forest scoring hammer or using it with no right or against the legal dispositions;

Infractions foreseen by Law 192/2001 regarding the fishing stock, the fishery and the aquaculture are committed through the following methods and means:

- Unauthorised electric fishing with explosive materials, with toxic substances or any kind of narcotics or with some stingers and hangers;
- Reducing the debit and water volume in the fishing settlements and on the water course, on the purpose of poaching;
- Opening, closing, obstructing, damming with fishery hence or any kind of fishing tools the channels and the brooks connected to the lakes, ponds or floodable lands;
- Illegal acquisition, transportation or trade of fish, spawn, and fish products;
- Fish steal by any means and methods from the fishing settlements.

3.2.- Particularities of on scene research of the infractions with impact on the environment[242]

In the instrumentation of the infractions with impact on the environment two aspects are relevant: one related to the elaboration of findings, determinations, laboratory test or other specialty checks, and respectively taking measures in order to neutralise affected areas when the situation requires so, and establishing the accomplishment of the obligations by all the authorities according to the legal regulations in the field.

In the first case, a good collaboration is required especially with the territorial authorities of environmental protection but also with other bodies that could assure the tests, determinations or expertise when they are required.

A special importance is represented by the on scene research that should be seriously and meticulously made, by taking all the measures necessary for the limitation of pollution effects, when it is required, fixing and obtaining the samples in secure conditions, both for not destroying the evidence, and for not affecting the health or life of the staff executing these activities, of people or animals and for not causing the goods' destruction or alteration

It is indicated that the information structures organs to accompany and to assist the samples take-off showing when it is required where to take off the samples from and what they should determine. This is why, it is necessary for the workers to develop these activities, to be trained, to have an elevated level of training on environmental protection line.

Determining the prejudice in case of infractions against the environment, even if it is not required by law[243], presents some particularities, respectively when including the future necessary costs for rebuilding affected areas. Secondly, it is required considering the costs regarding the survey, take-off of samples, laboratory tests, taking the conservation and effects limitation measures, etc.

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[242] According to. Art 1 Government Emergency Order 195/2005, The environment represents the sum of conditions and natural elements of Terra: air, earth, subsurface, characteristic aspects of landscape, all the atmospheric beddings, all organic and an-organic material, and also alive beings, natural systems in interaction, including the above indicated elements, and also material and spiritual values, life quality and conditions that could influence person's welfare and health.

[243] EMERGENCY ORDER NO. 195/2005 regarding the environmental protection modified through OUG no. 164/2008.

Therefore, the authorities involved in samples take-off and implementation of effects limitations will be asked to express their point of view also on the own registered costs.

Another aspect is requiring the injured ones to appear as civil part in the criminal suit, indicating the respective amounts and the quantification of some results of the infraction determined by the recreation of health state of affected people or even of intervened deaths in the case.

By applying the "the pollutant pays" principles, the complete task to pay for the prejudice comes to him, who through real determinations can lead to reconciliation of the judicial framing conditions with aggravating circumstances.

The ecologic criminality particularities also require a good collaboration with prefect organs and a specialization in evidence administration and appreciation, in order to lead to a valid and correct solution of cases.

As far as it concerns the particularities of infraction research having as result water pollution, we would like to mention the following:

a. It is required the solicitation of laboratory tests, analyses or expertizes through which to be highlighted the "harmful" character and also establishing the causality report between action and this result.

b. It is necessary checking the repetitive or continuous activities having as result waters pollution;

c. The downstream users must be contacted, so they shall report the damages.

In both cases, it is imposed the collaboration with environmental and especially water utility authorities, but also with other institutions or bodies able to assure specialty checks in the case.

Some infractions stipulated by law are more easily to check, the police having the obligation to ascertain the absence of water utility authorisation.

In practice, there are many situations in which there are difficulties in identifying the pollutant, either because of his disappearance from the scene, or because of the encountered difficulties while establishing the causality report between action or inaction and result – environmental pollution (e.g. acid rains).

While ascertaining this type of infractions it is required urgently taking some fixation and samples take-off measures (photos, videos, plans) and respectively measures for effects limitation, making sure that the last ones do not lead to samples destruction.

Thereby, the on scene research has a particular role because a set of well-coordinated and guided actions in order to reach the objective. The samples take-off are also fundamental, by the way in which these were collected, kept, conserved and analysed usually depending the facts incrimination.

It is recommended that the workers from information structures to participate at the samples collection, being obliged by law to support the specialists from the environmental and waters agency, making sure that there were collected samples from all the affected areas, but also from the other areas, in quantities and quality conditions that should assure their facile analyses, taking in the same time the measures to assure their integrity and security and also of the specialists collecting the samples,

The time factor is sometimes fundamental, its actions being against the evidence administration for the case, representing an advantage for the criminal through samples extinction, deformation or destruction.

Some difficulties can be encountered while establishing and determining the "damages", condition expressly stipulated by the law for some facts incrimination, being required the quantification of supplementary costs for extra measurements and determinations of limitative parameters, respectively for neutralising the affected areas and the recreation of ecologic balance, both by downstream water users in order to avoid the negative effects or the interruption of water supply for water provision from other sources.

In this situation, it is required that the workers from the information structures making on scene research, to have the proper instrumentation of those causes, to have a supplementary training in the field, being also required a sustainable collaboration with environmental or water public authorities.

In order limit the pollution effects and to recreate the ecologic balance in the affected areas it is required the collaboration with local administration authorities. The defence commissions against the disasters, civil protection inspectorates and other institutions or competent bodies able to offer support in this sense.

3.3. Specificities on the organisation and development of informative-operative activity

Both the specialised officers department within economic-financial information structures and other information officers within territorial structures with responsibilities on environmental protection line act of

office and as a result of intimations of citizens, economic agents, state institutions and mass-media, reporting aspects of interest on environmental protection line, effects of eventual pollution or other visible consequences of infringing the law or other judicial acts, with ecologic character, by economic agents, other legal and natural people.

The main task of informative activity develop on this labour line is represented by the environmental pollution and reduction until the liquidation of the ecologic disasters risks.

On this purpose, the profile department, especially the police, mainly collects information within general informative surveillance that should be the fundaments of immediate, fast interventions in order to eliminate the generating causes and the conditions that enhance the events of infringing the judicial regime regarding the environmental protection.

Considering the disastrous effects of irresponsible acts of infringing the principles and strategic directions established by the legislation regulating the environmental protection from all the fields (transportation, energy, hydro-technical constructions, waste and packages regime, national defence, sport - tourism, entertainment, industry, forestry, installation works, etc.) on this labour line it should not be basically developed informative activity on long term, by informative file suit and suspect map, but it is required the practice of direct-immediate action in order to prevent the ecologic event and its negative consequences.

The specific informative activity will be developed according to the orders in force and will mainly focus on obtaining and valuing the data and information regarding:

- The willing or on fault infringement of environmental protection legislation;
- Report of cases when activities with particular impact on the environment are developed in time and space;
- Infringement of legal regulation regarding the granting of environmental-water permits, authorisations or any other activity submitted to the permits and authorisation regime;
- Continuation of the activities by the economic agents or natural people after the cessation disposition or its suspension by the environment-water authority;
- Infringement of legal dispositions regarding the dangerous substances and wastes regime;

- Reporting repeated "accidental" discharges by the great pollutant economic agents and the cases of not taking the appropriate measures to prevent those negative situations;
- Identifying the cases of using some recipients, cisterns, wagons, offhand deposits, etc. for the transportation and conservation on toxic strongly corrosive or dangerous substances;
- Cases of historic pollution;
- Tracing the cases of production, trade and use of some prohibited substances in Romania;
- Tracing the people within the system and others indulged in corruption, defalcation, forgery, circumventions, abuses and negligence during the service, all related to the environmental protection;
- Any other data and information through which is reported the inobservance of the legislation regarding the environmental protection and to prevent ecologic disasters.

3.4.- Methods and means of documentation and intervention

The department specialised to act on environmental protection line and other information officers with territorial units with responsibilities in the field, in the activity of documentation, data and information collection and recovery will mainly use the documentary portfolio, the intervention portfolio for each case and suspect's portfolio in special situations.

The fundaments for those regulations are the modification of art. 38 from EMERGENCY ORDER no. 195 from 22nd of December 2005. [244]

This way, the information regarding the environment – any written, visual, audio, electronic or any other material form about:

a) state of environment elements as the air, atmosphere, water, earth, terrestrial surface, landscape and natural areas, including humid, marine and coast areas, biologic diversity and its components, including genetically modified organisms, and also the interaction between those elements;

b) factors, as substances, energy, noise, radiations or wastes, including radioactive wastes, emissions, discharges and other environmental evacuation affecting or that could affect the environmental elements mentioned at the letter a);

c) measures including administrative measures as policies, legislation, plans, programmes, convention concluded between public

[244] Updated by the EMERGENCY ORDER no. 164 from 19th of November 2008

authorities and natural and/or legal people regarding environmental objectives, activities affecting or that could affect the elements and factors mentioned at the letter a) and respectively letter b) and also the measures or activities designed to protect the elements mentioned at the letter a);

d) reports related to the legislation implementation regarding the environmental protection;

e) analyses cost-asset or other analyses and economic prognoses used in the measures and activities mentioned at the letter c);

f) human health and safety state, including contamination, any time it is relevant, of trophic chain, human life conditions, archaeological sites, historic monuments and any other constructions, while those are or could be affected by the state of environmental elements mentioned at letter a), or through those elements by the factors, measures and activities mentioned at letter a) and respectively c).

For example the intervention portfolio for each case is open and kept for the cases in which were developed concrete activities of preventing ecologic disasters or for the situations in which were made observations or are made researches under contravention or criminal aspect according to the competences of information structures given by law or by other authorised organs at the information structures intimation.

The intervention portfolio for each case is kept both by the specialised department officers and by the policemen from the territorial units acting on labour line regarding environmental protection and ecologic disasters preventions.

The documentary portfolio and the intervention portfolio for each case are not registered in operative evidence, but only at the level of economic-financial information structures, and territorially at the secretaries of economic-financial services or information structures units.

Specialised officers from environmental protection department and other information officers from territorial unit acting on this labour line will develop the activity of information collection during the general informative monitoring by: obtaining data and information of operative interest, result of direct observation of facts; connected information sources, occasional sources, data resulted from corruption causes research – on the line of permits, authorisations for operations with dangerous substances, etc.; data resulted from mass-media, any other possibilities of intimation that require interventions with specific

prevention and research activities in real cases of breaking the law regarding the environmental protection.

The officer of specialised department within economic-financial information structures will recruit and work with informers in the places favourable for committing infractions affecting the environmental protection and among people with tasks of permits, authorisation, fund management, control and other task predisposed at corruption acts, abuses, negligence, defalcations, etc.

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PREVENTIVE MEASURES IN REGULATING THE NEW CODE OF PENAL PROCEDURE

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ABSTRACT

The main problems which the current judicial penal system faces are connected to the overload of prosecutor's offices and law courts, the excessive duration of the procedures, the unjustified delay of cases and to leaving the case files unfinished for procedural reasons. The provisions of the new Code of penal procedure aim to meet current demands, such as shortening the duration of penal procedures, simplifying them and creating a unitary jurisprudence in accordance with the jurisprudence of the European Court of Human Rights.

KEYWORDS: *preventive measures, defendant, reversing, replacement, termination of preventive measures*

I. Introduction

The realities of present-day judicial life have shown the lack of expediency in carrying out the penal actions in general, the litigants' lack of trust in the act of justice and the significant social and human costs which translate to a high consumption of time and financial resources. All these have led to mistrust in the efficiency of the act of penal justice.

The purpose of the new Code of penal procedure is essentially to create a modern legislative framework in the procedural penal field which will be fully suited to meet the imperative requirements of a functioning modern justice, adapted to the social expectations as well as to the necessity of a better quality of this public service[245].

Equally, the Code of penal procedure also aims to meet the predictability exigencies of the judicial procedures derived from the

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245 Presenting reasons for the new Code of penal procedure project, www.just.ro

European Convention for the protection of human right and fundamental freedoms and, implicitly, from those stated in the jurisprudence of the European Court of Human Rights.[246]

II. Concept.

In the doctrine several concept were expressed in order to explain the judicial nature of the preventive measures.

According to the first concept, based on an idealistic-naturalistic vision of the notion of freedom and on the exaggeration of the principle of the benefit of the doubt, taking preventive measures is acknowledged not to be legitimate.

In this sense, holding a person in custody as long as their guilt is not determined by an indefeasible court order is not justified as it would mean violating the fundamental human right to freedom.

It is also claimed that the deprivation of freedom during the penal trial cannot be accepted unless it is a form of punishment ruled by means of an indefeasible court order and that provisional detention creates suspicion on the person under investigation, which opposes the benefit of the doubt, being unfit because of the psychological play which it provokes by the rupture from the family, professional and social environment, by the tendency of some individuals or even of the collectivity to consider the arrested guilty already, and it is even claimed that in this way the judicial bodies can force the person on trial to confess.

The second concept exaggerated in reverse the legitimacy of the preventive measures. The fundamental idea of this concept is that society, in its fight against crime, needs preventive measures as a manifestation of sacrificing a person's freedom in favor of some superior general social interests.

In the contemporary doctrine, both concepts were criticized and the objective necessity of preventive measure in the penal trial. The advantages and the drawbacks of preventive arrest can be assessed by concrete reference to the seriousness of the deed and the danger the doer poses.

The preventive measures are *institutions of penal law procedures with a nature of constraint.* The functionality of the preventive measures is implied in art. 202, meaning that these are taken in order to ensure that the trial is well carried out or in order to prevent the suspect's or

[246] Idem

defendant's avoidance of legal prosecution, trial or sentence, or to prevent new crimes.

The preventive measures regulated by the new Code of penal procedure are:

- custody;
- legal supervision;
- legal supervision on bail;
- house arrest;
- preventive detention.

Apart from the general conditions, when choosing the preventive measure, the judicial body must take into account some complementary criteria, such as the purpose of the measure, the severity of the accusation which was brought to the person for whom the preventive measure is taken, as well as any other criteria relevant to the case.

III. Conditions.

In order to take preventive measures, the following conditions must be met *cumulatively*:

a) there must be solid evidence or clues which lead to the reasonable suspicion that a person has committed a crime;

The evidence is any de facto element which helps to determine the existence or non-existence of a crime, the identification of the person who committed it and knowing the necessary circumstances to justly solve the case, and which contributes to finding the truth in the penal trial [art.97 paragraph (1)].

The Code of penal procedure does not define the notion of solid clues. In order to define it, we shall refer to the definition given in the 1968 Code of penal procedure which defines solid clues as the existent data in the case which lead to the reasonable supposition that the person for whom pre-trial actions, or actions of legal prosecution have been taken, has committed the crime.

b) they must be in accordance to the severity of the accusation brought to the person for whom they are taken and necessary for the objective it was ruled.

According to art. 23 paragraph (1) from the Constitution of Romania, "one's freedom and safety are intangible".

The right to freedom is also guaranteed by the European Court of Human Rights in art.5.

When the designated judicial body rules a preventive measure, they must analyze which of the measures stated in the Code of penal procedure in art. 202 is fit, assessing in each solid case the severity of the deed, its modus operandi and circumstances, the entourage and the environment of the defendant, the defendant's criminal record and other facts related to the defendant.

After the analysis of such circumstances, the judicial body must rule the preventive measure which will ensure that the trial will run its course, that the suspect or the defendant will not avoid legal prosecution or will not commit another crime.

c) There must not be an obstacle for the initiation or the exercise of the penal action;

The reasons which prevent the initiation or the exercise of the penal action are as follows: there was no crime, the deed is not stated in the penal law or was not done with the guilt stated by the law, there is no evidence that the person committed the crime, there is a justifying or unimputability reason, there is no pre-proceedings complaint, authorization or seise of the competent body or another condition stated by the law, necessary to set the penal action in motion, amnesty or limitation period intervened, the suspect's or defendant's decease occurred as natural person or their deregistration as legal entity, the pre-trial proceedings have been cancelled for the crimes for which the cancellation supersedes the penal responsibility, a settlement intervened or a mediating agreement was reached according to the law, there is a case of impunity stated by the law, there is claim preclusion, a transfer of procedures with another state intervened, according to the law [art.16 paragraph (1)].

d) by ruling the measure a penal trial should be well carried out, the suspect or defendant should be prevented from avoiding legal prosecution or trial or committing another crime.

The Code of penal procedure eliminates a disfunction of the old code by excluding the hypothesis where a preventive measure can be ruled, respectively when the suspect or defendant is avoiding punishment. Thus, the new legislation conforms to the European Court of Human Rights standards in relation to respecting the benefit of the doubt of a person prosecuted legally or for trial.

An ambiguity of the lawmaker can be observed when comparatively analyzing the conditions in which preventive measures can be ruled: the legal supervision or the legal supervision on bail.

Although these measures have approximately the same contents, the only difference being of economical nature in regard to legal supervision which requires recording a bail decided by the judicial body, the conditions for ruling these measures are, however, different.

Thus, for the measure of legal supervision on bail to be ruled, the same conditions as those ruled when the measure of preventive detention, which is a liberty restrictive measure, must be met.

IV. Competent judicial bodies and actions through which preventive measures can be taken

In order to guarantee the person's freedom, preventive measure are usually taken by *the* prosecutor or by *the court*; the only measure which can also be ruled by *the penal investigation bodies* being *the custody* which *must not be longer than 24 hours*.

Thus, *the* prosecutor can rule *custody, legal supervision* or *legal supervision on bail* during the penal prosecution.

The judge of rights and liberties can rule the following measures in the course of penal prosecution: legal supervision, legal supervision on bail, house arrest and preventive detention.

The preliminary board judge can rule the following measures: legal supervision, legal supervision on bail, house arrest, as well as preventive detention in preliminary board procedure.

The court can rule the following measures: legal supervision, legal supervision on bail, house arrest, as well as preventive detention, in the course of trial.

Preventive measures can be taken by the following *procedural actions*:

- *decree* of the penal prosecution body;
- *decree* of the prosecutor;
- resolution or decision.

Unlike the old legislation, preventive measures can no longer be ruled by indictment or by the decision with which the court passes judgement on the main issue of the matter on trial.

A surprising solution chosen by the lawmaker can be derived from the interpretation of art. 399 paragraph (10) „once the decision is

pronounced, until the appeal court seise, the court can rule, on request or ex officio, *taking*, reversing or replacing a preventive measure regarding the sentenced defendant, according to the law", which allows the court, after ruling the decision, to take a preventive measure on request or ex officio, although the same court cannot take such a measure once they have passed judgement on the main issue of the matter on trial.

The provisions in art. 23 paragraph (8) from the Constitution of Romania state that „He who is in custody or arrested will be communicated, in the language he understands, the reasons he is placed in custody or arrest, as well and he will be communicated what he is accused of as soon as possible; the accusation is stated only in the presence of a lawyer, be they chosen or ex officio."

The constitutional regulation is reiterated in art. 210 respectively in art. 228 Code of penal procedure, which states, moreover, that "Once a measure is taken, the defendant is communicated at once, in the language he understands, the reasons for which the preventive detention was ruled. That person will also be communicated, under signature, in writing, the rights they have as a defendant, as well as the right to medical emergency care, the right to challenge the measure and the right to demand reversing or replacing the arrest with another preventive measure, and if he cannot or will sign, a minutes will be written".

The text renders in fact new procedural guarantees which add to those capable to protect the procedural rights and interests of the suspect and the defendant within the penal trial.

The suspect or the defendant has the right to personally or otherwise demand that the judicial body who ruled the measure announce a member of his family or another designated person of the custody measure and the place where he is held. The detainee cannot be refused exercising the right to make the announcement personally unless there are solid reasons which will be noted in the minutes. Exceptionally, for solid reasons, the announcement can be delayed for 4 hours at the most.

V. Reversing

Preventive measures are reversed ex officio or on request when the reasons which determined the measures do not exist any more or new circumstances from which the illegality of the measure results, being ruled, in the case of custody and preventive detention, the release of the suspect or defendant, if he is not arrested in another case.

If the preventive measure was taken during the penal prosecution by the prosecutor or by the judge of rights and liberties, the penal

investigation body is obligated to notify the prosecutor at once about any circumstance which would lead to the reversal.

If the information communicated are assessed to justify the reversal of the preventive measure, the prosecutor rules it or, as it is the case, seises the judge of right and liberties who took the measure, within 24 hours from receiving the information.

The prosecutor is obligated to seise the judge of right and liberties ex officio as well, whenever he himself discovers the existence of a circumstance which justifies the reversal or the replacement of the measure taken.

The appeal for reversal of the preventive measure forwarded by the defendant is addressed *in writing* to the judge of right and liberties, to the preliminary board judge or to the court, as it is the case.

One can draw the conclusion that the prosecutor has no longer the competency to be able to replace a preventive measure with an easier or a more difficult one, even if he would have the competency to rule both. For example, during the penal prosecution, the replacement appeal forwarded by the defendant concerning the measure of legal supervision on bail ruled by the prosecutor, along with the legal supervision measure will be resolved by the judge of rights and liberties belonging to the court which is competent to judge in lower court.

During the penal prosecution, the prosecutor forwards to the judge of rights and liberties the case file or a copy, certified by the registry of the prosecutor's office, within 24 hours from the judge's demand.

In order to resolve the reversal appeal, the judge of rights and liberties, the preliminary board judge or the court sets the date of resolution and rules the defendant's summon.

When the defendant is present, the appeal resolution is carried out only after his hearing on all the reasons which the appeal is made, in the presence of a lawyer, either chosen or designated ex officio.

The appeal is also resolved in the absence of the defendant, when the defendant is missing although he was summoned or when, because of health reasons, force majeure or state of emergency, he cannot be brought, but only in the presence of a lawyer, chosen or ex officio, who speaks in order to draw conclusions. The prosecutor's participation is compulsory.

VI. Replacement

During the penal trial certain circumstances can arise which require the replacement of the preventive measure taken initially with another one.

The preventive measure is replaced, ex officio or on request, with a lighter preventive measure, if the conditions stated by the law for taking it are met and, after assessing the factual circumstances of the case and the procedural conduct of the defendant, it is appreciated that the lighter preventive measure is *sufficient to achieve* the objective stated by the law.

The preventive measure is replaced, ex officio or on request, with a heavier measure if the conditions stated by the law for taking it are met and, after assessing the factual circumstances of the case and the procedural conduct of the defendant, it is appreciated that the heavier preventive measure *is necessary* for achieving the objective stated by the law.

If the preventive measure was taken during the penal prosecution by the prosecutor or by the judge of rights and liberties, the penal investigation body is obligated to inform the prosecutor at once in writing about any circumstance which may lead to the reversal or the replacement of the preventive measure.

If the prosecutor appreciates that the communicated information justifies the replacement of the preventive measure, he rules it or, as it is the case, seises the judge of rights and liberties who took the measure, within 24 hours from receiving the information.

The prosecutor is obligated to also seise the judge of rights and liberties when he discovers himself the existence of a circumstance which justifies the reversal or the replacement of the preventive measure taken.

The appeal of replacing the preventive measure forwarded by the defendant is addressed in writing to the judge of rights and liberties, to the preliminary board judge or to the court, as it is the case.

During the penal prosecution, the prosecutor forwards to the judge of rights and liberties the case file or a copy, certified by the registry of the prosecutor's office, within 24 hours from the judge's demand.

In order to resolve the appeal, the judge of rights and liberties, the preliminary board judge or the court sets the date of resolution and rules the defendant's summon.

When the defendant is present, the appeal resolution is carried out only after his hearing on all the reasons which the appeal is made, in the presence of a lawyer, either chosen or designated ex officio.

The appeal is also resolved in the absence of the defendant, when the defendant is missing although he was summoned or when, because of health reasons, force majeure or state of emergency, he cannot be brought, but only in the presence of a lawyer, chosen or ex officio, who speaks in order to draw conclusions. The prosecutor's participation is compulsory.

If the appeal is meant to replace the measure of preventive detention or house arrest with the measure of legal supervision on bail, should he find solid grounds for the appeal, the judge of rights and liberties, the preliminary board judge or the court, by court decision, pronounced in the advising chamber, agrees to the appeal in principle and sets the bail amount, giving the defendant a deadline to pay it.

The deadline starts from the date when the resolution in which the bail amount was set has been pronounced indefeasible.

If the bail is paid within the set deadline, the judge of rights and liberties, the preliminary board judge or the court, by court decision, pronounced in the advising chamber, agrees to the appeal of replacement of the preventive measure with the legal supervision on bail measure, sets the obligations that the defendant will have during the measure and rules the immediate release of the defendant, unless he is arrested in another case.

If the bail is not paid until the set deadline, the judge of rights and liberties, the preliminary board judge or the court, by court decision, pronounced in the advising chamber, in the absence of the defendant and the prosecutor, overrules the appeal forwarded by the defendant as unsubstantiated.

VII. Termination of preventive measures

The preventive measures stay in effect until:

a) deadlines stated by the law or set by judicial bodies expire;
b) the prosecutor rules a resolution of non-arraignment;
c) the court rules an acquittal, a withdrawal from the penal trial, a waiver of setting punishment or a suspended sentence, even if it is not final;
d) the date when the decision which stated the sentence of the defendant was ruled final.

The preventive detention and the house arrest cease in the following situations:

a) during the penal prosecution or during the trial at lower court, when the maximum duration stated by the law expired;
b) in appeal, if the duration of the measure reached the duration of the punishment ruled in the sentence decision.

Acknowledging ipso jure the cease of the preventive measure is done ex officio, on request or after seising the administration of the detainment place by the judicial body who ruled the measure or by the judicial body who analyses the case. For the person in custody or preventive detention, release is ruled unless they are detained or arrested in another case.

The judge of rights and liberties, the preliminary board judge or the court pronounce by motivated court decision the cease of the preventive measure ipso jure even in the absence of the defendant. Judicial assistants of the defendant and the participation of the prosecutor are compulsory.

A copy of the decree or the resolution in which the judicial body acknowledges the ipso jure cease of the preventive measure is handed to the person for whom the preventive measure was ruled, as well as to all the institutions with attributions in exercising the measure.

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THE DISCIPLINARY LIABILITY OF FRENCH CIVIL SERVANTS – COMPARATIVE ANALYSIS WITH THE ROMANIAN LAW

Andra PURAN *

ABSTRACT
The present paper aims an analysis of the disciplinary liability of the French civil servants, in comparison with the same form of legal liability of the Romanian civil servants, in order to emphasize possible similarities.
Though stated by the four laws forming the Statute of the civil servants, the French public position enjoys specific and very well stated regulations, the disciplinary liability having an important place within several normative acts in this area.
In the Romanian law, the procedure of the administrative investigation previous to the application of a disciplinary sanction for the civil servant originates in the preliminary disciplinary investigation stated by the Labor Code, but acquired additional meanings through a detailed regulation corresponding to the administrative law.
Knowing and correctly applying these legal norms ensures the legality of the administrative act by which is established the disciplinary liability of the civil servant.

KEYWORDS: *civil servant, disciplinary liability, deviation, sanction, France*

As it has been stated in the doctrine[247], "the public position law studies the common law for three public positions (State, territorial collectivities, hospital units) considering the synthetic exposure of the relevant jurisprudence and of the constitutional norms, European, legislative and regulatory…".

The general statute of French civil servants depends on four laws representing each title of this statute[248]:

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[247] E. Aubin, *Droit de la fonction publique*, 3rd Edition, Gualino Publ.-house, Paris, 2007, p. 12.
[248] http://www.fonction-publique.gouv.fr/fonction-publique/statut-et-remunerations.

- *General provisions*, Title I, Law No 83-634 of 13 July 1983 on the rights and obligations of civil servants (*Le Pors Law*)[249];
- *State civil service*, Title II, Law No 84-16 of 11 January 1984 on the statutory provisions relating to the state function service[250];
- *Territorial civil service*, Title III, Law No 84-53 of 26 January 1984 on the statutory provisions relating to the territorial function service[251];
- *Civil service in hospitals*, Title IV, Law No 86-33 of 9 January 1986 establishing provisions on the hospitals civil service[252].

Specific regulations on the statute of the Romanian civil servants are stated by the Law No 188/1999[253], with its subsequent modifications and amendments.

In our national law, the civil servant is defined as "*the person legally invested by an appointment in a civil service within the structure of an administrative public service, in order to fulfil its competence*"[254] or "*the person chosen or appointed in a public position within a public authority or institution, in order to fulfil its competences and prerogatives*"[255].

Civil servants who do not comply with their obligations may be subjected to a disciplinary investigation. While in Romania the disciplinary liability is stated by the Law No 188/1999, in France, disciplinary deviations, sanctions and the disciplinary procedure are stated by different normative acts applicable for civil servants.

A. Disciplinary deviations

[249] Published in the Official Journal of the French Republic (OJFR) of 14 July 1983, with its subsequent modifications and amendments.
[250] Published in the Official Journal of the French Republic (OJFR) of 12 January 1984, with its subsequent modifications and amendments.
[251] Published in the Official Journal of the French Republic (OJFR) of 27 January 1984, with its subsequent modifications and amendments.
[252] Published in the Official Journal of the French Republic (OJFR) of 11 January 1986, with its subsequent modifications and amendments.
[253] Published in the Official Gazette No 600/8 December 1999, republished in the Official Gazette No 251/22 March 2004 and in the Official Gazette No 365/29 May 2007.
[254] V. Vedinaş, *Drept administrativ*, 7th Edition, reviewed and updated, Universul Juridic Publ.-house, Bucharest, 2012, p. 507.
[255] A. Drăghici, R. Duminică, *Deontologia funcţionarului public. Curs pentru studenţii programului frecvenţă redusă*, University of Pitesti Publ.-house, Piteşti, 2010, p.18.

In our national law, the administrative-disciplinary liability is considered to be[256] "*the first form of liability specific to the administrative law, occurring for the commission of the administrative illicit itself, as the disciplinary deviation*".

According to Art 77 of the Statute, the disciplinary liability of civil servants is engaged if they have committed actions representing disciplinary deviations.

The disciplinary deviation, the only base of disciplinary liability, is defined by the same article of law representing "*the violation with guilt by the civil servants of the obligations specific to their public function and of the professional and civic behavior norms stated by the law*".

The disciplinary liability has also been defined by the doctrine as representing "the action committed with guilt by which the civil servant violates his obligations resulted from their statute or in a direct/indirect relation with it, aiming his socio-professional and moral statute"[257].

The statute of the Romanian civil servants not only defines their disciplinary deviation, but also enlists, with limitation in order to avoid the abuses from their superiors, the actions representing such deviation:

a) The systematic delay in performing their activities

This disciplinary deviation can be committed only by the civil servants performing certain activities with performance deadlines, established either by the law, or by his superior. In the doctrine[258] it was stated that this is about a "usual" disciplinary deviation, being necessary for the delay to be systematic.

b) Repeated negligence in performing their activities

This disciplinary deviation assumes the existence of two such actions, regardless of the period of time elapsed from the moment when the first action was committed. The negligence may aim both the content of the work, as well as its form.

c) Unexcused absence from work

Unexcused absences assume that the civil servant is absent without any justification from where he performs his activities, either in

[256] V. Vedinaș, *Drept administrativ*, 7th Edition, reviewed and updated, *op. cit.*, 2012, p. 282.
[257] V. Vedinaș, *Statul funcționarului public*, Nemira Publ.-house, Bucharest, 1998, p.185.
[258] A. Mocanu-Suciu, *Deontologia funcției publice*, Techno Media Publ.-house, Sibiu, 2010, p. 96.

the spaces of public institutions or authorities, or outside these spaces for those who perform certain attributions in other places than the spaces of public institutions or authorities.

d) *Repeated non-compliance of the work schedule*

Non-compliance with the work schedule implies either the non-compliance with the start time of the program, or leaving work before the end time, or even during the program. Commissioning this offence once does not represent a disciplinary deviation, given that the law states the repeatability of the offence to be considered a deviation.

e) Interventions or insistences for solving certain demands outside the legal framework

This deviation assumes that the civil servant uses his position in order to intervene, before solving a demand, for it to be solved outside the legal framework.

The doctrine[259] has considered that the legislator has been too restrictive, limiting the content of this offence only to the solution of certain demands, given that the civil servants also perform other duties.

f) Non-compliance with the professional secrecy or the confidentiality of certain performed works

Information protected by this regulation are those that fall within the professional secrecy[260] or aims the confidential feature of the works.

g) Events affecting the prestige of the public authority or institution where the civil servant performs his duties

This deviation refers both to the actions of this nature committed in the performance of the profession, as well as to the actions performed outside the profession.

h) Conducting during the working hours of political activities

Though the right to political assembly is recognized for civil servants, they cannot express their political opinions or perform political activities during the working schedule.

i) Refusal to perform professional duties

[259] A. Mocanu- Suciu, *op. cit.*, 2010, p. 101.
[260] Protected by Law No 182/2002 regarding the protection of classified information.

In order to be a disciplinary deviation, the refusal to perform professional duties must be unjustified, considering Art 45 Para 3 of the Statute stating that the civil servant has the right to refuse, in written and motivated, the performance of the duties assigned to him by his superior, if he considers them to be illegal.

j) Violating legal provisions regarding the duties, incompatibilities, conflicts of interest and interdictions established by the law for civil servants

This disciplinary deviation states four categories of actions: regarding the duties, incompatibilities, interdictions and conflicts of interest.

k) Other actions stated as disciplinary deviations by normative acts from the area of the public position and civil servants

This regulation gives the possibility of establishing certain disciplinary deviations by their own statutes, as well as by other normative acts applicable for civil servants. Such normative act, with interest for the institution of the disciplinary liability due to its classification of certain actions as disciplinary deviations is the Law No 7/2004 on the Code of conduct for civil servants[261].

Art 29 of the French Law No 83-634 of 13 July 1983, as well as Law No 84-16 of 11 January 1984 and Decree No 84-961 of 25 October 1984 regarding the disciplinary procedure applicable for state civil servants state provisions regarding the disciplinary deviation.

Art 29 of the Law No 83/634 of 13 July 1983 states that "*any offence committed by a civil servant during or in relation with the performance of his duties exposes him to a disciplinary sanction, without removing, if necessary, the application of the penalties stated by the criminal law*". Thus, it is deduced that the offence attracting a disciplinary sanction may consist of a violation of the legal duties or by an action endangering the activity of the civil servant, representing in the same time a criminal offence.

As well as in our legislation, the disciplinary liability is independent from the criminal liability, exercised separately, but the same offence may attract upon the same person both a disciplinary, as well as a criminal sanction. The authorities invested with disciplinary

[261] Republished in the Romanian Official Gazette, Part I, No 525/2 August 2007.

powers are not bound by the criminal decision, except the material findings on the facts.

The disciplinary deviation may also consist of a purely professional action, as well as of an action committed outside the professional area, for instance an offence prejudicing the dignity of the position, as in the case of our law applicable in this area. It has been shown[262] that certain facts are not subjected to disciplinary sanctions such as: professional incompetence, deviations due to a medical condition, if the agent was not responsible for his actions during the commission of the offence, actions covered by amnesty.

B. Disciplinary sanctions

Disciplinary sanctions applicable for the Romanian civil servants[263] are[264]:

a) Written reprimand;

b) Reduction of salary rights with up to 5-20% for a period up to 3 months;

c) Suspension of the pay scale advancements or, where appropriate, of the promotion in the public function for a period between 1 and 3 years;

d) Demotion in the public function for a period up to 1 year;

e) Dismissal from the public function;

It has been stated in the doctrine[265] that it has been removed from the actual form of the Statute of one of the disciplinary sanctions with a prevailing moral feature, the warning, considering that prior to this modification the same author criticized the existence of two moral disciplinary sanctions.

Disciplinary sanctions are classified in 4 major groups, similar for all the three laws above mentioned:

- *Group I*: warning, reprimand, temporary exclusion of functions for maximum 3 days (only for territorial civil servants);

[262] http://www.fonction-publique.gouv.fr/fonction-publique/statut-et-remunerations.

[263] See also A. Puran, L. Olah, *Disciplinary sanctions applicable to Romanian civil servants*, in AGORA International Journal of Juridical Sciences, www.juridicaljournal.univagora.ro, ISSN 1843-570X, E-ISSN 2067-7677, No. 4/2013, pp.182-189.

[264] Stated by Art 77 Para 3 of the Statute.

[265] V. Vedinaș, *Statutul funcționarilor publici*, Universul Juridic Publ.-house, Bucharest, 2009, p. 291.

- *Group II*: removal from list of promotion (except the territorial civil servants), decline in employment, temporary exclusion of the functions for maximum 15 days, relocating the office (only for state civil servants);
- *Group III*: demotion, temporary exclusion of the functions for a period between 3 months and 2 years (or for a period between 16 days to 2 years for territorial civil servants);
- *Group IV*: mandatory retirement, demotion

Among the penalties stated by the first group, only the reprimand and the temporary exclusion for maximum 3 days are written in the civil servant's file. These sanctions are radiated within 3 years if during this period the civil servant was not disciplinary sanctioned for another disciplinary deviation.

The removal from the list of promotion may as well be disposed as complementary sanction for one of the sanctions stated by the 2nd or 3rd group.

The temporary exclusion of the functions, with the deprivation of any remuneration, can be accompanied by a total or partial suspension. It cannot have as effect the reduction of the period of exclusion, for the sanctions stated by the 3rd group, for less than a month. If it intervenes as a disciplinary sanction from the 2nd or 3rd group within 5 years from the temporary exclusion, it attracts the revocation of the suspension. If any disciplinary action other than warning or reprimand was not pronounced in this period against the civil servant, who is permanently exempt from serving the part of the penalty for which he received a suspension.

C. Disciplinary procedure

In the French law, the general regulation regarding the disciplinary procedure is stated by Art 19 of the Law No 83-634 of 13 July 1983 regarding the rights and obligations of civil servants. Also, for establishing the rules of disciplinary procedure for the civil servants was adopted the Decree No 84-961/25 October 1984. Art 19 of the Law 83-634 of 13 July 1983 states that no disciplinary sanction, except the ones stated in the 1st group by the statutes of the state or territorial civil servants or civil servants in hospitals can be disposed without the prior consultation of an organism serving the Disciplinary Board, representing the personnel, organism called the joint administrative commission.

This provision is similar to the provisions in this area from our law, where the prior procedure applicable for a disciplinary sanction is mandatory.

Rules regarding the joint administrative commission and the disciplinary board are stated by Art 90 of the Law No 84-53 of 26 January 1984 and Art 83 of the Law 86-33 of 9 January 1986. Members of the joint administrative commission must not have an inferior rank than the investigated civil servant, the commission being formed only by civil servants with at least an equal rank with the person investigated, and also cannot be members of the same commission those who have manifested a special animosity for the investigated civil servant. In the constitution of the commission shall be ensured the numerical parity between the representatives of the authority and those of the personnel. During the investigation of a certain case, the commission's members cannot be replaced, in the absence of certain members of the personnel's representatives, appropriately reducing the number of the authority's representatives. Also, the commission's members who did not attend the debates cannot vote.

During the disciplinary investigation[266] is ensured the civil servant's rights to receive a copy of the full case file, to make any written or oral defense which he considers necessary in his favor, to propose witnesses and to be assisted by one or two defenders elected by him, solution recommendable in our internal law.

The disciplinary regime of civil servants and public agents are characterized first of all by the existence of the procedural rights and the appearance of a jurisdiction of the repression, which allow the insurance of complying with the right to defense of the civil servant who has violated one or more obligations inherent to his position[267].

The disciplinary board is notified by the authority with disciplinary prerogatives, stating the alleged facts imputable to the civil servant and the circumstances in which they occurred. If the board members are edified on the circumstances in which the offences occurred, with the majority of the present ones, they can require an investigation. The authority with disciplinary prerogatives is the same authority which had the prerogative of appointing the civil servant.

Summoning the civil servant in the investigation is made by the board's president with at least 15 days before the established date, by a registered letter with acknowledgment of receipt.

After the debates, this organism issues a reasoned opinion which is communicated to the authority with the disciplinary prerogative, the

[266] Stated by the Decree No 84-961 of 25 October 1984.
[267] E. Aubin, *op. cit.*, 2007, pp. 281-282.

latter one not being compelled to comply with the proposal of the boarder, being able to order only the sanctions stated by the law. If the proposal of the disciplinary board shall not be considered, the authority with disciplinary prerogatives shall inform the board of the reasons for which it did not considered its proposal. The disciplinary sanction ordered by the authority with disciplinary prerogatives shall be immediately applied, regardless if the decision is challenged.

In our national law, according to Art 79 of the Statute, for the analysis of the offences mentioned as disciplinary deviations and proposal of disciplinary sanctions applicable to civil servants from public authorities or institutions shall be created disciplinary commissions. The organization and function of these commissions is stated by Government Decision No 1344 of 31 October 2007 on the organization and function of the discipline commissions.

Regarding the disciplinary procedure, national regulations establish precise and detailed rules being grounded on the same principles and stages as the procedure established by the French legislation.

D. Challenging the decision to sanction

The French civil servant dissatisfied by the decision ordering the sanction has the following means of challenge: graceful or hierarchical appeal, the appeal at the superior council of the state public position, contentious appeal.

Within the graceful appeal the civil servant address the authority which ordered the sanction, the latter one being able to maintain the sanction, to diminish it or to withdraw it.

The hierarchic superior notified by a hierarchic appeal against a decision issued by his subordinate shall verify the legality of the decision, being able to cancel it, maintain it or report it.

The civil servant against who was ordered a disciplinary sanction may submit an appeal at the appeal commission of the superior council of the state public position[268] according to Art 10 of the Decree No 84-961 of 25 October 1984. The administrative authority must notify the interested party, with the notification of the sanction, the information allowing him to determine the conditions for notifying the SPSPP.

After debating the evidences, the commission within the SPSPP either issues an opinion by which it rejects the appeal, or a

[268] Hereinafter SPSPP.

recommendation to annul or modify the disciplinary sanction, which is not mandatory for the authority with disciplinary prerogatives. If the authority decides to consider the SPSPP recommendation, its new decision shall have retroactive effects.

The contentious appeal may be submitted within maximum 2 months from the notification of the challenged decision (the decision to maintain the sanction from the graceful appeal or the SPSPP opinion to reject the appeal). The administrative judge shall verify: if the issuer of the act was competent, if the rules regarding the form and procedure were fulfilled, the accuracy of the facts, if there was a violation of the law, a procedural abuse or an abuse of power, if there was an intended error of assessment, if the civil servant was liable for his actions during the performance of the actions, an altering of the mental faculties or a pathological problems being excluded[269].

In the Romanian law, the Statute of civil servants[270] states the right of the civil servant dissatisfied with the sanction applied to address the court of administrative contentious for the annulment or modification of the sanctioning administrative act. Thus, the national legislation offers for the disciplinary sanctioned civil servant the right to address the court, unlike the French civil servant who shall address to a specialized authority.

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[269]http://www.fonction-publique.gouv.fr/fonction-publique/statut-et-remunerations.

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THE MEASURE OF EXTENDED CONFISCATION AND MONEY LAUNDERING

Mohammad-Ali RABABAH *

ABSTRACT
Although the current legal framework allows for confiscation of corruption, due to the need to harmonize national legislation with EU states, was introduced by Law nr.63/2012 confiscation extended to them. How effective will this solution will be able to see when its application in relation to the Constitution. We will emphasize the fact that autonomous money laundering still needs to be successfully prosecuted in the case of a domestic predicate offence and we will adequately support the assumption why the Romanian legal authorities should take the adequate measures in order to provide the effectiveness of the confiscation system of the proceeds of crimes.

KEYWORDS: *extended confiscation, confiscation of the proceeds of crime, proceeds of crime, money laundering, presumption of lawful acquisition of wealth.*

1. General aspects concerning the legal and criminal framework in Romania for the regulation of money laundering offence

The process of harmonization of the criminal law provisions involves the adaption of the domestic law system, within a time limit, to the requirements stipulated by the Community legal act, concerning the accomplishment of a certain goal. Legal grounds for such cases can be found, on the one hand, in pillar III, respectively art. 29-31 of the Treaty on European Union, which are referring to the fact that, in order to combat organised and non-organised crime, it is necessary to progressively adopt measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking[271].

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[271] Helmut Satger, *Influenta dreptului european asupra sistemului de drept penal roman*

According to FATF Recommendations[272], countries should criminalise money laundering on the basis of the regulations of the United Nations Convention in Vienna (1998) and the United Nations Convention against transnational organised crime in Palermo (2000). These Conventions, as they were presented in the previous chapter, regulated the money laundering offence, act consisting in one of the following manners: processing and transfer of property of which the one who used it knew that they are proceeds of crime, in order to conceal or disguise the illicit origin of the respective assets; helping any person involved in committing the major crime to escape the legal consequences of his actions and a last manner consisting in the concealment and disguise of the nature, origin, location, disposition, movement or real ownership of property or the rights thereof, which the owner knew that the products are proceeds of crime.

Initially, money laundering was incriminated by the **Law no. 21/1999[273]**, by this law being brought a multitude of new aspects in the Romanian legislation, including, without limitation: defining the money laundering offence, the obligation instituted for credit and financial institutions to identify customers when they enter into relations or lead suspect transactions or those amounting more than 10.000 euro, special measures of confiscation and the setting up of the National Office for the Prevention and Control of Money Laundering, special confiscation of the proceeds of crime, enumeration of the offences generating dirty money – traffic of drugs, traffic of weapons, non-observance of the regime of nuclear materials or of other radioactive materials, coinage offence or forging other values.

The 1999 Law presented itself as an instrument that had not only the role of protecting the financial and banking system, but also the role of leading to the discovery and confiscation of the incomes of criminal

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si german, in Criminal Law Writings no. 2/2009, page 96.

[272] Recommendation no. 1 of FATF. Regarding the implementation of this Recommendation in the Romanian legislation, MONEYVAL experts considered that it is not efficiently implemented, considering the small number of final convictions for money laundering facts. MONEYVAL, Third Round Detailed Assessment Report on Romania – Anti Money Laundering and Financing the Terrorism, Strassbourg, the 8th of July 2008, pages 48-51, accessible on http://www.coe.int.

[273] Published in the Official Gazette no. 18 as at the 21st of January 1999. The draft bill was prepared in 1995 from the initiative of one of the big banks of Romania, Bancorex, and was imagined as a manner of securing the financial and banking system, without preoccupying itself of the other manners of committing money laundering crimes.

activities dedicated to recycling[274].

The prosecution of money laundering in the Law no. 21/1999 limited the sphere of offences out of which the amounts of money subject to laundering process derive from[275]. The evolution of international preoccupations to expand the sphere of predicate offences from the traffic of drugs to all substantive offences and at a later period to all criminal activities also determined the Romanian legislator to reconsider the prosecution of money laundering and to eliminate the limitation of the sphere of this offence, wishing to align the national legal framework to international and European Union standards[1].

By ratifying both Conventions, Romania prosecuted money laundering in the **Law no. 656/2002, republished, on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism financing, Law no. 39/2003 on preventing and combating organised crime**, **Law no. 78/2000 on preventing, identifying and sanctioning corruption acts**, thus aligning to international standards in point of prosecuting money laundering.

According to the regulations of Law no. 656/2002, republished, money laundering is the act of the person which, changes or transfers the property, knowing that it comes from committing crimes, with the purpose of concealing or disguising the illicit origin of property or in order to help the person who committed the offense from which the assets come from, to evade prosecution, trial or execution of sentence. Money laundering offence is also the concealment or disguising the true nature, source, location, disposition, movement or ownership or rights over their property, knowing that the assets come from committing

[274] Gheorghe Mocuta, *Consideratii asupra proiectului de lege pentru prevenirea si sanctionarea folosirii aparatului financiar-bancar in scopul spalarii banilor murdari*, in Dreptul Magazine no. 11/1998, page 74.

[275] According to art. 23 of the Law no. 21/1999, money laundering may be committed in connection with the following offences: traffic of drugs, non-observance of the regime of weapons and munitions in the aggravating form, non-observance of the regime of nuclear materials or of other radioactive materials, non-observance of the regime of explosive materials, coinage offence or forging other values, procuring, smuggling, blackmail, illegal detention, fraud in the banking, financial, or insurance domain, fraudulent bankruptcy, stealing and concealing of motor-cars, non-observance of the regime of protection of certain assets, traffic with animals protected in their countries, trade with human tissues and organs, offences committed through the agency of computers, offences committed with credit cards.

crimes as well as the acquisition, possession or use of property, the assets come from committing crimes. For transposing the European legislative framework of preventing and combating money laundering and financing terrorist acts, Law no. 656/2002, republished, was amended by **Government Emergency Ordinance no. 53/2008**[276], being stipulated new regulations on preventing and combating money laundering mainly in terms of expansion of the sphere of rapporteur entities as well as increasing the reporting threshold of cash operations, defining some new terms: real beneficiary, politically exposed person, fictive bank etc.

The existence of prosecution of money laundering offence in the Romanian legislation is due to the necessity to align the national legal framework to the international provisions of preventing and combating money laundering ratified by our county

The annual report for 2009 of the National Office for the Prevention and Control of Money Laundering, analysing the sources of provenance of the amounts subject to recycling, found in the finished financial analyses for 2009, indicates that the main vulnerable fields of activity are domestic trade, foreign trade and the real property field. The office decided to suspend three operations suspected of money laundering, in compliance with the provisions of art. 5, paragraph (3) of the Law no. 656/2002, republished, the amounts blocked in these cases having an approximate value of 1,6 million dollars.

A series of international bodies emphasized that the permissive legislation adopted in some countries allows criminal organisations to set

[276] The purpose of amending the Law no. 656/2002 is provided in the preamble of this ordinance: Having regards to the obligations set out for Romania subsequent to the commitments taken within the Adherence to European Union Treaty and also the necessity for implementing in the internal legislation the Directive 2005/60/EC of the European Parliament and of the Council, as at the 26th of October 2005, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, published in the Official Journal of the European Union, series L, no. 309 on the 25th of November 2005, and the Directive 2006/70/EC of the European Parliament and of the Council, as at the 1st of August 2006, laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of "politically exposed person" and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of financial activity conducted on an occasional or very limited basis (published in the Official Journal of the European Union, series L, no. 214 on the 4th of August 2006), the urgent modification of the legal framework is necessary, as it is an extraordinary situation whose regulation cannot be postponed..

up small private banks by means of which they can launder illicit funds.

In September 2009, MONEYVAL Committee of Experts of the European Council, reunited in plenary session in Strasbourg, unanimously adopted the **Romania's first progress evaluation report on anti-money laundering measures and financing of terrorism**[1]. Rapporteurs appreciated that „Romania recorded an important and successful progress in implementing the recommendations of the Financial Action Task Force – FATF".

The Romanian legislator, considering the recommendations provided in MONEYVAL Report concerning the third round of detailed evaluation of Romania on anti-money laundering measures and financing of terrorism, had intervened with additions and amendments of the national normative framework. Therefore, it adopted the **Law no. 238/2011** by which important amendments are brought in this matter, such as: clarifying the notions of family members of politically exposed persons and persons publically known to be close associates of politically exposed persons; expansion of the obligation to inform the Office concerning suspect transactions from the employees of the legal entities provided at art. 10 of the Law no. 656/2002 to all persons that carry on activities for them; instituting the obligation of the Office to prepare the working methodology concerning the transmission of reportings provided by art. 5 of the Law no. 656/2002; bringing additions to the obligation of the persons provided at art. 10 of the Law no. 656/2002 concerning the notification of the Office if they find that, in regard to one or more transactions performed in the account of a customer, there are suspicions that the funds are intended for money laundering or financing of terrorist acts; at art. 9, paragraph (2) of the Law. 656/2002, republished, concerning the suspension and expansion of transactions, the Law no. 238/2011 stipulates that if they are made with failure to comply with the legal provisions and in bad-faith or made as a result of committing an illicit act, according to the terms of tort liability, caused a prejudice, by the Office or by the Public Prosecutor's Office attached to the High Court of Cassation and Justice, then the country liability shall be engaged for the created prejudice; the Office is empowered to suspend the transactions aiming at money laundering and financing of terrorist acts, at the request of Romanian legal bodies or of foreign institutions with similar attributions, conditioned by keeping the secret in similar conditions, based on justifying of the applicant institution and if the transaction may have been suspended if it represented the subject-matter of a report concerning a suspect transaction, according to the Law no.

656/2002; persons having responsibilities concerning the application of the Law no. 656/2002 acquire direct access and in proper time to the data and information necessary for the fulfilment of their lawful obligations; the authorization of the entities carrying on currency exchange activities, others than those being under the supervision of the National Bank of Romania, is made by the Ministry of Finance, through the Commission of authorization of currency exchange activities. Ministry of Finance is also competent to determine the authorization and/or registration procedure of these entities, the Fraud Squad acquiring attributions of their supervision concerning the application of the provisions of the Law no. 656/2002; expansion of the sphere of contraventions provided by the Law no. 656/2002; elimination of the Government attribution to amend by decision the minimum limits of the transactions provided at art. 13, paragraph (1), letters b) and e) and the maximum limits of the amounts provided at art. 18, letter a) of the Law no. 656/2002, republished.

Among the special factors favouring the process of money laundering in Romania, we mention: liberalisation of currency provisions, that led to the set up of exchange offices in the private sector; liberalisation of the economic circuit, with possibilities of unlimited action; the gaps in the financial and tax system; legislative imperfections and gaps; confusion in banking legislation; failure to comply with professional tasks by the bank clerks; errors in the management action (absence of supervision of clerks, deficiencies on control, bureaucracy, etc.); abuses of some employees occupying management positions; anachronic system of understanding between banks[277].

Money laundering in the light of the provisions of the Law no. 656/2002[278] on prevention and sanctioning money laundering, stipulates the setting up of some measures for prevention and combating terrorism

[277] Gheorghe Bica, Larisa Loredana Bica, *Spalarea banilor – Business modern*, in Collection of legal studies, In Honorem Professor George Antoniu, PhD, Sitech Publishing House, Craiova, 2009, page 39.

[278] Republished in the Official Gazette no. 904 as at the 12th of December 2002 on the grounds of art. IV of the Government Emergency Ordinance no. 53 as at the 21st of April 2008 on amending and supplementing the Law no. 656/2002 on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism financing, published in the Official Gazette no. 333 as at the 30th of April 2008, approved with additions and amendments by Law no. 238/2011, published in the Official Gazette no. 861 as at the 7th of December 2011, giving the texts a new numbering. Amended and supplemented by the Law no. 187/2012 for applying the Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 757 as at the 12th of November 2012

financing.

The existence of an asset deriving from committing an offence is a sine qua non condition of the existence of money laundering offence, otherwise money laundering is lacking the material object.

In compliance with art. 29 of the Law no. 656/2002, republished, on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism financing, by money laundering is understood:

"(1) Represents the offense of money laundering and shall be punished with imprisonment from 3 to 12 years: a) the exchange or transfer of assets, **knowing that they come from committing offences**, in order to conceal or disguise the **illicit origin** of such assets or in order to help the person who committed **the offence from where the assets come**, to evade prosecution, trial or execution of the sentence; b) the concealment or disguise the true nature of the origin, location, disposition, movement or ownership of assets or rights over their property, **knowing that they come from committing offences**; c) the acquisition, possession or use of assets, **knowing that they come from committing offences.**"[279]

From analysing the incrimination text, we observe the fact that, no matter of the manner of committing the offence, the legislator provides the existence of an asset or certain assets coming from an offence. In other words, we are witnessing at a conditioning of money laundering of the existence of a previous offence, which awards to money laundering offence **the character of correlative offence**.

The connection existing between the offence generating money and the offence of money laundering does not prejudice the autonomous character of money laundering offence, the main offence preceding money laundering[280].

The assets came from committing the offence include not only the assets produced by the offence, respectively those assets that are created by committing the act which represents the material element of it (false money, false credit instruments, weapons, manufactured explosive materials), but also the assets acquired by the offence, respectively those assets that arrived in the hands of the offender or in the hand of a

[279] Vintila Dongoroz, *Explicatii teoretice ale Codului penal roman*. Partea generala, 2nd volume, Academiei Publishing House, Bucharest, 1970, page 319.

[280] Tudorel Toader, Andreea Stoica, Nicoleta Cristus, *Codul penal si legile speciale*, Hamangiu Publishing House, Bucharest, 2008, page 643.

participant, by committing this offence (stolen property, money obtained through bribery, blackmail, deception etc.).

In doctrine, there were expressed opinions according to which the following categories do not represent the proceeds of the main crime and, as a result, they do not represent the proceeds of crimes provided by art. 29 of the Law no. 656/2002:

a. The assets that redounded to committing the offence, because they are not the proceeds of crime, in this category being included: instruments of breaking, the motor vehicle or the computer personal property used at committing the main crime, etc.;

b. The assets representing the proceeds of a main crime committed in another country where the respective act is not an offence[4].

On the same lines, there was supported that the assets being the proceeds of crimes, other than the main one, for which the maximum punishment does not exceed 4 years, do not represent proceeds of crime, these assets may representing the material object of the concealment offence provided in art. 221 of the Criminal Code[281], offence whose pre-requisite situations consisting in committing an act stipulated by the criminal law.

Concerning the meaning of the expression, knowing that the proceeds of crime do not come from committing the crime, in doctrine, there was alleged that the legislator referred only to the acquirement, possession or use of assets, activities by which they contribute to laundering of the proceeds of crime, either simultaneously, or after the consummation of the main crime. In this opinion, the expression commission of crimes refers only to the main crimes by which the asset which is simultaneous with or after the laundering scope is or had been obtained.

Money and the rest of the assets that represent the object of money laundering offence come from the commission of the various crimes.

According to the provisions of **the Council of Europe Convention in Warsaw on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism (2005),** the predicate offence refers to any crime after which the proceeds are results and susceptible to become the object of an

[281] Valerica Dabu, Sorin Catinean, *Spalarea banilor in noul Cod penal si in legislatia penala actuala*, in Dreptul Magazine no. 4/2005, pages 180 -181.

offence provided in **art. 9**. In compliance with this article, on the condition that paragraph 1 would be applied for the predicate offence provided in the annex to this Convention, each state of the European Community may, at the moment of submission of the ratifying, accepting, approving or adhering instrument, by a declaration addressed to the General Secretariat of the Council of Europe, declare that paragraph 1 is applied:

a. Only to the extent to which the punishment provided by the law for the predicate offence is minimum one year or for those states having a general minimum period for crimes in their own legal system, to the extent to which the crime is sanctioned with deprivation of freedom or with a restraining order for a minimum period of at least 6 months and/or

b. Only in the case of some specified predicate offences and/or

c. In the case of a category of serious offences according to the national legislation of the party in this Convention.

Law no. 656/2002, republished, expands the list of offences including **all offences**, although, in the light of the provisions of art. 6, paragraph (4) of **the Convention in Strasbourg on laundering, search, seizure and finding of the proceeds of crime** (1990), art. 9, **paragraph 4 of the Convention in Warsaw (2005)**, as well as of **the Recommendation 1 of FATF**, the Romanian legislator may have incriminate money laundering only in connection with certain expressly stipulated offences.

The Romanian legislator provides as offence not only money laundering or laundering of other proceeds of serious crimes, as they are defined by art. 2, point 20 of the Law no. 39/2003 and art. 2, letter b) of the United Nations Convention against transnational organised crime, but also the acts of money laundering or laundering of other proceeds of any crime.

Classifying laws according to the line of predicate offences of which money or proceeds subject to laundering come from, the author Lopes de Lima makes the distinction between first generation anti-laundering laws summary incriminating money laundering deriving from the traffic of drugs, second generation anti-laundering laws incriminating laundering of funds derived from a series of exhaustively provided main offences, and third generation laws incriminating laundering of funds derived from committing any crime, in the last category being also included the Law no. 656/2002.

Concerning the term of **offence,** we mention that in the jurisprudence of the Constitutional Court of Romania, the fact that this

term is generically used by the legislator in order to present **the multitude of basic offences of which assets may derive** was acknowledged[282].

In the legal practice, it was acknowledged that money laundering offence does not exist if **the source of assets procured from the free market cannot be indicated**. In the case submitted for the examination of the Court of Appeal, it was acknowledged the fact that preparing and keeping the records on the documents of origin of goods, further capitalized by trade acts concluded with a trading company, using tax

[282] Constitutional Court, Decree no. 513 as at the 19th of April 2011 on the challenge of unconstitutionality of the provisions of art. 23 of the Law no. 656/2002, republished, on prevention and sanctioning money laundering, as well as for setting up some measures for prevention and combating terrorism financing, published in the Official Gazette no. 422 as at the 16th of July 2011. The author of the challenge of unconstitutionality affirms that the constitutional stipulations of art. 11, paragraph (2) on the affiliation to the domestic law of the treaties ratified by the Parliament, of art. 20 on the International treaties concerning the human rights and of art. 23, paragraph (12) on the principle of punishment legality, as well as the provisions of art. 4, paragraph 1 of the Protocol no. 7 to the Convention for the protection of human rights and fundamental freedoms on the right not to be tried or punished twice are not complied with by the criticized legal provisions. Examining the challenge of unconstitutionality, the Court finds that the criticized legal provisions had already been subject to its control. Thereby, on the occasion of rendering the Ruling no. 299 as at the 23rd of March 2010, published in the Official Gazette of Romania, Part I, no. 295 as at the 6th of May 2010, and the Ruling no. 889 as at the 16th of October 2007, published in the Official Gazette of Romania, Part I, no. 771 as at the 14th of November 2007, the Court determined that "the criticism according to which art. 23, paragraph (1) of the Law no. 656/2002 would prejudice art. 4, paragraph 1 of the Protocol no. 7 to the Convention for the protection of human rights and fundamental freedoms, which settles the non bis in idem principle, cannot be acknowledged because, in order that this principle of procedural law would find application, the involved person must have suffered a conviction, must have been brought in a verdict of not guilty or must have been ordered the dropping of criminal charges for the act for which he/she/it is again prosecuted or tried. Nevertheless, in the event of multiple offences (crimes), a main punishment is applied to the offender, without that by this the provisions of art. 4, paragraph 1 of the Protocol no. 7 to the Convention would be violated in any way." The Court also determined that the criticism on the violation of art. 23, paragraph (12) of the Constitution according to which „ Penalties shall be established or applied only in accordance with and on the grounds of the law", corroborated with art. 11 and 20 of the Constitution cannot be received because, in compliance with its jurisprudence, the concept of "offence" is generically being used by the legislator in order to cover the multitude of "basic offences" out of which the assets can derive from. Because new elements that may determine the replacement of this jurisprudence did not intervene to this date, the considerations of the above-mentioned rulings are keeping their validity and, in this case, for the entire criticized article.

invoices and receipts that do not reflect the truth, not only concerning the reality of the legal relationship of the supply of goods, but also concerning their value, in fact the assets being acquired from the free market, the source not being identifiable, does not represent money laundering offence. For this offence to be acknowledged, the condition required by the Law no. 656/2002, republished, is the illicit origin of the assets that represented the subject-matter of the subsequent transfer, the law defining the illicit character of the goods' origin only identifying them as goods coming from committing offences.[283].

The complex character of money laundering offence, of consequence offence and of autonomous offence, explains the complex legal regime of combating the acts of laundering from the perspective of the particularities of the evidences used in its investigation[284].

It is enough that the legal body would find the constituent elements of the predicate offence, lacking of importance the conjuncture that the predicate offence was committed abroad, that the circumstances of committing the act had not been elucidated, that the criminal prosecution was not commenced or that a final judgement of conviction could not be delivered because the offender died, a cause of removal of his guilt is incident or he benefits of immunity.

In the conclusions of the European Council in Vienna in December 1998, were requested greater efforts at EU level to combat international organized crime in accordance with an action plan detailing the best way to implement the existing provisions in the Treaty of Amsterdam on an area of freedom, security and justice[285].

According to the Recommendation no. 19 of the Action Plan entitled "Prevention and control of organised crime: a strategy of the European Union for the beginning of the new millennium"[286], it required a careful assessment to determine the need for a tool that, given the positive experiences of Member States and respecting their fundamental principles, to introduce the possibility of easing rules on the burden of proof in criminal, civil or tax area, on the source property owned by a

[283] High Court of Cassation and Justice, criminal division, Decree no. 4032 as at 05.12.2008, in www.scj.ro

[284] Philippe Nerac, *La répression de l'infraction générale de blanchiment*, Actualité Juridique Pénale, 2006, page 440, quoted by Camelia Bogdan, Spalarea banilor, op. cit., page 190.

[285] Official Journal no. C 19 as at the 23rd of January 1999, page 1.

[286] Official Journal no. C 124 as at the 3rd of May 2000, page 1.

person convicted for the membership in an organized criminal group[287]. Also, according to Article 12 of the United Nations Convention on the 12th of December 2000 against transnational organized crime, states should adopt in their domestic legal systems, the measures necessary to allow seizure of proceeds of crime[288].

2. The existing EU provisions in the matter of extended confiscation

The current EU legislative framework on the freezing and confiscation of proceeds of crime consists in four framework-decisions and one decision of the European Union Council. WE are taking about the Council Framework Decision 2001/500/JAI[289], which introduces the obligation of the member states to establish the measure of confiscation, to allow the confiscation of the equivalent value[290] if the proceeds of a crime cannot be confiscated and to secure the fact that the requirements addressed by other member states are treated with the same degree of priority as the internal procedures. Another decision in this respect is the Framework Decision 2003/577/JAI[291] which provides from mutual recognition of freezing.

Seeing that existing legal instruments in this area have not reached a sufficient cross-border cooperation regarding confiscation of proceeds and that there are still member states that are not yet in the position to efficiently confiscate the proceeds of crime, the Council of the European Union introduced the Framework Decision 2005/212/JAI[292] on confiscation of crime-related proceeds, instrumentalities and properties in order to ensure the application of regulations on confiscation of crime

[287] D. Hoffman, *Confiscarea speciala in dreptul penal*, Hamangiu Publishing House, Bucharest, 2008, page 80.

[288] Law no. 565/2002 ratifying the United Nations Convention against Transnational Organized Crime, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime, adopted at New York on the 15th of November 2000, published in the Official Gazette no. 813 as at the 8th of November 2002.

[289] Official Journal no. L 182 as at the 5th of July 2001.

[290] The confiscation of equivalent value aims at the confiscation of some amounts of money equal to the value of the proceeds of crime.

[291] Official Journal no. L 196 as at the 2nd of August 2003, page 45.

[292] The Council Framework Decision 2005/212/JAI as at the 24th of February 2005, published in the Official Journal no. 68, the 15th of March 2005, pages 49 -51, document available online at www.europa.eu.

and provisions on the burden of proof in relation to assets owned by a person convicted for an offense in connection with organized crime. For the purposes of article 1 of this decision, through proceeds of crime means any economic advantage coming from committing the crime, may consist of any good. Tool of the offense means any property used or intended to serve, in any way, in whole or in part, to commit a crime[293]. In this respect, according to article 2 of the framework decision, each member state shall take the necessary measures to confiscate, in whole or in part, instruments or proceeds of offense for which the penalty provided by law is imprisonment exceeding one year or other goods of an equivalent value to them. In terms of tax offenses, member states may use procedures other than those criminal to confiscate the proceeds of the offense.

In article 3 are provided stipulations of extensive powers in the matter of confiscation. Therefore, member states are bound to adopt a minimum number of measures that would allow them to seize, in whole or in part, goods belonging to persons convicted for committing crimes by an organized criminal group, as it is defined in Joint Action no. 98/733/JHA as at the 21st of December 1998 concerning the criminalization of participation in an organized criminal group, established for the purpose of committing certain offenses.

For the purpose of effective application of these provisions, Member States must take into account the possibility to set the power to confiscate, in whole or in part, property acquired by close relatives of the convicted person or a legal entity controlled by the convicted person or its close relatives.

Also, for the purpose of uniform application of the provisions of the Framework Decision 2005/212/JAI, as well as for a better cooperation in the matter of identifying the goods coming from committing crimes and recovery of receivables, it was adopted the Framework Decision 2006/783/JAI[294], which provides the mutual recognition of confiscation orders, as well as the Council Decision 2007/845/JAI[295] on the exchange of information and cooperation between assets recovery offices, which obliges member states to establish or designate national assets recovery offices as national central contact

[293] R. Jurj-Tudoran, D. Drosu Saguna, Spalarea banilor, Elemente de teorie si practica judiciara, C. H. Beck Publishing House, Bucharest, 2013, page 191
[294] Official Journal no. L 328 as at the 24th of November 2006, page 59.
[295] Official Journal no. L 332 as at the 18th of December 2007, page 103.

points to facilitate, through enhanced cooperation, identification as quickly as possible, at EU level, of goods coming from criminal activities.

3. The internal legislative framework concerning the measure of extended confiscation

In the Law no. 286/2009[296], besides the safety measures provided at art. 108 of the Criminal code, a new safety measure called extended confiscation is introduced. The confiscation is called "extended" because it is also extending on other assets than those for which the connection with the offence had been proved, as well as on the assets of other persons that the convicted one.

The confiscation is called "extended" because it is also extending on other assets than those for which the connection with the offence had been proved, as well as on the assets of other persons that the convicted one, the measure may be ordered if there are fulfilled the general conditions necessary for ordering a safety measure, namely, the offender would have committed an offence from those enumerated at art 112^1, paragraph 1, letters a – q of the Criminal Code[297], and he presents a danger for the society in the sense that he can commit another offence in the future, sense in which combating the state of danger would not be possible only by applying of a punishment,, but also taking a safety measure. Besides these conditions, for the enactment of the safety measure of extended confiscation, in compliance with the provisions of art. 112^1, paragraph 2 of the Criminal Code, there must be also cumulatively fulfilled other conditions: the existence of a judgement of

[296] Published in the Official Gazette no. 510 as at the 24th of July 2009.

[297] a) offences on the traffic of drugs and precursors; b) offences on the traffic and exploitation of vulnerable persons; c) offences on the state border of Romania; d) offence of money laundering; e) offences in the legislation on the prevention and combat against pornography; f) offences in the legislation on the prevention and combat against terrorism; g) setting up of an organized criminal group; h) offences against the patrimony; i) infringement of the regime of weapons, ammunition, nuclear materials and explosive materials; j) counterfeiting of currency, stamps of other securities; k) revealing of an economic secret, disloyal competition, infringement of the provisions regarding the import or export operations, embezzlement, offences on the regime of import and export, as well as on the introduction and taking out of the county waste and residues; l) offences on gambling; m) offences of corruption, offences assimilated to the offences of corruption, as well as offences against the financial interests of the European Union; n) offences of tax evasion: o) offences on the customs regime: p) offences of fraud committed by information systems and electronic payment devices; q) traffic of human organs, tissues or cells.

conviction of the offender; the value of the assets acquired by the convicted person, for a period of 5 years before and, if need be, after the moment of committing the crime, until de date of issuing the act of apprehension of the court, would visibly exceed the incomes illicitly obtained by it; to exist the belief of the court that the assets subject to extended confiscation come from offences of the nature of those for which the offender is convicted, of the offences provided in the provisions of art. 112^1, paragraph 1, letters a –q of the current Criminal Code.

For an accurate appreciation of the value of the assets acquired by the convicted person, the legislator considered necessary to also consider the value of the assets (amounts of money are also considered assets) transferred by the convicted person of by a third party to a family member or to a legal entity controlled by the convicted person. On determining the difference between the licit incomes and the value of the acquired assets, the value of the assets on the date of their acquirement and the expenses made by the convicted person or by the members of his/her/its family shall be considered.

Practically, the assets being in the property of other persons than the accused may be also confiscated in the courts will have the belief that the respective assets come from activities of the nature of those which determined the conviction.

4. Conclusions:

It was considered that Europe is the main actor in the global activity of money laundering. Its financial markets absorb huge quantities of dirty money no matter of the phases of the laundering process: placing, stratification and integration. To this end, we consider that the economic criminality is the favourite source of the funds representing the material object of money laundering offence, fact that was encouraged, in Europe, by a series of opportunities, beginning with the last two decades of the last century. In the ex-communist countries, these opportunities occurred in the field of privatisation, exports, financial and bank sectors and encouraged tax evasion, fraudulent bankruptcy, corruption, money laundering and organised crime. We shall see to what extent the European Union shall enforce to Romania the enactment of other provisions which would complement the safety measure of confiscation currently provided in the Criminal Code by adopting the Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime.

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THE PARLIAMENTARY STRIKE AS A FORM OF DEMOCRATIC PROTEST PERSONAL CRIMINAL LIABILITY OF THE MEMBERS OF PARLIAMENT FOR THE PARLIAMENTARY STRIKE

Maria-Georgiana TEODORESCU *

ABSTRACT
The article examines the possible criminal implications of the parliamentary strike on the term of Parliamentarians and to what extent the refusal to take part in the work of the Senate and the Chamber of Deputies represents a democratic form of protest or an illicit act. In the present legal context but mostly in the political context, the parliamentary strike may become a common practice of the opposition, which may lead to the temporary blocking of the legislative power. Therefore, it is necessary to analyse the risks to be borne by the Members of the Parliament and the measures that can be taken to control this form of protest.

KEYWORDS: *criminal liability of the Members of Parliament, parliamentary strike, abuse of office, offence, protest*

1. THE CONSTITUTIONAL NATURE OF THE PARLIAMENTARY TERM OF OFFICE

Although in modern public law certain legal institutions have been taken and adapted from private law (such as the contract or term of office), a distinction should be made between the civil law term of office and the parliamentary term of office. The civil term of

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office appears by the will of the parties, while in the case of the parliamentary term of office, it is reduced to the appointment of the representative, the content of the legal relationship between the electors and the representative being predetermined by the Constitution and law.

In a civil legal relationship, the principal may, together with the representative, modify at any time the subject of the legal act concluded, which is impossible in the public law term of office. The representative may be removed in a civil relationship, but this is not true in the case of a parliamentary term of office. The parliamentary term of office can be defined as a public office to which the holder shall be appointed by elections, his/her rights and obligations being determined by law.

Therefore, pursuant to article 69 of the Constitution, the parliamentary term of office is a representative one:

(1) *In the exercise of the term of office, the deputies and senators are in the service of the people.*

(2) *Any mandatory instructions are null.*

From the point of view of the legal nature, the parliamentary term of office is a power of attorney for representation. From a political point of view, it is an agreement between the electors and the elected MP, being based on an electoral platform. The electoral platform proposed by the Member of Parliament to the electorate comprises multiple forms of mandate, the initiation of legislative proposals, their amendment, expressing a vote in favour, against or an abstention in the event of legislative proposals, consultation of the electorate through the local Parliamentary Office, as well as advising voters in various legal or administrative issues falling within the competence of the civil service of the Member of Parliament.

We note that the formulation of article 69 para. (1) contains the syntagm "in the service of the people", aspect which produces effect from the point of view of the term of office the MP must fulfil. Within certain limits, which could comprise the general interest of the people, the parliamentary term of office may change, in the sense that, having no rigorous determined object, depending on the political context and on the requests of the civil society, the representative may perform the political tasks in various ways.

The term of office is representative and not imperative, because it is constituted in the absence of any proceedings for

revocation. This stems from the fact that although the MP is elected in a College, by a small group of voters, every deputy or senator represents the Romanian nation, as a whole.

The term of office of any parliamentarian is not a term of civil law because it does not belong to the sphere of legal civil relations, and therefore does not have a strictly predetermined content. It does not result from a contract, but from a manifestation of the collective will of the electorate, its purpose being to produce an effect of constitutional law. The rights and obligations of the Members of Parliament are generally determined by the regulations of the two legislative chambers of the Parliament and by special laws, for example, Law no. 96/2006 on the Status of Deputies and Senators, republished in 2008.

A parliamentary term of office is therefore regulated by constitutional law which has a general character, the parliamentarian being the representative of the entire nation, for all its interests. The term of office is independent and irrevocable, the parliamentarian manifesting himself/herself freely in the exercise of his/her term, and without being legally bound by his/her commitments in relation to the manifestations of his/her will for the duration of their term.

According to article 70 of the Constitution, MPs enjoy immunity in respect of the exercise of their term, from a political point of view:

"(1) *Deputies and Senators cannot be held accountable for the votes cast or for the political opinions expressed in the exercise of their term.*

(2) *Deputies and Senators may be investigated and prosecuted for criminal acts which have no connection with the votes or the political opinions expressed in the exercise of their term, but they cannot be searched, detained or arrested without the consent of the Chamber to which they belong, after hearing them. The investigation and prosecution can only be carried out by the Public Prosecutor's Office attached to the High Court of Cassation and Justice. Jurisdiction belongs to the High Court of Cassation and Justice."*

Immunity is justified by the fact that the essence of democracy is that any political opinion may be expressed freely. The right to a political opinion, basis of the immunity mentioned above, does not exclusively belong to the MP as a natural person, it is basically a transfer of all the rights of the citizens in a given Electoral

College, who have expressed their vote appointing the respective Deputy or Senator with a term in the Romanian Parliament. Once elected, the MP enjoys protection against political censorship or against any administrative or institutional pressures. However, such protection shall be composed of the sum of the constitutional guarantees granted individually, to each voter who is represented by that MP, as well according to article 29 (Freedom of Conscience) and article 30 (Freedom of Expression) of the Romanian Constitution.

In relation to the general interests of the nation, the MP may decide when to manifest his/her opinions and votes in relation to the legislative projects subject to debate, and, at the same time, he/she may decide not to exercise the prerogative to vote, abstaining.

The MP may decide under which form he/she shall exercise the term granted by the electorate, either by voting, by participating in the legal committees to which he/she belongs, or through consultation and counselling of the electorate, from the local Parliamentary Office.

2. THE PARLIAMENTARY STRIKE - FORM OF DEMOCRATIC PROTEST

In the year 2012, in the domestic political landscape, the so-called "parliamentary strike" of the Opposition took place, characterized by the following:

1. Waiving the parliamentary allowance (more precisely, its donation), but keeping the lump sum for the offices in the territory;
2. Keeping the parliamentary term and the right to vote;
3. The presence in the Parliament but not participating in the deliberations and the votes in Plenary;
4. Liaising with the electorate through the parliamentary offices;
5. The presence of Parliamentarians for votes on matters "of extreme urgency" as well as motions of censure, etc.

In legal terms, the "parliamentary strike" was not a strike *sensu stricto,* in accordance with article 43 of the Constitution, but rather a form of protest, by willingly limiting the prerogatives related to the parliamentary term.

According to Law no. 96/2006, the Members of Parliament have a number of obligations and rights. They can be held liable for failure to comply with their obligations, but they cannot be held liable for non-exercise of rights.

With regard to their obligations, we underline the one established by art. 29 of Law no. 96/2006, namely the obligation to participate in the work of the Chamber, a legal, moral and regulatory obligation. Failure to comply with this obligation shall attract the punishment of the Deputy or Senator under art. 30.

In the case of the 2012 parliamentary strike of the opposition, that is, the Social Liberal Union, this obligation has been complied with by the Members of Parliament, having been absent from meetings only occasionally and with a good reason.

The SLU Members of Parliament have mutually decided to restrict the scope of the rights which they may exercise on behalf of the elected politicians, believing that such action corresponds to the purpose for exercising the parliamentary mandate, remaining "in the service of the people".

At this point in the discussion, we must make an analysis of the nature of the obligations entered into by means of a parliamentary mandate, and thus we will have to point out that in the exercise of parliamentary powers, the elected person will not be accountable to the ones who appointed him for failing to achieve results. In relation to the proposed electoral platform that prompted voters to grant parliamentary mandate to a particular person, in a particular political party, we note that even such a commitment type structure cannot transform the obligation of the Member of Parliament from an obligation of diligence to an obligation of result.

We can now analyse the reasons for which the duty of an MP is established as an obligation of diligence. The achievement of the objectives composing the electoral platform promoted during parliamentary elections depends on a plurality of political factors, without the possibility to properly control the manner in which the political landscape of the country will evolve in the course of a term. The Deputy or Senator proposes during the elections objectives which they would like to achieve in the course of the term of office of 4 years; however these projects should be viewed as additional to the standard obligations involved in the parliamentary function. Thus, no one will be able, after 4 years of parliamentary mandate, to hold an elected representative accountable for failure to appropriately or fully fulfil the electoral platform published prior to the investiture in his office.

In the spirit of the general principles of law, any right has a correlative obligation. In the case of Law 96/2006, we will find that

there is an atypical structure from this point of view, so that the MP has, according to art. 29 only one obligation, namely to be present at the works of the Legislative Chamber to which he/she belongs. The term "works" shall refer to the participation in the deliberations of the specialized legal commissions on legislative texts, respectively, in the debates of the Senate or of the Chamber of Deputies.

There are strictly determined situations when the representatives in the Romanian Parliament may chose not to comply with this obligation and be absent from the works cited above, with justification. One of these hypotheses is, when in compliance with the provisions of art. 29 para. (2) Letter d) the MP's "motivation for the absence has been approved according to the regulations of the Chambers, for the resolution of personal problems or of those resulting from the exercise of mandate."

The phrase "problems arising from the exercise of their mandate" may include a broader range of activities than those in the art. 29 of Law 96/2006. The parliamentary mandate also involves, as previously indicated, other types of actions, such as consultation and guidance of voters in the electoral college to which the Deputy or Senator belongs, elaboration of projects at a central or local level for the implementation of the objectives of the electoral platform, institutional request regarding matters of public interest, obtaining public information at the request of the electorate, the expression of opinions in the framework of a Parliamentary Commission, etc.

When an MP decides that from the point of view of the interest of the "people", which he represents, it is better for him to take part in some activity, being absent from another, no one may restrict such a choice, but the people who appointed him/her, generically determined as the electorate. Even though the parliamentary mandate is granted by the vote of a geographically and demographically determined college, after the validation of the term, and the Deputy or Senator exercises his duties in the Romanian Parliament, he/she is perceived from the outside as a representative of the whole country. This is due to the principle of national unity that should exist in the legislative authority, the Romanian Parliament; the regulatory acts are applicable equally to all citizens of the country.

According to art. 35 of Law 96/2006, parliamentarians have the following specific political rights:

a) the right of legislative initiative;

b) the right to initiate and to support simple or censure motions;

c) the right to initiate and to support decisions of the Chamber, in any matter within its competence;

d) the right to make political statements, to ask questions, to make queries and other such interventions;

e) the right to request the meeting in extraordinary session of the Chamber or its working structures;

f) the right to notify the Constitutional Court, pursuant to art. 146 letters a)-c) of the Constitution, republished;

g) the right to demand the suspension from office or impeachment of the President of Romania, under the terms of art. 95 and 96 of the Constitution, republished;

h) the right to request the prosecution of the members of the Government, under the terms of art. 109 of the Constitution, republished;

i) the right of parliamentary control in all forms of its exercise, in the regulation provided by the law and parliamentary regulations;

j) the right to speak, freedom of expression and the right to vote.

All of these can be exercised by the parliamentarian according to his free will, or even not exercised at all, for certain periods, without attracting his/her punishment. It is apparent that the scope of rights enjoyed by the MP in the exercise of his/her mandate is wider than that of the obligations provided by law. If, regarding the obligation laid down in art. 29 of Law 96/2006, the parliamentarian decides to replace it with another form of exercise of its mandate, it may be absent, with justification, from the works of the Commission, respectively, from those in the Plenary of the legislative Chamber to which it belongs.

The possibility to choose between different forms of exercising the mandate pertains strictly to its legal nature, the mandate being a constitutional one, with political character. The fact that the representation of the interests of the society does not involve obligations of result, but only of diligence, offers the parliamentarian the possibility to unilaterally choose the optimal manner of exercising its mandate in relation to its voters, on the one hand, and in relation to the Romanian people, on the other.

3. CRIMINAL LIABILITY

Pursuant to article 70 of the Constitution, we note that "*Deputies and Senators cannot be held liable for the votes cast or political opinions expressed in the exercise of their mandate*."

It refers, therefore, to the sense of the vote or the opinion expressed. Art. 35 letter j) of Law 96/2006 states that the parliamentary vote is a right of the Deputy or Senator. The text of art. 29 of the same legislative act states the obligation of the parliamentarian to participate in the works of the Legislative Chamber to which it belongs. We can only surmise that the "participation" should be carried out in an active way, through the exercise of the rights under art. 35 of Law 96/2006, in the sense of achieving constitutional balance of the political debate, much needed in a democratic State. The literal and systematic interpretation of the regulation, however, leads to the conclusion that the text refers to a form of actual presence, which materializes through a quorum, the rule in art. 29 not being fit to compel the exercise of one of the rights contained in article 35, that is, the expression of a vote or a certain political view.

We conclude by stating that in relation to the general interests of the people, the MP may decide when to manifest his/her opinions and votes in relation to the legislative projects subject to debate, and, at the same time, he/she may decide not to exercise the prerogative to vote, abstaining.

In the case of participation in the deliberations of the Parliamentary Committees, the obligation under art. 29 para. (1) of Law 96/2006 is mitigated by the provisions of paragraph (2) letter d, such that when the parliamentarian believes that the general interests of the people or his electoral college voters whom he/she represents are other than the effective participation in a meeting of the Legal Committee, the parliamentarian may decide to be absent, with justification, carrying out another task specific to the mandate of Deputy or Senator.

The justified absence or the participation in a Legal Committee without expressing opinions or votes, all represent legal means for the exercise of the parliamentary mandate, having been provided for in Law no 96/2006. A contrary situation, whereby rigorous service obligations would be indicated for the public function of Member of the Romanian Parliament, could easily lead to crossing the democratic limits, suppressing not only the constitutional

right of the public servant, MP or Senator, but also the rights of the tens of thousands of voters who mandated him/her to represent them in the legislative process. Therefore, a restrictive interpretation of the obligations of a parliamentarian is justified, as well as an extensive one as regards the scope of the rights associated with this function, in order to preserve the constitutional balance between the powers of a democratic State.

We mentioned above that during the 2008-2012 parliamentary mandate, more precisely in the year 2012, the parliamentary opposition represented by the Social Liberal Union (a political alliance between the National Liberal Party and the Social Democratic Party) has put in place a political initiative titled the "parliamentary strike".

Specifically, the members of the opposition were showing their dissatisfaction with the lack of real political debate on the texts of laws, given the fact that the Liberal Democratic Party and the Alliance of the ruling parties were taking advantage of the majority of votes to pass legislative proposals without having to take into account the amendments made by the other parties of the opposition. The dissatisfaction of the members of opposition materialized in that they refused to exercise their rights under art. 35 of Law no. 96/2006 so long as they were confronted with debates initiated by the Liberal Democratic Party and the governing allied political parties. The approach was motivated by the fact that any debate on a legislative proposal or amendment would be conducted in an adversarial manner, none of the arguments made by the parliamentarians in the opposition parties were heeded, these being rejected permanently as a result of the parliamentary majority representing the arc of the ruling political parties.

We emphasize that in the context of the so-called "parliamentary strike", there were people who filed criminal complaints against the leaders of the Social Liberal Union, Mr. Crin Antonescu, Mr. Victor Ponta, and Mr. Daniel Constantin, accusing the ones mentioned of various offences, ranging from abuse of office, negligence in office, conflict of interests, bribery, receiving undue benefits. Some people, even if they did not belong to the electoral colleges where the leaders of the three parties in the SLU ran, have filed a criminal complaint against them, disapproving the "parliamentary strike" approach. In the complaints sent to be settled by the Prosecutor's Office attached to the High Court of Cassation

and Justice, the complainants emphasized the fact that the parliamentarians mentioned have committed the offences referred to above by the fact that they have received proper compensation for being members of the Romanian Parliament and did not express their votes on the legislative proposals of the LDP, they have not expressed their legal views in the specialized committees on the same proposals and on certain occasions they have been absent from the meetings of the Legislative Chamber to which they belonged.

These are the definitions given by the Old Criminal Code regarding to the offences object of the criminal complaints made against the members of the SLU:

1. **Abuse of Office**[298]

a. Against the interests of the people - a deed of the public official who in the exercise of his duties knowingly fails to perform an act or it performs it in an inadequate manner and thereby causing harm to a person's legal interests (art. 246 Criminal Code)

b. Through the restriction of certain rights - restriction by a public official of the use or exercise of certain rights of a person or the creation of an inferiority situation for that person on the basis of race, nationality, ethnic origin, language, religion, gender, sexual orientation, views, political affiliation, beliefs, property, social origin, age, disability, non contagious chronic illness or infection with HIV/AIDS (art. 247 Criminal Code)

c. Against the public interests - a deed of the public official who in the exercise of his duties knowingly fails to perform an act or performs it in an inadequate manner and thereby causing significant disruption to the functioning of a body or of a state institution or of another unit referred to in article 145 or if damages were brought to its patrimony (art. 248 Criminal Code)

2. **Negligence in office**[299] is the culpable violation by a public official of a service duty, by its failure or its improper performance, if a significant disruption was caused to the functioning of a body or of a state institution or of another unit referred to in article 145 or if damages were caused to its patrimony or if harm was brought to the legal interests of a person (art. 248 Criminal Code)

[298] Art. 297 in the New Criminal Code
[299] Art. 298 in the New Criminal Code

3. **Conflict of interest**[300] refers to the deed of a public official who in the performance of his duties carries out an act or participates in the taking of a decision which results, directly or indirectly, in a material gain for himself, his spouse, a relative or close family up to grade II included, or for another person with whom he was in trade or labour relations in the past five years or from whom he has received or receives services or benefits of any kind (art. 253 Criminal Code)
4. **Bribery**[301] is the act of the public official who directly or indirectly claims or receives money or other undue benefits or accepts the promise of such benefits or does not reject it, in order to fulfil or not fulfil or delay the performance of an act regarding the duties of his office or in order to perform an act contrary to these duties (art. 254 Criminal Code)
5. **Reception of undue benefits**[302] represents the reception by a public official, directly or indirectly, of money and other benefits, after having fulfilled an act by virtue of his office to which he was obliged under it (art. 256 Criminal Code).

In terms of the subject matter of the offence, the public official, parliamentarians have fulfilled that condition. Related to the objective and subjective sides of the offences concerned, we find that none of these criteria is met by materializing the political approach called "parliamentary strike". Basically, the subject of the complaint was the absence of the parliamentarians from the votes in the Plenary of the Legislative Chamber regarding the various legislative proposals under discussion, which would have had a direct impact on the population of Romania, recipient of the rule of law.

The main offence mentioned was the abuse of office against public interests, consisting in the refusal to be present for the voting of certain legislative proposals proposed by the Liberal Democratic Party and the Alliance of the ruling political parties during the parliamentary mandate period of 2008-2012, which would be harmful to the population, depriving it of legislative action. In fact, the "parliamentary strike" was just a way of manifesting political rights, more specifically the abstention from voting or replacing some activities with others, specific to the parliamentary mandate.

[300] Art. 301 in the New Criminal Code
[301] Art. 289 in the New Criminal Code
[302] Offence merged with that of bribery under the New Criminal Code.

The justified absences of the Social-Liberal Union MPs from the works of the Legislative Chamber did not have any effect with regard to the quorum of the meeting that was otherwise provided through the majority of the members of Parliament who belonged to the ruling Alliance of the Liberal Democratic Party. Thus, the legislative activity had in no way suffered from the democratic approach to opt for a particular exercise of the mandate of a Deputy or Senator.

Moreover, in situations where a quorum of a meeting was necessary, set up after special rules, for example, in the recent case of granting of the approval for the detention, respectively arrest of the Deputy Mihail Boldea, the Social-Liberal Union deputies were present in the Plenary meeting to constitute the required majority to carry out the legal terms of the debate, expressing at the same time the vote.

Obviously the objective aspect of the offence cannot be fulfilled through what was generically titled as a "parliamentary strike". The analysis of the Public Ministry on the facts reported in the complaint was restricted to checking the nature of the political approach of waiving the rights granted to a Member of Parliament under his mandate, with the view to represent the interests of the people.

The conclusion of the Public Ministry was not to prosecute; the solution was founded at that time on the provisions of art. 10 letter a) of the Old Criminal Code, respectively, "the deed does not exist".

4. CONCLUSIONS

We have noted that the approach called "parliamentary strike" is actually a legal manifestation in the context of giving up certain rights. The rights may be exercised or not, according to the wishes of their holder, in this case, the MP exercising his political mandate.

Failure to exercise a right under certain conditions represents an attribute of the parliamentarian, which derives from the fact that the term of office of a Deputy or Senator shall only institute obligations of diligence, the latter being required to be in full accord with the interests of the Romanian people and the electorate as a whole.

If in a given political context, the MP decides that it is in the interest of the electorate and of the people for him to refrain from the exercise of certain rights, thus managing to convey the message to his

agents, then he is entitled to make such an endeavour as part of his constitutional term limits, within his obligation of diligence.

Therefore, there is no criminal liability in this context, because this is the case of a constitutional and democratic exercise of the parliamentary mandate.

However, by the *lege ferenda*, a democratic solution should be found to stop political absenteeism, whether it is caused by a reason of protest or other causes, absenteeism which often led to the blocking of the Parliament's legislative work.

CONSIDERATIONS ON THE CONCEPT OF "GLOBALIZATION"

Alexandru-Marius TUDOR *

ABSTRACT
Globalization is a very difficult and challenging topic of discussion, and very ambigous, due to the many uncertainties in both the system and between researchers in the field. However it seems pertinent the analysis in what might be called the winners and loosers of the globalization.

KEYWORDS: *globalisation, research, uncertainty, phenomenon*

Conceptually, globalization has undergone constant changes as the phenomenon that defines it had not worn the same clothing size and did not show the same dynamic over time.

The pervasive nature of globalization and its modernity, and also the topics related to it, are enabling it to handle large areas in speeches and political, intellectual and academic debates without issueing definitive theories and concepts that preserve the temporal effects. The multitudes of definitions attributed to globalization include common terms such as: streams, integration, interdependence. Professor H. Siebert defines globalization "as a complex phenomenon that captures the global economy in the space of national economies through international trade flows of information, technology and capital." [303]

Globalization is defined also as a "geographic and interconnected expansion, open markets, dissemination of information using the latest

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[303] Moldoveanu, Marcel, *Mersul lumii la cumpăna dintre milenii,* Editura Expert, Bucureşti, 2003, p. 14.

communications technologies"[304]; "Complex process of multiple dimensions, of conflicting events that planetary disseminates the type of production and consumption, trade liberalization, increased investment process and the increased importance of capital flows to international competition[305]; one of the classic definitions of globalization is: "increasing integration of national economies through trade, finance, technology and the labor movement, all made possible by the abolition of barriers built by governments"[306]; "International transactions growth in goods, services and factors of production and the development of institutions beyond national barriers"[307]; "The process by which most internationalized firms tend to redefine the rules previously imposed by the nation-states for their benefit"[308]; "Very dynamic process of increasing interdependence of national states as a result of the expansion and deepening of transnational ties in more wide and varied spheres of economic, political, social and cultural, having the implication that the problems are global rather than national demanding in turn a global rather than national settlement."[309]

In this context, globalisation was defined as "a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions - assessed in terms of intensity, velocity and impact - generating transcontinental flows and networks or inter-activity, interaction and the exercise of power"[310]; "Increasing global interdependencies between different national economic and social systems through private economic institutions."[311]

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[304] Lorot, Pascal, *Dictionnaire de la mondialisation,* Editons Ellipses, Paris, 2001.
[305] Senarclens, Pierre de, *La mondialisation. Théories; enjeux et débats*, Armand Colin, Paris, 2001, p. 321.
[306] Gavin, Brigid, *The European Union and Globalisation,* Edward Elgar, Chaltenham (UK), Northampton MA (USA), 2001
[307] Deardoff, Alan V., Stern, Robert, M., *What public should know about globalization and the WTO,* Discussion Paper No. 460, Research Seminar in International Economies, School of Public Policy, The University of Michigan, July 2000.
[308] Cordellier, Serge, *Mondializarea dincolo de mituri,* Editura Trei, Bucureşti, 2001, p. 45.
[309] Bari, Ioan, *Probleme globale contemporane*, Editura Economică, Bucureşti, 2003, p. 57
[310] Held, David, McGrew, Anthony, Goldblatt, David, Perraton, Jonathan, *Transformări globale. Politică, Economie şi Cultură*, Editura Polirom, Iaşi, 2004.
[311] Acocella, Nicola, *La politica economica nell'era della globalizzazione*, 2 edizione, Carocci editore, Roma, 2005

The name ”global village” given by Marshall McLuhan in the 1960s, suggesting completion of an "institutional framework for global regulation" is not in reality, although globalization is widely recognized. [312]

Analyzing and tracking overall system characterization, S. Cordellier explains that the globalization as a process "in which national economies are broken, then rearticulate within a system and process transactions that are operating internationally."[313] This definition suggests a breakthrough in the quality evolution of the process and restart them in another plane, homogeneous.

Any definition of globalization is not exhaustive, tending more towards art Liot. This is due to the complex nature of the phenomenon, the multitude of determinants, consequences and effects of accelerated growth while less predictable. None of them fully expresses the phenomenon, but certainly try not to exaggerate or minimize the main features and trends.

Conceptual Approach to the term globalization is able to clarify the dimensions of the process, and the differences between it and related phenomena's.

The first attempt to define processes related to globalization, without specifying the term as such, was of a famous French writer called Paul Valéry, in his ”Regards sur le monde actuel” in 1931 He captures five major phenomena: "natural resources inventory of the planet; knowledge and formal sharing of agricultural land habitable; connecting to the global communications networks of the world; universal solidarity imposed by phenomena such as economic shocks, wars, revolutions, natural disasters; preservation of national character through traditions, ambitions, habits acquired in history between countries and regions and their possible transformation generating global conflicts. "[314]

In this context, the term globalization has found its explanation in many dictionaries of literature.[315] If by the end of the nineteenth century the world was known as a "ball", after this period there were introduced

[312] Coşea, Mircea, *Economia Integrării Europene,* Editura Tribuna Economică, Bucureşti, 2004.
[313] Cordellier, Serge, *Mondializarea dincolo de mituri,* Editura Trei, Bucureşti, 2001.
[314] Defarges, Philippe, Moreau, *La mondialisation*, 4ème édition, Presses Universitaires de France, Paris, 2002
[315] Moldoveanu, Marcel, *Evoluţii ale procesului de globalizare şi integrare regională la început de secol şi mileniu,* Institutul Naţional de Cercetări Economice, Centrul de Informare şi Documentare Economică, Bucureşti, 2004

terms "globalization", "globalism", "global". Term popularity is evident in the last quarter of the century, the conceps regarding this problem becoming universal known.

However, there are many debates on the proximity of the three terms: internationalization, mondialisation and globalization, which are sometimes considered synonymous, but different in certain aspects. Thus, in 1983, Theodore Levitt "denotes smoothing tendency of markets where companies selling the same products, the same way everywhere as globalization"[316]. In 1990, Kenichi Ohmae associates with this term the action to lead global activities of transnational companies.[317] These two definitions develops the idea that globalization would be a mondialisation of the economy enterprises. [318]

Francois Chesnais shows that, in fact, equivalent to the term ofglobalization is the mondialisation of capital. The term mondialisation would mean businesses and more specifically, their tendency to internationalize.

Analyzing and following the evolution of these three phenomena, we can easily grasp the differences between them. Internationalization is the first stage of the mondialisation process, an intensification of relations of technical, economic, financial and cultural type between nation-states. They are becoming more interconnected, reaching to exert profound influences on each other, while remaining separate entities. International connections translate into significant distances in space. The international economy is made up of national markets for goods, capital, people, information, which are on a delimited territory. There are also in the process of internationalization interactions and interconnections, but they are established between several states.

Internationalization term was first used by the philosopher Jeremy Benthan in 1780 became popular and was quickly appropriated as a reality evident at that time, namely the emergence of nation-states and international links between them. [319]

Mondialisation is the process of forming the global economy as a whole and is reflected by the integration of national economies into the global space, the impact being the weakening role of the states and

[316] Crozet, Yves, Abdelmalki, Lahsen, Dufourt, Daniel, Sandretto, René, *Les Grandes Questions de l'économie internationale,* Editions Nathan, Paris, 2ème édition, 2001
[317] Ibidem.
[318] Moldoveanu, Marcel, *Evoluţii ale procesului de globalizare şi integrare regională la început de secol şi mileniu, op. cit.*
[319] Plihon, Dominique, *Le nouveau capitalisme*, Editions La Découverte, Paris, 2003.

geopolitical borders and loss of national economic space character. These changes do not occur spontaneously and randomly, they are the result of regulations and organizations worldwide.

In this context Dominique Plihon explains the mondialisation, in terms of its size and the evolution of economic phenomena. The "international dimension translates into opening the national economy and the development of trade in goods and services." [320]

In the second stage of its evolution, mondialisation reaches the multinational dimension through the internationalization of the production factors, especially financial capital. Another vector of this size is the external foreign investment promoted by transnational companies.

The third dimension, the global one, is expressed by a deepening of the interdependence of national economies, a reduction in national type regulations, a relocation of economic activities. It is internationalized not only the production, but also markets that are integrated and businesses turn into global players. The strongest market is the capital market, due to increased mobility of financial flows on a global scale. This dimension of mondialisation is the process of globalization.

So the current state of mondialisation is the globalization, the expanding of the financial markets, development of the production and the multinational investment are a transfer of activities from a different part of the world, surpassing boundaries. The consequences of the activities in a region has effects on people and communities elsewhere in the world.

Trade and financial flows are produced this time between large areas of the world economic space.

United Nations Education and Culture, in his publication Courrier de l'UNESCO in September 2000, defines globalization as a process of mondalisatione caracterised by universality. UNESCO believes that globalization "has a technological origin, producing the enhancement of relations between nations."

One of the most recent and interesting approaches to the concept of globalization is the work of Nicholas Bell ”Typological forms of nationalism and globalization”. From the beginning, it addresses nationalism, stating that "regardless of its forms, it acts directly or indirectly on globalization, not helping its advance." Author adds that,

[320] Plihon, Dominique, *Le nouveau capitalisme*, Editions La Découverte, Paris, 2003.

"viewed from the perspective of globalization, the issue of nationalism globalization is the ratio of the national and international conflict between independence and interdependence. Against this general background, the strongest conflict arises in the relationship between imperialist expansionist forces of nationalism and anti-imperialist nationalism. The conflict takes the form opposite doctrine and action often based on violence or war. "[321]

Thus, "nationalism and globalization are two fundamental forces of contemporary human society: the first occurs in the path of the second not as an external factor, but as one who, like globalization, of the same historical realities: human contemporary society era. Nationalism and globalization rejects one each other and at the same time, assume each other ", and therefore" like any historical process, globalization is also accompanied by its opposite, anti-globalization, whose representative is contemporary nationalism."[322] The struggle between globalization and globalization is seen as the engine of the contemporary human society progress, with the specification that "globalization, being the bearer of the future trends, is the force which drives the motor, while nationalism, representing the past, the engine brake is inevitable; it can create conflicts and delay progress of globalization, but he can not remove". [323]This last statement has a particular value, given the final verdict note that is loaded.

In this context, nationalism is "a historical concept of social-political behavioral attitude"[324]: this second conclusion explains the first one, showing that although nationalism is "basically a globalization force, between the two parts take place combinatorial variants. For example, some nationalists are pro integration and globalization, but not by supranational coordinating bodies, but through interstate (intergovernmental) bodies, thus maintaining the national state entity. However, the anti globalisation nationalism becomes an historical form of nationalism, with national and international events, often accompanied by conflicts and even war. "Nationalism is an ambiguous term, a common name for two opposing attitudes: although it is known as a

[321] Nicolae, Belli, *Formele tipologice de naţionalism şi globalizarea,* Seria Probleme Economice, Colecţia Biblioteca Economică, Academia Română - Institutul National de Cercetări Economice, Vol. 210-213, 2006.
[322] Ibidem.
[323] Ibidem.
[324] Ibidem.

major phenomenon in the history, nationalism did not yet have a clear concept, scientifically structured, able to cover its entire surface." [325]

Daniel Daianu advocates for the deep examination of globalization, in order to understand its complexity and to try to capitalize on opportunities and benefits and reduce the trade costs. "The thesis that globalization, understood strictly in terms of technological determinism and generalization of economic policy measures (without considering the circumstances), resolves itself the world's problems, simplify and underestimate (ignore) a large portion of reality"[326].The author captures the main sections of the debate on globalization: international financial and trade system functioning, poverty and inequality in the world, namely the role of the states vs. that of transnational actors in international relations. This synthesis may be considered premonitory, through the first element remembered – functioning of the financial system - against which the author states that "there is great dissatisfaction due to the volatility and the impact of short-term capital movements - that is one of the major features of financial globalization. "[327]

Do we have institutions to manage global processes ?, the issue of reforming the international financial institutions figured on the agenda of the last four G20 summits devoted to the economic crisis. At the same time, there are becoming increasingly louder the voices claiming more strongly the need to redress global imbalances that are considered the factors that triggered the most recent financial crisis.

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[325] Ibidem.
[326] Dăianu, Daniel, *De ce stârneşte globalizarea atâtea pasiuni?, Secolul 21 - Globalizare şi Identitate, publicaţie* periodică de sinteză editată de Uniunea Scriitorilor din România şi Fundaţia Culturală Secolul 21, Bucureşti, 2001, p. 9.
[327] Ibidem.

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TRANSBORDER CRIMES - RISK FACTOR FOR EUROPEAN AND NATIONAL SECURITY

Ana Maria TUDOR *

ABSTRACT

Organised crime is, at the present moment, a special hazard for all states. If the institutions concerned will not respond promptly, by legal approaches, as well as through extremely strong operational measures, patriarchy worldly things, no matter where and how they are made up, on ethnic criteria, cultural, territoryal or of any other nature - will pay, natural, profiteers, his own weakness or cowardice. In this sense, we have to admit that this contemporary problem, with deep implications in the whole world, requires an antidote to measure which we have the obligation to find and use it both in combat, as well as in prevention.

KEYWORDS: *Crime, criminal organizations, interstate cooperation, law*

Changes which have occurred in the field of criminal activities, at national level to the transnational, have been favored by a number of factors such as: changes in concept of "common European space", with facilities that they incur, that opened opportunities for organized crime by universality of community networks; end of the cold war, the triumph of democracy in the former socialist countries and rudimentary mechanisms governing economic activity; increasing tide migrationist by developed countries and the setting up of networks on ethnic criteria, which represent true enclaves of the proceeds of crime, but it is difficult to penetrate due to language barriers, cultural and mechanisms governing their activity; revolution in communications which led to the growth of the degree of flexibility and mobility of transnational criminal networks; liberalise moving of persons as a result of bi- and multilateral agreements between states, etc.

There is not a unique pattern to criminal organizations, these varying in shape, rules of conduct, experience, specialization in criminal

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activity, area of operation, tactics and defenses, for which the fight to prevent and combat them implies a higher degree of complexity, which necessarily requires interstate cooperation.

Organized crime may be perceived as a social product "entered social and political[328] in our lives", which arises from various groups of tendency to use crime as means of social mobility and even seize power[329].

This theory developed by A. J. Ianni and Daniel Bell[330], argues that the basis organised crime is a social process. For example in America, explains D. Bell, organized crime is the way in which groups of emigrants in impoverished condition rises above the ghetto and acts to avoid oppression and discrimination. It is one of the explanations given for the existence of Italian Mafia or other groups of organized crime such as: organizations Tong, Triads, Yakuza, Colombian groups, Russian etc[331]. In a similar theory, the so-called cultural theory, Edwin Sutherland[332] argues criminal behavior as learned, taught, and involves something more than the simple mimics. Those who become criminals know such a trend because of their permanent contact with those who are in breach of the law and because of the relative isolation of those who comply with the law.

Sociologists have shown that certain areas, medium, "nurses" (encourages) crime to become land conducive to gangs and structures of organised crime. Where there is no other alternative, the success and well-being of drug traffickers and other criminals involved in criminal activities, constitute models worthy to be followed for the young people[333]. The source for organised crime finds such place in fraying and malfunction of the system (understanding the system as a whole), which led to, after changes in the former totalitarian states, organized crime to develop with great swiftness, surpassing structures of law, democratize

[328] Robert J.Kely – *Natura crimei organizate şi operaţiunile ei specifice*, SUA, 1987, pag.5.
[329] Gh.Nistoreanu, C. Păun – *Criminologie,* Editura Europa Nova, Bucureşti, 1996, pag. 211.
[330] Dorean Marguerite Koening – *Confruntarea dintre sistemul justiţiei penale şi crima organizată în Statele Unite.* Raport la Colocviul preparator al Asociaţiei Internaţionale de Drept Penal, Egipt, 1977, în Revista Internaţională de Drept Penal, vol.69, pag. 306.
[331] Damian Miclea – *Cunoaşterea crimei organizate*, Editura Pygmalion, Ploieşti, 2002, pag.12-13.
[332] E.Sutherland – *White collar crime*, Editura Dryden Press New York, 1949, pag.53.
[333] F.Alder şi alţii – *Criminologia*, Ediţia a II-a, Editura MacGrew N.J.All., SUA, 1995, pag. 304.

banking circuits, highly political class, and managed to intimidate or to overpower repressive system[334].

In the view of the majority of researchers, organized crime, this phenomenon, is a creation of the last centuries and has appeared at various points in the world (U.S.A, China, Japan, Italy) in certain specific causes and having historical and social effects, under different names: the mafia, Yakuza, triade, etc. These criminal organizations have dealt with crime as a way of earning high profits by committing crimes specific such as: prostitution, gambling, drug trafficking, of persons, weapons, smuggling, money laundering, etc.

In the opinion formulated by F. Alder[335], organized crime has occurred, however, prior to this period, even if they had used specific names. For this purpose are illustrated existence illegal trade in slaves or of one of the most ancient offenses that withstood the early days at sea, and up to now, namely piracy. Also, it can be said that a number of facts and specific organised crime groups were not only tolerated by countries and therefore obtained huge profit over time, but social structures were also involved in committing and in their organization, afterwards being that got out of control. For example, economic policy carried out for more than three centuries of English Company of Western Indian Teritories, transformed the People's Republic of China a true nation of opium smokers and triggered the two wars of opium[336].

Thus, the end of the 18th century, one-third of the population of China was male consuming opium. To put an end to opium consumption, the Chinese authorities summoned all foreign merchants to bring their stocks of opium to be destroyed, the British protested when the 1,400 tonnes of opium that belonged tot them, were thrown at Canton in river waters. As a result, on 4 April 1840 Queen Victoria of England declared war against China's emperor, war lost by China, and duet o the peace at Nankin in 1842, the British gadgets island Hong Kong, as well as stimulating trade in opium. After the second war of opium (1856-1858) won by the French and British, and the peace in Tianjin, China is obliged to legalize trade in opium against a customs duty, which led to an

[334] Damian Miclea – *Cunoaşterea crimei organizate*, Editura Pygmalion, Ploieşti, 2001, pag.13.
[335] F.Alder şi alţii – *Criminologia, Ediţia a II-a,* Editura MacGrew N.J.All., SUA, 1995, pag. 305.
[336] Richard Bell – *Interzicerea stupefiantelor* în Revista Interpol nr. 432/oct. 1991, în acelaşi sens V.Bercheşan şi C. Pletea – *Drogurile şi traficanţii de droguri*, Editura Paralela 45, Bucureşti, 1998, pag. 103.

increase in imports, but also to the cultivation of poppy, China becoming first producer of opium in the world, with 100,000 tonnes between 1905-1908[337]. This resulted in opium spreading not only in the region, but also in Western states through the grand number of Chinese immigrants, Indians, Philippines. This period improved and extended criminal organizations called Triads Chinese. In this situation, the West prohibited illicit trade in drugs by the Convention in Shanghai in 1909, which was also attended by the U.S.A , Germany, France, Great Britain, Iran, Portugal, Russia and Cambodia, which has lodged a beginning in the fight against organised crime.

The last decade of the XXth century was, at the time, characterised by a real change in all areas of life economic, social and political, of the thinking and the way of life. A doctrine retrograde damper of citizen rights and liberties collapsed and another, opposite, making its way to geographical areas particularly in Eastern Europe but also in Asia, Africa and Latin America. This changes increased criminal acts, in view of the fact that this constitutes an assembly of favourable factors[338].

Development of the means of transport and communication, trade and tourism on a world scale, increasing the speed of those means of transport, has allowed moving more rapidly of offenders in different countries for committing the criminal deeds, in order to get rid of legal liability, or to hide or product leverages offenses. We are witnessing a phenomenon of globalization of trade, the financial markets, the protection of human rights etc[339] . This trend has resulted in the first row to the disappearance of limits between national, regional and international and to the interpenetration of political, economic and social issues. Within the framework of this trend, globalization expanded in crime.

The opening of borders meant not only an increase in economic cooperation, cultural and political between member states but also, in conjunction with economic instability and weaken border controls, also went to the increase in crime, the organised crime at transnational level and transcontinental. This typology of crime turned its attention to some

[337] Damian Miclea – *Combaterea crimei organizate, E*ditura Ministerului Administraţiei şi Internelor, Bucureşti, 2004, pag.11.
[338] Damian Miclea, *op. cit*., pag. 12.
[339] Ion Chipăilă şi colectiv – *Globalizarea traficului de copii*, Editura Sitech, Craiova, 2006, pag.16

of the areas, favored by the climate of globalization such as: drug trafficking, illicit weapons, nuclear materials, terrorism, trafficking in persons, prostitution and paedophilia, money laundering, theft and smuggling of expensive cars, theft and smuggling of objects from the national heritage, kidnapping businessmen and redemption lies in order, corruption in multinational companies, maritime piracy and airline, etc. organised crime prejudicing public safety and national security, good progress on the work of the economic, political and social institutions.

From one day to another forms of manifestation of organized crime have been diversified, passing from traditional areas, such as games of chance and prostitution, to international traffic of stolen cars, works of art and archaeological objects stolen, fraud with credit cards, trade in animals and birds rare, etc. , leading to the organization criminal activities after the model legitimate businesses (sectors of take-over, production, transport, recovery, protection)[340].

Criminal organizations are involved more and more in the illicit dumping practices and recording of fictitious losses, operations carried out often in complicity with some corrupt officials. A situation of novelty, operated by organized crime, is the decrease in demand of international human organs for transplant. As a result, appeared a black market with such components to exploit poverty, particularly in least developed countries, and further developments in transplant techniques of components taken, are of such nature as to increase this activity so somber[341]. The unseen face of illicit profits, which can be realized by money laundering knows increasingly sophisticated means, and huge amounts obtained shall be initiated by the criminal cartels to control important institution financial and banking, or economic and social, creating true monopolies by removing competition. By corruption, the most common weapon, organised crime climbed to the tips, including vital institutions of the state, therefore jeopardizes national security.

Regarding the concept of international crime, it includes in its content two aspects: **crime**, regarding all offenses committed on the territory of states in a given period of time (statistics it is difficult to achieve) and **international crime**, which refers to the number of infringements committed in a given period of time, by which there have

[340] Damian Miclea – *Combaterea crimei organizate*, Editura Ministerului Administraţiei şi Internelor, Bucureşti, 2004, pag.12.
[341] I.Pitulescu – *Al treilea război mondial, crima organizată*, Editura Naţional, Bucureşti, 1996, pag.15.

been essential violated, the laws of at least two states[342]. However, all of these elements, we believe that the concept of international crime includes all deeds committed within a period of time, well determined in the territory of the state in the international community or in the territory of the state in a specific geographical area, by natural and legal persons.

In view of the fact that the offenses have already gained an international character, legislative bodies of the states have been obliged to specify that transnational crime is considered any deed which, as the case may be: is committed both in the territory of a state, as well outside of it; it is committed in the territory of a state, but preparation, planning, management and control, is to take place, in whole or in part, to the territory of another state; it is committed in the territory of a member of a criminal group organized carrying out criminal activities in two or more States; it is committed in the territory of a state, but the result of occurs in the territory of another state.

Related to these four terms of reference, crime means that segment crime which incorporates illegal activities, committed by people on an individual basis or which is teaming up incidentally, using various methods and means and watching various purposes. The concept of crime acts more categories[343] according to the different components of reference with which they operate: depending on the reference space. There is a national crime; referring to the period of time, we can speak of annual crime, semester, monthly; if the facts are reported regarding different categories of persons there is adult crime, youthful, male, female, white collar crime "white-collar" (persons who hold important positions in the sphere business relations, etc.); according to the degree of awareness of criminal offenses by components of justice, crime can be actual (corruption acts committed effective), appearance and legal (or trial).

International concept of infringement is relatively recent, although some national legislation contained legal provisions relating to punish acts of this kind. Thus, the Constitution of U.S.A. from 1787 and the Swiss Confederation shall include provisions under which internal organs are competent to flinching international offenses[344].

[342] Ion Suceavă şi colaboratorii – *Omul şi drepturile sale*, Editura Ministerului de interne, Bucureşti, 1991, pag. 240.
[343] Valerian Cioclei – *Manual de criminologie*, Editura All Beck, Bucureşti, 1998, pag. 14-16.
[344] Grigore Geamănu – *Dreptul internaţional penal şi infracţiunile internaţionale*, Editura Academiei Române, Bucureşti, 1977, pag. 127.

Gradually, international law has gained same foundation of the domestic law. Some contemporary authors have argued that the first manifestation of international criminal law was founded in 1945, without having had previously, no precedents and no precursors[345]. This opinion is ruled out, by the number of acts and international documents. For the purposes of assessing whether a fact has or has not the character of offenses, regarding criminal international order, we must take into account the international law, as a whole, and also the conventional law. It is therefore beyond doubt that, at the time it was committed, those acts were illegal and punished not only by international law, but also by the ordinary law[346] of the member state , which aware of the danger, have concluded a series of agreements which provide for their suppression[347].

The extent of international crime affects all states and constitutes a plague which manifest themselves in various forms: from terrorism, drug trafficking, trafficking in human beings, organized crime, money laundering, trafficking in arms and explosives, and up to settlement of accounts between criminal structures, or killings of mafia-type creates a general psychosis of insecurity civic and terror[348].

According to international criminal law, there have been multiple attempts to define the international criminal offense, tests that have been aimed at shaping as precise as possible for the components of the Community, with a view to its delimitation of the infringement of a national one. One of these definitions belonging to Romanian jurist Vespasian Pella, who considers international offense "action or inaction sanctioned by a punishment pronounced and carried out on behalf of the Community Member"[349]. Another lawyer Stefan Glaser, considers international offense as being "a fact not regarding international law and so deleterious to the interests protected by this right, that member in agreement assigns a criminal sense, by asking also criminal suppression[350]".

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[345] H.Meiyrowitz – *La repression et par les tribunaux allemands des crimes contre l'humanite et de l'appartenance a une organisation criminelle en aplication de la loi* – in nr. 10 cu Conseil de Controle allie, Paris, 1960, pag.5.

[346] Grigore Geamănu, *op. cit.,* pag. 128.

[347] Convenţia din 1904 privind traficul cu fiinţe umane şi Convenţia din 1961 privind traficul de stupefiante.

[348] Stancu Şerb, C-tin Drăghici, A.Iacob, A.Ignat – *Drept poliţienesc*, Editura Tritonic, Bucureşti, 2003, pag. 192.

[349] V.V.Pella – *La criminalite collective des etats*, Bucureşti, 1927, pag. 175.

[350] St.Glaser – *Droit international penal conventional*, Paris, 1929, pag. 145-148.

The most complete definition of these offenses belongs to Professor Grigore Geamanu which says "international crime is an act consisting of an act or omission contrary to international law, and essential element of international crime is downgraded opposed to international peace and security which attracts necessarily criminal sanction[351]".

O. I. P. C. docrine - International INTERPOL considers it a crime "any criminal activity interested in more than one country, whether because of the nature of offense committed, or author's personality or behaviour or his accomplices". The same doctrine shows that: "a crime is seen as international if they are involved at least two states with regard to the place they have been committed, the citizenship of the author (authors), place of storage or trafficking objects body offense[352]". An international offense will also lead to international repercussions in relation to the circumstances (corruption acts committed in more than one country or evading criminals abroad) or to the consequences of that delictuos act (drug trafficking, trafficking in human beings, in stolen cars, terrorism, etc.).

A particular importance for the determination of the international character of offenses, is the offender's personality. From this point of view, an individual who has committed illegal acts of local nature (thefts from shops, in homes, drug trafficking, etc.) but successively in several countries it is an international criminal. Thus, a criminal who has committed crimes in the territory of a member state and which he returns to the territory of another state is a international criminal.[353]

On the other hand, there are some crimes which are subject to a degree of danger particularly, and even if they are committed in the territory of the state of which it is a national interest for the author,the other states will cooperate in view of a possible "international expansion". Such situations are determined by offenses such as: terrorism, drug trafficking, trafficking in persons, the false and faked currency, trafficking in stolen cars, with weapons, etc. , criminal offenses for which laws are incriminated in all countries and which requires prevention and fight against them, the efforts concentration of several

[351] Grigore Geamănu – *Dreptul internaţional penal şi infracţiunile internaţionale*, Editura Academiei Române, Bucureşti, 1977, pag. 131.

[352] Gh.Pele, Ioan Hurdubaie – *Interpolul şi criminalitatea internaţională*, Editura Ministerului de Interne, Biroul Naţional Interpol, Bucureşti, 1983, pag.4.

[353] Stancu Şerb, C-tin Drăghici, A.Iacob, A.Ignat – *Drept poliţienesc*, Editura Tritonic, Bucureşti, 2003, pag. 193.

countries in a specific geographical region, or from areas depending on different situations, are determined[354].

International crime classification may be made after several criterias: after the **subject offense,** shall be distinguished crimes whose subject can only be the state, i.e. infringements committed by state organs in the name and on behalf of state and criminal offenses whose subject is the individual as a private person (drug trafficking, terrorism, piracy, trafficking in persons, etc.); after their **purpose**, international crimes can have a political goal or ideological dogma, in which they are placed crimes against humanity, including genocide, war crimes and international terrorism; **another criterion**, time in which these acts are commited (in time of peace or in time of war)[355].

Professor Grigore Geamanu classified offenses after their seriousness as follows: international crimes; crimes committed by private individuals (drug dealing, prostitution and procurement, trafficking in human beings, the false and trafficking in coin etc.)[356]. Such facts are qualified crimes by international agreements, treaties or international conventions concluded between the signatory states by which they undertake to incriminate them in their legislation and internal criminal sanction them also.

In today's world, more than ever, took on a unprecedented large-scale, organized crime, which, in many cases, compliments with terrorism and contains a hard core, economic-financial crime, as well as corruption, phenomena that tend to erode basic economic system and affect fundamental institutions of the rule-of-law.

Increasingly, criminal organizations take advantage of contradictions generated by either the lack of some laws, non-application of existing laws, the application of theoretical models from other states not integrates with concrete conditions of the state what they borrow, inappropriate relations spheres of political, economic and administrative, as well as the inefficiency or poor collaboration between internal structures or competent international in the fight against crime.

Against this background, security strategies must be analised fundamentally, taking into account the new vectors inclusion in the

[354] Ion Suceavă, Florian Coman – *Criminalitatea şi organizaţiile internaţionale*, Editura Romcartexim, Bucureşti, 1997, pag.13.
[355] Ştefan Glaser – *Droit international penal convenţional*, pag. 51.
[356] Grigore Geamănu – *Dreptul internaţional penal şi infracţiunile internaţionale*, Editura Academiei Române, Bucureşti, 1977, pag.133.

equation of national security of each member. In the context in which continental and global fora channeling their efforts to identify the direction for suitable solutions, regarding the elimination of corruption, Romania has boosted efforts to counter this scourge, both at an international level as well as in internal affairs. These efforts aimed at Romania's joining the international coalition, by provision of the whole national potential and stepping up the update of the legislative framework and implementation of the acquis communautaire.

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EVOLUTION OF ROMANIAN LEGISLATION IN THE FIELD OF PREVENTING AND FIGHTING TAX EVASION

Bogdan VÎRJAN [*]

ABSTRACT

The phenomenon of tax evasion has an important place in the macro-economic policy of the Romanian state, given the unintended and unforeseen consequences that this phenomenon may have on social and economic environment. The negative effects of this phenomenon of evasion are felt directly on income tax collections, causing major distortions in the functioning of the market mechanism and it can affect even the stability of the national economy. In these circumstances, the tax evasion regulations have sought to find the best solutions to prevent and combat acts of tax evasion through a permanent adaptation to the realities of Romanian society.

KEYWORDS: *tax obligations, evading tax, tax evasion, tax payer, prevention*

1. Foreword

Regulations for preventing and fighting tax evasion have existed since before the post communist period characteristic to the '90s, evasion of tax obligations being sanctioned on the Romanian territory since the mid-nineteenth century. However, after the events of December 1989 tax evasion has became incredibly common, evading tax obligations being very difficult to control and sanction. This was mainly due to the legislation being insufficiently adapted to the market economy. Therefore, an analysis of the law on preventing and fighting tax evasion within the Romanian space must be divided into two parts: the period up to the events of December 1989 and the period following these events, when tax evasion has taken an unprecedented turn in our country.

2. Brief history of the evolution of legislation in the field of preventing and fighting tax evasion

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One can say that the Organic Regulation of 1831 and 1832 achieved the first fiscal unification of Walachia and Moldavia, basing the early tax system on principles of taxation that continue to be valid.

The Organic Regulation, entered into force in 1831 in Walachia and 1832 in Moldavia, ruled as principles of taxation the equality of people regarding taxes and established that taxes should be determined and not arbitrary, as it was before. Also, taxes had to be paid on certain due dates that were known and the amount to be paid was to be known to the taxpayer. It set the state's expenses for each year, introduced order in finance, set the taxes and other revenues to be able to cover the expenses[357].

In 1877 was passed the first law on tracking the public revenues of the state, of the counties and of the communes, of the administrations and of the public and charitable establishments. The law contained 25 articles, it listed privileges and exemptions but also stipulated that "the taxpayers who did not fulfill their legal duties until the fifteenth day of the second month of each quarter" was to be prosecuted.

After the union in 1918 Nicolae Titulescu had the historical role of carrying out the Fiscal reform of reunited Romania. He proposed in 1921, as Minister of Finance, when discussing the first unified budget, several principles inspired from the legislation of other more developed European countries, principles that established among other things drastic reduction of costs, taxation of revenues based on the taxpayer's tax return or progressive tax on general income and inheritance.

Also, severe sanctions were imposed against the practice of evading tax obligations to the state.

In 1923, Vintila Bratianu completed the new tax reform by Law no. 661/1923 for the unification of direct contributions and for setting general income tax. This law abolished minimum taxes and mitigated the severe penalties introduced by Nicolae Titulescu against evasion practices [358]. The following taxes were established: the tax on agricultural revenue; the tax on real estate revenue; the tax on securities; the tax on commercial and industrial revenue; the salary tax; the income tax for professions and other occupations not mentioned in other taxes; the progressive tax on general income.

[357] Cosmin Balaban, *Tax evasion. Controversial aspects of judicial theory and practice*, Rosetti Publishing House, Bucharest, 2003, page 11

[358] Costica Voicu, Alexandru Boroi, *Criminal law and business*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2006, page 139

The new tax system was based on the idea of taxing the actual income obtained by natural or legal persons. The general income tax was calculated on the entire annual income of the taxpayer, which consisted in the revenue subject to primary taxes. In the case of industrial and commercial enterprises general tax was replaced with the complementary tax also calculated gradually, depending on the company profitability established as the ratio between the net profit and the share capital to which were added the reserves[359].

By the law from 1923 was established a complex sanctioning system which stipulated for evading tax obligations a fine "equal to the double of the evaded income tax." This fine could go up to "three times the income spread" if the taxpayer would not declare contracts, records or any other documents he was required to submit and which showed taxable revenue higher than those established.

The law from 1923, besides its good parts, had some shortcomings, which made the tax burden not being equally distributed, since the law allowed some companies to avoid the tax. Given that companies' real estate properties were not subject to tax, the most common form of tax evasion was "inflation of amortizations". This procedure consisted in overestimating the value of the buildings and of the facilities in order to deduct from the benefits a depreciation fund corresponding to investments higher than actual ones.

One of the effects of enforcing the law from 1923 was the alarming decrease in the yield of direct taxes. This led to a special regulation of the measures for suppression of tax evasion and a complete change in the taxation methods for those categories of taxpayers that could easily evade taxation.

The regulation of the measures for suppression of tax evasion and the modifications made to the law from 1923 represent the beginning of the fight against the tax evasion phenomenon in Romania. During the interwar period, the largest business founded on tax fraud was the "black spirits" business, due to which the state budget lost billions of lei[360].

The first law that dealt exclusively with tax evasion was passed in 1929 and was the "Law for suppression of tax evasion on direct contributions". It must be noted that the law fails to give an explicit

[359] Constantin Ioan Gliga, *Tax evasion. Regulation. Doctrine. Jurisprudence*, Praxis fiscal, C.H. Beck Publishing House, Bucharest, 2007, pages 23-24

[360] Ion Olteanu, *Tax evasion.* Methods and techniques for combating tax evasion, PhD thesis, Bucharest University of Economic Studies, 2003

definition of tax evasion. Moreover, the content of this law never mentions "tax evasion". The law only refers to delays in filing the tax returns, the decrease of the income declared, correct keeping of taxpayers records etc., meaning administrative irregularities or criminal fraud, without ever mentioning the term tax evasion.

Starting with the Law from 1929, the Romanian fiscal legislation tends more and more to narrow the scope of the direct method of taxing through the taxpayer's tax return and to replace it with the minimum lump sum taxation system, based on the "external signs and presumptions"[361].

A real tax evasion code was introduced by Law no. 88/1933 for combining direct contributions and for setting general income tax. It resumed the sanctioning method introduced by the law from 1923, which established the fine by multiplying by two or three the amounts not declared for taxes, but this time it added the multiplication up to by four times the revenue not declared and ascertained. In Chapter VI of the 1933 law, called Measures against tax evasion and sanctions, the violation of the provisions of this law were classified into "simple infractions" and "aggravated infractions". The sanctions were fines for simple infractions, respectively fines or prison for aggravated infractions, depending on the offense. Thus, according to art. 110 of Law no. 88/1933, "the taxpayers who will attempt or succeed to diminish their income or to evade the obligations stipulated by this law, by committing acts against the agents of the revenue authority, will be rendered under the request of the Ministry of Finance, to the courts of law to be sentenced to 6 months to one year of imprisonment."

On December 29, 1947 a new law sanctions tax evasion. The law was extremely harsh and carried severe penalties both for the tax evaders as well as for those that failed to fulfill their obligations to the state. However, it should be noted that this law was given those in question the possibility to become legal by paying all the fiscal obligations, even if in the past they had evaded paying taxes[362].

Together with the beginning of the communist regime in Romania, the entire economic activity entered gradually under the strict control of the state, which has lead to the elimination of market economy

[361] Costica Voicu, Alexandru Boroi, *op. cit.*, page 139
[362] Costica Voicu, Alexandru Boroi, *op. cit.*, page 139, Cosmin Balaban, *op. cit.*, page 12

and implicitly to the decrease of the actual possibilities of evading payment of the obligations to the budget.

However, by Decree no. 202/1953 on the modification of the Criminal Code of the People's Republic of Romania it was introduced Title III bis, named "Offenses against the economic system", which in art. 268 index 35 was incriminating "failure to pay, within the legal terms, the taxes or duties or the mandatory insurance premiums, by those having the possibility to pay and who have been subject to civil forced execution at least once during the same year or during the previous year". Also, art. 268 index 36 was incriminating "evading taxes or duties by concealing the taxable object or sources, fully or partially or by destroying or concealing the mandatory records".

These incriminating rules were eliminated together with the entry into force of the Criminal Code on January 1, 1969. In the preamble to the new Criminal code is shown that the new regulations were meant to "depict the radical economic and social-political changes that occurred within the socialist revolution and development". The changes referred to in the preamble had created a society where it was almost impossible to independently obtain income other than from the salaries that were paid by the economic operators.

Also during the communist period entered into force Law no. 18/1968 on control over the properties of natural persons that were obtained illegally. This law allowed the prosecution of the persons with large unjustified income, which is why it can be considered a simplified version adapted to the circumstances of that time of the laws on fighting tax evasion and corruption.

3. The legislation on fighting tax evasion in Romania after 1989

The first regulation regarding tax evasion issued after the events of December 1989 is Government Ordinance no. 17 dated August 20, 1993 establishing and sanctioning contraventions of financial-management and tax regulations. This regulatory document was regulating two categories of offenses: i) art. 1 contained the offenses against the legal norms on budgetary, financial and management discipline and ii) in art. 3 were sanctioned the offenses against the legal norms on taxes and duties owed to the state. Among the acts sanctioned contraventionally in art. 3 should be mentioned: i) failing to declare, for taxation purposes, performing an activity producing income or all the income and property subject to taxes and duties, for those registered with

the fiscal bodies, ii) failure by the taxpayers to keep, according to the legal provisions, records regarding the income obtained and the taxes and duties owed or writing therein incomplete or erroneous data and failure to register the specific registers with the territorial fiscal bodies, or iii) preventing the verifications that are performed by the competent bodies regarding the enforcement of the legal norms regulating taxes and duties. Such acts represented offenses unless committed under such circumstances as to be, according to the criminal law, considered crimes.

However, Government Ordinance no. 17/1993 did not allow a reaction corresponding to the existent situation, considering the extremely serious acts committed in the field of tax evasion. Nevertheless, we must remember Law no. 82/1991 on accounting, that incriminated "deliberately keeping inaccurate records" as well as "deliberate omission of accounting registrations, that had as consequence the distortion of the financial results and of the patrimony elements shown in the balance sheet", which represents forgery, punishable under art. 289 Criminal code with imprisonment from six months to five years.

The first regulatory document passed after the events of 1989, expressly sanctioning the tax evasion acts is represented by Law no. 87/ October 18, 1994 on fighting tax evasion. The acts sanctioned by Law no. 87/1994, as republished in 2003, were classified, depending on the severity, in two categories: a) crimes, which were regulated in art. 9-12 from Chapter II - Crimes and b) offenses, which were regulated in art. 13 from Chapter III - Offenses and sanctions.

Art. 1 of the law was defining tax evasion as being "evasion by any means the payment of taxes, duties, contributions and other amounts owed to the state budget, to the local budgets, to the state social security budget and to the special funds budgets by the Romanian or foreign natural persons and legal persons, named taxpayers in the body of the law".

The legislative framework for Law no. 87/1994, as basic law on tax evasion acts (meaning tax fraud), was also completed by other laws or ordinances. Among them I must mention Accounting Law no. 82/1991, Government Ordinance no. 92/2003 on the Fiscal procedure code, Law no. 656/2002 on prevention and sanctioning money laundering, Law no. 78/2000 on preventing, discovering and sanctioning of corruption acts, Law no. 161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and businesses, preventing and sanctioning corruption or Government Ordinance no. 75/2001 on the organization and operation of the tax record.

Law no. 87/1994 was repealed on August 26, 2005, together with the entry into force of Law no. 241/2005 on preventing and fighting tax evasion, regulatory document that is still effective. This law introduces more novelty elements, among which I must mention the express provision in its content of measurements for preventing tax evasion or the regulation, besides the tax evasion crimes, of the crimes related to the tax evasion crimes, by treating separately the two categories of crimes. Also, the acts incriminated as crimes are more compared to the old regulation and there are defined more terms used in the law, thus avoiding issues related to the interpretation of the notions used in this regulatory document[363].

Another important novelty introduced by Law no. 241/2005 on preventing and fighting tax evasion was represented by the fact that it no longer comprises the offenses, which in the older law were regulated in art. 17, which subsequently became art. 13, after republishing. The reasons of this solution chosen by the legislative were the following:

- first, the intention was to avoid a parallelism of the regulations, considering that part of the offenses stipulated in Law no. 87/1994 had been undertaken in the body of the Fiscal procedure code; thus, the offense regulated by art. 13 paragraph 1) letter a) of Law no. 87/1994, consisting in "failure by the taxpayers to declare within the terms stipulated by the law the income and the property subject to taxes, duties and contributions" was in art. 189 paragraph 1) letter b) from the Fiscal procedure code[364], the offense from art. 13 paragraph 1) letter g), consisting in "failure to fulfill, in due time, the provisions stipulated in the verification document concluded by the financial-fiscal bodies" is in the provisions of art. 189 paragraph 1) letter e)[365] reported to art. 103 paragraph 9) from the Fiscal procedure code.

- second, it was considered the serious social danger posed by the tax evasion phenomenon and the worrisome increase thereof, which is why it was considered that strict criminal measures are necessary for preventing and fighting it; in this regard, we are showing that some of the offenses that were in Law no. 87/1994 were undertaken and considered

[363] V. Dabu, A.M. Gusanu, *The new law on tax evasion*, Criminal law Review, no. 1/2006, page 31

[364] Art. 189 paragraph 1 letter b) from the Fiscal procedure code was repealed by item 81. from Government Ordinance no. 29/2011 as of 01.01.2012

[365] Art. 189 paragraph 1 letter 3) from the Fiscal procedure code was repealed by item 81. from Government Ordinance no. 29/2011 as of 01.01.2012

crimes in the new Law no. 241/2005, such as art. 13 letter e) from the old law that is at art. 6 from the new law[366].

We must not forget that art. 16 of Law no. 241/2005 repeals not only the old regulation on fighting tax evasion (Law no. 87/1994) but also art. 188 named Crimes from the Fiscal procedure code and art. 280 from Labor code, instruments effective at that time. Thus, the act incriminated by art. 188 paragraph 1 from the Fiscal procedure code is undertaken under a slightly different form in the incrimination from art. 9 paragraph 1 letter g) of Law no. 241/2005 and the acts incriminated by art. 188 paragraph 2 from the Fiscal procedure code and art. 280 from Labor code are undertaken in the incrimination from art. 6 of Law no. 241/2005.

In literature it was correctly determined that exclusively criminal regulation of the tax evasion acts is not the best solution chosen by the legislative[367]. Even if some tax evasion acts are considered crimes and others offenses, they are comprised by the wide notion of "tax evasion". Therefore, no strict separation was necessary, within the regulatory documents, of the regulatory offences from the contraventions, especially considering that the regulations on tax evasion, both those of Law no. 241/2005 as well as from the Fiscal procedure code or other regulatory documents (such as the Accounting Law or the Customs Code) have the same goal, namely preventing and fighting this phenomenon.

Following the train of thought chosen by the legislative, we could say that it is not clear why is justified the presence in Law no. 241/2005 of some crimes related to the tax evasion crimes, and not the presence of the offenses in the field of tax evasion.

Some authors show that, although by the title and further by art. 1, Law no. 241/2005 intended to establish measures for "preventing and fighting" tax evasion, the content of the law shows, however, that its objective is to sanction the tax evasion acts and not to take preventive measures[368]. I do not agree with this opinion given that, according to art. 52 paragraph 1 from the old Criminal code effective on the date of entry into force of the law, the purpose of the penalty is to prevent new crimes. The prevention of new crimes is done both for those on who penalty is

[366] C.I. Gliga, *op. cit.*, page 38
[367] See in this regard M. St. Minea, C.F. Costas, D.M. Ionescu, *Tax evasion law. Comments and applications*, C.H. Beck Publishing House, Bucharest, 2006, page 21 and C.I. Gliga, *op. cit.*, page 38
[368] M. St. Minea, C.F. Costas, D.M. Ionescu, *op. cit.*, page 32

imposed as well as for the other objects of the criminal law, which under threat of punishment provided in the criminal law, comply with its requirements[369]. On the other hand I agree that Law no. 241/2005 could have also stipulated other specific measures for preventing tax evasion, in addition to those on setting punishments.

One can easily see that the optics that was intended by the legislative when passing Law no. 241/2005 was that the criminal sanction and the degree of severity thereof would lead to the decrease of the tax evasion phenomenon. I do not agree with such optics of the legislative, restating in this regard that the certainty and the expediency of the punishment have a more important preventive role than its seriousness. In 1764 Beccaria intuited accurately that the perspective of moderate, but inevitable sanctions will always leave a stronger impression[370] than "the vague fear of a terrible ordeal, which leaves room for some hope of impunity[371].

The legislative framework created by Law no. 241/2005 was completed by Government Decision no. 873/July 28, 2005 on the approval of special measures for preventing and fighting tax evasion acts in the field of ethyl alcohol of agricultural origin, spirits, tobacco products and mineral oils[372]. With the purpose of preventing and fighting tax evasion in the fields considered, the regulatory document stipulated the establishment of a central coordination commission and of several territorial control teams with clearly stated duties.

For the enforcement of the provisions of art. 10 paragraph 1) of Law no. 241/2005 on preventing and fighting tax evasion, the Ministry of Public Finance issued Order no. 1076/2012[373] on the collection of the amounts representing the prejudice caused and recovered according to the provisions of art. 10 of Law no. 241/2005. This order stipulates that, upon the request of the competent fiscal bodies of the National Agency

[369] Constantin Mitrache, *Romanian criminal law*, Sansa Publishing House, Bucharest, 1994, page 209

[370] Valerian Cioclei, *Criminology textbook*, 5th Edition, C.H. Beck Publishing House, Bucharest, 2011 page 87

[371] Quote from Cesare Beccaria, *Des Delits et des Peines, deuxieme edition Guillaumin et Cie, libraires, Paris, 1870, page 90,* in Valerian Cioclei, *op. cit.*, page 87

[372] The regulatory document was published in the Official Gazette no. 739 dated August 15, 2005

[373] The Order of the Ministry of Public Finance no. 1076/2012 was published in the Official Gazette, Part I, no. 558 dated August 8, 2012, the date on which it entered into force

for Tax Administration, there will be opened with the units of the State Treasury within the fiscal bodies having jurisdiction over the domicile of the accused (of the suspect, according to the new Criminal procedure code) or of the defendant account 50.86.09, coded with his fiscal identification code. The amounts collected in this account are transmitted daily by the territorial units of the State Treasury, electronically, to the fiscal bodies. The amounts that are already in accounts opened with bank units can be transferred into account 50.86.09.

4. The amendments made to Law no. 241/2005 on preventing and fighting tax evasion

Law no. 241/2005 on preventing and fighting tax evasion was amended on June 23, 2010 by Emergency Ordinance no. 54/2010 concerning certain measures for fighting tax evasion[374]. The purpose of this emergency ordinance was: i) to fight tax fraud related to VAT for the deliveries of cereals, technical plants, vegetables, fruit, meat, sugar, bread and bakery products, ii) establishing minimum common standards for the registration and deregistration of taxable persons that carry out intra-community trade operations, especially intra-community purchases of goods, in order to reduce tax evasion related to VAT, iii) providing better monitoring of the economic operators carrying out operations with excisable goods, respectively energy products, alcohol and alcoholic beverages and processed tobacco, in order to accelerate the collection of excises to the state budget and to reduce tax evasion in the field, iv) intensifying customs monitoring and control of the activity involving entering and marketing goods in duty-free regime, and last but not the least v) establishing some leverage that would lead to the increase of the degree of collection of revenues to the consolidated state budget.

Thus, to reach these objectives, G.E.O. no. 54/2010 amended not only Law no. 241/2005 but also other regulatory documents, such as Law no. 571/2003 on Fiscal code, Emergency Ordinance no. 48/2006 on the trade of goods in duty-free and duty-paid regime, Law no. 86/2006 on the Romanian Customs Code, Government Ordinance no. 92/2003 on the Fiscal procedure code, Law no. 31/1990 on trade companies, Law no. 508/2004 concerning the organization and operation within the Ministry of Public of the Directorate for the Investigation of Organized Crime and Terrorism, Law no. 39/2003 on preventing and fighting organized crime,

[374] The Emergency Ordinance no. 54/2010 was published in the Official Gazette, Part I, no. 421 dated June 23, 2010, the date on which it entered into force

Government Emergency Ordinance no. 195/2002 concerning traffic on public roads, Law no. 290/2004 on criminal record. In regard to Law no. 241/2005, the amendments concerned: i) art. 2 letter g) of the law, the inclusion into the category of competent bodies the criminal investigation bodies within the judicial police, ii) art. 4, the replacement of the expression "after being notified three times" with the wording "within no more than 15 days since the notice", amendment that had the intention of eliminating the difficulties encountered in the practice regarding the fulfillment of the material element of the objective side of the crime; as well as iii) art. 7 paragraph 1) and 2), adding the alternative action of holding between the ways of committing the act.

Law no. 50/2013[375] also made several amendments to Law no. 241/2005, as follows:

i) in art. 3 of law was incriminated the act of refusing to restore the accounting documents destroyed, within the term mentioned in the control documents, and if the act is committed by fault and at the same time is eliminated the special request of incrimination, existent in the initial form of the article, regarding the possibility for the offender to restore these documents; it also replaces punishment by fine from 50,000,000 old lei to 300,000,000 old lei with punishment by imprisonment from 6 months to 5 years;

ii) in art. 4 is modified the sanctioning regime of the crime represented by the refusal to present the legal documents and the patrimony goods, meaning that it replaces punishment by imprisonment from 6 months to 3 or punishment by imprisonment from 1 year to 6 years;

iii) in art. 5 is modified the sanctioning regime of the crime represented by prevention of carrying out the financial, fiscal or customs verifications, meaning that punishment by imprisonment from 6 months to 3 years or a fine between 500 and 30,000 new lei is replaced with punishment by imprisonment from 1 year to 6 years;

iv) in art. 6 is modified the sanctioning regime of the crime represented by retention and failure to transfer withholding taxes and contributions, meaning that punishment by imprisonment from 1 year to 3 years or a fine between 500 and 30,000 new lei is replaced with punishment by imprisonment from 1 year to 6 years;

[375] Law no. 50/2013 for the amendment of Law no. 241/2005 on the prevention and combating tax evasion was published in the Official Gazette, Part I, no. 146 dated March 19, 2013 and entered into force on March 22, 2013

v) in art. 9 paragraph 2) and 3) is aggravated the sanctioning regime of the two aggravated versions, meaning the increase of the special limits for punishment by 5 years, respectively 7 years, compared to 2 years, respectively 3 years, as it was in the initial draft of the law.
In conclusion, we can say that Law no. 50/2013 has intensified the sanctioning regime for some crimes related to the tax evasion crimes and for the aggravated versions of the tax evasion crimes and at the same time for the crime stipulated by art. 3) of Law no. 241/2005 the intensification also referred to the conditions of incrimination.

Law no. 255/2013[376] for enforcement of Law no. 135/2010 on the Criminal procedure code and for the modification and completion of some regulatory documents comprising criminal procedure provisions, also modified chapter III and art. 10 within this chapter of Law no. 241/2005, as follows:
i) the title of chapter III, initial named "Causes for impunity and for reduction of punishment" was renamed "Causes for reduction of punishment, interdictions and termination of rights";
ii) it was eliminated the cause for replacement of punishment by prison with punishment by fine, stipulated in thesis II of art. 10 for the presumption that the prejudice caused and recovered ranged between EUR 100,000 and EUR 50,000, as well as the cause for enforcement of an administrative sanction (justifying the name of cause for impunity), stipulated in the final thesis of art. 10 for the presumption that the prejudice caused and recovered was lower than de EUR 50,000.
iii) it was extended the scope of art. 10 not only to the tax evasion crimes, stipulated in art. 9 of the law, but also to the crimes stipulated by art. 8 of the law.

We cannot help noticing an inconsistency in the legislative's wording following this modification. Thus, in art. 1 of the law it is mentioned that "this law establishes measures for preventing and fighting the tax evasion crimes and some related crimes", thus making a clear distinction between the tax evasion crimes and the related crimes. Also, in art. 9 there are mentioned the tax evasion crimes, while in art. 3 - 8 are incriminated acts named generically "crimes", thus clarifying the conclusion of the existence of a clear distinction between the tax evasion crimes and crimes related to the tax evasion crimes. However, in art. 10 there is reference to the tax evasion crimes stipulated by art. 8 and 9,

[376] Law no. 255/2013 was published in the Official Gazette, Part I, no. 515 dated 14.08.2013 and entered into force on 01.02.2014

although the interpretation of the law texts shows that art. 8 regulates crimes related to the tax evasion crimes. In order for this law text to become incidental, the offender is required to fully cover the claims of the plaintiff, as opposed to the initial draft of the article, which required full coverage of the damages caused.

5. Conclusions

As it can be seen, the legislation in the field of prevention and fighting tax evasion was constantly adapted to the economic-social realities, including during the period when Romania was under the communist regime, when the elimination of market economy led to the limitation of actual possibilities for evading the payment of tax obligations. After the events of December 1989, together with the development of private initiative and the return of the Romanian society to the natural values of a free market economy, the tax evasion phenomenon spread more than ever. Under such conditions, the reduction of the tax evasion phenomenon has become extremely important for the development of the society, determining an unprecedented dynamic of the legislation in the field, with the purpose of solving the various problems that occurred in the practice and jurisprudence, from the insufficient regulation of some economic fields to the legislative inaccuracies that determined a non-unitary practice of the courts.

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