

THE INTERDISCIPLINARITY OF THE SCIENTIFIC RESEARCH OF LAW. THE INSOLVENCY INSTITUTION – AN INTEGRATIVE AREA CONFIGURED AND RESIZED BY THE INTERSECTION OF THE LEGAL, ECONOMIC AND SOCIAL REALITIES

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ABSTRACT

Law is a dynamic social phenomenon reconfigured and re-dimensioned by the continuous and complex changes of the society, the multidisciplinary and especially the interdisciplinary of scientific research ensuring the dynamics of the norms of law outlined in the light of an integrative knowledge so necessary in the postmodern era.

KEYWORDS: interdisciplinary, transdisciplinary, insolvency, innovation, research, economic context, social context.

INTRODUCTION.

The need for excellence in research requires an interdisciplinary, multidisciplinary and transdisciplinary analysis of sciences in general, the disciplinary research being characterized by “scientific rigidity”. The interdisciplinary approach stimulates innovation, creativity. The capacity of analyzing and connecting concepts and ideas from different and even contrasting perspectives, thus developing new research areas, which correspond to certain current social, economic and political interests.

The traditional branches of law are gradually reconfigured, oscillating between fragmentation and fusion, phenomena that lead to the emergence of other disciplines, fields,

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legal institutions, as a result of the continuous changes of the society, unavoidably creating bridges that link the legal sciences and the auxiliary sciences through connections, transfers of concepts, ideas, analysis methods and techniques, interrelations, interferences, required by the exigencies of the legal approach in outlining the set of legal norms which nevertheless keep their identity.

Insolvency remains a controversial and topical subject that provides a wide spectrum of analysis, even in an interdisciplinary manner, representing a real interest in the current and future socioeconomic environment, and also an expanded interest in the international context (cross-border insolvency). Insolvency law can be considered a result of the approach of the research and of the interdisciplinary analysis in the context of the branches pertaining to the field of economy, sociology, psychology, but also of the branches of law, through its interference with other domestic and international normative acts, such as labor law regulations, criminal law, civil law, civil procedural law, administrative law, public procurement, etc., which have left their mark on the evolution of insolvency and have created new analysis perspectives, new legal visualizations, outlining, why not, a special, particular, individual law, insolvency law, which crossed the limits of commercial law and expanded to natural persons and to administrative and territorial units.

1. BRIEF CONSIDERATIONS. INTERDISCIPLINARITY - A “SINE QUA NON” PREREQUISITE OF SCIENTIFIC RESEARCH

The multidisciplinary, interdisciplinary and transdisciplinary research approach, provides an overall perspective of the legal phenomena, which allows for the interconnection of the realities, needs and expectations of the society in general, boosting, synthesizing and ensuring, at the same time, the profoundness of the regulations with legal content. The social and economic realities continuously configure the normative form, requiring a multiplication of the perspectives, which since it is many times imperceptible, generates a slow or a sudden transformation of the legal content, by fragmentations of law branches, or fusions of these branches, the separation of certain legal institutions which gradually substantiate their status of law branches based on their own principles, procedures and resources for the exclusion and filtration of the rules coming from outside which are specific to other law branches.

The origins of the interdisciplinary policy can be found in the 1920s, in the United States of America, when the Social Science Research Council was established, in order to promote research concerning several disciplines. Interdisciplinary programs were initially used in the USA, being taken over by Great Britain and expanded as bachelor's and master's specialties, later initiated in the entire European community.¹ National Science Teachers Association (NSTA) established in the United States of America also played an important role in promoting interdisciplinarity, because it developed, in 1964 a list of fundamental concepts common to sciences, in order to expand the curricula.² At the same time, UNESCO played an essential role in the promotion and highlighting of the interdisciplinarity principle, initiating, at the beginning of the seventh decade, projects based on integrated sciences.

An important episode in the promotion of interdisciplinarity was the report published in 1972 by the Centre for Educational Research and Innovation (CERI), a structure of the Organization for Economic Cooperation and Development (OECD), which report initiated a joint international effort in this direction, promoting the idea of keeping the disciplinary identity, without rejecting, however, certain forms of conceptual and methodological

¹ V. Cojanu, *Interdisciplinaritatea în științele sociale ca problemă de management*, in *Revista de Politica Științei și Științometrie* – New series, Vol. 3, No. 1, INOE, Măgurele, 2014, pp. 31 and subsequent.

² A. Jula, *Interdisciplinaritatea și transdisciplinaritatea, factori de creștere a calității învățământului universitar* - <http://www.agir.ro/buletine/83.pdf>.

integration, by approaching the following definition: “Interdisciplinarity – an adjective describing the interaction among two or more different disciplines. This interaction may range from simple communication of ideas to the mutual integration of organizing concepts, methodologies, procedures, epistemology, terminology, data and organization of research and education in a fairly large field. An interdisciplinary group consists of persons trained in different fields of knowledge (disciplines), with different concepts, methods and data and terms organized into a common effort on a common problem with continuous intercommunication among the participants from the different disciplines.”³

Under the aegis of OECD, very many international conferences were organized in relation to the advantages and disadvantages of the interdisciplinary research, and work seminars took place in prestigious universities, activities that gradually led to the outlining and development of the interdisciplinarity principle, the interdisciplinarity route characterizing the top of modern science and the revival of the educational system.⁴ Moreover, disciplines interact in time and space, generating new disciplines, branches and fields of knowledge that imply numerous social, economic, technological, ecological, political, and legislative factors, etc. The interest in promoting the approach of interdisciplinary education and research has been enhanced by establishing institutions, organizations such as Association for Integrative Studies - AIS, International Association for the Study of Interdisciplinary Research - INTERSTUDY, Center for the Study of Higher Education, etc., comprising members coming from the government, industry, business area, specialists in various fields co-opted in universities, which focused on the consolidation of the methodology, interdisciplinary research strategies, and on the approach of an interdisciplinary curricula in the educational system. Following practical experiments, it was determined that in the educational system, an interdisciplinary approach captures students’ interest and helps them, at the same time, to connect information, from a multitude of perspectives, developing high analysis capacities, both overall, complex, as well as synthesis ones, forming critical thinking, tolerance for ambiguity and acceptance of innovation, by creating new horizons and bridges between various disciplines, borrowing and crossing methods and concepts, thus stimulating an original manner of thinking.⁵ A number of such experiments⁶ highlighted the importance and the role of interdisciplinarity in the evolution of society in general, a concept that underwent changes in the approach and definition, over time, due to the fact that a “fight” between specialization and integration continued to exist. As Hans Klette said⁷ in an international conference held in 1975, the society continues to oscillate between unity and diversity, between cooperation and isolation, between concrete research and abstract research. Thus, we ask ourselves the following question: is interdisciplinarity a philosophical or a practical concept? We can certainly say that interdisciplinarity is a practical concept, not only an aspect approached from the philosophical point of view, because it has marked the education and research system in a concrete, tangible manner. We cannot deny that man is by nature a complex being who evolves in a more complex world, which requires an overall, integrative perspective and also capacity of synthesis, in order to adjust and reach a balance between the needs of the human being, the society viewed as a whole with the specific economic,

³ OECD, *Interdisciplinarity: Problems of Teaching and Research in Universities*, Paris, OECD, 1972 - *apud* C. Toth, *Raport privind cercetarea interdisciplinară*, DOCSOC - Excelență, inovație și interdisciplinaritate în studiile doctorale și postdoctorale în sociologie -

- http://docsoc.sas.unibuc.ro/wp-content/uploads/2013/09/DOCSOC_E2_Raport-cercetare-interdisciplinara.pdf

⁴ Julie Thompson Klein, *Interdisciplinarity: History, Theory and Practice*, Wayne State University Press, Michigan, 1990, p. 36 and subsequent.

⁵ Lisa R. Lattuca, L.J. Voight, K.Q. Fath, *Does Interdisciplinarity Promote Learning? Theoretical Support and Researchable Questions*, The Review of Higher Education, Fall 2004, Volume 28, pp.23-48.

⁶ See Casey Jones, *Interdisciplinary Approach - Advantages, Disadvantages, and the Future Benefits of Interdisciplinary Studies*, ESSAI, Volume 7, 2010

- <http://dc.cod.edu/cgi/viewcontent.cgi?article=1121&context=essai>

⁷ Julie Thompson Klein, *op. cit.*, p. 38.

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legislative, social, political administrative implications, but also the implications of the environment characterized by its own universal laws. This is precisely why we talk about a rigorous knowledge path, more specifically, the deepening of disciplinary, segmented type, in order to understand the essence, subsequently following the multidisciplinary, pluridisciplinary approach, of juxtaposing information, and the interdisciplinary one, respectively, which provides the integrative, synthesizing vision, to transdisciplinarity, which involves crossing the disciplinary borders and the capacity to work with new concepts, theories and methodologies that are not actually specific to a single discipline or branch. This high level of knowledge allows, in fact, for the possibility to give a favorable answer to the so complex global challenges. In the spirit of the promotion of transdisciplinarity, the Centre International de Recherches et d'Etudes Transdisciplinaires - CIRET, was established, which develops, in collaboration with UNESCO "The Transdisciplinary Evolution of the University", a project discussed in the International Conference "Which University for Tomorrow?" held in 1997, proposing an educational system that should allocate time for the transdisciplinary approach by creating transdisciplinary research workshops and preparing PhD theses in this respect.⁸ Interdisciplinarity remains a controversial field, practically understood and applied in various and surprising ways, a field of interest still present in the studies and research of the great international bodies, which promote an integrative vision, exceeding the traditional borders of the disciplinary approach. Thus, on the website of the Organization for Economic Cooperation and Development, we identify research programs, projects, reports and activities proposed for the promotion of the interdisciplinary science and innovation, as perspectives that are so necessary in the context of global changes, such as for example health and climate.⁹ In fact, the real concern and interest for the promotion of interdisciplinarity can also be inferred from the project consecrated in this respect, namely: "An interdisciplinary perspective on 2020 Science"¹⁰, outlining the idea of the need to train scientists in wide scientific areas and branches. Moreover, this is also invoked as a measure required as a matter of urgency¹¹, due to the current concern to understand the functionality, survival of the planet in general, viewed and analyzed by integrating several scientific perspectives, a "computer of science" type of integration that allows for a functional analytic and strategic system which provides an integrative vision corresponding to the needs of humankind and society, in perfect balance with nature, the ecologic, biologic system, based on an equal and correct distribution of the resources, the predictions related to disasters, global catastrophes as a result of human activity being already known ("Science 2020 presents the world as seen from a computer-science + biological sciences viewpoint. What could the integration of other viewpoints contribute?"). Thus, we are dealing with new research areas, such as the ecological economy, biotechnology, globalization, artificial intelligence, digital technology, etc., fields that were also included in the plan of debates, studies and recommendations of the Organization for Economic Cooperation and Development, the changes and perspectives of the 21st century being marked by the speed of global transformations that require an integrative research and approach vision. Moreover, the implementation of such strategic plans is an opportunity for significant innovation and evolution of any country, and such plans can be accessed by adherence. **Romania's adherence to OECD is a strategic objective of the Romanian foreign policy**, included in the current governance plan, and Romania officially applied for the adherence to OECD during the previous enlargement exercises, more specifically in April 2004

⁸Basarab Nicolescu is one of the most well-known Romanian researchers in the transdisciplinarity field - B. Nicolescu, "The Transdisciplinary Evolution of the University"

- <http://cds.cern.ch/record/365269/files/SCAN-9809055.pdf>

⁹<http://www.oecd.org/sti/inno/measuringinnovationanewperspective.htm>

¹⁰<http://www.oecd.org/innovation/research/37592129.pdf>

¹¹"There is a fundamentally urgent need to understand the Earth's life support systems..."

and November 2012, and renewed it in 2016 and in 2017. The main advantages of Romania's potential adhesion to OECD would be: the benefit of Romania's belonging to the restricted club of developed economies and the implicit recognition, at global level, of its status of functional market economy and consolidated democracy, with an impact on the country's rating and on the attraction of foreign investments; the benefit of the example, Romania's favorable image both in relation to the big economies of the world (USA, China, Japan, etc.), and in relation to the countries in the region with European aspirations (Moldova, Macedonia, Albania, Serbia, etc.); the benefit of expertise, the access to the information required in the priority areas for Romania (governance framework, legislative reform, anti-corruption, tax policy, transport infrastructure, agriculture, education, etc.); the benefit of Romania's access to economic decision instruments and centers of OCDE and the possibility to contribute to the global economic governance; the benefit of assistance in relation to public policies from OCDE members by periodical assessment of Romania's policies in specific areas (*peer reviews*) and issuing recommendations for their improvement.¹²

By outlining an overall image of interdisciplinarity, with all its implications, we understand why it is a current challenge, an approach that can be found not only in theory, but also at practical level in the future strategy of any structure, organization, society, government, state, etc.

Returning to scientific research, we consider that it is imperative to exceed the traditional boundaries of disciplines and to implement an educational system focused on the interdisciplinary study, especially in the higher education system, which is the key point of the development strategy of a society able to respond to unavoidable global challenges, by training people able to make inter-connections that should further develop and apply these aspects. Romanian universities can follow the example of great education institutions in the developed states such as Great Britain, namely to attract research funds through competition, dedicated to the construction of transdisciplinary consortiums, comprising specialists from various fields, in order to respond to global challenges such as climate, infectious diseases, pollution, virus spread, mass industrialization, etc. The interdisciplinary approach is practiced in our country especially in our doctoral and postdoctoral programs. It would bode well, however, that the national education law regulate the possibility of creating interdisciplinary work departments, in which students specialized in different disciplines, fields, could carry out debates, researches, applying various methodologies from the sociological, economic, legislative perspective, etc., around the same subject of interest, in a current and real context, developing conceptual "bridge" between disciplines and responding to the challenges of the 21st century. Moreover, the current diverse demands of our society have prompted young people's interest in multidisciplinary training, such young people graduating from two or three faculties in different fields.

Strictosensu, the interdisciplinary nature of the scientific research of law, a field of interest in the present study, creates a multiplication of perspectives, resulting in the fragmentation of the branches of law, cohesions with other sciences, the configuration of new institutions of law, new branches, ensuring the complex research of juridical phenomena in the attempt to develop an all-encompassing juridical order able to adapt to the dynamics of the social, economic, administrative, environmental, health realities, etc., which are triggering factors of the juridical mechanism.

¹² <https://www.mae.ro/node/18539>

2. THE CONTINUOUS RESIZING OF LAW THROUGH COHESIONS WITH OTHER SCIENCES AND CONNECTIONS WITH THE ECONOMIC, SOCIAL AND POLITICAL REALITIES AND TRENDS. BETWEEN THE TENDENCY TO FRAGMENT LAW AND THE ASPIRATION TOWARDS UNITY

Law is a dynamic phenomenon, configured and resized by the social, historical, cultural, moral, political and economic context, a phenomenon that has gradually abandoned the autonomous, closed system hypostasis and has inevitably turned towards an open, flexible, integrative, interdisciplinary, complex system, which are, as a matter of fact, specific characteristics of our century, a century of complexity. This vision matches the effective reality, complexity being “a state of the natural, social, human world”.¹³

Consequently, law cannot escape interferences, requiring a multitude of perspectives, such as the philosophical perspective in response to the necessity of deepening and knowing the human condition, the sociological perspective, due to the fact that law reflects the social needs and the moral condition of the society in general, the political perspective, the administrative and political system influencing the law system, outlined in a democratic state that promotes the principle of the separation of powers in the state, democratic values, rights and liberties, as law is a phenomenon that successfully preserves its specificity and autonomy and that can be invaded at the same time by multidimensional realities, which outline the juridical norm filled with social, political, philosophical, moral, cultural contents, legal actors, such as the legislator, the prosecutor, the judge, etc., playing an essential role in its concrete application in a given context.

We invoke the autonomy and the specificity of law precisely in the idea of preserving the moral values on which it was founded and on the basis of which it develops and cannot be transformed into a mere instrument subordinated to the political or economic interests, the juridical phenomenon tending in its evolution towards a “moral ideal”.¹⁴

In its evolution, law oscillated between fragmentation and unity, the tendency of fragmentation ensuring the depth of legal interpretation, but also the multiplication of perspectives, the “birth” of transcendent matter through the cohesion of law with other sciences. Law has been explored in all its hypostases, starting from the fundamental division, public-private law, the traditional division of the legal systems that remains topical, following the ramification under the pressure of the aforementioned external factors. Thus, the legal regulations have expanded and continue to expand in the most diverse areas of life, constituting branches of legal sciences, such as civil law, commercial law, criminal law, administrative law, constitutional law, etc., branches that were fragmented, in their turn, into institutions of law (Special Contracts, Principal Real Rights, Obligations, Administrative Act, Insolvency, etc.), legal orders, the fragmentation still producing other smaller “legal pieces of analysis”¹⁵, individually studied and deepened. Moreover, around this normative flow that is so complex, integrative but also able of synthesizing, sciences that are ancillary to the legal sciences have been developed, which, however participate, in equal measure, in the research of the juridical phenomenon and in its practical application, namely: legal sociology, juridical ethnology, legal anthropology, legal logic, legal psychology, legal economy, legal informatics, etc., which are, as a matter of fact, interdisciplinary sciences. Consequently, law cannot remain singular in its approach, because it interferes with many other sciences and

¹³ I. Craiovan, *Exigențele Demersului Științific – Repere Majore Pentru Configurarea Ramurilor Dreptului*, in *Dreptul* no. 3/2017, p. 24 and the following.

¹⁴ J. Gardner, *The Legality of Law in Associations*, vol. 7, “The IVR 21st World Congress”, Lund, Sweden, 2003, Plenary Sessions papers, p. 89-103, *apud* I. Craiovan, *Exigențele Demersului Științific – Repere Majore Pentru Configurarea Ramurilor Dreptului*, in *Dreptul* no. 3/2017, p. 25.

¹⁵ O. Podaru, *Dreptul, între fragmentare și re(co)agulare*, in *Dreptul* no. 4/2017, pp. 10-17.

creates connections, interferences, transfers of concepts, manifesting itself in diversity, from which it cannot escape and by virtue of which it oscillates between unification and specialization.

Fragmentation has gradually generated a phenomenon of absolutization of the research by approaching a complex perspective. Numerous legal institutions have been placed in real time and space, and reported to an overall view, and they successfully defined themselves and created their own rules and principles, thereby highlighting a certain branch of law and gradually claiming their title of branch of law. Such examples are: electoral law, derived from the constitutional law, environmental law, public health law, urbanism law, detached from the administrative law, maritime law, cambium law, transport law, competition law, insolvency law, detached from the commercial law. Moreover, law has crossed the traditional jurisdictions, the legal norm being “modelled” by its interaction, and its interconnection with international, union law norms, giving rise to international law, European Union law, corporate law, international arbitration, cross-border insolvency, etc. We support the doctrinal opinion according to which complex research of legal phenomena ensures the dimension of the synthesis and deepening, by overcoming the level provided by branch sciences, through the multidisciplinary and interdisciplinary approach, etc.¹⁶ Nevertheless, practitioners mention legal blockages and conflicts at the legal practice level, due to the attempt to create an all-encompassing, complex and autonomous legal order in each area of application, by overlapping competences, national norms and international norms.¹⁷

The border between a branch of law and an institution can often be imperceptible, and this is a controversial topic in the specialized literature. The outlining of a new legal discipline, or even a veritable branch of the legal system, has a detailed and long-lasting course, such as, for example, that of the insolvency institution which gradually succeeds to establish itself with a new status, exceeding the status of a law institution corseted in the provisions of the Code of Commerce, with the abrogation of the latter and the entry into force of the new Civil Code, a revolutionary moment that marked the affirmation and evolution of special, peculiar rights.

Thus, in contrast to the fragmentation trend, which certainly provided the depth of the analysis, law reverted to unity, attempting a normative cohesion, with the entry into force of the new Romanian Civil Code in 2011. This tendency towards unity led to the brutal disappearance of certain branches of law, such as family law and commercial law, on the grounds that the legal norms are closely interlinked and form a whole, an organic ensemble, the unification creating an internal, functional and balanced normative coherence, based on the interdependencies between these branches of law. This scientific approach, addressing the legal phenomenon in a unitary and complex, borderless manner, of re(coagulation) according to a recent doctrinal opinion,¹⁸ has generated very many controversies, doctrinal opinions in antithesis about the survival of the branches of law, especially those of commercial law, virtually absorbed by the civil law through their “return to its origin”.

Taking into account the evolution of commercial law as a distinct branch of private law, its own institutions which it created as sub-branches and which were subsequently developed as special laws, complementary laws, we believe that it is difficult to admit and recognize the effective disappearance of this law and reconsider as a part of the civil law, especially since this law has not lost its essence, being totally absorbed by the Civil Code and resized on the basis of new concepts, namely “professional” and “enterprise”, concepts that obviously delimit the commercial legal relations and the civil relations.

However, we cannot deny the structural and functional dependence, the subordination of commercial law to civil law, the Commercial Code being considered before its repeal a special, incomplete law, which is supplemented by civil law and the general principles of civil

¹⁶Emil Bălan, Gabriela Varia, *Fragmentare și interdisciplinaritate în cercetarea fenomenelor juridice*, in *Dreptul* no. 4/2017, pp.18-21.

¹⁷Case Micula/Romania - <http://www.mircea-asociatii.ro/sesiune-comunicari-londra-sustinuta-emanuela-matei/>.

¹⁸O.Podaru, *op.cit.*, pp. 10-17.

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law. Moreover, it is obvious that the commercial law has taken over, adapted and expanded civil law institutions. Civil law, as a common law, general law, is resized, expanded and adapts continuously, encompassing rules and institutions of the commercial law, through the so-called “commercialization” of the civil law.¹⁹

Paradoxically, this unification, by opening the frontiers between the aforementioned branches of law, has in fact allowed for the construction of other branches of law that have “escaped” from the branch of commercial law as simple legal institutions but which have founded their own “regulatory code”, gradually claiming their special, peculiar law, pointing our attention in this analysis to the legal institution of insolvency, which certainly exceeds the civil law.²⁰

Consequently, we are currently witnessing a new fragmentation of the law, despite the aim of legislative unification pursued by the new Civil Code, putting “under scrutiny” new forms of law derived from the classical commercial law, such as corporate law, banking law or insolvency law, the inevitable result of the transformations, changes and continuous evolutions generated in the society, law proving over time that it is able to match social realities and to ensure the required analytical deepness.

We discovered that interdisciplinary vision is not, actually, a mere cohesion that merges landmarks, information, opinions, perspectives, subjects, fields, etc., being, instead, an intersection, synthesis and remodeling of sciences in general, which cannot be separated from a historical time. Consequently, interdisciplinarity involves a multiplication of perspectives that synthesize and create, in an integrative vision, a complex final “product”, as is the case of the institution of insolvency, which has gone beyond the boundaries of the traditional branches of law, by incorporating social, economic, administrative, management factors, as law displays a flexible legal dimensioning and management, adapted to the needs of the economic crisis, global conflicts and problems.

3. INSOLVENCY - A TRANSCENDENT MATTER, WITH A UNIFYING ROLE, WHICH HAS GONE BEYOND THE BOUNDARIES ESTABLISHED BETWEEN THE TRADITIONAL BRANCHES AND SYSTEMS OF LAW

The institution of insolvency, more specifically bankruptcy, originates from the Commercial Codes, becoming gradually detached and outlining its own legislative course through the advent of Law no. 64/1995 on the procedure of judicial reorganization and liquidation, followed by Law no. 85/2006 on the insolvency procedure, Law no. 381/2009 on the introduction of the preventive arrangement and the ad hoc mandate, with the purpose of safeguarding the debtor in difficulty through amicable procedures for the renegotiation of creditors' claims or their conditions and, finally, the drafting of an Insolvency Code, namely Law no. 85/2014 on insolvency and insolvency prevention procedures, which corresponds to a vision aimed at promoting entrepreneurship, investment and employment.

With good reason, the current law on insolvency is considered to be a veritable Insolvency Code that proposes an integrative vision, which includes in a single regulatory corpus the general legislation, applicable to all economic operators, the special legislation applicable to credit institutions and insurance companies, to groups of companies as well as regulations on cross-border insolvency, in addition to insolvency prevention instruments, the ad hoc mandate, and the preventive arrangement.

¹⁹See I. Didea, D.-M. Ilie, *Insolvența - instituție de drept sub egida dreptului civil în lumina teoriei moniste sau parte componentă a corolarului legislației comerciale în lumina teoriei “supraviețuirii” dreptului comercial? Între tradiție și modernitate*, in *Curierul Judiciar* no. 6/2017, pp. 320-328.

²⁰See I. Didea, D.-M. Ilie, *Un nou statut al instituției insolvenței raportat la viziunea monistă promovată de Noul Cod Civil. Conturarea unui drept special, particular – dreptul insolvenței – urmare a abrogării Codului Comercial*, in *Curierul Judiciar* no. 8/2017, pp. 425-434.

Insolvency law has undergone a remarkable evolution, becoming a legal phenomenon accessible to other legal subjects through the elaboration of Law no. 151/2015²¹ on the insolvency of natural persons, as well as of Government Emergency Ordinance no. 46/2013 approved by Law no. 35/2016²² on the insolvency of the administrative-territorial units, provisions that reflect and strengthen the current trends at European level and outline a new “architecture” of insolvency in the Romanian legal space as an incontestable effect of the present and future economic and social reality.

Having a brief overview of the legislative evolution related to insolvency, we can notice the accelerated legislative expansion in this field, which field has been outlined in a multitude of social, economic, and financial perspectives, thus becoming a complex system of harmonized legal norms in a fragile general context under the pressure of globalization, the domino effect of the economic crisis, unemployment, the refugee crisis, security and citizens' rights, which are the current subjects of interest in the development of strategies by the bodies of the European Union.²³

Although it interferes with both domestic and international normative acts on labor law, criminal law, civil law, civil procedural law, administrative law, banking law, public procurement law, etc. and was substantiated an integrative vision of the branches related to the sphere of economy, sociology, etc., insolvency law created its own course in the attempt to achieve its objectives, being currently harmonized with the monist system implemented by the new Civil Code but also driven, at the same time, in its evolution, by the principles promoted at the level of the European Union.

In the specialized literature, we also find opinions according to which commercial law keeps its existence by outlining a new law, oscillating between the name of economic law, enterprise law, and business law. Thus, we find a tendency of multidisciplinary and interdisciplinary approach, in the attempt to resize the commercial law by outlining a new, complex law, which comprises, in addition to the norms specific to the commercial law, other legal norms established in the business field (fiscal, administrative, processual, and labor law, etc.), in this case a veritable business law, the special laws that are essentially commercial, until the repeal of the Commercial Code (including the insolvency law), being integrated into this new branch of law and creating a new legal reality. This opinion is also supported in the foreign specialized literature²⁴ that is also supported by Romanian doctrines, and according to

²¹Initially, Law no. 151/2015 on insolvency procedure of natural persons, published in the Official Journal of Romania, Part I, no. 464 of 26 June, 2015, should have entered into force on 26 December, 2015. The first postponement was made by Government Emergency Ordinance no. 61/2015 for 31 December 2016, followed by Government Emergency Ordinance no. 98/2016, which extended the deadline for the entry into force to 1 August, 2017, meanwhile the Methodological Norms for the application of Law no. 151/2015 were also approved. Nevertheless, the application of Law of Insolvency of Natural Persons faces a new postponement of the entry into force, namely 1 January, 2018, according to Government Emergency Ordinance no. 6/2017, published in the Official Journal of Romania no. 614 of 28 July, 2017, on the grounds of the complexity of the field regulated by this law, and also due to the point of view of the Superior Council of Magistracy who points out the fact that a rigorous preparation of the administrative capacity of the courts called to apply the natural person insolvency procedures is required. The letter of the Superior Council of Magistracy also mentions that the recently adopted law on *datio in solutum* and the unpredictability regulated by the Civil Code provides alternative solutions for the cases where contractual imbalances led to the loss of the utility of the contract for one of the parties. Consequently, the expansion of the deadline for the application of the Law on the procedure of insolvency of natural persons ensures the time required for the training of the staff in charge.

²²Official Journal no. 219/ 24.03. 2016.

²³*Document de reflexion sur la maîtrise de la mondialisation*, 10 May, 2017, -

https://ec.europa.eu/commission/publications/reflection-paper-harnessing-globalisation_fr

²⁴ In France, part of the doctrine considers that the business law includes the commercial law, the latter being a subassembly of business law. Thus, the French authors (Brigitte Hess-Fallon, Anne-Marie Simon, *Droit commercial et des affaires*, Paris, 1996), consider that the business law, being interdisciplinary, cannot be reduced to the norms comprised in the Commercial Code, but outside the commercial law, and includes: labour law rules, public law rules, through the intervention of the state in the economy by programmes, international

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which “commercial law is a multi-disciplinary business law, comprising both private and public law rules, and this nature is undeniable.”²⁵

Indeed, an interdisciplinary approach, an *in globo* research within this corpus of business law, allows for merging perspectives from an expanded sphere, through a trans-systemic, cross-sectoral research, outlining a final legal product, a complex one, multi-dimensioned to the real existence, such as that of insolvency. Nevertheless, the actual absorption by the business law of so many specific rights, which already tend towards their own evolutions and resizing, is a difficult legislative step, especially as we already have the example of the unification of the civil and commercial obligations according to the monist system, which has generated numerous doctrinal controversies, legislative interpretations, while at the same time putting in motion an entire mechanism of legislative correlation and harmonization, which can create dangers of legal insecurity.

However, we cannot deny that only by creating an open “border” framework we can find the way to understanding the complexity, processes of fragmentation followed by unification, leading to the combination of different elements to create something new, and in this case we see how the disappearance of a branch of law, respectively that of the commercial law, has led to the construction of other possible branches, as such as, for example, the insolvency law. Is the insolvency law the result of the fragmentation of the commercial law? From this point of view, we consider that, in relation to its evolutions, the institution of insolvency succeeds in becoming gradually detached as a distinctive special law in relation to the civil law, and even more so in relation to the commercial law, unlike the old bankruptcy legislation, exceeding the narrow sphere of traders, due to the fact that we are currently talking about the insolvency of professionals, the insolvency of natural persons, but also the insolvency of the administrative-territorial units with a genuinely separate normative *corpus*, but which could form a common *corpus* in the future, even approached in an integrative vision that could be the subject of a true Insolvency Code.

We notice the fact that the institution of insolvency has covered a path of knowledge from disciplinarity, to interdisciplinarity and transdisciplinarity, cultivating an integrative style and trying to exceed the boundaries of traditional disciplines, the boundaries between public law and private law, which exceeds the civil law, the commercial law through integration and intersection with the norms of public interest, with emphasis on reorganization, recovery, rehabilitation, as procedures that extend especially in the direction of safeguarding the subjects involved due to a general interest that is necessary in the current economic and social context according to the new objective of the European Commission.

Insolvency tends towards a unitary coordination and an integrative vision of these protection mechanisms that really address distinctive legal subjects, but which have the same main objective by aspiring to outline a new Insolvency Code that could facilitate the access to such procedures by eliminating regulatory overlaps, with the obvious maintenance of the specific legal regime.

Thus, although there is still a deeply rooted boundary between the public law and the private law, and the three aforementioned normative acts, which have the same regulatory object, but address subjects of law belonging to distinctive systems of law, the essence of the modern normative goals of insolvency for all the legal subjects to which it is addressed remains the identification of a balance between the interests of the debtor and those of the creditors through their constructive harmonization, which is reflected in the *judicial reorganization* regulated by Law no. 85/2014 on insolvency and insolvency prevention procedures, *financial*

conventions, criminal law rules, such as tax evasion, etc. - M. Nicolae, *Unificarea dreptului obligațiilor civile și comerciale*, Universul Juridic, Bucharest, 2015, pp. 623-624.

²⁵D. Clocotici, Gh. Gheorghiu, Delimitarea actelor de drept civil față de actele juridice cu caracter comercial, in *Revista de Drept Comercial* no. 6/1998, p. 43-44.

recovery according to the rules of G.E.O. no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units, approved by Law no. 35/2016, as well as the well-deserved *fresh start* granted to natural persons, as regulated by Law no. 151/2015 on the insolvency of natural persons, passing through the current economic and social filter the importance and the necessity to approach these mechanisms promoted both in the national and in the national context, but also in the union one.

CONCLUSION

Although we tend to start from the premise that interdisciplinarity is an abstract, purely theoretical, philosophical notion, we cannot deny its profound, profound mark on the society in general, due to the fact that man by nature is a complex being, living, creating, building and evolving through an overall picture, a multidimensional picture in which thoughts, information, needs and ideas are intersected, in the attempt to find perfection.

Essentially, performance in research, which actually involves the evolution of humanity, society, or even survival in such a fragile world, which faces a high degree of pollution, ecological disasters, financial, economic, political crises, disease untreatable by the development of bacteria, uncontrollable viruses, etc., obviously requires an interdisciplinary approach through a multitude of perspectives and through the incorporation of visions that belong to even completely opposed domain.

Law is a result of the multidisciplinary, interdisciplinarity and transdisciplinarity, being an essential factor in the organization of life and society that cannot be separated from a historical time, the economic, political, cultural, organizational state of an era, being resized with the evolution of humanity.

Consequently, we need a cognitive consciousness of the complexity in any legal approach to promote an open, flexible, forward-looking law that at the same time succeeds in preserving its identity, autonomy and specificity within this dynamic process. It is not by accident that we have mentioned the institution of insolvency in this study. It is one of the institutions of law that has evolved remarkably throughout history to this day, being indeed a result, a product of the interdependence of legal, social, economic factors, which is moving towards an autonomous law, has filtered out its own principles and operating procedures. Insolvency transcends the traditional branches of law and creates a viable "resuscitation" mechanism of the economy, a survival mechanism against budget imbalances, at the center of interest of national, union and international bodies.

Based on the new vision of strong economic recovery promoted at European Union level, with a focus on outlining a legal culture oriented towards the promotion of entrepreneurship, investments, employment, in the light of the remedial, recovery and revival perspective of professionals, and of natural persons, as consumers, who also have the opportunity to develop and implement a debt repayment plan, the insolvency institution can be an instrument for the development and implementation of the strategy of the European Union - Europe 2020²⁶, corresponding to the priorities of creating an industry, competitive economies, as well creating jobs and reducing poverty.

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LIMITATION OF THE RIGHT TO REQUIRE ENFORCEMENT UNDER THE RULE OF THE NEW CIVIL PROCEDURE CODE OF AN ENFORCEMENT ORDER OBTAINED BEFORE ITS ENTRY INTO FORCE

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ABSTRACT

In a case, the court of appeal have interpreted the provisions of the law regarding the enforceable judgments delivered at first instance, with the right of appeal, or those in respect of which the parties agreed to directly exercise the appeal, when those interested or harmed by the enforcement can require the cancellation of the enforcement documents drawn up by violation of the legal provisions. The jurisprudence is not unanimous to consider the enforceability of the final civil decision is, however, a temporary one, until it is confirmed by the court of appeal, and it is removed when the court of appeal gives a contrary approach.

One of the roles of the limitation is to provide the security of legal relationships, because after the expiry of the limitation period the debtor is satisfied that it can no longer be enforced, and the creditor knows that he no longer benefits from the coercive force of the state in order to recover his debt. On the other hand, to oblige the creditor to enforce a temporarily enforceable decision, about which he has no certainty that it will be upheld on appeal, means violating the very principle of the security of legal relationships, which the legislator intended to protect.

KEYWORDS: *limitation the period, enforcement of the judgment, appeal, claim*

INTRODUCTION.

The role of the jurisprudence is very important in the interpretation of those provisions of the law which are not clear enough. There is still a dispute regarding the enforceable judgments delivered at first instance, without right of appeal, or those in respect of which the parties agreed to directly exercise the appeal, when those interested or harmed by the enforcement can require the cancellation of the enforcement documents drawn up by violation of the legal provisions, if they can invoke substantive defenses against the enforcement order which is not issued by a law court or if they can invoke exceptions in this framework.

CHAPTER I.

By civil decision no. 11107/2015 of Oradea Law Court, it was partially upheld the appeal against enforcement filed by the appellant against the appellee SC E SA, and consequently it was partially annulled the conclusion for determining the costs of enforcement no. 1 as at 22.09.2015 within the enforcement file no. 608/2015 of B.E.J. Gîrdan Marius Florin, in that it has been ordered the reduction of the costs of enforcement as follows: service of procedural documents from 496 lei to 24.8 lei, consultations relating to the making up of the enforcement

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file from 248 lei to 24.8 lei and bailiff's fees from 2513.48 lei to 571.07 lei; there were kept the other enforcement documents and the other costs of enforcement established by conclusion no. 1 as at 22.09.2015.

The court rejected the appellant's application for annulling the enforcement itself; it bound over the appellee to pay the appellant the sum of 200 lei representing court fees consisting of lawyer's fees; It rejected the appellant's application for reimbursing the legal stamp duty because it was prematurely brought; It recorded that the appellee did not request any court fees.

In order to deliver this judgment, the trial court concluded the following:

CHAPTER II.

By civil decision no. 1776/02.02.2012 delivered in case no. 8950/271/2005* by Oradea Law Court, final through Civil Decision no. 1017/R/02.12.2014 of Bihor Law Court, it was upheld the application for returning the enforcement, the appellant being required to reimburse the appellee the sum of 12.651 lei brought up-to-date with the inflation rate from the date of receipt until the date of reimbursement. From civil decision of Oradea Law Court, it results that the sum in question was paid by the appellee to the appellant under civil decisions no. 830/C/2003 and no. 791/C/2004 of Bihor Law Court. These judgments were changed by decisions no. 320/2005 and no. 321/2005 of the Court of Appeal of Oradea.

CHAPTER III.

By application no. 4513/14.08.2015, registered at BEJ Gîrdan Marius Florin on 21.08.2015 in the enforcement file no. 608/E/2015, the appellee filed an application for the enforcement of judgments for the sum of 20144.95 lei, representing: 18908.95 lei compensation payments made under Government Emergency Ordinance no. 98/1999 brought up-to-date with the inflation rate until 31.03.2015 and 1236 lei undue court fees representing the expert's fee.

Being the second phase of the civil trial, enforcement shall take place in strict compliance with the provisions of Art. 622 et seq. of the Civil Procedure Code. The violation of such provisions opens for the interested party the opportunity to file an appeal to enforcement by which there can be invoked, in principle, only the aspects related to the alleged irregularities committed by the representative of the public force.

Within the appeal to enforcement, according to Art. 622 et seq. of the Civil Procedure Code, those interested or harmed by the enforcement can require the cancellation of the enforcement documents drawn up by violation of the legal provisions, they can invoke substantive defenses against the enforcement order which is not issued by a law court and they can invoke exceptions.

According to Art. 632 paragraph 1 of the Civil Procedure Code, the enforcement can be made only pursuant to an enforcement order, and according to paragraph 2, there are enforcement orders the judgments under Art. 633, judgements with provisional enforcement, final decisions and any other decisions or documents which, according to the law, can be enforced.

Art. 633 point 2 of the Civil Procedure Code states that there are enforceable judgments the judgments delivered at first instance, without right of appeal, or those in respect of which the parties agreed to directly exercise the appeal, according to Art. 359 paragraph 2.

Also, according to Art. 663 paragraph 1 of the Civil Procedure Code, the enforcement cannot be done unless the claim is certain, liquid and due.

On the other hand, Art. 706 of the Civil Procedure Code provides that the right to obtain enforcement shall be prescribed within 3 years, unless the law provides otherwise, and that the limitation period shall begin from the date when it is given the right to obtain the enforcement, in case of judgments, the limitation period starting from the date they remain final.

According to Art. 3 paragraph 1 of Law no. 76/2012, the provisions of the Civil Procedure Code of year 2009 shall apply only to trials initiated after its entry into force. As a result, the nature of civil decision no. 1776/02.02.2012 and the limitation of the enforcement of judgments within the case no. 8950/271/2005* shall be governed by the Civil Procedure Code of year 1865.

Civil Decision no. 1776/02.02.2012 is final, according to Art. 377 point 1 of the Civil Procedure Code of 1865 and enforceable, in accordance with Art. 376 paragraph 1 of the Civil Procedure Code of 1865, and the appellant's appeal did not suspend the execution of the civil decision, according to Art. 300 paragraph 1 of the Civil Procedure Code of 1865. Art. 405 paragraph 2 of the Civil Procedure Code of 1865 provides that the limitation period shall begin from the date when it is given the right to require enforcement.

From the perspective of the limitation, the court concluded, in agreement with the appellant, that the moment when the limitation period starts is given by the acquisition of the enforceability of the enforcement order. Since the Civil Decision no. 1776/02.02.2012 of Oradea Law Court was delivered under the Civil Procedure Code of 1865, it results that there are applicable to it, in terms of acquiring the enforceability or not, the provisions of the law under which it was delivered, according to the principle of non-retroactivity of civil law provided in Art. 15 paragraph 2 of the Romanian Constitution, Art. 1 of the Civil Code of 1864 and Art. 6 of the New Civil Code. Therefore, being final, having the possibility only to be appealed, it results that the decision was enforceable and could be enforced voluntarily, even since 02.02.2012. This principle is also reiterated by Art. 27 of the Civil Procedure Code of 2009, applicable in this case from a procedural point of view, showing that judgments remain subject to appeal, to the grounds and terms provided by the law under which the trial began.

The enforceability of the final civil decision is, however, a temporary one, until it is confirmed by the court of appeal, and it is removed when the court of appeal gives a contrary approach.

One of the roles of the limitation is to provide the security of legal relationships, because after the expiry of the limitation period the debtor is satisfied that it can no longer be enforced, and the creditor knows that he no longer benefits from the coercive force of the state in order to recover his debt. On the other hand, to oblige the creditor to enforce a temporarily enforceable decision, about which he has no certainty that it will be upheld on appeal, means violating the very principle of the security of legal relationships, which the legislator intended to protect.

There are often situations in which decisions are changed in the appeal, and a cautious creditor prefers to wait to be given irrevocable right not to get in the situation where the performance was to be cancelled and returned, with the consequence of not recovering the costs of enforcement and of being obliged to bear the costs. In addition, it would generate many trials having as object appeals to enforcement and return of enforcement, or, the legislator did not intend to burden the court dockets.

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In this case, the appellee has enforced a civil decision, final and enforceable, paying into the appellant's and other former employees' accounts the amounts which she was obliged to pay, but the legal relationship was completely changed on appeal. She led to the making up of case file no. 8950/271/2005* having as object the returning of enforcement, where in 2012 more than one hundred individuals were required to repay the appellee the amounts received in 2004, with court fees. It is an example of the negative effects that may occur by the enforcement of a decision for which no remedies have been exhausted.

As regards the limitation, we should distinguish between the substantive right of action and the right to require enforcement, as in the first case we deal with a substantive civil law, while in the second case we deal with a procedural civil law, each subject to the specific rules of law, or civil law in the first case, and civil procedural law in the second case. In the first case, there is applied the substantive civil law governed by the New Civil Code, as in this case, by reference to the moment when the first judgment was delivered, 02.02.2012, when it was given the right to action, this being the time of acquisition of the enforceable nature of the order enforced, and in the second case there are applied the provisions of the Civil Procedure Code of 1865, in relation to the same moment, 02.02.2012.

The limitation of the right to request enforcement cannot begin as long as the interruptive effect of the writ of summons is not definitively consumed and the substantive right to action is not exhausted (Art. 2537 et seq. of the Civil Code, and previously, Art. 16 and 17 of Decree no. 167/1958), namely until the judgment for upholding the action has not been in res judicata.

Moreover, Art. 1868 of the Civil Code of 1864, under which it started the whole dispute that was the object of case no. 8590/271/2005* (taken over by the current regulation by Art. 2539 of the Civil Code.), provided that an application cannot interrupt the limitation, only if it is permitted by the law court by judgment with irrevocable authority. In this case, no limitation could begin after the filing of the writ of summons and until the delivery of such a judgment.

In relation to the above, the court considered that by the establishment of the enforceability of the final civil decisions, the legislator in 1865 intended only to enable the creditor who was in a state of emergency to obtain the enforcement of his claim, and not to defraud for the effects of a judgment the cautious creditor who preferred to wait for the irrevocable solution in order to avoid the costs and the involvement in other trials. Therefore, by the provisions of Art. 405 paragraph 2 of the Civil Procedure Code, the legislator had in mind as the moment for beginning the limitation the final entitlement to require enforcement. The appellee's right of claim was finally given when delivering Civil Decision no. 1017/R/02.12.2014 of Bihor Law Court, in relation to which the limitation was not fulfilled on the date of appealing to the enforcement body.

In conclusion, in the case of the judgments, limitation of the right to request enforcement always begins from the date on which it becomes irrevocable. The beginning of the limitation shall not be linked to the enforceability or non enforceability of the judgment, but to its res judicata.

As for the date on which the judgment to be enforced became irrevocable, it is, in this case, in the moment when it was delivered by the court of appeal, 02.12.2014.

Given the fact that the enforcement application was registered on 21.08.2015, at less than a year as from the date of delivery of the judgment in the appeal, the court concludes that it was

delivered during the limitation period, so that the court shall expel the appellant's allegations on the illegality of the enforcement in the enforcement file no. 608/2015 of B.E.J. Gîrdan Marius Florin.

By the conclusion as at 22.09.2015 the bailiff established following costs of enforcement: 1.5 lei for mail envelope, 17 lei for C.N.P.P. fees, 20 lei for town hall fee, 49 lei for postage fees, 124 lei for material expenses under Art. 670 paragraph 2 point 7 of the Civil Procedure Code, 496 lei for the service of procedural documents, 248 lei for consultations relating to the making up of the enforcement file, and 2513.48 lei for the bailiff's fee.

According to Art. 669 paragraph 4 of the Civil Procedure Code, the sums fixed by the bailiff, including his fee, may be censored by the court by way of appeal against enforcement, taking into account the evidence administered.

The bailiff set the maximum fee for the service of procedural documents and for indirect enforcement. Given the fact that the bailiff was given at the same time several cases based on the same enforcement order, and thus he issues common addresses or notifications to the public institutions and banks, and that in the case it is done enforcement concerning movables, the court considered that it is enough the minimal fee, and therefore it ordered the reduction of the costs of enforcement as follows: service of procedural documents from 496 lei to 24.8 lei, consultations relating to the making up of the enforcement file from 248 lei to 24.8 lei and bailiff's fees from 2513.48 lei to 571.07 lei, the sums including VAT.

Material costs and those on the fees were maintained at the level set by the bailiff. For the reasons above, under Art. 720 of the Civil Procedure Code, the court upheld in part the appeal to enforcement, according to the dispositions.

According to Art. 453 paragraph 2 of the Civil Procedure Code, the court bound over the appellee to pay the appellant the sum of 200 lei representing court fees consisting of lawyer's partial fees, according to receipt filed (f.37) and it rejected the appellant's application to oblige the appellee to pay the court fees consisting of the legal stamp duty, given the provisions of Art. 45 paragraph 1 subparagraph f and paragraph 2 of Government Emergency Ordinance no. 80/2013, the appellant having the possibility to require the reimbursement the legal stamp duty proportionally to the upholding of the appeal, after a final judgment.

IV. The appellant made an appeal against this judgment, requesting the upholding of the appeal, the changing of the civil decision no. 11107/2015 of Oradea Law Court, having as consequence the upholding of the enforcement appeal brought against the acts of enforcement and the enforcement itself that is the object of case no. 608/2015 of BEJ Gîrdan Marius Florin and the cancellation of the enforcement following the expiration of the limitation period of the right to obtain enforcement in accordance with the provisions of Art. 706-707 of the Civil Procedure Code in relation to Art. 376-377 of the Civil Procedure Code of 1865. There were charged court fees.

As grounds for the appeal, it is stated that by the appeal against the enforcement filed by the appellant SC. E. Oradea S.A., the court was requested to declare as fulfilled the limitation period of the right to obtain enforcement, under the following considerations:

The enforcement order which is the object of the enforcement of the enforcement file 497/2015 of BEJ Gîrdan Marius Florin is represented by the Civil Decision no. 1776/02.02.2012 of the Law Court of Oradea, becoming irrevocable by Civil Decision no. 1017/R/02.12.2014 of Bihor Law Court, both being delivered in case no. 8950/271/2015*.

Civil Decision no. 1776/02.02.2012 of the law court of Oradea is a final judgment, this character being due to the incidence of the provisions of the Civil Procedure Code of 1865

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and the fact that the judgment in question was delivered without right to appeal, which in accordance with the provisions of Art. 377 point 1 of the Civil Procedure Code of 1865 led to becoming a final judgment.

According to Art. 376 of the Civil Procedure Code of 1865, and given the final Civil Decision no. 1776/02.02.2012, this judgment was enforceable as from the time of it was delivered, and it could be put into enforcement.

According to Art. 706 of the Civil Procedure Code, the right to obtain enforcement shall be prescribed within 3 years, unless the law provides otherwise, the limitation period beginning from the date when it is given the right to obtain the enforcement. Thus, given the procedural provisions in force at the time of delivery of Civil Decision no. 1776/02.02.2012, respectively Art. 376 and Art. 377 of the Civil Procedure Code of 1865, the right to obtain enforcement was given at the time of delivery of Civil Decision no. 1776, namely on 02.02.2012.

Following the filing of the application for enforcement by the creditor S.C. E. S.A. on 21.08.2015 it shall be found to be fulfilled the limitation period of the right to obtain enforcement. Therefore:

Generally, the court of appeal is requested to find out the fact that based on the legal norms mentioned above, Civil Decision no. 1776/02.02.2012 has become final and enforceable as from the date of its delivery namely 02.02.2012, in this case being irrelevant the fact that, after passing the appeal, Civil Decision no. 1776 became irrevocable by delivering the Decision 1017/R/02.12.2014, as long as the right to obtain enforcement was given on the date of delivery of Civil Decision no. 1776/02.02.2012 and not on the date when it became irrevocable.

Specially, even where it would be calculated the date when the right to obtain enforcement was given as from the time when Civil Decision no. 1776/02.02.2012 became irrevocable, it shall be found out that in relation to the appellant, Civil Decision no. 1776/02.02.2012 became irrevocable at the expiry of the period to make an appeal due to the fact that he did not appeal against the Civil Decision 1776.

Thus, the court of appeal is requested to find out that the appellant acted as an appellee within the appeal against the judgment in question, as it results from Decision no. 1017/R/02.12.2014 delivered in case 8950/271/2005*, and thus in relation to her, Civil Decision no. 1776/02.02.2012 became irrevocable at the latest on the date on which the appeal was made against her, namely 18.04.2012.

As regards Civil Decision no. 10916/03.12.2015 delivered by the Law Court of Oradea in case 14934/271/2015, it is considered to be unfounded for the following reasons:

The first instance finds out that the Civil Decision no. 1776/02.02.2012 is final according to Art. 377 point 1 of the Civil Procedure Code of 1865 and enforceable in accordance with Art. 376 of the Civil Procedure Code of 1865 and the appeal made in this case did not suspend the execution of the civil decision according with Art. 300 of the Civil Procedure Code of 1865, but it considers that "the enforceability of a civil decision is temporary, until the confirmation thereof by the court of appeal" and "to oblige the creditor to enforce a decision which is temporarily enforceable, about which he is not sure that it will be upheld on appeal, means violating the very principle of the security of legal relationships, which the legislator intended to protect."

In relation to these conclusions of the trial court, it is considered that "by the establishment of the enforceability of the final civil decisions, the legislator in 1865 intended only to enable the creditor who was in a state of emergency to obtain the enforcement of his claim, and not to defraud for the effects of a judgment the cautious creditor who preferred to wait for the irrevocable solution in order to avoid the costs and the involvement in other trials."

In essence, the trial court recognizes the final and enforceable nature of the Civil Decision no. 1776/02.02.2012 but assigns it a provisional attribute, arguing that the limitation period of the right to obtain enforcement does not start on the date on which there is given the right to require enforcement, but from the time when the Civil Decision no. 1776/02.02.2012 cannot be reformed anymore or when it becomes irrevocable.

The appellant considers the conclusions of the trial court as being absolutely unfounded, the first instance building its argument by adding to the law and by removing the unequivocal provisions of legal norms incident in the matter, legal norms linking the start of the limitation period to the time when there was given the right to require enforcement, right which is given by the final and enforceable nature of civil decision no.1776/02.02.2012, acquired even since the time of its delivery.

For the above reasons, it is requested to uphold the appeal, to change the decision appealed, to uphold the appeal against enforcement, as it was filed, to cancel the enforcement itself and all enforcement documents drawn up for this purpose, with court fees.

The appellee S.C. E. S.A., by its insolvency administrator, the insolvency company - Casa de insolvență Transilvania, brought statement of defense by requesting the appeal to be rejected as unfounded with the consequence of keeping the appealed decision in its entirety.

In supporting its procedural position, the appellee company states that the appellant's affirmation regarding Civil Decision 1776/02.02.2012 to become irrevocable, at the expiry of the period for making an appeal, cannot be upheld by the court, being applicable in the case the New Civil Procedure Code as regards the enforcement according to Art. 3 paragraph 1 of Law 76/2012.

Regarding the appellant's arguments concerning the illegality of the enforcement documents and the enforcement itself as an effect of the expiry of the limitation period of the undersigned's right to require enforcement, it is considered that they cannot be upheld by the court, stating the following:

First, according to the law, the provisions of the New Civil Procedure Code shall apply both to enforcements initiated after its entry into force and to judgments delivered before its entry into force.

Thus, according to Art. 3 paragraph 1 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, "the provisions of the Civil Procedure Code shall apply only to processes and enforcements initiated after its entry into force", and according to Art. 5 of the same regulatory document "the provisions of the Civil Procedure Code relating to the enforcement orders shall also apply to judgments or other documents delivered or, as applicable, drawn up before the entry into force of the Civil Procedure Code, which can be enforced even if they did not obtain any declaration of enforceability." Art. 8 of the law in question adds that "as from the entry into force of the Civil Procedure Code, references within regulatory documents to the "final and irrevocable" judgment or, where appropriate, "irrevocable" shall be understood as being made to the "final" judgment."

As can be seen, by Law no. 76/2012 the legislator established the transitional rules on the practical application of principle *tempus regit actum* under the conditions of coexistence of

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two different laws. Analyzing Art. 3, Art. 5 of Law No. 76/2012, as well as Art. 632 NCPC, it results that, after its entry into force, all enforcements shall be conducted under the new Civil Procedure Code, the enforceability of the order shall be analyzed in relation to the new law including for the orders delivered under the old law. Thus, decision no. 1776/02.12.2012, respectively decision no. 1017/R/02.12.2014 are subject, as regards their legal nature of enforcement orders, to the new procedural rules (Book V, Title I, Chapter II - Enforcement Order, of the New Civil Procedure code).

In this sense, the High Court of Cassation and Justice¹ also decided, which, by Decision no. 2144 as at 11.06.2014² established that "(...) in accordance with Art. 5 of Law no. 76/2012 for the implementation of the new Civil Procedure Code, (...) Even if according to Art. 720⁸ of the old Civil Procedure Code under which the civil trial was initiated and it was delivered civil decision in question which was enforceable, given the provisions of the new Civil Procedure Code, it results that civil decision (...) is subject to the provisions of the new code. Thus, civil decision (...) is not an enforceable judgment in relation to the provisions of Art. 632 and the provisions of Art. 633 of the Civil Procedure Code."

It is also shown that the New Civil Procedure Code states in Art. 632 that "(1) Enforcement shall be made only pursuant to an enforcement order. (2) There represent enforcement orders the enforcement judgments referred to in Art. 633, judgments with provisional enforcement, final judgments, as well as any other judgments or documents which, by law, can be "enforced", and it sets out in Art. 633 the enforceable judgments: "There are enforceable judgments: 1. the judgments delivered on appeal, unless the law provides otherwise; 2. the judgments delivered at first instance, without right to appeal, or those in relation to which the parties agreed to exercise directly the appeal, according to Art. 459 paragraph (2)". Hereinafter, in Art. 63 it is stated which are final judgments: "(1) There are final judgments: 1. judgments which are not subject to appeal or recourse; 2. judgments delivered in first instance, with right of appeal, not appealed; 3. judgments delivered in first instance, which were appealed; 4. judgments delivered on appeal, with no right of appeal, and not appealed; 5. judgments delivered on appeal, even if by them is was resolved the case; 6. any other judgments which, by law, cannot be appealed. (2) Judgments referred to in paragraph (1) become final on the date of expiry of the deadline for exercising the appeal or the recourse or, where applicable, on the date of delivery."

Consequently, Decision no. 1776/02.12.2012 is an enforceable judgment, but it is not final (it became final after the Law Court of Bihor rejected the appeal, on 02.12.2014).

¹The High Court of Cassation and Justice decided that, in accordance with Art. 5 of Law no. 76/2012 for the implementation of the new Civil Procedure Code, the provisions of the new Civil Procedure Code regarding the enforcement orders shall also apply to judgments and other documents delivered, or where appropriate, drawn up before the entry into force of the Civil Procedure Code. Therefore, even if according to Art. 720⁸ of the old Civil Procedure Code, under which there began the civil trial, the civil decision in question was enforceable, given the provisions of the new Civil Procedure Code, it results that the civil decision delivered, in this case, in October 2013, is subject as regards its enforcement to the provisions of the new Procedure Code, not being an enforceable judgment (judgment delivered in the first instance and appealed), so that it cannot be upheld the application for suspension of the decision enforcement.

²<http://www.juridice.ro/347769/iccj-hotarare-executorie-vs-hotarare-neexecutorie.html>

In relation to the limitation of the right to obtain enforcement, Art. 705 of NCPC provides that: "(1) The right to obtain enforcement is prescribed within 3 years, unless the law provides otherwise. (...). (2) The limitation period begins as from the date when it is given the right to obtain enforcement. In the case of judgments and arbitrated judgments, the limitation period begins as from the date when they become final", thus when they cannot be attacked anymore. As a result of the provisions stated, the limitation period does not begin when the judgments are enforceable without being final.

Thus, although in the case of judgments and arbitral judgments the right to obtain enforcement is given as from they become enforceable, the limitation begins only from the date when they become final, so from the moment when they cannot be appealed anymore. In this sense, it was also set the doctrinal opinion³ according to which "(...) the creditor - owner of a judgment (...) - is not exposed to the risk of limitation of the right to obtain enforcement if, by caution or for any other reason, it waits the enforcement order to become final."

Also in the sense of the above are the provisions of Art. 637 paragraph 1 of the New Civil Procedure Code stating that "the enforcement of a judgment which is an enforceable order can be made only at the creditor's risk if the judgment can be appealed; if the order is subsequently amended or abolished, the creditor shall be obliged, under the law, to give the debtor its rights, in whole or in part, as appropriate."

The legislator warns the creditor that he may proceed to enforcement in vain, as long as his order is not consolidated by a final judgment.

However, the limitation of the right to obtain enforcement begins only when the judgment becomes final.

Moreover, even the old regulation on the limitation period beginning when it is given the right to obtain enforcement (namely when the decision became enforceable) was also heavily criticized in the specialized literature and it also had echoes in jurisprudence (in the Decision of the Supreme Court of Justice no. 2373/1997, the supreme court ruled that "a judgment that is not final and irrevocable cannot be considered an enforcement order even if it was given with enforceable order (...) and therefore, the judgment not being final, being contested (...) it cannot be enforced)."

In the specialized literature⁴ it has been shown that "the beginning of the limitation period should not be linked to the enforceability or the enforceability of the judgment, but to its *res judicata*, since as long as the judgment is not final, and the appellant does not have the certainty of being given the right, the enforcement order is threatened by dissolution in the extraordinary remedies. In addition, the extended length of the trials, especially in the extraordinary remedies before the High Court of Cassation and Justice, can lead to expiry of the limitation period until the appeal is resolved. Under these conditions, the creditor who wanted to be sure of his right, to avoid a possible return of enforcement, is sanctioned by the impossibility to exploit in an enforceable manner the right that was just irrevocably given to him." Therefore, the limitation of the right to require enforcement must always run from the date when the judgment becomes irrevocable.

The appellant's defenses as a whole, are based on the assumption that SC E Oradea SA was obliged to enforce the decision no. 1776/02.12.2012, using a restrictive interpretation of Art.

³Gabriel Boroi (coordinator) and the collective, *New Civil Procedure Code- comment on articles*, Hamangiu Publishing House, Bucharest, 2013, p. 191

⁴Marian Nicolae, *Treaty on limitation*, Universul Juridic Publishing House, Bucharest, 2010, p. 950

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405 of the Civil Procedure Code of 1865, according to which the limitation period begins from the date when it is given the right to require enforcement, date which, in this case, according to the appellant, would coincide with the date of delivery of the decision by the trial court.

However, it is stated that at the time of delivery of the decision no. 1776/02.12.2012, the New Civil Procedure Code was not yet in force, so if there had been an obligation to enforce the decision, as regards the limitation period, there would have been applicable the provisions of the old code. Consequently, such an interpretation of the appellant does not explain how it is possible that an irrevocable and enforceable judgment, which has *res judicata*, however cannot be enforced because it have already limited the right to require enforcement, although the application for enforcement filed by the appellee was recorded at BEJ Gîrdan Marius on 21.08.2015, namely at less than a year after decision no. 1776/02.12.2012 became irrevocable and was delivered by Oradea Law Court in case 8950/271/2005* by rejecting the appeal by Civil Decision no. 1017/R/02.12.2014 delivered by Bihor Law Court in the case with the same number.

By applying the *reductio ad absurdum* argument of interpretation, it can be seen that the acceptance of the appellant's reasoning leads to unacceptable solutions. For example, an application of a creditor is upheld in part by the trial court by an enforceable judgment, and subsequently the court for judicial control, by a final judgment (irrevocable), upholds in its entirety the creditor's application, but the delivery of the solution of the remedy is on a date that exceeds 3 years from the date of delivery of the trial solution.

By applying the appellant's theory, it would mean that the creditor, although has finally obtained a final and irrevocable enforcement order, with *res judicata*, is not entitled to use the enforcement procedure except for the debit amount contained in the application upheld by the trial court. However, this is contrary not only to legal principles, but also to any elementary logic.

It is estimated that, for the decision which became irrevocable by the decision of the recourse delivered in 2014, the beginning in 2015 of the enforcement falls within the period of three years provided for in Art. 705 paragraph 1 and 2 of the Civil Procedure Code, republished.

V. Analyzing the appeal in terms of the reasons put forward by the appellant and those of public policy that can be put forward by the court and *ex officio*, under Art. 476-478 of the Civil Procedure Code, the court of appeal concluded the following:

In essence, the appellant states that the trial court wrongly rejected her application for annulment of enforcement itself, given that the right to request the enforcement of civil decision no. 1776/02.02.2012 was prescribed, at the time of filing the application to the bailiff, in relation to the provisions of Art.706 of the Civil Procedure Code of 1865, according to which the limitation period begins as from the date when it is given the right to obtain enforcement, a right which was given on the date of delivery of civil decision no. 1776 of 02.02.2012, judgment which had an enforceable effect, according to Art. 377 point 1 of the Civil Procedure Code, so that on 21.08.2015 when filing the application to the bailiff, the limitation period of 3 years had expired.

VI. The court of appeal considered the appellant's criticisms to be unfounded.

As also correctly concluded the trial court, the enforcement order on which it is based the application for enforcement of the appellee S.C. E. S.A. is represented by civil decision no.

1776/2012 of Oradea Law Court by which the court upheld the application for return of enforcement filed by the appellant S.C.E S.A. against many appellees, including also the appellant, and obliged the appellees to reimburse the sums received during January-February 2004 by way of compensation, specifically the appellant to pay the sum of 12651 lei, sum that would be brought up-to-date with the inflation rate on the date of the effective reimbursement. This civil decision became irrevocable by rejecting the appeals of some of the appellees, by civil decision no. 1017/02.12.2014 of the Law Court of Bihor. As results from the provisions and considerations on the record of this decision, the appellant did not exercise the remedy of the appeal against that judgment, having the quality of appellee in the appeal filed by the other employees.

The enforceability of civil decision that represents the enforcement order in question shall be always reported to the law in force at the time of delivery of the decision, according to the principle *tempus regit actum*, because on the date of delivery of a judgment the holder of the right shall know, in relation to the law in force at that time, if the judgment he holds can or cannot be enforced on the date of its delivery.

Thus, the trial court correctly concluded that civil decision no. 1776/2012 delivered under the Civil Procedure Code of 1865 became final in accordance with Art. 377, paragraph 1, subparagraph 1 and enforceable under Art. 376, paragraph 1, first sentence, on the date of its delivery, namely on 02.02.2012, being a decision delivered in first instance without right of appeal, which could be appealed only by recourse.

Thus, there is no doubt that at the time of delivery of civil decision no. 1776/02.02.2012, S.C. E Oradea S.A. had a clear representation of the fact that it held a final and enforceable judgment that could be enforced without any impediment under Art. 376 in relation to Art. 374 of the Civil Procedure Code of 1865.

The enforceability of a judgment is the one that gives it the enforcement power that is the possibility to be immediately enforced after being given enforceable nature, under the law at the time, of course with the risk, under the law, of the person who enforces the judgment, to be obliged to reimburse the benefits if the court for judicial control changed the judgment in favor of the opposing party.

This risk taken, regulated by law under Art. 379 index 1 of the Civil Procedure Code of 1865, however, is not able to annihilate the final and enforceable nature of a judgment in particular, clearly resulting from the law.

Moreover, in this case there must be taken into account the appellant's specific situation who did not make an appeal in the case and in relation to which civil decision no. 1776/2012 became final on the expiry of the appeal period, under Art. 377 paragraph 2 subparagraph 1 of the Civil Procedure Code.

There was mentioned that it cannot be taken into account the appellee's criticism in respect of a passive procedural co-participation that would have influence over the final and irrevocable nature of the judgment, given that from the provisions of civil decision no. 1776/2012 it is clear that the law court has established for each appellee debtor in part a distinctive debt individualized in the judgment, and for the appellant a concrete sum of 12651 lei, so in relation to her, and to all the other debtors, the company had an individual claim coming from its own right to salary, without between these rights to be any interdependent relationship of solidarity and indivisibility.

Under these conditions, in which the flow due by the appellant was distinctly individualized from the other debtors' flow according to the judgment itself, and it did not exercise the

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remedy of appeal, there was no impediment for the creditor S.C. E S.A. to pursue it in order to make the claim, especially since in relation to this appellee the decision no. 1776/2012 became final and enforceable on the date of its delivery 02.02.2012 and irrevocable on the expiry of the 15-day period for exercising the remedy.

As regards the limitation of the right to require enforcement under Art. 405 paragraphs 1 and 2 of the Civil Procedure Code of 1865, the period is of 3 years and begins on the date when it is given the right to require enforcement.

Clearly, the right to require the enforcement of a judgment arises on the date on which it can be enforced, in the case in question on the date of delivery of civil decision no. 1776/2012, final and enforceable judgment of first instance because it is subject only to appeal.

The enforceability of this decision comes from the law, namely from Art. 377, paragraph 1, subparagraph 1 of the Civil Procedure Code which gives it the value of final judgment and Art. 376, paragraph 1, first sentence of the same code which gives it enforceable nature.

Thus, it is undoubtedly that the time when a judgment becomes enforceable, namely it can be enforced without any legal limitation, overlaps with the time at which begins the limitation period of enforcement of the decision, because as from that time the creditor can be deemed to be passive in relation to its own right.

The fact that in this case the remedy of recourse was judged in 2014, and the judgment became irrevocable, in relation to some of the debtors (but not in relation to the appellant who did not make an appeal in that case), and the beginning of the enforcement by the procedure followed by the bailiff is subject to the provisions of the New Civil Procedure Code according to Art. 24 thereof, as the executor request was filed after the entry into force of this law, shall not have any influence on the enforceability of the judgment which represents an enforcement order, because this character is always taken into account in relation to the law in force on the date of delivery of the judgment and not in relation to a subsequent law, nonexistent on the date of its delivery.

The principle of law predictability requires the beneficiary of a judgment to clearly know on the date of delivery of a judgment whether the judgment in question is enforceable or not and whether it can be immediately enforced, appreciation that must always consider the law of the time, according to the principle *tempus regit actum*.

Conditioning the enforceability of a judgment and hence the possibility of enforcing it by a subsequent law would represent a law retroactivity, expressly prohibited in Art. 15 of the Romanian Constitution.

It should be understood that the enforceability of a judgment and, therefore, the date from which begins the limitation period for the enforcement, moments that overlap, are closely related to the judgment and its legal status, being previous elements, intrinsic and conditional to trigger the enforcement.

Thus, even if the enforcement of the judgment follows the provisions of the new Civil Procedure Code on effective procedures for enforcement, representing summons and all other acts of the executor, the enforceability of the judgment shall remain closely linked to the law under which it was delivered and can be reported only to that law, namely the Civil Procedure Code of 1865.

It was considered that there cannot be retained in this way the allegations of the trial court which circumstantiates the enforceability or not of a judgment of a preventive behavior of the

creditor who would not be required to enforce a judgment if it is not irrevocable, because in this way it is illegally added to law.

As long as the law clearly provides by Art. 377 paragraph 1 and Art. 376 sentence I of the Civil Procedure Code of 1865 that the final judgment given without right of appeal is enforceable, any discussion on the enforceability conditioned by the creditor's will becomes useless and ineffective.

Moreover, in the specific case of the appellant debtor, given that it did not exercise the remedy of recourse, and his claim was individual and well-defined in the provisions of the judgment, without being directly related to that of the other debtors, the law court judgment remained even irrevocable within 15 days from its delivery by non-recurrence according to Art. 377 paragraph 1 subparagraph 2 of the Civil Procedure Code, not being at that time any impediment to the enforcement of the debt owed by it.

Therefore, it was specified that the appellant correctly argues that at the time of filing the application for the enforcement of civil decision no. 1776/0.20.2.2012, respectively on 21.08.2015 the 3-year period of limitation of enforcement had expired, according to Art. 405 paragraphs 1 and 2 in relation to Art. 377 paragraph 1 subparagraph 2 and Art. 376 first sentence of the Civil Procedure Code of 1865.

The appellee's statements related to the way in which she would be harmed by such an interpretation cannot be accepted, given that the legal provisions on the date of the judgment delivery were very clear and gave her the right to enforce the judgment, without any restriction.

Moreover, if they felt endangered and wished the suspension of the enforcement of that judgment, the debtors had at hand another procedural means, namely that provided by Art. 300 paragraph 2 of the Civil Procedure Code of 1865, that of requiring in a reasoned way the suspension of the judgment enforcement, a procedural means which, however, the appellant did not have, by not making a recourse, the reasons why, in relation to her the judgment became irrevocable on the expiry of the recourse period, being unable to prove any reasonable legal impediment to prevent the creditor the begin the enforcement against him thereafter.

The appellee's criticism on the applicability concerned of the New Civil Procedure Code cannot be considered as long as the enforceability of the judgment in 2012, and by default the date from which the limitation period begins can report exclusively to the law in force at that time, namely the Civil Procedure Code of 1865.

Also, there cannot be retained any allegations as regards the possibility to enforce a judgment only after it becomes irrevocable, because such an interpretation interferes with Art. 377 paragraph 1 subparagraph 1 and Art. 376 first sentence of the Civil Procedure Code of 1865 which expressly confers enforceable and final nature to the judgments delivered without right of appeal, contested only by recourse.

As a matter of fact, in the case, in relation to the appellant's situation who did not make any recourse against the decision, the enforcement is limited and in relation to the decision which becomes final and irrevocable and which intervened in his case within 15 free days from the date of delivery.

Any theories according to which there are enforceable judgments which are not final do not find their application in the Civil Procedure Code of 1865, and the time when the enforcement limitation begins shall always be related to the date on which the judgment becomes enforceable, mingling with this time; any theory that leads to the disintegration of the two moments does not find its logic in the purpose and the foundation of the two institutions,

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given that the enforceability of a judgment is recognized for an essential purpose, which is to be enforced from the date of delivery, so that the creditor's passivity at this time entitles the limitation beginning with the consequence of the possibility of limiting the right to obtain the enforcement of the decision.

VI. For all these factual and legal reasons, concluding that at the time when it was filed the application to start enforcement at the bailiff on 21.08.2015, the right to request enforcement had already been prescribed under Art. 405 paragraphs 1 and 2 of the Civil Procedure Code of 1865, the 3-year period that began from the date of delivery of civil decision no. 1776/02.02.2012 expiring on 02.02.2015, the court of appeal concluded that the right to require enforcement is prescribed, reason for which it cancelled the enforcement itself from the enforcement file no. 608/2015 of BEJ Gârdan Marius Florin.

Accordingly, the court of appeal under Art. 480 paragraph 2 of the Civil Procedure Code upheld the civil appeal⁵ brought by the appellant against the appellee SC E SA against civil decision no. 11107 as at 09.12.2015 delivered by Oradea Law Court that was changed in part, in that: it upheld the appeal to enforcement filed by the appellant against the appellee SC E S.A.; it upheld the objection of limitation of the right to require enforcement; it cancelled the enforcement itself from enforcement file no. 608/2015 of BEJ Gârdan Marius Florin against the appellant debtor.

Under Art. 453 paragraph 1 of the Civil Procedure Code, seeing the appellee's claims, the appellee was obliged to pay the appellant as court fees to the fund and appeal the sum of 800 lei, representing the lawyer's fees, proven with receipt no. 484/19.11.2015 filed in original to the trial court, issued by S.C.P.A. Vântu & Crișan.

Under Art. 45 paragraph 1, subparagraph f of Government Emergency Ordinance 80/2013 as regards the upholding of the appeal to enforcement by this final judgment, the court ordered to be reimbursed to the appellant the legal stamp duty paid to the trial court amounting to 1000 lei and the stamp tax paid on appeal amounting to 500 lei, the total stamp tax to be reimbursed amounting to 1500 lei.

CONCLUSION

All in all, the interpretation of the court is based on the next conclusions: any theories according to which there are enforceable judgments which are not final do not find their application in the Civil Procedure Code of 1865, and the time when the enforcement limitation begins shall always be related to the date on which the judgment becomes enforceable, mingling with this time; any theory that leads to the disintegration of the two moments does not find its logic in the purpose and the foundation of the two institutions, given that the enforceability of a judgment is recognized for an essential purpose, which is to be enforced from the date of delivery, so that the creditor's passivity at this time entitles the limitation beginning with the consequence of the possibility of limiting the right to obtain the enforcement of the decision.

⁵Civil Decision no. 331/A/06.04.2016 of Bihor Law Court, delivered in case no. 14721/271/2015, not published

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THE AUTHENTIC WILL BETWEEN THEORY AND PRACTICE

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ABSTRACT

A will is the unilateral, personal and revocable judicial act through which a person, called a testator, rules for the time when he is no longer alive. A specific form of will regulated by law is the authentic will. It is characterized by the fact that the will of the testator is drawn up in authentic form, the testator is advised, and thus the will acquires the specific force of the authentic act. What differentiates the authentic will from other forms of will is the authentication procedure, which is described within this article. This procedure ensures the protection of the testator's will, the full understanding of the effects of a legal act with death cause.

KEYWORDS: *will, authentication, public notary, proof*

INTRODUCTION.

The will is the unilateral, personal and revocable judicial act, by which a person, called a testator, rules, in any form required by law, for the time when he is no longer alive¹.

Deriving from the Latin word testis (witness), the testament was a permanent preoccupation of doctrine, being seen as a rigorous inventory of goods, but also as an act of last will by which the destination of certain goods is established, thus offering “the most convincing, most sincere and most exemplifying expression of what man understands by property and its destiny”².

By discussing the critiques phrased in specialty literature, the Romanian lawmaker correctly described, within the new Civil Code, the essential distinction between legate and testament, thus correctly appreciating that the will is merely the act of final will of the testator which can comprise provisions of patrimonial character, namely legates, as well as non patrimonial provisions. *As opposed to the phrasing of the Romanian lawmaker within article 1035 of the Civil Code, we believe that stating legates is not of the essence of the will, it pertains to its nature, as the will contains exclusively patrimonial provisions which will come into effect after the death of the testator.*

Thus, the will is merely the legal support of the manifestation of will of the testator, being a complex and heterogeneous legal act, which contains more legal acts, independent as legal regime and purpose³. *Being a legal act, namely a manifestation of will with the purpose of*

¹ Article 1034 of the Civil Code passed by Law no 287/2009 regarding the new Civil Code, republished in the Official Bulletin part I no 505 of July 15th, 2011

² The National Union of Public Notaries of Romania, *Wills - an anthology* by Georgeta Filitti, Notarom Publishing House, Bucharest, 2007, page 19

³ M. Popa, *Civil law. Succession*, Oscar Print Publishing House, Bucharest, 1995, page 68

causing legal effects, the will must be seen as an instrumentum, as well as a negotium; our opinion is that the idea according to which the will is merely the proof of the legatee⁴ is unacceptable; furthermore, the lawmaker regulates the possibility to test in regard to other aspects except the patrimonial ones.

1. THE NOTION OF THE AUTHENTIC WILL

The authentic will is that testament which was authenticated by a public notary or by another person invested with public authority by the state, according to the law⁵. Initially, the competence of authenticating a will belonged to the courts of law, as a result of subsequent changes of law the competence was given to public notaries.

The lawmaker expressly regulates in article 1043 first alignment of the new Civil Code the fact that the authentication of a will can be performed not only by a public notary, but also by another person invested by the state with public authority, without clearly stating who that person is. *In our opinion, these people can be exclusively the heads of diplomatic offices and consular offices of Romania situated abroad, namely the consuls and ambassadors⁶.*

Doctrine expressed the idea according to which the authentication of a will can be performed by a lawyer, given by the fact that a lawyer's activity includes drafting legal acts, attesting the identity of parties, content and date of acts which are to be authenticated⁷. *We do not share this opinion as we do not share the opinion according to which the secretaries of local or communal councils where there are no public notaries are people invested with public authority⁸; this opinion is shared by the High Court of Justice⁹. In justifying this opinion, we must first consider the provisions of article 17 of Law 36/1995¹⁰ according to which the secretaries of local councils of cities and villages where there are no offices of public notaries*

⁴ O. Căpățână, *Gratuity in legal acts*, Rosseti Publishing House, Bucharest, 2003, page 29; pertaining to this theory, we must mention that old French literature states the idea of interpreting the will both as an instrumentum and as a negotium - see D. Guevel, *Successions. Liberalities*, Armand Colin Publishing House, Paris, 2008, page 214

⁵ The authentic will is acknowledged in most laws, much like the requirements of it being drafted by a notary and signed by the testator. In French law, the authentic will must be drafted by dictation of the testator, by two notaries or a notary assisted by two witnesses - article 971 of the French Civil Code. The witnesses must be people of age, able to understand the French language and able to sign. The legatees, the parents or relatives up until the fourth degree can't be witnesses. The will must be dictated to the notary or notaries who will write it by using legal terms according to the will of the testator. The witnesses must assist in the writing of the will. Subsequently, the will shall be read to the testator and it will be signed by the testator, the witnesses and the notary - see Cour de cassation - Première chambrecivile - Arrêt n° 134 du 1 février 2012 (10-31.129) and Cour de cassation - Première chambrecivile - Arrêt n° 704 du 29 juin 2011 (10-17.168), accessed at http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/134_1_22143.html on 13.05.2014. In Austria, this certain type of will can be made in oral form before a court of law.

⁶ However, this possibility is not new as, since 1944, by Law no 358/1994 for the authentication and legalization of documents, establishing a certain date and legalization of copies of documents, a law which was in force until 1960; it also unified the provisions of different laws regarding notary activity, it improved the procedure of authentication and investing of authenticated documents, it maintained the duties of the Public Notary and stated the right of diplomatic and consular offices to authenticate, legalize and invest documents presented by Romanian citizens abroad.

⁷ C.S. Ricu, G.C. Frențiu, D. Zeca, D.M. Cigan, T.V. Rădulescu, C.T. Ungureanu, G. Răducan, Gh. Durac, D. Călin, I. Ninu, Al. Bleoancă, *The new Civil Code. Comments, doctrine and jurisprudence, second volume*, Hamangiu Publishing House, Bucharest, 2012, page 169

⁸ I. Genoiu, *The right to inherit in the new Civil Code*, C.H. Beck Publishing House, Bucharest, page 167

⁹ By decision no 6257 of 2005 of the High Court of Justice seen at <http://legeaz.net/spete-civil-iccj-2005/decizia-6257-2005> on 11.08.2014 it was established that "the written document, signed on March 25th, 1992 by H.V. and H.C. before the secretary of Prisacani village of Iasi county, named a will is null as a testament as it violates the formalities stated by articles 858-860 of the Civil Code, thus it can't be assimilated to the hand written will, as it is not written, dated and signed by the testator. It is also not an authentic will, as it was not drafted in front of a notary."

¹⁰ Law no 36/1995 of public notaries and notary activity, republished in the Official Bulletin, part I, no 444 of June 18th, 2014.

perform, on the parties' request, the legalization of certain copies, except for private documents; similar are the provisions of article 78 first alignment of the same law, according to which the legal acts which require an ad validitatem authentic form will be drafted up by public notaries.

The reason for such an interpretation is extremely simple and derives from the importance of the act of final will and from the necessity of guaranteeing a freely expressed and non vitiated consent which can only be determined by an organ invested with public authority.

The authentic will has a series of advantages which pertain to the fact that: - it ensures certainty in regard to the person of the testator, as it is an authentic act and the procedure states that it is mandatory to identify the parties; it allows for the clear determination of the will of the testator, as he is advised - an obligation regulated by article 9 of Law no 36/1995 which states that the public notary is obliged to find out what is the real will of the testator; it avoids the inefficiency of clauses or the impossibility to execute them as a result of the testator disrespecting the imperative legal provisions; in this case, the notary must refuse the authentication of acts which are contrary to the law or good morals; it enjoys the proof force of authentic acts and, as a result, the task of proof belongs to the person who contests it; it is accessible to people who can't write or read or to the people who, due to infirmity or any other cause, are unable to sign, as authentication is possible by authorized interpreters and assistant witnesses; subsequent contestation is difficult, possible only by the procedure of declaring it fake; a copy of the document is permanently kept in the archive of the notary office thus it can't be stolen, hidden or destroyed by the interested parties; if it disappears, a duplicate can be obtained or it can be reconstructed under the conditions stated by law; the existence of the will is ensured by its registration in the General Evidence Register of Notaries¹¹.

The disadvantages of this type of will pertain mainly to the fact that it is somewhat expensive, as the testator must pay the notary fee; it also does not ensure the secret of the last will of the testator. In regard to this aspect, we must mention that information about the will can only be provided after the testator dies.

2. THE PROCEDURE OF AUTHENTICATING OF A WILL

The competence of authenticating of a will is general and belongs to any notary on Romanian territory, independent of the domicile of the testator or the place where the goods are situated. The exclusive competence established by article 12 of Law 36/1995 considers only the successor procedure, which is started by request, after the death of the testator.

The regulation of the new Civil Code is completed with the one of Law no 36/1995 republished which thoroughly describes the procedure of authentication of wills by public notaries.

Thus, according to legal provisions, all notary acts are drafted on demand. Although the rule is that of phrasing a verbal request, in the matter of wills, written form is mandatory in order to obtain an authenticated document. The demand is obviously phrased by the testator personally, as the will is an act which is essentially personal and can't be concluded by legal or conventional representative. The request must contain the identification information of the applicant and the mention regarding the fact that the will which is annexed to the request was drafted by the person itself or that the person has no written will and demands to dictate the content of his will to a public notary. Obviously, the request will be signed by the testator. In the special case of providing consent by an interpreter or authorized translator in the presence of assistant witnesses, the request will be signed by them as well.

In order to admit the request for authentication of the will, the public notary needs to verify if the act meets the conditions stated by law, namely capacity, consent, licit and determined object and the licit and moral cause.

¹¹ Founded in 2007, it records donations, authentic wills, revocation of wills as well as retraction of revocations.

Before proceeding to the authentication of the will, the public notary must make all efforts in order to find out which is the real will of the testator, he must advise the testator and determine the purpose which the testator wished to achieve; all these are contained in the general obligation of advice as stated in article 9 of Law no 36/1995. During these verification stages, a special role is played by the verification of consent and all vices which affect consent and which attract the sanction of annulment of the drafted act.

As an example, we mention that one of the tasks of the public notary is to search whether the testator has reservation heirs, what is the connection between the testator and the potential legatee, what is the successor mass and so on; he must also advise the party by pointing out the effects of its act. Thus, the notary will show the applicant the inefficiency of drafting a will which states as universal legatees the children of the testator, in case there are no other heirs. Also, in case the testator requests the authentication of a will by which he leaves his family house to a certain legatee, the notary will have to be diligent in finding out if the testator wished to leave only the house or his entire fortune which contains the house. This aspect is especially important as it determines the qualification of the legatee in a particular or universal one with all consequences which come from this qualification. The most important of consequences pertains to the particular legatee in case there are no other heirs, thus requiring a different and difficult procedure of declaring a vacant inheritance.

Also, the public notary must verify if the testator, by his act of final will, aims to disrespect the imperative legal provisions, such as those of article 1009 first and second alignment of the Civil Code or those of article 1138 of the Civil Code regarding vacant inheritance¹², in which case if the testator insists in authenticating the act in that certain form, the public notary will have to refuse the authentication of the act.

Also, during the authentication procedure, the public notary will have to inform the testator that he can be assisted by one or two witnesses, thus allowing him to decide whether to dictate his final will in their presence or not.

The provisions of Law no 36/1995 state two possibilities in drafting and authenticating wills:

- the first entails dictating the provisions of the will in front of the notary. Thus, the notary will register the will of the testator in legal terms, after fulfilling the legal obligation of advising and finding out the real will of the testator;
- a second possibility is that the testator presents an already written will, in which case, after the will is drafted, it will be read to the testator by the public notary. The hand written document will be kept in the archive of the notary office.

The will shall be drafted in Romanian, given the principle that all notary acts are drafted in Romanian¹³. By exception, on the justified request of the testator, the public notary can perform the act in another language only if he knows that certain language or after he is informed of the content by the interpreter, in which case a translated in Romanian copy signed by the translator will be attached to the file¹⁴. *As opposed to the way the legal text is drafted, we appreciate that the possibility of drafting the will in another language is possible in any of the following ways:*

- *in case the public notary knows that certain language as it is his maternal language or he is an authorized translator, the will can be written after dictation or after the already drawn up will,*
- *in case the public notary doesn't know that certain language because it is not his maternal language or he is not an authorized interpreter or translator, the will can be written only based on the certified translation by an authorized interpreter which is attached to the original document.*

¹² Vacant inheritances are given to the city or the village where the goods were located at the time the successor procedure began and become part of their private inventory. Any testamentary provisions which aim to remove this certain rule are considered to be unwritten clauses.

¹³ Article 81 first alignment 1 of Law no 36/1995

¹⁴ Article 81 fourth alignment 1 of Law no 36/1995

The will shall be written with no blurred lines, free spaces, erase marks, the sums of money will be written in words and numbers, according to the general rules of drafting up notary acts.

The content of the will shall mention the existence or inexistence of reserve heirs, the fact that the testator was made aware of the legal provisions regarding the reserve, regarding the possibility to revoke the will and the legates as well as the possibility to be assisted by two witnesses.

After it is drawn up, the will shall be read by the testator or it will be read to the testator by the public notary, by making a mention of this aspect. By exception, when the testator is in a special situation which does not allow him to read the document himself or understand the content as explained by the public notary, an authorized interpreter or translator will sign along with the notary.

After the will is read, the testator must declare that it expresses his final will; afterwards, the will is signed by the testator, in case the testator was assisted by one or two witnesses, they will also sign the will. The signature represents the exteriorization of consent and must be applied on the document in front of the public notary. In case the testator is deaf, mute, deaf-mute but able to read, he will write, prior to signing the will, the following mention "I consent with the present document which I have read". In case he can't read, the will shall be signed by the interpreter.

The force of the authentic will resides in the authentication procedure of the document which means the procedure was completed. It must contain the mandatory mentions as stated in article 83 of Law no 36/1995, but also some special mentions regarding:

- fulfilling the formalities requested by article 1044 of the Civil Code as described above
- the identification information of assistant witnesses¹⁵ and the reason for which the testator did not sign the document personally
- the identification information of the authorized interpreter or translator
- the identification information of the lawyer who assisted the party
- mentions regarding the normal procedure of obtaining consent in special situations.

Disrespecting the provisions of article 83 of Law no 36/1995, as well as the special ones, is sanctioned with annulment, if they can't be interpreted and have caused damage which can't be removed in any other way.

The authentication is drafted along with the will. There are special situations in which the consent of the testator is taken outside the headquarters of the office (for example, at the domicile of the testator or even in the medical facility where the testator is admitted) and the authentication document is drafted subsequently at the public notary office. If the testator is still alive during this interval, this aspect is irrelevant. In the unfortunate case in which case the testator dies between the time the will is signed and the time it is authenticated, the doctrine is unanimous in stating that the authentication document can't no longer be signed, as by the death of the testator, the successor transmission has already operated, and the existing will did not meet the conditions required by law for a personally signed will, as it was not written and signed by the testator, nor those of an authentic will, as it was not authenticated by the public notary.

The authentication document must expressly mention the year, month, day and hour even the minute when the document was authenticated.

3. THE REGISTRATION AND PROVING FORCE OF THE AUTHENTIC WILL

In order to inform people with legitimate interest, but also in order to ensure the respect of the will of the testator, the notary who authenticates the will is required to register the will in the National General Evidence Register, electronically held by the Public Notaries Association of

¹⁵ The following people can't be assistant witnesses: people under the age of 18, people who are either a party or the beneficiary of the act, people who, as a result of physiological or physical deficiencies are not able to assist as witnesses, people who can't read or people who can't sign for any reason.

Romania according to the law¹⁶. Information regarding the existence of a will can be provided to those who justify legitimate interest but only after the testator dies. Proof of death can be made with the death certificate.

In case the will contains certain provisions regarding the acknowledgement of a child, the public notary is obliged to communicate a copy of the will to the General Evidence of Population Service within 10 days of the authentication of the will.

The authenticated notary document is full proof, in regard to any person, until it is declared a fake, in regard to the facts personally acknowledged by the person who authenticated the will. The declaration of parties, as stated in the notary document, represents proof until contrary argument, between the parties, as well as in regard to other people.

CONCLUSIONS

The will is a legal act of significant importance through which the testator “arranges” its patrimony after his death. The importance of this act is acknowledged and provided by the lawmaker through the fact that it can be drafted in authentic form. The necessity of the authentic form is completed by an extremely thorough procedure which is meant to ensure the understanding by the testator of the importance of his act as well as the subsequent respect of his final will.

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***The National Union of Public Notaries of Romania, *Wills - an anthology by Georgeta Filitti*, Notarom Publishing House, Bucharest, 2007.

¹⁶ The provision of the new Civil Code is not entirely new, as the Ilfov Tribunal had, ever since 1944, an archive of authentic and mystical wills, started as a result of the Law-Decree no 358/1994 for the authentication and legalization of all documents, for establishing a certain date and legalizing copies of certain documents, as published in the Official Bulletin no 152/2 of July 1944, which registered all wills which were authenticated by public notaries of judges.

LEGITIMATE DEFENSE AND THE MILITARY RULES OF ENGAGEMENT OF THE ARMED FORCES

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ABSTRACT

In a practical sense, we can say that legitimate defense is at the foundation of any military action or inaction, it is at the same time the legal basis for any decision made by military decision-makers. Of no lesser importance are those regarding the general public, society as a whole, given the situation in the current international context, when the right to free movement is already established, therefore any person may be directly or indirectly confronted with a limit-situation in which, one's instinct of self-preservation would require and result in an attitude of legitimate defense, when one's own life is endangered, as is the case more and more often nowadays.

For these reasons, the obligation to ensure public security, order and the safety of citizens through a solid cooperation in the civilian-military relationship has become a matter of major general concern, enshrined by the entire legislation applicable to the field.

Given these new features of the concept of legitimate defense, we will try, in this article, by using the comparison method, in addition to the general opinions expressed by the quoted authors, by the doctrinarians of the studies carried out, to include in its content elements of justification of a military nature, for the simple reason that this article is aimed at an audience segment that belongs both to civil society and to the military, with an emphasis on the latter, who are increasingly confronted with this concept of use of force.

KEYWORDS: *legitimate defense, R.O.E., military, criminal, penal.*

INTRODUCTION.

The concept according to which some causes make the criminal (penal) rule not result in its sanctioning effect was found in the provisions of the Criminal Code Carol II (of Romania), and has been adopted by the Romanian author in the doctrinal evolution under the generic name of *causes that remove the incidence of the criminal law*.

The terminology used by the lawmaker of 1936 does not count in a criminal offence for justifiable causes or is a person responsible for the offence in case of the appearance of causes of irresponsibility¹, instead, by *Law no. 286/2009 for the implementation of the Criminal Code*, there is a clear delineation between *justifiable causes* and *causes of impunity* which are presented in Title II. Thus, it is stated that “*the deed provided by the criminal law does not constitute a criminal offence, if any of the justifiable causes provided by the law is present*”².

Professor Vintilă Dongoroz approached these issues in a thorough manner, he divided the criminals into *criminals in fact*, i.e. persons who can only be physically blamed of the offence, and *punishable criminals*, i.e., persons capable of bearing the criminal sanction. In order for a person to be criminally liable, to be punishable, a number of positive conditions must be met, which relate to the presence of guilt, and no negative conditions should

¹The Criminal Code of 1936, Title VII, Chapter II - Causes that defend from or mitigate liability.

²Article 18 of the Criminal Code, General Provisions (relating to justifiable causes).

intervene in his/her favour, which would remove the enforcement of the criminal law, the lack of such conditions having to be established, and the same author generically calls them causes that remove the incidence of the criminal law, dividing them into three categories³:

- a) causes related to the *person's capacity*, meaning immunities (indemnity);
- b) causes related to the *person's ability*: disabilities determined by: mental alienation, drunkenness and other intoxications, passions, sleepwalking and hypnotism, suggestion, minority, infirmities;
- c) *cases of non-imputability*: ignorance, factual error, error of law, fortuitous case, physical constraint, moral constraint, state of necessity, legitimate defense, causes based on the motive of the fact – enforcement of law or of an order of authority, the exercise of a profession, art or craft, the ritual of recognized cults, sports, self-injury, the victim's consent.

I. LEGITIMATE DEFENSE.

The regulation of legitimate defense is one of the most important issues that need to be clarified, that the military deal with in the exercise of their functions, both in peacetime and, especially, during military warfare or military peacekeeping operations.

The legitimate defense, as a component of the legal category called "*justifiable causes*", appears in the law next to the following concepts: *state of necessity, exercise of a right or fulfillment of an obligation, consent of the injured person*⁴.

Through Resolution no. 1368 of the Security Council, terrorist acts were classified as acts of direct armed aggression in the proper sense of the word, which gives, according to Art. 51 of the Charter of the United Nations, *a right to legitimate individual and collective defense*.

It should be reminded that such consensus has not existed within the Security Council since the Korean War and the Gulf War. This decision of the Security Council was to be expected, since, as early as 19th December 2000, it had adopted Resolution no. 1333 which reaffirmed and supplemented previous resolutions, in particular Resolution no. 1267 of 15th October 1999⁵.

Contemporary views expressed in the literature have shown that the new regulation brings another perspective to the explanations and understanding of legitimate defense, by *considering it as a justifiable cause*, not as a *cause for the removal of criminal liability*⁶. The author quoted also considers that, unlike the 1968 Criminal Code, wherein the act committed in legitimate defense does not constitute a criminal offence, in the new regulation it is only justified, preserving the characteristics of a crime.

However, we want to signal, as we did before, the fact that the text of Art. 18 para. (1) of the Criminal Code states that "*the offence provided by the criminal law does not constitute an offence, if any of the justifiable causes provided by the law*", thus the expression *does not constitute an offence* is preserved, as in the case of the regulation contained in Art. 19 para. (1) of the 1968 Criminal Code.

³Dongoroz Vintilă, *Drept penal (Criminal Law)*, Bucharest, 1939, re-edited by the Romanian Association of Penal Sciences, Bucharest, 2000, pp. 305-306.

⁴Article 19 to Article 22 of the Criminal Code.

⁵Toma Gabriel, *Terorismul internațional. Reacțiile actorilor regionali și globali (International Terrorism. Reactions of Regional and Global Actors)*, Editura Institutul European (European Institute Publishing House), Iași (Jassy), 2013, p. 154.

⁶Vlăsceanu Adina, Barbu Alina, *Noul cod de procedură penală comentat prin raportare la codul penal anterior (The New Criminal Procedure Code commented on by reference to the previous criminal code)*, Editura Hamangiu (Publishing House), Bucharest, 2014, pp. 481-482; Ionescu Victor, *Legitima apărare și starea de necesitate (Legitimate Defense and the State of Necessity)*, Ed. Științifică (Scientific Publishing House), Bucharest, 1972, pp. 37-45.

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It is unanimously accepted that no equivalence can be established between the legitimate defense and the right of the perpetrator to breach the criminal law, because the person in question acts in order to defend itself, or to defend a public interest, or another person.

In the doctrine, the legal foundation of legitimate defense is controversial⁷, and through the different regulatory regimes in certain evolutionary epochs, it can determine different meanings amongst people who find themselves more and more often in situations of this kind (*militaries in theatres of operations outside the national territory, militaries from the gendarmerie structures when intervening in the restoration of public order, specialized personnel destined for the destruction of explosive loads or improvised devices of the same type, militaries from fire-fighting structures, when in life-saving or goods-rescue missions*) within a time-limit range (even seconds) and are required by law to immediately manifest in each of these situations, or to fight back.

From the content of the text provided by Art. 19 of the Criminal Code which entered into force in 2014, it results that the attack must fulfill the following conditions⁸, therefore, by comparison to the wording in the Criminal Code in force, it is somewhat different from the previous one, thus the phrase *state of legitimate defense* has been replaced by the phrase *legitimate defense*.

The first paragraph of the provision states that the state in question is a justifiable cause, an aspect which did not exist in the previous law, and the next paragraph is reworded by inserting the *requirement of proportionality*⁹ in relation to the gravity of the attack, instead of “public interest” the phrase “general interest” has been used, as well as the text “excessive defense due to the disturbance or fear”, a situation regulated among the causes of impunity provided by the same code.

The material character of the attack is the first element of the legal, but especially the practical analysis, for the application of the compulsory rule on the military. It is supposed to emerge from a natural person who acts directly, by his/her physical force, either mediatory, through animals, things or technical means, we might add, on which he/she imposes his/her will, through action or inaction¹⁰.

And because we have approached the issue of the material character of the attack, its form and ways of transmission, it is very important for the military to act, beyond the rigors of the law, and another important thing is the way in which they act in relation to the concrete situation created.

In their support, the lawmaker comes up with and clarifies the notions specific to the terminology of invoking and using military force, but also with respect to preventing abuses or excesses even from those who manage the force element. Thus, the material attack, this time the armed one, cannot be appreciated by military commanders without identifying in its content hostile intent as an element of the will to materialize the attack.

The categories of military force through which decisions are considered and taken are: *minimum force* – is the force strictly necessary in terms of intensity and duration for the fulfillment of the mission; *lethal force* – is the force the use of which is likely to cause death or serious injury that may result in the death of a person; *hostile force* – is the force that manifests hostile intentions, commits a hostile act or has been declared hostile.

⁷Dongoroz Vintilă, *Drept penal (Criminal Law)*, Bucharest, 1939, re-editing, op.cit., p.360; Pașca Viorel, *Curs de drept penal. Parte generală (Criminal Law Course. The General Part)*, Editura Universul Juridic (Publishing house), Bucharest, 2010, p.172; Ionescu, V., op.cit., pp. 38-44.

⁸There must be a *direct, immediate and unjust material attack, endangering one's or another's person, their rights or a general interest if the defense is proportionate to the seriousness of the attack*.

⁹Codiță Dumitru, collective of authors, *Manual pentru instruirea militarilor în dreptul internațional umanitar (Manual for the Training of the Military in International Humanitarian Law)*, Centrul tehnic editorial al armatei (Editorial Technical Centre of the Army), Ploiești, 2006, p.19.

¹⁰Antoniou George, *Vinova penală (Criminal Guilt)*, op.cit., p.276

For the purposes of *Law 122/2011 on the regime of arms, military devices and ammunition owned by M.Ap.N. (Ministry of National Defense) and by the foreign armed forces on the Romanian territory*, the following terms and expressions, with legal implications in determining justifiable causes and in the inquiry, have the following meanings¹¹, notions and principles found in the methodology of the development and implementation of the *rules of engagement of the military force*¹², as follows:

Hostile intent, expressed in synthetic form, is the imminent threat or use of force against the military personnel or against any other person, the Romanian armed forces or other persons, or the designated property, as well as against the members of the allied foreign military forces in the areas under force control.

The identification and determination of hostile intent is an obligation of the military commander on the ground for the sole reason that, on the basis of his general professional training, he has the power to appreciate and to discern situations in which we are facing a hostile intent or hostile act. In addition to these situations, in the case of individual missions, the determination of hostile intent is done by the mission executor, on the basis of the same elements.

Here is another argument why the collective and individual training, the thorough juridical knowledge of the law applicable to the military, moreover, their professionalization, have been and are continuously necessary.

From the discussions with the staff involved in such actions, in our opinion the factors that can be taken into account for determining hostile intention areas follows: firearms (whether they are present, what type?); the size of the adversary force; whether weapons are present, how they are handled; did the armed person take a firing position; whether the adversary force is acting against unarmed civilians; other aggressive actions.

On the basis of these situations, in order to prevent and avoid such acts, the military may detain persons who threaten serious injury or who oppose the fulfillment of the mission. Also, persons committing criminal acts in areas under force control may be detained, provided that detained persons are handed over to the superiors as soon as possible.

A *hostile act* is any action or use of force by a foreign military force or terrorist entity directed against the Romanian State, the Romanian armed forces or other persons, or against designated property, or which seeks to hijack or prevent the accomplishment of a military mission by the Romanian and/or allied armed forces.

The *instructions* consist in the general and specific duties of the personnel on a mission, we also find the legal term in the criminal law provisions in the legislation of the categories of crimes committed by the military¹³.

The *military objective* is the buildings, equipment, installations, such as barracks, camps or arrangement districts of one or more military units, warehouses, stations, ports, airports, military transports, owned or administered or assigned to the guard and defense of the Ministry of National Defense (M.Ap.N.).¹⁴

In the case of international operations provided by the Romanian legislation, the combat personnel or any good that, by its nature, location, destination or use, makes an effective contribution to the military action and whose partial or total destruction, capture or neutralization, under the concrete conditions, provides a reliable military advantage, is a military objective.

As far as a certain special capacity of the persons is concerned, the law contains the phrase “designated persons” – the persons established by mission instruction or order, for

¹¹Art.3 of Law 122/2011 on the regime of arms, military devices and ammunition owned by M.Ap.N. and by the foreign armed forces on the Romanian territory.

¹²Idem Art. 25-26.

¹³Art. 415 of the Criminal Code, the offence of “Violation of instruction”.

¹⁴Order of the Minister of National Defense no. M.97 of 2nd September 2014 for the approval of the Internal Service Regulation, published in the Official Journal no. 745 of 13th October 2014, Art. 15.

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whose protection the use of force, including lethal, is authorized, or the denomination “designated property” – the property for the protection of which force is used; lethal force is used only under circumstances established by mission instruction or order¹⁵.

By recognizing legitimate defense as a justifiable cause, operating *in rem*, the current Criminal Code has abandoned the concept of the previous code that justified legitimate defense on the basis of the notion of moral constraint and the impossibility of free determination of the will of the respondent. According to this conception, legitimate defense was a cause for the removal of guilt, and the deed continued to be an act provided by the criminal law, susceptible to security measures and civil liability; also legitimate defense operated *in personam*, being unable to expand on the participants¹⁶.

We believe that not every attack against the social values protected by the law presupposes legitimate defense, only a real concrete attack, i.e. an attack with a certain specificity that justifies the defense reaction and the removal of the danger. The elements characterizing the attack in relation to our current criminal law are the following: it should be material, direct, immediate and unjust.

The attack is direct when it is directed against and directly jeopardizes the social value protected by the criminal law. The direct nature of the attack does not imply the obligatory existence of a direct contact of the aggressor with the object that incorporates the protected social value. This condition displays the spatial relation between the attack and the value protected¹⁷.

*The unjust nature of the attack*¹⁸ implies its lack of legal legitimacy or its lack of authorization by the legal order, so that, when the act takes place under the law, one cannot speak of an unjust attack, so there is a lack of legal legitimacy of the attack.

Legitimate defense can also be concurrent with error when the person attacked is not aware, for instance, of the attacker’s state of irresponsibility. In such a situation, he/she will react in legitimate defense, not having the obligation to seek a less dangerous solution.

The attack should seriously jeopardize the values mentioned in Art. 19 para. (2) of the Criminal Code. Therefore, the outcome should be consequences that are irreparable or difficult to remedy had they not been defended, such as: a serious threat to a person’s safety, the rights of the person attacked, or the general interest, the seriousness of the danger being analyzed on a case-by-case basis, depending on the concrete conditions of the attack.

We consider that throwing pieces of wood and bricks onto the house of another person, thus causing unnecessary damage, does not constitute an attack that seriously jeopardizes the estate, nor does the appropriation by a warehouse operator of two liters of fuel he wished to use in his household in order to ignite a fire, the condition of serious danger not being met in these instances¹⁹.

Instead, we want to show how ungraspable reality is, where such small-sized materials, assembled into simple mechanisms, are used to make improvised devices containing explosive materials, which the often uninformed general public considers as non-dangerous, so its attitude is to ignore them or, even more, people have a tendency or even proceed to closely examine such materials.

¹⁵Idem, Law 122/2011 on the regime of arms, military devices and ammunition owned by M.Ap.N. and by foreign armed forces on the Romanian territory.

¹⁶Antoniou Ghe., coordinator; authors (Antoniou G., Bulai C., Duvac C., Griga Ion, Ivan Ghe., Mitrache C., Molnar I., Pascu I., Pasca V., Predescu O.), *Explicații preliminare ale noului Cod penal (Preliminary explanations of the new Criminal Code)*, Vol. I, Editura Universul Juridic (Publishing House), 2010., p.179.

¹⁷Antoniou George, *Vinovăția penală (Criminal Guilt)*, Editura Academiei Române (Publishing House of the Romanian Academy), 1995, p.276.

¹⁸Ibidem.

¹⁹Basarab Matei, *Drept penal. Partea generală (Criminal Law. The General Part)*, Editura Lumina Lex (Publishing House), 1997, p.128.

These situations fall within the scope and specificity of terrorist activity and anti-terrorist technical control activities are aimed at the early detection and investigation of suspicious objects in order to neutralize any improvised explosive or incendiary devices, as well as arms, ammunition, radioactive sources or substances, other technical means that can be used in extremist terrorist actions, actions of this kind, without a doubt, threaten the values defended by the criminal law²⁰.

For a good understanding, by *tactical comparison*, I would point out that in order for there to be a defense, there must be an attack, so *the defense ought to be preceded by an attack* concerning the person attacked or the general interest.

The conclusion we acquiesce in is that the defense may take place²¹ in the presence of the attack, with the fulfillment of all the above conditions and taking into account the circumstances in which it occurred, and that it must observe the principle of proportionality in relation to the attack.

In reality, when the exceeding of the limits of legitimate defense occurs as a result of disturbance or fear, there is only a diminution of the ability to predict, which must be real. If such exceeding is not due to the above causes, the circumstantial legal provisions shall apply.

We can also find ourselves in the face of a *putative or imperfect legitimate defense*, which exists when a person is convinced, on the basis of objective data and subjective conditions, that he/she is confronted with an attack that is not actually happening. In this case, the deed was committed without guilt, because of the error regarding the circumstances in which the defense took place. Putative legitimate defense is distinguished from the putative criminal offence, which exists when the criminal decision is followed by an action that has no criminal significance, in the case of putative legitimate defense, the decision is justified, and however, the defense action is unlawful²².

The attack is apparent (putative), but the actual defense is based on that attack. So there must be some real circumstances that create for the person who defends itself the certainty of being confronted with an attack. Therefore, the person who believes to be under attack or the intervening third party acts in good faith.

For example, a military from the Afghanistan operations theatre who participates in patrol missions and who has been confronted with real situations in which a disguised person attacked him, is always armed, according to the rules. A woman of Afghan origin who was traditionally dressed, with her face covered by a "burka" (a traditional garment covering the faces of Muslim women), originating from areas other than those of direct confrontations, during a visit to a relative, while in the street, being unaware of the situation, unwittingly and jokingly, made a gesture with her hand from under those garments that seemed to indicate that she was pointing an object of the size of an automatic weapon towards the military patrol. The military, believing he was being confronted with a real assault, of the kind he had previously encountered, shot her deadly.

II. RULES OF ENGAGEMENT– R.O.E.

The lawfulness of the operations deployed by the armed forces in order to carry out a mission is based on the domestic and international regulations under which they are created and act.

²⁰Counter-IED Smart Book for Pre-Deployment and Field Use, version 2, Kwikpoint, US DoD, 2006, pp. 141-145.

²¹Idem reference 19.

²²Ionescu Victor, *Legitima apărare și starea de necesitate (Legitimate defense and the state of necessity)*, Editura Științifică (Scientific Publishing House), Bucharest, 1972, p.128.

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The so-called Rules of Engagement (ROE²³) have an important role in ensuring the efficiency of the armed forces' action and in creating the feeling among the military personnel that they are acting in full compliance with the legal provisions.

The rules of engagement in conflict are instructions developed by the competent political or military authority, in order to define the circumstances and limits of the use of force by its armed forces to initiate and/or continue armed engagement when confronted with other forces.

They are in full compliance with the principles and rules of criminal law and of international humanitarian law with regard to the use of force and justifiable causes, specifically legitimate defense.

According to NATO's view²⁴, rules of engagement are defined as follows: "Directives issued by a competent military authority specifying the circumstances and limits under which forces will engage in and/or continue combat".

At a practical, operational/tactical level, they are the commander's rules regarding the use of force.

Rules of engagement do not limit the inherent right to self-defense of the individual or the unit/sub-unit.

For example, for the military actions in the Afghanistan Theatre of Operations, at one point there were:

1. NATIONAL LIMITATIONS:

- a) Romanian forces may be used throughout the territory of the Republic of Afghanistan only after obtaining national approval under the conditions of providing air transport and logistic support.
- b) Romanian forces may temporarily retain / detain suspects / insurgents / terrorists only during the execution of missions. Suspects / insurgents / terrorists will be handed over to the Afghan authorities as soon as possible.
- c) Persons detained in the situations referred to in letter (b) shall be disarmed if necessary and transferred as soon as possible to the competent Afghan authorities.
- d) The control of crowds can only be performed by military sub-units prepared, equipped and fitted appropriately.

²³For example, the following are presented synthetically: *SPECIFIC EMPLOYMENT RULES AUTHORIZED BY ISAF (International Security Assistance Force) ON THE TERRITORY OF THE ISLAMIC REPUBLIC OF AFGHANISTAN* (0 variant).

Scope of application:

1. 10-GEOGRAPHICAL POSITION OF OWN FORCES
2. 13-PREVENTION OF THE INSPECTION ON BOARD, ARREST OR SEIZURE OF CIVIL PROPERTY
3. 15-WARNINGS
4. 16-CHANGES OF THE TRAVEL ITINERARY
5. 17-INSPECTION ON BOARD
6. 18- ARREST OR SEIZURE OF PROPERTY
7. 22- INFRARED AND VISUAL ILLUMINATION
8. 23-IDENTIFICATION OF POTENTIAL TARGETS BEFORE ENGAGING THEM
9. 28-TARGET INDICATION
10. 32-MEANS TO BE USED FOR THE CONTROL OF CROWDS
11. 33-THE USE OF FORCE IN DESIGNATED OPERATIONS
12. 35-PROHIBITION OR RESTRICTION OF THE USE OF SPECIFIC ARMS IN DESIGNATED CIRCUMSTANCES.
13. 37-THE USE OF ELECTRONIC COUNTERMEASURES (ECM)
14. 42-THE ATTACK.

²⁴Center for Army Lessons Learned, *Tactical Commander's Handbook. Information Operations*, NATO, US Unclassified 2005.

- e) Entering and conducting searches in buildings or dwellings inhabited by civilians, searching civilians and goods in their possession are activities that fall within the competence of the host nation's authority.

2. NATIONAL RESTRICTIONS:

- a. The Romanian forces execute missions only on the territory of the Islamic Republic of Afghanistan. Operations beyond the borders of Afghanistan are not authorized.
- b. Lethal force shall not be used on areas inhabited by civilians, civilian buildings or houses, religious facilities, museums, and cultural or historical works that are not used for military purposes.
- c. Crowd control missions such as civil disturbance operations (CDO), and respectively, crowd and riot control (CRC), are prohibited.
- d. It is prohibited to register biometric data of the civilian population, except for detained persons and persons who request access to ISAF displacement bases.
- e. The use of close air support (CAS), as well as indirect fire on residential areas is prohibited.
- f. The use of incendiary weapons is prohibited.
- g. The use anti-personnel mines is prohibited.
- h. It is prohibited to destroy bridges, tunnels, dams that are not used for military purposes.
- i. The punitive use of force (reprisals) is prohibited.
- j. Actions that may cause collateral damage or injure the local population that does not pose a threat to ISAF (the military coalition force) are not allowed.
- k. It is forbidden to engage in counter-narcotics operations, without the prior consent of the competent national authorities.
- l. The participation of Romanian contingent personnel in the questioning/interrogation of detainees who are suspected of collaborating with insurgents or of committing offences under the criminal law, during the carrying out of missions or of military operations together with the local sub-units, is prohibited.
- m. Romanian forces will not use anti-personnel mines.

CONCLUSION

Conclusions, through and under the coverage of justifiable causes, in particular legitimate defense, *rules of engagement* (ROE) are the means by which an authority (political, military) controls the use of armed force in a given political and military context, taking into account certain factors that will be examined at a later stage, in the form of national limitations and restrictions.

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ORDINANCE N^o. 53/2017 FROM AUGUST 4th, 2017. COMBATING UNLAWFUL LABOR, MODIFICATIONS OF IMPACT OF THE ROMANIAN LABOR CODE UNDER THE EMERGENCY¹

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ABSTRACT

By Law no. 40 / 2011 de modification of art. 16 par. (1) of the Labor Code has been radically changed as to the legal nature of the form of the individual labor contract. This has been changed from a test condition of the contract (ad probationem) to a validity (ad valitatem) Amendments to the Labor Code, by Emergency Ordinance No. 53/2017 of 4 August 2017, have as main purpose the fight against undeclared work, including during the duration of the employment contract

KEYWORDS: *individual labor contract, contract nullity, employment relationship, illegal work, contravention sanction and criminal offense.*

INTRODUCTION

The aim of legalizing undeclared work was to limit the unfavorable work - "black" - thus providing the employee with guarantees that, for his work, he would benefit from all the rights that are recognized by law in that capacity. In connection with this legislative amendment, the jurisprudence of the Constitutional Court stated that "the written conclusion of the employment contract is justified by the fight against employers' practices by which, taking advantage of the fact that the written form of the employment contract was merely a probumenal instrument, were evading taxes and duties owed to the state budget or the state social security budget due to the effect of the conclusion of the employment contract. Such conduct is also negatively reflected in the social protection plan of the employee who does not have a contribution period for periods not worked by the employer to the competent authorities, nor for health or social insurance."²

I. THE NULLITY OF THE INDIVIDUAL LABOR CONTRACT, ON THE GROUNDS OF NON-OBSERVANCE OF THE WRITTEN FORM.

In accordance with Art. 16 par. (1) C. Work, republished, the individual labor contract is concluded in written form, in Romanian, based on the consent of the parties. The obligation to conclude the individual contract of employment in written form rests with the employer, irrespective of its legal status, whether it is a legal person, an authorized natural person or a natural person with full exercise capacity.

The written form represents one of the most important amendments to the Labor Code through Law no. 40/2011, becoming a condition of validity (ad validity) of the individual

¹Published in the Official Gazette of Romania no. 644 of August 7th, 2017

²Decision no. 383 of 23 March 2011, published in the Official Gazette of Romania, Part I, no. 281 of 21st April 2011

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labor contract, in the absence of which the contract can not be validly issued. For imposing the compulsory written form of the individual labor contract and removing any possibilities for circumvention of this mandatory provision, Law no. 40/2011 removes the following relative legal assumptions:

The employment report can only be validly issued by concluding the individual contract of employment in written form. The verbal agreement between the parties or the manifestation of their tacit will on the existence of an individual labor contract is sanctioned with absolute nullity.

The legal sanction that intervenes in the case of non-observance of the mandatory written form of the individual labor contract is not expressly provided by the Labor Code, but it results from all the provisions of the Labor Code, republished. Thus art. 16 par. (1) impose the mandatory written form of the contract, and art. 57 par. (1) establishes that the non-observance of any legal conditions necessary for the valid conclusion of the individual labor contract results in its absolute nullity.³

The absolute nullity of the individual labor contract on the grounds of non-compliance with the written form ad validity may be invoked at any time by any interested person and can not be subsequently covered by the confirmation of the employment relationship by its parties.

In the case of absolute invalidity motivated by the non-observance of the written form of the individual labor contract, the provision of art. 57 par. (3) C. Work, republished, which allows the invalidity of the individual labor contract to be covered by subsequent fulfillment of the conditions imposed by the law. The explanation is that, in the absence of written form, there is no individual labor contract whose vices can be covered later.

Prior to the adoption of Law no. 40/2011, the employee who did not have an individual written employment contract could prove the existence of the contract and the benefits provided by any means of proof. Once the employee provided this evidence, the court established the existence of contractual relations and ordered the employer to pay the wage and social security rights corresponding to the work performed by the employee.

Under the amendments to the Labor Code through Law no. mandatory in written form, ad validity condition. The justification for this rule is given by the application of the principle of symmetry of legal acts.

Law no. 40/2011 criminalizes the admission of more than 5 people, irrespective of their citizenship, without the conclusion of individual employment contracts. At the same time, it was criticized for the admission of a person in a situation of illegal stay in Romania, although the employer knows that she is a victim of trafficking in human beings.

The criminal sanction of unlawful labor was not a premiere in Romanian labor law. Law no. 130/1999 regarding certain measures for the protection of the employed persons criminalize the repeated use of the work without legal forms. However, this normative act was repealed shortly before the entry into force of Law no. 40/2011.

In fulfilling the duties established by Law no. 108/1999 on the establishment and organization of the Labor Inspection, the labor inspectors control all aspects related to the employment and termination of the activity of the persons performing any activity under an individual labor contract.

The identification at one employer's level of more than 5 persons carrying out non-legal activity or, as the case may be, the identification of a person in a situation of illegal residence in Romania who performs an activity without having an individual employment contract determines the notification of the research bodies criminal .

Active subject of the offense:

³A.Ticlea The Labor Code Commented Ed A Has Revised and Added You, Publishing House UniversulJuridic, Bucharest 2014

According to the previous regulation of the offense of receiving unlawful work, under Law no. 130/1999, the active subject was identified either in the person of the director, the administrator, the legal representative or another person empowered by the employer - legal person, or in the person of the employer - natural person. In all cases, the offense could only be committed by a natural person.

Law no. 40/2011 no longer identifies persons who can be held criminally liable in the case of non-legal work. Moreover, the additional punishments stipulated by this normative act are applicable especially to legal persons. As a consequence, we have to accept that at present, the active subject of criminal liability can be not only the employer - a natural person and the natural person empowered by the employer - a legal person, but the employer itself - a legal person. The principal punishment applicable to the employer - legal person is the criminal fine, plus one or more additional punishments from those provided under art. 265 par. (4) C. Work, republished.

Criminal participation is possible in the case of these crimes, especially in the form of co-author.

The passive subject of the offense:

In the case of the offense provided by art. 264 par. (3) C. of the work, republished, the quality of the passive subject is the persons identified by the labor inspectors, who work under the subordination of an employer, without having concluded individual labor contracts. These are at least 6 people identified under the above conditions.

In the case of the offense provided by art. 265 par. (2) C. Work, republished, the status of a passive subject is the person in a situation of illegal residence in Romania who is a victim of illegal trafficking in persons who performs a professional activity without having concluded an individual employment contract. The employer must know in this case the appearance that the alien or stateless person is a victim of trafficking in human beings.

The objective side of the offense:

In the case of the offense provided by art. 264 par. (3) C. of the work, republished, the material element of the objective side is made by identifying, for the same controlling action, by one employer, more than 5 persons who carry out professional activity without having concluded individual labor contracts. In the framework of the previous regulation of this crime by Law no. 130/1999, the material element consists in the repeated use of persons for carrying out paid activities, without complying with the legal provisions regarding the conclusion of the individual labor contract. Under the conditions established by Law no. 40/2011, repeated identification at the level of an employer of persons who perform non-legal activity can only be sanctioned from a contravention point of view, as long as the number of identified persons is below the criminal penalty (up to 5 persons). As the employer hires up to 5 or more than five people without an employment contract, its liability is different.

According to art. 260 paragraph (1) lit. e) of Law no. 53/2003 - Labor Code, republished in the Official Gazette no. 345/2011, as subsequently amended and supplemented, constitutes a contravention and sanction the admission to employment of up to 5 persons, without the conclusion of an individual labor contract, according to art. 120 and 240 days-fine, when the law provides for the alternative fine to imprisonment for a maximum of two years; 180 and 300 days-fine, when the law provides for the alternative fine punishment with more than 2 years' imprisonment.

If the offense committed has sought to obtain a patrimonial benefit, and the punishment provided by law is only a fine or the court opts for the application of this penalty, the special limits of the days of the fine may be increased by a third.

We see the rigidity of the current regulation, which does not allow the application of the ablation system to establish the right of the offender to pay half of the minimum fine established by the normative act within 48 hours after receiving the report.

In the exercise of the control activity, the labor inspectors identified numerous situations in which the employers used more than 5 persons, without concluding an individual labor

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contract, thus falling under Art. 264 of the Law no. 53/2003 - Labor Code, and employing the employers' criminal liability.

Analyzing the way of solving these criminal cases, in almost all cases, the criminal investigating body and the court pronounced solutions not to initiate criminal prosecution or acquittal, as the case may be, considering the lack of social danger of the deed.

Thus, the impact of setting up the crime of having more than 5 people without an individual employment contract as an offense was not the one expected, which has led to a deprivation of regulatory effects and discrimination between employers and sanctioned offenders within the maximum limit of the fine regulated by the provisions of art. 260 paragraph (1) lit. e), respectively up to 100.000 lei for 5 persons identified without a labor contract, and employers in the situation regulated by art. 264 par. (4) who, following the analysis of the criminal offense, are sanctioned with a possible administrative fine, the amount of which is extremely low (500-1 000 lei).

The penal sanctions applied have been ineffective, in the vast majority of cases the investigation of the criminal file generates consequences contrary to the intention to regulate, and the costs occasioned by the trial of the criminal file remained with the state, generating the reduction of the revenues to the state budget of the amounts from the contravention fines applied for undeclared work, since the offender was not encouraged to pay the fine for the fine, namely to pay half of the fine imposed within a period of 48 hours.

II. COMBATING UNDECLARED WORK

Amendments to the Labor Code, by Emergency Ordinance no. 53/2017 of August 4, 2017, have the main purpose of combating undeclared work, including during the duration of the employment contract. This regulation creates the possibility of verifying in real time the form of employment of the persons who carry out activity at the controlled work place, through the immediate confrontation of the data existing in the documents with those submitted in the general register of the employees' records

Undeclared work is a phenomenon of increased gravity facing society, with negative consequences on both the worker and the state budget manifested in different forms, both by not declaring to the authorities the entire activity of the employee and by the partial declaration of its activity.

The Romanian legislation until the amendments were enacted by the Emergency Ordinance no. 53/2017 did not provide a definition of undeclared work, with the Labor Code penalizing only the fact of receiving a person's work without writing the individual labor contract before starting work, and not other forms of undeclared work.

In this context, it was necessary to adapt the national legislation to the new challenges faced by the authorities in their efforts to prevent and combat this phenomenon, including by regulating situations that constitute undeclared work, regulation without which these facts can not be sanctioned

Thus, in order to streamline the control activity to combat undeclared work, as well as to define more clearly the sanctioning regime of undeclared work in Law no. 53/2003 - The Labor Code, by amending the sanctioning regime of this act, in order to eliminate the limit of 5 persons, currently established by the Labor Code, for the framing of the act as contravention.

The recent amendments to the Labor Code, by the Emergency Ordinance no. 53/2017 of August 4, 2017, have the main purpose of combating undeclared work, including during the duration of the employment contract.

The following key changes have been made to the Labor Code over the factual situations that can be circumscribed to the concept of undeclared work:

- receiving a person's work without the conclusion of the individual work contract in written form on the previous day
- receiving a person's work without transferring the employment report to the general register of employees at the latest on the day before the start of the activity;
- getting an employee to work while he / she has a suspended individual work contract;
- the employment of an employee outside the working hours established under the individual part-time work contracts.

Another amendment establishes that the admission to work of a person illegally in Romania knowing that she is a victim of trafficking in human beings is a crime and is punished by imprisonment from 3 months to 2 years or by a fine. Tightening the contravention regime applicable to undeclared work by establishing a fixed amount of the fine of 20000 lei for each person identified as pretending the undeclared work for the first three possible situations mentioned above and 10000 lei for receiving an employee outside the program fixed in individual part-time employment contracts.

At the same time, it may be ordered in some cases the complementary sanction to cease the activity of the organized work place under control, based on a procedure to be developed. In order to encourage the offender to pay the fine of the fine, it was possible to pay half of the fine within 48 hours from the date of communication of the sanctioning protocol. On the other hand, criminalization was criminalized as an offense of the employer's deed, who received more than 5 people to work without concluding an individual labor contract, starting from the fact that, in most cases, such cases were pronounced classification (not respecting the objective envisaged by the legislator by criminalizing the facts in question). Also, as I have shown above, undeclared work may also exist in the context of the lack of an individual written employment contract.

The recent amendments to the Labor Code have brought to our attention the employers' obligations;

- the copy of the individual labor contract must be kept, by the employer, at the workplace (and not only at the employer's premises) for the employees who work in that place
- the additional acts on the individual labor contracts must be concluded before the implementation of the changes (except where they result from the law or from the applicable collective labor contract)
- the start and end hours of the work program must be highlighted.

Adopting the above-mentioned measures in such a short time affects employers who have fulfilled their duties in a timely and timely manner and who did not have the time to adapt their conduct in line with the new regulations. We refer in particular to the requirement for a system to highlight the start and end time for each individual employee.

The old regulation also required the employer to keep records of hours worked, but the regulation was general.

According to the new regulation, this evidence will have to be kept daily and include the start and end hours of the activity. Specifically, each employer will have to decide internally on how to organize this record, depending on the specifics of its activity, as well as its resources (card access systems, physical registers or electronics etc.).

I appreciate that it will be difficult for employers, as they will have to analyze, decide and implement the new issues, taking into account the significant sanctions to which they may be exposed through non-compliance. The employer has the obligation to keep a copy of the individual labor contract and the records of the working time provided by each employee on a daily basis, with an indication of the starting and ending hours of the work program.

CONCLUSION

We appreciate that the amendments to the Labor Code, by the Emergency Ordinance no. 53/2017 comes to the benefit of the employee who, in the case of black work, has the majority

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of the benefits of an individual employment contract, the main drawback being that he will have a lower pension.

The undeclared work was introduced in the late 1990s by the European Commission and defined as "all remunerated activities that are mainly legal but are hidden from the state in the sense that they are not declared to public authorities even if their declaration is required by the system "Generally speaking, we talk about two main forms of non-legal work: - the employee provides, consciously or not, work without the conclusion or absence of an individual employment contract, whether it be a period of time day work, of an activity of limited or unlimited duration - we are dealing with "black work" in which no taxes and social contributions are paid at all, the employee not being able to enjoy the benefits of an employment contract legal; - the employee has an individual employment contract, but either he / she is declared a lower salary than he / she is receives in fact (often the minimum guaranteed salary is declared), the difference being directly received ("salary in the envelope"), or the salary is declared fair, but the employee often performs additional work above his / her working norm, the part of the salary corresponding to it is also "enveloped" - this is " gray.

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5. Decision no. 383 of 23 March 2011, published in the Official Gazette of Romania, Part I, no. 281 of 21 April 2011.

CONSIDERATIONS OF CRIMINAL LAW AND FORENSIC SCIENCE REGARDING THE ILLEGAL ACCESS TO A COMPUTER SYSTEM

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ABSTRACT

Starting from the provisions of Article 2 of the Council of Europe Convention on Cybercrime and from the provisions of Article 3 of Directive 2013/40/EU on attacks against information systems, the present study analyses how these provisions have been transposed into the text of Article 360 of the Romanian Criminal Code. Illegal access to a computer system is a criminal offence that aims to affect the patrimony of individuals or legal entities.

The illegal access to computer systems is accomplished with the help of the social engineering techniques, the best known technique of this kind is the use of phishing threats. Typically, phishing attacks will lead the recipient to a Web page designed to simulate the visual identity of a target organization, and to gather personal information about the user, the victim having knowledge of the attack.

KEYWORDS: *illegal access; computer system; phishing; attack.*

INTRODUCTION

The offence of illegal access to a computer system is provided by the Article 360 from Chapter VI, entitled *Offences against the safety and integrity of computer systems and data* from the Romanian Criminal Code. The legal text states:

“(1) Access, without right, to an information system, shall be punishable by imprisonment from 3 months to 3 years or by fine.

(2) The act referred to in paragraph (1), committed in order to get computer data, and shall be punishable by imprisonment from 6 months to 5 years.

(3) Should the act referred to in paragraph (1) was committed in relation to an information system to which, through some procedures, devices or specialised programs, the access is restricted or forbidden for certain categories of users, the punishment is imprisonment from 2 to 7 years”.

The offence of illegal access to an information system is stipulated in a simple form, which prohibits the access without right to an information system (paragraph 1) and two aggravating variants, consisting in committing the act referred to in paragraph 1 in order to obtain computer data (paragraph 2), as well as in committing the act referred to in paragraph 1 in relation to an information system to which, through some procedures, devices or specialised programs, the access is restricted or forbidden for certain categories of users (paragraph 3).

By *access* it is understood any successful interaction with an information system, computer or mobile phone, entering the whole or just a part of the computer system¹. Access without right to an information system means, for the purpose of Article 35 (2) of Law no.161/2003² on some measures

¹Spiridon, Ionuț Ciprian (2008). *Reflecții cu privire la legislația română în domeniul criminalității informatice*, [Reflections on the Romanian legislation on cybercrime], in Law Review no. 8, p. 243.

² The Romanian Official Gazette no. 454 from the 21st of April 2003.

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to ensure transparency to exercise public dignities, public office and business environment, prevention and to sanction corruption, that such person is in one of the following situations:

- a) is not authorized, under a law or a contract;
- b) exceeds the limits of authorization;
- c) does not have the permission, from the competent natural or legal person, pursuant to law, to give, use, administer or control an information system or to carry out scientific researches or to carry out any other operation in an information system.

Access means an “interaction of the perpetrator with concerned computer technology, through the equipment or different components of the concerned system”³. Thus, the modality of illegal access of information system may be carried out closely, directly by the person in front of the information system, but it may also be carried out from distance, through communication public networks⁴.

I. CRIMINALIZATION OF THE OFFENCE OF ILLEGAL ACCESS TO A COMPUTER SYSTEM WITHIN THE CONVENTION OF THE COUNCIL OF EUROPE ON CYBERCRIME

Article 2 of the Council of Europe Convention on Cybercrime⁵ refers to unlawful access, which consists in getting into a computer system, in whole or in part, without right. The offence of illegal access to a computer system is committed by infringement of security measures with the intent of obtaining computer data or with other dishonest intent, or in relation to a computer system that is connected to another computer system. Therefore, this article covers hacking into a computer system⁶. The offence is relatively easy to commit through the Internet, which allows multiple types of connections, from a simple unencrypted connection to a multi-level security connection.

The term *access* does not specify specific means of communication, but is open to future technical developments⁷. Therefore, this term includes all the means of entry into a computer system, including attacks on the Internet, as well as illegal access to wireless networks⁸. This broad approach demonstrates that illegal access covers not only the subsequent technical developments, but also covers the unauthorized access to computer data by intruders or employees⁹.

As with other offences covered by the Council of Europe Convention on Cybercrime, the Article 2 of the Convention also requires the offender to commit the offence of illegal access with intent. However, we note that the Convention does not define the term *with intent*. In the

³Dobrinioiu, Maxim (2006). *Infrațiuni în domeniul informatic*, [Crimes in the IT field], Bucharest: C.H. Beck Publishing House, p. 149.

⁴Vasiu, Ioana; Vasiu, Lucian (2011). *Criminalitatea în cyberspațiu*, [The criminality in cyberspace], Bucharest: Universul Juridic Publishing House, p. 145.

⁵The European Council Convention on cybercrime was adopted at Budapest 23rd of November 2001. Retrieved 25th of October 2017 from: <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/185.htm> The European Council Convention on cybercrime was ratified by Romania through the Law no. 64/2004, published in the Romanian Official Gazette no. 343 from the 20th of April 2004.

⁶Savin, Andrej (2013). *EU Internet Law*. Cheltenham, Glos: Edward Elgar Publishing Limited, pp. 236-237.

⁷Gercke, Marco (2009). Council of Europe. Economic Crime Division. Directorate General of Human Rights and Legal Affairs. Strasbourg, Octopus Interface 2009, *Cybercrime training for judges: Training manual (draft)*, March 2009, p. 27, Retrieved 25th of October 2017 from:

http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy%20activity%20interface%202009/IF_2009_presentations/default_en.asp.

⁸Gercke, Marco (2012). International Telecommunication Union. *Understanding Cybercrime: Phenomena, Challenges and Legal Response*, p. 179, Retrieved 25th of October 2017 from: www.itu.int/ITU-D/cyb/cybersecurity/legislation.html.

⁹Computer Security Institute (2007). *CSI Computer Crime and Security Survey 2007*, p. 12, Retrieved 25th of October 2017 from: <http://gocsi.com/survey>.

Explanatory Report to the Council of Europe Convention on Cybercrime, the legislators emphasized that the term *with intent* should be defined at national level. The illegal access to a computer system to fall under the provisions of the Article 2 of the Council of Europe Convention on Cybercrime must be done without right. The Convention's legislators also underline that testing or protecting the security of a computer system, authorized by an owner, and is done with right.

We believe that the illegal access to a computer systems is in most cases not the end of the illegal act committed by the offender, but rather the first step towards committing additional offences, such as alteration or obtaining stored data.

II. CRIMINALIZATION OF THE OFFENCE OF ILLEGAL ACCESS TO A COMPUTER SYSTEM WITHIN THE DIRECTIVE 2013/40/EU OF THE EUROPEAN 3. PARLIAMENT AND OF THE COUNCIL OF 12 AUGUST 2013 ON ATTACKS AGAINST INFORMATION SYSTEMS

The offence stipulated by the Article 3 of the Directive 2013/40/EU¹⁰ on attacks against information systems refers to illegal access to information systems. This category of offences comprises a series of computer attacks, also known in the literature as *hacking*. The offence consists in committing intentionally the access without right to the whole or to any part of an information system, by infringing a security measure. The offence of illegal access to information systems must not be a minor case. In conformity with ground no. 11 of the Directive 2013/40/EU, a case may be considered minor “where the damage caused by the offence and/or the risk to public or private interests, such as to the integrity of a computer system or to computer data, or to the integrity, rights or other interests of a person, is insignificant or is of such a nature that the imposition of a criminal penalty within the legal threshold or the imposition of criminal liability is not necessary”.

The offender in the area of IT illegally accesses a computer system by infringing a security measure. The most commonly encountered security measures used against illegal access to a computer system are the following: passwords, access codes and encryption codes.

III. ANALYSIS OF THE OFFENCE OF ILLEGAL ACCESS TO A COMPUTER SYSTEM REFERRED TO IN ARTICLE 360 OF THE ROMANIAN CRIMINAL CODE

III.1. The pre-existing conditions

III.1.1. The object of the crime

The special legal object of the offence of illegal access to a computer system is the social relations that concern the security of the computer system, its inviolability and which are able to guarantee the confidentiality and integrity of both the computer data and the computer systems¹¹.

The material object of the offence of illegal access to a computer system consists of the components of the computer system on which the criminal activity was directed (such as, for example, the data storage disks) or through which access was made without right (for example, the computer network components). In the case of the variant under paragraph (2),

¹⁰Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JAI, Official Journal of the European Union, 14.08.2013, L218/8.

¹¹ Romanian Information Technology Initiative; Romanian Government (2004), *Ghid introductiv pentru aplicarea dispozițiilor legale referitoare la criminalitatea informatică* [An introductory guide to the application of legal provisions on cybercrime], Bucharest, p. 57, Retrieved 25th of October 2017 from: <http://www riti-internews.ro/ro/ghid.htm>.

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the material object will consist mainly in the material entity on which the computer data is stored and on which the committed activity is directed¹². Therefore, we consider that this incrimination is intended to protect by criminal means the confidentiality and integrity of the computer systems and the data hosted by them.

III.1.2. The subjects of the crime

The active subject can be any person who meets the general conditions of the law for criminal liability.

Usually the offender of such an offence is a person who has skills or technical knowledge in the field of information technology, being familiar with the IT security systems and the vulnerabilities of these systems¹³.

Participation is possible in all its forms: co-author, instigation and complicity.

The passive subject of the offence of illegal access to a computer system is the natural or legal person who bears the damage caused by the commission of the offence, this being, as a rule, the owner of the computer system accessed without right or another natural or legal person who is prejudiced by accessing the computer data of interest to the offender.

There may also be one *passive secondary subject*, where the computer system concerned by the illegal access concerns a natural or legal person other than the owner or the right holder of that computer system¹⁴. For example, the offender illegally accesses a customer database of a bank by obtaining information about their financial situation or other personal data.

There may also be one *collective passive subject*, made up of several natural or legal persons, where access to the computer system automatically generates illegal access to other computer systems of the same type interconnected with the first¹⁵.

III. The constitutive content

III.2.1. The objective side

The material element of the offence of illegal access to a computer system is accomplished by an access activity without right to a computer system.

The illegal access to a computer system can be accomplished through several types of actions:¹⁶

- a. authenticate – present one's identity to a program and, if necessary, verify that identity in order to gain access to the target system;
- b. bypass– avoiding a process or program using an alternative method to access the target;
- c. read – obtaining the content of a data environment;
- d. copy– copying the target without modifying it;
- e. steal – taking possession of a target without keeping a copy in the original location.

In order to gain illegal access to a computer system, the cybercriminal will try to use several types of dangerous attacks, such as: the password attack, the free access attack, the attack

¹²Vasiu, Ioana; Vasiu, Lucian (2007). *Informatică juridică şi drept informatic*, [Legal informatics and IT law], Cluj-Napoca: "Albastră" Publishing House, p.127.

¹³Vasiu, Ioana; Vasiu, Lucian (2001). *Totul despre hackeri*, [Everything about hackers], Bucharest: Nemira Publishing House, p. 151-152.

¹⁴Dobrinioiu, Maxim (2006). *Infraţiuni în domeniul informatic*, [Crimes in the IT field], Bucharest: C.H. Beck Publishing House, Bucharest, p. 148.

¹⁵Ibidem.

¹⁶ Romanian Information Technology Initiative; Romanian Government (2004), *Ghid introductiv pentru aplicarea dispoziţiilor legale referitoare la criminalitatea informatică* [An introductory guide to the application of the legal provisions on cybercrime], Bucharest, p. 58, Retrieved 25th of October 2017 from: <http://www.riti-internews.ro/ro/ghid.htm>.

exploiting technology weaknesses, the attack exploiting shared libraries, the IP hijacking, and the TCP hijacking.

The criminal legislator provides for the aggravating version of the Article 360 paragraph 3 of the Romanian Criminal Code that illegal access is made by using specialized procedures, devices or programs that override security measures, which should restrict or prohibit illegal access for certain users. So, we believe that the cybercriminal will illegally access the computer system by violating these security measures.

Immediate consequence represents the second mandatory component of the objective side and refers to the prejudice of the social value protected by the criminal law, in this situation being the security of the information systems, or a state of danger, or threat created for that value.

There must be a causality link between the activity of the offender and the immediate consequence. In the case of illegal access in a simple form, the causality link results from the materiality of the deed, while for the other two forms of aggravating illegal access in the literature¹⁷ it was considered that the forcing of security measures had to be proven.

III.2.2. The subjective side

For the existence of an offence of illegal access to a computer system it is necessary that the offence be committed with guilt. In this situation, the form of guilt necessary is both the direct and indirect intention. In the variant from the paragraph 2 of the Article 360 of the Romanian Criminal Code, the legislator also provides an essential condition for the purpose of achieving illegal access: obtaining computer data.

III.3. The forms of the offence

The preparatory acts (purchase or manufacture of devices for illegal access) are possible, but they are not criminalized for this crime and as such they are not punishable. However, certain preparatory acts are incriminated as self-contained offences, such as the offence provided by the Article 365 of the Romanian Criminal Code, which refers to illegal operations with computer devices or programs.

The attempt is possible and is punished according to the article 366 of the Romanian Criminal Code.

The consumption of the offence is attained when the access to the attacked computer system has been obtained without right, irrespective of the consequences of the access to the computer system and the data contained therein. The moment of illegal access to the computer system can be determined by specific technical means (for example, with the help of log files).

The exhaustion of the offence occurs at the time of committing the last act of illegal access to a computer system. The offence can be committed in a continuous form (illegal access existing over a longer period of time) or continued (repeated acts of illegal access to the same computer system and against the same passive subject).

III.4. Modalities

The offence of illegal access to a computer system presents a normative modality expressed through its material element, by access without right to a computer system. There are several modalities of doing this normative modality.

The offence of illegal access to a computer system also includes two aggravated modalities. The first aggravated modality is when illegal access is made to obtain computer data.

Thus, the cybercriminal acts with qualified direct intention of having a purpose, obtaining computer data, this purpose having to exist at the time of committing the act, being indifferent to the existence of the qualified form, whether the offender succeeds in obtaining such data or not, and whether the data sought by the offender was or not in the illegally accessed computer

¹⁷Hotca, Mihai Adrian; Dobrinoiu, Maxim (2008). *Infrațiuni prevăzute în legi speciale. Comentarii și explicații*, [Crimes under special laws. Comments and explanations], Bucharest: C.H. Beck Publishing House, p. 581.

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system. At the same time, we consider it is indifferent to the existence of the offence in this aggravated modality if the obtained computer data is public or not public, has commercial value or is of a different nature.

The second aggravated modality is when the offence is committed by using specialized procedures, devices or programs that override security measures that should restrict or prohibit illegal access for certain users.

III.5. Sanctions

The offences provided in the Article 360 of the Romanian Criminal Code are sanctioned as follows:

- the simple form (paragraph 1) shall be punished by imprisonment from 3 months to 3 years or by fine;
- the first aggravating form (paragraph 2) shall be punished by imprisonment from 6 months to 5 years;
- the second aggravating form (paragraph 3) shall be punished by imprisonment from 2 to 7 years.

III.6. Procedural Aspects

The criminal prosecution begins *ex officio*.

IV. FREQUENTLY USED TECHNIQUES BY CYBERCRIMINALS FOR THE PURPOSE OF ILLEGAL ACCESS TO COMPUTER SYSTEMS AND NETWORKS

IV.1. Phishing

Phishing represents a practice of sending fake e-mails, or spam, written to appear as if they had been sent by banks or other respectable organizations, with the intention to lure the recipient into disclosing important information, such as usernames, passwords, account IDs, PIN codes of some credit cards¹⁸. Typically, phishing attacks will lead the recipient to a Web page designed to simulate the visual identity of a target organization, and to gather personal information about the user, the victim having knowledge of the attack.

Obtaining this type of personal data is attractive to criminals, because it allows attackers to impersonate their victims and to make fraudulent financial transactions. Victims often suffer significant financial losses or their whole identity is stolen, usually for criminal purposes.

Over time, the definition of what constitutes a phishing attack has become blurred and expanded.

The term *phishing* covers not only getting the user account details, but it now covers access to all personal and financial data¹⁹.

What originally prompted deceiving users to answer e-mails for passwords and credit card details, it has now has extended to false Web sites, installing Trojan horses, key-logger and screen capture, which are all delivered by any electronic communication channels. Given the success of this type of crime, an extension of the classic phishing fraud includes the use of fake Web sites about workplaces or job offers.

The first step of this mode of operation is the creation of fake websites that imitate the pages of known financial institutions such as banks or retailers conducting online transactions with the use of credit cards. Once created, these fake sites are hosted by Internet service providers.

¹⁸The HoneyNet Project. *Know Your Enemy: Phishing*, Retrieved 25th of October 2017 from: <http://www.honeynet.org/papers/phishing>.

¹⁹Ollmann, Gunter. Next Generation Security Software Ltd., NGSSoftware Insight Security Research, *The Phishing Guide. Understanding & Preventing Phishing Attacks*, p. 4, Retrieved 25th of October 2017 from: <http://www.ngssoftware.com/papers/NISR-WP-PHISHING.PDF>.

Hosting can also be realized with no authorization on certain servers, or by paying for this service fraudulently, with electronic payment means.

The next step is to obtain the e-mail addresses of the clients of these financial institutions, which is realized by certain specialized programs, or through unauthorized access to databases containing this information.

After obtaining the customers' e-mail addresses, they are sent messages as if these messages came from the real financial institution whose website has been forged, by asking customers to enter their credit card data (credit card number, expiry date and PIN code), by giving various excuses.

Regarding the legal status of phishing, it should be noted that phishing is not specifically criminalized in the Romanian legislation. If the offender commits the act by spoofing²⁰, by simulating e-mail or by rewriting the URL, the act constitutes the crime of computer-related forgery, which is provided by the article 325 of the Romanian Criminal Code.

Phishing can also fall within the crime of deceit under the article 244 of the Romanian Criminal Code, when the act of sending messages in order to obtain the identification data of an account or a person produces a loss. Moreover, from our point of view, phishing could be criminalized by the article 249 of the Romanian Criminal Code, which refers to the crime of computer-related fraud.

IV.2. Phishing threats

Phishing attacks are based on a combination of technical deceit and social engineering practices. In most cases, the attacker must persuade the victim to deliberately perform a series of actions that will give the attacker access to confidential information²¹.

Communication channels such as e-mail, web pages, IRC (Internet Relay Chat) and instant messaging services are used by the majority of the population. In all cases, the attacker has to play the role of a trustworthy source so that the victim believes it. The most successful phishing attack was initiated via e-mail, where the attacker plays the role of the referral authority (e.g., spoofing the source e-mail address).

IV.2.1. Distribution of phishing messages based on e-mail and spam

E-mail-based phishing attacks are the most common. Using techniques and tools used by spam, attackers can distribute misleading emails to millions of legitimate email addresses in just a few hours. In many cases, address lists used to distribute phishing e-mails are purchased from the same sources used by conventional spam.

Examples of techniques used in phishing emails:²²

- a. Searching for and officially probing emails.
- b. Copying corporate emails with minor URL (Uniform Resource Locator) changes.
- c. E-mails sent in HTML format used to cover the information of target URL address.
- d. Viruses and worms attachments to e-mails.
- e. Including spam detection techniques.

IV.2.2. Web-based phishing distribution messages

An increasingly popular method of phishing attacks is the malicious content of websites.

Examples of web-based phishing spamming techniques:²³

- a. Including hidden HTML (HyperText Markup Language) links inside known websites.

²⁰ The term *spoofing* refers to the act of presenting that the computer data come from another source than the original one, by hiding from the addressee the true origin of data.

²¹ Ollmann, Gunter. Next Generation Security Software Ltd., NGSSoftware Insight Security Research, *The Phishing Guide. Understanding & Preventing Phishing Attacks*, p. 5, Retrieved 25th of October 2017 from: <http://www.ngssoftware.com/papers/NISR-WP-PHISHING.PDF>.

²² Idem, p. 6.

²³ Idem, p.7.

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- b. Use of counterfeit advertising messages to lure buyers.
- c. Use Web-bugs to track a potential client in order to prepare for a phishing attack.
- d. Introducing a malicious content into a webpage that exploits a known vulnerability in the customer's web browser software and installing by the attacker of a software (for example, Keylogger, Backdoor, Trojan horses, etc.)
- e. The abuse of trust relationships concerning the configuration of the customer's web browser for the use of authorized components that use site scripts.

CONCLUSIONS

Illegal access to an information system is a means-offence which is aimed at affecting the patrimony of natural or legal persons²⁴. We consider that Romanian legislators should modify both the title and the content of the Article 360 of the Romanian Criminal Code (illegal access to an information system), as from the technical point of view illegal access is carried out *within an information system, notto an information system*.

We noticed that the provisions of the Article 2 (illegal access) of the Council of Europe Convention on cybercrime, as well as the provisions of the Article 3 (illegal access to information systems) of the Directive 2013/40/EU on attacks against information systems were transposed in the Article 360 of the Romanian Criminal Code.

Finally, we believe phishing is the creation of messages sent by e-mails and webpages that are accurate reproductions of existing sites to mislead users to disclose personal and financial data, or passwords. Therefore, phishing e-mails appear to be sent from a bank, an insurance company, a trader or an electronic payment processor.

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²⁴Reed, Chris; Angel, John (2007). *Computer Law. The Law and Regulation of Information Technology*. Sixth Edition. Oxford: Oxford University Press, pp. 565-567.

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UNDUE PAYMENT OF GOODS BETWEEN ROMAN TRADITION AND THE PRESENT TIME

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ABSTRACT

Undue payment is one of the numerous legal institutions created by the eminent Roman legal advisers, who, by exquisitely developing the legal technique and practice would create that certain tool which would valorize the subjective rights in regard to reestablishing the equilibrium and the equivalence which the parties of a legal obligation report owe to one another, within an uncorrupted legal circuit; these institutions would later prove their viability and permanence across centuries, being reconfigured according to the new factors which configure law in the modern and contemporary age within the continental system of law.

KEYWORDS: *payment, unjust enrichment, legal fact, civil obligation, quasi contract*

INTRODUCTION

The principle of equity which would later become one of the postulates of Roman law, was expressed in the phrase used by Celsus according to which, *Jus est ars boni et aequi*,¹ is suggestively shown in the legal construction named “undue payment”, an institution seen by the Roman lawmakers as of one the forms of manifestation of quasi contracts, in regard to the effects it causes.

Although quasi contracts were known as distinctive sources of civil obligations, in Roman doctrine they were seen as those licit legal acts which would produce legal effects similar to those which reside in contracts². Thus, in regard to the form, there are some differences between contracts and quasi contracts, while in regard to the legal effects they cause, there are certain similarities which lead to perfect symmetry.

Undue payment aims to terminate an obligation; in reality it expresses the licit legal deed seen as a distinctive source of obligation. The mechanism of this legal operation resides in the fact that a person performs a payment by error, which was in fact not owed to the person known as accipiens.

In a subsequent age, Pomponious would rephrase the principle of equity and equivalence of performances in the light of natural law by showing that “according to natural law it is equitable that no one would unjustly enrich by causing damage to another person”³.

According to the principle of equity, the person who made an undue payment had the right to demand the restitution of payment, namely the repeat of the undue performance⁴, an issue which, a few centuries later, would be expressed under the direct influence of Roman law, in the regulation of article 1092 first alignment of the 1864 Civil Code, which stated that “any payment entails a debt; that which was paid without being owed is subject to repetition in

¹E. Molcuţ, D. Oancea, *Roman law*, Sansa Publishing House, Bucharest, 1993, page 6

²Ibidem, page 309

³D.50.17.20.6

⁴A.E. Gittard, R. Villers, *Droit romain et ancien droit français. Les obligations*, Paris, 1976, page 295

regard to the conditions in which it was performed, as well as in regard to the effects which it produces; all these would later be regulated in article 992-998 of the old Civil Code. In the light of the new Civil Code according to article 1470 “any payment entails a valid debt; if the payment occurred in the lack of a valid legal obligation, the person who pays without owing would be entitled to restitution” (see article 1341, first alignment).

Even if the term for payment, by its semantics, indicates that providing an amount of money of transferring property, would synthetically be expressed in the modern age, by showing that by payment “*latosensu*”, we mean the execution in nature of an obligation whose object can be different, starting from providing an amount of money or performing any other activity (see article 1469 second alignment of the new Civil Code).

In order for a person to be held to perform a payment, a valid debt must exist; otherwise the payment is undue.

The fundament of the legal nature of undue payment would be qualified by most roman practitioners as a practical application of unjust enrichment.

This is partially true as in the opinion of Roman practitioners, starting from the fact that, in a particular approach in a specific case, if either an amount of money or any goods would be received without being owed, they are to be returned. When performing a systematic analysis, there are no essential differences between unjust enrichment and undue payment.

However, the fact which made possible a certain connection between these two institutions in regard to the legal effects they cause was the postulate which would govern the system of “*juscivilae*” according to which good faith – *ex bona fidae* – must direct the conduct of civil law subjects within the civil circuit.

A fortiori, in the old age, when merchandise exchange were rare, given the natural character of economy, the legal relations, especially the civil ones, were created between people who had complete confidence in one another; furthermore, the excessive formalism of legal acts derived from the will agreement of the parties and was subject to the this legal concept with strong moral characteristics. From the perspective of this historic-legal relation, specialty doctrine publicly stated the fact that - good faith - as a constant of law is practically presumed – *boe fides praesumitur* – when concluding any legal act.

This postulate of Roman law was perpetuated until the modern and contemporary age, as under the influence of the law school built by the eminent Roman legal advisers of the classic and post classic age, where we find this principle of presumed good faith, rephrased under a modern form, a principle with strong socio-human implications.

Thus, the 1804 Napoleon Civil Code expressly states this principle in article 2268 which stated that “*La bonne foie et toujourspresumee*”, a legal regulation also found in the 1864 Civil Code which states in article 1899 second alignment that - “Good faith is always presumed” - while in the new Civil Code, the Roman concept is expressed in the following manner, in article 14 second alignment - “Good faith is presumed until proven otherwise”.

This subjective conditions with strong moral significance is particularized in the contractual relations where it is directly applied in the matter of civil obligation thus “*de plano*” forbidding double payment for any performance derived from a contract, thus – *Bona fides non partiturutbis idem exigatur*.

In the opinion of Roman legal advisers of the classical age, undue payment was a form of unjust enrichment⁵. This solution was based on the principle of equity which emphasized an ethic aspect and a legal interdiction according to which the deed of the person who would enrich at the expense of another person, which made possible the creation of a legal identity between undue payment and unjust enrichment.

It is however obvious that, in case of transferring values form one patrimony to another, this is achieved without the consent of the person who is impoverished and without the guilt of the

⁵C. Murzea, *Roman law*, All Beck Publishing House, Bucharest, 2003, page 295

enriched person⁶, as if we were in the presence of this situation, the general provisions which govern the institution of tort civil liability would apply.

The essential difference is that, in case of undue payment, an apparent legal relation is presumed to exist between solvens and accipiens, namely between two subjects of law, with an apparent “contractual relation”, one being the creditor and the other one the debtor.

Solvens makes an erroneous payment, as in the first situation the payment was made to a creditor which does not in fact exist, but, in the end, the payment was made to a person other than the real creditor or, eventually an existing debt was paid by another person than the real debtor.

In the above mentioned situation “at least one of the parties is the real creditor or the real debtor and the person who makes the payment, does so by error, as otherwise we would be in the presence of a valid legal relation”.

In the current law, the two licit legal deeds seen as sources of obligations are sanctioned by distinctive actions; thus, in case of unjust enrichment the specific action – *actio de in rem verso* – is not identified with – *condictio sine causa* – namely the action on the repeat of the undue payment.

In Roman law, undue payment is seen as a particular situation of unjust enrichment, sanctioned by a – *condictio* - which practically achieves a true action of repeat which, as a result of praetorians’ intervention, would later become the – *condictio sine causa*.

In the old age, the *condictiones* were those personal actions by which “restitution of an amount of money or other fungible goods or other determined objects was requested”⁷, thus the source of the obligation was a literal contract or a *mutuum* contract.

Thus, *Silia* law introduces “*condictiocertaepecuniae*”, while *Capurnia* law “*condictiotriticaria*”.

However, it was not possible to establish if the general line of evolution or Roman law between the old age *condictiones* and –*condictioincerti* – which aimed the restitution of undue payment in the classical age, was a determination and influence relation; however the connecting element is the moral and legal fundament which entails the situation according to which someone is not allowed to enrich to the damage of another person. “*Jurenaturaeaequumest, neminem cum alteriusdetrimento et juriafierilocupletiores*”⁸.

For identical reasons, based on principles of factual symmetry, a continuity and evolution relation between “*condictiocerti*” of the classical age and the diverse forms of manifestation of the *condictiones* of the post classical age can’t be established, with express reference to Justinian’s law – *condictioindebiti*, *condictioabcausarumdatorum*, *condictioabturpemcausarum*, *condictioabiniustamcausamsicondictio sine causa*⁹.

This system, generically designed in the classical age by the expression– *condictio sine causa* – is subsequently completed in Justinian’s age under numerous forms of expression, according to their role and the area of application as shown above. However, we must mention that what was determined by *condictio sine causa* of the classical age is not identified in regard to the legal form with *condictio sine causa* as a special *condictio* of Justinian’s age. Regardless of the Roman age which we analyze and the form of *condictiones*, these entail the restitution of an undue performances which resulted in the unjust enrichment of a party at the same time another party was impoverished, a deed which would likely create an imbalance between the subjects of law; this imbalance was to be repaired by solvens returning the undue payment whose object could be different in regard to the shape regulated by the activity finalized as a result of the systematization of law performed in Justinian’s age.

⁶*Ibidem*

⁷I. Cătuneanu, *Elementary course of Roman law*, Cartea Românească Publishing House, Cluj, 1922, page 348

⁸D. 50-17.20.6

⁹I.Cătuneanu, *op.cit.*, page 350

The common denominator of all these conditions is that according to which the performance was made by error – *condictio indebiti* – whether it was made by fulfilling a dishonorable deed by the person who received payment – *condictio ab turpem causam* – or by expecting a licit fact which did not occur – *condictio causa data non secuta* – or the performance resulted in the payment of interest above the legal limit or the performance would result in the restitution of amounts of money paid as down payment for concluding a contract which was no longer concluded – *condictio sine causa*.

The task of providing evidence in order to obtain the restitution of performances would belong to the person who filed a complaint before the court, according to the following principle – *ei incumbit probatio qui dicit non qui negat*¹⁰.

In regard to the object of restitution, it would “return to the person who was entitled to own it, as modified when the good was unjustly taken from his patrimony, with all its accessories, fruits and so on”¹¹. In case the good was estranged, *accipiens* was held to return the usual price, as the fact that he sold someone else’s possession was considered, thus resulting in unjust enrichment.

By commenting and interpreting the classical texts and by the systematic analysis of the Digests “Unjust enrichment which is to be returned means all that was left to the plaintiff to use as a result of the value which was transferred without cause”¹². As a consequence “restitution was demanded, restitution of the good and the use which would have been the plaintiff’s”¹³, obviously in the situation in which he would have been of good faith.

If the good faith *accipiens* would have proved that the good was destroyed as a result of an emergency situation, he would not be held to return the good, thus considering that the rules which apply are those which regulate the situation of the bad faith person who, by receiving a undue payment commits a crime, namely theft, and, as a consequence the rule “*fur semper in mora*” would apply. Possession of such a stolen good can’t be achieved, as the conditions of useful possession were not met. Thus, it resulted in a particular situation of - *condictio indebiti* – sanctioned by *condictio possessionis*, which emphasizes the case according to which the object of restitution can be simple possession.

In the light of the above mentioned issues, we can conclude that all these conditions were nothing more than forms meant to valorize subjective rights in the form of personal actions of abstract character, as is the material fact which was the basis of the plaintiff’s claim and which would result in unjust enrichment.

The conditions would sanction those obligations derived from outside contractual relations which would connect the parties and regulate their legal conduct.

The regulation of undue payment also has a prevention component by not allowing debtors to double pay, a sanction which was applied in case a debt was denied but later proved in court, thus the debtors would rather pay and then, by filing an *condictio indebiti* would request repetition of payment, a situation which was favorable to them in those historic times “as the person who makes the payment would indirectly deny that he owes what he paid, but would not risk a double conviction”¹⁴.

Under the direct influence of Roman doctrine, there are similar present days opinions, sometimes even symmetrical opinions in contemporary judicial specialty doctrine, which converge toward the conclusion according to which undue payment is a form of unjust enrichment, but obviously the two licit deeds are always distinctive sources of obligations.

Undue payment is different from unjust enrichment without basis in regard to extent of the restitution obligation, as in the second case bad faith *accipiens* is held to pay damages to solvens for the entire prejudice, as well as by the specific forms of valorizing, namely the

¹⁰I. Cătuneanu, op.cit., page 350

¹¹D. 12.6.15

¹²I. Cătuneanu, op.cit., page 350

¹³*Ibidem*

¹⁴E. Molcuț, D. Oancea, op.cit., page 310

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actions which are distinctive *retractio in re verso* in case of unjust enrichment and the complaint for the restitution of undue payment¹⁵.

In **conclusion**, under the new Civil Code, the lawmaker regulated the two distinctive categories, by qualifying them as licit judicial facts which are sources of civil obligations.

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¹⁵I.Adam, Civil law, General theory of obligations, second edition, CH Beck Publishing House, Bucharest, 2014, page 270

CONSIDERATIONS REGARDING THE SPECIFICS OF THE TRANSACTION CONTRACT

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ABSTRACT

Transaction contract was and continues to be widely applied in legal life. The present study discusses the matters which particularize this contract in legal life, by analyzing its definition, its legal characters, by emphasizing the specifics of the validity conditions and the effects it generates.

KEYWORDS: *transaction, concession and mutual receding, prevention, ending litigation, validity conditions, effects.*

INTRODUCTION

According to article 2267 first alignment of the Civil Code, transaction is that contract by which the parties prevent or decide to end a trial, including in the phase of enforcement, by concession or mutual receding of certain rights or by the transfer of rights from one party to another. The definition of the transaction contract, points out the following issues:

- the parties aim to prevent or end litigation, which means that by concluding a transaction a trial can be prevented (thus we are in the presence of an extra judiciary transaction) or the transaction is concluded during the trial with the purpose of ending it (thus a judiciary transaction). In other words, transaction entails the existence of imminent/inevitable litigation or an already stated trial. At the same time, the parties' intention¹ is that of preventing or ending that particular trial. Transaction entails concession or mutual receding of rights or the transfer of rights from one party to the other. The text of article 2267 second alignment of the Civil Code states that by transaction the parties can create, modify or end different legal relations which are subject to litigation between the parties.

- judicial transaction can be concluded including in the phase of enforcement, thus also during trial, as well as in any phase of attack. If the transaction is concluded in the enforcement phase, we must mention that the transaction can't abolish the executed court decision; however, the parties will be limited to concluding a transaction in regard to the debt which is enforced.

1. JUDICIAL CHARACTERISTICS OF THE TRANSACTION CONTRACT

The transaction contract is particularized by the following legal characteristics²:

- it represents a mutual contract, as the parties have mutual and interdependent obligations through concession and mutual receding of rights or by the transfer of rights from one party to

¹ Doctrine appreciates that the parties' intention to end or prevent litigation, by concluding a transaction contract, represents the very essence of transaction. See R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 294.

² G. Boroi, I. Nicolae in G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 682-683.

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the other. Doctrine³ has stated that reciprocity of the effects of transaction is the essence of this contract, thus transaction is an essentially mutual contract.

- it is an onerous contract as both parties aim to obtain a patrimonial benefit by concluding the transaction, by avoiding trial or by preventing the continuation of a trial in return for any performance.

- it is a commutative contract as both parties are aware of the existence and extent of their obligation when concluding the contract

- it is an indivisible contract, as transaction is the result of a mutual concession and entails an indivisible connection between all the legal relations it entails, because it is indivisible in regard to its object.

- it is a consensual contract, as it is validly concluded by the simple agreement of the parties. According to article 2272 of the Civil Code, in order to prove a transaction, it must be concluded in writing. This means that it must be concluded in writing *ad probationem*⁴, and not *ad validitatem*. Thus, as a rule, transaction is a consensual contract; the exception is the case when transaction results in the transfer or creation of a real right on an immobile good⁵, as it requires the authentic form. Doctrine⁶ states that the notary act is only necessary in case of extra judiciary transaction, as in case of the judiciary transaction, the consent of the parties is regulated in the court decision, which is assimilated to an authentic act. This solution is erroneous⁷, as article 434 of the Civil Procedure Code states that the court decision has the proving force of an authentic act, thus the court decision is not assimilated to an authentic document in regard to all its effects (such as being a validity conditions for the conclusion of certain legal acts).

As a result, the authentic form is mandatory in case of the judicial transaction which results in the transfer or creation of a real right over an immobile good. According to article 439 of the Civil Procedure Code, judicial transaction is concluded in writing and it will form the actual content of the court decision. This court decisions is an executive title for all obligations which result from the transaction of the parties⁸.

2. SPECIFICS REGARDING THE VALIDITY CONDITIONS OF THE TRANSACTION CONTRACT

The special requirements for the conclusion of the transaction contract are the following: first, there must be a conflict of interest between the parties which could generate or has already generated litigation; second of all, the intention of the parties is to prevent litigation or end a pending trial; thirdly, the existence of mutual concession or mutual receding of rights or the

³ R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 295.

⁴ The written form is necessary in order to provide proof of transaction during a trial which is much more difficult than the one the parties tried to avoid. R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, pages 295-296.

⁵ According to article 1244 of the Civil Code, except for other cases stated by law, transactions must be concluded in authentic form, under the sanction of absolute annulment, in case they create or transfer real rights which are to be registered in the cadastral register.

⁶ See F. Moțiu, Special contracts, sixth revised and completed edition, Universul Juridic Publishing House, Bucharest, 2015, page 318 and R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 296.

⁷ G. Boroi, I. Nicolae in G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 682-683.

⁸ See article 632 second alignment and article 633 second point of the Civil Procedure Code

transfer of rights between parties⁹. All these special requirements¹⁰ of the transaction contract are stated in article 2267 of the Civil Code.

In regard to the capacity of the parties of the transaction contract, article 2271 of the Civil Code states, that in order to conclude a transaction, the parties must have full capacity to exercise the rights which form the object of the contract. Those who do not have this capacity can conclude a transaction only under the conditions stated by law. The final thesis of this article refers to the people who don't have exercise capacity; in their case, the transaction will be concluded by their legal representatives in their name, with previous notice to the tutelary authority. Transaction can be validly concluded by proxy, provided there is special empowerment for this. Transaction entails waving a right, thus it is equivalent to disposition acts, even if transaction does not necessary entail alienation¹¹, as the parties must have full exercise capacity.

In regard to the consent of the parties, the general common law validity conditions must be respected (thus consent must come from a person with exercise capacity, it must be expressed with the intent of causing legal effects and it must be freely expressed)¹², as there are no specifics to point out. In this context, we must mention the provisions of article 2273 of the Civil Code, a text according to which transaction can be affected by the same annulment causes as any other contract. Given all these, it can't be annulled for an error of law regarding the issues which are the object of the parties' agreement, or for lesion. This matter will be separately analyzed when discussing the resolution causes of the transaction contract, in a separate study.

In regard to the object of the transaction, there are some more specifics as opposed to common law, as follows¹³:

- according to article 2268 first alignment of the Civil Code, civil status or civil capacity can't be subject to transaction (for example, the mother of the child can't recede the complaint for establishing paternity, the mother can't renounce the payment of child support which she owes to the child); also, certain rights of which the parties can't dispose of according to the law (such as successor procedures which have not begun) can't be subject to transaction.
- by exception, according to article 2268 second alignment of the Civil Code, the civil action which derives from committing a crime, thus preventing a separate trial for the awarding of damages can be subject to transaction.
- according to article 2270 first alignment, transaction is limited to its object; renouncing all rights, actions or claims extends only in regard to the cause which was the subject of transaction. This means that the effects of transaction are strictly limited to the object of litigation.

⁹ G. Boroi, I. Nicolae în G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 683.

¹⁰ Also see L. Stănculescu, *Civil law course. Contracts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2014, page 466.

¹¹ Fr. Deak, *Civil law treaty. Special contracts*, Actami Publishing House, Bucharest, 1996, page 476.

¹² See G. Boroi, C.A. Angheliescu, *Civil law course. General part*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2012, page 138 and following

¹³ G. Boroi, I. Nicolae în G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 683-684.

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- according to article 2270 second alignment, transaction regards only the cause which was the object of transaction, regardless of whether the parties manifested their intention by general or special expressions, or if their intention is clear from the content of the transaction. In regard to the cause of the transaction contract, it must exist, it must be licit, moral, it must obey the provisions of law and it must not defraud the interests of the parties' creditors. If transaction occurs during trial and the court believes the parties had an illicit or immoral purpose, the request for concluding a transaction will be denied and the trial will continue¹⁴.

3. THE EFFECTS OF THE TRANSACTION CONTRACT

According to article 2267 second alignment of the Civil Code, transaction can create, change or end legal relations which are different from the object of the parties' litigation. Thus, the results of the transaction contract can be extinctive, declarative, constitutive or translativ or relative.

Extinctive effects consider the fact that after the transaction contract is concluded, the parties can't claim the rights which were subject of the transaction; if the rights in regard to which the parties concluded a transaction are later subjected to trial, the mandatory force of the contract can be invoked, regardless of whether the transaction was judiciary or extra judiciary¹⁵.

The declarative effects of the transaction contract occur as preexisting rights are acknowledged, thus no new rights are created¹⁶. The declarative effect generates¹⁷: the retroactive consolidation of the rights acknowledged by transaction; the party whose rights were acknowledged by transaction is not the successor of the other party in regard to these rights; in other words, the parties are not held to guarantee their acknowledged rights; transaction in regard to immobile goods is not subject to registration in the cadastral register.

The constitutive or translativ effects of the transaction contract derive from the provisions of article 2267 second alignment of the Civil Code. As a general rule, the transaction contract has declarative effects; however if the parties state new obligations within their mutual concessions, the constitutive or translativ effects occurs. These effects generate the following legal consequences: if the transaction states the transfer of rights between parties, the contract will only cause effect for the future, thus there is an obligation of guarantee as the person who acquires a rights is the successor of the other party in regard to that particular right; transaction which regards immobile goods is subject to authentic form and registration in the cadastral register.

The relative effects of the transaction contract consider the fact that it causes effects only in regard to the contracting parties, not in regard to third parties (*res inter alios acta*), according to the principle of the relativity of the effects of the contract. Transaction is not opposable to the people which acquired rights over the litigating good previous to the conclusion of the transaction. In other words, the retroactive character of the transaction can't be opposed to

¹⁴ See F. Moțiu, Special contracts sixth revised and completed editions, Universul Juridic Publishing House, Bucharest, 2015, page 321.

¹⁵ G. Boroi, I. Nicolae in G. Boroi, M.M. Pivinceru, C.A. Anghelescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 684. For the same opinion, see F. Moțiu, Special contracts sixth revised and completed edition, Universul Juridic Publishing House, Bucharest, 2015, page 322.

¹⁶ Similarly see Fr. Deak, Civil law treaty. Special contracts, Actami Publishing House, Bucharest, 1996, page 480.

¹⁷ Also see R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 300.

third parties who acquired rights over the litigation good previous to the conclusion of the transaction.

CONCLUSIONS

The transaction contract, whether judiciary or extra judiciary, represents a widely applied contract in legal life, which is why the present study showed the particularities of this contract, in the new configuration of the Civil Code. The importance of this contract in ending or preventing a trial is uncontested, as the parties avoid costs, the arbitrary of a court decisions and it is also time economic, as it is a known fact that the duration of the trial is most times uncertain.

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CONSEQUENCES OF THE DECISION OF THE CONSTITUTIONAL COURT OF ROMANIA NO. 2/2017 ON THE EXTRAORDINARY APPEAL PATH OF THE REVIEW

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ABSTRACT

The central element of this extraordinary appeal is the judicial error. The review involves finding a legal error in the criminal case settled by a final judgment, which was based on an erroneous assessment of the state of affairs. Exercising appeals does not create a new procedural report, but only extends the initial report in this new procedural phase. In our judicial system, the unanimous classification is that appeals are divided into two categories: ordinary ways and extraordinary ways. Thus, before the decision, the case under Article 453 (1) (a) could be invoked as a ground for review only in favor of the convicted person or of the one to whom the waiver of the punishment or deferment of the punishment or termination of the criminal proceedings, if the review is aimed at obtaining an acquittal. Therefore, this case of revision could not be used to the detriment of the person who was acquitted or who was ordered to terminate the criminal proceedings, with the aim of reaching a decision on conviction, renunciation of the punishment or postponement of the application punishment.

KEYWORDS: *decision CCR 2/2017, extraordinary appeal, review, role of the prosecutor, acquittal.*

INTRODUCTION

In the course of criminal justice, some legal errors are possible that can spring for countless reasons. Thus, legal errors are possible due to the fact that the court does not know the true factual situation; the use of distorted evidence (due to criminal activities); corruption of organs that have solved the cause; the existence of contradictory decisions¹.

The essence of any remedy in criminal matters is that no judicial decision based on the misconduct or misinterpretation of the legal norms or the erroneous preconceived factual circumstances generated by a multitude of circumstances, some attributable to the judicial bodies, others not imputable to them, do not come to produce the effects that a final judgment in criminal matters may develop². Therefore, in order to overcome any mistakes made at the

¹ According to I. Neagu, *Criminal Procedure Treaty*, Ed. Pro, 1997, p.620.

² According to M. V. Tudoran, *The necessity of introducing in the Criminal Procedure Code a new case of revision of final criminal law rulings on Community law*. in Law no. 10/2009, p. 180.

first trial, it is necessary that the adjudication of a case in the main is followed by a subsequent trial, respectively, to take advantage of an extraordinary way of attack.

The extraordinary ways of attack in criminal matters are based on two principles whose importance was highlighted in the case of *Hornsby v. Greece*³, in which the European Court held that “one of the fundamental aspects of the rule of law is the principle of legal certainty requiring, *inter alia*”, that when the courts have pronounced a final solution, their solution can no longer be called into question. Legal security involves the principle of *res judicata* (the principle of the final character of judgments), and a derogation from that principle can only be justified when exceptional circumstances require it. The principle implies that no party may request the modification of a final and binding court judgment only in order to obtain a new re-examination of the case. The right of access to a court would be illusory if the national judicial systems would allow a binding judgment to remain ineffective at the expense of a party.

The appeal to the review is essentially a recourse appeal, since after the invocation of new issues unknown to the court at the time of the case, all the judges who have tried the case at first instance are called upon to analyze the new issues raised and to appreciate if taking in view of those found, would have a completely different solution.

The central element of this extraordinary way of attack is the judicial error. The review involves finding a legal error in the criminal case settled by a final judgment, which was based on an erroneous assessment of the state of affairs.

I. REVIEW HISTORY

Although it can still be found in Roman law, under the name *restitutio in integrum*⁴, the review has acquired the character of an extraordinary way of attack only in modern law. The revision was also known by the old Romanian laws, being regulated in the rule of Ion Sturza in 1826, where it is stated that “the one who has been convicted has the liberty of the pavilion to ask for extravagant research when he has enough evidence to his indignation”; in the Organic Regulation of Muntenia in 1832, where revision could be required for the contradiction of judgments and the life of the alleged victim; and Criminal Code Barbu Știrbei in 1850, where the review was allowed in three cases: contradictory judgments, the existence of the alleged victim and the false testimony⁵.

In the old French law, the review was made by Lettres de Revision, which aimed at removing the possibility that a person would remain condemned for an act which later proved to be committed by somebody else. This is the first case of revision existing in all legislation, which concerned the situation of a convicted person who was guilty of the evidence administered during the trial, but who subsequently proved to be innocent because of circumstances or deeds discovered after the conviction. For this reason, the first extraordinary appeal was the review, with the sole purpose of reviewing the sentenced person⁶.

Under English law, the review had a difficult path because it was not even admitted in criminal matters. Any unjust bribery offered by jurors could be canceled by the President of the Court, who could refer the case back to court⁷.

The European Court of Human Rights, in its case-law, ruled on the nature of extraordinary ways of attack. In *Mitrea v. Romania*⁸, the Court assessed the extraordinary remedies that an

³Case Hronsby v. Greece, Case 18357/91 of 19 March 1997, source: <http://jurisprudentacedo.com/HORNSBY-c.-GRECIA-articolul-6-paragraful-1-din-Convention-incalcare.html>, accessed at 02.11.2017, hour 09:16.

⁴ According to T. Tanoviceanu, *Treaty of Law and Criminal Procedure*, vol. V, Bucharest, 1927, Printing, "Curierul Judiciar", p.596 in I. Neagu, op.cit, p.620.

⁵I. Neagu, op.cit, p.621.

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extraordinary appeal, either brought by one of the parties to the proceedings, can not be upheld on the sole ground that the court whose judgment is being challenged misapplied evidence or misapplied the law in the absence of a fundamental defect that may lead to arbitrariness.

II. ASPECTS OF COMPARATIVE LAW

The review body is not identically regulated in all countries, the main differences arising from the regulations of the different systems regarding the application and regulation of the review. We will proceed to an analysis of how the provisions of Art. 453 paragraph 1 letter C of the Romanian Criminal Procedure Code, as reflected in the laws of other states.

Albania has regulated the revision at Chapter IV, Articles 449-461⁹ of the Code of Criminal Procedure, in art. 4, the cases of revision are presented: a) when the facts and grounds on which the sentence was based are not in line with those of another sentence, b) when the sentence is based on a decision of the civil court, which was later revoked; c) when new evidence has emerged or has been discovered after the sentence has been pronounced, which, together with those already administered, proves that the convict is innocent; d) when it is proved that the conviction was given as a result of falsification of the evidence or other fact provided by the law as a crime.

It is noted that in Article 450 letter c of the Code of Albanian Criminal Procedure, we find a correspondent of art.453 paragraph 1 letter a of the Romanian Criminal Procedure Code and also in their criminal procedural system, new evidence, may be invoked only in support of the convicted person, leading to the acquittal of the defendant. With regard to the persons who may request the review, art. 451 letter b, in general terms, that the request for review may also be made by the prosecutor.

Croatia has regulated the review in art. 515-519¹⁰ of the Code of Criminal Procedure. Article 517, includes revision cases: a) for violation of the Criminal Code to the detriment of the convicted person referred to in Article 469, points 1-4 of this law, or for the violation of paragraph 5 of this article, if the court has exceeded its statutory power in a decision on the punishment, the security measure or seizure of the pecuniary benefit; (4) for violation of the criminal procedural provisions referred to in Article 468 (1), (5) and (9) of this Law or for taking part in the decision to grant a decision on the offense. second or third instance of the judge or the secular judge who should have been disqualified (Article 32, paragraph 1) or if the defendant, contrary to his request, denied the right to use his language in the trial or trial before the court judgment; c) breach of the defendant's rights of defense or infringement of procedural provisions in the appeal procedure, if such violation could have influenced the judgment.

The cases under letters b and c can only be invoked if they have been the subject of an appeal against the judgment given in the first instance or if they were formulated in the pre-litigation procedure.

From the above, we conclude that, as far as the extraordinary appeal of revision is concerned, in Croatian law, we do not meet a correspondent of art. 453 para. 1 letter a of the Romanian Code of Criminal Procedure.

⁸The case of Mitrea v. Romania, no. 26105/03, July 29, 2008, source: <http://jurisprudencedo.com/Mitrea-c-Romania-Reinadrare-pe-acelasi-post-dupa-concediere-Despagubiri-Recurs-in-anulare.html>, accessed at 04.11.2017, hour 13:44.

⁹http://www.legislationline.org/download/action/download/id/6467/file/Albania_CPC_1995_am2014_en.pdf accessed at 02.11.2017, hour 13:12.

¹⁰http://www.legislationline.org/download/action/download/id/4284/file/Croatia_Criminal_proc_code_am2009_en.pdf accessed at 02.11.2017, hour 16:17.

Regarding the role of prosecutor, art.509 provides that the Attorney General may apply for a review if there has been a violation of criminal law, the Constitution, fundamental rights and freedoms or other domestic or international rights. As a consequence, in the Croatian procedural law, the role of the prosecutor is essential in ensuring the lawfulness of the criminal process.

Germany regulated the revision in Title IV, art. 359-363¹¹, under the heading of "reopening of proceedings through a final judgment", being admissible both in favor of and against the convicted person, including where there are factual elements or new evidence which, independently or in conjunction with other evidence previously administered, support payment of the sentenced person or the application of a lighter punishment or a fundamentally different decision on the application of a re-education or security measure;

Thus, Article 359 of the German Code of Criminal Procedure refers to the invocation of the review only for the reason that new facts or evidence have emerged that could lead to the acquittal of the convict and not to the detriment of him.

However, the German Code of Criminal Procedure also permits the possibility of introducing a petition for review over the sentenced person, in the cases provided by art. 326: A document used to the benefit of the convicted person was false or forged; a witness or expert who has declared against the convicted person was guilty of an intentional or culpable violation of the oath obligation or deliberately made a false statement without being under oath; a judge or an assistant magistrate who participated in the judgment was guilty of a criminal offense in relation to the criminal case.

France has regulated the review institution in Title II, art. 622-626¹². Thus, from the analysis of this rule, we deduce the fact that only the review in favor of the convicted person who has committed a felony or misdemeanor can be accepted and can be requested in several cases, including when after the conviction, new factual elements were known at the time of the conviction and are capable of establishing the innocence of the convicted person.

According to art. 623, in the case of new facts and circumstances which were not known at the time of the conviction, can be invoked only in favor of the convict, leading to his acquittal, therefore, neither in the French criminal procedural system, the prosecutor cannot invoke this case of review to the detriment of the convict.

Switzerland regulated the revision in Chapter IV, Articles 410-415¹³. Article 410 provides the revision cases and admissibility conditions. Among these, we also find the case where new circumstances have emerged that were not known before the decision was taken or evidence came to light that could lead to an acquittal at a considerably reduced penalty or a more severe punishment for the person convicted or convicted of an acquittal.

In light of the above, we understand that Article 453 (1) (a) of the Romanian Code of Criminal Procedure has a correspondent in Art. 410 alin.1 lit. a of the Swiss Code of Criminal Procedure. However, the case of revision is characterized by complexity, and it has indicated in concrete terms the ways that can lead to the revision of a final decision, a matter that has no correspondent in the national regulation.

Paragraph 3 of Article 410 provides that a case may be requested for the benefit of the convicted person and after the case has become forbidden, an aspect that we also encounter in our national law in the form of "final court decisions" and art. 411 of the Swiss Code of Criminal Procedure provides the form and the time limit within which the request for review is to be filed.

As a consequence, we notice differences as to the court where the review request is to be filed, our national law being the first instance; as well as the term, which is clearly and

¹¹<http://legislationline.org/countries/country/28>, accessed at 02.11.2017, hour 19:44 .

¹²<http://legislationline.org/documents/section/criminal-codes/country/30>, accessed at 02.11.2017, hour 21:02.

¹³http://www.legislationline.org/download/action/download/id/6449/file/Swiss_CPC_2007_am2016_en.pdf , accessed at 03.11.2017, hour 12:30.

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predictably regulated, for a simple reason, the review in Swiss procedural law does not distinguish between a review in favor of or at the expense of the defendant as to the term.

Concerning the role of the prosecutor in Swiss law, by correlating the admissibility conditions and the case under art.410 para.1 letter a, it appears that the prosecutor may request a review only in cases where new circumstances that were not known at the time of the final settlement of the case and the prosecutor requests, through the revision, a more severe punishment for the convicted person or the conviction of a person which had been initially acquitted.

In conclusion, we consider that CCR Decision no.2/2017, although having a correspondent in the Swiss procedural law, should also take into account other institutions of the Swiss system, which operate at a different legal level than the Romanian one. Under Swiss law with regards to case in point a, it is said that the revision comes to support the correct settlement of the causes and the finding of the truth and not to protect the equality of rights between the citizens and the free access to justice, as motivated by the Constitutional Court of Romania. At the same time, we can observe elements of similarity between the CCR Decision and the German, French, Albanian law, which seems to bring Romania closer to the Romanian Criminal Procedure Code from 1968.

III. CONSEQUENCES OF THE DECISION OF THE CONSTITUTIONAL COURT OF ROMANIA NO. 2/2017 IN THE CONTEXT OF THE REVIEW

The decision of the Constitutional Court 2/2017, deals with art.453 para.1 letter a and art.453 par.4 of the first sentence, which stipulate: (1) The review of the final judgments on the criminal side may be requested when: a) there were discovered facts or circumstances that were not known to solve the case and which prove the lack of judgment of the ruling in question; (4) *The case referred to in paragraph (1) letter a), is a reason for review if, on the basis of new facts or circumstances, it can be proven that the decision to condemn, waive the punishment, postpone punishment or stop the criminal proceedings may be inappropriate;*

The doctrine stated that the provisions of art. 453 para. 1 letter a) are new in relation to the previous regulation, which allowed the review procedure to be exercised also to the detriment of the person who was acquitted or who was ordered to terminate the criminal trial, provided that it has been exercised within one year from the date on which the new facts or circumstances on which the request for revision is based are known (art. 398 para. 2 letter a of the Proc. from 1968)¹⁴.

Prior to the decision, the case under Article 453 (1) (a) could be invoked as a ground for review only in favor of the convicted person or of the person to whom the waiver of the punishment or the postponement of the punishment or termination of the criminal proceedings was ordered, if the review process was initiated in order to obtain an acquittal.

In the interpretation and application of the provisions regulating this case of review, it has been pointed out in the judicial practice that the reopening of the criminal prosecution, ordered by the prosecutor by an ordinance against a person other than the convicted person, for the facts which were the subject of the criminal action directed against him, does not constitute a reason for revision, not having the meaning of a new fact or circumstance within the meaning of art.394 paragraph 1 letter a Criminal Procedure Code of 1968.If, however, after the reopening of the criminal prosecution, another person has been sued and convicted for the offense committed solely by the latter against the convicted person, there is the case

¹⁴According to M. Udriou, A. Andone-Bontas, G. Bodoroncea, M. Bulancea, V. Constantinescu, D. Grădinaru, C. Jderu, I. Kuglay, C. Meceanu, L. Postelnicu, I. Tocan, AR Trandafir, *Code of criminal proceedings. Comment on articles.*, Ed. C.H. Beck, Bucharest, 2015, p.1125

for revision provided for in Article 394 paragraph 1 letter a C.pr.pen of 1968, and this constitutes a ground for revision according to article 394 paragraph 2 of the same code¹⁵.

If by the new facts or circumstances the tendency is not to prove the groundlessness of the conviction, to renounce the punishment, to delay the punishment or to stop the criminal proceedings, but only to prove the elements that imply the maintenance of these solutions, the new facts or circumstances is not a reason for review¹⁶. Thus, in practice, the courts have decided that if the review request, based on new facts or circumstances, sought to change the legal classification, while maintaining the conviction, they are not a case of revision¹⁷. In other respects, if the new facts or circumstances that tend not to prove the inherent nature of the decision, but the establishment of situations to mitigate criminal responsibility, it does not constitute a reason for revision. At the same time, even if a new act attesting to the existence of a ground for more favorable individualization of the punishment can not constitute a basis for the admission of the petition for revision, and it is not capable of proving the mercilessness of the conviction¹⁸.

In the grounds of Decision 2/2017, the Constitutional Court revealed that the provisions of Art. 453 par. (3) of the Code of Criminal Procedure regarding the case of review provided for in para. (1) lit. a), as well as the legislative solution contained in the provisions of art. 453 par. (4) the first sentence of the same code, which excludes the possibility of reviewing the payment order for the case provided for in paragraph (1) lit. a) violate the constitutional provisions of art. 16 on equal rights, art. 21 on Free Access to Justice and Art. 131 regarding the role of the Public Ministry, as the civil party is missing the possibility of defending its legitimate rights and interests, and also leaving the prosecutor of the levers necessary for the fulfillment of his specific role in the criminal trial. The Court notes that, if facts or circumstances unrecognizable in the outcome of the case and which prove the mercilessness of the acquittal decision are to be ensured, both the civil party and the prosecutor must be able to request and obtain the restoration of judicial truth by withdrawing the judgment.

Regarding the role of the prosecutor, the decision of the Constitutional Court no. 2/2017, comes to give him a new case in which he can request the review, when facts or circumstances that were not known to the case have been discovered and prove the mercilessness of the order of acquittal in question; basically basing themselves on the regulation of the Criminal Procedure Code from 1968.

We agree with the view expressed in the doctrine that decision no.2 / 2017, does not confer the prosecutor the power to require review on the civil side, power which he held under the previous rules¹⁹.

CONCLUSIONS

In the present paper we have analyzed the consequences of the decision no.2/2017 of the Constitutional Court of Romania, emphasizing on the role of the prosecutor.

The judicial practice has shown that there are often situations where there is a conflict between two fundamental principles of any system of law.

Legislation to be genuinely effective must allow for review to address legal errors that have a

¹⁵ H.C.C.J., criminal section, dec.no. 3055 of 12 May 2006; <https://legeaz.net/spete-penal-iccj-2006/decizia-3055-2006> accessed on 04.11.2017, time: 11:35.

¹⁶ S.C., criminal section, dec.nr.853 of 14 February 2002; <https://legeaz.net/spete-drept-penal-csj-2003/decizia-853-2002> accessed on 04.11.2017, time 12:16.

¹⁷ H.C.C.J., criminal section, dec.nr.1869 of 17 March 2005; <https://legeaz.net/spete-penal-iccj-2005/decizia-1869-2005> accessed on 04.11.2017, time 13:11.

¹⁸ S.C., criminal section, dec.nr.2101 of 26 September 1997; <https://legeaz.net/spete-drept-penal-csj-1997/decizia-2101-1997> accessed on 04.11.2017, time 13:58.

¹⁹ P. Buneci, Gh. Serban, I. Ciolca, I. Dragnea, A. Vasilache, S. Cretu, I. Vasilache, V. Stoica, D. Titian, M. Jiganie-Șerban, *New Criminal Procedure Code. Notes. Correlations. Explanations*, Ed. C.H.Beck, Bucharest, 2014, p.540.

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negative impact on the legal awareness of citizens. Therefore, the reasons for the review require rigorous and clear regulation to fit the above mentioned coordinates.

Of course, the number of situations that can lead to a legal errors not unlimited. Starting from this point, the regulations of the different states are designed almost identically, with little nuances or differences of formulations.

We have shown that even in Roman law there were contingent remedies for the removal of errors, evolving in time with the needs of society and outlining in the form of genuine remedies, but keeping the same reasoning: although it is a form of manifestation of the state authority, repressive justice is not always precise and infallible, which explains the necessity of means of withdrawal of unjust judgments. This explains why the reasons justifying the review of a final criminal judgment were completed with the emergence of new cases that required the annulment of criminal judgments for serious misconduct.

As a result of the admissibility of the objection of unconstitutionality, we observe the optic change of the constitutional litigation court, which on this occasion comes to the solution provided by the old regulation regarding the transformation of the first case of review regarding the occurrence of new facts or circumstances from a case to be invoked solely in favor of the convicted person in a case that can be promoted and defaulted, thus allowing a request for review to be made against an acquittal.

In the light of the new regulation, we have highlighted the limitation of the role of the prosecutor in this procedure, a legislative solution that had the character of evidence, for observing some important principles of the criminal trial. However, inexplicably, the legislator chose to retain the delegation of the prosecutor by the court in charge of resolving the petition for review in order to carry out investigations that can not be directly addressed to the court or would cause delays in re-examining the case. We have shown the ambiguity and shortcomings of this regulation, as well as the fact that it would contravene constitutional provisions.

The assessment of these issues made it possible to establish the superiority of the regulations in the new Criminal Procedure Code, in some cases, but also to reveal the vulnerabilities of the new rules, which we observe would require the intervention of the legislator and not the constitutional court, also European institutions regarding the conduct of a fair trial, with full assurance of the function of the fundamental principles and rules applicable in the court proceedings, suggest this.

In the light of all the issues addressed in this paper, we appreciate that the current system of extraordinary ways of attack is far too restrictive in relation to their purpose. This legal system does not sufficiently guarantee the purpose for which these extraordinary remedies were established, starting from the fact that, for example, the reasons for the review does not cover all situations where there is a high probability of occurrence of factual or legal errors.

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TERRORISM AND PARADIGM OF COMPARED CRIMINAL LAW

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ABSTRACT

The article is trying to briefly and generally present the philosophic and sociologic conceptions about paradigms regardless if these have been elaborated by specialists in the field of criminal law and how the influence of paradigm analyzed (paradigm of compared criminal law) reflects on terrorism by emphasizing the fact that a paradigm appears in the context of substituting the former ideas and acceptance without reserves of new.

KEYWORDS: *paradigm, compared criminal law, terrorism, foreign fighter, lone wolf.*

INTRODUCTION

A paradigm of compared criminal law in a field so difficult to approach, that of terrorism, appeared in the context of confrontation of ideologies in contradiction, confrontation of confessional perceptions and more recently of crisis of migrants came from Asia coinciding with the transformations determined by the concepts of “foreign fighter” and “lone wolf” which currently seem to merge and which have revealed extremely brutal a new side of terrorism and the need to explain new legislative interpretations and wishing that criminal branch is perceived as an antagonist contradiction, but positively, by the fact that old elements and out of use ideas which no longer answer to current requisites are substituted by new components and notions, resulting thus improvement and development of the process of prevention and fight against terrorist threat.

I. BRIEF HISTORY

“The determination and causality of phenomenon was and still is organized around five big paradigms, mainly when the object of study is the violence of movements and groups not directed by state”.¹

Consequently, the paradigms of a system where chaos is present, are manifested and influence the system, including in case of terrorism such as the paradigm of crisis, instrumental paradigm, cultural paradigm, ideological paradigm, social paradigm, have been dealt with by philosophers, sociologists and other specialists in their works but a paradigm of compared criminal law from the perspective of prevention and combating terrorism has not been approached up to present.

In the vision of Thomas Samuel Kuhn, the paradigm is the exponent of a complex system combining technical, economic and socio-human concepts with a view to integrate the

¹ Gheorghe Arădăvoaice, Dumitru Iliescu, Laurențiu Dan Niță, *Terrorism, antiterrorism, contraterorism – Istoric, actualitate, perspective*, “Antet” Publishing House, Bucharest, 1997, p. 36.

knowledge accumulated in scientific search² for a transfer of ideas the target, in this case, being the development of a capacity of scientific understanding of compared law in case of occurrence of atypical situations.³

In fact, we may consider the search in the field of compared criminal law from the perspective of prevention and combating terrorist phenomenon as being an esoteric search due to the complexity of terrorist phenomenon manifested nowadays.

The appearance of a new paradigm does not represent a simple process by which the paradigm with a declining evolution is transformed by adding ideas and concepts but it maintains the base of former paradigm. The acceptance of the new ideas and concepts entails the disappearance of former paradigm and occurrence of new paradigms, although it solves only partially and for limited term the problems considered until substituted by a new paradigm generated by the phenomenon dynamism, does not represent but the axiom of progress⁴ in the scientific theory of the field studied and searched.

The manner how prevention and combatting terrorism is reflected in the legislation of word states and mainly in the manner how such states understand to approach unitarily the integration of activities of phenomenon counterattack in their own legislation based on resolutions, agreements, protocols and treaties elaborated by forums competent on world and regional level represents practically the base of occurrence of the paradigm of compared criminal law and development of legal system on global, regional and national level.

This paradigm has appeared as alternative to the need of improvement of order in order to reduce the negative restrictions which used to influence the society, pursuant to the division of parties which generates the chaos and which freely feeds the terrorist phenomenon.

The new manifestations of terrorism practically compel the authorities in charge with enforcement of law to order measures so as national criminal law of world states to interact more and more powerfully so that the ideas and concepts forming the base of knowledge of human conduct inclined to terrorist activity to converge to an effective collaboration based on unitary definitions related to terrorist phenomenon.

II. CURENT LEGISLATIVE STATE ON LEVEL OF EUROPEAN UNION

In the second half of 20th century, the vision of European states influenced by the manner how terrorism is manifested on the national territory presents major differences related to the manner of combating the terrorist phenomenon. In the context of recrudescence of this phenomenon the need of approach with increased responsibility of elaboration of policies to combat the phenomenon has appeared being paid the equal attention to legislative, operative, logistic and financial fields by which one tries to restrict the terrorist activity and its consequences since the incipient phase.

The manner of manifestation of terrorism lately, trying to create chaos in society, has determined the amendment of the legislation of European Union and result an improved version to answer better the current requisites related to terrorist threats.

² ... In other words, normal science is science by excellence. – Thomas S. Kuhn, *Structura revoluțiilor științifice*, translation from English by Radu J. Bogdan, “Humanitas” Publishing House, Bucharest, 2008, p. 21.

³ ... the history must compare the paradigms of community between them, as well as to the current search reports. Acting as such, the objective is to discover which isolable or implicit elements could be extracted by the members of such community, from ample paradigms, as enforced as rules in search - Thomas S. Kuhn, *Structura revoluțiilor științifice*, translation from English by Radu J. Bogdan, “Humanitas” Publishing House, Bucharest, 2008, p. 106.

⁴ ... no paradigm ever solves all problems defined and since never two paradigms generate exactly the same problems unsolved, the controversies between paradigms are always addressing the question: which problems are the most important to be solved ? ... just due to turning to such external criteria the disputes between paradigms become revolutionary. - Thomas S. Kuhn, *Structura revoluțiilor științifice*, translation from English by Radu J. Bogdan, “Humanitas” Publishing House, Bucharest, 2008, p. 175.

Relying on the frame Decision 2002/475/JAI of the Council for prevention of terrorism, dated 13th June 2002, continuing with the Convention of Europe Council for prevention of terrorism, signed in Warsaw on 16th May 2005⁵, the Decision 2005/671/JAI of Council related to information exchange and cooperation concerning the terrorism crimes, since 20th September 2005, Directive 2013/40/EU of European Parliament and Council dated 12th august 2013 on attacks against information systems and of substitution of frame Decision 2005/222/JAI of Council and reaching to the Directive (UE) 2017/541 of European Parliament and Council dated 15th March 2017 on combatting terrorism and substituting the frame decision 2002/475/JAI of Council and for amendment of Decision 2005/671/JAI of Council, we determine that the anti-terrorist measures transposed in European legislation have been amended, and relying on it, there has been a permanent attempt to update the national legislations at least on the level of states members of European Union.

If the frame Decision 2002/475/JAI of the Council for prevention of terrorism has determined as terrorist actions 9 criminal acts to be committed with a certain scope stipulated by criminal law, the (EU) Directive 2017/541 of European Parliament and Council presents 10 criminal acts⁶ which, if committed in the scope presented by the criminal norm, are classified as terrorist crimes.

A major difference between the two normative acts elaborated on the level of European Union is included in the definition of crimes related to terrorist activities. Therefore, if in the year 2002 only 3 such crimes have been defined, the decision from 2017 present minimum 10 facts incriminated as terrorist activity-related crimes.

Currently, although on the national level of the states of European Union one or several criminal acts in the field of prevention and combating terrorism could exist, such legislation relies on the legal norms from the years 2002 and 2005 and thus it is highly necessary to be transposed in the national legislation, preferably in a sole normative act and within a term as short as possible, the disposals of (EU) Directive 2017/541 of European Parliament and Council of 15th March 2017 related to combating terrorism.

Considering that the individuals inclined to commit terrorism acts try to move, as much as possible, from one area to another within a short interval, they choose air routes and in order to supervise the transition of borders for the discovery of such individuals and restriction of their circulation in potentially terrorist areas, including European citizens enjoying free circulation, among the measures ruled, we may mention the incorporation of the Register with the names of passengers (PNR).⁷

Pursuant to analyzing the legislation of the states of European Union, we determine that anti-terrorist and counter-terrorist measures rely on the disposals of the Directive of European Union of 2017, as follows:

“1. Administrative interdictions to leave or enter the national territory of some member states. The temporary interdictions may be extended to three years in a row. (i.e. France, Germany, Italy, Spain, Denmark, Netherlands).

2. Supervision in mass of telephones and use of internet. A variation of this category stipulates including the interdiction of coding the phone or internet conversations in progress

⁵ On 15.06.2015, in Bruxelles, the Convention has been improved by the proposal of decision of Council related to signing, on behalf of European Union, the Convention of Europe Council related to prevention of terrorism.

⁶ The new disposal rules the cyber attacks (cyber terrorism) - article 3 lett. (i) of (EU) Directive 2017/541 of European Parliament and Council dated 15th March 2017 on combatting terrorism.

⁷dr. Simona R. Soare, drd. Claudia M. Postelnicescu, European Institute of Romania, Strategic and Policy Studies SPOS 2015, study no. 5, *Impactul noilor măsuri de combatere a fenomenului terorist, propuse la nivel european, asupra liberei circulații*, Bucharest 2016, p. 41 – “According to the data updated in April 2015, supplied by FRONTEX, European agency in charge with supervision of cross border traffic in European Union (Schengen Space in particular), the highest number of foreign terrorist fighters who leave the European space and return to European Union are using the air route”.

at all big companies producing technology and mobile telephony. (i.e. Belgium, France, Great Britain, Italy, Romania).

3. Freezing the personal assets suspected/proved to be foreign terrorist fighters (ex. Great Britain, Germany, France, Belgium, Netherlands).

4. Withdrawal of citizenship and passports of individuals suspected/proved to be foreign terrorist fighters (i.e. Great Britain, Netherlands, and France).

5. Including in Criminal Codes the crimes related to the phenomenon of foreign fighters including the trip preparations in order to prepare/train in a terrorist camp or crimes related to online financing of terrorism. (ex. Germany, Denmark)".⁸

III. TERRORIST CONCEPTS WHICH INFLUENCE THE OCCURRENCE OF NEW PARADIGMS

The philosophy of terrorist synthesized as "foreign fighter" or "lone wolf" is both simple and complex. The philosophy is influenced by principles difficult to understand by normal people, as we perceive it, as we consider the decisions made primitive or phantasmagorical and senseless, but which for such terrorist represents the relation of self with divinity.

In the conceptions developed in time, the terrorist phenomenon has kept as main attribute the creation of terror, however, the manner of transposing it to practice has evolved from one epoch to another.

It is also the case of the so-called "foreign fighters" or "lone wolf", and their manner of action and motivation has been changed from one stage to another. If 4 – 5 years ago the youth used to have as motivation the fight within Daesh⁹ in general by their perception of being isolated by the society in which they were living, will of revenge for different reasons or religious convictions, in time, this motivation has changed currently the motivation being the will of adventure. Also, the "foreign fighters" coming from states with a religion mainly catholic or orthodox from Europe have as main motivations the crisis of identity whereas some Muslim fighters came from Arabian states are motivated by the financial aspect to be able to maintain their families.

Currently, the states of European Union are facing a new scenario enforced by the supporters of Daesh namely the return home of jihadist to commit attacks in their states of origin, whereas "future is less the object of anticipations and more that of alternative scenarios".¹⁰

A similar situation is noticed as well in the case of the fighters, the so-called "lone wolf". If the attempt was "committed in the past by individuals with major psychological problems"¹¹ and who were living in a restricted universe most of the times and were never leaving the locality of residence or the original country, currently, the terrorist attempts are committed by radicalized persons and trained abroad or who participated to armed conflicts as fighters of terrorist groups such as Daesh, al-Qaida¹² etc.

We may say that the "lone wolf" of today is the "foreign fighter" from the past who returned home with a more radicalized conception and from different reasons with higher frustrations.

As previously shown in order to restrict the terrorist threats by the legislation adopted on the

⁸ Dr. Simona R. Soare, drd. Claudia M. Postelnicescu, European Institute of Romania, Strategic and Policy Studies SPOS 2015, study no. 5, *Impactul noilor măsuri de combatere a fenomenului terorist, propuse la nivel european, asupra liberei circulații*, Bucharest 2016, p. 29.

⁹ It is also known as Islamic State of Iraq and Syria (ISIS), Islamic State of Iraq and the Levant (ISIL), Islamic State (IS) or Daesh.

¹⁰ Solomon Marcus, *Paradigme universale. Pornind de la un zâmbet*, "Paralela 45" Publishing House, Pitesti, 2006, p. 9

¹¹ Medeanu Tiberiu Constantin, *Criminalistica în acțiune – Omorul, terorismul și crima organizată*, "Lumina Lex" Publishing House, Bucharest, tome II, 2006, p. 301.

¹² It is also known as al-Qaeda or al-Qaeda

level of European Union and not only, different measures have been ruled in the legislative, operative, logistic and financial field.

This paradigm, which we shall call *paradigm of compared criminal law*, the result of an assiduous work of harmonizing the anti-terrorist legislation in Europe must be appropriated and create concepts and work mechanisms by which the persons in charge with functions of decision from the governments of all world states to be open to dialogue and leaving behind the difficulties of the past, to encounter the language necessary to approach under all aspects the terrorist threat and to elaborate a legislative deed which may answer for a period as long as possible to an increasing number of common problems.

CONCLUSIONS

In order to cover the legislative gap and prevent the interpretations with negative influence on the activity of the authorities of law enforcement, the activity of prevention and combating terrorism may be construed as an abuse or more seriously as breach of human rights, most improvements were made in the field of crimes related to terrorism activity. Therefore, activities like recruitment, offering or receiving training in terrorist scopes, public instigation to commit a terrorism action and last but not least financing terrorism which in the past it used to be stipulated by documents complementary to that ruling the prevention and combating terrorism are ruled. Today, one tries to reach a harmony between the crisis generated by terrorist activities and the answer of authorities to this crisis, being observed the fundamental human rights and the European values obtaining with such effort.

Practically, the base of this article is not to analyze the implications of terrorism or its effects, it is represented by the process of encountering new paradigms on which may rely the approach in a new light of the elements, ideas or conceptions that must be changed for a unitary approach related to prevention and combating the terrorist phenomenon on level of the states of European Union.

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THE REGIONAL LEVEL IN THE ROMANIAN AND FRENCH LAW – COMPARATIVE STUDY

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ABSTRACT

The present paper outlines a comparative study on the regional level as stipulated by the Romanian and French legislations. It aims to identify the main similarities and differences between the Romanian development regions and the French regions, although Romania does not have a real administrative regional level. The study also considers the particular territorial features of the two states, along with the specific trends they are following in their administrative-territorial reorganization and which can determine different evolutions.

KEYWORDS: *development regions, region, territorial collectivity, administrative-territorial organization/reorganization, decentralization, administrative level, county, competences*

INTRODUCTION

Territorial organization in Romania and France relies on the same principles, such as territorial uniformity, coexistence in the same territory of a decentralized administration along with a deconcentrated one, but also two common administrative levels: the basic level (commune) and county level. In France, there is also a third level of territorial administration – regional administration, which does not quite have a proper correspondent in Romania, because the development regions do not enjoy the status of territorial community.

The great number of communes, the various territorial collectivities led by specific regimes and the development of inter-communality increase the complexity of the French administrative environment. The collectivities that are in derogation of the common law, the collectivities with particular status, the overseas collectivities as provided by Art.74 of the Constitution, or the collectivities with uncertain status embody the numerous particularities of the French territorial administration.

In turn, the territorial organization of Romania is less complicated. At basic level, the commune and the town make the distinction between rural and urban. Based on their development and the population density, the major Romanian towns are converted into municipalities. Stipulated facultatively for all municipalities, the administrative-territorial divisions do not exist literally outside the capital-city where they are named *sectors*. The capital-city of Romania has 6 sectors while the number of *arrondissements* in Paris, Lyon and Marseille is greater (20, 16 and 9, respectively). In both countries, the capital-city enjoys a special status¹.

At county level, the Romanian Constitution confers the County Council the particular status of coordinator and also provides the traditional county pattern which distinguishes it from the French *département*. For France, highly important is also the election of the county

¹ The law of February 28th 2017 on the status of Paris and metropolitan planning, known as the Paris Act, relaxes the criteria for access to metropolitan status. Unlike French legislation, in Romanian system there is no law dedicated exclusively to Bucharest, but a separate regulation in the Law on Local Public Administration No. 215/2001.

counselors (former general counselors) at canton level. In terms of the number of communities at every level and their territorial and demographic characteristics, the discrepancies between territorial collectivities within the same division are more evident in France.

A relatively flexible and progressive legal framework has been created to meet the diversity of the French territorial collectivities, framework which does not ignore various autonomist trends expressed by the overseas population. The less complicated configuration of the Romanian territorial administration is given by the reduced number of territorial divisions and collectivities within the same division, but also the presence of the quite isolated derogatory situations. Of the utmost importance is the fact that the Constitution currently in force strengthens especially the local autonomy² of the basic administration level, whereas the county governing body receives the mission to coordinate the whole range of county public services. Marked by the past experience of centralization, this approach of the Romanian lawmaker reveals the strong desire to provide more freedom to the local administration.

THE FRENCH REGION - THE TERRITORIAL COLLECTIVITY OF THE FUTURE (?) – THE ROMANIAN DEVELOPMENT REGION - A SIMPLE COOPERATION BETWEEN COUNTIES

Provided by the Constitution following the revision of March 2003, the French regions were converted into territorial collectivities by the Law of March 2nd 1982. At that time, France had 21 metropolitan regions regulated by Law no. 86-16 of January 6th 1986 and 4 overseas regions whose territory matched that of the overseas *départements* (Law no.82-1171 of December 31st 1982 concerning the organization of the Guadeloupe, Guiana, Martinique and Reunion regions). Although the provisions regarding Corsica are part of the General Code of Territorial Collectivities which regulates the regions, Corsica falls in the category of the collectivities that hold special status along with Ile-de-France and other overseas regions.³ While the special feature of the overseas regions is that they make up a unitary *département*, the metropolitan regions are completely different.

In spite of the controversial debates and rivaling opinions that it had stirred, on 17th of December 2014, the French National Assembly adopted unappealable the map of the 13 French regions, reform which came into force in 2016. The purpose was to create European-level regions able to generate economic development. The adopted document⁴ also amended the mechanism that allowed a *département* to change the region it belonged to, by removing the requirement of the local referendum. But this right to make a choice involves the consent of the two involved regional councils, as well as the consent of the departmental council with a three-fifths majority. As the project is unfinished, other future transfers of competence are planned to the benefit of these regions.⁵ In particular, the Law “NOTRe” on the *New Territorial Organisation* of the *Republic*, enacted on August 7th 2015 confers new competences to the regions and clearly redefines the competences assigned to every category of territorial collectivity.⁶

The region is the newest common law collectivity of France, created based on the existing *départements*. Being conferred at the very beginning the status of specialized public establishment by Law no.72-619 of July 5th 1972, it became territorial region in full exercise

2 For the first time in the modern history of Romania, this principle was stipulated by the Constitution of 1991.

3 M. Verpeaux, *Droit des collectivités territoriales*, PUF, Paris, 2005, p. 46.

4 Law of January 16th 2015 concerning the delimitation of regions, the regional and departmental elections, voted in 2014, which also modifies the election calendar.

5 It concerns the administration of departmental colleges, school transportation, roads and harbors.

6 It concerns the third stage of territorial reform, desired by the President of the Republic, following the Law regarding the modernization of the territorial public action and the creation of the metropolis, and the Law on the delimitation of regions.

on March 16th 1986, which also marked the first election of the regional counsellors based on a direct universal suffrage. While in France this new category of territorial collectivities is stipulated by law, its creation in Romania would involve a revision of the Fundamental Law of Romania. The Constitution does not stipulate the competence of the lawmaker in this matter. Moreover, Art.3 paragraph 3 of the Constitution concerning the administrative organization of the territory is interpreted in a restrictive manner.

Also based on the current counties, the 8 Romanian development regions, pursuant to Law no.151/1998, can develop nothing more than a cooperation between the counties. Art.5 paragraph 2 of the new Law no. 315/2004 on the regional development in Romania, clearly stresses that „they are not administrative-territorial units⁷ and have no legal status”. The development regions are intended to represent the framework for the elaboration, implementation and evaluation of the regional development policy, and for collecting the specific statistical data according to European regulations issued by EUROSTAT for NUTS 2”⁸ (Art.6 paragraph 2 of the new Law no. 315/2004). The initial purpose of the French region was to act as „an instance meant to coordinate, schedule and organize the development process”⁹ and whose competences were specialized. The enactment of Law NOTRe in August 2015 redefined the competences and responsibilities of the French regions.¹⁰

The presence of the regional collectivity has generated debates on the relevance of the county and the overlapping of different territorial administrative levels. Although these debates have been less visible in Romania, the Government Decision no.229/2017 concerning the new General Decentralization Strategy might stir them. This body of law is intended to prepare the transfer of new exclusive competences to the local authorities.¹¹

With the exception of Bucharest-Ilfov no other Romanian development region comprises less than 4 counties (the Western region case), as compared to its French counterpart where several regions had only two departments (Alsacia, Nord – Pas-de-Calais, Haute-Normandie or Corsica, but the latter can be referred to as a region) before the regional reform. Following its division into 13 regions Corsica has become the only French bi-departmental region. Every new region comprises 7.3 departments.¹² The average surface of a Romanian development region is about 33 795 km² except for Bucharest-Ilfov.¹³ In Metropolitan France¹⁴ the average surface of a region had been of about 25 903 km², before their number was reduced in 2014. Considering the DOM/ROM, the average surface of the NUTS 2 French regions¹⁵, as shaped

7 In the Romanian legal terminology, the term “administrative-territorial unit” has two meanings: territorial collectivity and state administrative circumscription. With origins going back to the communist regime, the notion highlights the double nature of the commune, city or county as provided by the Romanian law.

8 According to the official Eurostat site, NUTS is a three-level classification. It divides each member-state into a whole number of NUTS 1 regions, each of the latter being subsequently sub-divided into a whole number of NUTS 2 regions, etc. The NUTS regulation also sets the minimum and maximum population limit for the medium-size NUTS regions. For the NUTS 2 level, the minimum limit is of 800,000 inhabitants while the maximum limit reaches 3 million inhabitants. Considering the differences in the number of population between the various French regions, as shaped initially, they correspond to NUTS 1 and 2 levels. After the reform, population gaps between regions were reduced.

9 P. Sadran, *La région*, in *Les Cahiers français* n° 239, janvier-février 1989, La documentation Française, Paris, 1989, p. 28.

10 They are in charge of: establishing the regional economic development, innovation and internationalization plan; coordinating the support provided to tourism; devising a land use and sustainable development plan; strengthening its role in non-urban transportation.

11 They involve fields like agriculture, education, health, culture, environment, youth and sport, tourism.

12 Source: <http://geoconfluences.ens-lyon.fr/actualites/eclairage/regions-francaises>, accessed at the beginning of October 2017.

13 NSI, Statistical Yearbook 2006.

14 According to NSI, its total surface is 543 965 km².

15 Source: the official Eurostat site.

initially, is of 24 356 km². The French actual regions have almost doubled their surface since their creation (their average surface is of 44 600 km²).

Apart from Ile-de-France whose population exceeds 11.5 million inhabitants, the population density in the French regions was on average 2 483 800 inhabitants in the Metropolitan France¹⁶ before the reshaping of the regional map, and about 4.8 million inhabitants¹⁷ after this date. According to the Census of 2012¹⁸ the average number of stable population in the Romanian development regions is of about 2.7 million inhabitants. On January 1st 2017, the most populated Romanian development region was the North-Eastern Region (3 238 910 inhabitants) while the less populated area was the Western Region (1 791 922 inhabitants).¹⁹ Over the last years, there has been an obvious decline in the Romanian population density, while in the new French regions the trend is positive. According to the French Census of 2007²⁰, the most populated region is Ile-de-France (11 740 138 inhabitants) whereas the region with the most scarce population is Limousin²¹ (759 414 inhabitants) in Metropolitan France and Guyane (215 036 inhabitants) in the overseas regions. After the reform, Corsica has become the less populated French region (over 300 000 inhabitants). Comparing the number of regional population in the two countries, there is a more striking contrast between the French regions, although before the fusion these regions were smaller than the Romanian development regions, and larger after this moment.

Before 2013, the doctrine emphasized the “adoption [in France] of a territorial pattern that has determined the creation of “small regions” (around 20 for the metropolis instead of 5 or 6 as initially considered based on economic criteria)” and raised the issue of cooperation between neighboring regions.²² In addition, we should also mention the great demographic discrepancies which “justify the difficulties encountered in the implementation of land use policies due to the strong concentration around Paris and some large cities”.²³ Considering the small number of comparative studies based on figures, the idea that the French regions are weaker than their German, Spanish or Italian counterparts is sometimes challenged”.²⁴ However, we must acknowledge its contribution to the recent fusion of some regions and to the reshaping of the regional map.

In Romania, a certain reluctance of the politicians to a potential regionalization of the country, the need for constitutional revision in this matter, and the risk to overlap different territorial administration levels considering the smaller surface of Romania as compared to France, could delay the creation of regions. However, the draft law which proposes a new regional organization in Romania, approved by the Senate in February 2010 by tacit acceptance procedure, seems to demonstrate the contrary.²⁵ While in France, the reform of territorial collectivities initiated in 2013 encourages the regional clusters in order to increase their size

16 NSI, the Census of 1999 and some estimates made on January 1st2006.

17 NSI, data from 2011.

18 [Source: www.insse.ro](http://www.insse.ro), Census of population and dwellings of 2002.

19 NSI, 2017.

20 www.insee.fr.

21 Aspect perfectly available if we don't consider Corsica a region.

22 J. Moreau, *Administration régionale, départementale et municipale*, 14^{ème} éd., Dalloz, Paris, 2004, p. 215.

23 M. Verpeaux, *La région*, Dalloz, Paris, 2005, p. 28.

24 J.Ziller, *Fragmentation/participation : quelle bonne dimension?* dans *Pouvoirs* n° 95, *La commune en France et en Europe*, Seuil, Paris, 2000, p. 20.

25 Initiated by the Democratic Union of Hungarians in Romania and submitted to the Parliament in June 2009, this project proposes the reorganization of the Romanian development regions. The initiators aim to create 16 regions grouped in 5 macro-regions. But the project was strongly criticized by the opposition due to its attempt to regionalize the country based on ethnic criteria. Thus, Region 14 would have a preponderantly Hungarian population and would aim to recreate the old Hungarian autonomous Region of Mureş(1952-1968). In March 2010, this body of law received a negative opinion from the Judicial Commission of the Chamber of Deputies.

and competitiveness, in Romania, there is an opposite tendency which aims to rise the number of regions from 8 to 16, although the latter would finally be reorganized in 5 macro-regions.

CONCLUSIONS

While the region could be perceived as the territorial collectivity of the future in the Hexagon, its creation would involve a constitutional revision in Romania and would generate such complications like the overlapping of two intermediate territorial administration levels. The current Romanian development regions serve as framework for the implementation of regional development policies and especially for accessing community financing. In search of an optimal collectivity size, the debates on the reform of the administrative map are considerably stronger in France and they concern in particular the relevance of the departmental collectivity. Even if the communal division is an issue that particularly France has been dealing with for a long time, both countries promote an intercommunal cooperation policy which is in its early stages in Romania.

Over the last years, the two countries have experienced different trends in the matter of administrative-territorial reorganization. While in Romania, a controversial draft law proposes the doubling of the current number of development regions, the Law of December 16th 2010 on the reform of French collectivities encourages the fusion of the counties and regions in order to increase their size and power. The reshaping of the regional map made in 2014 reduced by a third the number of French regions. Also, the conversion after 1990 of more than 60 Romanian communes into towns, while about 2 000 town halls had serious difficulties in paying current financial obligations from their own budget²⁶, opposes the idea of a strong French Metropolis, according to MAPTAM Law, voted in 2013, which provided the existence of 13 metropolises. Nevertheless, a positive trend can be noticed at intercommunal level in both countries, although in Romania it is just an early stage because the intercommunity development associations are private law entities and only, by way of derogation, public utility entities.

We would like to stress again that, formally, the implementation of a new administrative-territorial organization in Romania requires the revision of the current Constitution which legitimizes only restrictively the administrative division of the national territory. Upon its accession to EU, Romania committed to maintain its regional organization until 2013. The public consultation and the consent of the member counties are prerequisites to any amendment in this matter. At the same time, politicians have different opinions when it comes to the need for an administrative reorganization of Romania. It is interesting to find out the potential change generated by the draft of the Romanian Administrative Code sent for public consultation in November 2016, or the implementation of the recent General Decentralization Strategy.

In France, the simplification and relief of the territorial configuration are considered a real necessity and the main objective out of the three aimed by the collectivity reform promoted by the Fillon government and its successor. The purpose is thus to create two different poles: counties – region and communes – inter-communality. In 2014, the same politicians are members of the Departmental Council (ex-General Council) and of the Regional Council. The division of competences between the department and region is carried out by clearly defined principles which are meant to prevent overlapping. Intercommunal regrouping is also encouraged considering that the intercommunal coverage of the national territory had to be accomplished by January 1st 2014. More power was also granted to prefects. Due to the foreign territorial competition and based on a voluntary communal initiative, the French metropolises have been created, which hold the status of public establishments for

26 In this context, it is worth mentioning the adoption of the Emergency Governmental Ordinance no.43/2013 on the financial crisis and insolvability of the administrative-territorial units.

intercommunal cooperation (ICPE) in which the integration of competences and financial framework is strengthened. The public establishment for intercommunal cooperation with their own fiscalism can create “metropolitan poles”, structures that are managed by mixed syndicates. Last but not least, the accession of territorial collectivities to multiple financing programs is regulated by the law.

Nowadays, the French regions are smaller in number, but larger and less unequal in spite of their inner heterogeneity.²⁷ The challenges they are facing mainly concern their financial means and the limited number of competences that they can exercise. Their role demonstrates another ongoing decentralization process, just like in Romania. The deployment of all these changes made by the adoption of several successive laws facilitates an important evolution, especially in terms of the structure of the administrative map of France whose current complexity still raises lots of issues.

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CONSTITUTIONAL LEGAL DISPUTES BETWEEN THE PRESIDENT OF ROMANIA AND OTHER PUBLIC AUTHORITIES IN THE CASE-LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

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ABSTRACT

Article 146 (e) of the Romanian Constitution stipulates the power of the Constitutional Court to solve legal disputes of a constitutional nature between public authorities. Thus, the Constitutional Court solves or settles constitutional disputes between the authorities belonging to the three powers in the state. These situations may concern disputes between two or more constitutional authorities regarding the content or length of their powers, as provided for by the Constitution. The result sought is to overcome possible institutional blockages.

From 2005, when the Constitutional Court of Romania first decided on such dispute, and until today, thirteen decisions for settling certain disputes between the President of Romania and other public authorities have been issued. The multitude of disputes is due, primarily, to the semi-presidential system of government provided for by the Constitution and to the ambiguous provisions regarding the division of powers between the Romanian President, Government, Parliament and the judicial power. Last but not least, this dispute is due to a certain political context, too.

The present paper aims to analyze the case-law of the Constitutional Court of Romania regarding the constitutional legal disputes between the President of Romania and other public authorities, as well as its impact on the constitutional order and the relationships between the public authorities from the checks and balances system.

KEYWORDS: *Constitution, Constitutional Court, constitutional legal disputes, public authorities, President of Romania.*

INTRODUCTION

The emergence of certain conflicts between public authorities is quite natural given the fact that these authorities are organized and operate on the principle of separation and balance of powers, a principle that involves, when talking about collaboration, areas of autonomy and independence¹.

Following the model of constitutions of Austria, Poland and Slovakia, since 2003, the Constitution of Romania, through Article 146 (e), assigns to the Romanian Constitutional Court the competence to settle legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister or the President of the Superior Council of Magistracy. It is, therefore, a political prerogative exercised exclusively by the Romanian constitutional contentious court, in its capacity as guarantor of the supremacy of the Constitution.

¹ Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentariu pe articole*, CH Beck Publishing House, Bucharest, 2008, pp. 1404-1405.

I. THE CONCEPT OF CONSTITUTIONAL LEGAL CONFLICTS BETWEEN PUBLIC AUTHORITIES

Disputes that may concern conflicts between two or more constitutional authorities on the content or scope of their duties arising from the Constitution represent the object of situations stipulated by Article 146 (e) of the Constitution. Therefore, the Constitutional Court will settle positive or negative conflicts of competence between two public authorities that declare interest or invoke their incompetence in solving the same problem. In the case of positive conflict of competence, two or more public authorities declare their jurisdiction to regulate or to solve one and the same problem. Instead, there will be a negative conflict of competence where two or more public authorities decline jurisdiction or refuse to perform certain acts that fall within their obligations. The net effect of conflicts of competence between public authorities is the emergence of institutional blockages between them.

In the attempt to define as precisely as possible the term “constitutional legal conflict”, the Romanian Constitutional Court underlined that in its contents it may also enter legal situations of a conflict nature arising directly from the fundamental text of the document. In this respect, by Decision no. 901 of 17 June 2009, the constitutional contentious court established that the concept of constitutional legal conflict “is not confined only to conflicts of positive or negative competence, which could create institutional blockages, but concerns any conflicting legal situations whose birth lies directly in the Constitution”. On the contrary, from the case-law of the Court, it results that the conflicts between a political party or a parliamentary group and a public authority does not fall into this category; opinions, value judgments or statements do not constitute by themselves a conflict of this nature; views or proposals regarding the exercise of the competence, even critical, do not trigger institutional blockages, if they are not followed by actions or inactions to hinder the fulfilment of constitutional duties, remaining within the limits of freedom of expression.

Romanian constitutional text envisages three conditions that must be fulfilled in order for the Constitutional Court to intervene to resolve a conflict: a. the conflict must be legal, excluding other types of conflicts: political, social, trade union, etc.; b. the conflict must be of a constitutional nature, targeting only those powers conferred to public authorities through the fundamental act; c. the conflict must be between public authorities, i.e. between those authorities falling under Title III of the Constitution of Romania – Parliament, the President of Romania, the Government, public administration and judicial authority – being excluded from this category the public powers, trade unions, employers, political parties or associations, whatever they may be².

II. RESOLUTION PROCEDURE OF THE CONSTITUTIONAL LEGAL CONFLICTS BETWEEN PUBLIC AUTHORITIES

The competence to solve disputes of a constitutional nature belongs, as we have already mentioned, only to the Constitutional Court, under Article 146 (e) of the Constitution, which is supplemented by the provisions of Articles 34-36 of Law no. 47/1992 on the organization and functioning of the Constitutional Court.

Referral to the Constitutional Court may come from the President of Romania, one of the presidents of the two Chambers, the Prime Minister or President of the Superior Council of Magistracy, without the need for the author’s referral to be “party to the conflict”.

The request must specify the public authorities in conflict, the legal texts upon which the conflict is bearing, a presentation of the position of the parties and the opinion of the request’s author.

²Ștefan Deaconu, *Legal Disputes of Constitutional Nature between the Juridical Authority and Other Public Authorities in the Case-Law of the Constitutional Court of Romania*, *Analele Universității din București, seria Drept*, 2011, pp.232-233.

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After the president of the Constitutional Court receives the request, he shall notify it to the parties in conflict and urge them to express, in writing, within a deadline, their point of view on the content of the conflict and possible ways to overcome it. He shall also appoint a Judge-Rapporteur.

According to Article 35 paragraph (2) of Law no. 47/1992, on receipt of the last standpoint, but not later than 20 days after receiving the request, the President of the Court sets a term for the hearing and summons the parties under conflict. From this legal provision, it can be noticed that the request's author is not quoted to proceedings.

The debate takes place at the date fixed by the President of the Court, in closed session, and even if any of the concerned public authorities do not respect the deadline for submission of its viewpoint. The debate is based on the report of the Judge-Rapporteur, the referral, the points of view presented, the evidence and submissions of the parties.

The resolution of legal conflicts of a constitutional nature between public authorities is made by the Constitutional Court, by decisions. These decisions shall be published in the Official Gazette and are binding from the date of publication, having power only for the future.

The big problem raised by this type of decisions is the fact that they are not exclusively legal. An important political charge is added to their legal side, which is why, in exercising its power, the Constitutional Court must give proof of greater demands on the independence and moral status of judges³.

We should also mention the fact that the solutions passed by the Constitutional Court in the matter shall be liable to execution, i.e. to be able to remedy the legal effects produced by the constitutional legal conflict, which intervened between public authorities. The legal failure of enforcement of the solution adopted by the Court equals with the failure to remedy the legal effects and, therefore, with the ineffectiveness of noticing a conflict of competences between public authorities⁴.

III. THE ROMANIAN PRESIDENT IN LEGAL CONFLICTS OF A CONSTITUTIONAL NATURE

So far, of the 26 referrals to the Constitutional Court of Romania regarding the settlement of legal disputes of a constitutional nature between public authorities, in 14 cases the President of Romania was involved. Of these, only in five cases the Constitutional Court established that there was a constitutional legal conflict between the President of Romania and another public authority, and in other 9 cases the Court has established that there was not such a conflict.

In the following, we shall analyze the most relevant decisions taken in this matter by the Romanian Constitutional Court, which involved the Romanian head of state and had a major impact on the constitutional relations between the public authorities mentioned in Title III of the Romanian fundamental law.

a. Freedom of the President of Romania to express political opinions

The first two referrals to the Constitutional Court of the existence of a legal dispute of a constitutional nature between public authorities have focused on the limits of the right to freedom of expression of a person who holds a public office, namely the President of Romania.

³Ioan Vida, *Curtea Constituțională a României: Justiția politicului sau politica justiției?*, Monitorul Oficial PublishingHouse, Bucharest, 2000, pp.100-101.

⁴George Liviu Gîrleşteanu, *Conflictele juridice de natură constituțională dintre autoritățile publice*, Revista Transilvană de Științe administrative 1/(30), 2012, pp.42-43.

In the first case, the presidents of the two Chambers of the Parliament have asked the Constitutional Court to declare the existence of a legal conflict of a constitutional nature between the President of Romania and Parliament, as consequence of statements made by the Romanian President, Traian Băsescu, concerning the Parliament and political parties, in an interview given to a newspaper of general circulation.

President's remarks, which, among other things, argued that a political party represents "an immoral solution" and instigated to the onset of parliamentary procedure to change the two Presidents of the Chambers of the Parliament and to convene early parliamentary elections, were considered, by the authors of the referral, as being contrary to the specific duties of the President granted by the Constitution.

The second case also has its starting point in the injurious statements of the President of Romania made, this time, to the address of justice and magistrates, generally, referring to the "incompetence", "independence of law" and "high level corruption" from the judiciary system.

Starting from these considerations, the President asked the Superior Council of Magistrates to establish the existence of a constitutional legal conflict between the judicial authority, on the one hand and the Romanian President and Prime Minister, on the other hand.

In both cases, by decision – respectively Decision no. 53 of 28 January 2005 and Decision no. 435 of 26 May 2006 – the Constitutional Court of Romania has established that the declarations of the President, which, otherwise, did not produce any kind of legal effect, did not raise a legal conflict of a constitutional nature between the concerned authorities.

In its reasoning, the Constitutional Court held, in both cases, that the opinions, value judgments and statements of a warrant holder of public office, relating to other public authorities, do not constitute by themselves legal disputes between public authorities. The views or proposals on how it acts or should act a certain public authority or its structures, even being critical, do not trigger institutional blockages if they are not followed by actions or inactions to hinder the fulfilment of constitutional powers of other public authorities. Such opinions or proposals remain within the limits of freedom of political expression, with the restrictions provided for by Article 30 paragraphs (6) and (7) of the Constitution.

Moreover, the Constitutional Court emphasized that, in the activity of fulfilling the constitutional mandates, the public authorities, by the positions they express, are required to avoid creating conflict situations between powers. The constitutional status of the President, as well as his role in the constitutional democracy, compels him to choose the appropriate forms of expression, so that the criticisms he makes against some state powers should not turn into elements that could generate legal disputes of a constitutional nature between them.

b. Romanian President's attribution to dismiss and appoint some members of the Government at the proposal of the Prime Minister

By decisions no. 356 of 5 April 2007 and no. 98 of 22 February 2008, the Constitutional Court settled the legal disputes of a constitutional nature issued between the President of Romania and the Government of Romania, due to the President's refusal to appoint as minister the persons nominated by the Prime Minister, in the situation of some governmental reshuffle, according to Article 85 paragraph (2) of the Constitution.

This time, the Constitutional Court found the existence of a constitutional legal conflict between the two public authorities, the President of Romania and the Romanian Government, under Article 146 (e) of the Constitution, holding that their disagreement is irreducible and may create an inadmissible institutional blockage capable to impede the proper functioning of Government.

Moving on to the conflict resolution, the Court found that, in fulfilling the duty provided for in Article 65 paragraph (2) of the Constitution, "the President shall dismiss and appoint, on the Prime Minister's proposal, some members of the Government", the President does not enforce a decision of Parliament, but he is in the situation of deciding himself the appointment

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of some ministers on the Prime Minister's proposal. At this stage, the decisional act of the President is by definition an act of will and, therefore, he is free to receive the Prime Minister's proposal or to ask him to make another proposal. However, the Constitutional Court does not recognize to the President an absolute right of veto in this area, excluding the validity of an unjustified, arbitrary refusal (Decision no. 356 of 5 April 2007).

To eliminate the institutional blockage, which would generate through an eventual repeated refusal of the President to appoint a minister on the Prime Minister's proposal, the Constitutional Court turned, more or less forced, to a solution, which in its opinion has the value of a constitutional principle, in resolving legal conflicts between public authorities. More specifically, the Court referred to the constitutional regulation of the law-making process, which provides for the right of the President to ask Parliament to review a law before its promulgation, only once.

Under this principle, in this case, the Court found that, just as in the legislative procedure situation, in exercising the power envisaged by Article 85 paragraph (2) of the Constitution, the President of Romania, without having a right of veto, may ask the Prime Minister once, motivated, to make a new proposal for the appointment of another person as Minister. The Romanian President's reasons for the request cannot be censored by the Prime Minister, who, under the procedure of Article 85 paragraph (2) of the Constitution, has only right to propose to the President to appoint a minister and he does not enjoy decisional competency. As with the exercise of other powers provided for by the Constitution, the President remains politically responsible to the electorate for how he motivated the refusal to follow the proposal of the Prime Minister, as the Prime Minister and the Government remain politically responsible to Parliament (Decision no. 98 of 7 February 2008).

Another aspect related to the Romanian President's duty of appointing new members of the Government was brought to the attention of Romanian constitutional judges at the constitutional legal conflict resolution between the Romanian Parliament and Romanian President by Decision no. 1560 of 18 November 2009. In essence, the referral of the Senate's President invoked the impossibility of the President of Romania to appoint an interim minister without the approval of Parliament [according to Article 85 paragraph (3) of the Constitution], given that through this appointment the political structure or composition of the Government was changed.

Holding that there is no conflict between the two authorities, by Decision no. 1560/2009, the Constitutional Court stressed the inapplicability of the provisions of Article 85 paragraph (3) of the Constitution in the case of the appointment of interim ministers, unlike the case of appointment of new members of the Government. Thus, the Court has noted: "the appointment of ministers in case of government reshuffle is a distinct constitutional institution with a constitutional regulation distinct from that designation of interim ministers. Since the appointment of interim ministers, governed by article 107, paragraph (4) of the Constitution does not require the exercise of Parliament as referred to Article 85 paragraph (3) of the Fundamental Law, it cannot be supposed the violation in this matter by the President of Romania of this power, or of "preliminary procedure" imposed by the same constitutional text". Only this conclusion may be accepted from both the literal interpretation of constitutional texts of reference (Article 85 of the Constitution which refers to the appointment of the Government, while article 107 paragraphs (3) and (4) of the Constitution refers to the appointment of other members of the Government as interim ministers) and from a systematic interpretation of the constitutional provisions contained in Article 85 (Appointment of the Government), Article 103 (Investiture), Article 104 (Oath of allegiance) Article 106 (Cessation of membership of the Government), Article 107 (Prime Minister).

c. The duty of representing the Romanian state at the European Council

Another conflict that reached the Romanian constitutional judges' table referred to the Romanian state representation in European forums, namely, the European Council. Thus, the President brought before the Constitutional Court the conflict between the Government, represented by the Prime Minister, on the one hand, and the President of Romania, on the other hand, conflict generated by the action of the Government and Prime Minister to exclude the President of Romania from the delegation attending the European Council and, consequently, the assumption by the Prime Minister of the constitutional duty to represent the Romanian state at the European Council.

By Decision no. 683 of 27 June 2012, the Constitutional Court declared admissible the complaint made by the President of Romania, noting the existence of a legal conflict of a constitutional nature between the Government and the President of Romania, due to the following reasons:

- public positions of the representatives of the two authorities have given rise to tensions that meet the constituent elements of the concept of conflict;
- the conflict is a legal one, as it aims to determine the role that the President and the Government have in defining and orientation of the State's foreign policy;
- the legal conflict is of a constitutional nature, as it aims the interpretation of Article 80 paragraph (1) and Article 102 paragraph (1) of the Constitution, which regulate the role of the President of Romania and the Government in achieving the country's foreign policy.

On the merits of the case, in solving the constitutional conflict, the Constitutional Court decided that the representation of the Romanian State at the highest level belongs to the President of Romania.

In order to decide thus, the provisions of Article 80 paragraph (1) of the Constitution were taken into consideration, "the President of Romania shall represent the Romanian State", which were interpreted in the sense that the Head of State is the person leading and engaging the State's foreign policy. This constitutional text allows the President to draw future lines that the State shall follow in its foreign policy. Basically, it shall determine its orientation in external relations, taking into account, of course, the national interest. Such a conception is legitimate by the representative character of the office, the Romanian President being elected by the citizens by universal, equal, direct and secret suffrage. On the contrary, the Government's role in foreign policy is rather of a technical nature, it must follow and meet the obligations to which Romania has undertaken at State level. Thus, the role of Government is diverted and not original, as the one of the President of Romania. Fulfilling one of his powers when representing the Romanian State, the Romanian President may also delegate this power to the Prime Minister, by an act of will, when he considers this to be necessary (Decision no. 683 of 27 June 2012).

d. Powers to grant the military rank of general

At the request of the President, the Constitutional Court was asked to rule on the existence of a legal conflict of constitutional nature between the President of Romania, on the one hand, and the judicial authority, represented by the High Court of Cassation and Justice, on the other hand, conflict raised because the Supreme Court failed to comply with a decision given by the Constitutional Court. This conduct of the High Court of Cassation and Justice put the Romanian President in the impossibility to respect the same time both the decision of the court and that of the Constitutional Court.

More specifically, by Decision no. 384 of 4 May 2006, the Constitutional Court ruled that the provisions of Article 66 paragraph (3) of Law no. 80/1995 on statute of military staff, according to which "Colonels and Commanders in activity, with a length in rank of at least 5 years and have been employed for at least 3 years in offices provided in the organisational charts with the rank of general or similar, assessed in this period with a grade of *very good*, upon discharge or directly upon retirement will be awarded with the rank of Brigadier

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General, respectively of general of aviation fleet or admiral of fleet, and will be discharged or directly retired with the new rank” are unconstitutional, contrary to the provisions of article 94 letter (b) of the Constitution.

By Decision no. 384/2006, mentioned above, the Constitutional Court ruled that the duty of the President of Romania, exercised in his capacity as head of state and commander of the armed forces, to grant degrees of marshal, general and admiral represents one of his rights and not an obligation. In this regard, the Court held that “the President has the opportunity to determine whether or not to grant these degrees without being conditioned by law, as appropriate to the duty of appointments to public offices. The Court finds that the criticized text of the law provides in an imperative form the advancement in rank of colonels and commanders in activity upon discharge or directly upon retirement, if they comply with the conditions of seniority in rank and grade required by law. The duty of the President of Romania provided for in Article 94 letter b) of the Constitution appears, in this case, as a formal intervention to fulfill certain legal provisions. Thus, this authority is deprived of the very substance of the constitutional powers”.

Later, contrary and totally ignoring the decision of the Constitutional Court, the High Court of Cassation and Justice established by a one of its decisions, under Article 66 paragraph (3) of Law no. 80/1995 on statute of military staff, the right of a complainant to be promoted by the President of the State to the rank of general.

Consequently, in view of the above, the Constitutional Court, by Decision no. 1222 of 12 November 2008, found that there was a constitutional legal conflict between the President of Romania, on the one hand, and the High Court of Cassation and Justice, on the other hand, conflict generated because the Supreme Court ignored the Decision no. 384/2006 of the Constitutional Court. It was found that the decision of the Supreme Court was unenforceable against the President, who was not party to proceedings and, extremely important, the Constitutional Court reiterated the exclusive power of the President of Romania to grant the rank of general, under Article 94 letter b) of the Constitution.

CONCLUSION

The semi-presidential political system enshrined in the Constitution contains many sources of conflict within the executive power or between the executive and legislative, conflicts that fully manifest in certain political contexts, such as, for example, the cohabitation. The main cause of these conflicts is represented, in our opinion, by the ambiguity of the constitutional provisions on the distribution of powers between the President, Government, Parliament and the judiciary power.

Entrusting to the Constitutional Court the power to resolve legal conflicts of a constitutional nature between public authorities is likely to increase the role of this institution among the state authorities. Thus, from the experience until now, it results that the Constitutional Court has a fairly wide margin of appreciation as regards the possibility of interpreting constitutional rules on the powers of public authorities. In some cases, the Constitutional Court even added new interpretation to the constitutional text based on principles borrowed from other institutions, as it happened in the case we have presented in detail in section 3.b. Sometimes, the Constitutional Court, seeking an escalation of conflict settlement, issued a conjectural solution.

We must emphasize, by paraphrasing the European Commission for Democracy through Law (Venice Commission) that the Constitutional Court is not and should not be an organ of mediation between the State’s powers in charge of settling their disputes and of finding “political” solutions for their differences. The Constitutional Court must act as a balancing factor in the Romanian society and among the Romanian authorities as a true guarantor of the

rule and respect of the Constitution. And for this to be done, the Court's judges shall manifest total independence from the authorities or political majorities that have appointed them, high moral integrity and professional competence.

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SHORT LEGAL FORAY ON THE EUROPEAN CERTIFICATE OF SUCCESSION

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ABSTRACT

The structure and content of the article describe the considerations relating to the premises of the European Heir Certificate, the juridical concept, character, purpose and not only the probative value and effects of this European document in the light of Romanian and international specialized literature, but also from the point of view of notarial practice.

KEYWORDS: *European Certificate of Succession, Regulation, probative value, effects.*

INTRODUCTION

The increase of the international inheritance due to the growing international mobility of persons and capital was the reason why the European legislator conceived EU Regulation No. 650/2012, whose aims are to facilitate the settlement of inheritance with foreign elements. These rules adopted at European level are purposeful reduction of legal difficulties arising in the event of death of a person who owns property in another EU Member State. The major innovation of the creation of a European Heir Certificate appears from well defined goal of proving the status of heir, legatee and the duties of executor or administrator of the inheritance into another Member State.

I. THE PREMISES OF THE EUROPEAN CERTIFICATE OF SUCCESSION CONSECRATION(ECS)

Over the years, internationally supported efforts were undertaken in order to harmonize the right of inheritance¹ and countless legal instruments adopted in this endeavor. We recall, in this regard, the Hague Conference on Private International Law, an organization established precisely which came into being for the purpose of harmonizing the rules of private international law worldwide.

The Hague Conference on Private International Law has devoted an important part of its concerns to issues raised/specified by the regulation of cross-border succession through four reference documents²:

- Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Disposition

¹http://ec.europa.eu/civiljustice/applicable_law/applicable_law_int_ro.htm, consultat la 20 septembrie 2017

²For more details see Mariel Revillard, Drept Internațional Privat și Comunitar. Practică Notarială. Prefață de Paul Lagarde. Ediția a 6-a, Editura Notarom, 2009, pag. 240-244

- Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons
- Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition
- Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons

The idea of the EMS's consecration was inspired, apparently, by the Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons. The signatories to this convention³ established a common denominator in identifying a unit of inheritance law to give the parties involved predictability in the succession realm. The merit of the Convention is to adopt the principle of unity of succession law⁴ and the *professio juris* consecration⁵, relevant aspects in the planning of a succession with elements of foreignness. This convention has attempted to solve some difficulties of international successions by establishing an "*international certificate designating the person empowered to manage the succession by indicating its powers*".

According to the Convention, this certificate should have been drawn by the authorities and, in principle, under the domestic law of the last ordinary residence of the deceased.⁶

The aim established by the European Union to promote and develop an area of freedom, security and justice based on the free movement of persons could not neglect the difficulties caused by international successions. They wished to ensure greater predictability in establishing the court or competent authority to solve the inheritance, but also in determining the law applicable to it, thus establishing effective tools for organizing an inheritance.

On this line, the European Council adopted on 4-5 November, in Bruxelles, "*The Hague Program*" regarding to strengthening freedom, security and justice in the European Union, which highlights the usefulness of adopting an instrument at European level aimed at unifying the conflicting rules in the area of inheritance law, including rules of international competence in this field, guaranteeing mutual recognition and enforcement of inheritance decisions and the establishment of a European Certificate of Succession.⁷ In addition, the European Council meeting in Brussels on 10-11 December 2009 adopted a new multiannual program entitled "*The Stockholm Program - An open and secure Europe serving and protecting the citizens*", highlighting the need to extend the principle of mutual recognition to new areas, essential for everyday life, such as successions and wills. This was the basis for a proposed future regulation that would maintain the traditions of the country's legislation in this area and would provide increased predictability to those interested in anticipating succession planning.

The European Commission published on 1 March 2005 the Green Card "*Succession and wills*", which is a questionnaire containing questions on conflicting rules in the field of succession, including the rules of international competence which was to be taken into consideration when adopting a future European instrument in this area. This questionnaire also contains questions on EMS, on the conditions for its release, its content and its legal effects. The responses to the Green Paper were published on the website of the Directorate-General for Justice, Freedom and Security.⁸

³ The Hague Convention of 2 October 1973 entered into force on 1 July 1993 between Portugal, the Slovak Republic and the Czech Republic. It was signed by Italy, the Netherlands, Luxembourg, the United Kingdom and Turkey.

⁴ Based on this principle, the only law governs the movable and immovable property succession

⁵ The testator's ability to choose the law applicable to his succession.

⁶ For more details see Mariel Revillard., pg.288

⁷ For more details see articles (5) și (6) the preamble to the EU Regulation no. 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, the recognition and enforcement of judgments and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁸ http://ec.europa.eu/justice/index_en.htm#newsroom-tab consultat la 20 septembrie 2017.

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At the request of the European Commission – Directorate-General for Justice and Home Affairs, the German Notary Institute,⁹ together with Professors Heinrich Dörner (University of Münster) and Paul Lagarde (Sorbonne University), developed a large study of comparative law and private international law in inheritance matters - *"Etude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives et testaments et successions dans les Membres de l'Union européenne"*. The study was based on 15 national reports, including the final synthesis report and conclusions, under the coordination of the two illustrious teachers.¹⁰

Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, was launched in October 2009. *Max Planck Institute* for Comparative and International Private Law in Hamburg¹¹ has developed a detailed commentary on the articles of this draft, containing proposals for amendment or modification, entitled *"Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession"*¹². The study was published in *"Rechts Zeitschrift für ausländisches und internationales Privatrecht"*, vol. 74 (2010), Heft 3 (Juli), p. 522-720.

Regulation (EU) No 650/2012 of the European Parliament, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession was adopted on 4 July 2012 and was published on 27 July 2012 in Official Journal of the EU no. 201.

Regulation (EU) No 650/2012 is to apply to the succession of persons who have died since August 17, 2015, stating the possibility of choosing the law applicable to the inheritance just before that date under Art. 83 - Transitional provisions¹³.

Starting in 2012, EU Member States have had a three-year deadline to harmonize their national legislation so that the new EU rules produce legal effects.

EU Commissioner for Justice, Ms. Viviane Reding, Vice-President of the Commission, said: *"Once we have relieved the situation of couples involved in cross-border divorce, we are doing the same thing for families that have to cope with the legal consequences of losing a close person." In this context, "the existence in each EU Member State of distinct rules on successions has frequently resulted in a legal labyrinth. This legislation simplifies procedures*

⁹ DeutschesNotariatinstitut - DnotI.

¹⁰ For more details see http://ec.europa.eu/civiljustice/publications/docs/testaments_successions_fr.pdf; <http://dnoti.de/> (ambele site-uri consultate la 20 septembrie 2017); D.A. Popescu, Ghid de drept internațional privat în materia succesiunilor, Ed. Magic Print, Onești, 2014, pag.8; D.A. Popescu, Dreptul european al moștenirilor sau cum să traversezi râul simțind pietrele. Dreptul succesoral între trauma tradiției și perspectiva modernității. Principiile regulamentului european al succesiunilor în Revista Română de Drept Privat nr. 1/2014, pag.151

¹¹ Institut für Ausländisches und Internationales Privatrecht

¹² <http://europarl.europa.eu/document/activities/cont/201005/20100526ATT75035/20100526ATT75035EN.pdf> consultat la 21 septembrie 2017

¹³ "(1) This Regulation shall apply to the succession of persons who died on or after 17 August 2015.

(2) If the deceased has chosen the law applicable to his succession before 17 August 2015, that choice is valid if he fulfills the conditions laid down in Chapter III or is valid in applying the rules of private international law in force at the time of the election the state in which the deceased was habitually resident or in any of the States whose citizenship it had.

(3) A provision for death toll made before 17 August 2015 is admissible and valid on the merits of the form if it satisfies the conditions laid down in Chapter III or is admissible and valid on the merits and in the form of application of the rules of private international law which were in force in the Member State in which the deceased was habitually resident or in any of the States of which he or she is a national, or in the Member State in which the successor authority is situated.

(4) Where a death sentence was made before 17 August 2015 in accordance with the law which the deceased could have chosen under this Regulation, that law shall be deemed to be the law applicable to the succession."

*and citizens enjoy legal security. The enactment of this EU law facilitates the identification of the law that will be applied in each case. This is just an example of how the European Union is working to resolve everyday legal issues and allow Europeans to make savings."*¹⁴

II. EUROPEAN CERTIFICATE OF SUCCESSION- CONCEPT, LEGAL CHARACTERS, PURPOSE AND PROBATIVE VALUE

II.1 CONCEPT

One of the innovative elements of EU Regulation no. 650/2012 is the establishment of a European Certificate of Succession (EMS).

The main articles are Art.62¹⁵, art.63¹⁶ and Recital 67¹⁷ din of EU Regulation No. 650 / 2012. The argument behind the creation of this new European legal instrument starts from the EU desiderate expressed in the preamble of EU Regulation no. 650/2012 at recital 67, according to which: "In order for a succession with extraneous elements in the Union to be resolved in a rapid manner, the heirs, legatees, executors or administrators of succession assets should be able to easily prove their status and / or rights and competences in another Member State, for example in a Member State where the succession assets are located".

We note that the procedure has a precedent in the economy of European regulations, in the field of marriage dissolution, a European Certificate of Divorce was established by the provisions of Regulation (EC) no. 2201/2003.

EMS is issued for the well-determined purpose of being used in another Member State.

We note that the European legislator does not provide a legal EMF definition, and the legal literature has the task of defining the concept introduced by EU Regulation no. 650/2012. The doctrine¹⁸ outlined a definition according to which "the European Certificate of Succession is the act issued by a competent authority through which heirs, legatees, testamentary executors and administrators of the patrimony of the person whose inheritance is transmitted can prove their quality and rights in an another EU Member State in the case of inheritances opened as from 17 August 2015". The European Certificate of Succession was also defined as "a

¹⁴ <https://legestart.ro/norme-ue-de-simplificare-a-sucesiunilor-transfrontaliere-au-in-prezent-putere-de-lege/> - consultat la 21 septembrie 2017

¹⁵ "(1). This Regulation establishes a European Certificate of Succession (hereinafter referred to as "the Certificate"), which is issued for use in another Member State and produces the effects listed in Article 69.

(2) The use of the certificate is not mandatory.

(3) The certificate does not replace internal documents used for similar purposes in the Member States. However, a certificate issued for use in another Member State shall produce the effects listed in Article 69 and in the Member State whose authorities have issued the certificate under this Chapter.

¹⁶ (1) The certificate is intended for use by heirs by direct liaison with successors and by executors or administrators of inheritance property which must prove their status in another Member State or exercise that right as heir or legatee and / or the duties of the executor or the successor inheritor

(2) The certificate may be used in particular to prove one or more of the following:

(a) the status and / or the rights of each heir or, where applicable, of each legatee mentioned in the certificate and the respective shares in the succession heritage;

(b) the assignment of a good or certain property that is part of the succession heritage to the heir / heirs or, as the case may be, to the said legatee (s) mentioned in the certificate

(c) the attributions of the person mentioned in the certificate as the executor of the testamentary or as the administrator of the succession patrimony.

¹⁷ "In order for a succession with extraneous elements in the Union to be resolved in a rapid, simple and effective manner, the heirs, legatees, testamentary executors or administrators of the succession heritage should be able to easily prove their status and / or rights and competences in - in another Member State, for example in a Member State where the succession goods are located. To enable this, this Regulation should provide for the creation of a uniform certificate, the European Certificate of Succession (hereinafter referred to as the Certificate) be issued for use in another Member State. In order to comply with the principle of subsidiarity, the certificate should not replace the internal documents that may exist for similar purposes in the Member States."

¹⁸ To be seen Veronica Stoica, Succinte considerații în legătură cu certificatul european de moștenitor, Revista de investigare a criminalității, Vol. IX, nr. 1/ianuarie-iunie 2016, Ed. Universul Juridic, Bucharest, pag. 46

uniform European document by means of which, in a Member State other than the issuing of the certificate, the rights of heirs, legatees, testamentary executors or administrators of the succession heritage, serves at the same time to exercise those rights".¹⁹

In another form²⁰ "the European Certificate of Succession is a standard form intended to enable heirs, legatees, testamentary executors or successors to prove their quality and rights in successions from August 17, 2015".

We note that it is necessary to distinguish between the EMS, which is a standard form, with probative valences, and other documents issued in inheritance proceedings in the Member States, namely: "authentic act", "judgment" or "judicial transaction" as defined by EU Regulation no. 650/2012 in Article 3, paragraph 1.²¹

II.2 THE OPTIONAL CHARACTER

As a rule, the application and use of ECS is not mandatory. EU Regulation no. 650/2012 enshrines in his head note on the point 67, the principle of EMS subsidiarity, in the light of which it "does not replace domestic documents used for similar purposes in the Member States"²².

The effect of this principle lies in the fact that ECS can circulate alongside national certificates of succession or other internal documents used for similar cross-border successions (being excluded a substitution thereof) or including states where the succession procedure completes with issuing such a certificate²³.

If we analyze the optional character of EMS from the perspective of notary practice in Romania, we identify the possibility that in an international succession, according to the request of the heirs, a notary issues both a certificate of heir under the Law no. 36/1995 of the notaries public and of the activity notaries in Romania, as well as an EMS under Art.67 of the EU Regulation no. 650/2012²⁴.

Also, legal literature²⁵ outlining the event that a foreign element, which justifies the issuance of ECS, is not present since the opening date of succession, but appears later. In this case, it is possible to issue an ECS in an inheritance file that already issued a national certificate of inheritance.

¹⁹ For more details see Daniela Negrilă, *Moștenirea în noul Cod civil. Studii teoretice și practice*. Ediția a II-a, revăzută și readăugită, Ed. Universul Juridic, Bucharest, 2015, pag. 324

²⁰ For more details see D.A. Popescu, Ghid, op. cit., pag. 101

²¹ "(i) 'Authentic instrument' means a document in matters of succession drawn up or registered formally as authentic instrument in a Member State and the authenticity of which:

(i) refers to the signature and content of the authentic instrument; and

(ii) has been drawn up by a public authority or by any authority empowered to do so by the Member State of origin.

(h) "legal transaction" means a transaction in matters of succession approved by a court or entered into before a court in the course of proceedings;

(g) "judgment" means any judgment on matters of succession rendered by a court of a Member State, whatever its name, including a decision on the determination by a Registrar of the costs;

²² The principle of ECS subsidiarity is reiterated in paragraph 3 of Article 62 of the Regulation.

²³ For example in the case of Italy.

²⁴ "Issuing the certificate:

1. The issuing authority shall, without delay, issue the certificate in accordance with the procedure laid down in this Chapter where the elements to be certified have been determined in accordance with the law applicable to the succession or any other law applicable to particular elements. It shall use the form drawn up in accordance with the consultation procedure referred to in Article 81 (2).

The issuing authority shall not issue the certificate, in particular if:

(a) the elements to be certified are the subject of a challenge; or

(b) the certificate would not be in conformity with a judgment relating to the same elements.

2. The issuing authority shall take all necessary measures to inform the beneficiaries of the issue of the certificate."

²⁵ To be seen Ioana Olaru, *Dreptul european al succesiunilor internaționale*, Ghid practic, Editura Notarom, Bucharest, 2014, page 153 and Daniela Negrilă, op. cit., page 323

It can be seen that Regulation (EU) No 650/2012 does not fully clarify the relationship between ECS and national certificate of succession. Therefore the European legislator is silent which of these would take precedence in the event of a conflict²⁶ or what procedure should be followed when they were required simultaneously different State authorities for their issue²⁷. It seems that it falls to the European Court of Justice to clarify the gaps in Regulation (EU) No 650/2012 which can lead to legal uncertainty.

II.3 THE PURPOSE OF ECS

ECS purpose is clearly stated in Article 63 paragraph 1, which is a legal instrument used by heirs, the legatees having direct rights in the succession and the executors or administrators of the estate who need to prove their status in another Member State or to exercise that right of a heir or legatees and/or those duties of an executor or administrator of the estate.

It can be seen that ECS covers all certificate types regulated in the Romanian law, respectively the certificate which confirm the quality of the executor or as heir. Also, as we will show below, it may be useful to other stakeholders, such as creditors surviving spouse or heirs.

II.4 PROBATIVE VALUE

ECS is a document that can be issued in all succession proceedings with foreign elements and serves to prove the status as heir, legatee and the competences of the executors of wills or administrators of the estate in another Member State.

For example, we can remember the following assumptions which requires issuance of an ECS:

- when the last habitual residence of the deceased lies in another state;
- when goods constituting the estate are located in another country than the issuer.

Therefore, in an international succession ECS issue it is not mandatory²⁸. Depending on the request of the parties to complete the procedure of succession, the notary will issue a national certificate of inheritance or will issue an ECS, if the parties wish proving certain rights in another Member State.

ECS can be used as evidence to prove the following issues listed by the Regulation (EU) No 650/2012 Article 63, paragraph 2:

"(a) status and / or rights of each heir or, as the case may be, each legatee mentioned in certificate and respective shares of the estate;

(b) the award of a specific asset or specific assets forming part of the estate of heir/heirs or, where appropriate, legatee mentioned (legatees mentioned) in the certificate;

(c) the powers of the person mentioned in the Certificate to execute the will or administer the estate. "

For the first time, because of ECS there is a uniform sample, in particular the quality of heir/legatee, and the quality of the executor²⁹. It can be seen that national certificates of succession are not replaced by this certificate.

In terms of probation, ECS creates a presumption of accuracy of the elements established by law that the certificate contains. The probative value of ECS lies in Article 69 paragraph 2 of

²⁶ In the sense that this priority should be recognized to the European certificate, to be seen P. Lagarde, *"Les principes de bases du nouveau règlement européen sur les successions"* RCDIP, no. 4/2012, page 72. In the sense that in Romania should prevail the national certificate of inheritance, which is authentic, to be seen Ioana Olaru, *Dreptul european al succesiunilor internaționale, Ghid practic*, Editura Notarom, Bucharest, 2014, page 154, *apud* D.A. Popescu, Ghid..., op. cit., note 251

²⁷ The guidance of the doctrine of using the provisions of the institution of lispence, although effective, can not completely prevent contradictory documents, see P. Wautelet, Article 62, *Le droit européen des successions. Commentaire du Règlement no. 650/2012 du 4 juillet 2012*, Bruylant, 2013, pag.717 *apud* D.A. Popescu, Guide ..., op. cit., Note 252

²⁸ To be seen Ioana Olaru, op. cit., page 154

²⁹ To be seen C. Dorsel, *"Remarquessur le certificate sucesoral européen"*, Europe For Notaries - Notaries For Europe, Training 2015-2017, JUST/2014/JTRA, pag.73

the Regulation: "It is alleged that the certificate proves exactly the requirements set under the law applicable to the succession or under any other law applicable to specific elements. It is assumed that the person mentioned in the Certificate as the heir, legatee, executor or administrator of the estate is mentioned in the certificate status and/or to hold the rights or the powers stated in the certificate with no other conditions and/or restrictions attached to those rights or powers than those stated in the certificate."

We are therefore in the presence of a relative presumption which can be reversed by proving otherwise.³⁰

III. THE EFFECTS OF THE EUROPEAN CERTIFICATE OF SUCCESSION

ECS content has a relative presumption of precision³¹³². This way, according to Article 69 of the Regulation, ECS is deemed to certify the veracity of the items referred in its content, proving "exactly the requirements set under the law applicable to the succession or under any other law applicable to specific elements."

ECS is automatically efficacious in all Member States (including the issuing State) without the need for any procedure of recognition / enforcement in the State of destination.

Therefore, in order to be accepted, the ECS effects does not require legalization or other similar formality, as it is been stipulated in Article 74 of the Regulation³³. Also, ECS control in the destination country is not allowed. It can be seen, also as a consequence of its effectiveness, that the ECS can be challenged only in the Member State of origin.³⁴

The ECS effects stated in the Article 69 of the Regulation have basically a probative character and mainly refers the elements determined according to the lex successions (designation successors / legatees and their rights, the establishment of the administrator functions or of the executor). ECS effects could even concern matters which are governed by their own laws, but which also directly influences the content of the certificate (ex. The validity conditions of a disposition of property upon death)³⁵.

People mentioned in the ECS are presumed to have the quality of legal heir, legatee, administrator or executor of the estate and they have the status and rights / powers recorded in the certificate. The person registered as beneficiary of the ECS can make use of this capacity, without any other documents or additional tests³⁶. It can be seen that the presumption stated by ECS involves a reversal of the burden of proof which benefits to the person listed as the beneficiary in the certificate³⁷.

We note that the European legislator provides legal protection to third parties who acted based on ECS. This way, bona fide third parties taking part in contractual relations with the heirs are entitled to acquire goods or to transfer to the heirs' goods or money, considering their quality emanating from ECS.

³⁰ Given the possibility of challenging the certificate (and correlatively, withdrawing, correcting or modifying it), the presumption can only be a simple one - to be seen R. Crône, "Le certificat successoral européen", in G. Khairallah, M. Revillard (dir.), *Droit européen des successions internationales. Le règlement du 4 juillet 2012*, Defrénois, Lextenso, 2013, n° 422, p. 183, *apud* D.A Popescu, Ghid..., op. cit., nota 266.

³¹ J. Gomes de Almeida, Le certificate successoral européen: Quelques questions, Europe For Notaries - Notaries For Europe, Training 2015-2017, JUST/2014/JTRA, pag.112

³² For documents issued in a Member State in the context of this regulation is not necessary any legalization or other similar formal condition.

³³ To be seen article 71 and article 72 of Regulation (UE) No 650/2012

³⁴ To be seen D.A. Popescu, Ghid..., op. cit., page 104

³⁵ We take into consideration the identity and civil status documents such as birth or marriage certificates.

³⁶ J.Gomes de Almeida, op. cit., page 112

³⁷ For instance, third party was notified to declare an appeal against ECS and acted without knowing how it will be solved.

Regulation (EU) No 650 / 2012 establishes the validity of transactions involving third parties, unless they know that the information contained in the certificate are contrary to reality or did not know this because of their serious negligence.³⁸

We note that the rules of the Regulation (EU) No 650 / 2012 resort to the rule *error communis facit jus*, which can be removed only if the third part did not know the reality because of serious negligence³⁹.

As a rule, any entity (ex: a bank) which deals with the transfer of goods or made payments on account of ECS is considered released from those obligations and cannot be ordered to a new payment. Also, the good faith third part purchaser who acquires an ownership / another right on an asset under an ECS is deemed to have contracted by a person who is entitled to dispose of succession property and can not be forced to return it or pay its value to the true owner. In conclusion, the effects of ECS ensure legal certainty for bona fide third parties.

ECS efficacy, according to the European legislator, means access to public records through this available document. According to paragraph 5 of Article 69 of the Regulation "shall constitute a valid certificate for the recording of succession property in the relevant register of a Member State, without prejudice to Article 1 (2) (k) and (l)." This means certain that ECS is a valid document for registration of transfer of succession property in the relevant registers of a Member State (land registers, commercial register, register for inventions or trademarks)⁴⁰, without requiring a special procedure.

Although, it can be seen that this rule must be reconciled with that stated in Article 1 paragraph 2 lit. k) and l)⁴¹ which excludes from the scope of Regulation the matters regarding the nature of real rights issues and enrollments in public registers.

It can be considered that the relationship between ECS and *lex rei sitae* is determined by the scope of Regulation (EU) No 650 / 2012 and, this way, we should not overlook recital 18⁴².

Therefore, it can be concluded that whenever public records of a Member State requires special conditions for documents under which is recorded creation, transfer or termination of real rights, such compliance is mandatory. The solution is justified by the intention of the European legislator to safeguard the requirements of national legislation⁴³, with the immediate consequence that sometimes to refrain from establishing legal equivalence between ECS and documents required by national law of Member States.

In other words, if the public registers allow recording the documents without imposing special conditions, ECS will be scored as the basis for transmitting property in the light of Article 69 paragraph 5 of the Regulation.

For instance, the legal doctrine⁴⁴ claims that an ECS is not sufficient in order to proceed to France to update land registers, where the ECS must be accompanied by a notary certification.

³⁸ To be seen Daniela Negrilă, op. cit., page 330

³⁹ To be seen D.A. Popescu, Ghid..., op. cit., page. 105

⁴⁰ "Are excluded from the scope of this Regulation:

(k) the nature of rights in rem, and

(l) any recording in a register of ownership of immovable or movable property, including the legal requirements for such recording, and effects of recording or failing to record such rights in a register."

⁴¹ "Requirements for enrollment in a register of a right in immovable or movable property should be excluded from the scope of this Regulation. Should therefore be the law of the Member State in which the register is kept (for immovable property, the *lex rei sitae*) to be the one that sets the legal conditions and how they have performed registration and which authorities, such as cadastral offices or notaries, are responsible for verifying all the requirements and that the documentation presented or established is sufficient or contains the necessary information."

⁴² We took into consideration the validity conditions of those documents, strictly regulated by the law.

⁴³ .To be seen C. Dorsel, op. cit., page. 89

⁴⁴ According to the article 31 of the Regulation: where a person claims a real right to which he is entitled under the law applicable to succession, and the law of the Member State where the real right is invoked does not provide for the real right in question, that right shall adapt, where necessary and as far as possible, to the closest equivalent real right under the law of that State, taking into account the objectives and interests pursued by the specific real right and its effects.

SHORT LEGAL FORAY ON THE EUROPEAN CERTIFICATE OF SUCCESSION

The situation is the opposite in Germany, where it is sufficient to submit the ECS to make changes in the land registry.

Article 1 paragraph 2 lit. k) and l) of the Regulation leads us to make the following interpretation:

- remains the preserve of each EU Member State to determine which are real rights. Therefore, no real right referred in the ECS cannot be entered in the registers of another Member State unless it integrates *numerus clausus* of real rights enshrined in the legal system of that State. As an example, remember the case when ECS mentions a dismemberment of property unrecognized in the legal system of the State of destination, in which case it is usually advisable to adapt real rights^{45, 46}, in order to not miss the ECS of juridical efficacy;
- each EU Member State is free to decide which of real rights and other rights, facts, legal statements can be entered in public registers and in what circumstances;
- is the prerogative of each Member State to determine the effects of recording / failing to record such rights in a public register or constitutive effects of enforceability or information⁴⁷.

It can be considered that the State of destination may require documents certifying other issues necessary for the registration of that right mentioned in ECS referring to fiscal issues (certificates showing payment of taxes related to real or payment of registration fees) or documents certifying the title of the deceased on those goods.⁴⁸

We note that the legal effects of ECS cannot be extended to matters excluded from the scope of Regulation (EU) No 650 / 2012 such as those relating to property rights, kinship between the deceased and the beneficiary, the deceased matrimonial regime or "property regimes of relationships deemed, under their applicable law, to have comparable effects to marriage" as it is stipulated in Article 1 paragraph 2 d) of Regulation. Therefore, to determine the circle of heirs or the estate and shares related to party beneficiaries, the competent authorities shall determine under its own rules of private international law, the existence of kinship or marital problems of the patrimonial regime of the deceased⁴⁹. It should be mentioned that these issues do not operate with the presumption of veracity enshrined in Article 69 paragraph 2 of the Regulation. Thus, the authorities of the destination are free to determine, in light of their own rules⁵⁰, the existence of kinship or mentioned in ECS or if matters of matrimonial settlement was done properly or not

CONCLUSIONS

It can be said that the rationale for the EMS's consecration by EU Regulation no. 650/2012 is to constitute firstly an instrument of attestation of inheritance rights resulting from a succession with elements of foreign affairs. As such, this European material instrument refers to a potential simplification of the resolution of cross-border succession. Most of the time, this potential is fully realized. However, the legal status of the European Certificate of Succession

⁴⁵ To be seen I-L.Vlad, *Sucesiuni internaționale. Regulamentul nr. 650/2012. Tratatate internaționale în domeniu*, Ed. Universul Juridic, Bucharest, 2016, page 256

⁴⁶ Considering that EMF cannot transmit rights to heirs who did not exist in the deceased's patrimony

⁴⁷ According to Recital 12: "This Regulation should not apply to the patrimonial aspects of matrimonial property regimes, including matrimonial property regimes, as are known in some legal systems, insofar as such schemes do not deal with matters relating to successions, and patrimonial aspects of relations considered to have comparable effects to marriage. The competent authorities with regard to a certain succession under this Regulation should, however, depending on the situation, consider addressing the patrimonial aspects of the matrimonial regime, or of a similar patrimonial regime of the deceased in establishing the succession patrimony of the deceased and of those shares of the beneficiaries. "

⁴⁸ Until the adoption of uniform EU provisions in the field.

does raise difficulties in interpreting and implementing the European legislator's provisions because of its novelty.

It is considered that making use of the European Certificate of Succession in practice will highlight its clear advantages and help to overcome the gaps that may arise in the implementation process.

In conclusion, we note that the ECS maintains the rules of the national laws of the Member States which govern the following aspects:

- who are the appointee of the inheritance and what successor statuses they have;
- the right to property and family law;
- tax issues related to succession property

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VICES OF CONSENT CONCERNING THE CIVIL LEGAL ACT

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ABSTRACT

"The right is the totality of the conditions under which the will of each can coexist with the will of all, according to a universal law of freedom". Immanuel Kant.

The requirement that the expression of will to be uncorrupted is a legal necessity, but also a guarantee of compliance with the principle of freedom of civil legal acts, the real principle of will and the principle of law which enshrines the legal equality of the parties to civil legal relationship since the legal civil act must be the consequence of a volitional attitude, free and conscious expressed

KEYWORDS: civil legal act, consent, vices of consent, error, fraud, violence, injury.

INTRODUCTION

The Civil code expressly states in art. 1166 the notion of contract as wills agreement between two or more persons with intent to establish, modify or extinguish a legal report.

Essential for civil legal act is the manifestation of will of the party or parties and their intention on it to produce, within the objective law, legal effects.¹ Examination of legal will is required in this context because, as we know, civil legal act is exactly a manifestation of will committed with the intent to produce legal effects.

In order for the civil legal act to produce legal effects and to be fully valid, as it follows from the above, it is necessary for the will to be uncorrupted. This condition is fulfilled when the will is free and undisturbed in its manifestations.²

The manifestation of will may be expressed precise or tacitly and is "the core" of the civil legal act, the one that sets in motion the creation of the legal act, so when it's missing this will we are dealing with a legal act. The will is psychological and appears as a complex

¹Muțiu, M. I., (2001), *Drept civil. Parte generală și subiectele*, Oradea, Editura Imprimeriei de Vest, p. 90

²Hamangiu, C., Rosetti Bălănescu, I., Baicoianu, Al. *Tratat de drept civil roman*, vol. I, Bucharest, Editura All, p. 81.

phenomenon. It interested, however, civil law directly, because there is a close correlation between will and consent, and the consent is a substantive condition for any civil legal act. In terms of legal, the structure of will comprises two elements: consent and cause (purpose).³

The consent appears in the legislation as a condition of substance, general, essential, of validity of civil legal act. Consent means expressing the decision to conclude a civil legal act.⁴

As a general rule, parties are free to choose the form of an expression of their will, apart from the exceptions expressly provided for by law, as is the case for legal acts which the law requires that the expression of will to put on a special form.⁵

The civil code stipulates in art. 1204 conditions of validity of consent, which must be cumulatively met, namely, to be serious, free and expressed learnedly. Some authors consider that should be met other requirements too, such as consent to be serious and precise.⁶

In order to be free, consent must be uncorrupted, respectively not to be impaired by vices altering it.

The vices of consent can be defined as those circumstances affecting the nature of consciousness and the free will to conclude a legal act.

According to the legislation in force, namely the Civil Code, consent is corrupted when given in error, surprised by fraud or torn by violence. Also, consent is vitiated in case of injury.

I. THE ERROR

The error is, as noted in the special literature, to believe what is truly false or false.⁷ In other words, the error is a false representation of reality at the conclusion of a civil legal act.

The classification of the error can be made in relation to three criteria, namely the consequences that occur, the nature of the false reality represented, as well as whether it is imputable to the misleading party.

Depending on the consequences, we are going to distinguish between essential error and nonessential error.

According to art. 1207 al. 2 Civil Code, the error is essential if the false representation falls on: the nature or the object of the legal act that is concluded (error in negotium), the physical identity of the object of the benefit (error in corpore), the substantial qualities of the object of the benefit or other circumstances considered to be essential in the absence of which the legal act had not been concluded (error in substantiam) or the identity of the person or the quality of the person in the absence of which the contract would not have been concluded (error in personam).

The non-essential (irrelevant) error is the false representation of less important circumstances at the conclusion of the legal act in the sense that the mistaken party would have concluded the legal act and had a fair representation of those circumstances, so that the very validity it. The nonessential error may at most result in a reduction (or increase) in the value of the benefit, but it may even remain without any legal consequence.⁸

Depending on the nature of the false reality represented, the error may be:

– In fact, what is the false representation of a state or factual situation at the conclusion of the civil legal act? It concerns either the object of the legal act or its value, or the co-contracting or beneficiary of the unilateral legal act.

³Ionașcu, T., Barasch, E. (1967), *Tratat de drept civil, vol. I, partea generală*, Bucharest, Editura Academiei, p. 252.

⁴Boroi, G., Angheliescu, C.A. (2012), *Curs de drept civil: parte generală*, ediția a 2-a revizuită și adăugită, Bucharest, Editura Hamangiu, p. 131

⁵Boroi, G., Stănculescu L. (2012), *Instituții de drept civil în reglementarea noului Cod civil*, Bucharest, Editura Hamangiu, p. 94

⁶Ionașcu, T. (1967), *Consimțământul, ca element al voinței juridice*, în *Tratat de drept civil*, vol. I, Parte generală, Bucharest, Ed. Academiei, p. 263, 264

⁷Deleanu, I. *Cunoașterea legii și eroarea de drept*, in *Dreptul* no. 7/2004, p. 45

⁸Boroi, G., Angheliescu, C.A. (2012), *Curs de drept civil: parte generală*, ediția a 2-a revizuită și adăugită, Bucharest, Editura Hamangiu, p. 144

– Legally, consisting in the false representation at the conclusion of the legal act of the existence or content of a legal norm, cannot be invoked in the case of accessible and predictable legal provisions.

As it is attributable to the misleading part of the misleading party, we can distinguish the excusable error that cannot be accused of the party who had a false representation of reality at the conclusion of the legal act, which is not the result of the lack of information or negligence of that party and the inexcusable error, being that fault attributable to the party because the fact that it was carrying the error could be known with reasonable diligence.

Because the false representation of reality at the conclusion of a legal act is a vague consent, two requirements (conditions) must be met cumulatively:⁹

– the factual or legal element on which the error occurred was decisive, decisive for the conclusion of the legal act, in the sense that if the reality had been known the act would not have been concluded;

– In the case of bilateral or plurilateral legal acts, for consideration, the other contracting party must have known or should have known that the item on which the false representation falls is essential to the conclusion of the respective civil legal act.

In case of essential error, in any of its forms, according to art.1207 al. 1 Civil Code, where the relative nullity of the legal act intervenes as a sanction.

II. THE DEFRAUD

The Civil Code enshrines art. 1214 of this vitiation of consent, and AL. (1) of that article provides: "consent is vitiated by a party where the defraud has been in error as a result of fraudulent misconduct of the other party or when the latter has fraudulently omitted to inform the Contractor of circumstances was required to reveal it. "

The Romanian legal doctrine defines the defraud as the vitiation of conspiracy to mislead a person by means of cunning or dowsy means to make it conclude a certain legal act. Therefore, in essence, the defraud is a provocative error and not spontaneous as in the case of the actual error.¹⁰

As a vice of consensus, the defraud is made up of two elements:

– An objective element (material) that consists in the use of sneaky means (fraudulent manipulation, chirping, etc.) to mislead. It can consist of both an action (committing action) and an inaction (omission);

– A subjective (intentional) element consisting of the intention of misleading a person to cause her to conclude a particular legal act.¹¹ It is important to note that making a mistake of simple negligence, without a bad faith, is not a downside.

Initially, the silence on the decisive elements at the conclusion of the contract was not recognized as a vague consent but exceptionally. Later, it was argued that we can talk about reluctance if the law claims information. It is now unanimously considered that the reluctant idiom is a vague consensus that can attract the cancellation.¹²

The only requirement of the defraud, which comes out of art.1214 and art. 1215 Civil Code, it is that the inferior comes from the other party, from the representative, the agent of the other party or a third party, unless the other party knew or ought to have known the existence of the defraud at the conclusion of the contract.

Since the inferiority is not presumed (Article 1214 paragraph 4 of the Civil Code), the person requesting the annulment of the civil legal act on the grounds that he has had the defraud

⁹Vasilescu, P., (2012), *Dreptcivil. Obligații*, Bucharest, Editura Hamangiu, p. 333-335

¹⁰Boroi, G., Anghelescu, C.A., *Curs dedreptcivil: parteagenerală*, ediția a 2-a revizuită și adăugită, Editura Hamangiu, Bucharest, 2012, p. 149

¹¹Boroi, G., Anghelescu, C.A. (2012), *Curs dedreptcivil: parteagenerală*, ediția a 2-a revizuită și adăugită, Bucharest, Editura Hamangiu, p. 151

¹²Popa, I.F., *Obligația de informare în contractele sinalagmatice*, in *Dreptul* no.7/2002, p.65.

consent through the defraud must prove the dowry. Unlike the error test, the doll test is much easier to do because of its material element.

If the consent of one of the parties is vitiated by the defraud, the sanction that comes is the relative nullity of the respective legal act.

III. THE VIOLENCE

Violence is that vitiation of consent that consists in threatening a person with an evil that can produce, without right, a fear that leads him to conclude a legal act that he would not otherwise have concluded.¹³

Unlike the error and error, where the victim does not realize they are acting under their empire, in the violence she is aware that she does not have to conclude, modify or quit the legal act but cannot withstand violence so she prefers to do so in order to avoid the evil it is threatened with.¹⁴

In the legal doctrine, two criteria for classifying violence-consensus vice have been identified: the nature of the evil that threatens and the nature of the threat.¹⁵

According to the nature of the evil that is threatened, violence can be physical (dread), when the threat of harm refers to the physical integrity or property of a person or moral (metus) exists when the threat of harm refers to honor, honor or feelings to a person.

In relation to the nature of the threat, there is a distinction between the legitimate (right) and the evil threat, which does not constitute a vitiation of consent, thus not affecting the validity of the legal act, but violence is the fear inspired by the threat of exercising a right made in order to obtain unjust advantages and the unlawful (not right) threat with an evil that seeks to induce a fear without right, so that it constitutes a vitiation of consent, drawing the relative nullity of the legal act concluded under its empire.

As a structure, violence-vice of consent has two elements:

- an external, objective object, consisting of threatening with evil;
- a subjective internal element of a psychological nature, consisting in instigating fear of the person in danger, which causes the person against whom the violence is to conclude a legal act that he would not otherwise have concluded.

In order for violence to constitute a defect of consent, three requirements must be met cumulatively: the instigated fear is decisive for the conclusion of the civil legal act, the threat to be unjust (unlawful, unjustified when it is a violation of the law) bilateral and plurilateral legal, the threat comes from the other party or, if it comes from a third party, the co-contractor knew or ought to have known the violence committed by the third party.

The sanction that intervenes in the case of violence is, as it results from art. 1216 par. 1 Civil Code, the relative nullity of the legal act.

Exceptionally, violence can also lead to the absolute nullity of the legal act, namely when, because of it, consent is completely absent, for example, a person is forced to sign the document of a legal act by other persons lead his hand to sign.¹⁶

IV. THE INJURY

¹³Boroi, G., Angheliescu, C.A. (2012), *Curs dedreptcivil: parteagenerală*, ediția a 2-a revizuitășiadăugită, Bucharest, EdituraHamangiu, p. 154

¹⁴Diaconescu, H. *Violența-viciu al voinței juridice și efectele ei în dreptul civil și penal, cu privire specială la sancțiunea juridică a acesteia.*, in Dreptul no.6/2003, pp.65-66.

¹⁵Boroi, G., Angheliescu, C.A., *Curs dedreptcivil: parteagenerală*, ediția a 2-a revizuitășiadăugită, EdituraHamangiu, Bucharest, 2012, p. 155

¹⁶Hamangiu, C., RosettiBalanescu, I., Baicoianu, Al., *Tratat de dreptcivilromân*, vol.II, Bucharest, EdituraAll p.501

The injury is regulated in Art. 1221 Civil Code which states that "there is a lesion when one of the parties, taking advantage of the state of need, the lack of experience or the lack of knowledge of the other party, stipulates in favor of himself or another person a benefit of considerable value higher than the amount of its own benefit at the time of the conclusion of the contract."

Injury means material damage suffered by one of the parties as a result of the conclusion of a contract. As a rule, the lesion consists in the apparent disproportion of value between benefits, which exists even at the time of conclusion of the contract (laedere - injuries, laesio - wound, injury, damage).

The structure of the injury differs according to the conception underlying its regulation, and there are two concepts in this respect.¹⁷

Within the objective conception, the lesion involves only one element, namely material damage equal to the disproportion in value between the benefits.

According to the subjective conception, the lesion involves two elements: an objective element, consisting in the disproportion of value between contraptions and a subjective element, consisting in taking advantage of the special situation in which the co-contractor is found.

Our doctrine devotes both concepts.

According to the legislation, we have to distinguish between the minor injury and the major injury.

As regards the injury in the case of a minor, it may be invoked if it is a legal act that fulfills the following requirements: to be a civil legal act of administration; be a bilateral legal act, for consideration and commutative; be concluded by the juvenile between 14 and 18 years of age alone (the minor with restricted exercise capacity), without the consent of the legal guardian; to be detrimental to the minor.

In order for a major to claim the injury, two requirements must be met cumulatively: to prove the existence of a manifestly disproportionate value between benefits visible from the moment the contract is concluded; manifestly disproportionate to intervene as a result of the provision by the other party, at the date of the conclusion of the contract, of a benefit considerably higher than its own benefit, taking advantage of its state of need, lack of experience or lack of experience.

Art. 1222 al. 1 Civil Code states that "the party whose consent has been vitiated by the damage may request, at its option, the cancellation of the contract or the reduction of its obligations with the amount of damages to which it would be entitled", but the text has a poor wording because, depending on the situation the injured party may require the benefit of the other party to be increased.

So the injury can lead to two alternative sanctions:

- Relative nullity;
- Reducing or, as the case may be, increasing one of the benefits.

¹⁷Boroi, G., Anghelescu, C.A. (2012), *Curs dedreptcivil: parteagenerală*, ediția a 2-a revizuitășiadăugită, Bucharest, EdituraHamangiu, p. 159

CONCLUSIONS

We can say that what explains and justifies vices of consent is freedom of will, as an extension of the person's freedom. "Free legal arbitrariness" means the possibility for each person to choose a certain behavior, materialized by the conclusion of legal transactions. Violations of consent have not only a purely theoretical interest but also have an undeniable practical importance.

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MINORS' PROTECTION THROUGH ADOPTION. CRITICAL ANALYSIS ON NEW REGULATIONS

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ABSTRACT

Adoption is one of the main measures to protect the minor in difficulty, which represents the minor who does not even benefit from the protection of one of his parents. Adoption is a measure of the minors' protection because it ensures a substitute family, being understood that the child develops best physically and mentally within a family. The adoption procedure in both its forms (administrative and judicial) is perfectible, having suffered many changes in recent years, the last change being made in 2016. Among other important changes, the new regulation emphasizes the importance of one of the principles of adoption - celerity, setting new deadlines to be respected in adoption procedures or reducing existing ones.

KEYWORDS: adoption, minor in difficulty, family, alternative care/protection.

INTRODUCTION

Adoption, as a measure of protection of the minor deprived of the care of at least one of his parents, is currently governed by Law no. 273/2004. Recently, this regulation was modified by the appearance of Law no. 57/2016. Regarding the new regulation on the adoption procedure [1], Law no. 57/2016 brought a number of changes and repeals, some of them desirable and other questionable.

I. THE CONDITIONS THAT ARE REQUIRED TO BE FULFILLED IN THE NAME OF THE PERSON OR OF THOSE WHO ADOPT

Regarding the conditions that are required to be fulfilled in the name of the person/of those who adopt, it can be noticed that the persons convicted of the crime of child pornography were added to those who have been convicted for a crime against a person, family or for drug trafficking. Of course, we agree with this option of the legislature, since it is inconceivable that such a convicted should become adopter. This is obviously inconsistent with the overriding interest of the child [2] that should govern the whole adoption procedure. However, if we analyse the elimination from the legal text of the interdiction to adopt by a person who has been convicted for consumption (not traffic) of illicit drug, this modification is open to criticism for two reasons. Firstly, it is obvious that the person who consumes drugs is not able to ensure harmonious growth for a minor, and secondly, by this disposal, it is ignored the correlation between the reasons why a person cannot adopt and those for which one parent is deprived of parental rights. According to Article 508 Civil Code, loss of parental rights can be issued by the court of guardianship if the parent endangers the life, health or development of the child by consumption of alcohol or drugs, among other things. Or, if a parent is liable to the penalty of loss of parental rights by the mere consumption, unaccompanied by traffic, why should another person be allowed to become a parent in cases where he/she is guilty of this consumption?

II. A NUMBER OF CHANGES AIM AT CARRYING OUT THE PRINCIPLE OF CELERITY IN THE ADOPTION PROCEDURE:

- a. As regards the consent expressed by the natural parents to adoption, according to the new regulations, the situation in which the natural parents or, where appropriate, the guardian, although duly summoned, did not appear at two consecutive deadlines fixed in order to express the consent may be considered as abusive refusal to consent to adoption. In the old regulation, the term was rather ambiguous (repeated failure of a person to appear). The consent to adoption may not be expressed in the name of natural parents/guardian of the child by the trustee, mandatory or other person authorized in this respect. Exceptionally, where one of the natural parents, although there had been made sufficient efforts, could not be found to consent, the consent of the other parent is sufficient. When both parents are in this situation, adoption may be terminated without their consent. The court may approve taking the consent from the one called to express consent at his residence, by a Judge, if the person, for good reason, is unable to appear before the court. The person who lives in the jurisdiction of another court expresses his/her consent through rogatory committee.
- b. The applicant's final assessment report of the ability to adopt, which contains the proposal on issuing or not issuing the certificate, too, shall be drawn up, under the new regulations, within 90 days (compared to 120 days as it was in the previous regulations) from the request demanding assessment and it shall be communicated to the applicant.
- c. As regards the validity of the effects of the judgment to initiate the procedure of adoption, these provisions shall subsist until the child turns age 14 and not just age 2, according to old regulations. Of course, this change is likely to ensure the principle of celerity to the adoption procedure, because according to the previous regulations, if the child was not adopted within two years after the irrevocable decision to initiate the adoption, the legal hearings would resume.
- d. International adoption of children with habitual residence in Romania when the adopter or one spouse of the adoptive family is a Romanian citizen is allowed for children for which the request to initiate the procedure of adoption has been granted and for which it could not be identified an adopter or adoptive family with habitual residence in Romania or one of the persons referred to, within one year from the date of the final judgment upholding the request to initiate the adoption procedure. In the previous regulations, the term was 2 years.

III. LIKEWISE, THE CHANGES AIM THE INTRODUCTION OF SOME PROVISIONS MEANT TO SUPPORT THE ADOPTERS' EFFORTS FOR ADOPTION.

The certificate of person/family able to adopt is no longer valid only for one year but for two, with the possibility of lawfully extension for cases expressly provided by law. Obviously, this change will support future adoptive persons, as the expiry of the certificate obliges them to restart the entire administrative procedure of adoption from the beginning.

After the period of validity of the certificate of person/family able to adopt (2 years) expires, attending the preparatory phase for knowingly taking to parenthood is no longer necessary in justified cases.

In terms of neighbourhood, legislative changes come again to support future adopters, recognizing the competence of the direction of his/their residence, if he/they lives/live there in fact [3].

For the stage match between the child and the person of adopter, the new regulation is more explicit, clearly stipulating the categories of persons with whom the child has enjoyed family life: guardian, professional caregiver, placement person/family or, where applicable,

other persons who lived/live together with the child, whether they were directly and immediately involved in his care and education, and the child has developed relationships of attachment to them.

Patrimonial facilities similar to those of natural parents are also stipulated, being obviously necessary in a modern regulation of the institution of adoption, given that it is attempted to assimilate adoption with parent-child relationship. Thus, according to the new regulation, the adopter or, optionally, either of the spouses of the adoptive family, earning taxable income[4] from employment activities and assimilated activities or, where applicable, independent activities or agricultural activities, may benefit from accommodation leave for maximum one year, which includes the period of custody of the child for adoption, as well as from a monthly allowance. On those rights no tax is due and no social security contributions provided by law, except the health insurance contribution. The length of the leave is assimilated to contribution stage in order to establish social security allowances and it may be used to obtain social security benefits.

Employers are obliged to grant the employee or, where appropriate, the employees (husband and wife) who adopt, time off in order to undertake the required assessments for obtaining the adoption certificate and assessing practical suitability, without salary reduction, up to a maximum of 40 hours per year.

IV. NUMEROUS CHANGES WERE ALSO MADE IN ENSURING THE PRINCIPLE OF CONFIDENTIALITY IN ADOPTION PROCEDURE:

- Unlike the previous regulation, according to which the adoptee could get information only on adoption and general aspects on the institutional itinerary and personal history that does not reveal the identity of the natural parents, now, those adopted have the right to request and obtain information about place of birth, institutional itinerary and personal history that does not reveal the identity of the natural parents/biological relatives. Information attesting adoption can be provided only to persons who have acquired full legal capacity.
- The provisions allowing natural parents or biological relatives of adopted persons to obtain general information regarding the person adopted were repealed. Currently, the natural parents or biological relatives of adopted persons may obtain information regarding this person about confirming adoption, the adoption year, national or international character of adoption, and whether the adopted person appearing in the records of the authorities is alive or deceased. Further information regarding the adopted person can be provided only to biological parents or biological relatives, and only if there is express consent of the adopted person who has acquired full legal capacity or, if the adopted person is a minor, there is the consent of the person or adoptive family. The consent is requested by the A.N.P.D.C.A., where appropriate, through the direction or the central authority of the receiving State or through the accredited foreign organization involved in the adoption.
- In order to authorize access to information regarding the identity of the natural parents, it is necessary to submit a request to the court for guardianship. The court accepts the request if, according to evidence, it finds that the applicant is a person adopted which had established affiliation to at least one of the biological parents, benefited from counselling, and the court has the conviction that the adopted person is psycho-emotional balanced.
- The adopters are obliged to inform gradually the child about the adoption, starting as early as possible. In carrying out this obligation, the adopters may benefit from support through the specialists of the department of adoptions and post-adoption of the direction or through private authorised organizations, individual offices, associated offices or social assistance and/or psychology civil professional societies that concluded agreements with A.N.P.D.C.A.

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- The identity of the natural parents of the adopted person may be disclosed before the reach of full legal capacity only for medical reasons, by the A.N.P.D.C.A. at the request of either of the adoptive parents, the adopted person or of a healthcare representative, accompanied by supporting medical documents. People who have information on the identity of the natural parents can directly address A.N.P.D.C.A. for making steps aimed at contacting the biological natural parents or relatives.

V. CONCERNING INTERNATIONAL ADOPTION, THE ADOPTION OF THE CHILD WHO IS HABITUALLY RESIDENT IN ROMANIA BY A PERSON OR FAMILY WITH HABITUAL RESIDENCE ABROAD HAS ALSO SUFFERED SOME CHANGES. INTERNATIONAL ADOPTION HAS RETAINED THE ACCESSORY CHARACTER TO THE INTERNAL ONE, BEING POSSIBLE IN THE FOLLOWING CASES:

- children are in the record of the Romanian Office for Adoptions; the adopter or one spouse of the adoptive family is relative up to the fourth degree with the child for whom the internal adoption procedure was opened;
- the adopter or one spouse of the adoptive family is a Romanian citizen, when he granted the application for the opening of the internal adoption procedure, but no adopter/adoptive family with habitual residence in Romania could be identified within one year from the date of the final judgment upholding the request to initiate the adoption procedure. Previously to the legislative amendment taken under consideration, the term was two years. Shortening the term greatly contributes to ensure the celerity of international adoption procedure, as it was done for internal adoption, too;
- the adopter is the natural parent's spouse of the child whose adoption is requested.

In the second form of international adoption, when the adopted person is ordinarily resident abroad, while the adopter/adoptive family resides in Romania, the applicants' requests for adoption are transmitted to foreign authorities only through the Romanian Office for Adoptions. Another change occurred in the initial and practical matchmaking of the child with the adopter/adoptive family with habitual residence abroad, which is achieved at the adoption and post-adoption section from the direction of the child's domicile. Selected person or family as a result of the initial matching is required to travel to Romania and actually live in the country for a period of at least 30 consecutive days in order to achieve practical suitability with the child.

The request to allow the international adoption shall be submitted by the Office to the court. Based on the final judgment of approval of adoption, the Office issues, at the request of the adopter/adoptive family, within 5 days, a certificate of adoption subject to the rules of the Hague Convention.

Finally, the movement of the adopted person from Romania in the state where the adopter or adoptive family has the habitual residence is possible only when the judgment of adoption is final. The adopted person can travel only accompanied by the adopter or at least by one of the spouses in the adoptive family, in safe conditions according to his/her needs.

CONCLUSION

Thus, the adoption procedure in both its forms – internal and international – is a procedure that over time has been improved by new European regulations. However, the adoption procedure remains a perfectible procedure, which, in relation to developments in civil society, must be continually improved. New legislative changes in the field refers to ensuring the principle of celerity (since the main criticism of this procedure is the slowness with which it is carried out both the administrative procedure and the judicial adoption; but what has not yet been submitted to the legislature is the introduction of penalties for

breaching the terms, existing the risk that a term in the absence of sanction for non-compliance will be considered by those involved in the procedure only as one of recommendation), the principle of confidentiality, international adoption and support of the adopters for their efforts during the adoption procedure. Even if the legislature steps are overall beneficial, in this paper we have also pointed out some critics that the legislator should take into account in a future regulation.

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^[2] For more details on children's rights, including rights to inheritance, see Tudorașcu M., Drăgoi A., *Dreptul asupra moștenirii*, Editura ProUniversitaria, București, pp. 38-59, 2016.

^[3] According to Article 17 paragraph (1) Law no. 273/2004, as amended by Law no. 57/2016, "if the applicant actually lives at residence, the assessment is done by the direction under the jurisdiction of which is established the residence or by a private body authorized to carry out activities within the internal adoption procedure".

^[4] According to Law no. 227/2015 on the Fiscal Code, as amended and supplemented.

THE GCC DIPLOMATIC RIFT AND ITS REVERBERATIONS UPON ROMANIAN PRESENCE IN THE REGION

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ABSTRACT

By virtue of their economic influence, the Arab States of the Gulf are highly interlinked within the global community. Dimensions of globalization (such as outward looking focus on international trade, openness, growing business opportunities and investment) are shifting their interests to a broad spectrum of partners leading to increased connectivity platforms and links. Apparent deteriorating ties seriously undermines relations among GCC¹ players and adversely affects its functioning. Current dispute, centered on allegations about Qatar's foreign policy, caused much consternation, in fact, unequivocally conflicted with the interests of other members and escalated tensions. A scheme of prolonged economic isolation for the Gulf state of Qatar presents challenges and opportunities for Romania (particularly in food security initiatives in Qatar), however, in light of inter-regional realignments, a united GCC stance must consequently prevail to promote stability and reinforce its status of regional power in the Arab World, that would develop and maintain a strong bilateral relationship between Romania and the GCC.

KEYWORDS: Gulf Cooperation Council, diplomatic crisis, trade, Romanian entities

INTRODUCTION

The official inauguration of the Cooperation Council for the Arab States of the Gulf referred to as the Gulf Cooperation Council (GCC)² took place in May 1981 in the midst of Iran-Iraq conflict with the Charter signed on the 25th of May in Abu Dhabi City, United Arab Emirates.³ In some ways the GCC mirrors the European Union. Essentially there are two core intergovernmental bodies, a Supreme Council (consists of the six heads of the member states and summoned once per year) and a Ministerial Council (comprised of six foreign ministers which gather four times per year).⁴

Qatar peninsula is about 11,586 sq. km and it connects to the mainland with eastern border of Saudi Arabia.⁵ Before falling under the control of the al Thani family in the mid-nineteenth century, the present-day leadership of Bahrain (al Khalifa family) dominated parts

¹ (Gulf Cooperation Council (GCC) is a political and economic union currently consisting of Bahrain, Kuwait, Qatar, Oman, Saudi Arabia and the United Arab Emirates)

² The Cooperation Council for the Arab States of the Gulf Secretariat General, 'The Charter of the GCC' (2016), Article1, available at: <http://www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx> (accessed on 7th February 2017).

³ Riccardo Dugulin, 'A Neighborhood Policy for the Gulf Cooperation Council' (Gulf Papers Series, Gulf Research Center, United Arab Emirates, 2010), p. 9.

⁴ The Cooperation Council for the Arab States of the Gulf Secretariat General, Organizational Structure, 2016, available at: <http://www.gcc-sg.org/en-us/AboutGCC/Pages/OrganizationalStructure.aspx> , (accessed on 12th July 2017).

⁵ Central Intelligence Agency (CIA), 'World Fact Book: Middle East: Qatar' available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html> (accessed on 10th July, 2017).

of the Qatari peninsula. Both countries reasserted and claimed authority of the Hawar Islands and were confined under the territorial dispute until 2001 when the issue was settled and internationally recognized at the International Court of Justice.⁶ The longstanding border dispute between Saudi and Qatar which resulted in the 1992 clash preoccupied the ruling families in both countries for decades.⁷ Qatar's rise to global prominence coincided with a new generation of leadership which embraced economic openness, astute strategy design and accelerated the development of its liquefied natural-gas infrastructure and long-term energy agreements with emerging economies worldwide.⁸ The Qatari foreign policy and diplomatic moves with the new rule of Shaikh Tamim bin Hamad al Thani from June 2013⁹ involved the desire of consolidating national interests however not necessarily in coordination or mutual agreement or policy consistent with the other GCC member states.¹⁰ There are a number of factors from local, regional and international that appears to have contribute to the shift in Qatar's more independent position. Viewed through a lens of predominant realist approach *'the realists assume that the real issues of international politics can be understood by the rational analysis of competing interests defined in terms of power'*.¹¹ At the same time Qatar strengthen its alliance with the US and the partnership with the GCC members however, it is also on good terms with regional rivals such as Iran to the detriment of its diplomatic relations with its neighbours.¹²

The Gulf monarchies were unable to prevent the crisis or the conflict scenario from emerging and the 37 years old alliance was impacted to the extent that it caused rupture of diplomatic ties between United Arab Emirates (UAE), Saudi Arabia (KSA), Bahrain, Egypt and Qatar on Monday 5th of June 2017. Under the move, Saudi Arabia closed its borders with Qatar and blocked access and contacts (land, sea and air) for respective Qatar routes.¹³ With the exception of Oman and Kuwait, other countries joined the Saudi's positions against Qatar's open-door policy towards political actors in the region and the rift appeared to be widening (Yemen, Egypt, Libya, Mauritius, Maldives, Senegal, United Nations of Comoros and Mauritania also cut diplomatic ties with Qatar while Jordan, Chad, Djibouti, Niger downgraded diplomatic ties). The two remaining GCC member states, Kuwait and Oman, less interventionist, have not announced their stance on the rift and have been trying to mediate between all parties. The collapse in the relation with the GCC also resulted in the formation of the Saudi-UAE committee announced at the GCC summit in Kuwait City attempting to represent an alternative vis-à-vis the GCC bloc.¹⁴

According to public debate, the Qatar's crisis and country's distinctive approach to regional affairs has several components that grown intertwined as Qatar became more independent in regional and international relations. Saudi Arabia, United Arab Emirates, Bahrain and Egypt charged Doha of extending financial support and dedicating resources for

⁶Krista E. Wiegand, 'Bahrain, Qatar, and the Hawar Islands: Resolution of a Gulf Territorial Dispute' (2012) *Middle East Journal* 66, pp. 79-96.

⁷ The New York Times, 'Qatar Says Saudis Seized Its Border Post', (News Article, 2nd October, 1992) available at: <http://www.nytimes.com/1992/10/02/world/qatar-says-saudis-seized-its-border-post.html>, (accessed on 12th July 2017).

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¹⁰LinaKhatib, 'Qatar's foreign policy: The limits of pragmatism', (2013) *International Affairs* 89, pp. 417-413.

¹¹ Jack Donnelly, *Realism in International Relations* (Cambridge University Press, United Kingdom, 2000) p. 7.

¹²LinaKhatib, 'Qatar's foreign policy: The limits of pragmatism', (2013) *International Affairs* 89, p. 418.

¹³ Patrick Wintour, 'Gulf plunged into diplomatic crisis as countries cut ties with Qatar' (News Article, The Guardian, 5th June, 2017) available at: <https://www.theguardian.com/world/2017/jun/05/saudi-arabia-and-bahrain-break-diplomatic-ties-with-qatar-over-terrorism> (accessed on 7th June 2017).

¹⁴ Patrick Wintour, 'UAE announces new Saudi Alliance that could reshape Gulf relations' (The Guardian, 5th December, 2017) available at: <https://www.theguardian.com/world/2017/dec/05/uae-saudi-arabia-alliance-gulf-relations-gcc> (accessed on 7th December 2017).

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high profile Islamist groups that emerged to disrupt the balance in the region and, Al Jazeera, the Doha based broadcaster was being used as a platform and instrument for such groups with a far reaching, impact given its new dynamic of engagement.¹⁵ There have been minor sporadic diplomatic breakdowns between the countries, but another worrisome crisis broke out in 2014. Once again old emerging issues and past differences have blown up over border demarcation and the four capitals escalated a trend of bilateral disengagement and judged that the leadership in Doha has repeatedly failed to meet its promises and was not in full compliance with the agreements and written obligations to the GCC signed in 2014.¹⁶

Subsequent to withdrawing diplomatic ties, a series of measures against Qatar severely impacted the movement of people with a number of airlines announcing flight cancellations to/from Doha. UAE based airlines Etihad Airways, Emirates, AirArabia, Flydubai and Royal Jet suspended service to of Qatar effective June 6th 2017. Saudi Arabia, UAE and Bahrain took measures against Qatar by issuing a ban for nationals to travel the country, and taking the decision to expel Qatari nationals. Subsequently, Qatar Airways, the state-owned flag carrier of the state Qatar suspended all flights to Saudi Arabia, UAE, Bahrain and Egypt.¹⁷ Banning of Qatar Airway flights from UAE, Saudi and Bahrain airspace resulted in significant delays and flight cancellations. The flight cancellations primarily impacted those who fly to and from the UAE and Qatar regularly due to work commitments increasing duration and cost given that longer routes through Kuwait and Oman had to be considered. The restriction of movement had serious implications for commercial entities in relation to set-up and servicing the rest of the Gulf monarchies as most of the financial institutions, consultancies and food consolidators historically set up in the UAE as a gateway due to the developed infrastructure and access. Qatar's has managed to increase its international prestige and casted an image of beneficial business climate. Large corporations are adapting to the change by setting up a presence in Doha, however small and medium-sized businesses are finding hard to maintain commercial relations with Qatar while the GCC dispute remains due to limited budgets and requirements to deliver projects on schedule.

Qatar is the third largest projects' market (USD\$228.4 Billion planned or under construction)¹⁸ in the GCC after Kingdom of Saudi Arabia and the United Arab Emirates, with project companies already feeling the effect of slowdown in activity in 2016/2017. Imposing economic sanctions and closing vital land border with Saudi Arabia will affect Qatar's imports including food. The Gulf monarchy is heavily dependent on food imports and construction materials leading to disruptions that may significantly affect the country.¹⁹ Since the crisis began Qatar continued to prioritize food security strategies and invested in food security facilities and warehouses making it better positioned to serve its domestic needs.²⁰

¹⁵ Patrick Wintour, 'Qatar diplomatic crisis – what you need to know' (The Guardian, 5th June, 2017) available at: <https://www.theguardian.com/world/2017/jun/05/qatar-diplomatic-crisis-what-you-need-to-know> (accessed on 7th June 2017).

¹⁶ The National, 'Revealed: the secret pledges Qatar made — and then broke. Formerly secret documents show commitments Doha made to fellow Arab countries in 2013 and 2014' (News Article, 11th July 2017) available at: <https://www.thenational.ae/world/gcc/revealed-the-secret-pledges-qatar-made-and-then-broke-1.484155> (accessed on 12th July 2017).

¹⁷ Paul Crompton, 'How the Qatari crisis affects you', (Gulf News, 5th June, 2017) available at: <http://gulfnews.com/news/uae/general/how-the-qatari-crisis-affects-you-1.2038738> (accessed on 7th June 2017).

¹⁸ Ventures Onsite, 'Qatar Constructions Industry 2017' (Report, May 2017) available at: <http://www.projectqatar.com/pdf/Qatar%20Construction%202017.pdf> (accessed on 25th June 2017).

¹⁹ Adams Taylor, 'Qatar could face a food crisis in spat with Arab neighbors' (The Washington Post, 5th June, 2017) available at: https://www.washingtonpost.com/news/worldviews/wp/2017/06/05/qatar-could-face-a-food-crisis-in-spat-with-arab-neighbors/?utm_term=.b5b8a644b52b (accessed on 10th June 2017).

²⁰ Irfan Bukhari, 'QR 1.6bn food security project launched' (The Peninsula, 17th July 2017) available at: <https://www.thepeninsulaqatar.com/article/17/07/2017/QR1.6bn-food-security-project-launched> accessed on 2nd December 2017.

Qatar imports 90% of its food supplies²¹ and 40% enters the country from Abu Samra, the only Saudi – Qatari land border crossing. In the short to medium term, Qatar will become reliant on air and sea freight with suppliers already connected through Qatar Airways. Turkey, Morocco, Lebanon and Iran already attempted to address shortages in water, meat, sugar and vegetables supplies and sent fresh produce to Qatar via air freight.²² The rerouting of trade will raise the cost of imports and pass-through to consumer inflation and prompts entities doing business with Qatar to essentially plan for operational disruptions and seek legal advice to assess existing contractual terms. The impact caused by the disruption to the flow of goods and people by air, land, or sea, could trigger severe implications causing rapid economic dislocation and leading to social or political unrest.

Romanians in the region are no longer able to travel directly to Qatar from the UAE, Saudi Arabia and Bahrain. Romanians in managerial positions with regional responsibilities will find it difficult to meet with potential leads and achieve relevant sales and engagement targets due to this disruption. It is estimated that the current travel restrictions will remain in place for the coming month impacting on Qatar tourism, industry, aviation - all relevant for Romanian professionals doing work in the region. In addition, this instability has a tendency to reduce the influx of Romanians to the region due to media coverage that may place inaccurate information and leads to departures as a result of perceived threats.

By all accounts, Qatar remains confident in their economic prospects and signed a transportation agreement and a bilateral deal in the field of engineering with Turkey and Iran to speed up the movement and exchanges of goods and to ease economic pressure by the GCC states.²³ Despite the fact that Qatar has ensured uninterrupted food supplies we must not overlook the disturbing tendency and adverse impacts of the diplomatic crisis and the related consequences for food security, the vast bulk of its food is imported and the sanctions have halted transport of foodstuff and disrupted shipping routes.

This crisis presents challenges and opportunities for Romanian entities. The main challenge revolves around logistical requirements, transport, shipping and freight. Romanian exporters will face increased costs for exporting their products to Qatar due to increase time of shipping through Oman and Kuwait as most of the large shipping lines only ship to United Arab Emirates (Jabel Ali). Smaller vessels depart the UAE loaded with products to other GCC countries. However, the crisis also leads to opportunities for Romanian exporters especially in the food and agriculture sector given Qatar's high level of food import dependency therefore Romanian food exporters may provide a direct channel for the Qatari market in areas such as fresh food, meat, proteins and grains.

Bilateral trade between Romania and Qatar outlined an ascending trend with a relative dominance of food, furniture, clothing, chemicals, materials, plastic products, machinery, industrial equipment and imports from Qatar include oil and petrochemicals. Romanian Ministry of Foreign Affairs revealed a total trade figure between the two nations of \$US 56.88 million for 2015.²⁴ In additions, the existence of eighteen bilateral agreements between Romania and Qatar provide the required foundation to consolidate and further cement the bilateral relationship.²⁵

²¹Oxford Business Group, 'Report: Qatar 2015' (Report, 2015).

²² Jason Neely and Mark Potter, 'Iran flies food to Qatar amid concerns of shortages' (Reuters, 11th June, 2017) available at: <https://www.reuters.com/article/us-gulf-qatar-iran-idUSKBN1920EG?il=0> (accessed on 14th June 2017).

²³ Jim Carey, 'Iran, Turkey, and Qatar sign Major Transportation Deal to Boost Trade' (Geopolitics Alert, 26th November 2017) available at: <http://geopoliticsalert.com/iran-turkey-qatar-transportation-deal> accessed on 4th December 2017.

²⁴ Romanian Ministry of Foreign Affairs, Bilateral Relations with the State of Qatar (Department of Middle East and North Africa, Bucharest, February 2016) available at: <https://www.mae.ro/bilateral-relations/1785#782> (accessed December 4th, 2017).

²⁵*Ibidem*,

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A potential challenge faced by all entities in the region and exporters may be related to the payment for relevant projects in Qatar and the impact of potential financial sanctions imposed by the GCC in dealing with Qatar. In addition to reduced regional trade, Saudi Arabia's central bank advised banks in the kingdom to hold off on deals with Qatari banks. Similarly, UAE, Bahrain and Egypt's local banks received instructions to limit transactions, delay business with Doha and report their exposure to Qatari banks. Qatar has enough financial power to protect its banks and provide liquidity given its massive SWF estimated at US \$320 billion²⁶ however, given Qatar's integration with regional counterparts combined with lower confidence levels, foreign business links may be intensely impacted.²⁷ Romanian entities planning for business and operational disruptions will incur additional costs that were not originally stipulated in contracts and business agreements. The challenge for Romania is to maintain a competitive edge whilst factoring risk management and costs as a result of the blockade.

Kuwait has played an unmatched big brother role in restoring balance and narrowing the gaps between the crisis-affected countries. In past disputes which engulfed Qatar, Kuwait was recognised as virtually the key contributor, a fundamental intermediary and played essential roles to assuage consequences of dissension.²⁸ Its leadership facilitated dialog and conciliation and pursued mitigation in a way that resonated with all sides. The present predicament is still in its early stages however, as in previous times, the success of mediation is yet to be seen given that these countries rejected Qatar's response to their demands as of 12th July 2017. A negotiation route out of the rift will work if it considers diverging interests of the concerned parties and resonates with local cultural nuances and norms.

In the Middle East North Africa region, the GCC bloc emerged as an organization with effective dispute resolution functions, a competent force from a regional security role and the main forum for the conduct of collective diplomacy by its member states thus, on the political front that provided Romania with a clear and well-defined engagement plan across the GCC region. The diplomatic crisis will open new avenues for foreign players in Europe and the Middle East to be involved in the political, economic and social streams in the Gulf monarchies. In long term, however, the uncertainty and the shifting of allegiances in some instances are bound to create additional political tensions, all of this, in turn leaves little room for Romania to manage and consolidate the key relationships in the region it wishes to pursue.

CONCLUSION

The current GCC diplomatic split is damaging for all parties involved and in particular for foreign countries like Romania, trying to navigate the political and economic sphere in the GCC. The estimation of the economic costs (around \$US 1 Billion including loss of projects for companies and investments) is an essential first step for reversing the damage caused by the recent dispute between Qatar and the other Arab state actors. Gulf-based power structures are embedded with glaring manifestations of tribalism, rigid cultural conceptions and pride. Besides, their identities are defined by inherent patrilineal networks, the role of Islam,

²⁶ Sovereign Wealth Fund Institute, Sovereign Wealth Fund Rankings, available at: <http://www.swfinstitute.org/sovereign-wealth-fund-rankings/> (accessed on 12th July, 2017).

²⁷ Tom Arnold and SaeedAzhar, 'UAE blacklist may squeeze liquidity of Qatari banks. The move followed the isolation of Qatar by the four states' (News Article, Business Standard, 10th June, 2017) available at: http://www.business-standard.com/article/international/uae-blacklist-may-squeeze-liquidity-of-qatari-banks-117061000737_1.html (accessed on 11th July, 2017).

²⁸ Naser Al Wasmi, 'Kuwait faces tough test as it struggles to resolve Qatar crisis. Country has become the peacemaker of choice in the fractious dispute between Doha and its neighbours', (The National, 5th July 2017) available at: <https://www.thenational.ae/world/kuwait-faces-tough-test-as-it-struggles-to-resolve-qatar-crisis-1.91724> (accessed on 5th July, 2017).

increasingly diverse domestic politics and conflicting foreign policy approaches which enabled different national level politics. Hence, only in line with sufficient understanding of this pertinent background, the architecture of international relations and the compelling processes at work in the GCC states a more broad-based approach can be contemplated and truly increase connectivity platforms and links.

Romania's ability and willingness to engage directly with Qatar as evidenced by a number of high level visits, bilateral agreements and trade exchanges appears to remain solid and may provide further opportunities and pave the way for new Romanian entities and presence in the region. The emerging trend in engagement between Qatar and Romania and interest in the region favors the consolidations of bilateral ties. Expanding Romania Qatar relations may also signal stronger economic and investment gains. In turn, Romania has to recognize that engagement in the Gulf is a multi-dimensional phenomenon and must balance its relationships and commercial interests for Romanian entities in United Arab Emirates and Saudi Arabia. High level visits across the region by Romanian officials must continue with all relevant stakeholders because despite the diplomatic rift, the GCC remains a substantial integrated bloc with a shared history of achievements and challenges that are usually overcome.

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BEYOND THE LAW. THE CPD MODEL FOR THE PROFESSIONAL DEVELOPMENT OF FUTURE TEACHERS.

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ABSTRACT

The paper aims to describe the experimental project of the adjustment pathway to school that was developed at the Primary Education Degree of the University of Molise. The project started from the model of the Continuing Professional Development (CPD) typical of the Anglo-Saxon professional culture that does not find a specific application in schools system of teacher training, especially in Italy, and developed from the scholar prof. Stefano Bonometti. The project aims to develop the students' culture of lifelong learning education, starting from universities education by developing a personal plan of professional development through typical methods of the CPD. Particularly, students of the fifth year, the final year of the degree course, will start a process of reflection of acquired skills, while those of the second year, the first year of traineeship, will start the process of training and monitoring of their acquisition skills during the course. The project after a period of stop is starting again in this year.

KEY WORDS: Continuing Professional Development, teacher training, learning environment, primary education degree.

INTRODUCTION

As reported in a previous paper traditionally the development of the professional identity of teachers is an activity carried out by many scholars concerned with pedagogy and didactics. It does not seem, however, there is no one in Italy, but perhaps also in many other European countries, using model of Continuing Professional Development to develop the professional identity in other professional fields. Some years ago we started together to prof. Stefano Bonometti with a pilot project, still undergoing implementation, with the aim of promoting the professional identity of the future teacher importing a typical model generally used in company and private organizations context. The framework comes from a perspective of lifelong learning, proposing strategies and opportunities for empowerment, through the activation of a professional project in

continuous development using the Continuing Professional Development model with students of the Primary Education degree of the University of Molise, the future primary teachers. The key assumptions of this particular educational path are the learning from experience and reflection on it, trigger a project dimension in a lifelong learning perspective, referring to build professional identity. This perspective highlights the context socio-cultural environment (Engeström, Sannino 2010), and encourages a reflective attitude that leads the students to observe their actions in the school, context of work. The aim is to support the acquisition of a strong identity as a teacher and learning capacity of the continuous development of their professionalism. The theoretical framework of experimentation lead back to UK studies on CPD and their application in the contest of teachers training and supports the ability to build relationships of trust that can strengthen the sense of organizational citizenship.

BASIC PRINCIPLES OF CONTINUING PROFESSIONAL DEVELOPMENT

The Institute of Personnel and Development of the United Kingdom defines CPD as a constant keeping up-to-date (updating) of the professional knowledge throughout the entire working life through systematic, informal or self-directed learning models. A further definition, affirmed by the Royal Town Planning Institute and confirmed by the CPD Certification Service of London, indicates CPD as "the systematic maintenance, improvement and broadening of knowledge and the development of personal qualities necessary for the execution of professional and technical duties throughout the practitioner's working life" (Peel, 2005). The definition emphasizes CPD as a systematic process within the professional development in order to maintain, increase and develop knowledge, skills and personal qualities throughout one's working life. The key features can be summarized in four expressions: continuity through the whole working life, professional requirements, personal qualities, systematic nature of the process. The approach to CPD requires: – the mutual linking between organisational strategies and individual needs; – the view of human resource management as an investment and not simply as a cost; – the enhancement of learning on the job, taking care of the effective transfer of learning in the workplace; – the planning and designing of training activities at different levels of formality (Eraut, 2000) to support learning processes that correspond to the concept of Personal Development Plans (PDPs).

The key features of the definition which distinguish the CPD are represented by the continuity of learning throughout the working life, the maintenance of high-level quality and competence of professionalism, the development of knowledge, skills and personal qualities, the planning that ensures a systematic process. These characteristics allow CPD to assume a fundamental role to facilitate the accreditation process of professionals and to support the personal professional development and of the group.

WORKPLACE LEARNING, LEARNING ENVIRONMENT AND LEARNING FROM OTHER

The first requirement is considering the workplace as an opportunity of Workplace Learning in continuum with university context. The workplace is not only the place where intellectual or practical activities carried out but also the place site with continuing learning opportunities. This means that the range of activities that take place, daily, in the workplace provide learning opportunities supported by actions that Eraut (2000) lists as follows: – learning from doing routine work activities; – learning on the job through a learning plan with the involvement of a certain variety of roles connected to the own role; – informal and occasional learning through meetings with other workers; – both informal and formal learning through the reflection on artefacts in the workplace. This means that people, the work activities, the materials and the equipment all become learning

resources. The analysis conducted by A. Fuller, L. Unwin (2004) leads to identify a list of factors that shape the environment according to an Expansive Learning approach. This list is based on the antinomy between “expansive-restrictive” which, in the opinion of the authors, allows a better understanding of the actions to be adopted to define a learning environment. The comparison between the two methods emphasizes the different actions that will be needed to create the learning environment. Between these two extremes, actually in the continuum are identified the most effective practices for the different organizational contexts. Focusing on the “expansive” approach the above mentioned research has identified a certain number of actions that allow the realization of an Expansive Learning Environment. Among them, the most significant are: the participation and commitment to diverse communities of practice in order to favour the exchange of different competencies and skills. The attention is also paid to the realized learning experiences (or to realize) in other organizational contexts, overcoming the insurmountable “fear of being copied”. This mental approach, if related to a genuine professional interest, supports and strengthens the organizational identity.

Evans et al. (2006) also argue that both formal education and informal learning taking place in the immediate workplace community are essential, thus extending the apprenticeship learning advocated by Lave and Wenger. Second, they offered an analytical continuum, acknowledging the context-specific nature of learning in individual classrooms and schools, in a way that Lave and Wenger’s work did not. Third, Evans et al.’s work challenged ideas of a linear journey from novice to expert as being too simplistic. This framework offered us a way of evaluating workplaces, although in our study from the BTs’ perspectives only. It was not designed however to offer a way of understanding teachers’ responses to such environments. Another requisite for the start of CPD is given by what Eraut defines learning from others through peer learning (peer to peer) as well as learning from experts or significant others (tutoring). In a research conducted by M. Eraut (2007), that evidences some approaches that support Expansive Learning Environment (Fuller & Unwin, 2004), the persons interviewed affirm that “learning from others” in the working context represents one of the most significant methods for professional development. This approach can be placed, according to Eraut, in the continuum where on one side there is the individual dimension and on the other the organizational dimension. Referred to the individual one, the fulcrum of “learning from others” is the importance of the tacit knowledge of everyone to share daily with the colleagues while carrying out one’s profession. On the opposite side of the continuum in the organizational dimension the reference point of learning is mainly based on “propositions and written documents” which are progressively more formalized. According to Eraut, “the learning process started by the worker moves within this continuum in accordance with some central reference points: the own personal dispositions and the manager’s support” (Ibidem, p. 36). In other words, the effectiveness of a learning environment that gives value to the support and mutual help is fully implemented if it is hold up, on one hand, by the personal motivation and the willingness to a social participation and, on the other hand, by the workplace configuration and the organizational culture that encourages and stimulates co-participation and collaboration. The vast majority of teacher trust that there is still a lot to be discovered and developed for consistently brilliant teaching. Istitute for Leanring write that «evidence shows that the CPD most likely to lead to the desired impact is based on learning from others – from shared resources, from peer support and working together and through formal and informal networks. Organisations with a real interest in developing teaching and learning also identified working in teams, mentoring, and engaging in action research as most likely to lead to brilliant teaching and training » (IfL, 2010).

A. D. Ellinger and M. Cseh (2007), who identified a certain number of factors, such as behaviour and communication that facilitate the learning process of the participants, have also investigated the importance of the personal dimension for the creation of working environments. The authors indicate the listed factors as behaviours that experts can adopt to facilitate the learning, mentioning managers and responsible persons in charge, by improving confronting techniques and forms of co-participation starting from daily experiences. A recent Irish study (Morgan, 2009), highlighted that life beyond school is important in helping novice professionals to cope with new workplace demands, both in terms of emotional and informational support. It is for these reasons that we have investigated the role of personal networks to help us understand how support is offered and used by Beginner Teachers. (Fox et al., 2010). The study of Fox evidence that the Beginner Teachers found schools as largely expansive learning environments in terms of support planned into their induction or training or as opportunities with which the teachers could engage informally. This represents the strong invitational nature of these schools as learning environments (Billett, 2001). This should not be entirely surprising given that the schools, at least in the pre-service year, were selected by the University as suitable environments into which to place training teachers.

TEACHER'S PROFESSIONAL DEVELOPMENT THROUGH THE CPD APPROACH

«Brilliant teaching and training does not happen by accident. It is created through careful thinking ahead and preparing teaching or training to meet the needs of each learner; the level and kind of course; and the range of outcomes and progression needed» (Fazaeli T., 2010). Become brilliant teachers requires a process of gradual integration into communities, as referred professional, this is done through a dual path of professionalism: the first relates to specific disciplinary skills, the second path regards teaching methodologies that promotes effective teaching practice. The application of CPD can have three different approaches (Bonometti, 2013) that represent different levels of formalization of the process. The first approach, defined "certified", has a "standardized" structure with the designing of the process according to the rules and the culture of a specific profession. In fact, the scientific community and the "professional group" can determine the development-phases and the steps of continuing updating which are essential to ensure a certain level of professionalism. The development of the process and the sharing agreement of the updating according to the rules guarantee public accreditation to the professional (in some cases with legal value). In such a case, the process of professional development (CPD) becomes a sort of obligation while carrying out one's profession and the lack of respect for the operational guidelines may produce sanctions by the "professional group". The risk that may occur with this approach is to confine people exclusively within basic routine activities, asking them to perform a standard of disciplinary skills, rather than producing new ones and going beyond. It becomes a kind of pre-formulated module of development which will give the necessary certification at the end. In the international healthcare sector all professional in medicine and nursing follow a learning program to ensure the maintenance and development of the professional skills, just called CPD. A comparative study, Peck et al. (2000), compares the use of CPD in Canada, United States, Europe and Australia and highlights the common elements and difference.

A second approach can be defined "organized", in other words it is characterized by the explicit planning of a consistent learning program in line with the indications given by the relevant organizational context or in some cases by the scientific community. Compared to the previous path it is not connected to legal aspects and certifications. In this case, CPD is closely linked to the strategies of the Human Resource Development

(HRD) and, converging individual needs and position requirements, a skill development process is defined in line with the strategies and the expectations of the belonging organization. A particular attention is paid to the transfer of knowledge in the workplace and at the same time, the workplace must provide continuing learning opportunities to the people. The characteristic of this second approach is given by the close correlation between personal professional expectations and business development prospects. In the organization an effective people strategy, a strategic thinking applied to the development of human resources in line with the organizational strategies is put into practice, in which CPD can be considered a tool in supporting management and professional development with an eye on the future.

Finally, the third approach, called "personalized", presents CPD as an opportunity for individual growth which is less bounded to organizational needs but, nevertheless, related to a specific working context. Compared to the previous approaches, this one could seem less systematic and continuing, leaving more possibilities to the participant to design the process and to redefine the objectives to achieve. This method finds more application possibilities during the internship of post-graduate participants, where the practitioner is facing the professional integration and role integration with the support of a project designed by a third party in addition to the company and the employee. This process requires a definition of the own initial competences and the planning of the learning process with a possible redesign of the module in case of need, in order to respond in an appropriate way to the expectations of the participant and the organizational context. The development of a personalized CPD implies as specific characteristic the presence of a third party who is involved in the negotiation between participant and company, in order that the skill development process allows sufficient time for the training and not just the time convenient to the organization. The places with similar characteristics that carry out this function between worker and organization are the placement services of the universities or colleges, the employment centres of the provinces/districts, the vocational education centres. As regards the CPD apply to the professional development of teachers, research of Institute of Learning highlights that shows that the key to success is when CPD mirrors the learning of others, including students and trainees, what is good practice for one is good practice for the other. Effective CPD is not an end in itself but fundamental to the sustained, positive teaching and continuous improvement of teachers and trainers, sector organisations and brilliant success for learners. A project of continuing professional development is considered a learning action during the work placement and a socialization process with the professional context and role when a real and proper apprenticeship is provided that turns knowledge into competencies. During this period, the new entrants, through a continuing internship or during the professional integration, activate their knowledge and skills linking them to the specific working context in order to develop the appropriate skills requested by the daily activities in the workplace. It is a challenging time where the willingness to learn of the employees and the commitment of the company to provide learning opportunities are at the top, aiming at the achievement of the fixed objectives.

In the school context, the process of construction of the professional identity of a teacher has the aim to increase the capacity to reflect on the experience, analyze the practices, and deepen the theoretical models. Specifically, learning how to learn, to make the best decisions in school situations. To make all this happen some essential pedagogical-didactical approaches are needed to favour the start of the learning/teaching processes. Initiate the CPD from university education can encourage the formation of beliefs, pedagogic and didactic skills centred on the identity teacher.

An important but largely neglected factor is teachers' own beliefs, which are the best indicators of the decisions individuals make throughout their lives. Beliefs are critical

guides of thought and behaviour (Borg, 2001), as well as filters through which people screen new knowledge and experiences for meaning. Teachers' beliefs about learning and teaching have often been subjects of research; they relate closely to the instructional decisions that teachers make (de Vries et al., 2012).

AN APPLICATION FOR INTERNSHIP OF DEGREE COURSE IN PRIMARY EDUCATION

The steps of a professional development process concerns we take some illustrative indications from the model provided by C. Abrutyn and L. Danielson and used by P.G. Rossi for the definition of portfolio (Rossi, 2005). The model consists of four stages/phases that represent the cycle of development of the portfolio according to a logic that does not limit a one-off application but with a regular procedure and method. The starting point is the model developed by Danielson and Abrutyn that articulates the process in four phases: a) Collection, defining the criteria to identify artefacts related to the objective and the participant; b) Selection, selecting the materials, specifying the criteria for the selection of the materials that meet the educational goals fixed for the portfolio; c) Reflection, including reflections in each section of the portfolio and a global reflection; d) Projection, revising periodically materials and reflections on learning included in the portfolio to verify the achieved goals and those to achieve. The model is characterized by the integration of the four phases of the process. During the first phase it is decided how and from which source selecting the material, the second phase involves the selection of the material, in the third phase reflection and self-assessment are activated, as well as in the fourth phase can be identified with the analysis of the achieved goals and the definition of the objectives to achieve. These phases can be applied during the structuring phase of the CPD, broadening the perspective beyond the evaluation. In particular, the CPD process consists of 4 macro-phases (V. Cross, C. Liles, J. Conduit & J. Price, 2004) and it starts with an initial briefing that includes the period of time where tutor and trainee know each other, the contract agreement and the definition of the competency standards. The initial period is crucial for the prosecution of the process. It's the moment to develop a relationship built on trust and respect and to recognize the roles and the mutual commitments to achieve the goals. This specific stage/phase provides for the Educational Agreement and the Start of the process with a look to the standards related to the role and the competences to achieve. These references will become central elements even during the intermediate and final evaluation.

The second macro-phase, Collection, highlights the importance of the active role of the participant who has the commitment to record the significant events in his personal diary (log or blog) that may occur after the work placement. Since the CPD scheme is characterized by continuing learning, the following phases can become cyclical and can be proposed after a certain time interval. The evidences recorded in the personal diary will refer to the first professional experiences, in case of newly hired or interns, or will mainly focus on critical events during the following training periods.

The third macro-phase is defined Selection with the purpose of focusing the attention on specific events related to the professional experience which are significant in the sense of acquiring skills. In particular, it is meant to select some (for instance three) events among the ones reported in the personal diary where the trainee has carried out some activities relevant to his professional role. The next step (Analysis) requires the analysis of the selected material starting from the competency standards that were defined in the initial phase.

The macro-phase called Debriefing is the moment where with the support of mediation and analysis tools a critical reflection on the performance is made. That moment represents the starting point of the effective learning process. The reflection on the

performance, the definition of the analysis methods and the determination of the development goals represent the kick-off of the process that changes the competencies and plans the next phases. In this phase the materials are linked in a network in order to describe the change, a new knowledge, the attention towards the constituent elements of a task or work activity (Rossi e al. 2012)

Subsequently the critical reflection aims to identify areas of improvement, the problematic issues, the involved professional issues, the priorities and emergencies, converging towards a shared definition of the core problem.

Through problem solving techniques, that help to perceive the discomfort and the symptoms, the real problem can be focused and the participant is invited to reflect upon the critical situations and the committed mistakes. Once identified the problem, the required working practices and the skills to achieve must be investigated. According to the method of scaffolding, the tutor (as well as the participant and his peer) supports the reflection with appropriate stimulus that help the understanding from another point of view, with more distance and a different knowledge not known to the participant up until that moment. The process continues with the definition of the goal that focuses on the work activities to achieve and to become good practices in the workplace. At that point, it is necessary to assess the required skills for the application of the new practices by identifying the sources, the offer and the activities that allow the evolution of knowledge. The phase at the end of the process starts off the cyclical process of project work. This tool allows the planning of learning activities, starting from the working activities to achieve and the skills that are considered necessary. The articulation of project work highlights the correlation between the detected problem and new expected working activities in terms of monitoring systems.

The phases are the result of the interlacing of the methods of reflective practice, of the learning from and through experience and of the planning of changes in the working context. In CPD these factors are well documented with the help of many tools that support the learning process. The monitoring of the learning projects becomes an opportunity to verify the steps taken during the execution of the project, to modify the schedule in case of insuperable problems and to set new goals in the continuing professional development. In order to find a different way of working on the development of the skills of teachers we decided to experiment in the process of training of the degree in primary education model of CPD applied to school. This will follow two different approaches: the first will involve students who for the first time will do the traineeship and they will build an educational agreement starting according to the more traditional approach of the CPD. The goal of this planning is to define a personal project work that will be useful for their professional life. With this approach we aim to form immediately in students the aptitude to reflect on the knowledge and skills for each year acquire in their degree course and that will be needed to teach. The second approach will be done with the final year students to develop an educational agreement starting from competency standards gained in degree course and starting a critical reflection during the debriefing for planning the most effective and useful project work with any objectives to be achieved. In the latter case, the aim is to allow students to reflect on the critical aspects of their professionalism, their professional weaknesses to plan training courses and self-training to fill up any professional gaps. This double work will be carried out through times of classroom teaching but also through the use of an online platform that students have available for networked working with each other and with the tutors.

Fig. 1 – CPD for students of Primary education degree

Briefing	Educational Agreement Start	Period of time where tutor and participant know each other and sign a learning contract (Educational Agreement). It is the moment to develop a relationship built on trust and respect, to recognize the roles and the mutual commitments to achieve the goals. Collecting of internal and external material that allows the definition of the standards competency of the role. The material can be placed in a personal folder with all the material that will document the professional development
Collection	Personal log (Blog)	Recording the significant events related to the workplace (both positive and negative) aimed at the increase of practical experience and related to a certain period in the personal diary
	Inner contradiction and problems	Evidencing problems and contradictions or adopted good practices and connecting a representative object to the event, integrating the material in the personal folder
Selection	Selection	Selecting three particularly significant events from the list based on personal experiences and the priorities of the role.
	Analysis	Identifying and reporting the facts (evidences) for each of the events that practically describe what happened.
Debriefing	Critical reflection	Analysing activities with the support of mediation tools, such as concept maps, models of organizational analysis, flow charts and identifying the core problem of the critical issue. Searching for solutions, formulating the work activities to achieve and identifying areas to improve related to skills development.
Planning	Project work	Defining the project's objective and goals in terms of learning and planning of the project work. Assessing the resources in terms of skills, sources, social network. Planning the schedule and the rate of efficiency

Source: reworking

CONCLUSIONS

Propose again a scientific reflection and an experimental initiative in a different context has the aim to resume an importante job for a different kind to develop teacher skills. In fact we repeat that introduce at school a model of training staff in the perspective of life long learning in other contexts seem to have success stems from the belief of the authors that this different approach the teaching profession may help to improve the approach to updating and continuing education that in Italian schools it is not developed. Educate from the beginning the usefulness of a teacher form throughout the life allows you to learn about the society in which you live, the young student that need to be trained and potential practices used for their training. It will be possible achieve this only by developing in the teachers the knowledge to be professionals and growing the competence to reflect on their experience and the capacity, to analyse the practices used by other teachers and learn the ability to deepen theoretical models of these practices. That means to learn how to learn from the experience; only through these capabilities, it will be able to take appropriate decisions to problematic situations that can be found in school. The belief of the authors is that as for professionals in general for a teacher is necessary to acquire skills criticalreflective about its own being a teacher through a training process that enables them to acquire the ability to reflect critically on their educational action and teaching, both on the positive elements that characterize it but also about what is not, they represent, therefore, the need for training during their lifetime.

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A LEGAL REVIEW OF ITALIAN MODEL OF INTERCULTURAL EDUCATION

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ABSTRACT

The aim of this work is to repeat in another european scientific context an overview of intercultural education in Italian school starting from the legal perspectives. Unlike Italy, in many European countries, since the middle of the 900, the issue of interculturality, in field of education, has become a real emergency. In this perspective, the Council of Europe and UNESCO, in the Eighties of the last century, have focused their attention on this issue by adopting various pronouncements and recommendations. In Italy, however, the National Council of Education (CNPI) has ruled in favor of intercultural education much later – by means of different standards and ministerial circulars that have treated this issue explicitly – and only recently has defined a national model of intercultural integration in the school. The Molise, as region with special characteristics, is trying to find its own model of integration through a research called Plism entrusted by the Region at the University of Molise.

KEYWORDS: EDUCATION, INTERCULTURALITY, INTEGRATION, ITALY.

INTRODUCTION

As already mentioned in other scientific contexts the significant presence of foreign students in Italian schools is, undoubtedly, a clear challenge to the educational institutions of our country, as they have to face the need to develop appropriate educational strategies designed to respond effectively to the needs of a social reality that, over the years, has undergone profound structural changes, until it assumed an increasingly multiethnic and

multicultural countenance. In confirmation of this, it should be considered that, according to the estimates of the Ministry of Education, in the school year 2011/2012 there were 755.939 pupils with non-Italian citizenship in our schools. In this regard, it is important to note that "according to the ratio of foreign students to the total of the students, regarding nowadays compulsory education, 9 students over 100 are foreigners. On the whole, the pupils undergo a slight decrease (-0.1%), which is more evident in primary and secondary level (-0.3%), while they tend to increase in kindergarten and first grade secondary school (respectively 0.4% and 0.3%). "This trend is driven by the continuous decline of Italian students, as opposed to the stronger presence of students with non-Italian citizenship in any grade of study: compared with the previous school year, it has increased to 45,676 units, up to 6.4% ". In this regard, it is worth noting that "despite the increase of students with non-Italian citizenship has always been on the rise, the increase from year to year resulted descending. This year, instead, the phenomenon is in contrast, as, for the first time, the percentage change is greater than the previous year.

The overall increase of 6.4% was mainly due to non-Italian pupils born in Italy (44% of foreign students in total) rather than to the size of the migration flow (3.6%)"

ITALIAN SCHOOL LEGISLATION IN THE FIELD OF INTERCULTURAL EDUCATION

The theme of intercultural education has revealed to be urgent not only in our country, but also in many other European nations. On this side, in fact, on several occasions the Council of Europe and the UNESCO have focused on this matter and have issued various pronouncements and recommendations since the eighties⁹⁹. On this subject, even the National Council of Education (CNPI) intervened with its pronouncements in favor of intercultural education, followed by different rules and ministerial circulars that addressed the issue explicitly. In this regard, we plan to look more closely at those which, in our opinion, provide more guidance and are aimed at all levels of school. The concept of intercultural education is introduced for the first time with the Ministerial Circular no. 205 of the 22 July 1990 on Obligatory schooling and foreign students. Intercultural education. It is conceived as a response to the new demand for a multicultural society and aims at promoting a culture of acceptance and the integration of people belonging to other cultures and ethnicities. Within the Circular in question, particularly significant are the indications concerning the educational interventions, which should aim, even in those classes where there are no foreign students, at promoting a culture of dialogue and tolerance¹⁰⁰. In particular, within this circular it was stated that: "the primary objective of intercultural education is the promotion of the ability of a constructive coexistence in a multi-cultural context. It involves not only the acceptance and the respect of diversity, but also the recognition of the cultural identity in the daily search for dialogue, understanding, collaboration, in a perspective of mutual enrichment ". With this Circular, therefore, the Ministry of Education acknowledged that "intercultural education is a structural condition of a multicultural society, and the school, exercising the role of mediator between different cultures, must also become the animator of a continuous, productive comparison between different models "(Durino Allegra, 1993, p. 67). It was also required to the teachers "not to force foreign students to follow the patterns of

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Western culture as if they were the best possible, and to remember that this ethnocentric vision should be avoided even when the class consists of foreign students only"¹⁰¹ , because the educational action is directed not only to the historical present, but also to the future.

Of fundamental importance is also the C. M. n. 73 of 2 March 1994 on Intercultural dialogue and democratic coexistence: the planning effort in the school that, as well as incorporating the issue of the integration of foreign students in schools of any grade and level, addresses the matter of the importance of preventing any form of racism and anti-Semitism and mentions the possibility of the emergence of "the intercultural value of all disciplines"¹⁰² . In this circular is also stated that it is "in the universal value of the person that the foundation of a common culture resides, and in the Universal Declaration of Human Rights (ONU, 1948) the expression of general consensus values is recognised "; it was also highlighted that, to create an intercultural context, the awareness of their own identity and roots is necessary as an essential basis for comparison". Unlike the previous ones, this circular made a specific reference to the role and prerogatives that should be employed in the various disciplines taught at school, "drawing inspiration from the indications in the syllabus and reading them vertically reading them," so as to extract from them some real intercultural objectives. A final aspect in this document, that we consider worth pointing out, is the one related to the theme of acceptance: "The school must keep in mind the conditions of general discomfort of the families and, in particular, the problems resulting from the eradication of the pupil from the original environment. The relationship with the families and with the community allows the knowledge of the different situations, with reference to the guidelines and ways of life of the country of origin [...]. In reference to any type and grade of school, socialization between Italian and foreign students (also achieved through recreational activities and non-verbal language) is the first prerequisite for the development of common intercultural activities and a facilitating element for learning Italian as second language by foreigners. " Precisely in this perspective, the teaching methods have been redesigned over the last two decades in order to encourage forms of dialogue and interaction between pupils able to promote their awareness that "the knowledge and the relationships (cognitive and social) are the result of a collective construction "(Frigerio, 1996, p. 257), to which every person has the duty to bring her unique contribution. Undoubtedly, the provisions in the Law no. 40 of 6 March 1998 on the regulations governing immigration and the status of foreigners are important as well. In it, the emphasis is on the educational value of linguistic and cultural differences and, as highlighted in the Art.36, "(---) in the exercise of teaching and organizational autonomy" it is necessary to promote "intercultural projects of improvement of the educational syllabus, aimed at the appreciation of differences in language and culture and at the promotion of reception and exchange initiatives" in the schools¹⁰³ . Along the same line is the Legislative Decree no. 286 of 25 July 1998 on the "Consolidated text of provisions governing immigration and the status of foreigners". In this Decree, we may identify a particular attention to all those activities designed to promote the integration of foreigners and to make the right to education effective. With this purpose, the school should promote the teaching of the Italian as a second language, to respect the language and culture of the countries of origin, as well as provide the training to the teachers and social integration to the immigrants¹⁰⁴ .

With regard to teacher training it is also important to remember the DPR n. 394 of 31 August 1999 on the "Implementation Rules of the Consolidated provisions concerning immigration and the regulations on the immigration of foreigners" in which, in addition to various provisions concerning the insertion of foreign students in our school system and certain indications on the division into classes, is ensured the Ministry's commitment to support the training of teachers through the realisation of projects aimed at upgrading and training, on the national and local level, regarding issues related to intercultural education. Moreover, this commitment is also reiterated in the C. M. n. 155 of 2001, in which additional funds for the teaching activities will be destined to all those schools with an attendance of foreign students and nomads superior than 10% of the members¹⁰⁵. The legislative measures mentioned are only a part of the various regulations issued in the last few years, in favor of the integration of foreigners in the context of the Italian school. Among these, we wish to point out the Ministerial Circular no. 24 of 2006 on the "Guidelines for the reception and integration of foreign students", which emphasizes the importance of paying a particular attention to the reception of minors and also provides many guidelines and suggestions to organise the teaching and to facilitate their integration and success in education and training¹⁰⁶, as well as the important Document The Italian approach to the intercultural school, edited in October 2007 by the National Observatory for the integration of foreign students and the intercultural education, established in December 2006 by the Ministry of Education. About this last document, it is particularly noteworthy what was stated in the introduction about the reasons that led the Ministry to wanting to find a purely Italian model of intercultural school. In this regard, it is stated: "The goal of identifying an Italian model derives from the need to draw attention on specific conditions, choices and actions that characterized the Italian experience; to identify the strengths that have to become "system "; to identify the weaknesses that should be dealt with new practices and resources; to give visibility to new goals and projects"¹⁰⁷. The aspiration to create an Italian model of integration can also be found in the document edited by the Immigration Committee, Observations and Proposals on the second generations and policies for the school, approved by the National Council of Economy and Labour (CNEL) on January 31, 2008. In this document, it is stated that in terms of integration, the Italian set of rules is oriented towards a different model than those of the other European countries, that is a model that is "neither inclusive " such as the French one, "nor (- -) multicultural "as promoted by the United Kingdom. According to the drafters of the document, in fact, these countries "are both dramatically proving their limits up against the diverse nature of migration, injustice and marginalization, social arrangements, new and serious problems, the international context." The model proposed by the Committee for Immigration has the ambition to pursue "a process of recognition, dialogue, confrontation" that not only promotes the respect for cultural diversity, but also takes into account the differences as a resource and a moment of enrichment for both locals and for foreigners (CNEL, 2008, pp.. 9-10). In line with the project addresses presented by the Ministry therein, we will start, in 2007, the National Action of training for multicultural schools directors, oriented in particular to those schools with a strong presence of foreign students - and conducted through national training workshops and discussions among school leaders - and, in 2008, the

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National Plan for teaching Italian as a second language, oriented in particular to migrant students recently arrived to first and second grade secondary schools (Ongini, 2011, p. 3). The brief discussion conducted so far reveals a significant wealth of statements of principle. However, facing a rather evolved legislation about these issues, one can not but notice the countless shortcomings in many Italian schools, where the inadequacy of the available financial resources adversely affects the possibility to carry out projects aimed at encouraging the development of language skills, the training of teachers, the realisation of language laboratories, the presence of cultural mediators and the support from local institutions, as well as the increase of initiatives to provide a better knowledge of the languages and cultures of origin and of aids from the social services in the area and funds proportionate to the needs of the projects often launched and then discontinued for lack of funds. In conclusion, one has the impression that, on the issue of the integration of foreign students, "our schools are even equipped primarily to manage the first phase of the integration of pupils with nonItalian citizenship" (CNEL, 2008 pp. 12-13).

These limits require a decisive approach that can not be left to improvisation, but, on the contrary, has to be planned carefully. In this regard, it proves essential to create a training system able to educate permanently and positively to the values and principles aimed at grasping the dignity of the human person without reserve; to consider the different - in our case the alien - as a subject of rights and duties and as a potential resource for the host country; to emphasize the importance of protecting certain inalienable rights that are proper to the human person; to realise educational interventions and initiatives of a clearly intercultural origin. In essence, the goal that should be pursued is to give life to a real cultural exchange through which stakeholders can learn to use their communication skills to interact with each other and to start a reciprocal and balanced relationship, based on active listening and respect of the differences.

THE LEARNING ACTIVITIES AND TEACHING IN INTERCULTURAL SCHOOL

In a cross-cultural perspective, the school has to educate the students to develop "a sense of belonging to humanity" (Santerini, 2006, pp.. 12-13) and a spirit of "brotherhood" capable of overcoming language and cultural barriers and aimed at enhancing the common universal principles shared by all humans. Moreover, on a practical level, intercultural education must be translated into a series of training and educational activities to promote active listening, communication, respect and the ability to interact and engage with each other on a par basis and with the awareness that the other has its own way of thinking and manage their own feelings that must be accepted and respected (Portera, 1992, pp.. 219-221). In the end, the school has to realise a series of training and educational activities aimed at promoting the processes of integration and learning, but, above all, it must focus on a solid intercultural training for the teachers. In this regard, it is essential to provide them with a valid and continuous professional training including also the acquisition of all the knowledge and the relational skills needed to effectively carry out a process of intercultural education. In this respect, acquiring the concept of intercultural means, on the one hand, promoting in the students the ability to interact and relate to the other, and, on the other hand, working on themselves, on their way to relate to immigrant pupils and to consider their cultural differences, as well as: "Rethinking

their teaching methods through a review of the contents and methods; adopting attitudes in favour of the establishment of a 'scholastic climate' of openness and dialogue in the classroom and to the development of a perception of diversity as an enrichment; and as a mutual access to new knowledge to be able to manage this complexity; adopting critical-reflective attitudes related to the experience in the teaching practices and an attitude of research in collaboration with groups of teachers and with the help of external experts, aiming at the realization of a project of research-action, which constitutes an active method of in service education and continuous updating" (Fiorucci, 2011, pp. 79-88). In the end, when relating to foreign students, we must always keep in mind that each of these students has his own life history, with its experiences, and a particular way of perceiving changes related to the migration experience and to the adaptation to the social reality and the culture of the host country. Furthermore, the barriers that immigrant students must face are many: just think about the difficulty of communicating and interacting with their classmates because of the lack of knowledge of the language and the inability to decode the implicit cultural system of the new society. This last difficulty, moreover, often causes a number of misconceptions and misunderstandings in the relationship with their colleagues and with the teacher him/herself and can give rise to a strong sense of disorientation due to the fact that, in addition to the ignorance of the new system of implicit cultural rules, immigrant students already "carry with them a parallel system of implicit rules relating to their own culture of origin, which in most cases are not known or are even subject to opposite interpretations in the culture of the host country" (Pinto Minerva, 2002, p. 44). In order to transform these communication barriers into an opportunity for growth and mutual understanding for the students, the teacher must be able to recognize and be aware of the symbolic meanings and values of the cultures of the children in that class in order to understand their needs and promote common rules of coexistence (Demetrio, Favaro, 1997, p. 88).

As for the training and educational activities, if you want to realise a real transformation of the school in a inter-cultural sense, a radical revision of the programs, the organizational structures of the school, the languages and the relationship between the school and the area, as well as a rethinking of the teaching methods and the criteria of orientation, evaluation and selection, is more necessary than ever. In short, the goal that we must pursue is to implement a concrete renewal of the school on an intercultural basis. Rethinking the teaching in an intercultural logic, therefore, means to cultivate also on a practical level those concepts of complexity, of otherness and of identity that are at the basis of the intercultural reflection. In general, the commitment of intercultural education should not be limited to the mere transmission of that notional knowledge already set within the curricula. It should, instead, promote a relational climate of openness and dialogue and - through the trial of specific educational activities - lead the students to discover the differences and similarities, the respect for diversity and ways of thinking other than theirs, removing those prejudices that hinder the realization of a constructive dialogue.

The intercultural approach should also include the development of teaching methods designed to encourage the active participation of all pupils and to create, especially in the native students, a genuine interest and curiosity about everything related to the culture,

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the traditions and the customs of other countries, particularly those countries from which their foreign classmates come from.

CONCLUSION

Considering the results of the short close examination of the ministerial measures aimed at promoting the integration of immigrant pupils and an intercultural education in Italian schools at all levels, it seems important to pause and reflect on the primary objectives of the intercultural approach, which proposes, first, to overcome all those cultural patterns related to old stereotypes and prejudices, as well as the consequent fear of losing their security, or even their own cultural identity. Obviously, intercultural dialogue does not claim to be as the solution to all problems related to immigration and integration, and doesn't either pretend to give answers to all the questions that may arise in this regard, however, it can definitely provide a valuable contribution "to the development of democratic stability and to the fight against prejudice and stereotypes, both on the social and the political level, and facilitate the development of alliances between cultural and religious communities, thus helping to prevent or mitigate conflicts, including in post - conflict or 'frozen conflicts'"¹⁰⁸ . To exit the logic of closure and individualism to get closer to the others also requires the effort to understand their needs and the innumerable difficulties related not only to the problems and misunderstandings that come from belonging to a different culture, but also the feelings of insecurity and inadequacy that the lack of reference points can arouse in an individual who finds himself living in a reality that does not belong to him and that, especially in the beginning, he is not able to handle. The intercultural relations require, in fact, not only the willingness to learn about other cultures and to recognize and accept differences, but also a commitment to put in the middle of the relationship the individuals themselves, bearing a specific cultural identity, with their life experiences, their hopes and their specific needs.

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