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HUMAN DIGNITY AND SOCIO-ECONOMIC RIGHTS

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Abstract

In current society, where the gap between rich and poor is widening[1], human dignity is invoked very frequently in relation to socio-economic rights. We analyze in this study the jurisprudence of the Romanian Constitutional Court and the recent jurisprudence of the European Court of Human Rights.

Keywords*: human dignity, socio-economic rights.*

Introduction

Today, the poor are considered human beings who are in a position of vulnerability. Fighting against poverty and social exclusion that accompanies it is now a struggle for recognition of the poor as human beings and members of society as worthy as everyone else. To recognize the other as equal in dignity involves treating him with respect and being united with him. Every man therefore appears as "stems from a normative relationship with himself and all the other people at the same time" as far as dignity is accompanied by a "recognition order"[2], an "obligation of action"[3] which engages the other. All human rights are universal, inseparable, interdependent and intimately related and must be treated in a fair and balanced manner, on an equal footing and giving them equal importance[4]. The Human Rights Council of the United Nations said in a recent resolution that "the ideal of free human beings, free from fear and poverty can only be achieved if conditions are created to enable everyone to enjoy the economic, social and cultural rights, as well as civil and political rights"[5].

Human Dignity and Extreme Poverty in the Jurisprudence of the Constitutional Court of Romania

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[1] According to the Organization for Economic Cooperation and Development (O.E.C.D.) average incomes of the rich people 10% of the populations are now nine times higher than those of the poor, the difference increased by 10% since 1980. Studies are reported after a certain income, those who do not get are considered poor. O.E.C.D. set as reference the income in each state analyzed. Being a value changing is called "relative poverty." To define the "absolute poverty" it is taken into account the average income in a given year that is determined as the border of poverty, as it is determined how many have come under this limit in the crisis.

[2] Pech T, *La dignité humaine. Du droit à l'éthique de la relation*, Éthique publique, volume 3, no. 2, 2001, p. 95.

[3] Pettiti L.E., *La dignité de la personne humaine*, in M.L. Pavia, Th. Revet, *La dignité de la personne humaine*, coll. Études juridiques, volume 7, Paris, Economica, 1999, p. 54.

[4] The United Nation Human Rights Council, A/CHR/RES/8/2 Resolution 8/2, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

[5] The United Nation Human Rights Council, A/CHR/RES/8/11 Resolution 8/11, Human rights and extreme poverty, June 18th, 2008.

The inclusion in the Constitution of the concept of human dignity as a supreme value determined from the Romanian state affirmative actions to promote and protect human dignity. Article 1 paragraph (3) of the Romanian Constitution provides that "Romania is state under the rule of law, democratic and social, in which human dignity, rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and ideals of the Revolution of December 1989, and are guaranteed". Numerous Constitutions refer to "fundamental social opening"[6] of the human dignity: Italy, China, Slovakia, Belgium, and the list is much longer.

In the jurisprudence of the Romanian Constitutional Court, dignity was invoked in Decision no. 1576 of 7 December 2011[7] on the unconstitutionality of the law approving Government Emergency Ordinance no. 37/2008 on certain financial measures in the budget. In support of the plea of unconstitutionality, its authors argued that legal texts criticized infringe the Romanian Constitution which establishes human dignity and the free development of human personality as supreme values of the Romanian state as is suspends rights granted to persons under their outstanding contribution to the conduct of the Revolution of 1989. Subsequently, the authors of the objection of unconstitutionality have developed criticisms about the unconstitutionality of article 18 of the text of the legislation criticized, showing that a number of people who were ostracized during the Communist regime as the military in the royal army, war veterans, political prisoners and magistrates subject to political examination were recompensed or rewarded by the democratic state, which is possible thanks to the contribution of people who fought the Revolution of 1989, and depriving them of the rights provided by Law no. 341/2004[8] is likely to affect human dignity.

The decision is an important one since the Constitutional Court of Romania accepts that dignity can be used in the devotion of a positive obligation for the State to intervene in a sense of obligation to provide the resources necessary for life, to the extent that in their absence would reduce life to a level that may not be considered appropriate to any human being. In addition, the decision deserves attention because it gives the opportunity to the Constitutional Court of Romania to characterize human dignity as "an inalienable attribute of the human person, which requires to all members of society to respect and to protect the other individuals and prohibiting any humiliating or degrading attitudes to the man"; in other words, "each individual is bound to recognize and to respect to any other human the attributes and values that characterize the man".

The Constitutional Court of Romania considers that human dignity is not and should not be construed as establishing a preferential treatment for certain people, regardless of contributions, qualities or their intake to society because human dignity is an intrinsic value that has the same meanings for any of the individuals. The Romanian Constitutional Court establishes that the gratitude and the respect due to persons with special contribution to development of the society, not to be reported to article 1 paragraph (3) of the Basic Law, but it holds to the moral obligation of the society to express gratitude to these people. Therefore, the moral basis to provide benefits that springs from a sense of gratitude to those who contributed to the fall of the communism and establishment of the democracy is undeniable, but not an obligation under the Constitution to regulate the state in this regard, and can't speak of a fundamental right to obtain compensation by virtue of wrestling which is

[6] Mathieu B., *La dignité de la personne humaine: du bon (et du mauvais?) usage en droit positif français d'un principe universel*, in Seriaux A., Le droit, la médicine et l'être humain: propos hétérodoxes sur quelques enjeux vitaux du XXIème siècle, P.U.A.M., 1996, p. 220.

[7] Published in the Official Gazette of Romania, no. 32 of January 16th 2012. See also Decision no.121 of March 5th, 2013 published in the Official Gazette of Romania, no. 358 of June 17th 2013.

[8] Law no. 341/2004 of gratitude to the heroes, martyrs and fighters who contributed to the Romanian Revolution of 1989, and to the people who sacrificed their lives or have suffered from anti-labor uprising in Brasov in November 1987 published in Official Gazette of Romania, no. 654 of July 20th 2004.

particularly remarkable in the Romanian Revolution of December 1989. We appreciate that the decision is correct. The human dignity means belonging equally to all human beings in the human community; it is refractory to all that distinguishes humans from each other. There are not degrees of dignity as human dignity belongs to every man simply because he was born a human being. Human dignity as the foundation of the rights and freedoms of the human person can only be the "equal dignity" of all people. Therefore, people who fought in the Revolution of 1989 may not claim the recognition of a more or less dignity than any others. Human dignity is "the essence of the human being" and can't be a mark of distinction between groups of people, but it distinguishes the human being from animals or things. This does not mean, as correctly recognizes the Constitutional Court of Romania that can't be granted special protection given the vulnerable position that requires to the lawmaker demands. Claiming a particular protection in this case allows us to aim for dignity. The aim is the universalism contained in the idea of dignity. Thus, postulating the universality, dignity requires overcoming the vulnerability that people are in a state of extreme poverty.

In support of the plea of unconstitutionality of the law approving Government Emergency Ordinance no. 111/2010 on parental leave and childcare monthly allowance[9] has argued that the text of the law is contrary to article 20 of the Constitution[10], in relation to the provisions of article 1 of the Charter of Fundamental Rights of the European Union[11]. Court merely stated: "In terms of the provisions of the Charter of Fundamental Rights of the European Union, legal act as distinct from the other international treaty invoked, the Court finds that they are in principle applicable to the constitutional review insofar as it provides, guarantees and develops the constitutional provisions regarding basic rights, in other words, to the extent that their level of protection is at least at the level of constitutional norms regarding human rights". The Romanian Constitutional Court finds that the provisions of the Charter are not affected, but it does not develop an argument showing which is the level of protection of rights whose violation is alleged in the exception of unconstitutionality in the jurisprudence of the Court of Justice of the European Union.

On the other hand, the Romanian Constitutional Court stated that the right to a decent standard of living is a right of a special nature. The Romanian Constitution contains no provisions on the concept of "standard of living" and neither regarding the means to achieve this objective. Consequently, the lawmaker established the set of measures for the State to ensure the protection and improvement of quality of life, by regulating certain fundamental rights such as the right to social security, right to work, right to a fair remuneration, the right to health protection and rights that do not have a constitutional devotion, but tend to achieve the same objective[12]. However, article 1 paragraph (3) of the Romanian Constitution foresees that Romania is "a State under the rule of law, (...) social" and article 135 paragraph (2) letter f) requires the State to create conditions for improving the quality of life. In addition, article 41 paragraph (2) and article 47 paragraph (2) of the Romanian Constitution foresees the right of the employees and of the citizens to welfare measures and social measures established by

[9] Constitutional Court Decision no. 765/2011 published in Official Gazette of Romania, no. 476 of July 6th 2011. See also Constitutional Court Decision no. 417/2012 published in Official Gazette of Romania, no. 520 of July 26th, 2012.

[10] Article 20 of the Romanian Constitution provides: (1) "The constitutional provisions on the rights and liberties of citizens shall be interpreted and enforced in accordance with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is part of "; (2) "If there is a conflict between the covenants and treaties on fundamental human rights to which Romania is a party, and internal laws, the international regulations shall prevail, unless the Constitution or laws comprise more favorable provisions".

[11] The Charter of Fundamental Rights of the European Union provides the article 1 that "Human dignity is inviolable. It must be respected and protected".

[12] Constitutional Court Decision no. 30/1994, published in Official Gazette of Romania no. 100 of April 18th 1994.

law, others than those expressly provided for in the constitutional text[13]. The Romanian Constitutional Court has consistently held that if citizens' rights that are not expressly provided for in the Constitution, lawmaker`s freedom to choose, based on state policy, financial resources, priority of objectives and the need to comply with the other obligations of the State under the Fundamental Law, measures through which it will be given to citizens a decent living conditions and limits of their grant. It was also envisaged the modification or termination to provide social protection measures taken, without being subject to the provisions of article 53 of the Romanian Constitution which are applicable only to the rights devoted in the Constitution[14].

In optical of the Constitutional Court of Romania, even if the lawmaker is free to choose the means to achieve social protection of citizens, the compliance of the obligation to ensure a decent standard of living must be considered independently, aiming not only how the State performs this obligation, but also how people manage to meet their living needs in a given time, depending on available resources to them. Currently, the Constitutional Court of Romania recognizes that establishing a standard of living that can be considered as decent must be assessed case by case, depending on a number of contextual factors, such as: the economic situation of the country, the State resources, the development of society, the degree of culture and civilization at a particular time and the organization of society. Therefore, these factors must be assessed in relation to the manner and extent to which the State shall carry the obligation to ensure a fair standard of living, appreciating that it is not possible to establish a fixed, immutable standard.

The Jurisprudence of the European Court of Human Rights

The European Convention on Human Rights contains only civil and political rights. The reason that social rights were not introduced in conventional text lies in the fact in 1950 there wasn't a political consensus in this regard.

A step forward was made in the Airey judgment of 9 October 1979[15], when the Court recognized that it "can no longer ignore that the development of the economic and social rights greatly depends on the situation of the State and especially their financial resources. On the other hand, the Convention must be read in terms of life today (...), and its field of application, it tends to a concrete and real protection of the individual. Or, if it provides essentially civil and political rights, many of them have economic or social extensions. Together with the Commission, the Court considers therefore that it must not eliminate an interpretation or another, simply because it may take to break the sphere of the economic and social rights; no tight partition separates it from the Convention". However, since the 80s, we could say, paraphrasing Professor Frederic Sudre that the Convention is "permeable to social rights"[16], in the sense that economic and social rights were protected by the European judge as

[13] Article 41 paragraph (2) of the Romanian Constitution provides that "Employees are entitled to social protection measures. They refer to employee health and safety, working conditions for women and young people, establishing a minimum gross salary per economy, weekends, paid annual leave, work in special conditions, training, and other specific established by law". Article 47, paragraph (2) of the Fundamental Law stipulates that "Citizens have the right to pensions, paid maternity leave, medical care in public health centers, unemployment benefits and other forms of public or private insurance provided by law. Citizens have the right to social assistance, according to the law".

[14] According to article 53 of the Constitution, entitled "Restriction of certain rights or freedoms": "(1) "The exercise of rights or freedoms may only be restricted by law and only if necessary, as appropriate, for: the defense of national security, public order, health or morals, rights and freedoms of citizens, conduct criminal investigation, preventing the consequences of a natural calamity, disaster, or an extremely serious catastrophe"; (2) "Restrictions may be ordered only if necessary in a democratic society. The measure must be proportionate to the situation that caused it, to be applied without discrimination and without prejudice to the right or freedom".

[15] Case Airey versus Ireland, judgement of October 9th, 1979, Series A, volume 32, paragraph 26.

[16] F. Sudre, "*La perméabilité de la Convention Européenne des droits de l'homme aux droits sociaux*", Mélanges offerts à J. Mourgeon, Bruylant, 1998, p.6.

he decided in each case whether impairment of a right or freedom that is provided by the Convention.

One of the significant decisions of the European Court of Human Rights was in Case Stec on 6 July 2005. The Grand Chamber decided that the conventional notion of "good" could apply to all performances and social benefits, whether contributory or not. It is shown that: "many individuals for their lifetime or for a part of it can exist only because of security or welfare benefits. Many domestic legal systems recognize that these individuals need some security and provide automatic disbursement whether the conditions for granting those rights are met. When a State law recognizes an individual's right to an allowance, it makes sense to reflect the importance of this interest, judging article 1 of Protocol No. 1, as applicable". However, expressly stated that article 1 of Protocol no. 1 does not create a right to acquire property, and States have complete freedom whether to apply or not some form of social security scheme, or to decide the type and amount of benefits provided under a certain scheme. If, however, the State law provides for the granting of such a right must be regarded as creating an interest in property that is part of the scope of article 1 of Protocol No. 1.

In the case Van Volsem, a Belgian woman gets custody of her children after divorce. She was unable to get a job because of psychological problems, living in alimony and welfare. She lived in a home for people with low incomes, but the power consumption was disproportionately high and could not afford to pay, so electricity was interrupted. The applicant complained under Article 3 of the European Convention on Human Rights because the electric company was a representative of the Belgian State, but the European Commission of Human Rights held that "suspending or threatening to suspend the supply of electricity, do not touch the level of humiliation or abasement required to be qualified as inhuman or degrading treatment". This decision was heavily criticized in the literature. Thus, Professor Frederic Sudre, in an article entitled suggestively "La première décision quart-monde" de la Commission européenne des droits de l'homme, une "bavure" dans une jurisprudence dinamique"[17] was firmly convinced that it is a wrong decision: "What we see in this case? Degrading and unsanitary living conditions (no light, no hot water, no heating in the middle of winter and a child) but also in a state of humiliation and emotional suffering (a reduction of electricity carried in December, the threat for further cuts, the permanent obligation for the applicant to seek understanding of the distribution company and seek to obtain a loan from banks)".

In Case Budina in 2009, a woman aged 60 years, suffering from bone tuberculosis complained about the fact that the pension she received, was only sufficient for basic needs, food and hygiene, but was not sufficient for sanitary goods, cultural services and treatment in sanatorium. In the Court's view, a very insufficient amount of pension and social benefits may fall within the scope of article 3. The obligation on States under article 1 and article 3 may require states to take measures so that persons not are subjected to inhuman and degrading treatment. Court noted that it can be described as degrading and covered by article 3, the treatment that humiliates or debases an individual, showing a lack of respect or decreasing his human dignity, or generating the feelings of fear, anguish or inferiority capable to defeat physical or moral resistance and that is enough for the victim to be humiliated in front of its own eyes. In order to determine whether the treatment is degrading, in a general way, the European Court of Human Rights considered whether its purpose is to humiliate or debase the person or its consequences adversely affected her personality in a manner incompatible with article 3, and the absence of such a goal does not definitely exclude an infringement of the conventional text. As expressed in previous cases, she ruled that a state can be held liable "in situations where a person is totally dependent on State support and is facing official indifference when it is in a situation of serious deprivation or needs incompatible with human

[17] Revue Universelle des Droits de l'Homme, no. 10/1990. p. 349.

dignity".[18] In this case, the Court held no violation of article 3 of the conventional text because the applicant failed to justify that lack of funds translated into concrete suffering, the applicant showing that afford basic needs, food, hygiene items and was eligible for free medical treatment. Although the Court accepted that the applicant was in a difficult situation, especially during 2004-2007, it was considered that the applicant has not proved that the pension and social assistance are insufficient to protect her against damages to physical or mental health, against a situation of degradation, incompatible with human dignity. The European Court of Human Rights made a thorough analysis of each case. A special attention is given to access to medical care of the poor, who are viewed from two perspectives: that of ensuring human health, but also in terms of social equality and the fight against exclusion by the degradation of the body. Finally, the Court ruled that Bulgaria violated the article 2 of the European Convention of Human Rights in a recent case in which 15 children and young adults admitted to a home for children with severe mental disabilities died between December 15, 1996 and March 14, 1997, due to lack of food, heating and healthcare, and the authorities have not taken measures to prevent their death, although they had been informed of the real and imminent threat to the lives of the individuals concerned[19].

Conclusions

1. We note from the analysis of the jurisprudence of the European Court of Human Rights the prudence in deciding that such extreme poverty is covered by article 3 of the European Convention on Human Rights. In this regard, the Court's attitude is perfectly understandable because article 3 is absolute and it does not allow justification from the States, especially of budgetary nature.

2. In the recent jurisprudence, the Constitutional Court of Romania refers to the concept of human dignity in the context of socio-economic rights and it is accepted that the State must intervene to provide the resources necessary for life.

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[18] Case Antonina Dmitriyevna Budina versus Russia, judgment of June 18th, 2009.
[19] Case Nencheva and Others versus Bulgaria, judgment of June 18th 2013.

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CORRUPTION WITHIN SECURITY FORCES

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Abstract

These criminal organizations aim at corrupting officials willing to influence public politics and to protect different illegal activities, in exchange for some undeserved advantages. Once inside in this game, the official will bend to any pressure coming from the criminal group, and the group will have no difficulties in finding more and more convenient ways to develop illicit activities.

Keywords: *corruption, forces crime, national security the impact*

Introduction

In September 1999, took place the first conference which dealt with the impact of organized crime against the national security of the states. Follow-up this meeting, many representatives of the participating countries and present organizations, being aware of the ampleness of the consequences of corruption even in the most secure institutions of the states, solicited the forming of a new conference on the same topic. Their solicitation was taken in consideration, and, on 14-18 May 2001, the George C. Marshall Center of Security Studies hosted an international conference on the topic "Corruption within Security Forces: A Threat to National Security" sponsored by the Federal Bureau of Investigations of the United States with the collaboration of Bundeskriminalamt from Germany. At this last reunion, at which participated over 40 states from Europe, Asia, America, the accent was put on corruption at the level of the government officials and security forces, on the consequences and the possibilities to confute it. The participants discussed the situation of the countries in transition which confront with numerous problems with the implementation of the anti-corruption fighting strategies.

During the discussions, an idea was launched, according to which the main cause of corruption increase is global development and organized crime at an international level, offers opportunities for transport over the border including drug traffic, human traffic, gun running. Lately, the main target of criminal group is represented by Security Forces which refer to all the institutions of the state which serve to apply the law, to the control at the national border, including the border police, immigration agencies, military services, custom's units, local and national police. The Security Forces have become the target of corruption because they control the force monopoly, they can be used as instruments by the criminal groups, have access to munitions and secret information and can facilitate the accomplishment of activities which are against the law.

The Security Forces staff has proven to be easy to corrupt the reasons invoked are the poor compensations, the lack of fortitude accompanied by the small possibility to be "exposed".

The most suitable means to annihilate corruption is considered to be electronic surveillance, used in undercover operations, advanced procedures of investigation, witness immunity and protection. Furthermore, the civil control of the Security Forces is essential in the preventing activity of corruption; in this direction, the vice-agents must appoint the anti-corruption boards which must modify the legislation and to adapt to its conditions, to perform investigations within the institutions, to secure the necessary means to recruit personnel, to elaborate codes of behavior, to monitor the conflicts of interest and to allow the access to information of the media and to some non-governmental organizations.

The accent was put on the importance of recruiting among population honest people, with self-control, fortitude, and with the spirit of sacrifice. Like in every other strategy, the society has a very important part; in order to win people's confidence the administration of the state must bear in mind the promotion of a transparent politics by ensuring free access to information, the cooperation with the media and with non-governmental organizations, which can be used by criminal organizations in concealing the truth.

In his intervention, Michael De Foe, F.B.I.'s Deputy Director, declared that the common factor of all scandals within the Security Forces is the lack of supervisors and the negligence of the administrators, which become most of the times accomplices in corruption cases. The instauration of severe measures of discipline, associated with intolerance of the leaders towards less important acts could intimidate personnel and determine it to avoid any act opposed to his attributions.

International cooperation in this area is an objective which must be taken into consideration, following the appraisal and interpretation of all the aspects of corruption and making sure of the collaboration of investigation units from different states.

The most affected states within the Security Forces by the corruption phenomenon are the once being in a transition period. The Global Assembly of the Central and Eastern European countries came to the conclusion that the worst enemy of evolution or the road to democracy is corruption, fact proven after an action attended in Albania, Bulgaria, Croatia, Macedonia, Romania and Serbia.

Corruption is defined as: "office or the public office abuse for personal benefit". During the same conference an idea was issued according to which corruption is the perfect way for the organized crime to manifest its power, as long as there is organized crime there probably exists corruption and the need for corruption.

Both discovering and investigating corruption cases is difficult to accomplish for at least five reasons:

- Corruption infractions are almost always committed undercover;
- Corruption involves a relative small number of participants;
- Many times, the institutions themselves manage the application of corrupted laws;
- Corruption has the potential to act for long periods of time;
- Corruption involves distraction this is why, every time a crime is discovered measures are taken to lade the process of gathering evidence and of finding out the truth.

Due to the penetration of corruption in all social layers, action must be taken against this phenomenon which threatens the national and economical security of one state, regional and democratic stability, isolating the corrupt country both in a diplomatic and economic matter.

For the elaboration of an anti-corruption strategy it was suggested the following of a few preceding steps and taking in consideration a few ideas:

- As for the adopted laws, they must have been applied by several other countries, with the same purpose, having positive results, but they also must be appropriate with the situation of the country in discussion, with the national interests, and it is mandatory to be applied;
- The second step is the elaboration of a definition of corruption, which must contain all its essential aspects, to incriminate the conflict of interests, the defining of

the term public servant, to incriminate the illegal usage of government resources, money laundering and bribery.

The fight against corruption becomes more efficient when it is applied on a sector; the steps cited previously are generally valid independent from the domain we are taking in consideration. For the annihilation of corruption within Security Forces, some directions were proposed:

- Defining "organized crime";
- The elaboration of a legal case referring to the Security Forces;
- The investigation of corrupt infractions must be made by the permanent departments of investigation, which must be independent and autonomous;
- To appoint the procedures which must be followed during the investigation of corruption cases;
- The departments of investigation must have the necessary tool in order to discover and investigate infractions;
- The staff within Security Forces must report any contravention of the legal foresight;
- The use of various methods to finish the investigations: electronic surveillance, interrogations, accounting auditing, undercover operations, the use of informers, assuring the protection of the witnesses, negotiation tactics of the punishment.

Conclusions

Some of the most important objectives of the meeting were:

- The evaluation of the threat corruption represents for the development processes and democratic institutions, and on the impact corruption might have on the Security Forces, on security, and on national stability.
- Establishing measures which must be taken to identify and annihilate corruption within Security Forces.
- To elaborate proposals which will be implemented local or transnational, in order to annihilate corruption within Security Forces.

The proposed measures have mainly addressed to the influencers factors at the governmental level. The outcome of the conference were satisfactory, most of the parliamentarians present managing to create plans to annihilate corruption, follow-up ideas of other states with experience in this domain.

Trying to find an explanation to the corruption problem which entered within Security Forces, some experts were asked for their opinion, who declared that through corruption, the criminal organizations manage to carry out their influence in an efficient and cheap manner. These criminal organizations aim at corrupting officials willing to influence public politics and to protect different illegal activities, in exchange for some undeserved advantages. Once inside in this game, the official will bend to any pressure coming from the criminal group, and the group will have no difficulties in finding more and more convenient ways to develop illicit activities.

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THE RESPONSIBILITY OF THE MEDIATOR

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Abstract

Mediation is an alternative to the court, which brings solutions for those in conflict, without appealing to legal instruments. The legal liability therefore comes when illegal acts take place, and represents a major guarantee of complying with legal standards. In the case of breaking legal standards, the social values which such standards defend are in danger. To protect such values, a legal liability is established, when the legal standards are broken, meaning that people, in our case the mediators, producing certain actions by which legal standards are broken, need to undergo certain legal effects, namely they are likely to have legal sanctions applied.

Keywords: mediator, legal liability, principles, obligations, sanctions

Introduction

The mediation is a process to manage conflicts, allowing the prevention or the solving of conflicts due to the intervention of a third party, impartial and having no power of decision, and who guarantees the communication between partners and, implicitly, leads to re-establishing the social connection[1].

The object of the mediation is the conflict between the parties. To mediate means to intervene between hostile parties and to lead them to solving a conflict. The mediator is obliged to value and analyze carefully the object of the conflict, before accepting the case, deciding if that conflict is likely to be solved via mediation.

The concept of liability or responsibility names a reaction of reprimanding coming from the society, towards a certain human action, mainly attributable to an individual. In other words, the liability is that social form, established by the state, through an illegal act, which determines undertaking the adequate consequences, by those guilty, including the use of constraint, with the aim of re-establishing the rule of law thus affected[2].

The common meaning ascribed to liability, no matter the way it takes places, is that of an obligation to undergo the effects of non-compliance with the legal standards. The nature of the broken rule determines the nature of the type of liability.

In case the mediator breaks the obligation stated by the law, the standards provided by the Working Regulations or the Code of Conduct and Professional Deontology, this one are

[1] Rădulescu, D.M.; Mic, E.; Mic, V. – *Medierea – metodă de combatere a discriminării (Mediation – Way to Combat Discrimination)*, vol. NEDES 2012 – Exercitarea dreptului la nediscriminare şi egalitate de şanse în societatea contemporană (Exerting the Right to Non-Discrimination and Equal Opportunities in Contemporary Society), Pro Universitaria Publishing House, Bucharest, 2012, p. 82.
[2] Popescu, A.M. – *Drept administrativ general. Manual de studiu individual (General Administrative Law. Individual Study Coursebook)*, Pro Universitaria Publishing House, Bucharest, 2012, p. 96.

made liable. Thus, according to Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work[3], the liability is disciplinary and civil.

Disciplinary liability

Disciplinary liability comes when a person, in our case the mediator, produces a disciplinary infraction.

According to the Labor Code, a disciplinary infraction is an act related to work and consisting in an action or in-action executed with culpability by the employee, through which this one broke the legal standards, the internal regulations, the individual applicable contract of labor or the collective contract of labor, the legal orders and dispositions of the line managers.

In art. 38 of Law no.192 on 16 May 2006 about the mediation and organization of a mediator's work, with subsequent additions, the followings infractions are listed, for which the disciplinary liability of the mediator's appear, namely:

a) breaking the obligation of confidentiality, impartiality and neutrality;

b) declining the response to requests formulated by the legal authorities, in the cases provided by the law;

c) declining the restitution of written records entrusted by the parties in conflict;

d) the representation or assistance of one party in a legal or arbitrary procedure concerning the conflict taken for mediation;

e) executing other actions which affect professional integrity.

One of the principles of mediation is *confidentiality*. The mediator is obliged by the law to ensure the confidentiality of information received during the mediation procedure. At the end of the mediation, he/she needs to give back all documents presented by the parties, and destroy the notes taken during mediation meetings. The obligation of confidentiality is therefore unlimited in time for the mediator.

This principle forbids the mediator to represent one of the parties in front of judicial bodies, arbitral or court one, during or after the mediation procedure.

According to the principle of confidentiality, the mediator cannot be heard as witness in connection with acts or facts about which he/she learns during the mediation. If there is a written and clear agreement of the parties, the mediator can inform the third parties about certain aspects or information part of the mediation process.

Not only the mediator is meant to keep a secret of information and documents he learned about during the mediation, but also the parties and assistants of those, except the cases when the parties decide otherwise.

We think that the disciplinary liability does not eliminate the commitment of the penal liability as well in the case of breaking the obligation of confidentiality, in conditions provided by art. 196 in the Penal Code – Disclosure of professional secrecy.

The principle of impartiality consists of the equidistance which the mediator needs to take to the parties and their claims. The mediator has to be, during the whole mediation process, impartial and perform duties without favors, prejudices or subjectivism. He/she also needs to act tactfully and in such a manner that has a permanent balance between the parties

[3] Published in Official Gazette no. 441 on 22 May 2006, with subsequent additions (Law no. 370/2009 to add and complement Law no. 192/2006 about mediation and the organisation of a mediator's work; Government Ordinance no. 13/2010 to change and complement legal acts in the area of justice in order to apply Directive 2006/123/EC of the European Parliament and the Council on 12 December 2006 about services part of the internal market; Law no. 202/2010 about some measures to accelerate the solutions to trials; Law no. 76/2012 to apply Law no. 134/2010 concerning the Civil Code; Law no. 115/2012 to change and complement Law no. 192/2006 about mediation and the organisation of a mediator's work; Government Emergency Ordinance (GEO) no. 44/2012 to change art. 81 in Law no. 76/2012 to apply Law no. 134/2010 about the Civil Code; GEO no. 90/2012 to change and complement Law no. 192/2006 about mediation and the organisation of a mediator's work; GEO no. 4/2013 to change Law no. 76/2012 to apply Law no. 134/2010 about the Civil Code, as well a to change and complement some attached legal documents).

of the conflict.

In case the mediator notices that he/she cannot be impartial, he/she needs to decline undertaking the case. If he/she notices this during the mediation process, he/she needs to give up the case.

Based on the principle of *neutrality*, the mediator has to stay outside the conflict and outside the interests of the parties. Through his/her neutrality, the mediator offers credibility and trust to parties. The neutrality of the mediator excludes any subjectivism of him/her, the tendency to get involved affectively in the conflict of the parties, the tendency to agree with, judge or blame one party.

We think that the disciplinary liability does not eliminate further the commitment of the penal liability in the case of breaking the obligation of confidentiality, in conditions provided by art. 196 Penal Code – Disclosure of professional secrecy.

The refusal of responding the requests formulated by the judicial authorities, in cases provided by the law are about the refusal of the mediator to cooperate with authorities in the case of judicial mediation. In this case, the disciplinary liability may join the administrative liability, through sentencing the mediator to pay a judicial fine for declining the cooperation.

The mediator cannot be accused by the non-compliance of the obligation to cooperate with the court when he/she refused the request of the court which would affect the obligation of confidentiality or to testify about the conflict.

The refusal to return the documents entrusted by the parties in conflict. As I mentioned earlier, at the end of the mediation, the mediator is to return all documents presented by the parties and destroy the notes taken during the mediation meetings. His/her refusal will affect the trust in the activity of mediation, but also in the profession of a mediator.

Representing or assisting one party in a judicial or arbitral procedure concerning the conflict subject to mediation. Based on the principle of confidentiality, the mediator is forbidden to represent one party in front of judicial, arbitral or court bodies, during or after the mediation.

The execution of other actions affecting the professional integrity is about, for instance, the simultaneous exercise of a profession incompatible with that of a mediator, or working as a mediator in other ways than those provided. Other acts which may affect professional integrity may be the breach of the obligation to inform the parties about the mediation, an abusive behavior to parties or to other mediators etc.

According to art. 39 (para 1) in Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work, disciplinary sanctions apply in relation with the seriousness of the breach and consist of:

a) written observation;

b) fine, from 50 to 500 lei (the limits of the fine are regularly updated by the Mediation Council, according to the rate of inflation);

c) suspending the quality of a mediator from one to six months;

d) terminating the activity of a mediator.

Art. 40 of the same law in para (1) provides that an interested person may notify the Mediation Council, in writing and with a signature, about a breach from one of those provided by art. 38.

The investigation of the breach will take place in maximum 60 days from the registration date of the request, by a disciplinary commission made of a member of the Mediation Council and 2 representatives of the mediators, appointed by drawing lots from the Table of mediators. The members of the disciplinary commission are appointed by a decision of the Mediation Council. The invitation of the respective one for a hearing is compulsory. The investigated mediator has the right to learn about the content of the file and to formulate his/her defense. In case of absence, a minute signed by the members of the commission will be written, stating that the mediator was invited and did not come in due time (art. 40, para 2).

The investigation file with a proposal for sanction or non-application of a disciplinary sanction will be submitted to the Mediation Council, which decides, in 30 days, about the disciplinary liability of the mediator (art. 40, para 3).

Art. 41 para (1) in Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work, with subsequent additions, provides that the Decision of the Mediation Council to apply the sanctions stated by art. 39 para (1) can be attacked at the competent administrative court, in 15 days since it was communicated.

Civil liability

As provided by Law no. 192 on 16 May 2006 about the mediation and the organization of a mediator's work, with subsequent additions, the liability of the mediator can also be a civil one.

Thus, art. 42 states that the civil liability of the mediator can be committed, under the conditions of the civil law, for causing prejudices, through the breach of his/her professional obligations.

In the mediation article, one can also include potential ways to settle the prejudice, namely: a moral reparation, a reparation in kind and a reparation through equivalent[4].

A moral reparation consists in the doer acknowledging the caused evil, and assuming the liability for the caused damage and a sincere manifestation of the regret for doing that act.

A reparation of the prejudice in kind, if possible at the moment of signing the agreement, and if following the wish and the interest of the parties. The ways to repair a prejudice in kind, according to art. 14 para (1) in the Penal Code are:

The restitution of work, the restoration of the previous situation before the infringement and through a total or partial annulment of a written document. These are listed in the code as examples.

The reparation of prejudice through equivalent consists in reimbursing an amount. Parties can agree on paying an amount as a way to repair the moral prejudice, non-patrimonial, caused to the affected party.

The professional obligations of the mediator are stated by art. 29-37 of the Law no. 192 on 16 May 2006 about mediation and the organization of a mediator's work, with subsequent additions, as follows:

- providing any explanation to parties about the work of mediation;
- ensuring the completion of mediation with the respect of freedom, dignity and privacy of parties;
- to take all efforts for parties to reach a mutual convenient agreement, in a reasonable time;
- to lead the process of mediation in an unbiased way, and to ensure a permanent balance between parties;
- to decline taking a case if he/she knows about any circumstance which would hinder him/her to stay neutral and impartial;
- to decline taking a case in which he/she notices that the rights under discussion cannot be the object of mediation;
- to keep the confidentiality of information he/she learns about during the work of mediation;
- to keep the confidentiality for the documents produced or those handed by the parties during the mediation, even after his position stopped;
- to comply with the ethical standards and to respond to requests formulated by judicial authorities, while complying the conditions of confidentiality;
- to communicate any change about his/her person to the Mediation Council, about concerning the Table of mediators;

[4]For further details, see Dragne, L.; Trancă, A.M. – *Medierea în materie penală (Mediation in Penal Matters),* Universul Juridic Publishing House, Bucharest, 2011, p. 142.

- to improve permanently the theoretical knowledge and the techniques of mediation, attending to this end continuous trainings, in the conditions decided by the Mediation Council;

- to return the written documents entrusted by the parties during the mediation procedure;

- not to represent or assist one party in a judicial procedure or an arbitral one, having the subject of the conflict taken for mediation;

- to testify as a witness in the penal cases, only if he/she has a written acceptance for that, expressed and written of the parties and other interested persons, depending on the case.

The mediator can be made liable only for the way the mediation procedure took place, but not for the content of the agreement reached by the parties, the agreement representing the will of the parties only.

At the same time, the mediator is not liable for the consultancy provided by the specialists assisting the parties or invited to express their point of view about controversial issues.

Conclusions

It is important for the evolution of a society to have multiple alternatives to solve conflictual situations, and people are aware of them. Mediation is one of the alternative ways to sort out conflicts.

If the mediator notices that the object of mediation is not suitable to be solved via mediation, this one needs to decline the mediation of the case. Also, the mediator is obliged to check the restrictions about his/her person or of the parties. The restrictions about the mediator are those in which he/she was or is party in conflict, assisted or represented one party. Or the mediator has an economic or a different interest in that conflict or has business connections with one party. In what concerns the restrictions to the parties, those are in which one party is a relative or a friend with the mediator or this concludes that there is violence or major differences between parties in what concerns their intellectual ability or their level of maturity.

Therefore, in case the mediators break the obligations stated by the law, the standards of the Working Regulations or the Code of Conduct and Professional Deontology, he/she will be made liable.

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MEDIATION VS. MEDIATOR

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Abstract

The title of this paper was suggested by the confusion existing even among certain mediators about what mediation is and what it represents actually.

Is mediation "a different type of justice" or, otherwise, it is "an alternative to traditional justice"? Is mediation a procedure still unknown to the public and professionals? Is mediation insufficiently publicised? Is there a background of distrust about this procedure?

In this paper we are trying to answer these questions and suggest solutions likely to determine the strengthening and promoting of the mediation procedure like a procedure both efficient and necessary all the same.

Keywords: *mediation, conflict, conciliation, procedure, alternative.*

Introduction

Is mediation a simple form of solving conflicts as a result of conciliation discussions skilfully and equably held by mediator or is it a procedure where the mediator can venture to suggest solutions often unlikely to comply with the legal provisions?

Is mediation an efficient alternative to avoid bureaucracy and save time and financial costs otherwise spent for settling litigations or is it an incorrect method of simulation of some "conflicts" approached under a mediation agreement likely to be subsequently validated by the court, without meeting all procedural and taxation duties imposed by law for such a procedure?

We believe mediation is a noble activity by its very purpose, by the economic and social importance generated by the result obtained, an activity which should be first respected by mediator and then by those who resort to mediation.

With a long history, with its sources in ancient Greece and Rome, they can be found in the modern history of civilized states, in our country it still faces problems of acceptance and perception as fighting a conflict procedure. From a legislative perspective "the mediation is a way to resolve conflicts amicably, with a specialized third party as mediator,... "[1].

If we consider that during 2007-2011, 265.772 cases were registered in the 15 civil appeal courts, representing a 77% increase, and if we consider that 941.335 cases were registered in the 46 civil courts of law, representing a 61% increase, and if we also analyze the fact that 1.942.001 cases were registered during the same reference period at courts, representing the stock existing on the 31st of December 2010, that is a 68% increase, then we can easily see that the mediation procedure is both useful and necessary as well.[2]

[1] Article 1 of Law no. 192 of 16 May 2006 regarding the mediation and establishing the mediator profession, published in the Official Gazette of Romania no. 441/22 May 2006, thus amended by Law no. 370/2009 for amending and supplementing Law no. 192/2006 on mediation and establishing the mediator profession, published in the Official Gazette of Romania no. 831/3 December 2009.
[2] Reports of the Superior Council of Magistracy from Romania, 2007-2011.

Nevertheless, in the year 2010 only 258 mediations were approved during lawsuits.

Under these circumstances one may naturally wonder about the reason why such a friendly and less expensive procedure like mediation is not adopted by courts or litigants.

Is mediation a procedure still unknown to the public and professionals?

We shall try to answer this question by submitting the result of a survey which, regardless of the sociological method of measurement used, shows certain values likely to generate conclusions.

In this regard we shall submit the survey conducted by the specialist publication MediereNet during 1 January-15 February 2013, on a sample of 1.800 people from Bucharest, Cluj-Napoca, Braşov and Sibiu cities.[3]

Here are the complete results of the survey conducted by MediereNet.ro:

1. Have you heard about the institution of mediation in Romania? Yes - 56%; No - 44%;
2. Have you ever participated in an information session about mediation? Yes - 4%; No - 96%;
3. Have you ever been part of mediation? Yes - 2%; No - 98%;
4. Do you know what prior information about mediation involves? Yes - 49%; No - 51%;
5. Do you know that prior information about mediation is mandatory in certain types of lawsuits, in accordance with the New Code of Civil Procedure? Yes - 38%; No - 62%;
6. Do you think the mandatory information on mediation is useful? Yes - 47%; No - 38%; Don't know-15%;
7. Do you know that prior information on mediation is mandatory since 2014 as well as in certain criminal law cases, according to the New Code of Criminal Procedure? Yes - 4%; No - 96%;
8. Do you know information about mediation is free of charge, in any situation? Yes - 32%; No - 68%;
9. Would you resort to mediation unless informing about mediation were mandatory? Yes - 17%; No - 69%; Don't know - 14%;
10. I you were part of a possible dispute where would you like to get informed first? Lawyer - 87%; Mediator - 8%; Another option - 5%;
11. In what types of disputes do you think mediation would be most useful? (This question allowed multiple choices) Family, divorce, inheritance - 60%; Work conflicts - 26%; Criminal law disputes - 56%; Commercial disputes - 2%; Other disputes - 16%;
12. Do you think there are enough information about mediation and the prior information on mediation? Yes -16%; No - 84%.

The survey aimed to highlight how Romanians see mediation, especially in the stage of prior information, before and after the coming into force of the new codes.

As we can see, over half of respondents stated they knew about the institution of mediation. It seems that the on-line, audio, video and written campaigns have reached their purpose. The mediation activity, so recently entered on the service market in our country, has managed to become known to a large number of citizens in a very short time. The conclusion shows the promotion was effective. In such a situation, what we should worry about when considering the perception of mediation as an alternative for solving conflicts, is the fact that in the survey, at the question: Would you resort to mediation unless informing about mediation were mandatory?[4] only 17 % answered “Yes” while 69% answered “No”.

Why or more exactly where does the distrust of citizens come from considering this procedure?

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http://www.csml909.ro/csm/index.php?cmd=24

[3] www.medierenet.ro/2013/02/26/sondaj-medierenet-informare-prealabila

[4] *Idem.*

We believe that if we can find an answer to this question, it will become easier to identify a solution.

Considering the public's knowledge or lack of knowledge about the mediation procedure, we think there are still many things to do in this direction, but the inefficiency of the procedure, determined by the fact that it is not accessed, is not the result of ignorance but of distrust.

Is there a background of mistrust likely to prevent the parties involved in a dispute to resort to mediation?

Certainly, the answer to this question is positive. In the following part we are trying to identify the sources of this distrust and submit solutions for changing the situation.

First, approaching the "topic of distrust in the mediation procedure" from social perspective, we wondered whether the occurrence in Romania of Law no. 192/2006 regarding the mediation and establishing the mediator profession was a favourable moment for introducing mediation and the mediator profession in Romania. Was the Romanian society ready to accept and adopt a new possibility for solving disputes? The real situation most mediators find themselves in, in terms of volume of activity, shows that our society, with an impressive number of records in litigation and a strong mental inaction regarding the settlement of these disputes only by court, was not and is still not ready to resort to mediation confidently. At the same time, we believe that the occurrence of the law at that time is appropriate and beneficial. History shows that legislative reforms, the introduction of certain new institutions and procedures have always been met with criticism, fears and resistance by both litigants and professionals. It is not the mistrust and fears existing upon the occurrence of Law no. 192/2006 which should make us worry. We should worry about the fact that this state is perpetuating, it becomes chronic and as it is now obvious, in seven years' time after that moment, the situation is slightly different. Quoting a professional mediator, who expresses the same concerns on his blog, "in the Netherlands, mediation began to operate and was implemented before the occurrence of a law on mediation, and it was enacted only after a few years, when they realized that it works and how it works. First, the Dutch understand. So and therefore, it is not the law that makes mediation work but something else. Or somebody else. I wonder who or what"[5]. The question bothering us is: has the law of mediation, the procedure of mediation or the mediator caused this state of distrust?

We believe that the Law 192/2006 is a very good legislative basis for this activity and profession. We believe that the mediation procedure, as it was provided under the Romanian legislation, is subject to perfection, but applicable. We only have to concentrate on the mediator as a freelancer and on reporting the mediator to the mission he is in charge of under the present legislation.

We believe that every single mediator is responsible to his fellow contemporary mediators, is responsible to the coming generations of mediators, is responsible to the legislative and executive authorities that trusted this procedure and this professional status and is mainly responsible to all present and future litigants who could settle a conflict faster and cheaper, both for themselves and for society.

"Basically, the raw material a mediator works with is trust. Trust in the proceeding, trust in the mediator as professional, trust in the mediator's skills, accuracy and balances are critical in the strategy of promoting mediation and mediators"[6]. If there was such trust, there would be no need for a law to impose obligations on this procedure. Starting with Law no. 192/2006 and continuing with all subsequent legislative acts in this field (Law no.370/2009 on amending and supplementing Law no. 192/2006 regarding the mediation and establishing the mediator profession; Government Ordinance no. 13/2010 for the amendment and

[5] V. Danciu, http://mediatorsm.blogspot.ro/2010/ll/sondaj.html.

[6] Ph.D. Associate Professor L.B.Ciucă, *Convorbiri juridice*, no. 4, "Juridică Universitară" Publishing House, 2011, p. 12.

supplementing of some legislative acts for transposing the Directive 2006/123/EC of the European Parliament and of the Council on 12 December 2006 on services in the internal market; Law no.202/2010 on some measures for accelerating the settlement of lawsuits; Law no.76/2012 for the implementation of Law no. 134/2010 on the Romanian Civil Procedure Code; Law no. 115/2012 for amending and supplementing Law no. 192/2006 regarding the mediation and establishing the mediator profession; Government Emergency Ordinance no. 90/2012 amending and supplementing Law no. 192/2006 regarding the mediation and establishing the mediator profession and for amending art. II of Law no. 115/2012 for the amendment and supplementing of Law no. 192/2006 regarding the mediation and establishing the mediator profession; Government Emergency Ordinance no.4/2013 on the amendment of Law no.76/2012 for the implementation of Law no. 134/2010 on the Romanian Civil Procedure Code and for the amendment and supplementing of some related acts; Law no.214/2013 for approving the Government Emergency Ordinance no.4/2013 on the amendment of Law no.76/2012 for the implementation of Law no.134/2010 on the Romanian Civil Procedure Code, and for amending and supplementing certain acts related; Government Emergency Ordinance no.80/2013 on judicial stamp duties) they have tried to strengthen the status of mediator, the mandatory character of accessing a mediation procedure "to further promote a more intensive use of mediation and ensure a legal framework predictable to parties resorting to mediation, the introduction of a framework legislation addressing mainly key aspects of civil procedure becomes necessary"[7].

Despite all these legislative efforts, the procedure of mediation remains unused, except very few cases, insignificant in terms of our analysis. We appreciate them as being insignificant in terms of our analysis, "as, most often, mediation is achieved as a result of certain approaches undertaken by some authorities for guiding clients to certain mediators"[8]. This guidance cannot be taken into account in the process of identifying the level of trust mediation has among people.

We believe the mediator should be aware of the nobility of his activity. We believe the mediator should be aware of the social responsibility he has. We believe the mediator must understand the social benefit he can generate. We believe the mediator should act as a professional towards other mediators like him and towards the parties that step into his office, hoping to find a solution to the conflict they are involved in. Beginning with the preparation, promotion and advertising systems, organizing the office, and continuing with the appearance and language used, ending with the solutions fairly and equally provided, everything must generate trust and appreciation toward the mediator. The same as a perfect picture consists of perfect details; the image of "mediation" consists of every single mediator's image. If they can build trust in the mediator, there will not be needed laws to compel a citizen to step into a mediation office and some mediators will not have any more to produce "conflicts", on a personal level, subsequently solved beyond the law, having the financial benefit as an only purpose.

In this regard, we can provide examples of some mediation agreements which exceed the legal provisions, agreements entitling heirs not having this quality, in compliance with the law. We can also mention mediation agreements which did not consider the legal provisions on the transfer of ownership on real estate properties or which included a transfer of property from individuals who did not have the quality of owners.

In order to support the above-mentioned data, we can mention: Civil Sentence, Case no. 3880/107/2007 public hearing on 18.02.2009 Alba Court; Civil Sentence no.7327, Case no. 11646/278/2010, public hearing on 16.12.2010, Petroşani Court; Civil Sentence no. 1535,

[7] Paragraph 7 from the Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on some aspects of mediation in civil and commercial terms, Official Journal L 136, 24/05/2008, pp. 0003 - 0008

[8] Group of authors, *Medierea un demers eşuat dar cu perspective*, Convorbiri Juridice, no. 6, "Juridică Universitară" Publishing House, 2012, p. 8.

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Conclusions

Considering the brief opinions expressed in this paper, we can submit the following conclusions:

There is a relatively high level of awareness among people considering the mediator profession and the mediation procedure.

There are few situations when people resort to mediation.

We can see a high level of distrust in the procedure.

Based on these findings, we believe that the mediator is at the heart of generating confidence in mediation. We refer to that honest, dedicated and professional mediator, that mediator who loves his profession and sees mediation as a modern, European and less expensive activity suitable for solving a conflict, that mediator who does not act as a judge, lawyer or notary, concluding thus mediation agreements beyond legal requirements. The mediator who wants to be mediator must be at the heart of this strategy!

We believe they must conclude partnerships with the other professions a mediator collaborates with in a mediation procedure or subsequently to the conclusion of a mediation agreement. It is known that public notaries support the mediation activity and welcomed the appearance of Law 192/1996, considering that a practical collaboration with mediators is beneficial to both parties. They must use the advantage provided by the fact that many lawyers are also mediators. We believe that this may be a way to get recognition and inter professional collaboration. Last but not least, mediation must be recognized and appreciated by all state institutions, professional organizations and by the public. We also need a more stringent regulatory activity on promotion and advertising, as well as on the minimum conditions of the functioning of an office; the training of future mediators should be balanced and honest without allowing mercantile aspects dominate the professional criteria. It is necessary to exploit the advantage generated by all legislation and we mention here the provisions from the Romanian New Civil Code of Procedure "The judge will advise the parties of the dispute amicably solution through mediation, according to the special law"[9]; "in disputes where according to the law may be subject to mediation proceedings, the judge may

[9] Article 21, paragraph (1) of Law 134/2010 on the New Civil Code of Procedure, republished in the Official Gazette of Romania, nr. 545 of August 3rd, 2012.

invite the parties to attend at an information session regarding the advantages of using this procedure"[10].

The legislative advantage is especially strong as, even if "mediation is not mandatory"[11].

"If the law provides otherwise, the parties, the natural or legal persons are obliged to attend the meeting of informing regarding the benefits of mediation"[12].

While this obligation "is striking" and is criticized as a form of "restriction of access to justice"[13] - using these advantages and even more than these, the mediators must first of all see in the mediation an activity that must be appreciated and respected, especially by those who practice it. The professional satisfactions surly will later on generate both financial satisfactions as well as satisfaction of social acknowledgement.

Mediation is fast, flexible and discreet. Mediation generates lower costs compared to a conflict settled in court and is a legal obligation in some circumstances. Mediation as procedure has all data to succeed. The mediator, as individual, must stand up to the nobility of this activity and the rigors of professional status. A decisive role in the construction and application of this strategy is the professional organization of mediators who must impose standards likely to be met by those who work as mediators and likely to be reached only by those deserve it.

In conclusion, we consider that the Romanian society needs mediation. It needs a mediation procedure likely to be practiced honestly and equally by professionals who must comply with regulation strictly and efficiently. Considering the social need for mediation and the lack of appropriate regulatory measures, there is the risk of a regulation coming from the outside, a situation likely to cause the risk of an inappropriate regulation, unjust and excessive, both for mediators as well as for those who need mediation.

We believe that the solution lies right at the mediators. At mediators as a person, at the mediator as a professional. As I have mentioned, the Romanian society needs this procedure and many professionals and passionate mediators who are passionate about what they do to deserve and to receive the necessary support in order for the mediation to be where it belongs, meaning among the procedures which appeals with confidence.

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JURISPRUDENTIAL ACCENTS ON THE NOTION OF ECONOMIC ACTIVITY IN VALUE ADDED TAX MATTER

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Abstract

Value Add Tax is the tax with the deepest harmonization level on the European single market. A crucial role in determining the unity of the legislative national formulas on Value Added Tax came to the Court of Justice of the European Union. The present study is a synthesis of these jurisprudential solutions with the aim of amply defining the notion in cause.

Key-words: *Value Added Tax, Court of Justice of the European Union, economic activity, definition, exemptions.*

Introduction

Value Added Tax is the result of a European construction, with intense jurisprudential interference. The Court of Justice of the European Union has been called upon to specify the notions of legal text. The Court has ruled frequently on the fundament of the Value Added Tax, the concept of economic activity. The Court identified several nuances to the cases presented by the national fiscal jurisdiction, and by doing so; it consolidated the concept in question. This case law brings contractual and factual criteria to the legal definition and extends the concept to its limits, underlining its true mining.

A. General provisions

The legal definition of the taxable persons resides in article 9 from Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[1]. The text stipulates: *"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as "economic activity". The exploitation of tangible or intangible property for the purposes of obtaining income there from on a continuing basis shall in particular be regarded as an economic activity.*

[1] Precedent regulation has found in the article 4 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment: *1. "Taxable person" shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity. 2. The economic activities referred to in paragraph 1 shall comprise all activities of producers, traders and persons supplying services including mining and agricultural activities and activities of the professions. The exploitation of tangible or intangible property for the purpose of obtaining income therefrom on a continuing basis shall also be considered an economic activity.*

The current definition is the result of systemic evolution, through jurisprudential intervention. The criteria for determining the taxable person, on which reside the current definition are: conducting an economic activity, on an independent manner and on a continuing basis.

B. The definition of economic activity

The definition in par. 2, enumerates a series of activities with economic nature: production, trade, services, mining, agriculture and professions[2]. ECJ jurisprudence emphasized since early stages the onerous nature of the Value Added Tax taxable activity, *which is due only if the service is provided for a fee (...) so there must be a direct link between the services provided and the consideration received*[3].

The Court held that it is not a taxable person, that who performs in all cases free services (consulting foreign markets) to various merchants[4]; nor the person who holds bonds, as this activity is a simple investment which does not go further than mere management assets and the generated interest, if there is such interest, cannot be regarded as remuneration for a business[5]. As to the quantification of the counterparty, it can be expressed in money or in kind, provided that the price is determinable in monetary form[6].

An economic activity consists also in exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis. Providing road infrastructure for road tax represents a paid service, *there is a direct and necessary link between the service ensured and the consideration received*[7].

C. Specific jurisprudential nuances

On jurisprudential basis, some specific conditions and nuances can be underlined. Generically, nonprofit activities do not fall within the definition of economic activity[8]. However annual subscriptions of members of sports associations may represent counterparty under the condition of a direct link to service provided to those members[9]. An external advertising activity conducted by the organization of a political party is not economic activity[10].

The preparatory activities fall within the definition of economic activity, determining the collection of Value Added Tax. Such is the case of assets acquisitions (a building under construction for later renting), which will take part of future taxable operations[11]. The contract (for renting a space), forwards fulfilled, although the economic activity which used its juridical effects ceased, constitutes an economic activity[12]. The activity of an association which has as only purpose to prepare the activities of a capital company is consisting with the

[2] For details, please see: L. Ţâţu, M. Brăgaru, H. Sasu, *Impozite, taxe, contribuţii*, ed. C.H. Beck, Bucureşti, 2011.
[3] ECJ, C-154/80, Staatssecretaris van Financiën v. "Coöperatieve Aardappelenbewaarplaats GA".
[4] ECJ, C-89/81, Staatssecretaris van Financiën v. Hong-Kong Trade Development Council.
[5] ECJ, C-80/95, Harnas & Helm CV v. Staatssecretaris van Financiën. 330/95.
[6] ECJ, C-330/95, Goldsmiths (Jewellers) Ltd v. Comisiaers of Customs & Excise; ECJ, C- 409/99, Metropol Treuhand Wirtschaftsstreuhandgmbh v. Finanzlandesdirektion für Steiermark et Michael Stadler v. Finanzlandesdirektion für Vorarlberg.
[7] ECJ, C-358/97, Commission of the European Communities v Ireland, ECJ, C-359/97 Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, ECJ, C-408/97, Commission of the European Communities v Kingdom of the Netherlands.
[8] ECJ, C-150/99, Svenska staten v. Stockholm Lindöpark AB et Stockholm Lindöpark AB v. Svenska staten.
[9] ECJ, C-174/00, Kennemer Golf & Country Club v. Staatssecretaris van Financiën.
[10] ECJ, C-267/08, SPÖ Landesorganisation Kärnten v. Finanzamt Klagenfurt.
[11] ECJ, C-268/83, D.A. Rompelman et E.A. Rompelman-Van Deelen v. Minister van Financiën.
[12] ECJ, C-32/03, I/S Fini H v. Skatteministeriet.

definition of economic activity[13]. Instead, the contribution to the establishment of a legal entity or the mere holding of shares in the company does not constitute an economic activity[14].

The economic activity is a direct activity with involvement in economic decisions. Simple acts of ownership executed by a holding company do not fall within the definition of economic activity[15]; if services are provided by the holding company to the subsidiary then, the activity has economic contain[16]. *Per a contrario*, buying and selling shares or other securities by an administrator during a charity asset management is an economic activity, because, similar to a private investor, it seeks to maximize dividend or income, even if for non-commercial goals[17]. It is also an economic activity the provision of a service consisting especially in eliminating the flow and the risk that the debt will not be collected[18].

An economic activity is the assignment by the parent of all the shares of wholly owned subsidiaries[19]. In this case, the nature and purspose of the operation are economic.

A secondary activity, such as setting up a pension fund for employees is an economic activity[20].

The economic activity is based on a legal act, resulting from an agreement of the participants to bilateral, onerous report [21], even if it lacks enforcement warranty as when the supplier agrees to provide those services on moral basis[22]. The Court excluded from Value Added Tax field, a transaction in which the trustee does not have a contractual relationship with none of the parties at the conclusion of the credit agreement which contributed[23].

The economic activity is carried out only on the basis of legal relations that determine reciprocal performances[24]; the condition is not met in the case of musical activities in public space, for which there is no provision for compensation, even if the artists receive donations from the public. Free disposal of assets purchased with deducted Value Added Tax, is a paid delivery[25], as long as any part of the price paid is not covered by the voucher upon which goods are offered. Contractual bound is directly related to the onerous and reciprocal mechanism of Value Added Tax. An activity is economic only if delivered under price condition. The lack of any contractual basis empties the relation of any economic purpose, as the parties do not prevail of any contractual means to ensure execution. Consequentially, the counter part is no longer a certainty, but a probability. Or this probable remuneration is contradictory to the neutral purpose of Value Added Tax. The economic activity does not necessary involve multiple acts[26] of execution; a physical person's single operation consisting of an asset lease to an association whose member and representative that individual is,

[13] ECJ, C-137/02, Finanzamt Offenbach am Main-Land v. Faxworld Vorgründungsgesellschaft Peter Hünninghausen und Wolfgang Klein GbR.
[14] ECJ, Cauzele reunite, Gemeente Leusden (C-487/01) et Holin Groep BV cs (C-7/02) v. Staatssecretaris van Financiën.
[15] ECJ, C-60/90, Polysar Investments Netherlands BV v. Inspecteur der Invoerrechten en Accijnzen.
[16] ECJ, C-16/00, Cibo Participations SA v. Directeur régional des impôts du Nord-Pas-de-Calais; C-496/11, Portugal Telecom SGPS SA v. Fazenda Pública
[17] ECJ, C-155/94, Wellcome Trust Ltd v. Comisiaers of Customs and Excise.
[18] ECJ, C-305/01, Finanzamt Groß-Gerau v. MKG-Kraftfahrzeuge-Factoring GmbH.
[19] ECJ, C-29/08, Skatteverket v. AB SKF.
[20] ECJ, C 26/12, Fiscale eenheid PPG Holdings BV cs te Hoogezand v. Inspecteur van de Belastingdienst/Noord/kantoor Groningen
[21] ECJ, C-16/93, R. J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden.
[22] ECJ, C-498/99, Town & County Factors Ltd v. Comisiaers of Customs & Excise.
[23] ECJ, C-453/05, Volker Ludwig v. Finanzamt Luckenwalde.
[24] ECJ, C-291/92, R. J. Tolsma v. Inspecteur der Omzetbelasting Leeuwarden.
[25] ECJ, C-48/97, Kuwait Petroleum (GB) Ltd v. Comisiaers of Customs & Excise.
[26] Pentru detalii, a se vedea: M. Collet, *Droit Fiscal*, Ed. Presse Universitarire de France, Paris, 2007.

represents an economic activity[27]. Alternatively, however, the Court reveals the nature of independency, *stressing that leasing activity does not that depends neither on the management nor on the association's representatives.*

An internal activity of operating a building by installing a photovoltaic system to supply electricity consumption even below that building's necessities constitutes of an economic activity[28] as long as power is supplied to the grid in exchange for a continuing income. So, a third condition resulting from the case law is the continuous nature of the activity and of the revenue it ensures.

Force majeure does not change the economic nature of the activity; supplying with timber by an individual in order to cover the consequences of an event of force majeure part of the exploitation must be to be regarded as 'economic activity'[29], because these deliveries are performed to obtaining income there from on a continuing basis.

D. Illegal activities

The principle of fiscal neutrality does not differentiate between legal and illegal operations *unless, due to the particularities of certain products, the economic competition between the legal and illegal is excluded entirely*[30]. Illegal export of goods covered by the Directive should be treated in the same manner as legal export of the same goods; *organizing illegal gambling*[31] *or operations involving counterfeit products - perfumes*[32] *or smuggled goods*[33] *- alcohol is concurrent with the principle of fiscal neutrality laws prohibiting activities to be treated differently.*

This position was refined by the case law; the Court held primarily on Value Added Tax for trading illicit materials. The Court decided that the importation of illicit drugs[34], qualified as a criminal act, is not an economic activity for Value Added Tax purposes, *as there are no economic channels strictly monitored by the competent authorities to be used for medical or scientific purposes*[35]. Unlawful delivery of amphetamines is not subject to Value Added Tax[36], nor of any products that contain cannabis substances[37]; could not collect Value Added Tax for the import of banknotes or counterfeit coins[38]. The criterion that emerges from this jurisprudence allowing to tax illegal activities is the existence of a state of competition between legal and illegal domains.

On the other hand, legitimate transactions as nature (providing of cafe places) used for illicit activities (drug use) are taxable transactions as they are carried out in a lawful economic activities[39].

D. Public institutions activities

Involving an element of public authority in the activity does not exclude it from the scope of economic activities; such is the case of notaries and bailiffs, which are providing services to third parties in exchange for fees[40].

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[27] ECJ, C-23/98, Staatssecretaris van Financiën v. J. Heerma.
[28] ECJ, C 219/12, Finanzamt Freistadt Rohrbach Urfahr v. Unabhängiger Finanzsenat Außenstelle Linz.
[29] ECJ, C-263/11, Ainārs Rēdlihs v. Valsts ieņēmumu dienests.
[30] ECJ, C-111/92, Wilfried Lange v. Finanzamt Fürstenfeldbruck.
[31] ECJ, C-283/95, Karlheinz Fischer v. Finanzamt Donaueschingen.
[32] ECJ, C-3/97, Criminal procediing v. John Charles Goodwin and Edward Thomas Unstead.
[33] ECJ, C-455/98, Tullihallitus v. Kaupo Salumets et autres.
[34] For details, please see: S. Deleanu, G. Fábián, C. F. Costaș, B. Ioniță, *Curtea de Justiție Europeană. Hotărâri comentate*, Wolters-Kluwer Publishing House, Bucharest, 2007, p. 338-342.
[35] ECJ, C-294/82, Senta Einberger v. Hauptzollamt Freiburg.
[36] ECJ, C-269/86, W. J. R. Mol v. Inspecteur der Invoerrechten en Accijnzen.
[37] ECJ, C-289/86, Vereniging Happy Family Rustenburgerstraat v. Inspecteur der Omzetbelasting.
[38] ECJ, C-343/89, Max Witzemann v. Hauptzollamt München-Mitte.
[39] ECJ, C-158/98, Staatssecretaris van Financiën v. Coffeeshop "Siberië" vof.

Equally, a significant problem is the quality of taxable person of public entities. The rule is that public institutions are not taxable for activities that are conducted as public authorities, even if such activities shall collect dues, fees, royalties or other charges. The exception is that activity which produces distortion of competition; activities expressly indicated by law (telecommunications, water supply, gas, electricity, heat, transport of goods and people, trade fairs and exhibitions activities, activities of travel agencies, etc.).

Related to the concept of competitive distortion[41], the public entity that acts as a trader in areas not related to the exercise of public authority, and could be space for private action cannot be exempt from Value Added Tax, as his services would advantage over competitors such as the Value Added Tax due. If the activities are carried out in the same legal conditions as the private operators, then they exceed the scope of authority and are taxable transactions.

In this regard, the Supreme Court of Justice, in tax matter, applied these dispositions in Decision no. 9094/2004: *In the case of security contracts for private businesses there is a competitive distortion as not including Value Added Tax fee is prices charged by the Public Guardians creates an economic disadvantage to other providers of security and protection services.*

Equally, ECJ case law references in this matter: the activities carried out in the same conditions as private operators are taxable activities[42]; collecting money for the use of public roads is taxable activity[43]. Rather, legal aid services of public offices, partially paid users are not taxable services as remuneration has little value and there is a direct link between services and the consideration offered[44], the allocation of frequencies is not an economic activity, while control is limited to the actions[45].

Conclusions

The challenges that a complex tax, such as Value Added Tax brought before the Court are extremely various. The positive effect is the continuous evolution of the notions as they refine. In Value Added Tax matter, this evolution transformed the legal ground and its premises. Therefore, the Court plays a vital and be energetic role in adapting a European tax institution to the various hypotheses in business practice in all state members. The present study underlined several conditions imposed by the case law to the legal definition. Further evolution of the jurisprudence, will only bring us closer to a more accurate definition.

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[40] ECJ, C-235/85, Commission of the European Communities v Kingdom of the Netherlands.
[41] ECJ, C-288/07, Comisiaers of Her Majesty's Revenue & Customs v. Isle of Wight Council et autres.
[42] ECJ, C-231/87, Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda and others v. Comune di Carpaneto Piacentino and others.
[43] ECJ, C-359/97, preci.t.
[44] ECJ, C-246/08, Comisia des Communautés européennes v. République de Finlande.
[45] ECJ, C-284/04, T-Mobile Austria GmbH et autres v. Republik Österreich.

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THE RIGHT TO A FAIR TRIAL: THE ROLE OF THE TRANSLATOR-INTERPRETER IN THE CRIMINAL TRIAL

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Abstract

The judicial dialogue, as an expression of judicial controversy, is organized in the national language. In order to observe the principle of audi alteram partem, when a litigant speaking another language is present, it is required that the dialogue should be reconstituted with the assistance of a translator-interpreter. The latter informs the litigant who speaks another language of "all acts that may affect him to a certain extent", in order to make the counsel understand the proceedings and to protect the rights of the person he defends. The translator-interpreter is thus the protector of the rights of the person for whom he translates, allowing the accused to participate in the debate. The presence of this occasional collaborator is a guarantee of good justice. Standing among the actors of a trial, the interpreter is the faithful transmitter of each person's words by the search of equivalences between two utterances. The translation must render as accurately as possible the intentions of the author of the translated utterance, thus becoming an "accurate re-creation", a "creation of meaning". Frequently based on "syntactical archaisms" and "stereotyped formulas", these turns do not have an equivalent in other languages.

Keywords: *the right to a fair trial, Romanian Constitution, the judicial dialogue, New Code of Criminal Procedure.*

Section 1. The right to a fair trial in the Romanian Constitution and in the European Convention on Human Rights

The right to a fair trial is safeguarded by the Romanian Constitution in art. 21(3), stipulating that "All parties shall be entitled to a fair trial and a decision in their cases within a reasonable time". As for the language in which the trial is conducted, the Constitution provides, in art. 128, *Use of mother tongue and interpreter in court*: "(1) The legal procedure shall be conducted in Romanian. (2) Romanian citizens belonging to national minorities shall have the right to use their mother tongue before the courts of law, under the terms of the organic law. (3) The ways of exercising the right stipulated in paragraph (2), including the use of interpreters or translations, shall be stipulated so as not to prevent proper administration of justice and not to involve additional expenses for those interested. (4) Foreign citizens and stateless persons who do not understand or do not speak the Romanian language shall be entitled to be informed of all the documents and materials in the file, to speak in court and draw conclusions, by means of an interpreter; in criminal trials, this right is ensured free of charge". The judicial dialogue, as an expression of judicial controversy[1], is organized in the national language. In order to observe the principle of *audi alteram partem*, when a litigant

[1] "La procédure c'est l'organisation de la controverse", Wierderkehr, G., *Droits de la défense et procédure civile,* D 1978, Chron, p. 38.

speaking another language is present, it is required that the dialogue should be reconstituted with the assistance of a translator-interpreter. The latter informs the litigant who speaks another language of "all acts that may affect him to a certain extent" [2], in order to make the counsel understand the proceedings and to protect the rights of the person he defends. The translator-interpreter is thus the protector of the rights of the person for whom he translates, allowing the accused to participate in the debate. "The presence of this occasional collaborator is a guarantee of good justice"3. So as to ensure the accuracy of information, the intervention of this third party, acting like an agent between the judge and the litigant, becomes ineluctable.

Stated in the European Convention on Human Rights and Fundamental Freedoms, the "fair trial" includes equal rights of speech whatever the language of the lawyer. A genuine dialogue cannot exist without understanding the debates. Even if the judge, litigant and lawyer speak the same language, they do not necessarily understand each other, and so much the more, they cannot communicate without recourse to a third party as a translator when they speak different languages. In accordance with art. 6(3) of the European Convention on Human Rights, "Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

Section 2. Appointing an interpreter

In order to permit the effective participation of the accused in the debate, it is essential to appoint an interpreter. In criminal matters, the assistance of a translator restores the balance between actors, allowing the accused to be heard in person. But in case the presence of the defendant in the debate is essential, there is a law protecting his interests, freedom and speech. The presence of an interpreter is regulated in the New Code of Criminal Procedure[4], which, under art. 11, *Official language and the right to an interpreter* provides: "(1) The official language in the criminal trial is Romanian. (2) Romanian citizens belonging to national minorities shall have the right to use their mother tongue before the courts of law, the procedural acts being drafted in Romanian. (3) All parties involved in the criminal trial who do not speak or understand the Romanian language or cannot express themselves shall be entitled, free of charge, to be informed of the documents in the file, to speak and draw conclusions before the court, by means of an interpreter. (4) Certified interpreters shall be used during judicial proceedings, as provided by law. The category of interpreters also includes certified translators, as provided by law". The legal classification of the activity of translation and the profession of translator is provided by INSEE Order no. 273/2002[5] within the group called "Specialists with intellectual and scientific occupations", position "Linguists,

[2] "The right to information precedes the exercise of the right of defence, the effect of surprise being proscribed in an absolute manner. The judicial law requires that the litigant should be precisely informed of all acts that may affect him to a certain extent", Salah-Bey, M., "*Les droits de la défense liés à l'information dans le proces civil*" *in L'information en droit privé*, LGDJ, 1978, p. 73.

[3] Eschylle, J.-F., *L'interprétation en matière pénale*, RSC, 1992, p. 261.

[4] The previous Code of Criminal Procedure provided under art. 7: "In the criminal trial the judicial proceedings shall be conducted in the Romanian language, the parties and other persons summoned in court shall be entitled to use their mother tongue before the judicial bodies, the procedural acts being drafted in Romanian". Art. 8 mentioned the use of the official language by means of an interpreter: "The parties who do not speak or understand the the Romanian language or cannot express themselves shall be entitled, free of charge, to be informed of the documents in the file, to speak and draw conclusions before the court, by means of an interpreter".

[5] Regarding the approval of the Procedure for bringing up to date the classified list, *The classification of occupations in Romania*.

translators and interpreters". The activity of *certified translators* is regulated by Law no. 178/1997[6] and the Regulation for the enforcement of this law[7].

The principle of oral debates before the court, that of being heard in person "to the extent that the focus will be on examining the personality of the defendant" justifies the systematic use of an interpreter during the hearing[8]. The interpreter must be morally competent, since he transmits, without any possibility of being controlled, what the parties say during the trial, the judges and clerks to the courts not being able to know all languages[9]. Etymologically, the term *interpreter* comes from *inter partes*, the interpreter finding himself between two persons who could not understand each other or communicate without his assistance. Or from *inter praes*, the guarantor between two persons who cannot understand each other, or between either of them and another person. Actually, the 'unfaithful' interpreter is subject to the risk of sanctions under criminal law or civil law, or disciplinary sanctions.

The presence of the interpreter makes the counsel benefit from protection consisting in the certitude to express himself and the possibility of understanding what the magistrates say. The mere assistance during the oral debates is not sufficient, the communication of procedural acts drafted in Romanian or of documents written in a foreign language requiring the intervention of the translator-interpreter for the translation of the documents in the file. Therefore, the appointment of an interpreter is a right of the person charged with a criminal offence. The omission of the prosecution to ensure, free of charge, the use of an interpreter, in the cases provided under art. 128 of the Code of Criminal Procedure involve the relative nullity of the acts performed during the prosecution, under art. 197(1) and (4) of the same code. Consequently, the violation of art. 128 may be raised during the completion of the act if the party is present, or at the first hearing with the observance of the procedure if the party was absent when completing the act; it is too late to mention the party for the first time on appeal.

Subsection 1. The double mission of the interpreter: to assist during oral debates and to translate documents

The essential mission of the interpreter is to translate for the defendant what was said during the hearing and to assist him in communicating his own statements. The interpreter must translate all that is useful for the perfect understanding of the debates, so that the defendant will understand, when he is addressed, the testimonies of the witnesses, the questioning of co-defendants, the documents read out during the hearing and, in particular, the written statements of the witnesses, the bill of indictment of the Public Ministry, the content of the sentence.

The translation of written documents raises two kinds of difficulties: on the one hand, the procedural acts drafted in Romanian must be translated for the defendant into his own language and, on the other hand, the documents written in a foreign language and presented by the counsel must be understood by the judge and the other parties. In Philippe Malaurie's opinion, "certain decisions involve, indeed, the fact that the judge has the ability to translate ex officio" the documents presented before the court in a foreign language, because the judge has today "the power to invoke ex officio the foreign law, so much the more one must recognize his ability to translate, ex officio, a foreign document on condition that the rights of the defendant should be observed, or to require its translation for the reopening of the

[6] For the authorisation and payment of interpreters and translators used by the Superior Council of Magistracy, the Ministry of Justice, the Prosecutor's Office within the High Court of Cassation and Justice, the National Anticorruption Prosecutor's Office, prosecution bodies, courts, offices of notaries public, lawyers and bailiffs.

[7] Regulation for the enforcement of Law no. 178/1997 as approved by Order of the Minister of Justice no. 1054/C/2005.

[8] Lasalle, J.-Y., *La comparution du prévenu*, RSC 1981, p. 541.

[9] Merlin, *Répertoire universel et raisonné de jurisprudence*, Tom. XV, ed. 5, Bruxelles, 1826, p. 485.

debates"[10]. The European Court of Human Rights states that the right to an interpreter is not confined to interpretation, it also extends to the translation … of all procedural acts against the defendant that he has to understand in order to have a fair trial[11]. Starting from art. 6 of the European Convention on Human Rights and Fundamental Freedoms, the Court finds the principle of equal footing absolutely necessary for a fair trial. This equal footing can only be fulfilled if the facilities granted to a counsel who knows the language of the judge, in order to prepare the case, are identical with those of the defendant who ignores this language. The trial is governed by a great principle: that of the "fair trial"[12] lying at the basis of the obligation to inform the defendant who speaks a foreign language in his own language, for the purpose of protecting human rights, since "the right to a fair trial stands among the fundamental requirements of a human being"[13]. Therefore the idea of a fair trial should include the protection of the defendant who speaks a foreign language from the very moment of his arrest until the verdict is given.

Subsection 2. The interpreter, an agent for the creation of an imperfect dialogue between the actors of the criminal trial

The intervention of an interpreter creates a risk of distorting what the magistrate and litigant say, because "translation is always betrayal"[14], it is never complete[15]. Translation must be "as neutral as possible, as simply transparent as possible between two identical discourses[16]. Exceeding the simple juxtaposition of terms, translation is rarely a calque, its main objective remaining the acceptance of the decision by the counsel speaking a foreign language, since "there is no legitimacy for the judge unless he makes himself understood"[17].

The European Court of Human Rights sets a limit to the scope of the right to be informed in one's own language. It holds "a concatenation of equivalences which, in fact, are not: the right of the defendant to speak = the right to defend oneself = the right of defence = prerogatives of the lawyer representing the defendant when he is, normally, present"[18].The litigant is informed by means of translation of the essential acts involving the protection of the defence rights, but he is not completely informed of the proceedings in his own trial, which leads to a vague understanding of procedural acts. In criminal matters, this limitation of the domain in which the translator intervenes is compensated by the assistance, free of charge, of an interpreter, thus maintaining the balance between litigants by eliminating the pecuniary difficulty which might deprive the defendant of the translator's help. To be effective, the assistance of an interpreter must be free of charge. The restoration of equal footing and equal access to justice involves this exemption from payment[19]. Stipulated under criminal law, it does not exist in other proceedings. Confined to ensuring oral interpretation, it is debatable for the translation of documents, even if the understanding of the trial by the litigant involves this

[10] Malaurie, Ph., *Le droit français et la diversité des langues*, Journal de droit international, 1965, p. 583.
[11] Cour européenne des droits de l'homme, *Affaire Luedicke, Belkacem et Koç*, 28 November 1978, series A, no. 29&48.
[12] Koering-Joulin, R., *La notion européenne de „tribunal indépendant et impartial" au sens de l'article 6 de la Convention européenne de sauvegarde des droits de l'homme*, RSC 1990, p. 765.
[13] Sperduti, G., *L'article 6 de la Convention européenne des Droits de l'Homme et les décisions administratives internes affectant des droits de caractère civil*, Mélanges Pictet, 1984, p. 813.
[14] "Déjà la langue ordinaire n'est jamais traduisible à 100% mais la langue juridique, qui plus est, est différente – les difficulté seront ainsi multipliées".
[15] Mauro, J., *Au Carrefour des droits et des langues: La langue applicable au contrat, le risqué linguistique*, Gaz Pal 1988/1, Doctr. P. 214.
[16] Didier, E., *Langues et langage du droit*, Wilson / Lafleur Ltée, Montréal, 1990, p. 241.
[17] Madame Burdeau, *A synopsis of the colloquium "Justice sans frontières, le juge et l'étranger*", Gaz Pal 3-4 February 1993, nos. 34-35, p. 47.
[18] Soulier, G., *L'égalité de parole, principe de la démocratie et du procès pénal*, Le théâtre et le procès, nos. 17-18/1991, p. 8.
[19] The European Court of Human Rights stated the importance of judicial assistance as a means for ensuring the effective right of access to justice, see especially *Affaire Airey*, 9 October 1979, series A, no. 32.

extension. The exemption from payment for the assistance of an interpreter, introduced in the European Convention on Human Rights and in Resolution (75)3 on the legal and administrative aspects of criminality among migrant workers, ensures its full intensity to linguistic assistance.

Conclusions

Translation, an inaccurate information instrument. Equivalence in translation is often uncertain[20], just as misunderstanding is part of any communication through language, for "faithfulness towards meaning is a search, not a prior certitude"[21]. The interpreter, as an agent between the judge and the litigant, reconstructs the message and ensures a minimum understanding between interlocutors. In this respect, the interpreter may find the literal meaning or may move away from mere translation, in the latter case remaining faithful to terms or their meaning. Meant to be faithful to the meaning of the message, the mission of the interpreter is also that of reconstructing the meaning of the utterance according to the abilities of the addressee, or the legal system where he intervenes. For the judge, the presence of the interpreter is essential, due to the fact that the latter transmits necessary information for deciding in the case. The translator does not have too much time to add the necessary explanations for the understanding of cultural and system differences. "Not simultaneous interpretation, but consecutive and synthetic interpretation" is admitted[22]. Standing among the actors of a trial, the interpreter is the faithful transmitter of each person's words by the search of equivalences between two utterances. The translation must render as accurately as possible the intentions of the author of the translated utterance, thus becoming an "accurate re-creation", a "creation of meaning"[23]. Frequently based on "syntactical archaisms" and "stereotyped formulas", these turns do not have an equivalent in other languages. Since they cannot be translated word by word, so as not to miss the significance or not to modify it, these expressions must be known by the translator for the re-creation of meaning[24]. The interpreter ignores the nature of the litigation and does not necessarily have legal knowledge; therefore he reconstructs the message according to his own perception of the trial. For complex utterances, he must understand the litigation and know the procedure well enough and, better, have legal knowledge. The interpreter's competence most often resolves linguistic disparity[25]. The linguistic barrier appears as a barrier between cultures, the interpreter having an explanatory, creative mission with regard to the original message, transmitting a simplified message reflecting, by translating what the magistrate says, the culture and terminology which might be familiar to the litigant. When translating, there is a "transfer of concepts, the expression of the intellectual lives of two peoples. It does not mean finding or explaining reality, but assimilating a civilisation"[26]. And the other way round, an interpreter may explain to a magistrate who does not understand, certain expressions of the litigant speaking another language, by a multicultural approach.

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SHORT REFLECTIONS ON THE EFFECTS OF DOMESTIC ADOPTIONS

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Abstract:

The act of granting an adoption produces two main types of effects. The first type of effect creates a bond of filiation between the adopter and the adoptee, as well as family bonds between the adoptee and the adopter's relatives. The second type of effect erases the natural relation between the adoptee and the former parents but also between the adoptee's descendants on one side and the adoptee's natural relatives on the other.

Keywords: *adoption, effects, the adoptee's name, the adoptee's residence, the adoptee's citizenship.*

Introduction

It has been said that adoption is "one of the noblest expressions of generosity and altruism through which we prove our solidarity"[1]. Its purpose is to ensure "the patrimonial and non-patrimonial of children deprived of parental protection or any similar protection"[2]. Seen from a general perspective, adoption seems a "wonderful solution" for adoptive parents who are unable to establish a much-desired family of their own because of infertility or certain illnesses, as well as for natural parents who are faced with an unwanted problem[3]. At the same time, adoption is not a perfect solution, leading to complications and difficulties generated by both its specificity, but sometimes by incoherent legislation, which is unable to promote or guarantee the rights of the child.

1. National and international adoption regulation

On a national level, the lawmaker dedicates a full chapter of the Romanian Civil Code to adoptions, more precisely Chapter III, articles 451-482 from Title III "Kinship", Tome II "Family". These stipulations complete those of Law 273/2004 concerning the legal adoption regime[4] and governmental decision 350/2012 for the approval of Methodological rules for applying Law 273/2004 and of the organizational and functional rules of the Coordination Council for the Romanian Adoption Office.

At the same time, the Convention on the Rights of Children[5] sanctions in article 20 the duty of the party states[6], in accordance with their national legislation, to ensure alternative care to children who are temporarily or permanently deprived of a family environment or who cannot be left in this environment, if their best interests are to be protected, and have a right to care and special assistance from the state. Such care can include especially foster care,

[1] Emese Florian, *Dreptul familiei*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2010, p. 205.
[2] Al. Bacaci, Viorica Dumitrache, Codrufa Hageanu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest, 2012, p. 219.
[3] To see: D.M. Brodzinsky, M.D. Schechter, R. Marantz Henig, *A fi adoptat. Căutarea de o viață a sinelui*, taken from the book *Being Adopted: The Lifelong Search for Self* p. 1, available online at: www, adoptiiromania.ro.
[4] Republished in the Official Gazette of Romania, Part I, no. 259 from 19 April 2012.
[5] The International Convention on the Rights of the Child ratified by Romania through Law no. 18/1990, published in the Official Gazette of Romania, Part I, no. 314 from 13 June 2001.
[6] E. Ciongaru, Drept international privat, "Scrisul Romanesc" Publishing House, Craiova, 2011, p. 18.

"kafalah" in Islamic law, adoption or if necessary placement in suitable institutions for the care of children. In order to choose one of these solutions it is necessary to take into account the need for a certain level of continuity of a child's education, ethnic, religious, cultural and linguistic background. Moreover, article 21 highlights the importance of the best interests of children in all proceedings related to their adoption.

In 2009, the UN Committee on the Rights of the Child recommended that Romania respect article 21 especially the best interests of children and therefore shorten all stages of the adoption process. Moreover, our country signed the revised European Convention on the Adoption of Children on 4 March 2009, passed in Strasbourg and ratified by Law 138/2011. These are some of the reasons leading to a new amendment of Law 273/2004.

De lege lata, adoption is defined by article 451 of the Romanian Civil Code as a "legal operation which creates a bond of filiation between adopter and adoptee, as well as bonds of kinship between adoptee and the adopter's relatives". In developing this definition, the lawmaker had thus taken into account the effects of adoption - the creation of a bond of filiation between adopter and adoptee, as well as legal family ties between the relatives of the adopter and the adoptee, from the date of the final judicial decision granting the adoption.

Beginning with the legal provisions mentioned above, we have defined adoption as the complex legal operation which creates a bond of filiation, under the law, between adopter and adoptee, and of lines of kinship between the adoptee and the adopter's relatives.

The Romanian Civil Code gives a general definition of adoption which is completed by the definitions of national and international adoptions found in Law 273/2004, in its republished form. These two concepts are explained for the first time in our legislation, thus putting an end to confusion between the two institutions, caused by the use of the legal residence as a differentiating criterion.

Given the integration of our country in the European Union, it has been noticed lately that in certain cases Romanian citizens have commenced adoption procedures domestically right after securing the right to reside permanently on the territory of another country, while keeping or reestablishing their residence in Romania, despite the fact that they were actually living on the territory of a foreign country. However, subsequent to end of the adoption process, these situations led to a number of difficulties in terms of their recognition by foreign states[7], including the child's status within that country. At the same time, when foreign nationals are granted permanent residence under the law in Romania, it subsumes the idea of domestic adoption - at the time when such adoptions are granted both adopter and adoptee should normally reside in Romania and therefore no such problem arises in cases of adoptions between a country of origin and a host country. It has been thus considered, given these considerations, that there is a necessity to regulate situations such domestic not international[8] adoptions as soon as possible.

Likewise, the regular residence of the adopter or adoptive family and the child to be adopted has been used as a criterion for a better implementation of the Hague Convention[9]. The concept of regular/habitual residence is increasingly being used in international legal documents. Moreover, our civil code also uses the concept of habitual residence, which required that stipulations in Law 273/2004 be correlated with those from the code. According to article 2 from the Law on the legal status of adoptions which has been republished, "an internal adoption is any adoption where both the adopter or adoptive family and the adoptee

[7] E. Ciongaru, *Drept international privat*, "Scrisul Romanesc" Publishing House, Craiova, 2011, pp. 25-27.

[8] In this regard, see: D. Buzducea, F. Lazar, Anca Bejenaru, V. Grigoraş, B. A. Panait, Ramona Popa, *Strategii de comunicare despre adopție între parinți adoptivi şi copilul adoptat. Raport*, "Romprint Paper SRL" Publishing House, Bucharest, 2013, p. 7.

[9] Convention on Protection of Children and Cooperation in international adoption, done concluded at the Hague on 29 May 1993 and ratified by Romania through Law 84/1994, published in Official Gazette of Romania, Part I, no. 298 from 21 October 1994, with subsequent amendments.

are normally reside in Romania" and the international adoption is "any adoption in which case the adopter or adoptive family and the child to be adopted usually reside in different countries and, following the adoption, the child will have the same residence as the adopter".

2. Overview of the effects of internal adoption

Varied in nature, the effects of adoption appear only in the future, after the adoption has been granted by the court.

The adoption has legal effects starting on the date when the decision of the court to grant the adoption is permanent. According to article 74 of Law 273/2004 on the legal status of adoption, the court able to grant the adoption is that in the jurisdiction of which the adoptee resides. Based on the final ruling, the General Register Office shall issue a new certificate of birth in the name of the adoptee, in which the adoptive parents will be included in the box for natural parents. The old birth certificate will be kept and a reference to the new certificate is made on it.

In accordance with the Romanian Civil Code, the first and main consequence of the adoption is the creation of a bond of legal kinship. According to paragraph 1 of article 470 of the Civil Code, the act of adoption establishes a lineage between the adopter, and the adopter's family of course, and the child. Given that the current legislation covers only full adoptions, the bonds of kinship are also created between the descendants of the adoptee, on the one side, and the adopter and his/her relatives, on the other[10].

The relatives resulted from the adoption have a mutual inheritance vocation mutual succession, just as the natural relatives in this case, following the rules established by the general legal principle of reciprocity vocation. While simultaneously opposed to and concurrent with the constitutive effect, adoptions also have an extinctive effect in the sense that natural kinship between the adoptee and their descendants and the adoptee's blood relatives cease. The only remaining effect of natural kinship is as an impediment to marriage.

In order to respect the child's right to an identity, Law 273/2004 stipulates in article 67 and develops in the following ones, that the adopters will gradually inform the child that he/she is adopted, starting at an early age, with the help of a specialist in the framework of the department of adoptions and post-adoptions within the service. Furthermore, adopters and adoptees are entitled to ask the competent authorities for extracts of public record documents, which attest to the date and place of birth, but does not reveal the identity of the natural parents or the adoption, aspects which we have already discussed widely in the section on adoption principles.

This is the general framework of the effects of adoptions, which can present the following subtleties:

- the partial extinctive effect if the adoptee is the natural of one of the spouses. This time, when the kinship is established through adoption between adoptee and adopter and his/her blood relatives, it only extinguishes the filiation to the natural parent that is not married to the adopter, as well as the blood relatives of the natural parent. However, there is no extinctive effect on the kinship between blood brothers adopted by the same adoptive parent or family.

- the constitutive effect is alone in the case of adopting the adopted child of the other spouse and the bonds of kinship thus created are added to those due to the effect of the previous adoption. Filiation and natural kinship of the same adoptee poses no interest, given that they ceased once the previous adoption has been granted[11].

Also, if the person in a relationship and living with the unmarried, single adoptive parent adopts the child, this produces similar effects to those of the successive adoption by the adoptive parent successively adopted by the person adoptive parent, single and unmarried, is

[10] Al. Bacaci, Viorica Dumitrache, Codrufa Hageanu, *Dreptul familiei*, C.H. Beck Publishing House, Bucharest 2012, p. 192.

[11] Emese Florian, *Dreptul familiei*, 3rd Edition, C.H. Beck Publishing House, Bucharest, 2010, pp. 592-593.

in a stable relationship and living, and gives rise to similar effects subsequent adoption by foster parent spouse. Article 6 paragraph 3 from the Law on adoptions stipulates that the legal stipulations relating to the child's adoption by the spouse of the natural or adoptive parent, as well as the child's name, residence, rights and duties of parents and children, exercising parental authority, inheritance rights, identity papers for the child born out of wedlock with an established legal filiation to both parents are to be applied accordingly.

Adoptions do not produce any effect on the existing filiation between the adoptee and his/her descendants.

A second category of effects concerns the relationship between the adopter and the adoptee. In order to regulate these, article 471 from the Romanian Civil Code states that the adopter has the same rights and duties towards the adopted child as the natural parent, i.e. both those is concerning the person of the child and those concerning the child's property. In other words, exercising parental authority must only be undertaken by the adopter alone. The only exception to this rule is the situation where the adopter is the spouse of the natural parent, in which case the parental rights and duties shall be exercised jointly by the adopter and the natural parent, an exception which the current lawmaker is quick to make in article 471, paragraph 2 from the Romanian Civil Code.

The adoptee's rights and duties towards the adopter are the same as those of any person towards their natural parents. The adoptee, whether underage or of age, integrates the adoptive parent's family and enjoys the same legal status just as any blood descendant. It fits into his adoptive parent family like a natural descendant thereof, whether we are talking about minor adoptee or about the major and enjoy the same legal treatment provided natural offspring. Article 471 paragraph 3 from the Romanian Civil Code reiterates the principle of equal rights of children stipulated in article 260[12].

If the adopter does not properly exercise his/her rights and duties, he/she may be deprived of parental rights. This penalty does not automatically lead to the dissolution of adoption, because it can be waived by the court. However, such a situation can lead to the dissolution of the adoption, in accordance with article 476 paragraph 2 from the Romanian Civil Code, in case the adoptee has to be protected under the law, if it is in the best interest of the underage adoptee.

In case both adoptive parents are sanctioned, the court may appoint a guardian or one of the safeguards provided by law and the child must be heard in the process.

After the adoption was granted, there are a number of consequences relating the name and residence of the adoptee who receives the name of the adopter. When the adopters are married or the adopter adopts their spouse's child and they have the same surname, the adopted child shall bear this name. If the adopters do not have the same surname and misunderstandings arise, the court will decide the name of the adoptee. Current legislation also stipulates the possibility of changing the surname of the underage adoptee, although not in the case of an adoptee of age with full legal capacity. This is possible when the adoptive parents request it, there are solid reasons and the 10-year old adoptee has consented to it. Subsequent to the adoption, the change of the adoptee's surname is only possible through administrative means, as stated by governmental ordinance 44/2003 on the name change through administrative means. If the adoptee is a married person bearing the same name as the other spouse, the adopted spouse may take the name of the adopter, but only with the consent of the spouse before the court granting the adoption. Regarding the home of the adoptee, if underage, will be home to the adopter or adoptive family. Article 92 from the Romanian Civil Code establishes the rule that the residence of the underage adoptee without full legal capacity will be the home of the parents or the home of the parent with a stable residence. If parents have different, separate homes and cannot agree on where the child will live, the court will

[12] Emese Florian, *Noul Cod Civil. Comentariu pe articole* (art. 1-2664), C.H. Beck Publishing House, Bucharest 2012, p. 513.

decide taking into consideration the best interest of the child, as well as what the parents and the child have to say.

The adoption can also have effects on the nationality of the adoptee[13]. According to Law 21/1991 Romanian citizenship is acquired by a foreign citizen or stateless child if at least one of the adoptive spouses is a Romanian citizen or if there is only one adopter, he/she is a Romanian citizen. If only one of the adopters is a Romanian citizen, the citizenship of the adoptee will be decided jointly by the adopters, and if the adopters do not agree on the nationality of the adopted child, the decision will be taken by the court granting the adoption, taking into account the best interests of the child. If the child has turned 14 and his/her consent is required. If the child is under 14 but at least 10 years of age his/her opinion is compulsory and taken into consideration, depending on their age and maturity.

Last but not least, the effects of adoption are regulated by the Law on adoptions which includes a whole section in which the conditions and the way is informed on the adoption and the family of origin as well as the general juridical status of adoption information, starting from the principle of confidentiality of information on adoptions announced by the article 474 from the Romanian Civil Code.

Conclusions

The way in which our legislation regulates the effects of adoption is similar to the provisions sanctions in the European Convention of Strasbourg. In accordance with article 11 from the Convention, the adopted child becomes a full member of the family of the adopter(s) and has the same rights and obligation in relation to the relatives of the adopter(s) as the child of the adopter, whose parentage is legally established. The adopter(s) assumes parental responsibility for the child. The adoption ceases the legal relationship between child and father, mother and family of origin. Exceptionally, the official or unofficial spouse or partner of the adopter shall retain the rights and duties towards the adopted child if it is his/her child, unless the law stipulates otherwise. With regards to the termination of the legal relationship between the child and the family of origin, the Convention allows the contracting states to stipulate the exceptions to certain aspects such as the child's surname, impediments to marriage or common-law marriage.

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SUPREMACY OF THE CONSTITUTION

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Abstract

The Constitution is the fundamental law of a Member State governing the organization and functioning of the relations between public authorities and citizens rights and fundamental freedoms, and ways to guarantee them.

The Constitution is the supreme law in the state, it is at the top of the pyramid and it is the source of all legal documents and legal regulations.

Supremacy of the Constitution is ensured through an effective mechanism resulted in a legal institution called constitutionality of laws controls, including all procedures through which achieve verification of low compliance with constitutional provisions.

Keywords: Constitution, the supreme law of the state.

Introduction

The Constitution genesis required a lengthy time[1]. "Constitutio" word in Roman law, designate laws emanated from the emperor. Imperial constitution, as Gaius said[2], is what the king decreed, dictates or what sets by letter[3].

The first constitution appeared in England in 1215 with the adoption of the Magna Charta Libertatum but her training process continued after the genesis of the written constitution[4].

In the feudal period, the term constitution designate those rules on the organization and functioning of the state, guaranteed certain rights and freedoms, which resulted in a limitation of the powers of the monarch.

"Enlightenment" brings a new movement that is constitutionalism movement that aims to replace traditions with a written constitution.

Constitutionalism, historically speaking, is offensive aimed at establishing the separation of powers - the basic functions of the state. According to the precepts of constitutionalism, the constitution had to be a written paper[5].

The first written constitution of the United States Constitution was adopted in Philadelphia in 1787, but preceded by the constitutions of American States issued under

[1] In the constitutional doctrine there is no single point of view on the genesis of the constitution. Some authors argue that it first appeared in England by adopting Libertatum Magna Charta, being a customary constitution, other authors show that the genesis of the constitution is when the first written constitution appeared.
[2] Roman legal advisers – II-nd century.
[3] Institutiones – «Constitutio principi est quod imperator decreto vel edicto vel epistula constituit».
[4] They were subsequently adopted Petition of Rights (Petitions of Rights) in 1628, Habeas Corpus in 1679, the Bill of Rights (Bill of Rights) in 1689, the Act establishing the succession to the throne (Act of Settlement) in 1701, the Reform Act 1832 Parliament Act in 1911 and 1949, the Act of 1958. All these acts are considered essential and are ongoing today.
[5] I. Deleanu, Constitutional Law and Political Institutions – Treatise – vol.I, Europa Nova Publishing House, Bucharest, 1996, p. 258.

English rule adopted their own written constitution (e.g. Virginia - 1776 or the State of New Jersey - 1777) before the adoption of the Federal Constitution.

In Europe, it is the first written constitution of France, adopted in 1791, and later, other countries have adopted written constitutions, like Sweden in 1809, Spain in 1812, Norway in 1814, Holland in 1815, Greece in 1822, Belgium in 1831, etc.

After that, "states have adopted constitutions and constitution became not only the fundamental law of a state, but also political and legal document which mark important moments in the development of socio-economic and politico-legal states"[6].

Constitution is the fundamental law of the state which includes general rules and principles by which the state is organized, are organized and function state authorities, are established fundamental rights and freedoms and their guarantees.

Due to its quality, the Constitution is at the pinnacle of legal documents, thus it is here an important consequence that all laws must be developed in compliance with constitutional norms, must be complied with that. "It can be regarded as sacred and inviolable precept principle that the constitution is supreme legal system of a State"[7].

Supremacy of the Constitution, as stated in the literature, appears as something natural, as such term is used in most cases, but over time have been used other names such as the highest legal value, super legality (M. Prelot), the supreme law (G. Burdeau) or the law of laws.

Constitution of a State ranks primarily within its organization and is the source of all legal regulations.

Some authors show that the supremacy of the Constitution is based on the content and form, in this regard talking of a material and a formal supremacy.

Thus, the force of constitutional provisions must be considered from a double point of view. It always comes from their content - material supremacy - and sometimes in the form in which they are enacted - formal supremacy[8].

"Substantiating material supremacy is that the law as a whole is based on the constitution; it is the fundamental rule of any legal activities taking place in the state. Material superiority of the constitution by the fact that it holds powers in reality, creating skills, it is necessarily superior authorities are invested with these skills"[9].

The same author considers formal supremacy as a guarantee of the rule of material conditions shape the development and modification of constitutional texts exhibited great strength of constitution. These form conditions determine the division of the supreme law in rigid and flexible, only rigid constitutions enshrine formal supremacy of the constitution.

The literature of our country from the same perspective shows that the fundamental law is superior to other laws and regulations because "expresses more directly the will of the people"[10].

Binding nature of the supremacy of the Constitution implies that no constitutional revision cannot remove nor to the material side, either the formal side[11]. From the material supremacy of the Constitution (as the same author highlights) two consequences arising:

a) any legislative enactment of law cannot exist if it is contrary to the Constitution, and
b) Constitution creates only skills, whether it pays specific skill to a particular body, as long as itself does not provide the possibility and conditions of re-delegation, this body cannot surrender jurisdiction to another body[12]; "delegation of power forms is

[6] I. Muraru, Constitutional Law and Political Institutions, Actami Publishing House, Bucharest, 1997, p. 52.
[7] I. Deleanu, op.cit., p. 273
[8] G. Burdeau, Manuel de droit constitutionnel, R. Pichon et R. Durand-Anzias, Paris, 1947, p. 49.
[9] Idem, p. 50.
[10] D.C. Dănișor, Romanian Constituion commented, Title I. General Principles, Universul Juridic Publishing House, Bucharest, 2009, p.100.
[11] Ibidem.
[12] Ibidem.

impossible, but material delegation is not, such material is provided as a material power is conferred to regulate the shape of will which is his own"[13].

Further, it shows that "formal supremacy of the Constitution consists, on the one hand, in special procedures and bodies that contribute to the adoption and revision and, on the other hand, in the fact that it creates principles procedures by which other rules will be adopted, any rule that does not comply with these procedures is invalid, that is not legal norm. Therefore, the laws related to the Constitution in two ways: one material, of compliance, and one formal, of validity. Control of validity should always precede the control of compliance"[14].

In another view, it is considered that the constitution itself pulls its content from a certain supremacy, "it consists of capital rules, which, in a certain way, the basis of all political rights legislation and private law. Such mastery takes not only a political character"[15]. Further, it shows that political rule is accentuated by its written character, while the legal supremacy of the constitution is based on rigidity, stiffness would not be possible without the written character.

Other authors consider that the supremacy of the Constitution is based on the fundamental principles of organization and functioning of the State, as follows:
→ principle of legality, with the argument that there is close connection between legality and constitutionality.

In this regard, it states that "if the principle of legality requires compliance at the forefront of constitutional norms, we must admit that the legal supremacy of the Constitution is based on the principle of legality, as determined by the content of this principle"[16].
→ principle of democracy[17] in this respect showing that the Basic Law is one of the principal means of achieving the organization and activities of the government, of democracy, the exercise of state power by the people who holds sovereign state power in any mode democratic.
→ principle of the uniqueness of the government, he was legally own socialist constitutional doctrine. This view can be studied only from a historical perspective or in conjunction with other doctrinal opinions[18].

Through The Constitution is legitimate power, is conferred authority to governors, is ensured legal in the state, are established the relations between public authorities and between them and the citizens, are enshrined and guaranteed rights and freedoms. The rules contained in the Basic Law have legal force superior to any rules of a state system of legal norms.

Kelsen[19] show that law is not a system of legal rules, all located at the same level, but a building with several floors, a pyramid; in other words, a hierarchy consisting of a number of levels or layers of legal rules, the top of which is the constitution.

The Constitution is the fundamental legal document that enjoys supremacy over all other legal acts. Supremacy of the Constitution is a complex concept whose content we find in its political and legal values, showing the dominance of the Constitution in the legal system, but also in the entire socio-political system of a state.

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[13] Hauriou, Précis de Droit constitutionnel, second edition, Paris, p. 265, cited by D.C. Dănişor, op. cit., p. 100.
[14] D.C. Dănişor, op. cit., p. 100.
[15] J. Barthelemy, Traite elementaire de droit constitutionnel, Paris, 1928, p. 189.
[16] M. Lepădătescu, The general theory of constitutional review of laws, "Didactică şi Pedagogică" Publishing House, Bucharest, 1974, p. 43.
[17] Idem, p. 64
[18] See extensively, A. Iorgovan, Constitutional Law and Political Institutions. General Theory, Publishing House "J. L. Galleries Calderon", Bucharest, 1994, p. 80.
[19] H. Kelsen, Austrian jurist, philosopher and teacher (1881-1973), where aa is the proposed creation of the first Constitutional Court of Austria. Kelsen has built a hierarchy of rules is based on the Constitution, arguing that legal rules should be applied by the judiciary and not the politics. In his view, the Court is to decide and not political power.

Therefore, the Constitution is the supreme law in the state and has an essential role in organizing the entire socio-political system, legal, economic and cultural center of the state. The Constitution is the source of all regulations in the economic, political, social and legal. Supremacy of the Constitution is a legal political group and is based on the totality of scientific "of economic, social, political and legal factors are closely related and interaction and to be seen in relation to the constitution of their indivisibility"[20].

Conclusions

Supremacy of the Constitution is its quality, which positioned it on top of all state institutions and businesses, making it a legal and political reality, not just legal. It is a complex notion comprising elements that ensure a supreme position in the entire state system. Supremacy of the Constitution is having an historical character[21].

Compliance with The Constitution, its supremacy and the laws are mandatory, rules value as principles are enshrined in the Constitution[22].

In order to ensure the supremacy of the Constitution was created constitutionality control, control in our country within the exclusive jurisdiction of the Constitutional Court of Romania. This is the most important legal guarantee of supremacy of the Constitution.

To achieve this control body responsible for this effect must be independent and impartial, without allowing the interference of politics in its otherwise would violate the constitutional order of the state. As shown in the literature, "free interpretation of constitutional provisions mean violation of the fundamental law and democratic principles specific to the civilized world"[23].

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[20] I. Muraru, op. cit., pp. 69-72.

[21] G. Iancu, Constitutional Law and Political Institutions, Treatise, Lumina Lex Publishing House, Bucharest, 2008, pp. 37-38.

[22] Article 1. 5 of the Constitution states that: "In Romania, compliance with the Constitution, its supremacy and the laws is mandatory".

[23] I. Rusu, Critical analysis of provisions of the Constitutional Court, Law Universe Publishing, Bucharest, 2012, page 6.

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FROM WORLD HERITAGE TO ENVIRONMENTAL PATRIMONY

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Abstract

Environmental law has proven itself to be a major challenge to all traditional branches of law, given its "horizontal" perspective and functioning, by encompassing elements and institutions from almost all of them, and by offering new insights and approaches to long consecrated concepts and juridical mechanisms.

The relation between civil law, one of the oldest fields of regulation of any legal system, and environmental law, a creation of the late XXth century, have proven itself to be not only intriguing and original, but also necessary, in view of the creation of the juridical structures fit to face the imperatives of the social, scientific and economic developments currently in course. By interfering with elementary concepts, such as property right and patrimony, environmental law has brought up the opportunity of creating new juridical theoretical structures, corresponding to the actual necessities of the beginning of the XXIst century.

This paper proposes construct following these lines, the environmental patrimony, having as theoretical models both the concept of patrimony, consecrated by civil law, and common or natural heritage, as accepted in international law. As practical aspects, we turned to the environmental protection mechanisms already in existence, thus to give a more complete and functional structure as possible.

Keywords: *environment, patrimony, property right, absolute, limitations, owner, titular, holder, heritage, nature, international, pollution, domain, tradition, innovation, civil regime, environmental regime, science.*

Introduction. Property, patrimony, heritage.

Despite the absolute character, unanimously accepted, of the property right, as it has been consecrated by the elementary regulations of any civil code legal system, all along the second half of the XXth century, thee limitations and the restrictions imposed upon it have exponentially grown, apparently depriving the owner of numerous prerogatives regarding his own goods. A great deal of these limitations have their origins in regulations regarding environmental protection; in this sense, a good example resides in the Romanian Constitution of 1991, at article 44 paragraph 7, as revised in 2003, which states that "the property right obliges to the respect of the encumbrances related to environmental protection and assuring good neighborhood, and also to the respect the other encumbrances which, according to law or custom, are charged to the owner.

From the contents of these provisions, it ensures that preset regulations pertinent both to environmental and urbanism law have a significant role in the limitation of the aforementioned prerogatives, on the purpose of assuring a common objective which, according to the law maker, justifies all the detriments to the property right. As long as there are accepted "limitations" and/or "restrictions" of any nature, we appreciate that they do not actually interfere with the base nature of the property right.

In an opinion present in the French jurisprudence[1], property is the right in virtue of which a person may profit from a certain good, in a sense of obtaining all possible benefits from it, and the encumbrances imposed by law do not interfere at all with the "empire" of property. Thus, according to the principle of sovereignty, it does not have to be confirmed at every moment, by an evident manifestation of its absolute character.

Related to the exclusive character of the owner's prerogatives, another case law opinion[2], supporting a similar approach, states that the limits to the property right are exclusively external and do not influence the essence of the right, but only some prerogatives related to use. According to the same opinion, the external encumbrances do not affect the exclusive status of property, because they do not imply mixing in the relation between the owner and their good. We consider that such an explanation would gain even more pertinence given that such forms of common property, collective property, indivisible property, the right of superficies, land rent etc. are to be taken into account.

A regulation of major importance, both practically and theoretically, deemed to be mention within this paper, is the French Charte de l'environnement (Environmental Charter) of April 28th, 2005, a regulation of constitutional status that provides, among others, that "environment is a common patrimony of the nation". However, such a statement is not quite new to French law, give that it states once more what was previously provided by article L 110-1 of the Code de l'environnement (Code of the Environment) regarding the common patrimony of the nation, its elements being "spaces, resources and natural environments, sites and landscapes, air quality, animal and vegetal species, biologic diversity and balances to which they contribute", but also water, according to article L 220-1. Another French regulation, this time Le code de l'urbanisme (Code of urbanism), includes in the national patrimony "the entire French territory" (article L 110).

First consecrated within international law, knowing various forms and formulations, the concept of common patrimony/heritage has entered completely in the juridical world and can no longer be ignored[3]. Despite the official English terminology of "common heritage", we will opt for the term of "patrimony", to be able to emphasize more easily the connections with the concept of patrimony from private law, used mainly in civil law systems (see French "patrimoine" or Romanian "patrimoniu").

The doctrine has stated that "It is more and more evidently that certain forms of usage of lands can lead to their degradation, or even to their extinction. International ecology law and international economic law can do nothing but conjugate, for the future, in view of diminishing sovereignty that, at their best, proved to be inefficient, and at their worst, has proven their noxious nature"[4]. It is difficult to imagine, in such conditions, that forms of sovereignty thus "condemned" are limited to State sovereignty.

By re-organizing the relations between individuals and goods, as imposed by the technological al scientific evolution and the apparition of the global environmental phenomena, the concept of common patrimony/heritage propounds a re-analysis and re-thinking of the relation between private and general interest, from a perspective that extends the historical studies of the jus-naturalists and leads to the recognition and acceptance, within the positive law, along with the sovereignty of the owner, asserting and accepting the prerogatives belonging to the collectivity, be it national, European or extended to the frontiers of humanity.

[1] Marquis de Vareilles-Sommières, *La définition et la notion juridique de proprieté*, RTD civ., 1905, p. 443.
[2] T. Revet, Le Code civil et le régime des biens: questions pour un bicentenaire, rev. "Droit et patrimoine", mars 2004, p. 20.
[3] François Guy Trébulle, Environnement et droit des biens, vol. "Le droit et l'environnement", Tome XI/Caen, Dalloz, Paris, 2010, p. 85-115, 130.
[4] P. Juillard, Rapport français de droit international public, vol. "Travaux de l'Association Henri Capitant", La maitrise du sol, t. XLI, Economica, 1990, p. 189.

2. A new form of domain separation

In the light of those presented up to this point, common heritage can be regarded from two points of view, on the one hand according to the individual and collective aspects, and on the other hand, from a "monist" perspective, according to the property law corresponding to the immovable goods. The limitations, especially the environmental ones, imposed upon the owner's prerogatives, are actually a reflection of the numerous interferences in their relationship with their goods; moreover, such conclusions make unacceptable the former, according to whom, beyond the limits of the absolutism of the exclusive character, (almost) anything is possible. In such conditions, the owner can follow his almost unlimited freedom to act within this exclusive space, without needing an authorization, and under any form this freedom can take. Instead, being a form of mastership specific to a collectivity, common heritage, without excluding the owner, imposes a true "co-property" over his elements, and can state, at least from this point of view, the end of exclusivism[5].

Thus, this "new juridical environmental order" is looming pithier, "menacing" individual's ownership over certain goods, be they movable or immovable, but also having a specific character, be it cause of the necessity of their protection, be it in view of preventing and limiting the harms to the environment, and sharing it with the collectivity, as guardant of the application of the environmental measures.

It is to be observed that, in the context of regulations regarding common heritage, under its various forms, a secular return to the "universal" or "sacred" domain, a concept specific to European medieval law, identified by the theologians of the ages as belonging to the godhead[6]. Despite the fact that the writers of the French (Napoleon) civil code have excluded – no without some complaints – such an idea, this distinct domain of property has discretely appeared, under the auspices of international law. It bears upon the goods and confers to the collectivity a direct ownership over the ones that simultaneously fall under the regime of the universal domain or common heritage, but also under the private domain, the property right respectively[7].

The issue of the revival of the "universal domain", a concept specific to a certain form of social and political organization, long gone, is not at all pertinent, given that it has been imposed in an age when restrictions to owner's prerogatives were limited, and they could be imposed solely by referring to the general interest, without mentioning the fact that the good could belong to more than one patrimony, and without a direct approach to the concerning good.

We consider that the most important input of environmental law, to this regard, resides in the fact that when it consecrate the less pertinent character of defending the owner's prerogative of disposition of the good, it brings forth the idea of abusus[8], meaning the prerogative to dispose not solely legally, but also physically, of the good, in its materiality. Thus, it structurally menaces a specific attribute of the property right, the one that it is often considered as its most complete expression.

Environmental law forbids such a perception regarding property, specific to the juridical theory of the XIXth century; for instance, in a phrase of French professor Demolombe[9], "property confers to the master a sovereign power over their good, a total despotism", we find an ideology that has become outdated, obsolete, absolutely unacceptable

[5] E. Zaccai, *Générations futures, humanité, nature: difficultés des collectifs pour la protection de 'environnement*, vol. "Le droit saisi par le collectif", Ed. Bruylant, Bruxelles, 2004, p. 275.
[6] M.-F. Renoux-Zagamé, Origines théologiques du concept moderne de propriété, Libraire Droz, Paris, 1987, p. 200, 247.
[7] *Idem*.
[8] Rémond Gouilloud, Le droit de détruire. Essay sur le droit de l'environnement, PUF, Paris, 1989, p. 27.
[9] Charles Demolombe, Cours de Code Napoléon, vol. IX, Paris, 1861, p. 462

given the evolutions of the destructive powers of this "despot" that, most of the time, is proven to be far from enlightened[10].

The restrictions imposed to the owner's prerogatives have acquired such an important nature, that they can no longer be considered exceptions. The notion of common patrimony imposes that, beyond the social function of property, it can be seen as the transposition of concurring mastery over a certain good, in the context of a new form of "universal domain".

The originality of the concept of common heritage/patrimony and, in the same time, the element that separates it from the private patrimony, in the form it has been analyzed by Aubry and Rau, resides in the fact that it detaches itself from the traditional liaison that patrimony has with the individual, its holder, to create a new link, to the collectivity. Thus it can confer to all its members a new individual right, recognized for every human being that "dismembers" the tradition property right[11]. The argument of the lack of juridical personality of this collectivity can be hereby rejected, given that the members themselves of this collectivity (citizens of a certain state, European citizens, all the human beings etc.) become holders of this common patrimony/heritage, of which they cannot be bereft. The institutional infrastructure implied in such a process, and also in creating a legal regime of protection, does not a priori involve the existence of a property right, such structures being solely managers or gerents of those goods.

Perceiving common heritage as a "domain" would lead to accepting an idea of returning to a socialized conception, a limited and, perhaps, a more utilitarian view upon the property right[12]. Obviously, it is not a return to the feudal order, nor a turning to socialism and/or communism, but it is important to notice that, following a new purpose and starting from the remarkable scientific progress, we find a qualitative division of the prerogatives regarding certain goods, thus allowing the observation and, eventually, the preservation of their "public" aspects.

Once the good has been integrated in many dominion regimes, the domain of property and the collective domain respectively, the juxtaposition of the credentials regarding a differentiate power may lead to a more strict respect of these diverse aspects and, moreover, of the plurality of its functions. In such conditions, using and disposing of the elements of common heritage are necessarily affected by their inclusion in one such patrimony, which makes the owner and also the collectivity that manages them, "guardians" of the good and a voucher of its diverse uses. Identifying the consequences of the existence of common heritages may also enrich case law, especially in aspects of administrative law.

Environmental law reveals, thus, an evolution of the structure of property law itself, towards a form of collective mastery, renouncing all forms of absolutist claims, be it private, collective or state.

3. Property in its environment

It is not necessary to recall that property right does not exist solely in regard of a certain good, but also in relation to other individuals or entities that, even though they are strangers to the relation between the owner and their good, are required to respect it. Because it implies complex relations between individuals and goods, environment cannot be fully comprehended but with regard to the concrete and extremely complex reality, where property right plays a most significant role. Thus, the concept of neighborhood comes forth as most essential.

[10] François Guy Trébulle, Environnement et droit des biens, vol. "Le droit et l'environnement", Tome XI/Caen, Dalloz, Paris, 2010, p. 85-115, 130

[11] G. Morin, Le sens de l'évolution contemporaine du droit de propriété, vol. "Le droit privé français au milieu du XXe siècle. Études offertes à G. Ripert", t. II, LGDJ, 1950, p. 15.

[12] E. Meynial, Notes sur la formation de la théorie du domaine divisée, vol. "Mélanges Fitting" II, Montpellier, 1908, p. 419.

3.1. The notion of neighborhood

It is well known, in the legal doctrine, that the first court decisions mentioning and consecrating the concept of "neighborhood troubles" have been pronounced in cases that we can appreciate, from our present perspective, as being among the precursors of the concept of the human right to a safe and healthy environment. Such an observation has its specific meaning, given that, as civil law has never been strictly independent or strange to the problem of the environment, it has been brought to the attention of the legal order precisely in questions regarding good neighborhood.

We must recall, in this context, an interesting remark, beyond its caricature aspects, that allows underlining certain essential aspects of our paper. Thus, French doctrine has concluded that "for the specialist in private law, environment means, first of all, neighborhood!"[13] From an environmental perspective, such a statement reminds us that this notion has an essentially relative character, especially in its geographic aspects, because currently, it cannot be limited to the main meaning of the term, of spatial join or proximity. From this point of view, we can appreciate that modern neighborhood troubles, especially the ones related to pollution, redefine the frontiers of neighborhood according to the area of exposure of the trouble[14]. Be there sounds, stenches, or vibrations, and given the transboundary (or even global) character of pollution and its effects, neighborhood in itself will lose its initial meanings. Thus, in the present conditions, the distance implied by the concept of neighborhood becomes relative, surpassing the geographical limits of the immovable good in cause.

For instance, if the trouble is solely an aesthetic one, the limits of neighborhood may extend, surpassing an entire visual panorama. And if the trouble is linked to emissions of dangerous substances, chemical or radioactive, the boundaries of neighborhood extend to a planetary level.

Moreover, the assessment according to which "environment means neighborhood" allows emphasizing a multitude of such "neighborhoods". For a long time, as shown, this notion has not been comprehended but as a material neighboring, concrete, between two or more plots of land. Currently, also from a private law perspective, beyond this version, one must also consider personal neighboring, that unites individuals that are not necessarily connected to the concerning fields (immovable goods) by a property relationship[15]. For instance, a contractor, as an "occasional neighbor" can cause a trouble to the occupant (locator) of a neighboring apartment; in this situation, French case law has retained the existence of an abnormal trouble (Civ. 3e, 30 juin 1998, Bull. civ. III, no. 144; RDI 1998), even if none of the individuals concerned had been an actual owner. Such a plurality of the forms of neighborhood shows that it is a domain still to be explored. And yet, as it has been described by the doctrine since the beginning of the XIXth century, it allows us today to notice and solve the difficulties created by the coexistence of the interests between which a just balance is needed.

It seems to us that this notion, well anchored in the law of goods, allows the integration of the aspects regarding environmental protection. Such an integration is not, though, unlimited, and can raise a number of questions, especially regarding the means of repair, and if they can actually produce specific results.

4. The possibility of an environmental patrimony

If we accept the existence of a juridical structure worthy of bearing the name of "patrimony" in environmental law, we must study it starting from its components. Even if we

[13] François Guy Trébulle, Environnement et droit des biens, vol. "Le droit et l'environnement", Tome XI/Caen, Dalloz, Paris, 2010, p. 85-115, 130.

[14] M. Boutelet, La place de l'action pour trouble de voisinage dans l'évolution du droit de la responsabilité civile en matière de l'environnement, vol. "Cahiers du droit des entreprises", 1999, p. 6

[15] V. Fournel, Traité du voisinage, t.1, 4e, Ed. Tardif, Paris, 1834, p. 24-34.

are tempted to use concepts consecrated and coming from private law, their specific meanings will differ, considering mainly the particularities of environmental law, and also because we cannot accept that doctrine and terminology are segregated and adhering to certain distinctive units, at least in aspects concerning the concept of patrimony. In such conditions, we are obliged to use terminological loans, but in the same time, we are trying to keep, as much as possible, the first meaning of the terms, adapted, obviously, to the rigors and imperatives of the environmental law problematic.

An environmental patrimony can be an imperfect reflection of the civil law patrimony, a transposition of its traditional characteristics in a field where such a term has been used in an almost improper sense, giving it its well-deserved importance and precision.

As shown earlier, we prefer to use the term environmental patrimony/heritage instead of already consecrated forms, such as natural or common heritage, because the latter two refer to elements of nature, seen as themselves, in their individuality. But "environment" implies the existence of a system within which, between these elements, be they natural or artificial, we encounter interconnections, just as they exist between the environment itself and the human being, in the widest meaning of this notion.

We propose to regard these elements of the environment from a theoretical approach closer to reality, to adopt an ensemble view over the planetary ecosystem, to better emphasize the importance and contribution of each of them to the optimal functioning of the system. In the same time, we would incline to bring an innovative aspect to this patrimony, namely the effects of one element over the other, and the way in which appear and exist interdependency relations, essential to the existence itself of such patrimony.

Even if such considerations did not know a direct juridical expression, they have already been partially overtaken and consecrated, as already shown, by concepts such as common or natural heritage, institutions created by French law at the beginning of the XXth century, imposing a special regime of protection over a certain kind of goods, that needed to be conserved and kept in good state, to the benefit of humanity, hereby including present but also future generations.

With the appearance and emergence of environmental law, these points of view could not limit themselves any more to episodic presences in national regulations or international conventions. Thus, protecting nature has turned, from an almost formal obligation, adjacent to recreational or entertainment needs, into an imperative of the survival of the human species on this planet. As natural resources are characterized, currently, both by scarcity and tenuousness, and in the future a real penury has been foreseen, concerning basic resources as water and soil, a legal regime of protection, both national and international, has become absolutely necessary.

In such conditions, and given the mechanisms already in existence and functioning in this field, we dare to propose the conceptualization and actual creation of an "environmental patrimony", independent from the natural heritage already accepted, to confer to the elements of nature a special legal status, to impose their protection and preservation in satisfactory conditions to their exploitation and capitalization, both for present, but more importantly, for future generations, to determine the strict regulation for this exploitation and, last but not least, to become aware that the only titular or holder of such a patrimony is none other than humanity, as a whole and its most juridical meaning possible.

Given that although it can be limited to natural goods bearing economic value, such a structure must envision also the fact that precisely the economic mechanisms, newly created in this domain, such as exploitation permits for certain resources or pollution certificates, bring a major contribution to consolidating an enforced regime of protection and, in the same time, sustain the fundamental distinction between ecological utility of the environmental good and its economical utility.

Even if such a juridical construct is far from being a reality, we appreciate that, such as the patrimony of civil law has been identified and contoured by Aubry and Rau, starting from

its functions, the same can happen in environmental law, where, by its special functions of protection and preservation, such an environmental patrimony can be conceptualized.

Conclusions

This conceptual evolution, from an institution created solely for private purpose, to an instrument of international environmental regulation, has proven itself to be much more than a theoretical attempt to explain the liaison between patrimony, heritage and all other intermediary form of ownership and/or mastery over natural goods. It has become, due to the recent changes and evolutions of perception, an expression of the imperatives and necessities of the "environmental revolution", a tool much needed in view of creating a special legal regime for all goods and resources, in respect to the principles of sustainable development, preservation and protection of the environment and, last but not least, even if it may still sound pretentious, the survival of the human species as a whole.

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THE MEANING OF THE EXPRESSION: "RESCISSION BY OPERATION OF LAW"

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Abstract

The non-compliance of the debtor's obligations doesn't lead automatically to the termination of the contract, even if a legal or a contractual resolutory clause is incident. Rescission by operation of law makes that the court's intervention to be limited, compared to the case of unilateral and judicial rescission.

Keywords: *rescission, termination, formal notice, non-performance, judicial review.*

Introduction

The concept of rescission has evolved according to the socio-economic needs, so the Romanian legislature, by regulating the new Romanian Civil Code, has partially aligned with the trends reflected in contemporary legislation.

1. Legal consecration of the analized expression

Rescission of the contract is one of the most energetic remedies that may be used by the creditor, in case that the debtor fails, without justification, to perform its obligations. Since the main effect produced by rescission is the abolition of contractual relationship, it was considered that the final part of the text of Art. 1321 of Romanian Civil Code, establishing the grounds for termination of the contract, it also refers to the resolution, when it states: "as well as any other cases provided by law"[1].

One of the phrases employed in the new regulation, susceptible to interpretations, is the one used in drafting art. 1550 par. (2) of Romanian Civil Code, which, referring to the operation of termination, provides that "rescission can operate of law". In order to determine the real meaning of this phrase, we will recourse to several rules and arguments of interpretation.

2. The motivations drawn from a teleological interpretation

The new Romanian Civil Code establishes several forms of recission, in terms of its source: judicial recission, unilateral recission, legal recission and conventional recission.

Of all these forms, only about legal and conventional rescission it is stated that are operating of law. Researching the history of development of the new Romanian Civil Code, we find that, in its original form, shaped by the Law no. 287/2009[2], the operation of the rescission by law was not provided. Specifically, art.1500 of the Romanian Civil Code consisted of a single paragraph, which established unilateral and judicial rescission of the contract. Consecration of legal and contractual rescission that is operating of law was achieved by introducing para. (2) of art. 1500 of the Romanian Civil Code, through art. 190

[1] See I.Turcu, *Noul Cod civil. Legea nr. 287/2009, Cartea a Va. Despre obligaţii, art. 1164-1649. Comentarii şi explicaţii*, "C.H. Beck" Publishing House, Bucureşti, 2011, p. 381.
[2] Published in The Official Gazette of Romania, no. 511/24.07.2009.

point 71 of Law no. 71/2011 for the implementation of the New Romanian Civil Code[3]. Although the argument that formed the basis of this change was precisely the need to bring clarity and legal certainty, paradoxically, the new format of the legal text, had made its interpretation to be more contradictory.

Clarifying the meaning of the phrase: "rescission by operation of law" is facilitated by the research of the amendments made to the project in December 2008. Thus, the former art. 119 789 (now art.1549 of Romanian Civil Code) stated that, in terms of rescission conditions, the analyzed text "should be linked to art. 119 755 (now art. 1516 of Romanian Civil Code), which establish the general means provided to the creditor, in order to remedy the debtor's failure in performance of the contractual obligations. "

Achieving this legal structure, in a piecemeal way, had generated some contradictions as those to which we refer below.

3. The meaning inferred by interpreting ad absurdum

Literal interpretation of the words "by operation of law", first used in the content of art. 1550 par. (2) of Romanian Civil Code, and then resumed in the formulation art. 1553 par. (2) of Romanian Civil Code, for indicating the operation of conventional rescission, leads to the conclusion that this occurs automatically, simply by non-compliance of certain provisions established by law, or, where applicable, of the obligations expressly described in the content of the comissory pacts. More specifically, this means that contract termination depends only on the debtor's conduct, without the need for expression of the creditor's interest to terminate the contract. Such a conclusion is incorrect, as we will demonstrate. Introduction para. (2) art. 1550 of Romanian Civil Code, indicates the intention of the legislature to establish a third way of operating termination, namely rescission of law, which acts distinct from the other two arranged in par. (1) of that article, respectively judicial rescission, which "may be ordered by the court, on request" and unilateral rescission, which "may be declared unilaterally by the entitled party". Distinguishing criterion used by the legislature to delineate these forms of resolution is, as indicated by the marginal name of the article, the mode of operation. The combined interpretation of legal texts enshrined to rescission, leads to the following results:

- judicial rescission is operating pursuant to final court judgment, through which was admited the creditor's claim for a resolution, following the verification of the conditions laid down in art. 1549; 1551 of Romanian Civil Code[4];
- unilateral rescission operates on the basis of issuing and notifying to the debtor of the creditor's declaration of rescission, with observing the requirements established by art. 1552 of Romanian Civil Code[5];
- rescission by operation of law can rests on two different sources:
  - legal rescission is incident in cases specifically provided by law, respectively the special regulations of Romanian Civil Code in matters relating to contracts, or other special laws, which establish the remedy of termination as a result of non-compliance of certain contractual obligations[6];
  - conventional rescission occurs in cases expressly described in comissory pacts, which shall provide, as determined by art. 1553 of Romanian Civil Code, the obligations whose failure to perform draws rescission of [7].

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[3] See the Report no. 850/03.05.2011 on the draft of the Law no. 71/2011, available at http://www. Cdep.ro/comisiii/juridica/pdf/2011/rp850/10.pdf, p. 263.

[4] See L. Pop, I. F. Popa, S. I. Vidu, *Tratat elementar de drept civil. Obligaţiile*, "Universul Juridic" Publishing House, Bucureşti, 2012, p. 292.

[5] Unilateral rescission is thus for the first time acknowledged by Romanian law, unlike the"common law" system, in which it has always been the basic version of termination. See H. Beale, *Chity on Contracts, vol.I,,General Principles*, "Sweet & Maxwell Ltd" Publishing House, UK, 2008, p. 1394.

[6] As noted above, in the regulation of the new Romanian Civil Code can not be identified any proper rescission cases, but only certain legal designation of the non-enforcement of resolutive nature.

[7] It was designated as the condition of transparency of the comissory pacts.

It follows that the tie breaker between the rescission forms, suggested by grouping them in the structure of the two paragraphs, indicates only apparently the presence of the classical dichotomy between the operational modes of a legal institutions: on request, or automatically, by operation of law.

To illustrate even more obvious that this is is not the meaning which should be attributed to the term under review, we will perform a brief comparison with some legal institutions that generate automatic dissolution of the contract.

4. The meaning shown by a comparative interpretation

In the event where there is a fortuitous impossibility of enforcement, according to art. 1557 par. (1) of Romanian Civil Code, whether it is total and complete, and it concerns an important contractual obligation, the contract will be terminated by operation of law and without further notice, right from the moment when the fortuitous event occurs. By applying in this case a contrario interpretation, taking into account that in art. 1550 of Romanian Civil Code, on rescission of full right, such a dispensation is not provided, it will mean that the legislature did not intend that rescission induce a similar effect to that of the fortuitous failure of execution, namely the automatic dissolution of the contract[8]. In continuation of the same reasoning, it appears that the extinctive effect of the rescission is subject to issuance by the creditor of a notification to this effect. We consider that if in the text of art. 1550 of Romanian Civil Code would have been included an express mention towards issuing such a notification, any confusion in interpretation would have been prevented.

The illustration of the differences between operating mode of the two causes of dissolution is also achieved by reference to para 2) art. 1557 of Romanian Civil Code, showing that the rules of the rescission will became applicable, whether the fortuitous impossibility of enforcement it is temporary and only if the lender has not requested the suspension of enforcement of its obligations. Recognizing the right of the creditor to choose mainly the resumption of the enforcement, and only as a secondary alternative, to send a notice for terminating the contract, the same as in the case of rescission, is justified only if the impossibility of enforcement is not yet definitive[9].

In case of achieving a resolutive condition, due to occurrence of the event to which the parties have atributed this meaning, the abolition of the obligations occurs automatically, according to art. 1401 of Romanian Civil Code, so, in this case, the issuing any notification by the creditor, would be unnecessary. The different tackling from the one consecrated to rescission operating of law, is explained by the fact that, in this case, the achievement of the resolutive condition was assumed by the parties as part of the contract, and whose presence influence its extinction[10]. Furthermore, the realization of the event can not depend solely on the will of the debtor, as in the case of a default attributable to him[11].

Instead, the right to require performance of the obligation is a result of the contract, which the creditor can not be assumed to have lost it, simply because of the debtors failure.

It follows therefore that termination will occur only if the creditor intend so, and communicates his will, by notifying the debtor. It has been shown that any contrary conclusion would be absurd, since if we admit that the debtor's failure would be regarded as a resolutive condition, it would still have not any effect, because, being at the discretion of the person who undertakes, it would have been considered as invalid, according to art. 1403 of Romanian Civil Code. Following the same false reasoning, it means that the obligation would be turned into an alternative one, as provided by art. 1467 of Romanian Civil Code, which gives debtor's the choice between execution of the contract in nature, or by equivalent, in case

[8] See I. Adam, *Drept civil. Obligaţiile. Contractul*, "C.H.Beck" Publishing House, Bucureşti, 2011, p. 461.
[9] See I.Turcu, op. cit., p. 653.
[10] See I.Turcu, op. cit., p. 640.
[11] See I.Adam, op. cit., p. 389.

rescission would occur automatically [12]. Such a conclusion is also wrong, because it is beyond any doubt that this choice is only in the creditor's power, by virtue of the binding force of the contract.

Compensation, as a way of extinguishing obligations, may be legal, judicial or conventional. The legal compensation operates as soon as the cumulative conditions laid down in para. (1) art. 1617 of Romanian Civil Code are met (debts are certain, liquid and falling due, whatever their source is, and whose object is an amount of money or a certain quantity of fungible goods of the same kind). This does not mean that the expected effect of art. 1616 of Romanian Civil Code, namely extinguishing mutual debts up to the lowest, occurs against the will of the creditor. Even if it takes effect without the necessity for a notice, as required for termination, compensation operates only if the creditor expresses at least his tacit intention towards embracing its effects[13]. This conclusion emerges from the interpretation of the para. (3) art. 1617 of Romanian Civil Code, which provides that either party may waive, expressly or tacitly, on compensation. The use, in compensation, of the term „of full right", has been criticized as being likely to induce confusion with automatic termination[14]. Doctrine indicates that compensation waiver, by tacit acceptance of assignment or payment, due to the suppletive nature of the analyzed rule, makes that the compensation effect, which operated by right, to be retroactively removed[15].

Likewise in the case of confusion of rights, as way of extinguishing obligations (which occurs when in the same report of obligations, the qualities of creditor and debtor are met in the same person) the term "by operation of law", used in the text of art 1624 of Romanian Civil Code, describes its way of operation. Dissolution due to confusion occurs automatically, since it can be seen as a case of impossibility of performance of the obligation, the claim being paralyzed[16].

It follows that, unlike cases where the termination occurs automatically, termination due to rescission of law does not occur unless it is triggered by the expressing of the creditor's will [17].

5. The meaning deduced from a coordinated interpretation

One of the essential conditions of termination is the gravity of non-performance, as resulting from a contrario interpretation of art. 1551 of Romanian Civil Code, which states that if the failure is of little significance, the creditor can not obtain rescission but only reduction of benefits. Failure of little consequence, which occurs repeatedly, can cause rescission, but only where of successive performance contract. It is noted that to each of the rescission forms differs not only the entity required to conduct the evaluation, but also the time when this estimating is made, by reference to the date of issue of the manifestation of the creditor's will for rescission. So we retain the following:

- in the case of judicial rescission, the assessment is posterior to the demand of the creditor;
- in the case of unilateral rescission, the assessment is concomitant with the declaration of the creditor;
- in the case of legal and conventional rescission, the assessment is prior to the notification issued by the creditor.

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[12] See V.Stoica, *Declarația unilaterală de rezoluțiune*, in "Dreptul" Magazine, no. 8/2006, p. 44.

[13] See C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, "All Beck" Publishing House, Bucureşti, 2002, p. 386.

[14]See I.Turcu, op. cit., p. 697.

[15] See Anişoara Ştefănescu, *Noul Cod Civil. Comentariu pe articole*, coord. FL.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, "C.H. Beck" Publishing House, Bucureşti, 2012, p. 1707.

[16] See L. Pop, *Tratat de drept civil. Obligațiile, vol. I, Regimul juridic general*, "C.H. Beck" Publishing House, Bucureşti, 2006, p. 538.

[17] See I. Adam, op. cit, p. 399.

The distinction mentioned above is reflected in the way of verifying this assessment by a judicial review:

- in the case of judicial termination, a binding control is performed in a direct way by the court, prior to the operation of the rescission;
- in the case of unilateral termination, an optional and indirect judicial control is performed only at the request of the debtor, posterior to the operation of the rescission;
- in the case of both legal and conventional rescission, assessing the appropriateness of termination is excluded from judicial review, because it was already definitively established, by enshrining an express legal provision or of a resolutive clause, called comissory pact[18].

So, when rescission operates by law, the court can only examine if debtor's failure in accomplish his obligations was committed as described in the legal text or in the resolutive clause. It means that in order to notification of rescission lead to the dissolution of the contract, it is necessary that the facts denounced by the creditor correspond exactly to the conduct deemed by law or by a termination clause as a serious non- enforcement[19]. If the non-enforcement for which law or the parties' agreement had established the application of the rescission, is only partial, then the court may consider that the special conditions demanded for operation of legal or conventional termination, are not met in that case. In such a situation, it may eventually pronounce a judicial resolution, but only upon verification of the severity of that partial non-performance. The judiciary control is optionally and can be done either upon a complaint made by the debtor against the notice of rescission which was considered as abusive, or upon an exception raised in an action promoted by the creditor for applying the effects of termination (restitution of the benefits, the obligation to pay damages).

It can therefore be considered that, in essence, the phrase reffering to rescission operation by law, covers only the differences in assessment the severity of the non performance, in the sense that, in the case that rescission is invoked upon legal or conventional basis, the court can not censor nor moderate its effects, so termination will invariably occur at creditor's claim.[20] By contrast, in the case of unilateral and judicial rescission, which have not a predefined evaluation of the significant degree of non-performance, the assessment made by the creditor can be countered by the judge's decision (on the principal or incidental). The advantage purchased by rescission of law is therefore the predictability of the cases which can attract contract termination. In no case, however, the termination effect does not occur automatically, nonperformance of the debtor's obligations being only one of the conditions to operate the rescission. The judicial review on the rescission of law isn't, however, excluded upon other substantive conditions of this remedy, namely the imputability of debtor (it should be verified only the lack of excusable reasons for non- execution[21], not necessarily debtor's guilt) and the formal notice of the debtor (by notice by the creditor, or as under the law, or by the agreement of the parties)[22]. These conditions are common to all forms of termination, as resulting from art. 1516 par. (2) section 2 of Romanian Civil Code, specifying "where, without justification, the debtor, after addressing a formal notice, fails to perform his obligation, the creditor may, at its discretion, and without losing the right to damages (...) obtain, if the obligation is contractual, the rescission or termination of the contract (...)". The reiteration of the binding nature of these conditions is performed in the content of art. 1553 par. (2) of Romanian Civil Code, which, referring to

[18]See I. Turcu, op. cit., p. 648.

[19] See C. Popineau-Dehaullon, *Les rèmedes de justice privée à l'inéxécution du contrat. Etude comparative,* "LGDJ" Publishing House, Paris, 2008, p. 119.

[20] See C. Popa, Andreea Lisevici, *Probleme privind rezoluțiunea contractului în Noul Cod civil (II),* in "Revista română de drept al afacerilor" Magazine, no. 9/2012, available at www.noulcodcivil.ro.

[21] The justified reasons for non-performance of contractual obligations are considered to be generated by: the order of execution the obligations (Art. 1555 Civil Code), exception of non-performance (Art. 1556 Civil Code), impossibility of execution (art. 1557 Civil Code.).

[22] See I. Turcu, op. cit., p. 648.

conventional rescission shows that it "(...) is subject to formal notice of the debtor, unless it is agreed that it will result from the mere fact of non-performance". Therefore, either it is done by a notification (in which case an additional period of performance is provided), or it occurs of law, since the due date (if the law or the parties have so provided), the condition that the debtor being in default, is also required in the rescission of law.

Conclusions

The meaning of the term "rescission by operation of law", as it emerge from the analized rules of interpretation, is that the termination of the contract will become operable without implying any direct or indirect judicial review, in terms of determining the serious nature of non-performance. If the creditor's claim of termination is based on a legal or on a conventional provision indicating the obligations whose non-execution attracts rescission, the judicial review will imply only verifying of the imputability of the debtor and his putting in delay. Rescission of law can not be assimilated to other means of termination of contract, such as the resolutive condition, nor with the definitive fortuitous impossibility of performance, nor with the confusion of rights, nor even with the compensation of law, with which have some similarities.

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REGULATION OF ENGAGEMENT IN THE NEW ROMANIAN CIVIL CODE[1] AND OTHER INTERNATIONAL LEGISLATIONS

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Abstract

Engagement is making a comeback to the landscape of the new Romanian civil legislation, being known that it has deep roots in the history of Romanian law. The institutionalization of engagement was justified by experts as a traditional reality in Romania. This article investigates aspects concerning the evolution of engagement, the content of this sui generis legal act, its legal nature, the substantive and procedural conditions, as well as considerable issues relating to the legal effects of engagement, particularly its rupture.

Keywords: *new Civil Code, engagement, liability.*

Introduction

Our old legislations, namely the Calimach, Caragea and Donici Codes, have regulated engagement as a pre-contract binding the parties to marriage. Subsequently, the Romanian Civil Code, following the model of the French Civil Code, and then the Family Code, did not regulate engagement, in order to give absolute consistency to matrimonial freedom. The institution of engagement is considerably old, being even mentioned in the Old Testament, where it was represented by the Hebrew word "aras", meaning marriage commitment or marriage covenant. Engagement, a symbol of the union between a man and a woman, after their solemn covenant to marry, was also present in Roman law[2], as designated by the term "sponsalia". From a spiritual standpoint, engagement is almost as important as marriage, as it signifies a confession of mutual feelings and a vow to enter into marriage, while it may also imply the blessing of the relationship by the parents and by the Church. But engagement is legally important only to the extent as the law recognizes it as such.

A. The place of engagement

Currently, "engagement" as a civil law institution is inseparably linked to marriage and is governed by the provisions of Art. 266-270 contained in Book II – On Family, Title II- Marriage, Chapter I – Engagement, of Law no. 287 of 17 July 2009 on the Civil Code, as republished.

[1] New civil Romanian Code, Law no. 287/2009, published in the Official Gazette of Romania, Part I, no. 511 of 24 July 2009.
[2] I. Chelaru, *Marriage and divorce. Judicial issues on civil, religious and comparative law matters*, A92 Acteon Publishing House, p. 27.

We emphasize that engagement is specifically regulated in international legislations, such as the German Civil Code[3], the Swiss Civil Code[4], the Italian Civil Code and the Anglo-Saxon system, etc.

B. The definition and legal nature of engagement

According to the New Civil Code, engagement is defined as "mutual promise to enter into marriage."

Engagement is nothing but a mutual promise of marriage, a solemn covenant of two persons of opposite sexes to marry, which is usually done in a festive setting. Engagement, in the view of the New Civil Code, is a social, moral and cultural relationship, with possible legal consequences for unilateral and abusive rupture.

Engagement is a civil law institution, included and addressed in the new legal structure of regulations on family life. The new Civil Code also defines marriage as "(...) freely consented union between a man and a woman, entered into under the law".

In the academic literature, engagement is not considered to be a contract, but a simple legal fact which can produce, at the most, extrinsic effects to marriage, especially in the case of unilateral and abusive rupture.

However, there are also views that share the contractual hypothesis of engagement, considering that denying the contractual aspect of engagement would be divergent to psychological and social reality. The argument of these views lies in the fact that the contract does not have the contents of a pre-contract of marriage, so that the parties would not commit to enter into marriage, but only pledge to loyally try to establish such relationship as to be likely to lead to marriage.

Thus, matrimonial freedom would not be reached because either party may unilaterally terminate the contract at any time, and, as such, they cannot be held responsible unless the termination was abusive. Therefore, the engagement contract leads to the same practical consequences as the classification of engagement as a simple legal fact.

Recently, according to an emerging view in the academic literature, based on the confrontation of the two pieces of legislation, it can be seen that, while for engagement the agreement of will is highlighted exclusively, emphasis in marriage is placed on the legal status subsequent to the expression of consent[5].

According to this view, differentiation is not justified, since both institutions stem from a legal act and generate a legal provision, a statute governed by law and which cannot be neglected.

For these reasons, the term of "engagement" may be given two meanings:

a. that of a legal act;
b. that of a legal status.

Thus, engagement is defined as a legal act in which the future betrothed mutually promise, by prior agreement, to meet a common goal, namely "entering into marriage", which can lead us to the idea of convention, following the synallagmatic promise to enter into marriage[6].

Therefore, we acquiesce in the view that engagement is a *sui generis* legal act, which entails a certain legal status for the betrothed, thus agreeing with the definition given to engagement, according to which it is a *facultative legal status, prior to marriage, stemming from the mutual promise made, under the law, between a man and a woman, to enter marriage*[7].

C. The legal characters of engagement

[3] 1900 German *Civil Code*, art. 1297-1302.
[4] Swiss *Civil Code*, art. 90-93.
[5] Lupaşcu, D., Crăciunescu, C.M., op. cit., 2011, p. 38
[6] E. Florian, op. cit. 2009, p. 632-633.
[7] Ibidem, p. 39

The institution of engagement, according to the regulations of the New Civil Code, has the following legal characters:

1. Engagement is a union between two people

The act of engagement admits an association between two individuals for the achievement of a common goal, namely entering into marriage.

*2. Engagement is concluded between a man and a woma*n – *engagement is monogamous*

As a legal provision prior to marriage, engagement assumes this essential character of marriage, being forbidden to people of the same sex.

On the other hand, as marriage is controlled by the principle of monogamy, as a result of the exclusive nature of the feeling of love, those engaged cannot enter into another engagement, as long as the previous one has not ended (*lato sensu*).

3. Engagement is freely consented

No circumstances can prevent such persons from promising each other to enter into marriage.

4. Engagement is consensual

In accordance with Art. 266 para. (3) thesis I of the new Civil Code: "Entering into an engagement is not subject to any formality..."

Consequently, no action is required from any authority to ascertain engagement, the parties having full autonomy to decide on how to tangibly express their consent.

Unlike marriage, where the Constitution itself provides for the possibility of religious celebration, occurring necessarily after the civil marriage[8], engagement has no such regulations, but it can be traditionally celebrated religiously.

5. The engagement is entered into until marriage

According to our ancient statutes, engagement had to be followed, within two to four years, by marriage, but the new Civil Code does not establish any such term for engagement.

For this reason, the parties may agree, during the engagement, on the date of marriage, just as they are free to not settle anything in this regard. Whichever variant is chosen, the legal status of engagement cannot exceed the time of marriage.

6. Engagement is based on equal rights and obligations of the engaged persons

Equality between men and women exists in all areas of social life[9]. In terms of engagement, this equality refers to both the conditions and the relationship between those engaged.

7. Engagement is entered into only for the purpose of marriage

The mutual promise of the parties concerns entering into marriage, the aim of which is to start a family.

D. Substantive conditions

According to art. 266 para. (2) of the new Civil Code, "Provisions relating to the substantive conditions for entering into marriage shall apply accordingly, except for medical certification and the approval of the guardianship court."

Therefore, the substantive conditions for an engagement take two forms[10]:

- positive conditions – *substantive requirements* that must exist in order to enter into an engagement;
- negative conditions – *impediments* (impediments to engagement), *de facto* or *de jure* states that must not exist in order to enter into an engagement.

From the above we conclude that only those who fulfill the necessary conditions for marriage may become engaged.

[8] Art. 48 para. (2) thesis II of the Romanian Constitution, as republished.

[9] Law no. 202/2002 on equal opportunities and treatment between men and women, republished in the Official Gazette, Part I, no. 150 of 1 March 2007.

[10] E. Florian, op. cit. 2011, p. 14.

1. Positive substantive conditions for engagement

Analyzing the provisions of art. 271-277 of the new Civil Code, on the substantive conditions for marriage, we note that engagement requires meeting three cumulative substantive requirements: *age required for engagement*, *consent to engagement*, and *difference of sex*.

Age required for engagement

By custom, engagement can be entered into only if both parties are aged over 18. Therefore, it is civil adulthood that is relevant here, and not the acquisition of full capacity of exercise[11].

According to art. 272 para. (2), as an exception, the minor who has reached the age of 16 can be engaged with the consent of their parents or, where applicable, guardian, only if there are "reasonable grounds" that the law does not define[12].

However, in case of disagreement between the parents on consenting to the engagement, it is the guardianship court[13] that decides, in the best interest of the child.

If one parent is deceased or is unable to manifest their will, the consent of the other parent will suffice. Also, in the case of shared custody, the consent of the parent exercising parental authority is sufficient.

If there are no parents or guardian, it is indispensable to obtain the consent of the person or, where appropriate, the authority entitled to exercise parental rights.

The approval of engagement is an element of parental care, being essentially a unilateral legal act, revocable until entering the engagement[14].

As in the case of child marriage[15], both the abusive refusal to consent to the engagement and the abusive revocation of consent can be appealed to in court, following the path of non-contentious procedure.

Legal norms do not impose any formal requirements for consent, in which case we believe that it can be given either verbally or in writing.

Consent to engagement

The consent to engagement is the manifestation of the will of the two people who wish to become engaged, being subject to the following conditions:

a. it must come from a discerning person, i.e. a person who has both intellectual and volitional capacity. Lack of judgment entails lack of consent;

b. it must be personally expressed by those who wish to become engaged; engagement by representation is not allowed[16];

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[11] For the capacity to enter into an engagement, see also art. 90 parag. (2) of the Swiss Civil Code.

[12] The same situation occurs in the case of child marriage. *De lege lata*, regarding the content of "reasonable grounds", the doctrine held such grounds to be: pregnancy, childbirth, serious illness, concubinage, etc. (See, e.g. I.P. Filipescu. A.I. Filipescu - *Treatise of Family Law*, Eighth edition, as revised and supplemented, "Universul Juridic" Publishing House, Bucharest, 2006, p. 12; A. Bacaci, V. Dumitrache, C. Hageanu – *Family Law*, "All Beck" Publishing House, Bucharest, 1999, pp. 18-19; E. Florian - *Family Law*, "Limes" Publishing House, Cluj - Napoca, 2003, p. 26-27.

[13] According to the 1864 Civil Code, as amended in 1906, for the boy and girl under 21 who wanted to marry, parental consent was necessary, and in case of disagreement between the parents, the father's consent was sufficient (art. 131). If both parents were dead or unable to manifest their will "then the grandfather and the grandmother from the father's side and, in their absence, the grandfather and the grandmother from the mother's side, shall replace them", and in the absence of grandparents, the guardian's consent was required (art. 133). With reference to: C. Hamangiu, N. Georgean – *Annotated Civil Code*, Vol. I (republished), All Beck Publishing House, Bucharest, 1999, pp. 175 - 176.

[14] Similarly, on the analysis of the requirements for age exemption for child marriage, with reference to: F.A. Baias, M. Avram, C. Nicolescu – *Amendments to Family Code brought by Law no. 288/2007, in „Law" Review no.3/2008*.no.3/2008, pp. 9-41.

[15] F.A. Baias, M. Avram, C. Nicolescu – op. cit., p. 18.

[16] In Roman law, the matchmaker or marriage mediator (*proxeneta* or *conciliator nuptiarum*) was entitled to payment (*Proxenetica jure licito petuntur*). Here this convention was regarded as contrary to morality, being invalid, so that the matchmaker did not receive any payment. (See: D. Alexandresco - op. cit., p. 142).

c. it must be free, in the sense that there is no obstacle in choosing the future betrothed.

In the legal sense, consent is free if there are no vices of consent;

a. it must be full, i.e. unaffected by modalities (term, condition, load);
b. it must be expressed without doubts.

As in the case of marriage, consent may be vitiated by error, fraud or violence.

Difference of sex

Engagement can only occur between a man and a woman. Although an express provision to this effect was not required – given the general reference made by art. 266 para. (2) to the substantive conditions of marriage – however, the legislator sought to remove any doubt[17].

Unlike the other rights and freedoms guaranteed by the European Convention on Human Rights as belonging to any person, that no one shall be subjected to torture or degrading treatment, forced labor or being convicted twice for the same offense, the wording of art. 12 states that, as soon as they have reached the legal age for marriage, a man and a woman have the right to marry. The text does not state that any person has the right to enter into marriage. The difference is fundamental, as it reflects the idea that the right to marry is only recognized to people who have a different biological sex[18].

2. Negative substantive conditions for engagement. Impediments to engagement

There are *de facto* or *de jure* states that must not exist in order to enter into an engagement:

Civil status as married person or an engaged person

According to the new Civil Code art. 273 Bigamy "It is forbidden for a person who is already married to enter into a new marriage. The provision is also applicable to engagement. Therefore, a married person cannot be engaged to another person."

Likewise, given the specificity of marriage and its basis, we believe that people who are already engaged may not enter into another engagement.

Kinship

It is necessary to distinguish between direct relatives, for whom engagement is prohibited regardless of degree, and collateral relatives, for whom engagement is forbidden only up to the fourth degree. For reasonable grounds, as in the case of engagement between minors, collateral relatives of the fourth degree (i.e. cousins) may be engaged.

Adoption

According to art. 451 of the new Civil Code: "Adoption is the legal operation which creates a parental relationship between the adopter and the adoptee, as well as kinship between the adoptee and their adoptive relatives."

As a result, engagement is prohibited between the adoptee and their adoptive relatives, in the same situations as between natural relatives, as provided in para. (3) art. 274 of the new Civil Code regarding marriage.

Guardianship

A guardian, for moral reasons, cannot be engaged to the minor person under guardianship, as between these two people there is a prohibition to marry. During guardianship, marriage, as well as engagement, is forbidden between the guardian and the minor person under guardianship (art. 275 Civil Code).

Mental alienation, mental deficiency or temporary lack of mental faculties

According to art.276 of the new Civil Code, "it is forbidden to marry a mentally alienated or mentally deficient person."

Consequently, the mentally alienated or mentally deficient person cannot be engaged, regardless of whether or not they are subject to a prohibition order.

[17] Art. 266 para. (5) of the new Civil Code.
[18] C. Bîrsan, The European Convention of Human Rights, vol. I, p. 850.

In the case of temporary lack of mental faculties (intoxication, hypnosis, delirium, etc.), engagement is prohibited just as long as they are devoid of judgment.

E. Formal requirements for engagement

Dominated by the principle of mutual consent, engagement is not subject to any formality and may be proved by any available means according to art. 266 para. (3) of the new Civil Code. However, it is considered that nothing prevents the parties from concluding an official engagement (e.g. before a notary public, priest, etc.) by recording the mutual promise to marry in writing.

Legal regulations do not impose any requirement relating to the bestowing of goods (engagement ring, any other gifts), so that their absence does not affect the validity of the engagement.

Engagement does not necessarily imply factual cohabitation, but does it not exclude it, either.

Consensual union (concubinage), as a tolerated matter of fact, but not regulated by law, is characterized by stable and continuous cohabitation, without interfering necessarily with any commitment to marriage; on the contrary, engagement is a mutual marital promise that does not inevitably entail the cohabitation of the betrothed. Obviously, concubinage and engagement are not incompatible; they are not mutually exclusive. We believe, however, that consensual union can bear the meaning of a tacit mutual promise of marriage; since engagement is confirmed by any available means, including presumption; it can be supposed that cohabitation organized like a marriage is, according to the will of the parties, a premarital stage[19]. Likewise, it is not required for an engagement to be recorded in the registries of any institution.

F. Proof of engagement

Under the provisions of art. 266 para. (3) of the new Civil Code, proof of engagement can be made by any available means (questioning, witnesses, presumptions, documents, etc.) permitted by law, or as a contract (when applying the rule of moral impossibility to reconstruct a document)[20].

Engagement can be confirmed by any available means; although the administration of evidence may seem very easy, in practice there may be difficulties in establishing the facts, as the actual relationship between the betrothed is difficult for others to assess objectively.

G. The effects of engagement

From the perspective of promised marriage, engagement is neither a necessary "preamble" to marriage, nor a guarantee of its materialization, as it is not binding.

The appropriation of the matrimonial engagement convention is made if both the engagement and the matrimonial convention precede marriage. Engagement consists of mutual promises of marriage. Matrimonial convention is concluded as custom before marriage, to enter into marriage.

The new Civil Code does not show the effects of engagement, but merely regulates the predominantly economic consequences of breaking the engagement.

The legal act of engagement generates the legal status of engaged persons. Hence, there are a number of moral, as well as legal consequences.

Engagement brings no rights and duties of a personal or economic nature binding the betrothed, regardless of how much the marital promise would be delayed.

The analogy with marriage provisions relating to the rights and duties of spouses is out of the question. It is only the substantive conditions of marriage that apply to engagement, excepting medical certification and the approval of the guardianship court.

[19] E. Florian, op. cit., 2011, p. 15.
[20] M. Avram, C. Nicolescu, op.cit., 2010, p. 71.

A special relationship is created between the two (man and woman), which must dominate their behavior in achieving the mutual promise to marry. In terms of religious doctrine, engagement is a form of "moral and spiritual kinship."

From the perspective of punishing the person who breaks the engagement abusively or who, by fault, causes the other to break the engagement, we may state that there are a number of personal rights and obligations between the betrothed, similar in principle to those of marriage.

Thus, as an expression of full equality of rights and obligations, the betrothed mutually agree on everything that concerns marriage.

However, without indicating equality between the two legal institutions, given that both are based on friendship and affection between a man and a woman, we believe that it is not exaggerated to support the existence of mutual obligations (respect, fidelity and moral support).

Apart from the rights and obligations arising from the nature of engagement, we believe there may be other reciprocal rights and obligations in relation to the actual content of the agreement between the parties.

While in the past engagement necessarily required adherence to a vow of chastity until the religious ceremony and, especially, the spiritual purification of the intending spouses, today they can agree to live and to manage a household together, in which case the engagement can be superimposed on the state of concubinage.

If children were born out of the relation between those engaged, they are born out of wedlock, according to the relevant legal regime.

The betrothed can choose the matrimonial regime, agreement which will take effect from the time of marriage. From this point of view, they have the following options: legal community; separation of goods; conventional community. If they choose a different matrimonial regime than that of legal community, this must be submitted to the notary public to conclude a matrimonial convention, which takes the form of an authentic document.

Since the betrothed are not subject to the matrimonial regime, property that had been acquired jointly during the engagement period is subject to the rules of co-ownership (shared ownership by quotas). Note that there is even a presumption of co-ownership, in the case of jointly owned property[21].

In considering engagement or throughout its duration, with a view to marriage, the betrothed can make gifts to one another (donations, by the rules of common law) or receive gifts from third parties. This latter option can take the form of legacy or donation, and the nature of ownership on that property will be set according to the will of the original owner.

The betrothed may agree to give each other material support (the obligation to jointly bear household costs and the obligation to provide support).

The rights and obligations of the parties are assessed in relation to the determined content of the agreement between them, as are, ultimately, the potential abusive attitude of disengagement or the wrongful determination to break the engagement[22].

H. The nullity of engagement

Given that legal norms provide that, with the exceptions mentioned above, the basic conditions for marriage are applicable to engagement, we believe that the consequence of non-compliance therewith, namely nullity, must also be accepted.

The penalty that may be applied for failure to comply with the requirements of legal norms for engagement is the nullity thereof.

Depending on the character of nullity, it is divided into absolute nullity and relative nullity.

The *absolute nullity* of engagement occurs in the following situations:

[21] Art. 633 of the new Civil Code.
[22] Florian, E., op., cit., 2009, p. 630.

a. those people had not reached the age required for engagement;
b. the engagement occurred between two persons of the same sex;
c. the consent does not meet the conditions analyzed above;
d. the engaged person was married;
e. the people who entered into the engagement are direct relatives (regardless of degree) or collateral relatives (up to the fourth degree) For collateral relatives up to the fourth degree, if there are reasonable grounds, the engagement is valid. The case presented takes into account both natural and civil kinship;
f. the engaged person is mentally alienated or mentally deficient.

According to art. 2502 para. (2) Section 3 of the new Civil Code, the action in ascertaining absolute nullity of engagement is imprescriptible and may be brought by any interested person, including the prosecutor.

Exceptionally, in the case of non-compliance with the age required for engagement, nullity is covered if, until the final judgment, such persons have come of age.

The *relative nullity* of engagement occurs in the following cases:

a. the minor who has reached the age of 16 became engaged without having the consent required by law;
b. the consent of one or both of the betrothed was vitiated by error, fraud or violence;
c. on the date of the engagement, the person was temporarily devoid of judgment;
d. the guardian became engaged to a minor under their guardianship.

The action for annulment of engagement is prescribed within 6 months, running from different dates, such as:

a. in the case of lack of consent for the minor's engagement, the period runs from the date on which those called to approve the engagement have become aware of this;
b. in the case of vitiation of consent or temporal lack of judgment, the term runs from the date of termination of violence or, if applicable, the date on which the person concerned has become aware of the error, fraud or temporary lack of judgment;
c. in the case of a guardian engaged to the minor under guardianship, the period runs from the date of the engagement.

The action for annulment has a personal character and can only be initiated by one whose interest was damaged, namely:

a. the person(s) or authority called to consent to the engagement of the minor under 16;
b. the engaged person whose consent was vitiated;
c. the person temporarily devoid of judgment;
d. the minor under guardianship.

The right of action is not transmitted to heirs. However, if the action was initiated by its holder, it can be continued by the heirs.

In the case of engagement entered into by a minor who has reached 16 years of age, the relative nullity is covered if consent is obtained until the date of the final judgment.

The final judgment of admission for the action in ascertaining nullity or in annulling the engagement takes effect retroactively, since the date of the engagement. As a result of admission of the action, it is deemed that there was no engagement, so that it did not produce any legal consequences.

I. Breaking the engagement and its effects

The new Romanian Civil Code does not provide for cases where the engagement can be broken off, but only regulates the legal consequences of breaking the engagement.

Mutual commitment to enter into marriage does not endow one with the power of a legal obligation of result, each of the betrothed or both jointly are free to abandon the project

of marriage until the marriage ceremony, being bound by the possible economic consequences incurred by them[23].

Thus, as engagement is based on agreement of the parties, nothing prevents them from agreeing to break off the engagement[24].

Likewise, we believe that the parties may decide to break off the engagement even in cases where the engagement would be null and void[25], as long as legal inefficiency was not ascertained judicially.

As regards the formal conditions of breaking the engagement, the new civil code reprises the idea based on the principle of symmetry of form, stating that: "Breaking the engagement is not subject to any formality and can be proven by any available means."[26]

The main consequence of breaking the engagement is the termination of the rights and obligations arising from the act of engagement.

According to the law, the person who breaks the engagement cannot be forced to enter into marriage[27]. The solution is natural, since engagement is not a contract, and the consent to marry must be given voluntarily[28].

The new Civil Code regulates two categories of economic effects of breaking the engagement, namely:

1. the obligation to return the gifts;
2. the responsibility for abusive breaking or, where appropriate, guiltily causing the breaking of the engagement.

Note that the economic consequences of breaking the engagement can be cumulated and that the right of action, based on art. 269 and 270 of the new Civil Code, is prescribed within a year of the date when the engagement was broken.

The obligation to return gifts

According to art. 268 para. (1) of the new Civil Code, this obligation applies to "gifts made by or received by the betrothed in consideration of the engagement or during it, with a view to entering marriage."

Although it may be presumed that the regulation is aimed mainly at gifts made between the betrothed, the correct interpretation of the text is that all gifts must be returned, including those received by one or both of the betrothed from third parties (*ubi lex non distinguit, nec nos distinguere debemus*).

We believe that these gifts are "conditional gifts", i.e. donations subject to a resolutory condition.

The above provision should be linked to art. 1030 para. (1) of the new Civil Code, according to which: "Donations made to intending spouses or to one of them, under the condition of entering into marriage, do not take effect if the marriage does not occur."

Although the marginal regulation of this Article refers to obsolescence, we believe that, in reality, it is the failure to fulfill a condition, because obsolescence involves the

[23] E. Florian, op., cit., 2011, p. 16.

[24] The Romans applied, here too, the principle: "*Quae consensu contrahuntur, contrario consensu dissolvuntur*" (contracts that are formed by consent are dissolved by contrary consent). Also, our old legislations stipulated that "the engagement is broken when, without cause, the betrothed would repent." (See: Andronachi Donici Code `- Chapter 30, § 7, and Caragea Code– Part III, Chapter 15, art. 3 letter h) – quoted by D. Alexandresco – op. cit., p. 462).

[25] Our old legislations mentioned that "the engagement is broken" in situations pertaining to its invalidity, such as: the engagement was not been entered into "by the will and knowledge of parents and guardians", "when there is a cause of relation" etc. [See: Code of Andronachi Donici (Chapter 30, § 7) – quoted by D. Alexandresco – op. cit., p. 461)].

[26] Art. 267 parag. (3) of the new Civil Code.

[27] Art. 267 parag. (1) of the new Civil Code.

[28] In the sense that "the consent of the intending spouses must be given freely and not forced, as it may not be subject to prior agreement." (See: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu – op. cit., p.188)

intervention of circumstances beyond the will of the parties to the legal act[29]. In addition, the obligation to return these gifts is independent of the idea of guilt of one of the betrothed for breaking the engagement.

Note that, in accordance with art. 268 para. (1) of the new Civil Code, the obligation of returning gifts does not include "ordinary gifts".

a. the concept of ordinary gifts can be found in the new Civil Code in several fields such as: art. 144 para. (1) provides that a guardian cannot make donations on behalf of the minor, except for ordinary gifts, according to the financial situation of the child;

b. art. 146 para. (3) provides that the child cannot make donations, except for ordinary gifts, according to their financial situation;

c. art. 346 para. (3) provides that ordinary gifts are exempt from the rule according to which common property of spouses may be transferred only with the consent of both spouses;

d. according to art. 1091 para. (3), the line of succession is determined without regard to ordinary gifts;

e. art. 1150 par. (1) let. c) provides that ordinary gifts are not subject to the obligation of a donation report.

We believe that ordinary gifts should be assessed in relation to context or the situation of offering them (e.g. birthday), as provided by art. 144 and 146 of the new Civil Code, as well as in relation to the financial situation of the persons concerned.

However, we believe that ordinary gifts should not be confused with handmade gifts, covered in art. 1011 para. (4) of the new Civil Code, the scope of which is wider.

In the case of donated amounts of money, returning them will take into account their current value, without interest (civil fruits), as restitution is independent of the good or bad faith of the betrothed. Interest would be payable only from the date on which the return of that amount is claimed.

If restitution in kind is not possible, this is done "to the extent of wealth"[30].

In case restitution in kind is no longer possible, the gifts or cash equivalent can be returned either voluntarily or through a court action.

In the latter case, the right of action is prescribed within one year, which commences after the date when the engagement was broken[31].

French courts tend to favor the category of ordinary gifts, refusing restitution claims unless the disputed property has an evidently important value relative to the donor's material possibilities – for example, it is 6 times their monthly salary or consists of family jewels. As regards family jewels, they were deemed to have a special regime: they were given as a donation (handmade gifts) but on loan of use and they had to be returned to be kept in the family.

In French doctrine, the solution is based on art. 1088 of the French Civil Code, which states that any donation made for the purpose of marriage becomes obsolete if the marriage ends. Such regulations can also be found in other legislations such as those of Germany and Switzerland. Engagement is expressly provided for with the effects discussed above in European legislations, such as the German Civil Code, the Swiss Civil Code, etc.

Responsibility for abusive termination of the engagement

According to art. 269 of the Civil Code "The party who breaks the engagement abusively can be obliged to pay compensation for expenses incurred or contracted for the purpose of marriage, to the extent that the circumstances were appropriate, as well as for any

[29] Obsolescence is the cause of inefficiency that consists of depriving the civil legal act validly concluded of any effects due to the occurrence of circumstances subsequent to its conclusion and which is independent of the will of the author(s) of the legal act – See: G. Boroi – *Civil Law. General Part. Persons*, All Beck Publishing House, 2002, p. 225.

[30] Art. 268 parag. (2) thesis II of the new Civil Code.

[31] Art. 270 of the new Civil Code.

other damages caused. The party that guiltily led the other to break the engagement may be forced to pay compensation under paragraph (1)."

Therefore, liability occurs in the following cases:

- for abusive termination of engagement;
- for guiltily causing the other party to break the engagement.

In terms of liability, it is the circumstances in which the rupture occurred that matter, and not the rupture itself – this provides the context of liability – from this point of view it does not matter which of the two broke the engagement, but which one is at fault.

The key element is the existence of facts or a sequence of actions due to which the continued promise of marriage became undesirable.

As an example, inspired by the solutions given by the French courts, the fiancé's marriage to another person after the promise made to the fiancée was reaffirmed repeatedly and publicly, or the brutal manner in which the rupture occurred, as a spontaneous gesture carried out without any prior dialogue, or at the wrong timing, i.e. just a few days before the scheduled celebration of marriage, or a succession of acts imputable to one of the betrothed, such as unacceptable behavior punctuated by humiliation or insults directed at the other. Whether the abuse was committed by unexpectedly breaking the engagement or by wrongful conduct that caused the other person to quit, the result is the same, namely the right to compensation in favor of the victimized party, as opposable to the party who is guilty for breaking the engagement.

The compensation may apply, according to art. 269 para. (1) of the new Civil Code, to expenses incurred or contracted for marriage, only to the extent where they were appropriate to the circumstances, as well as for any other damage caused.

This includes, for example, expenses incurred or contracted for the marriage ceremony, but one could equally talk about the damage represented by expenses related to obtaining or preparing the family home, for instance, a house that, given its surface area, location, etc., would not have been purchased without marriage prospects. We believe that whenever engagement entails living together, factual cohabitation, especially if lasting, can provide factual elements to amplify both the material and the moral component of the incurred damage. In any case, guiltily breaking the engagement must be the cause of the claimed damage; in this regard the provisions of art. 269 Civil Code leave no doubt. The burden of proof for elements of liability connected to breaking the engagement is on the plaintiff. The right of action for damage caused by breaking the engagement is prescribed within one year after the engagement was broken, art. 270 of the Civil Code.

Therefore, the source of liability is chargeability for breaking the engagement (and not the act of breaking the engagement itself), if and insofar it caused moral or material damage to the party that is innocent of the rupture. *De lege lata*, the ground for this is in the rules of common law in matter of tort. The solution is the same if the contractual theory of engagement is shared, as liability is not contractual but rather pertains to tort law, if it is determined that termination, as a unilateral manifestation of will, was abusive.

Romanian jurisprudence before 1948 had the occasion to rule on the effects of breaking the engagement, stating that it can only entail than tort liability, as engagement is not a contract, and that the party guilty of breaking relationship can be ordered to pay both material and moral compensation.

There are elements outlining the structure of tort liability for one's own actions, provided for by art.1357 para. (1) of the new Civil Code: "he who causes damage to another by an unlawful act, committed with intent or fault, is obliged to pay compensation." We believe it is necessary to mention that the text of the law incorporates the provisions initially imposed by art. 998-999 of the 1864 Civil Code and configures the general conditions of liability for one's own actions, namely: the existence of a wrongful act, the existence of damage, the existence of a causal link between the wrongful act and the damage and, last but

not least, the existence of fault, in any of its forms, according to art. 16 para. (4) of the new Civil Code.

Italian legal literature states, for the most part, the non-contractual nature of the obligation to pay compensation, with a reservation regarding tort liability. Some authors believe that this is a statutory, *ex lege* obligation, as it is unacceptable that the exercise of the freedom to choose whether to enter into marriage or refuse to do so, even after having promised, may acquire illicit connotations, for it would be tantamount to indirectly admitting that the fundamental right to marriage may suffer limitations on the basis of marital promises that are not binding.

French jurisprudence, in matters of "dissolution" of engagement, as well as in matter of abusive rupture of a consensual union, constantly admits that the one who suffered from the abusive breaking of engagement is entitled to compensation under the rules of tort liability[32].

J. Elements of comparative law

Swiss Civil Code

The regulation of engagement in Switzerland is done by art. 90-93 of the Civil Code. As provided in the Romanian and Italian civil codes, the Swiss Civil Code states, in article 90, that the law does not grant a right of action to force marriage on the engaged person who refuses. In addition to the two above-mentioned codes, some rules are enforced on the ability of persons who may enter into a valid engagement only by proxy, namely minors and incapable persons. The provision is objectionable, on the argument that engagement is a personal act and should be left to the discretion of the person with full capacity of exercise.

Article 91 of the Swiss Civil Code, concerning the returning of gifts in case of disengagement, are similar to those in the new Romanian Civil Code. Thus, the betrothed may require the restitution of the gifts in case of disengagement, unless one of them has died or the gifts were acquired. If these gifts no longer exist in nature, the return is made depending on unjust enrichment. Although the Swiss Civil Code does not expressly state this, as does the new Romanian Civil Code, it could be interpreted to refer to gifts made expressly for the purpose of marriage, and not every gift given during the engagement.

Regarding the scope of good faith, it is a novelty to the Romanian and Italian civil codes. Article 92 of the Swiss Civil Code provides: "If one of the betrothed decided on the marriage, on good faith, which occasioned expenses or the loss of earnings, s/he may require appropriate financial participation of the other, provided that it is not inequitable in relation to the entirety of circumstances."

The difference from the Romanian legislation on granting compensation primarily consists of:

a. the new Romanian Civil Code refers to the party that may be required to pay compensation, namely the one that broke the engagement abusively, whereas the Swiss Civil Code mentions the party that may require such compensation, namely the one that incurred, in good faith, such expenditures.

We believe that the Romanian regulation, although objectionable in terms of the lack of a definition or circumstances that qualify an attitude as abusive in the case of breaking the engagement, is still preferable to the Swiss one, which circumstantiates the good faith of the person who may require and not the one who may be required to pay compensation, as it would be natural in engaging the civil liability to a person;

b. the new Romanian Civil Code extends the scope of possibility for seeking compensation and for "any other damage", as compared to the Swiss Civil Code, which is limited to engaging expenses or loss of earnings in relation to marriage.

[32] E. Florian, op. cit., 2011, p. 20, with reference to J-J. Lemouland, in "*Droit de la familie"*, by P. Murat (coordinator), op. cit., p. 53-54, no. 111.72 and in terms of liability grounds for breaking the engagement, p. 458, no. 143.11-143.12.

We believe that the Swiss regulation, like the Italian one, in this respect, is more concise and less likely to be interpreted inconsistently, as might be the case with Romanian legislation.

The Italian Civil Code

The regulation relevant in the Italian Civil Code is brief, art. 79-81, and it begins by stating the rule according to which the promise of marriage cannot force the party who breaks it to enter into marriage.

In accordance with art. 80, the engaged person can demand the return of gifts made in consideration of the promise of marriage, if the marriage does not take place.

It is noted that, similar to the regulation in the new Romanian Civil Code, the obligation to return the gifts is not limited to gifts made between the betrothed, as the law does not exclude *ab initio* the restitution of gifts made to the betrothed by third parties.

Article 81 of the Italian Civil Code introduces liability for guiltily breaking the engagement, which only takes effect when the engagement was entered into by an authentic document or under private signature (i.e., by written document, which entails a more accurate proof of the real intention of the parties to enter into marriage). Liability is engaged only when a party breaks the engagement "without reasonable grounds".

It is noted that, here, the term “abusively”, as used in the Romanian legislation, is not employed, but the idea of justification or even fault remains. The second paragraph of art. 81 states, similar to the regulation in the Romanian Civil Code, that similar obligations are incumbent on the promiser, who “of their own fault, gave the other a reason to break the engagement”.

An important element is the fact that Art. 81 of the Civil Code obliges the promiser who broke off the engagement without reasonable grounds to indemnify the other for damages caused by “expenditures incurred and obligations contracted for marriage”, but it does not regulate on extending liability to any other damage caused. Basically, the law eliminates the possibility to remedy the moral damage or to compensate for the lost profit, the liability being strictly limited to the above-mentioned elements.

The Italian law also provides that reimbursement of expenses and obligations is made to the extent where they were made, according to the state of the parties.

As a general element, we note the more restrictive conditions in engaging liability for breaking the engagement, as compared to the new Romanian Civil Code.

To summarize, the Italian law engages liability only if the engagement was entered into by an authentic document or under private signature, and the content of liability is limited to expenses and obligations assumed for the purpose of marriage, without giving the possibility to remedy other damages.

Common law

The Anglo-Saxon system has known major changes in jurisprudence over the last two centuries[33], as far as the effects of breaking an engagement are concerned. These changes have occurred due to the belief that there have been abuses in the exercise of such actions, as well as to the current of opinion according to which “love and law are incompatible.”

In a first phase of Anglo-Saxon law in the United States of America, the owner of the action was the woman who had been promised to be taken into marriage and later deserted. She could seek compensation through an action for “breach of promise”[34]. The action had been known since the Victorian era of Anglo-Saxon law in the United Kingdom[35]. Compensation first consisted of remedying material damage. However, since the twentieth century, compensation included damage for loss of earnings that the woman would have had

[33] R.Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, p. 2.

[34] Also called “heart balm” action, according to R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, p. 2.

[35] M. Grossberg – Governing the hearth: Law and the family in nineteenth century America, 1985, p. 33- 38; G. S. Frost – Promises broken: courtship, class and gender in Victorian England, 1995, p. 80-97.

as a result of the marriage, the damage for loss of opportunity to marry someone else (e.g., due to loss of virginity or birth of a child), but also the damage for emotional distress caused as a result of breaking the engagement. The change occurred in terms of shifting the center of attention from the economic benefits lost as a result of not concluding the marriage to the moral emotional distress of the woman. After this change, the American courts faced difficulties in assessing such compensation for moral damages[36]. Between 1930 and 1950, due to frequent situations where women came to blackmail wealthy men through "breach of promise" action, many American States[37] repealed this possibility.

The main reasons that led to the repeal were those related to the invocation of the equal status of women to men. Marriage was no longer, in the view of the feminist current, the essence of a woman's existence, and the action in question did nothing but encourage women to see only the economic benefits of their relationship with a man, and not place them on a position of equality[38].

Reformists[39] supported the declining importance of the institution of seduction, as the loss of virginity was no longer regarded as something that could ruin a woman's life; more often these women were able to find a job and another man to marry. Moreover – they asserted – marriage was misunderstood because it should have been impossible to measure it in money. Since the woman was becoming increasingly freer to make plans in life, marriage was becoming more and more a relationship based on affection and less on economic issues, as had been the case in the past. Consequently, the removal of economic elements from the "breach of promise" action sought to modernize the approach to this action. The only economic element that was kept as an object of the action was related to engagement gifts, and they could be seen as a symbol of love and not as an intrinsic economic element.

From a legal point of view, action was considered an anomaly of the common-law system, as it contained both contractual elements, due to the existence of the promise of marriage, and tort elements, since it was not required to prove the existence of an agreement between the two with respect to marriage, but the woman's simple statement sufficed and it could be supported by witnesses[40].

Likewise, the assessment of the moral damage, consisting of emotional distress caused by the rupture of engagement, was criticized on the rationale that "love cannot be treated as a market transaction"[41] and relations within marriage and engagement cannot be expressed in money.

By the 1950s, breaking an engagement could only cause emotional distress, which could not be expressed in money. Only gifts given in advance between the partners, for the purpose of marriage, could be the subject of action. One such gift is the engagement ring[42] that is traditionally offered only in consideration of marriage, unlike other gifts, such as cars or clothes, which can also be given at birthdays and other events[43]. Action for the return of such goods is based on notions such as: conditional gift, restitution, unjust enrichment[44], but

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[36] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, pag.2;N.P. Feinsinger – *Legislative Attack on "Heart Balm"*, 33 MICH. L. REV. 979, 986-96, 1935; Lea Vander Velde – *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996).

[37] Indiana was the first state to adopt this change in 1935, according to M.B.W. Sinclair–*Seduction and the Myth of the Ideal Woman*, 5 LAW&INEQ. J. 33, 65&n.n.237-39 (1987).

[38] H. Spiller Daggett – *Legal essays on family law*, 1935, p. 39.

[39] J. E. Larson – Women understand so little, they call my good nature deceit: A feminist rethinking of Seduction, 93 COLUM. L. REV. 374, 379, 397-99 (1993).

[40] M. Grossberg – *Governing the hearth: Law and the family in nineteenth century America*, 1985, p. 33. 38; N. P. Feinsinger – Legislative Attack on "Heart Balm", 33 MICH. L. REV. 979, 986-96, 1935.

[41] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, p. 4.

[42] M. F. Brinig – *Rings and Promises*, 6 J.L. ECON. & ORG. 203, 206 (1990); Viviana A. Zelizer – *The social meaning of money* 99-101 (1994).

[43] R. Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, p. 4.

[44] *Heartbalm Statues and Deceit Actions*, 83 MICH. L. REV., 1770, 1786-87 (1985).

still combines elements of tort and contract, as was the case with the "heart balm" action in the past.

The action for return of property given between the betrothed has known, in its turn, three jurisprudential stages in the United States of America[45].

Thus, in a first stage, the betrothed were forced to return each other the goods when they broke the engagement. Subsequently, given the changes in family law according to which human relationships were too complex to be qualified in terms of fault, the restitution of property no longer rested on fault. Recently, this concept has evolved in the conditional gift theory, and the condition was marriage, with the obligation to return the gift if the marriage did not take place.

In the first stage, the basis for returning gifts given between the betrothed was the existence of fault: the fiancée had to return the engagement ring if she broke the engagement, but the same did not happen if the engagement was broken by the fiancé. The fault lay with whoever broke the engagement, regardless of the reasons that caused this to happen, the person regarded as guilty being the one who announced the breaking of the engagement[46].

The second phase began in 1965, when the State of New York amended the legislation, meaning that the action was permissible for the return of gifts made in consideration of marriage, if the latter did not take place. The action was not based on the need for proof of fault, but it was grounded in the objective fact of the marriage not taking place[47].

In the third stage, according to the conditional gift theory, the gift given on a condition that usually has to be explicit must be returned if the condition is not fulfilled[48]. In case of engagement rings, marriage is the default condition[49]. The condition was interpreted either as the donor's wish to marry[50], or marriage itself[51]. In cases of returning the engagement ring, U.S. courts chose the second interpretation.

Unlike American law, British legislation presumes that the engagement ring is an absolute gift of the woman, unlike other engagement gifts, which are conditional and must be returned if the engagement is broken, unless it was broken by fault of the person who made the gift[52].

Conclusions

At a first glance, despite the arguments related to tradition and some (few) foreign legislations, it could be argued that the regulation of engagement in the new Romanian Civil Code does not respond to a perceived social need. We believe, however, that an appreciation from an *obsolete* (outdated) perspective would be wrong, as engagement can be the "antechamber" of marriage. So herein lies the legal interest in knowing who can enter into an engagement, under what conditions, how to put an end to an engagement and, in particular, what the consequences of breaking the engagement are.

The new Romanian Civil Code provisions contained in articles 266-270 are open to criticism on at least the following grounds:

a. they do not determine the legal nature of this union;
b. they do not impose the written form as a condition to end the engagement;

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[45] R.Tushnet – *Rules of Engagement*, Yale Law Journal, June, 1998, 107 Yale L.J. 2583, p. 4.
[46] Case Spinnell vs. Quigley, 785 P. 2d 1149, 1150-51 (Wash. Ct. App. 1990), Cauza Stanger v. Epler, 115 A. 2d 197 (Pa. 1955).
[47] Case Heiman vs. Parrish, 942 P. 2d 631, 635-38 (Kan. 1997), Cauza Vigil v. Haber, 888 P. 2d 455, 457 (N.M. 1994); E. M. Tomko, Annotation – *Rights in respect of engagement and courtship presents when marriage does not ensue*, 44 A.L.R. 5th 1 68-78 (1997).
[48] 38 AM. JUR. 2D *Gifts*, par. 81 (1996).
[49] Case Fierro vs. Hoel, 465 N. W. 2d 669, 671 (Iowa Ct. App. 1990).
[50] Case Coconis vs. Christakis, 435 N.E. 2d 100, 102 (Ohio County Ct. 1981).
[51] Case Lindth vs. Surman, 702 A. 2d 560, 561 (Pa. Super. Ct. 1997).
[52] S. Cretney, Statues – *Law Reform (Miscellaneous Provisions) Act 1970*, 33 MOD. L. REV. 534, 536 (1970).

c. they substantiate the idea of liability for damages based on the idea of fault/guilt;
d. they leave it to the court to decide on the categories of damage that can engage the liability of the one who abusively breaks the engagement.

What would be desirable in future regulations is to separate the effects of breaking the engagement from the idea of fault or abuse. Without borrowing a particular model, it can be seen that both in the American and other legal systems, the evolution of jurisprudence and regulation has taken place in the direction of removing the subjective evaluation on such sensitive elements as human relationships and in the direction of a stricter evidence regime (not by any available means) for a promise of marriage, when it legal effects such as engaging liability are to be determined.

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THE ROLE OF THE PROSECUTOR IN THE INVESTIGATIONS AND PROSECUTION PHASES OF THE CRIMINAL PROCESS IN THE LIGHT OF THE NEW ROMANIAN CODE OF CRIMINAL PROCEDURE

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Abstract

Among the other important changes the new Romanian Code of Criminal Procedure have introduced in the criminal proceedings, those concerning the activity of investigating and prosecuting entail some clarifications of the attributions, a renaming of certain documents and acts issued by the Prosecutor, as well as expand the possibility for the investigators or the Prosecutor for gathering any kind of evidence during the investigation phases. In the same time, the legislator created guaranties of respecting the legal rights and freedoms for the suspected person in as manner as for the prosecuted person.

Key words*: ordinance, indictment, resolution, dismissal the case, waiving the prosecution, judicial control of Prosecutor's acts.*

Introduction

In the recent years Romania went through a period of profound transformation in the judiciary field, among the others, by adopting the New Civil Code in 2009 which came into force in early 2013 as well as adopting a new Criminal Code by the Law no. 286/2009, which entry into force is previewed on February 1, 2014 together with the new Code of Criminal Procedure[1]*. The adoption of a new package of civil and criminal codes, both in substantial and procedural matters, is a crucial moment in the evolution of the Romanian legislation*[2]*.*

If analyzing all the changes introduced by the new Romanian Code of Criminal Procedure[3] *(hence, the new R.C.C.P.) with regard to the activities of the prosecution phase, contained in the Title I of the Special Part, we observe that most of them concern only some formal aspects and just a few of them involve substantial changes in the matters relating to the jurisdictions, attributions, procedural terms and the relationship between different judicial bodies.*

The renaming of some terms

In respect of the former changes, we may recall that all the prosecutor acts, like ordering some procedural measures or closing a criminal file, with few exceptions, are going

[1] See, L. R. Popoviciu, *Legislative changes governed by the New Criminal Code in defining the notion of offense. Legislator's orientation: Romanian legislative tradition and European legal systems*, in AIJJS no. 2/2012, p. 155.
[2] Idem
[3] See, The Law no. 135/2010 regarding the new *Romanian Code of Criminal Procedure*, published in the Official Monitor of Romania, no. 486/15th of July, 2010.

to be called *ordinances* (Article 286 paragraph 1 of the new R.C.C.P). The *indictment* remains as the act which enshrines the end of the criminal prosecution and also the referral to the court, but is given a different content in the light of the new R.C.C.P. (Article 328 paragraph 1 of the new R.C.C.P). We can observe, *the resolution* disappears from the categories of the documents issued by the Prosecutor and thus also, all the controversies, essentially useless, on which of the names, the *ordinance* or the *resolution*, should be employed for certain acts of the Prosecutor. Instead, it is expressly provided by the text of the law (Article 286 paragraph 3 of the new R.C.C.P), the Prosecutor confirms an act or a procedural measure by a written statement indicating also the legal grounds, appearing directly on the act in question. Although the documents issued by the Prosecutor will be no longer entitled so, in fact, this is what we currently name a *resolution*.

Regarding the ways a criminal case can be notified to the competent judicial bodies, including the special procedures of *the flagrant crime* and *the prior complaint*, the changes brought by the new R.C.C.P are not essentially. Basically, they are designed to eliminate the ambiguity currently found in the content of many complaints, to give the possibility for new other ways of notifying the judicial bodies as well as to make a more suitable reformulation of the terms.

From the perspective of the ways to perform the criminal investigations, depending on the nature and gravity of the crimes as well as the quality of the suspect, according to the new procedural provisions, there are two possibilities: a criminal investigation by the judicial police under the supervision of the Prosecutor or a criminal investigation performed directly by the Prosecutor, with the possibility to delegate the police officers to performing certain acts of investigation.

The supervision of the investigations

The new procedural provisions concerning the ways the Prosecutor does the supervision of the criminal investigations performed by the police officers, respectively, how to assign one or other investigating body according to the nature of the crime, how to give directions, how to confirm or invalidate some investigation acts and so on, don't differ too much to the provisions currently in force. Notwithstanding, we must specify *the current Romanian Code of Criminal Procedure*[4] (hence, the current R.C.C.P), in its original content of the year 1968 had many differences at that time but it burdened some successive changes of the original provisions until nowadays when the matter we refer to, is very similar with that of the new R.C.C.P.

Regarding the provisions regulating the activities of the investigations and prosecution, it is necessary to make some remarks, because, even though the changes appear to be purely formal, actually, they have a significant implication on performing the criminal investigations and prosecution acts:

- The *criminal investigations* are triggered by a formal act, an ordinance of initiation, with its name so, *"The initiation of the criminal investigation"* which actually means the start of the investigations, firstly in the aim of determining the facts (the so called *in rem* investigations, according to Article 305 paragraph 1 of the new R.C.C.P). This ordinance is issued by the judicial policy, under the condition of confirmation by the Prosecutor. Where, according to the law, the Prosecutor must do himself/herself the investigations, this ordinance will be issued by the Prosecutor. We have to mention another new provision in this matter, brought by the *Law no. 255/2013*[5] (The law implementing the new R.C.C.P), according to which, if there are enough information

[4] See, *The Law no. 29/12th of November, 1969* regarding the *Romanian Code of Criminal Procedure*, published in the Official Monitor of Romania, no. 145, 146 /12th of November, 1968.

[5] See, *The Law 255/2013 for the implementation of the Law no. 135/2010* on the Code of Criminal Procedure and amending and supplementing certain normative acts which comprise some criminal proceedings, published in the Official Monitor of Romania, no. 515 /14th of August, 2013.

or evidence, a certain criminal fact had been, most probably, committed by a known person and the formal initiation of the *in rem* investigations had been done, then the judicial police or the Prosecutor must expand the *in personam* investigations in what regarding this person, hence becoming a *suspect*;

- The initiation of *prosecution* is decided by the Prosecutor, when issuing an ordinance in this respect, named *"The initiation of the prosecution"* as soon as, he/she has enough evidence to believe, on the ground of good reasons, that a certain person has committed a certain crime, and there is no one of the cases previewed by the Article 16, paragraph (1) which prevent the prosecution [see, Article 309 paragraph (1) of the new R.C.C.P.];

- The solutions adopted by the Prosecutor, when finishes his/her activity in the pre-trial phase of a criminal case may be:

- *a dismissal* of the case by an *ordinance*, where, from the core content and the form of the complaint cannot be identified enough reasons to initiate the investigations or, there is one of the cases previewed by the Article 16, paragraph (1) of the new R.C.C.P. which prevent the prosecution [see, the Article 327 letter b), the Article 314, letter a) and the Article 315 of the new R.C.C.P.]

- *a waiving* of the prosecution by *ordinance*, according to the Article 327, letter b) of the R.C.C.P., after the initiation of the prosecution was done and before the Pre-Trial Chamber referral of the case, where the conditions laid down in the Article 318, paragraph (1), of the new R.C.C.P. can be invoked. Basically, it's about those situations of lesser gravity offenses, committed in mitigating circumstances, or by the people without a criminal record and finally, which don't deserve a prosecution because there is a lack of the public concern in doing it;

- *an indictment*, when the Prosecutor decides the case gathered enough evidence to support the the criminal charges, the legal provisions guaranteeing the truth have been applied, the prosecution phase is concluded and following, the referral of the case before the Pre-Trial Chamber must be done, according to the provisions of the Article 327 letter a) of the new R.C.C.P..

If looking to the changes mentioned above, we can make some important remarks. First of all, it is salutary the initiative of the legislator to create a procedural framework to allow a full gathering of evidence without a necessary passing into the phase of the criminal prosecution. As it's well known, under the current rules of procedure, gathering certain evidence or conducting certain evidentiary procedures, like the forensic reports, technical appraisals or searches, require a certain legal framework, respectively the prosecution phase to be formally initiated and implicitly the criminal charges to be notified to the accused person.

In principle, this measure of *initiating the prosecution*, by itself is not likely to entail any legal consequences in the sense of deprivation of some legal or constitutional rights of the person concerned. After all, every citizen of Romania enjoys a presumption of innocence[6] a right with the rank of constitutional principle which assumes that, until a final judgment convicting a person is done, the innocence of him/her is presumed and therefore, any incurring damage and deprivation of rights can be ordered by judicial authorities only as exception and only in those conditions established by the law. As the criminal prosecution is not an exception in the above mentioned sense, in principle, it should not affect to the accused. However, we may note that there are increasingly more cases where the mere

[6] See, The Article 23, paragraph 11 of the Romanian Constitution, as amended and supplemented by the Law amending the Constitution no. 429/2003 published in the Official Monitor of Romania no. 767/ 31st of October, 2003.

initiation of the prosecution is likely to have consequences for the person against whom it was ordered. For example, the famous people having a public image like politicians, businessmen, artists, people working in mass-media, as well as people having a job in police, army, public administration, or justice, all of them can be affected more than mere psychologically. Those from the first category could suffer a depreciation of their public image with possible consequences on their career or business while those from the last category, could be prevented in getting a better position, a promotion or, in some situations, even to burden a suspension for a period of time. Therefore it's laudable the change of the proceeding allowing all kind of evidence to be gathered during the investigations phase, and not to push somehow the Prosecutor to initiate the prosecution and eventually to accuse a person, mere because, otherwise is not possible to bring certain evidence to the case.

Even though, during the investigations phase, if his/her identity is known, the person must be notified about the crime under investigation and the fact he/she is suspected for committing it, or, according to the case, for aiding, abetting or instigating to its commission (see, Article 307 of the new R.C.C.P), we consider the suspect's rights, the psychological impact or his/her public imagine cannot be as grave affected as in the case of prosecution when the criminal charges have been officially notified and that person becomes an accused. Moreover, according to the new procedural rules (see, Article 78 of the new R.C.C.P.), the suspect person enjoys the same procedural rights like those previewed for the suspect: the right of silent, of being assisted by a lawyer, of being acknowledged about the evidence gathered in the case, of proposing evidence for his/her defense and others (see, Article 83 of the new R.C.C.P.).

In the other hand, the new procedural provisions create a better procedural framework for initiating the criminal prosecution, which is a later stage and to an upper level in the charging process. After concluding the investigations phase, the Prosecutor already had the opportunity to manage all the necessary evidence to draw the right conclusions, and consequently, can better decide if there are reasonable grounds to believe that a person has committed a crime and to initiate the prosecution or, alternatively, to cease the case if there is a situation which, according to the law, prevents the criminal case to go further than the investigations stage. Regulating in this manner, we think the legislature succeeded to do, very well, a balance between a favorable procedural framework for managing all kind of evidence by the judicial bodies while not harming in any way the legal rights and freedoms of the suspected person.

Turning to other aspects of the pre-trial phase of the criminal process, we find that the provisions of the new R.C.C.P. does not bring considerable novelties in the matters like the extension of prosecution or its suspension, the remitting of the case to the investigation body, the reference to another body for criminal prosecution and the reopening the investigations or prosecution.

In the chapter governing the complaints against the measures and prosecution acts, should be added that, although basically they remain the same, there is a major change to the current regulations, the entering of *the judge of Preliminary Chamber*, who is empowered, *inter alia*, with the task to make the judicial control of that Prosecutor's solutions which cease the investigations and the prosecution by dismissal or waiving the case. These provisions appear as natural, given that one of the reasons why the above institution was created by the legislator is that of doing the judicial control of Prosecutor's solutions not to indict.

Conclusions

As a final conclusion, we can mention that the new procedural regulations brought some clarification in what regard the phases of the pre-trial stage of the criminal process, namely the investigations and the prosecution, together with clear attributions for the investigators and the Prosecutor as well as with enough guaranties of respecting the legal rights and freedoms for those persons against whom the proceedings are running. Another

welcomed change is that clarifying and simplifying the naming of the Prosecutor's acts and his/her final solution in those cases not brought before the court. In what regarding the judicial control of those above mentioned solutions of the Prosecutor, we have to mention the fact this is, also, existing under the current regulations but, the entering of the *judge of Preliminary Chamber*, an expected more specialized judge, will be, for sure, a step ahead for the criminal justice. Finally, the practice is only which can show us if the expectations for these new provisions of the R.C.C.P. in doing a better criminal process will be confirmed or not.

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GENERAL CONSIDERATIONS REGARDING WHAT IS AND WHAT IS AIMING TO BE THE LOCAL POLICE

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Abstract

The present paper aims to reveal the definitive elements; the particular and specific elements that are the structural and spiritual cause that have determined the birth, functioning and development of the local police entities. At the same time I wanted to motivate in my own version the reason of being, of existing and functioning of such a structure, as well as what they mean for the community, citizen and the administration of the town, of the locality. The answer to the question whether such a public institution was necessary or not, what is the spirit that it imprints at the level of the relation between the citizen and "the organ", service of order and public safety. What is different to what existed until the present day comes in front of the inhabitant of the town? The approach method of the issue, the behavior is different of what we have known so far.

Through systematizations and statements of the problem subsumed to the title of the article, the presentation, I wanted to outline the facet of the local police through which to offer a simple painting nevertheless with the many casts claimed by the corpus of the structure for a comprehensive and reflexive understanding of its ego in close connection with its Alter ego, that is the citizen.

The present article addresses both to the eager in the academic environment and also to the "common" citizen, indebted and willing to have a first and eloquent idea about what is and what aims to be this new public institution with judicial personality or in subordination of the local councils and which solves the daily problems of the citizens, which affect them directly or indirectly. Through the 7 (seven) abstract problems I appreciate that the discursiveness of the presentation will clear many aspects that at first sight could hardly be distinguished compared with the existence and functioning of the structures of national police.

Keywords: *local police force, community, public service*

Introduction

The consequences of the European integration over the system of Law in Romania manifest as significant as in other fields and in terms of what the local police represents, seen from the point of view of the organization, legal basis, action, recruitment, personnel, personnel training, transparence and prediction, in what exists and undertakes, internal and international cooperation and of course through the fact that it is subordinated to the community.

The activities of the local police are undertaken mainly in close connection with the population, the community, and its efficiency depends on the support of the latter. The trust of the population (of the community) in the local police is in close connection with the attitude and the behavior of the police regarding the community and particularly with the respect of

the human community, the freedom and the fundamental rights of the person that are stated mainly in the European Convention on Human Rights[1].

1. The birth and the evolution of the structures of local (community) police

The police serving the community (community policing) is an idea that took birth in the United Kingdom, where it meant the association of the entire community, particularly in order to prevent crime, but also detecting it.

This model was taken by many European countries and gained broad valences and with benefits for the citizens.

The assistance (the support) of the population (community) is the main mission of the community police.[2]

The comprisal of various services throughout the objectives of the community police is different towards what we knew so far, meaning that it changes the role of the police, that, by ceasing to be a force used in the society, becomes an "organ" serving the latter. For some years in Europe has appeared a new tendency, to integrate the police in the civil society and to bring it closer to the population.

This purpose is reached through the development of the community police in several member states. One of the main used means consists in the awarding of a status as an "organ" of public service and not just a simple "organ" instructed to apply the law.

If it is wanted that this transformation remains not just a linguistic one, it is necessary to introduce a category of "services" within the actions of the community police, through the objectives of a modern democratic police. The assistance assured by the local (community) police aims generally practical situations in which it should intervene.

In Romania, the community police was founded in 2005 as a condition sine qua non related to the increase of autonomy of the local public administration and of course as a necessity inducted by our admission in the European Union and the increase of the role of the state.

2. The local purpose and the fields of structures of the local police

In the 1st art. of the Law of local police the followings are stipulated: the local police is constituted with the purpose of carrying out main attributions of defending the fundamental rights and freedoms of the person, of private and public property, the prevention and discovery of crime, in the following fields:

- Public order and silence, as well as safety of citizens;
- Traffic on public roads;
- Discipline in intersections and street display;

a) Environment protection;
b) Commercial activity;
c) Listing of the population;
d) Other fields of activity appointed by law.

The local police functions in villages, towns, municipalities, sectors of municipality Bucharest and of course the capital.

The number of local police officers is according to the European Norm that states the report 1/1000, one police officer for 1000 inhabitants.

The organizational chart of each entity is decided by the local council of the community, as well as the main missions required by the territory and the population in the respective area.

[1] The Committee of Ministers of the European Council, The European Police Code of Ethics, Recommendation (2001) 10' 19.08.2001, p. 31.
[2] The European Police Code of Ethics. Recommendation (2001)1. 19.09.2001 p. 24.

Making a parallel between the Romanian police and the local police to show that the first is a reactive organ and, centralized and independent and the local police is a proactive organ decentralized which has close connections with the community. They act preventive and act as good householders.

3. The subordination, coordination and management of the local police

The local police are subordinated to the local council that is to the citizens of the town and must present quarterly and yearly information notes regarding its immediate activity. The local council decides performance assignments for the institution as well as the priorities given by the specific of the town.

The mayor coordinates closely the entire activity of the local police; he is in fact also the president of the commission for order and public safety and at the same time the one who approves yearly the plan for order and public safety of the town. On a monthly basis and each time necessary he is informed in written form about the results of the work and the objectives in the following period of time.

The mayor acts accordingly to the stipulations and obligations established by the Law of the local police.

The immediate and direct management of the local police is carried out by the General Manager or Executive Manager. He is helped by the Deputy Manager, Service and Office Managers, based on the yearly, monthly, weekly and daily plans. The integrative character of the work is defined also by the working procedures specific for the approximately 126 point-like that should be fulfilled by a structure of the local police.

4. Organization, facilities and the missions of the local police

The local police is organized and functions by means of decision of the deliberative authorities of the local public administration, as a functional compartment within the special apparatus of the mayor or as a public institution of local interest.[3]

The number of positions, the personnel categories, the facilities, endowment as established through the Framework Regulations and Organizational and Functional Regulations of the local police issued by the local council. The facilities of the structure are realized according to the legal provisions but also according to the particularities and distinctiveness of the town and comprise the individual and collective facilities of the institution.

The provision of lethal, non-lethal facilities, with communication technique as well as auto means confers to the institution management and executive capacity. The missions result from the fields subsumed by law and are about 65 and the tactic ones are of approximately 130.

The main three missions with strategic character:

- Supervises that the law is respected
- Helps the persons that are in need, trouble;
- Helps the citizens in the relation with other private and state institutions, as well as with other citizens

5. Working steps, cooperation and relation of the local police – of the local police officer.

Strength, respect and appreciation of the local police consist in my opinion in the compliance with the procedural working steps, in the relation with the citizen of course. These are:

- Preventive notification
- Formal notice
- Warning
- Fine

[3] Law of the local police no. 155 from the 12th of July 2010, Art. 4.

No matter the field of responsibility there is the smallest risk for the agent to fall in the disgrace of the citizen if he complies with these steps and of course realizes them personally of by dispatch data base, from where he can extract information regarding the prior behavior antecedents.

For the fulfillment of missions the local police, the local police officer cooperates and relates with the citizen, with all institutions subordinated to the city hall, with the institution from the town, county as well as the institutions in the area of public order and safety and national defense.

There is no mission for which information or cumulated action is not needed that is why the relational linkage is mandatory.

6. Legal competence and training of the local police officer

The responsibility area of the local police officer from a legal point of view is from contravention downwards. The crime field exceeds directly the activity of the local police officer. He undertakes the first steps. Regarding the progressive training of the local police I can show that it is being realized through 3 methods: taking-out from production through brief summons at the working place.

It is important for the local police officer the need to train continuously by means of an own system so that at the end of the year he/she can quantify the new or the added value in the field of preoccupation as well.

7. What aims to be the local police and the local police officer?

The direct answer to this relative question is: a structure used by the town hall with a particular spirit, an institution close to the citizen and the police officer an esteemed public servant, appreciated, wanted and close to the citizen.

The profile of the local police officer must be ennobled by the biological, professional, social-human and behavior component.

Conclusions

The presented material can be seen as an invitation to deeper analyze of the role, purpose and missions of this new institution within the town halls or related with the town halls, so that the citizen can be informed through various ways regarding the lucrative areas of this service and the institution should take into consideration the expectations of the inhabitants of the community.

I consider through this presentation “the face” of this new institution was projected together with its multiple responsibilities and competences in a polychromatic and multiform area such as that of the public order and silence, street sanitation, environment, commercial control, in one word of the sum of arrangements and good order, the utility of the environmental and of the beauty.

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THE DYNAMICS OF RAPE IN MODERN INDIAN SOCIETY

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Abstract

Rape is malum in se. *In modern India the institution of rape has flourished immensely in recent times, and presently it is a national problem. It is a challenge to the contemporary thinking. Gender equality is enshrined in the Indian constitution. In ancient times rape existed in Europe while women in India had divine personification as* Shakti *and in modern times millions of Indians visit* Shakti *temples with liberal offerings.*

This paper addresses dynamics of rape with particular reference to India. Rape is a multidimensional and dynamic phenomenon. Its perception may vary from radical to liberal, and the legal definition keeps evolving. Mathematically it may be modeled as a space-time function. In 2013 the definition of rape was revised both in India and US. It, however, differs. The paper examines recently introduced Indian law to reduce rape incidents.

There are various areas which need attention to have insight into the phenomenon of rape and measures to control the incidents. This includes understanding the effect of socio-economic-demographic predictor variables in reduction of the incidents. The authors have applied statistical analysis using correlation to rape data from all the 35 regions of India with eleven socio-economic-demographic predictor variables to find the effect of the variables on incidents of rape. It was found that only literacy status, or literacy status as a proxy, for male and female in urban population indicated significant desirable effect on the number of rape incidents. This sets a direction for further research. The rape challenge should be addressed with afresh look from multidisciplinary perspective besides law and enforcement. The fusion of data, analyses, and ideas including from sociological, cultural, psychological, and religious aspects, and encouraging merging of tools from disciplines, should provide an insightful and sound approach to find solution to the intractable social problem. Also social change with the universal wisdom thoughts of great minds like Mahatma Gandhi and Elie Wiesel is desirable to eliminate ills, including rape, from the modern society.

Keywords: *rape, literacy, Indian penal code, space-time function, socio-economic-demographic predictors, multidisciplinary perspective, statistical analysis, correlation, religion.*

Introduction

Rape is grave wrong. It is malum in se and can have severe consequences for victims. It has been occurring since the ancient times across cultures. It has too often been ignored and mischaracterized. Rape is a complex phenomenon with many dimensions. It is one of the most controversial issues, and is a challenge to the contemporary thinking. It is perhaps the

most under-reported crime. However it is on the increase despite changes in the legislation, practice and procedure in the investigation, high profile coverage in the media, and support available to the victims. However only a small number of perpetrators are brought to justice, and victims are routinely blamed for the crime. Dealing with rape is much more complex than dealing with most other crimes.

In India rape is horrific fact of life, a common occurrence that makes everyday news, and in recent times the incidents have increased sharply. Gruesome crimes against women have become rampant. A high profile savage gang rape case in December 2012 where a student was gang raped with unimaginable acts of cruelty. It pricked the conscience of the nation with unprecedented protests and drew the world attention. Again in August 2013 a similar brutal gang rape case in Mumbai stirred memories similar to the December 2012 case.

Recently the United Nations Secretary General Ban Ki-moon urged the Indian government to take action to protect women, and the United Nations High Commissioner for Human Rights Navi Pillay called rape in India a national problem. The Government of India acted swiftly, modified laws and had set up fast-track courts to deal with the crime. It is ironical that in spite of awakening, the sexual assaults continue to rise while gender equality is enshrined in the constitution. In modern India women occupy position of leadership in almost every field.

The paper describes dynamics of rape in the modern Indian society, and possible reasons for the crime. The history of rape law was traced, and current law with amendment was examined. Quantitative statistical analysis using correlation was employed on rape data with eleven socio-economic-demographic predictor variables. It was found that literacy plays an important role in reduction of the crime. It may be mentioned that to effectively contain rape crime requires a fresh look with multidisciplinary approach to gain insight and find solution to the intractable social problem.

Introduction to the Study of Rape

The English word rape is derived from Latin word *rapere.* The Merriam Webster dictionary defines rape as "unlawful sexual activity". However there can be several types of rapes like penetrative, non-penetrative, consensual, marital, and the crime of rape varies culturally.

Rape is not a modern phenomenon. Rape has been described in early religious texts in the western world. Greek mythological god Zeus raped women including Hera, Io, and Phoenician princess Europa, and the continent Europe is an eponym of the Princess. In ancient Rome rape had been reported e.g. the Rape of the Sabine Women. Rape was considered as a less crime for a particular girl than with the other girl like rape of a non-virgin was less crime than rape of a virgin. About three centuries back in France, marrying without parental consent was considered rape.

In Indian constitution gender equality is enshrined with provision of positive discrimination in favor of women. In modern India women occupy position of leadership in most fields. Even in ancient India women enjoyed status equal to men or even better. The divine personification of feminine power was and is known as *Shakti.* In India there are many temples dedicated to *Shakti* like *Mata Vaishno Devi Mandir* where number of annual pilgrims are over ten million and a nearby expansive modern university by the same name is funded by offerings by pilgrims at the *Mandir*. It confirms faith in the goddess by a large number of followers even in modern India. However rape as a national problem exists.

The reasons for rape include sexual pleasure, socioeconomic, power, sadism, anger, and evolutionary. For example persons in power can coerce mating with little fear of reprisal.

The perception and understanding of rape varies widely. The two extreme views are liberal and radical, and it is generally perceived somewhere between the two extremes. Liberal perception views rape as an assault like other assaults while the radical perception takes into consideration dominant role because of manhood. The judgment of rape can therefore be subjective. In some societies rape is a taboo for the victim.

The legal definition may vary depending on the country and time. In mathematical parlance rape may be described as a function of space and time. For example the definition of rape in US has been revised since January 2013 as "Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim". Marital rape was considered a crime in the US and the same has since been abolished. Since February 2013 in India the word rape has been substituted by the word "sexual assault" and it includes assault without penetration and new offences. The lack of physical resistance is immaterial. In contract in Germany the victim has to prove that sufficient resistance was put to avoid the assault for example in 2012 the judgment went against a 15 year old female rape victim. The judge pronounced "Es hätte weglaufen oder Hilfe rufen konnen, aber es hat alles iiber sich ergehen lassen. Das reicht nicht, um jemanden zu bestrafen" implying that not enough resistance was put. However in some societies like in Afghanistan rape is the ultimate taboo for the victim and the law and society imprison the victim. Elie Wiesel's wisdom thought "There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest" is apt in this and similar situations.

The impact of rape on victims can be severe. A victim may get severely traumatized, suffer from various stress disorders, and face social stigma. Many victims consider it as a moral injury. Many are harmed in their sexuality for a long time. The victim has to bear humiliation and shame. The victim's family may resort to honor killing or forced marriage to the rapist. To help victims there are institutional support centers, both governmental and NGOs. They have enhanced sensitivity and understanding of rape, and help victims including healing the damage. However there are a significant number of silent victims as rape is one of the most under-reported violent crimes. The reasons may include social stigma, fear of reprisal from the perpetrator, the attitude of the police, painful medical examination, possible humiliation in the court by the defense attorney, and in some societies the victim is imprisoned.

Indian Penal Code and Recent Amendments

The Indian Penal Code (IPC) describes an exhaustive list of all cases of crime and punishment. The first IPC document was prepared in 1860 with 511 sections, and came into force in 1862. Many amendments have since been made the IPC. However in the state of Jammu and Kashmir the IPC is known as Ranbir Penal Code (RPC). The IPC takes into account *actus reus*, *mens rea*, and the fundamental maxim *"actus non facit reum, nisi mens sit rea"* meaning the act is not culpable unless the mind is guilty. For example *mens rea* translates in the IPC as intentionally, knowingly, voluntarily, fraudulently, or dishonestly.

There are two sections in IPC pertaining to rape viz. section 375 and section 376. In 375 IPC a man is said to commit "rape" to a woman in a circumstance like against her will, without her consent under false promise, consent by coercion, with her consent when she has unsound mind or intoxication and is unable to understand the nature and consequences of that to which she gives consent, or with or without her consent when she was under 16 years of age. The section 376 defines a minimum punishment of seven years for the perpetrator. The punishment covers an exhaustive list of rape situations like punishment for a public servant, police, and gang rapists.

After the December 2012 Delhi gang rape case, the Government of India constituted a judicial committee headed by Justice J.S. Verma to suggest amendments in criminal laws and punishment to deal firmly in sexual assault cases, and based on the recommendations of the committee a Criminal Law (Amendment) Act 2013 was passed. The word rape has been replaced with sexual assault and it includes assault without penetration, and penetration to any extent other than penile penetration is also an offence. New offences have been added like acid attack, sexual harassment, voyeurism, stalking with related punishments.

Indian Rape Statistics and Analysis

There are various areas which need attention to gain insight into the phenomenon of rape and measures to control the incidents. This includes understanding the effect of socio-economic-demographic predictor variables in reduction of the incidents. In this study statistical analysis using correlation was employed for the analysis of 2012 rape data from

all India consisting of 35 regions representing 28 states and seven union territories. Eleven predictor variables were used to find the effect of the variables on incidents of rape. The predictors selected were male and female literacy in rural, urban, and total population, sex ratio, percentage of rural and urban population, work participation rates for male and female population. The rape data taken were from the National Crime Records Bureau under Section 376 IPC, and predictor variables chosen were from the 2011 Census Data. Predictors were taken as the independent variables while rape rates defined per *lakh* (1,00,000) of population were taken as the dependent variables. It may be mentioned that in India Vedic numbering system is used to denote large numbers like *lakh* (also *lac), crore* (IO^7), *arab* (10^9), and *kharab* (10^{11}).

Table 1 depicts descriptive statistics of rape rate and the variables for all the 35 regions of India. It is observed from the Table that the mean value of rape rate was 2.8 with standard deviation of 2.04 across the regions. Mean value of male literacy ranged from 91 to 82 for urban and rural areas respectively, and for the total region it was 85 with relatively lower standard deviation values across the regions. Mean values for female literacy ranged from 82 to 66 for urban and rural areas, and for total combined areas it was 71. Mean Sex ratio was 929 and that is number of females per thousand of male population. Mean values for rural and urban percentages to total population were 61 and 39 respectively with the same standard deviation of 22 across the regions. Mean values for male and female work participation rates were 54 and 26 respectively with relatively lower standard deviation across the regions.

Fig. 1 depicts 2012 rape rates across 28 states and seven union territories of all India. Mizoram state had the highest rape rate of 10.1 per lakh of population while the union territory of Lakshdeep had no reported rape incident. The reasons of highest rape rate in Mizoram include both high incidence of the rapes and high incidence of reporting. In Mizoram the overwhelming population is Christian and Christian ethics of forgiveness is misused and there is little fear of reprisal for committing crime coupled with and grim drug abuse problem there. In Lakshdeep women enjoy a respectful status. More than 40% of households are headed by women unlike in the rest of India.

Further bivariate correlations were computed between the predictor variables and rape rates across the Indian regions. All variables considered were on interval scale.

Table 1: Descriptive Statistics

	Mean	Std. Deviation	N
Rape Rate	2.7886	2.04346	35
% Male Lit. (T)	85.2717	6.32653	35
%Male Lit. (R)	82.3357	7.05876	35
% Male Lit. (U)	91.3011	3.54109	35
% Fem. Lit. (T)	71.4677	10.48830	35
% Fem. Lit. (R)	66.0589	11.31427	35
% Fem. Lit. (U)	82.1720	6.23847	35
Sex Ratio	929.30	79.682	35
% Rural	61.2140	22.20706	35
% Urban	38.7860	22.20706	35
WPR(M)	54.4029	5.11897	35
WPR (F)	26.3114	9.68427	35

Fig. 1. Rape Rate across Indian States and Union Territories in 2012

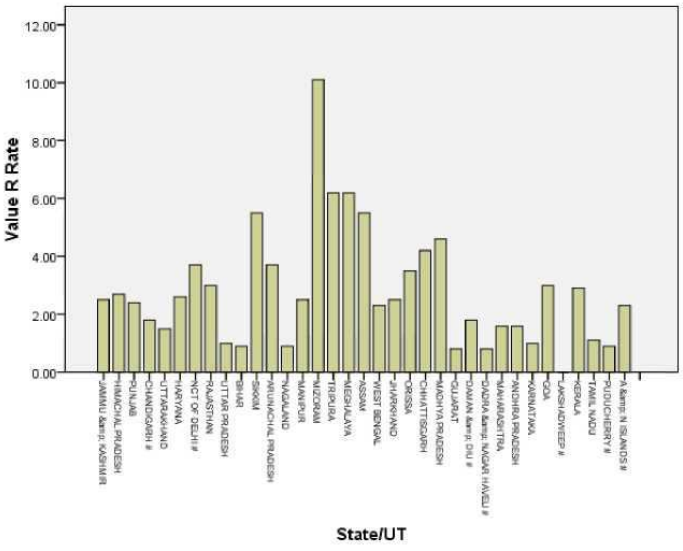

Table 2 depicts correlation coefficients of rape rates with predictor variables. It is observed that out of the eleven predictors, only male and female literacy status in urban population had significant effect on reduction of rape incidents. The strength of association was relatively significant at 5 percent significance level with 2-tailed sigma or p values of 0.032 and 0.014. Literacy is definitely a key indicator to reduce the crime. The correlation analysis, however, does not take into account of independent effects of the predictors on the dependent variable. It provides indication for further research using advanced techniques to explore more closely for the independent effect of the predictors on the rape rate. Literacy can, however, be a proxy for development related factors.

Table 2: Correlation Coefficients

	Rape Rate		
Variables	Coefficient	Sig. (2-tailed)	N
Rape Rate	1	.000	35
% Male Lit. (T)	.022	.899	35
%Male Lit. (R)	.014	.938	35
% Male Lit. (U)	-.363*	.032	35
% Fem. Lit. (T)	.177	.308	35
% Fem. Lit. (R)	.178	.307	35
% Fem. Lit. (U)	-.412*	.014	35
Sex Ratio	.175	.316	35
% Rural	.197	.256	35
% Urban	-.197	.256	35
WPR(M)	-.080	.650	35
WPR (F)	.287	.094	35

*. Correlation is significant at the 0.05 level (2-tailed).

Conclusions

Rape is *malum in se.* In India it has increased sharply in recent times and presently it is a national problem. It has drawn world attention including from UNO. Recently the Government of India modified laws and had set up fast-track courts to deal with the crime.

Rape is a challenge to the contemporary thinking. It is perhaps the most under-reported crime. Dealing with rape is much more complex than dealing with most other crimes. It is irony that rape cases in India are on the increase while gender equality is enshrined in the constitution, and in modern India women occupy position of leadership in almost every field. Many Indians, as in ancient times, still consider divine personification of women and visit *Shakti* temples with liberal offerings.

The paper addresses dynamics of rape and models it as a space-time function. Rape is a multidimensional and dynamic phenomenon. The perception and understanding of rape may vary widely. The two extreme views of rape are liberal and radical and the rape is generally perceived in between these extreme views. The judgment of rape may therefore be

subjective. The definition of rape keeps evolving and is country specific. In some societies rape is the ultimate taboo for the victim.

The authors have applied statistical analysis using correlation on the Indian rape data punishable under Section 376 IPC with eleven socio-economic-demographic predictor variables. The data taken were for all the 35 regions representing all India. The result of the analysis indicated that out of all the predictor variables chosen, only male and female literacy status in urban population or literacy status as a proxy indicated significant effect on reduction of rape incidents. The future work may include application of advanced statistical techniques to the analysis of the rape data to get deeper insight into the problem. It may be suggested that more predictor valuables be used for the analysis to unfold their effect on rape incidents.

It may be stressed that laws are necessary but not sufficient to contain rape incidents. It is desirable that the rape challenge should be addressed with a fresh look from multidisciplinary perspective besides law and enforcement. The fusion of data, analyses, and ideas including from sociological, cultural, psychological, and religious aspects, and encouraging merging of tools from disciplines, should provide an insightful and sound approach to find solution to the intractable social problem.

The social change with the universal wisdom thoughts of great minds like Mahatma Gandhi and Elie Wiesel is desirable to eliminate ills, including rape, from the modern society. Mahatma Gandhi's thought on religion "... our innermost prayer should be a Hindu should be a better Hindu, a Muslim a better Muslim, a Christian a better Christian" puts the religions in the right perspective in building character, and Elie Wiesel's thought "There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest" helps in gaining inner strength with desirable action even in extreme conditions. High character and moral strength would make the society courageous and free from ills including rape.

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EU BORDER CONTROL FOR COMBATING CROSS BORDER CRIME

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Abstract

One area of particular interest, both the European Union and Romania, is the border issue, which requires the setting up of a common institutional framework that embodies all specific courses of action across the EU.

The area of border control and Schengen cooperation, which is very important and at the same time very sensitive, imposed at Community level, a continuous development of legal regulations in order to ensure effective security of the EU's external borders.

Romania's geo-strategic position makes the Black Sea an indispensable part of Euro-Atlantic security and prosperity. Many of transnational threats facing Europe come from this region. A big part of the area is dominated by economic stagnation, unsafe and insecure borders, organized crime activities and frozen ethnic conflicts.

Keywords: *border control, organized crime, risk analysis, target.*

Introduction

Romania's accession to the European Union has resulted in, among other things, establishing new borders of the Community. Thus Romania becomes the eastern limit of the European Union, an important factor, with high share in promoting the interests, values and shared vision of the European space to these areas, the vector of interests of Western democracies, and will support in the future different forms of EU cooperation to other areas of interest. In the process of accession Romania, has assumed a number of responsibilities regarding the security of these new borders, taking care to follow the rules and requirements to ensure a secure environment within the European Union.

In this context, to support the primary objective of the Union's Justice and Home Affairs, to " maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons is ensured in accordance with appropriate measures on border controls, asylum, immigration and the prevention and combating of crime", Romania consistently works for the progressive implementation of the measures necessary to achieve an appropriate level of security of its borders.

These measures are included in the Schengen acquis which Romania was obliged by the Treaty of Accession to the European Union to accept fully it. After 1 January 2007, Romania has entered a new phase, which involves preparing and adopting the necessary measures to eliminate internal border controls subsequent to accession to the Schengen area which is not coming even in 2014... certainly not because of the border police.

1. The development of the international security area

Romania is preparing systematically for Schengen accession, while conducting activities aimed at integration into the European Union. European integration is based on the concept of freedom based on human rights, democratic institutions and law enforcement.

These common values have proved to be necessary to ensure peace and prosperity in the European Union, constituting criteria for EU enlargement.

Developments in the international security environment at the beginning of the century and millennium, have radically changed the perception of threats to continental and global security, which resulted in the review of a broad list of concerns, determining policy makers and analysts advised to assert that "the world changed", that a thorough cooperation, to mobilize resources combating unconventional threats.

The analysis of the development of contemporary societies reveals that although the intervention measures and the specialized agencies of social control have intensified against acts of organized crime in many countries there is a resurgence and a duplication representing a social problem whose way of expression and resolution is of interest both for control factors in the field, such as the police, judiciary and administration, and public opinion.

Threats which a decade ago was considered quasi-unanimous, speculations or analytical assumptions were unlikely to materialize now become reality.

In the current international security cannot be defined in a geographical sense, new challenges and new reality of national security involving the construction of a new vision, which involves strengthening cooperation with traditional partners who share the same values and goals. Without an integrated risk management system (described in Chapter 3) and vulnerabilities cannot achieve the national security management system and community. By solving cases and observing the changes, police make proposals to change the legal norms.

2. The European framework regarding border control

2.1 Legal Community instruments for border control

Area of border control and Schengen cooperation, which is very important and at the same time very sensitive, imposed at Community level, a continuous development of legal regulations in order to ensure effective security of the EU's external borders.

With the accession to the European Union, the border with Ukraine, Moldova and Serbia (+ MN) became the external border of the European Union. To secure this border, at national level, there have been implemented most of the objectives set out in policy documents so that, currently, state border control and surveillance is carried out in accordance with the integrated model of border security.

Romanian border authorities as of January 1, 2007 apply to border control and surveillance principles applied by the European Community, as laid down in EU legal instruments.

2.2 Common policy in the field of border control

Romania' engagement in Schengen integration led to a series of changes aimed essentially at creating legislative and structural compatibilities harmonizing Romanian institutions with the EU Member States ones and establish measures to ensure rapid implementation of new decisions adopted within the Union.

One area of particular interest, both the Union and Romania, is the border issue, which requires the creation of a common institutional framework that embodies specific courses of action across the EU.

2.3. External border control

Member States shall designate national service or services in respect of the staff responsible for the control of border crossings in accordance with their national laws. They will have to ensure staff and resources so as to ensure efficient, high and uniform checks at external borders.

Schengen Catalogue states: External borders control, extradition and readmission: Best practices and recommendations stated that effective border surveillance and control requires adapting the number of staff in risk assessment by analysis".

Schengen Catalogue recommended that staff intended to control border crossings to undergo a course on their future tasks, which should include: knowledge of the provisions of the EU / EC relevant basic rules and procedures, document control (validity, forgery), entry

rules, stay and exit from the country, coordination and cooperation with other agencies, special cooperation between states in the Schengen internal borders, police cooperation, the Schengen Information System, judicial cooperation.

However, it is recommended to continue training in the future, meaning that member institutions should provide programs and facilities at central and local level to assist staff by providing education and training on relevant issues in their work.

In Romania border crossing points are under the subordination of the Ministry of Internal Affairs which coordinates the border control activity and ensures public order through Romanian Border Police[1].

2.4. Abolition of controls at internal borders

In accordance with the definitions adopted by the Schengen Borders Code[2] "internal borders" shall mean the common land borders, including river and lake borders of the Member States, Member States airports for domestic flights and sea ports, river and lakes of the Member States for the links of regular ferry.

Citizens, whether belonging to a third country or enjoying the Community right of free movement, may cross borders in any place without being subject to a prior check. Principle enshrined in the Schengen Agreement of 1985, under which will be removed internal border controls is only applicable to common borders of Schengen Member States and does not require the abolition of borders, as it is often interpreted. The fact that it will abolish checks at internal borders shall not affect in any way the controls within the territory.

2.5. Characteristics of border control

The legal basis for the control of these categories is given by: Directive no. 38/2004 (Articles 4, 5 and 27) on the right to free movement and residence in Member States for Union citizens and their family members, Schengen Borders Code (Article 7) and the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation on the other part, on the free movement of persons.

Before discussing specific border control rules for these categories, we must specify which persons are enjoying the Community right of free movement, but without making reference to the evolution of the concept and its consecration in international legal instruments, European and national.

2.6. The efficiency of border surveillance activity

At the national level, to achieve effective supervision of the border we are seeking to adopt, improve and implement best practices of EU countries. To this end the new design was implemented surveillance and border control, which provides the general framework for a unitary approach, consistent with European standards of security concepts and a high level of border control.

The main purposes of border surveillance, identified by the Schengen Borders Code are:

- prevent unauthorized border crossings;
- countering cross-border crime;
- take measures against persons who have crossed the border illegally.

2.7. Joint border control

As required by international law, the borders are the " line which determines the limit of the territorial jurisdiction of the state" and present de facto the limits sovereignty, being a sensitive topic in all countries. Meanwhile, the process of European integration and regional cooperation issues grouped border area, often exclusive relationships between two countries, in a separate chapter. Integration into the Schengen area is directly dependent on the success

[1] Decision no. 445 of 9 May 2002 for the approval of the methodological norms of implementing the Emergency Ordinance no. 105/2001 regarding the state border.
[2] Art. 2, alin. 1

of each state record in the process of securing their borders, including by improving border control and management by policy standards, principles and community requirements.

Usually, by establishing joint control EU countries are pursuing a number of key objectives such as:

- changing the complicated and lengthy formalities at the border crossing operations making them faster and simpler for individuals and for the transit of goods;
- a border control more efficient and transparent;
- reducing the operating costs of border checkpoints;
- reducing risks of various phenomena difficult to counter, such as corruption and illegal trafficking of goods and people.

3. Main risks and threats at national security

Sources of instability, dangers and threats are directly proportional to the evolution of society, with positive effects, but also many contradictory effects. Interestingly, cross-border crime is not a product of a civilization or another, as sometimes is understood, but the degradation of the human condition, the evil that grows increasingly more inside world.

Romania's geo-strategic position makes the Black Sea an indispensable part of Euro-Atlantic security and prosperity. Many of transnational threats facing Europe come from this region. A too much of the Basin is dominated by economic stagnation, unsafe and insecure borders, organized crime activities and frozen ethnic conflicts.

Knowledge advances in threatening rhythms and is spreading rapidly and expanded spaces. Traditional pre- industrial societies, national and regional economies, social attitudes and behaviors are interrelated and remodels civilizations face, everything seems to be heading inevitably towards global state. At the beginning of the third millennium it is clear that a new world is born, even if, in some way at least three worlds continue to exist.

3.1. Operational risk analysis[3] - Case study

Stadard, risk analysis" is based on geographical and demographical and leads to a description of the areas of high, normal and low risk. This is used to support the different needs in surveillance. Another standard procedure is to gather strategical data on illegal crossings.

3.1.1 Border Crossing Points

In the following we will focus on border crossing points. Here Schengen Borders Code requires a 100 % control of persons crossing the border. Where this requirement is met, it means that every person will meet with a border guard. So everyone will have to have personal travel documents for legal entry or exit. People who do not have travel documents available will be sent back.

But when they occur due to other types of illegal activities, they cannot be discovered during border control measures. Let's take an example of illegal crossing of persons inside the trucks. It is well known that this type of activity takes place several times a day along the EU border. Often it is the poor victim of trafficking networks, one that is hidden in the truck, the person who otherwise will not make any change in crossing the border. To control the contents of a container truck requires a task that requires a lot of time, X-ray machines, CO2 samples, heartbeat detectors, etc.

3.1.2 Periodical operations

Suppose that during a week a joint operation is organized, where the idea of action is to detect activities led by people inside the truck by increasing control over the day. The trucks are randomly selected, because the idea is to collect statistical information available. In a BCP the lower traffic is of 200 trucks per day. Because downloading is hard work, the staff is able to search the 10 trucks, which means 5% of the total traffic each day. The following figure shows the situation of 200 trucks of which 10 (5%) are controlled.

[3] Adapted from Frontex: *Operational Risk Analysis 2010-2013.*

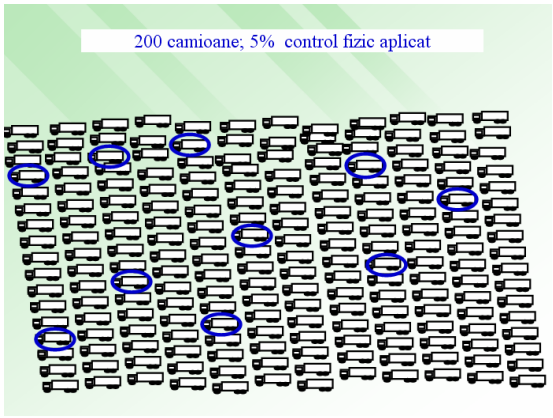

Figure 1. Randomly selected trucks for check

The border guard, reading this, should review their professional history and tell what conclusions can be obtained after such an operation !

Author's experience is as follows: The chief who is responsible will say something like "The result is zero. The test indicates that there are no problems, which is not surprising. Here in the BCP, there are no problems guiding the trucks.

There is another possibility, and it appears at the end of such an operation. In this case, one of the checks provides a positive result that illegal people are discovered in one of the trucks.

Again, the chief will likely conclude: "We normally do not experience any problem on the issue of people inside the truck. However, we have organized an action. I immediately arrested a driver who unfortunately decided to try this type of criminal activity.

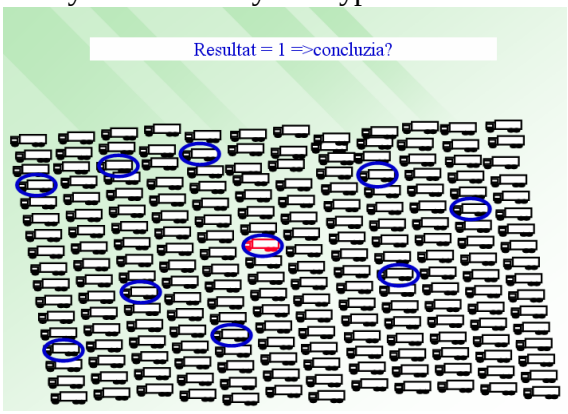

Figure 2. Randomly selected trucks for check with positive result

Commanders (chiefs) work in a culture where facts are more important than speculation. Besides, they deal with media. In this world there is room for "baseless speculation". At this point, we do not deal with the agenda of local managers and local media. Concept, which is now the base, is the common European border control, which has serious implications for the conditions of life and internal security in the EU Member States. So not to be caustic, but critical now! Figure describes how the situation looks in a very important scenario:

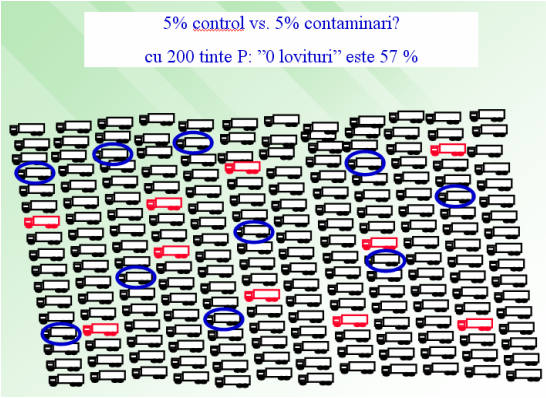

Figure 3. Truck randomly selected for check with real scenario

Statistical science says the following facts absolutely true: if we control 5 % of the trucks and choose targets randomly from a set of 200 trucks, and only 5% of trucks carrying illegal migrants (red trucks), we can find often 0 hits. The probability that the result is "zero" is 57 %.

Zero result does not prove, however, the absence of serious problems. 5% contamination is an extreme example. The actual level of contamination is lower than the normal considered which in the case study is alarming (such as the situation at the border between Austria and Hungary in 2010, when in a month passed 3,000 Asians).

We should be even more cautious in the case of a seizing. The probability of hitting once is close to 50 % in this awful scenario with 5% contamination. Together, the probability of hitting the "zero" or "one", is greater than 90 %. Other findings from this action are often impossible, even if the threat is very high.

If we make the same extrapolation for the green border, this result "one" suggests the following: we check 5 % and detect a case. That leaves 95 %, which means 19 other cases of contamination. The first estimate of the total of offenses is 20 cases. If here we played the God and created a contamination level of 5%, which means 10 trucks contaminate, we know that the real number of facilitating was only 10, not 20 as they appear in extrapolation.

Academic Question: We have two responses suggested the conventional one "no problem" and the assumed "20 potential cases of trafficking of migrants"?

Mathematically both lose 10 cases. The first suggests "no further action" and the second can be seen as a "call for serious measures to improve law enforcement". "Knowing" that the actual number of trucks involved was 10, which reply is more important and more realistic estimated in this case?

3.1.3 Constant randomly check

Previous chapter analyzes periodic actions where checks handle a small number of trucks. In statistical terms this is a simple sample taken from a lot smaller. And as we have seen, there is a high risk of not having hits, even for a relatively high crime rate. Zero findings are related to a small lot. In large lots we shall not encounter such difficulties. How close to reality are our findings will always depend on the size of the lot and the number of checked subjects. It would be interesting to define some basic rules for practical application, but they must be made in another setting.

Here, we see another end of this topic: an unlimited lot. When the number of trucks checked is very high, our findings will become a predictable manner. If traffic is contaminated at 5% level (5% of trucks carrying migrants), 5% of randomly selected checks will have a positive outcome.

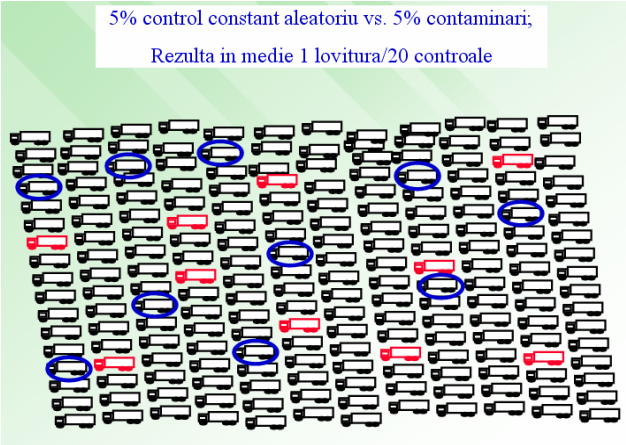

Figure 4. Randomly selected trucks for predictible result

Also in this case, it is important to see all the statistical figures: the control of 5% of the trucks we find only 5% of smuggling activities. Annual result of BCP should then be multiplied by 20 to achieve a valid estimate of the total number of illegal activities. This, extrapolation "is the same as that applied in the first instance about green border surveillance.

3.1.4 Targets

As the above examples show, random control is not very effective and comprehensive. Even large work load leads to poor results, and the vast majority of illegal activities remain undetected.

Profiling was described earlier as a function, where information based on information value is used to select targets for control. This should lead to more accurate and thus more cost-effective and better preventive effect.

Let us agree to our example of profiling, joint operations where trucks are sought during exercise. Information workers made risk profiles to be pursued in this exercise. When referring to trucks, indicators can be as follows: country of origin, owner, route, type of goods, etc.

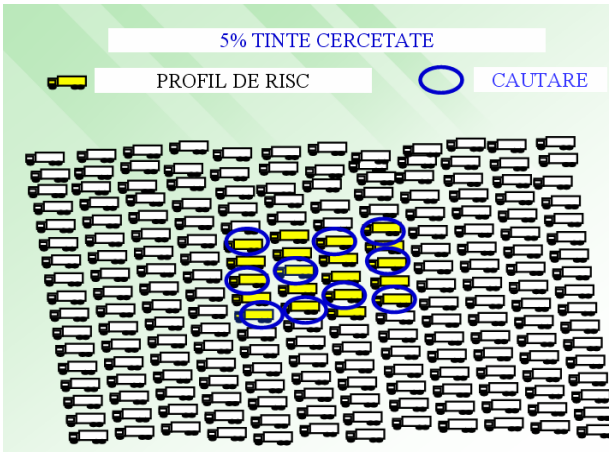

Figure 5.

Again, technical and human resources in the BCP allow only 10 checks during the operation. The next figures show checks based on profilation.

Risk profile does not cover all the crimes. **70% of the border crossings take place in the trucks that correspond to the risk profile.**

The estimated number of hits is 3.5 probably because we hit three or more trucks. Very different from the previous example, where I had to hit just 0 or 1 truck? and again, it is important to see what's behind the statistics. This time you will not have to multiply detections in the way we did in the previous one. The crowd is now the corresponding risk profile. We searched 50 % of them and found three illegal cargos. Conclusion: the 20 trucks that match the risk profile is an average of 2x3 = 6 cases in total.

One can now say that I have done is not enough to count criminal activity: even if we stopped three trucks, seven have passed so the crime is profitable. This conclusion is valid only if we talk about organizing an operation and if we leave things the same after that. But if you maintain this level of control (50 % searches in the group corresponding risk profile), the arrest rate is huge and very soon will reduce illegal crossings. Why?

First, the result of arrest is very damaging for the person involved. In this case, these losses count more than any potential payments for illegal transportation of people.

Another aspect is that maintaining a constant risk of being searched, will make systematic illegal activities of the same individuals become impossible: the risk of being arrested accumulates over time. The following graphic shows the progress over a year. This truck illegally transports people once a month. At the BCP, every time he encounters a risk of arrest of 30 %.

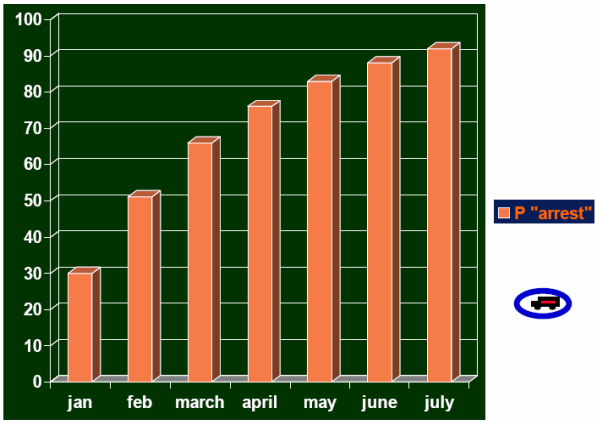

Figure 1. Constant risk for offenders to be searched

The probability of being arrested is almost 50% in February and June and is almost certain that this truck would be seized. Even a low risk of arrest will block these facilitators to operate continuously. In this example the level of border control is 30%. Much lower than is usually effective.

Let us have one more look at the figures regarding profilation.

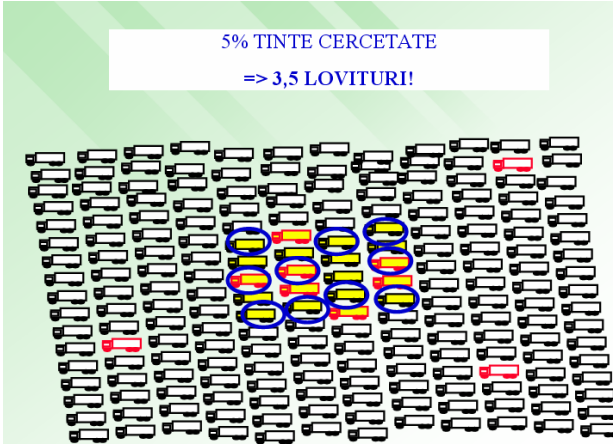

Figure 7. Risk profile of the targets

There are 3 trucks in the black area. As all the profiled trucks will be checked, the other trucks will not be checked. It is very important to know what trucks will be checked because this would mean a possibility for a BG to be corrupt. How do we remedy this? By distributing the decision making power. This means that at every orhanizational level managers may order checks where they consider necessary but the field workers may act upon their own decision.

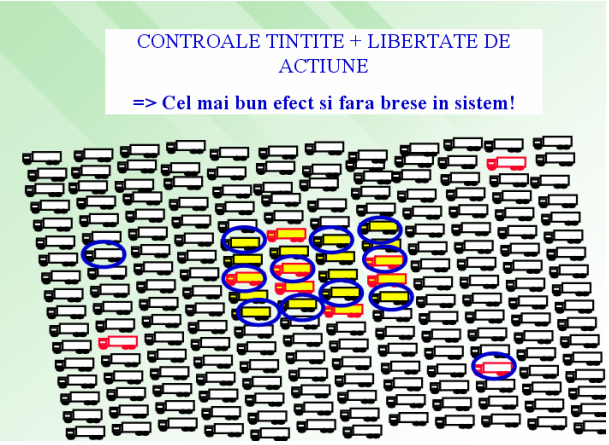

Figure 8. Hit check and intelligence

A good analyst should be able to show how each scenarion can be foreseen. This could be done by paying attention on the initial factors or risk indicators of operational level.

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THE REGULATION OF THE OFFENCES AGAINST THE CORPORAL INTEGRITY AND HEALTH IN THE NEW CRIMINAL CODE

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Abstract

The incriminations made by Section II of Chapter 1 of Title II of the actual Code (section titled "Hitting and damage to corporal integrity or to health")"are found in the Special Part of the New Criminal Code[1], in Chapter II of Title 1, chapter titled "Offences against life, corporal integrity or health". This chapter maintains the offences of "Hitting or other violence" and "Bodily harm". These two offences include the consequences of the serious bodily harm – offence which disappears from the new regulation. Beside the two offences, are maintained in the new structure: "Hitting or injury causing death" and "Bodily harm by negligence". Are added within this chapter "Ill treatment applied to minors" (in the actual regulation this offence is stated by Art 306) and "Scuffle" (in the actual regulation this offence is stated by Art 322).

The new Criminal Code incriminates in the same conditions hitting or injuries causing death[2]. The only difference is given by the limits of the punishments, which are smaller, in accordance with a new logic of the punishments residing from the entire economy of the new Code. But even regarding these offences must be given the necessary procedural warranties regulated by the new Code of Criminal Procedure[3] or by different international documents, to which Romania is part[4].

Key words: offence, violence, new Criminal Code, new Code of Criminal Procedure

[1] Law No 286/2009, with subsequent modifications and amendments.
[2] Art 195 "*Hitting or injury causing death*" states that "Should one of the acts in Art 193 and 194 result in the victim's death, the penalty shall be imprisonment from 6 to 12 years".
[3] Law No 135/2010, with subsequent modifications and amendments
[4] L.M Trocan, *Garantarea dreptului la apărare în lumina dispozițiilor tratatelor internaționale specializate în materia drepturilor omului şi jurisprudenței CEDO*, the Annals of the "Constantin Brâncuşi" University of Târgu-Jiu, Legal Sciences Series, No 4/2010, pp.111-128 (http://www.utgjiu.ro/revista/jur/pdf/2010-4/8_LAURA_ MAGDALENA _TROCAN.pdf)

1. Hitting or other forms of violence[5] and bodily harm[6] – the differences to the current regulation

The new Criminal Code brings a simplification in the area of offences against corporal integrity or health, regrouping the offences incriminated by Art 180, 181 and 182 of the actual Code in just two offences, namely: *hitting or other forms of violence*, stated by Art 193 of the new Code and *bodily harm*, stated by Art 194 of the new Code.

Hitting or other forms of violence is found as name in the new Criminal Code, but the incrimination has a wider area of application regarding the immediate consequences.

The new Criminal Code maintains as marginal name the offence of bodily harm, in Art 194, but the content of the offence is modified, meaning that are taken some of the consequences stated by the actual Code to the offence of serious bodily harm.

The acts of violence committed against family members, which in the actual regulation appear as agreed versions of the offences of hitting or other forms of violence and bodily harm, appear as a different offence, having as marginal name *family violence*, stated by Art 199.

The new Criminal Code no longer states an incrimination named serious bodily harm, but we found some of the consequences of this offence in the other two incriminations left: hitting or other forms of violence and bodily harm.

The criterion for the distinction between these two offences is double, namely the duration of the medical care needed and the nature of the injuries caused, but with some differences. Regarding the number of days for medical care, it has renounced to a detailed differentiation based on a smaller number of days, keeping a single criterion, namely that of 90 days. If the offence caused only physical sufferance, is shall be incriminated according to Art 193 Para 1, if the offence affected a person's health or caused traumas with a seriousness evaluated at 90 days, it shall be incriminated according to Art 193 Para 2, and if it caused traumas that needed more than 90 days of medical care, it shall be incriminated according to Art 194 Para 1 Let b).

Also Art 194 incriminates the consequences related to the second criterion, namely the nature of the traumas. From this perspective, we note that it preserves only the hypothesis of infirmity, to the idea that includes the loss of a sense or organ and the cessation of its function. The term "ugly" is replaced with the term "serious and permanent esthetic damage", used both by the doctrine, as well as in practice.

Unlike the old text of serious bodily harm, the aggravated form of the offence of bodily harm of the new Criminal Code, committed with direct intention (Art 194 Para 2) is made a correct reference to only the first three consequences stated for the normal offence [Art 194 Para 1 Let a), b) and c)].

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[5] Art 193 of the new Criminal Code titled "*Hitting or other forms of violence*" state: (1) Hitting or any other act of violence causing physical suffering shall be punished by imprisonment from 3 months to 2 years or by fine; (2) Hitting or acts of violence that caused an injury needing medical care of up to 90 days shall be punished by imprisonment from 6 months to 5 years or by fine; (3) Criminal action is initiated upon prior complaint of the injured person.

[6] Art 194 of the new Criminal Code titled "*Bodily harm*" states: (1) The offence stated by Art 193 causing one of the following consequences shall be punished by imprisonment from 2 to 7 years:
An infirmity;
Traumatic lesions or affected the health of a person, needing medical care of more than 90 days;
A permanent and serious esthetic harm;
Abortion;
Jeopardized the life of the person.
(2) When the offence was committed with the purpose of producing one of the consequences stated by Para 1 Let a), b) and c), shall be punished by imprisonment from 3 to 10 years; (3) The attempt to the offence stated by Para 2 is punished.

If, the purpose for which the offender acted was to produce an abortion, it shall be considered a plurality of offences between *bodily harm* and one of the offences stated by Chapter IV Title I of the Special Part, titled "*Offences against the fetus*", namely the *termination of pregnancy*[7] and *violence against the fetus*[8].

If the purpose for which the offender acted was to endanger the life of the person, it shall be considered as attempt of murder[9].

2. Bodily harm by negligence[10] – differences from the actual regulation

This offence is restructured in agreement with the new configuration of the offences of hitting and other violence and bodily harm. It is noticed a simplification of the regulation, in accordance with the one made for the offence of homicide out of negligence.

An aggravated form was included, for the case in which two or more persons have been injured. Thus it was removed the inconsistency from the actual Criminal Code, which states as a single offence the case in which two or more persons have been killed out of negligence[11] and a plurality of offences when they have only been harmed. Maintaining this inconsistency could have led to a more severe punishment for the author of the harm by negligence of more persons (as an effect of maintaining the plurality of offences) unlike the situation of the author of a homicide out of negligence committed in similar circumstances.

3. Ill treatment applied to minors[12] and scuffle[13]

In this chapter are added two offences, which in the actual regulation are stated in another title, namely Title IX *Offences that infringe upon relations that concern social community life*, Art 306 and 322.

Bringing these two offences in this category is motivated by their legal object, namely the fact that, really, the offences incriminated prejudice, firstly the physical integrity or the health of the person, and in subsidiary, the family relations or relations that concern social community life.

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[7] Art 201 of the new Criminal Code

[8] Art 202 of the new Criminal Code

[9] Stated by Art 188 and 189 of the new Criminal Code

[10] Art 196 of the new Criminal Code titled "*Bodily harm by negligence*" states: (1) Acts provided in Art 193 Para 2 committed by a person under the influence of alcohol or a psychoactive substance or in the performance of an activity representing an offence shall be punished by imprisonment from 3 months to one year or by fine; (2) The offence stated by Art 194 Para 1 committed by negligence shall be punished by imprisonment from 6 months to 2 years or a fine; (3) When commission of the act in Para 2 is the result of non-abidance by legal provisions or precaution measures for the exercise of a profession or trade, or for the accomplishment of a certain activity, the penalty shall be imprisonment from 6 months to 3 years or a fine; (4) Should the acts in Para 1-3 are committed by two or more persons the special limits are incremented by one third; (5) For the non-abidance of the legal provisions or precaution measures or the accomplishment of the activity which led to the commission of the acts stated by Para 1 and 3 is by itself an offence, shall be applied the rules of the plurality of offences; (6) The criminal action shall be initiated upon the prior complaint of the injured person.

[11] We hereby reiterate the provisions incriminating the offence of *homicide out of negligence* – namely Art 178 Para 5 of the actual Criminal Code, stating that "*If the act committed caused the death of two or more persons, the maximum of the penalties in the previous paragraphs can be supplemented by an increase of up to 3 years*". Such provision is not found in Art 184 of the actual Criminal Code stating the offence of *bodily harm by negligence*.

[12] Art 197 of the new Criminal Code titled "*Ill treatment applied to minors*" states: "*The act of seriously jeopardizing, either by measures or treatments of any kind, a minor's physical, intellectual or moral development, committed by the parents or by any person entrusted with the minor for raising and education, shall be punished by imprisonment from 3 to 7 years and the prohibition of certain rights*".

[13] Art 198 of the new Criminal Code titled "*Scuffle*" states: (1) Participation to a scuffle between several persons shall be punished by imprisonment from 3 month to one year or by fine; (2) If the scuffle caused any serious injury upon a person's corporal integrity or health and it is not known which of the participants committed the acts, the penalty of imprisonment from 1 to 5 years shall be applied to all of them, except to the injured person, who shall be held liable according to Para 1; (3) In case that death of a person was caused, the special limits of the penalty shall be incremented by a third; (4) A person who has been caught in a scuffle against his will, or who tried to separate others, to reject an attack or to defend another person, shall not be punished.

Besides, regarding the offence of *ill treatment applied to minors*, it has never been considered an offence with a special active subject. It can be committed not only by a family member or against a family member, but also against minors institutionalized in placement centers or in other forms of child protection centers, by the persons who must care for them.

It is noticed also the fact that in other legislations the offence of ill treatment applied to minors appears in the same shape or in a similar one, in the category of offences against corporal integrity or health[14].

Numerous legislations also state the *scuffle* in the category of offences against corporal integrity[15]. It is noticed the fact that it is maintained the exoneration from criminal liability of the person who is caught in a scuffle against his will or who tried to separate the others.

The differentiations from the actual regulation regard the limits of the punishment, which are considerably lower than in the actual Criminal Code.

4. Procedural provisions on the offences against corporal integrity or health

From the five offences representing the content of the chapter regarding the offences against corporal integrity or health, only for the offences of *hitting or other forms of violence*, stated by Art 193 of the new Criminal Code and *bodily harm by negligence*, stated by Art 196 of the new Criminal Code, the criminal action is initiated at the prior complaint of the victim.

This means that, according to Art 111 of the new Code of Criminal Procedure, at the beginning of the first hearing, the victim is notified (besides another series of rights) of the fact that she has the right to file prior complaint against the person she holds responsible.

If one of the offences is flagrant, the criminal investigation organ is compelled to establish its commission even in the absence of a prior complaint, but subsequently it shall summon the victim, and if she agrees to file a prior complaint, shall initiate the criminal investigation. Otherwise, the criminal investigation organ shall submit the case file to the prosecutor proposing the classification[16].

If, for any of the two offences, the prior complaint of the victim is missing, the criminal action cannot be initiated. Also, if the victim, after submitting such a complaint, withdraws it, the initiated criminal investigation can no longer be continued[17]. In this latter case, the victim shall support the judicial expenses caused to the state[18].

An important modification brought by the new Code of Criminal Procedure in the area of the prior complaint regards the term in which it can be submitted. Thus, it must be submitted within three months from the day the victim learned about the offence, with the mention that if the victim is a minor or an incapable, the three months term shall begin from the moment when his legal representative (or new legal representative, if he has been replaced) learned about the offence[19].

All the other provisions contained by the actual Code of Criminal Procedure in the area of the prior complaint are maintained by the new Code of Criminal Procedure.

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[14] Art 152 of the Portuguese Criminal Code, Art 225 of the German Criminal Code, Art 92-93 of the Austrian Criminal Code.

[15] Art 231 of the German Criminal Code, Art 91 of the Austrian Criminal Code, Art 154 of the Spanish Criminal Code, Art 151 of the Portuguese Criminal Code, Art 133 of the Swiss Criminal Code.

[16] Art 298 of the new Code of Criminal Procedure.

[17] Art 16 of the new Code of Criminal Procedure.

[18] Art 275 Para 1 Point 2) Let b) of the new Code of Criminal Procedure.

[19] Art 296 of the new Code of Criminal Procedure.

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INVESTIGATION OF CRIMES AGAINST FAMILY MEMBERS

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Abstract

The authors intended the first part of the article to present considerations on the moral and legal rules that provide for the rights and obligations of participants in family relationships. An analysis of acts constituting offences in light of the New Romanian Criminal Code will be provided.

Part two will include the presentation of activities specific to criminal investigations where acts are committed that meet the elements of offences against the family, activities such as: the crime scene investigation, the hearing of people with different standings in the case, forensic and psychiatric expertises, reconstructions, searches.

Keywords: investigation, forensic science, family, crime

Introduction

Given the fact that violence in general is on the rise in society and that the Romanian legislation on domestic violence either has recently changed through Law No. 217/2003 on preventing and combating domestic violence, republished in the Official Journal of Romania No. 365/2012, or will change through the new Romanian Criminal Code, Law No. 286/2009 published in the Official Journal of Romania, Part I, No. 510/2009, at the date of its entry into force (probably 1st of February, 2014, according to Law No. 187/2012 for the implementation of Law No. 286/2009 regarding the Criminal Code, published in the Official Journal No. 757/November 2012), we consider it useful to approach this topic.

The usefulness of the subject also lies in the role, demonstrated and supported by scientific theories that the family, as a primary social group, exerts on the child's personality and behaviour. In addition to the fact that the violence manifested in the family of origin spoils the family environment, it increases the chances for children to reiterate the social role models provided by their parents[1].

The parallel presentation of the current Romanian legislation and of the new legislative bills has scientific relevance among specialists from the country, as well as from

[1] Onica-Chipea, L., *Aspecte socio-juridice privind protecția drepturilor copilului. Studiu de caz în județul Bihor* (Socio-Legal Issues of Children's Rights Protection. A Case Study in Bihor County), Expert Publishing House, Bucharest, 2007, pp. 27-28, pp. 230-238.

abroad, because they can thus become familiar with or gather documentation regarding: certain terms (family member), the basic concepts in this area (domestic violence), the offences provided for under the Romanian Criminal Code, peculiarities of forensic science investigation.

The complexity of the forensic investigation and the peculiarities of the activities carried out in order to establish the truth in a case, to demonstrate the constituent elements of offences which lie in the use of violence, are also due to the specificity of the relations between the participants.

Violence is one of the major problems of the contemporary world. The media constantly inform us about various manifestations of this phenomenon, from its most aggressive forms such as wars or crimes of homicide, assault, rape, theft, destruction of property, to the less shocking ones, such as verbal violence[2].

Also, the topicality of the subject presented here is given by the fact that domestic violence occurs in all social and cultural backgrounds, in various ways, among people whose relationships are generally based on friendship, fondness, mutual moral and material support. Moreover, globalization, whose effects we have witnessed in the past few decades, has an impact even on social structures, such as the family[3].

Migration for family reasons, with its two main forms4: family formation and family reunification, can lead to the formation of environments with a vulnerability risk for the occurrence of domestic abuse, whether we think of the family members left behind, or of those who have left.

As a result, there are many situations where these facts fall within the category of things that go unnoticed, and, when they do get to be known by non-governmental organizations or institutions charged with their investigation, assistance or counselling, problems often occur in practice, because of the holding back and fears of the categories of people involved.

In its general sense, domestic violence is any act that is physically or emotionally injurious and occurring between family members.

The Romanian Criminal Code in force at the time of writing the article, defines a family member, in Article 149^1, as "the spouse or close relative, if the latter lives and shares the household with the perpetrator".

According to Article 149 of the Criminal Code, close relatives are "the ascendants and descendants, brothers and sisters, their children, as well as people who have become such relatives by adoption, in compliance with the law...".

The New Romanian Criminal Code, in Article 177, paragraph 1, defines family members as:

a) the ascendants and descendants, brothers and sisters, their children, as well as people who have become such relatives by adoption, in compliance with the law;

b) the spouse;

c) persons who have established relationships similar to those between spouses or between parents and children, if they live together.

According to paragraph 2, the criminal law provisions regarding family members, "shall also apply, within the limitations provided for in para. (1), letter a), in the case of adoption, to the adopted person or his/her descendants in relation to the natural relatives".

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[2] Nicoleta-Elena Buzatu, *Illicit Consumption of Narcotics – Violence Generator, vol. MEDIMOND, International Proceedings Medimond – Monduzzi Editore International Proceedings*, Division, Publishing House Editografica, Bologna, Italy, 2012, p. 221.

[3] Viorica Banciu, Angela Jireghie, Delia Ștefania Florian, *Multiculturalism and Metissage in the Globalization Context,* Tudományos és kulturális folyóirat, published by Szent István Egyetem Gazdasági, Agrár- és Egészségtudományi Kar Békéscsaba, 2012, no. 18, p. 80, gfk.tsf.hu/docs/system/files/files/pers2012_xvi_18.pdf

[4] Nicolaie Iancu, *Migrația internațională a forței de muncă (International Labour Migration),* Pro Universitaria Publishing House, Bucharest, 2010, p. 96.

Law No. 217/2003 on preventing and combating domestic violence, republished, extends the notion of the family member in Article 5. Thus, at letter b), we notice that beside the husband/wife, the former husband/former wife is mentioned; at letter d), the guardian or another person who exercises by law or in fact his/her rights regarding the child, and at letter e), the legal representative or caregiver of a person with a mental illness, intellectual disability or physical handicap, except those who fulfill these responsibilities in the exercise of their professional duties.

We note, in particular, the legislator's concern for persons who, without having well-defined capacities, need protection from possible abuse, namely "persons who have established relationships similar to those between spouses or between parents and children, if they live together" or "the former husband/former wife", in compliance with the law on preventing and combating domestic violence.

Law No. 217/2003 also defines domestic violence in Article 3, stating that it means "any intentional act or omission, except for self-defense or defense actions, manifested physically or verbally, committed by a family member against another member of the same family, which causes or may cause an injury or physical, mental, sexual, emotional or psychological suffering, including threats of such acts, coercion or arbitrary deprivation of liberty". Preventing women from exercising their fundamental rights and freedoms also constitutes domestic violence.

Broadly speaking, a family is a social group whose members are bound by relationships of age, marriage or adoption and who live together, cooperate in economic matters and have children in their care[5].

In the criminal doctrine, the term "minor" from civil law has always been used in reference to children and adolescents, since 1938. After 1990, under the influence of international documents, the Romanian legislation has also been using the notion of "child", as synonymous with that of "minor", giving priority to the sociological meaning of the concept, as compared to the legal one[6].

Aspects of criminal law relating to offences against the family members. Comparison between the Romanian Criminal Code and the proposals contained in the new Criminal Code

Title IX, Offences Against Relationships Regarding Social Cohabitation, Chapter I, Offences Against the Family, of the Romanian Criminal Code (in force at the time of writing this article), includes offences that have as a legal object: social relationships regarding social cohabitation within the family, social relationships that prevent the fulfillment of the legal obligation to support the person entitled to maintenance, social relationships that involve caring for the physical, mental, intellectual and moral development of the minor.

In the new Romanian Criminal Code, crimes against the family are provided for in Title VIII, Chapter II, Art. 376-380. The novelty it brings about is the criminalization of a new fact, namely the offence of obstruction of access to general compulsory education, under Art. 380.

We also notice a regrouping of the offences mentioned in this chapter, namely: the relocation of the offence of ill treatment of a minor provided for in Art. 306 Criminal Code in force to another chapter of the new Criminal Code. Also, the offence of incest, provided for in Title II Offences Against the Person, Chapter III Offences Regarding Sexual Life, Art. 203 of

[5] Cornelia Rada, *Repere antropologice ale familiei în contextul sănătății sexual-reproductive (Anthropological Landmarks of the Family in the Context of Sexual and Reproductive Health)*, "Academiei Române" Publishing House, Bucharest, 2009, p. 40.

[6] Nicoleta-Elena Buzatu, *The Minor – The Active Subject of a Crime*, vol. MEDIMOND, International Proceedings Medimond – Monduzzi Editore International Proceedings, Division, Editura Editografica, Bologna, Italy, 2012, p. 226; For the regulations on minority contained in the new Criminal Code, see Nicoleta-Elena Buzatu, Regulations Concerning the Minors as Stipulated in The New Penal Code, in Vol. *„Criza actuală în contextul globalizării"* ("The Current Crisis in the Context of Globalization"), Pro Universitaria Publishing House, Bucharest, 2010, pp. 837-839.

the Romanian Criminal Code, is relocated to the same chapter of the new Criminal Code, Art. 377.

The legal content of the offence of incest provided for in the two codes is different in terms of the penalty, in the sense that the new Criminal Code provides for a lesser penalty (imprisonment from one year to 5 years) as compared to the code currently in force (imprisonment from 2 to 7 years). Also, the content of the offence in the new Criminal Code highlights the lawmaker's concern to be explicit as regards the subjective side, i.e. sexual intercourse between relatives in direct line, between brothers and sisters which is committed with consent.

The criminal offence of bigamy is provided for in Article 303 of the Romanian Criminal Code, having as the material element of its objective side the action of "entering into a new marriage while still married to another" in the wording of para. 1, or an unmarried person's action of "marrying a person whom one knows to already be married" in the wording of para. 2.

We note that bigamy is also provided for in the new Criminal Code in Art. 376, having the same material element of its objective side. In this case too, penalties are different in that they are lower in the new Criminal Code. In the wording of para. 1, the penalty is imprisonment from 3 months to 2 years or a fine, as compared to imprisonment from one to 5 years in the current code, and in the wording of para.2, imprisonment from one month to one year or a fine, as compared to imprisonment from 6 months to 3 years in the current code.

The offence of family abandonment is provided for in Art. 305 of the Romanian Criminal Code and in Art. 378 of the the new Criminal Code. In terms of the objective side a few changes have occurred, namely: in para. 1, letter c, bad-faith failure to pay the alimony established in court for three months is an offence in the new regulation as compared to the current regulation in which the period is of only two months. Also, a new variant of committing this act is introduced by para. 2, as "the bad-faith failure by the person convicted to provide regular benefits established by court order in favour of the persons entitled to maintenance from the victim of the offence". In terms of penalties, the new regulation provides for a single penalty; in the form of imprisonment from 6 months to 3 years or a fine. Thus, we notice that the minimum limit of 6 months is preserved and the maximum limit is increased from 2 years to 3 years in the variants of para. 1, letters a and b.

The offence of non-compliance with child custody measures, provided for in Art. 307 of the Romanian Criminal Code, respectively in Art. 379 of the new Romanian Criminal Code has the same legal content, including as regards the penalty. Thus, in terms of the objective side the act can be commited by a parent retaining his minor child in the wording of para. 1 or by any person entrusted with the minor through court order repeatedly preventing the parents from having personal contact with the minor, under the conditions established by the parties or by the competent body[7].

In Art. 380 of the new Criminal Code the offence of obstructing access to the general compulsory education is provided for. According to para. 1 the penalty will be imprisonment from 3 months to one year or a fine for the act of the parent or the person entrusted by law with a minor who "unduly withdraws the minor or obstructs him/her by any means in attending general compulsory education".

Characteristics of the investigation of crimes against the family

In the case of the offence of bigamy, the circumstances under which the offence was committed should be determined. For this purpose, establishing the identity of the subjects of

[7] Regarding the right of the minor to have personal contact with the parent to whom he/she was not entrusted, and how to exercise it, see Andreea Drăghici, Andreea Tabacu, Amelia Singh, *Relațiile minorului cu părinții și familia extinsă. Aprecierea interesului superior al copilului. Criterii de apreciere (The Minor's Relationships with His/Her Parents and Extended Family. An Assessment of the Child's Best Interest. Criteria for the Assessment),* EIRP conference, Danubius, Galați, conference proceedings, pp. 86-94.

the crime, the number of participants and the capacity they have is required. In order to correctly classify the crime and make liable the persons involved the subjective side of the offence will be determined. Thus, the fact that both spouses knew they had a previous marriage or that only one of them had a different marriage will be demonstrated. Also, instigators or accomplices in the case may come forth, in which event information and data on the sequence of the participants' activities will be collected by researching the documents submitted at various institutions and by hearing persons having different capacities.

In order for the action of concluding a marriage/new marriage to constitute the material element of the offence of bigamy, on the one hand a personal connection between the first and second marriages has to be demonstrated, in the sense that one of the parties is identical in both marriages[8] and on the other hand the validity of the first marriage has to be documented. To this end, the research bodies will request information from the Local Public Community Service of Personal Records or through collaboration with another service of the kind from the country or through international police cooperation.

In the case of family abandonment having a circumstantiated active subject, namely the person who has the obligation to ensure the maintenance of the victim, in the hearing of the persons special situations may arise during the interrogation, given the relationships between the subjects of the offence. For example, relationships between spouses, parents and children, grandparents and grandchildren, brothers and sisters, etc. Documentation will be gathered regarding the special cases in which the maintenance obligation rests upon several persons who will be held liable as co-authors.

To demonstrate the objective side of the offence, evidence will be provided regarding the offender's actions, for the purpose of demonstrating by any legally-permitted means whether: the person entitled to maintenance was abandoned, banished or left without any help; whether the victim was abandoned or banished from his/her dwelling. To this end, data will be collected from the crime scene, the dwelling or the area where the victim was abandoned, from witnesses, neighbours, people in the surroundings.

In the case of bad-faith failure to pay the maintenance obligation, the existence of bad faith will be proved, i.e. the perpetrator's means of livelihood will be determined, the changes in his/her state of health, the economic welfare of the family within which the offender lives, the expenses he/she incurs, be they justified or not, the periods during which he/she paid, the periods of interruption of payment. In order for the perpetrator to be held liable, the case documentation should reflect an omission, i.e. the author should have financial means, yet refuse to pay. When referring to a specific period of time, e.g. two months, evidence of the respective period should result from the statements of witnesses, of the persons deprived of the financial contribution or from the means of payment, etc.

The offence of ill treatment of the minor brings two directions to the investigation. One regards the activities specific to offences against the person, for example, where acts of physical violence were directed against the body of the living person (the material object of the crime). Another direction is the one investigating mental violence or actions that jeopardize the proper upbringing and education of the minor. In this case too, taking into account the passive subject – the minor – and the active subject circumstantiated by his/her capacity (mother and/or father) or the person entrusted with the minor's upbringing and education, there will be practical situations in which the minor's statements will be obtained with difficulty, because of their fear, trauma. The minor's hearing will be carried out under the rules of criminal tactics and the provisions of the Criminal Procedure Code, in compliance with the phases of the hearing.

[8] In this respect, see T.R. Popescu, *Tratat de dreptul familiei (A Treatise on Family Law)*, vol. I, Bucharest, 1960, p. 280.

Inside the family the child spends most of the time. Emerging personality of the child is severely influenced by the example of the parents[9]. The family is preparing the child for life, it can be an educational environment, or contrary, the conductor of behavioural deviations[10].

The offence of ill treatment of a minor is a continuing offence, i.e. the actions/inactions applied are lasting, repeated and with negative consequences on the minor's proper development. The forensic investigation must prove, first of all, the fact that the measures and treatments to which the minor was subjected by the perpetrator resulted in a serious threat to the minor's development. Secondly, the investigation should clarify whether the perpetrator's action or inaction had a direct effect on the minor's bodily integrity and health[11]. Forensic medical, psychiatric, traceological expertises a.s.o. will be presented.

In the case of the offence of breach of child custody orders, the degree to which the parent to whom the child was entrusted, or who had the right to have contact with the minor complied with the limitations arising from their legal obligations or from the conditions set by mutual agreement between the parties.

Thus, the hearing will include the persons involved, witnesses, participants in the case who can provide information regarding the programme, the activities they carry out together, the visiting schedule, the duration of the visit, the way they relate to one another.

Documentation will be gathered in a similar manner in cases where either the parent or the person to whom the minor was entrusted does not allow him/her, withdraws him/her or hinders him/her in attending the general compulsory education. In order to establish the circumstances in which the act was committed, data and information will be collected from the micro-social groups that the minor and the circumstantiated active subject attend. As a result, the investigation bodies will gather information from the management and/or teaching staff of the educational institutions about the minor's school attendance, participation in the extracurricular activities organized, their school performances, places they frequent, habits they have. The family environment will provide particulars of the participants, thus allowing the demonstration of the subjective side of the offence, hence the form of guilt of each person involved. Co-participation is possible and there may be instigators or accomplices involved in a case.

In addition to activities specific to forensic investigation, in all cases searches, re-enactments, presentations for recognition may take place.

Of course, public interest does not only lie in identifying the perpetrator and individualizing the sentence, but also in the carrying out of activities of social reinsertion of offenders convicted for crimes of domestic violence.

Special care will be provided for the victim of a crime against the family, in terms of ensuring his/her counselling, assistance and protection.

As a general rule, the victim may apply for a protection order, in which case data will be collected with regard to the following issues: the relationship between the victim of domestic violence and the person against whom the restraining order is requested; establishing the circumstances in which the act was committed; details about the conditions of place, time and manner of committing the act; whether there were acts of domestic violence perpetrated on other members of the family; what people were present, especially whether they were minors; is there any risk for the minors; did the victim suffer any physical injury or

[9] Laura-Roxana Popoviciu, *Răspunderea penală a minorului*, Pro Universitaria Publishing House, Bucharest, 2012, p. 32.
[10] *Idem.*
[11] Carmina Aleca, Andreea Drăghici, *Particularități ale cercetării infracțiunii de rele tratamente aplicabile minorului (Peculiarities of the Investigation of the Offence of Ill Treatment of a Minor)*, CKS e-books 2010, Pro Universitaria Publishing House, Bucharest, pp. 243-248.

was he/she psychologically abused; did the victim receive medical care; does the victim have a forensic science certificate[12].

Also, specialized central bodies of public administration, public local administration authorities, non-governmental organizations and other representatives of civil society will constantly take measures to prevent and combat domestic violence and the offences resulting from the application of abuse, of all forms of violence: verbal, psychological, physical, sexual, economic, social, and spiritual.

Conclusions

The complexity of the forensic investigation and the peculiarities of the activities carried out in order to establish the truth in a case, to demonstrate the constituent elements of offences which lie in the use of violence, are also due to the specificity of the relations between the participants.

The topicality of the subject presented is given by the fact that domestic violence occurs in all social and cultural backgrounds, in various ways, among people whose relationships are generally based on friendship, fondness, mutual moral and material support.

There are many situations where these facts go unnoticed, and, when they do get to be known by non-governmental organizations or institutions charged with their investigation, assistance or counselling, problems often occur in practice, because of the holding back and fears of the categories of people involved.

Public interest does not only lie in identifying the perpetrator and individualizing the sentence, but also in providing counselling, assistance and protection for the victims of the victims of crimes against family members, of domestic violence, in general.

Specialized central bodies of public administration, public local administration authorities, non-governmental organizations and other representatives of civil society will constantly take measures to prevent and combat domestic violence and the offences resulting from the application of abuse, of all forms of violence: verbal, psychological, physical, sexual, economic, social, and spiritual.

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[12] See Annex to Law No. 217/2003.

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LEGAL PERSON – ACTIVE TOPIC OF CORRUPTION INFRACTIONS

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Abstract

In the context of the changes occurred in the international legislation, under the circumstances of the necessity of amortize the penal legislation with the provisions of the European legislation concerning the corruption, Romania made efforts in adopting the Law no. 70/2000, regarding the prevention, identification and retribution of corruption deeds[1] with the aim of counteracting the illicit activity of some category of persons who, using the positions and attributions which they should carry on, broke the law with the aim of gaining, for them or for other persons, money, goods, and other material benefits. In this context it becomes necessary to analyze the opportunity of incriminating the corruption deeds committed by the legal person as an active topic of these categories of infractions.

Keywords: criminal liability, sanctions, legal person, natural person

Introduction

The corruption phenomenon exists from the dawn of time, the corruption as universal social phenomenon developed along with the society, with the state and the right, getting new forms of existence. At present, it manifests as a phenomenon typical for the bureaucratic state, budgetary, representing a threat for democracy, circumventing the good administration, equity and social justice principles, denaturing the competition and impeding the economical development of the state and the stability of democratic institutions.

This phenomenon can be identified both in underdeveloped countries, where the corruption phenomenon is favored by the lack of authority of the administration, leading to an inadequate reaction towards the corruption acts, increasing this phenomenon to exacerbate dimensions following the dictatorial character of the administration, culminating with the dissemination of the corruption at all high levels of the political hierarchy[2], and also in the countries developed from economical point of view, with stabile, traditional democracies, which are capable, due to the competence and stability of the legal system, to counteract the effects of the large corruption scandals, out of which businessmen and politicians were incriminated in countries as Italy, Latin America, France, Japan, United States of America[3].

[1] Published in the Official Journal (OJ) no.219, dated on May 18th 2000.
[2] V. Dobrinoiu, *Corupția în dreptul penal român*, Atlas Lex Publishing House, Bucharest, 1995, pp. 6.
[3] V. Dobrinoiu, *Corupția în dreptul penal român*, op. cit, pp. 22.

Being a universal phenomenon, the corruption raises concern at global level affecting both private and public sector. The phenomenon, which represents not only an ethic problem, affects the loyal competition between companies and can lead to financial and image prejudices. Moreover, with the lapse of time there are destroyed the benefits of the free market forces, due to the defalcation of large amounts of money by the public authorities from various countries in the disfavor of the citizens who should benefit of the investments in large projects in education and health domain.

The existence of corruption can be noticed at the level of all structures of the society, affecting severely the political, economical, justice, central and local[4] administration area, generating the weakening of political authority, degradation of the standard of living, alteration of the state authority, reduction of the population confidence in the institutions and social values[5]. Due to the dimensions of this phenomenon with severe consequences for the social-economical or regional development, the international community developed useful instruments with the aim of preventing and combating efficiently the corruption acts[6]. Despite the negative effects generated by this phenomenon at global level, there is an international right to contain efficient rules which lead to the eradication of corruption, each country adopting its own laws and strategies.

European normative framework

By means of the provisions of art. 3 of the second protocol of the Convention, regarding the protection of the financial interests of the European Communities[7] it is foreseen the obligation of the members states to take the necessary measures with the aim of bringing the legal persons to book for committing three categories of infractions: fraud, active corruption and money laundering. To be able to bring the legal person to book for committing these types of infractions it is necessary that the infraction to be committed on behalf of the legal person, by any person who acts on its behalf as member of an organ of the legal person, who exercises leading duties in it, having the power to represent the legal person and the capacity to make decisions on its behalf. Also, in case of committing an infraction, the legal person can act either as an accomplice or instigator and also, it can commit only an attempt to an infraction.

Also, OECD (Organization for Economic Co-operation and Development)[8] Convention regarding the combat of bribery over the foreign public agents in the international commercial transactions[9], elaborated in 1997, establishes by means of the provisions of art. 2, the obligation of the members states to take the necessary measures with the aim of inserting in its legal rules provisions regarding the responsibility of the legal person in case of committing a corruption infraction.

Likewise, we mention on these lines also the provisions of the R Recommendation (88) 18, adopted by the Committee of Ministers of the European Council, on October 20th 1988, regarding the commitment over the criminal liability of the legal person.

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[4] E. Cherciu, *Corupția caracteristici și particularități în România*, Lumina Lex Publishing House, Bucharest, 2004, pp. 4.

[5] V. Dobrinoiu, *Corupția în dreptul penal român*, op.cit., pp. 6.

[6] S. Corlățeanu, D. Ciuncan, *Infracțiuni de corupție și infracțiuni privind piața de capital*, Universul juridic Publishing House, Bucharest, 2009, pp. 21.

[7] Published in OJ 221, on July 19th 1997, pp. 12-22.

[8] OECD is an international organism founded in 1960, which has in its competence 30 member states and its objective is to perform economical and social research, by collecting and analyzing information regarding the economical development and financial stability of the states. Romania is a member of OECD, but by means of GD no. 1607/2004 (published in OJ no. 932, dated on October 12th 2004) it was founded the Romanian Center for Information and Documentation and an Information and Documentation Point OECD, within the Ministry of External Affairs. In the activity of this international organism, a constant priority was represented by the fight against corruption.

[9] Document available online on www.oecd.org

Criminal Law Convention regarding corruption[10] from 1999, adopted by the Multidisciplinary Group within the Action Programme against corruption in 1999 contains legal procedure rules and substantial criminal law[11] and by means of its provisions it imposes to the signing states the adoption of legislative measures by which to incriminate the active and passive corruption deeds committed by the members of the national public assemblies, who exercise legislative and administrative power[12].

Also, by means of the provisions of art. 18 of the Convention it is recommended for each part to adopt the necessary legislative measures to enable bringing the legal persons to book for committing infractions of active corruption, influence peddling and money laundering, established according to it, in case there are committed on their behalf by a natural person, who acts either individually or as member of an organ of the legal person, in which it exercises leading duties, manifested by the power to represent the legal person, making decisions and exercising the control within the legal person. All these provisions regulate the performance of the legal person's activities, since these are, sometimes, involved in committing corruption infractions, especially in commercial transactions, in practice being quite difficult to track natural persons who act on behalf of a legal person, considering the dimension of the companies and the complexity of their activity, and sometimes the corruption practices continue also after applying sanctions which deprive of freedom the members of company's administration[13], following the fact that the company is not affected by applying individual sanctions[14]. On this line, the legal persons will be brought to book if the following conditions are not followed: in case they committed deeds qualified as active corruption, influence peddling and money laundering, these infractions were committed on the interest of the legal person, or especially on its behalf, by a person who owns a leading position within the legal person.

Also, according with the provisions of art. 18, pct. 3, of the Convention, the responsibility of the legal person do not exclude criminal prosecution of the natural persons, as perpetrators, instigators or accomplices in committing corruption infractions, cumulating in this way the criminal liability of the legal person and who participated to the infraction commission as perpetrator, co-perpetrator, instigator or accomplice[15].

United Nations Convention[16] against corruption aims to promote and consolidate the measures with the scope of preventing and combating the corruption in the most efficient way. With this purpose, the Convention's provisions sustain the promotion, easement of

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[10] Document available online on www.cccec.gov.md, adopted at Strasbourg, on January 27th 1999; The Criminal Law Convention regarding corruption was ratified by Romania by means of Law no. 27/2002, published in OJ no. 65, on January 30th 2002.

[11] See Gh. Mateuț – "Sinteză teoretică şi practică privind represiunea traficului de influență în reglementarea actuală şi în perspectivă", R.D., no. 5/2002, pp. 163.

[12] See V. Dobrinoiu, M. A. Hotca, N. Neagu, M. Murea, C. Căşuneanu, *Legea 78/2000 pentru prevenirea şi sancționarea faptelor de corupție*, Wolters Kluwer Publishing House, Bucharest, 2008, pp. 63.

[13] See F. Streteanu, R. Chiriță, *Răspunderea penală a persoanei juridice*, 2nd Edition, C.H.Beck Publishing House, Bucharest, 2007, pp. 106.

[14] C. F. Uşvat, *Infracțiunile de corupție în contextul reglementărilor europene*, Universul Juridic Publishing House, Bucharest, 2010, pp. 276.

[15] On this line see also R. Valeur, *La responsabilitė penale des personnes morales dans les droits français et anglo-americains avec les principaux arrets faisant jurisprudence en la matière*, Edition Marcel Giard, Paris, 1931, pp. 69.

[16] United Nations Convention against corruption (Convention from Merida) was adopted by means of the resolution no. 58/4, on October 31st 2003, and it became effective on December 14th 2005, ratified by Romania by means of Law no.365/2004, published in OJ no. 903, on October 5th 2004, the document is available online on www.transparency.org.ro. Between 9th–11th of December 2003, United Nations Convention against Corruption was opened to be signed by all states, in Merida (Mexico), subsequently on the United Nations' premises in New York, by December 9th 2005. By means of the Resolution no. 58/4, dated on October 31st 2003, the United Nations General Assembly established also the day of December 9th as the International Day of International Anti Corruption Day.

international cooperation and technical assistance with the aim of preventing corruption; it promotes the integrity, responsibility and good management of the public affairs and assets. It is important to underline the fact that this Convention, brings completions to the Convention regarding the combat of transnational organized crime by defining the following terms: public official, foreign public official, servant of an public international organization[17].

Also, the provisions of this convention recommend to each signing state to adopt the necessary measures, according to its judicial principles, to establish the responsibility of the legal persons who take part in the infractions established according to this convention, liability which can be penal, civil or administrative and which cannot be detrimental to the criminal liability of the natural persons who committed the infractions.

Internal normative framework

As regards the penal liability of a legal person who committed an infraction, in the penal doctrine there were controversies regarding the consideration of a legal person as an active topic of an infraction. Therefore, there were two tendencies namely, negative thesis on the basis of which the legal persons don't have a proper existence, but there are creations, a fiction of law, according to which the companies cannot commit infractions[18], but also the affirmative thesis according to which the legal persons represent a reality, being entities provided with proper will and conscience[19]. As a result of the acceptance of the liability commitment by the legal person, from the penal point of view, this measure was inserted in the Penal Code provisions, following the recommendations contained by the international documents in domain, and also as a result of the general tendency in the penal matter to consecrate the criminal liability of the legal person as a basic principle in the action of repressing the delinquency phenomenon. For the legal person who committed an infraction to be able to be brought to book for criminal liability, it is necessary for deed to be committed by a natural person with the guilty from requested by the incrimination rule, but to be imputable to the legal person[20].

In Romanian criminal law had applicability the personal nature of criminal liability the principle under which only the individual can be an active subject of crime[21].
Therefore, the legal persons can be brought to book for criminal liability for the infractions committed on their behalf by any natural person, who acts individually, as a member of an organ of the concerned legal person, on the basis of a trust mandate or of an authorization to make decisions in the name of the legal person or to exercise a control activity within it.

In the line of the criminal liability commitment of the legal person for the commission of corruption infractions we mention that, according to the provisions of art. 19^1 from Penal Code, "legal persons, excepting the state, public authorities and public institutions which perform an activity that cannot be the subject of private domain, are criminally liable for the infractions committed in performing the object of activity or in the interest or in the name of the legal person, if the deed was committed with a guilty form foreseen by penal law"[22]. According to these provisions there are criminally liable the commercial companies, but also other legal persons of private right (such as: associations, foundations, syndicates, political parties, employer's associations), and also the legal persons for which after the commission of the infraction it is discovered the nullity of the foundation procedure, this aspect resulting

[17] P. Abraham, *Corupția-cauze, mecanisme, efecte*, effects, solutions, op. cit., pp. 298
[18] See T. Pop, *Dreptul penal comparat. Partea generală*, vol. II, Cluj, 1928, pp. 272
[19] See C. Bulai, *Manual de drept penal*, All Publishing House, Bucharest, 1997, pp. 203
[20] A. Boroi, *Drept penal. Partea generală*, C.H.Beck Publishing House, Bucharest, 2008, pp. 147-148
[21] Laura-Roxana Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011, pp. 296.
[22] Provisions of art. 19^1, of the Penal Code, were inserted by means of the provisions of art. I, pct. 1 from Law no. 278/2006, to modify and complete the Penal Code and to modify and complete other laws, published in OJ no. 601, on July 12th 2006.

from the provisions of art. 58[23], of the Law no. 31/1990, regarding the commercial companies[24]. On the other hand a legal person, which is foundation process, cannot be criminally liable for committing an infraction[25]. According to the provisions of art. 19^1, of the Penal Code, the state, public authorities and public institutions, whose activity is not the subject of the private domain, are exonerated from criminal liability.

To enable the criminal liability commitment of the legal person it is necessary to fulfill all the constitutive elements of an infraction, existing some criteria on the basis of which an infraction to able to be allocated to a legal person, and namely the commission of an infraction in performing the object of activity of the legal person, in its interest or name. According to the provisions of art. 19^1, from the Penal Code, the criminal liability of the legal person do not exonerate the criminal liability of the natural person, who contributed, in any way, to the commission of the same infraction, of course this enunciation implies not always the liability of the natural person with that of the legal person, but in case of the joint criminal enterprise between the legal person and the perpetrator of the infraction it is possible not to be involved the criminal liability of the legal person if the decision to commit the infraction was reached by means of secret vote with majority of votes, by a fellowship organization of a legal person and not being able, therefore, to establish who caused, by its vote, the commission of the infraction[26].

The provisions regarding the liability of the legal person were foreseen also in art. 135, from Law no. 286/2009, regarding the actual Penal Code, are superior by including in the content of this article the provisions of align. 2, which stipulate that public institutions are not criminally liable for the infractions committed in exercising of some activity which cannot be the object of private domain.

As regards the categories of infractions which can be committed by the legal person, according to the Penal Code, it is regulated a general liability of the legal person for all categories of infractions, but it should be checked, yet, in case of each infraction if there are fulfilled the conditions for criminal liability commitment of the legal person, since there are some infractions which, by their nature, can be committed only by natural persons (escape, bigamy, false testimony). Also, in an opinion[27], it is considered that a company cannot be liable for the deed of the official in charge, by which it prejudiced the company itself, in this case having the quality of aggrieved party. In case of corruption infractions, within the provisions of Law no. 301/2004, regarding the Penal Code[28], according to the provisions of art. 313, concerning the incrimination of the legal person, it is mentioned that the legal person can be criminal liable for committing the infractions foreseen at art. 309 (hush money) and 312 (influence peddling), provisions which are no longer in the content of Law no. 286/2009, regarding Penal Code, being no provisions on this line also in the content of Law no. 78/2000, regarding prevention, identification and incrimination of corruption deeds[29] and also in Law

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[23] Art. 58, align.1,„On the date on which the court decision, regarding the nullity ascertainment or declaration, becomes final, the company stops its activity with no retroactive effect and goes into insolvency. The legal provisions regarding the insolvency of the companies, as a result of development, apply accordingly".

[24] Published in OJ no. 126-127, on November 17th 1990.

[25] C.F. Uşvat, *Infracţiunile de corupţie în contextul reglementărilor europene*, op.cit., pp. 282.

[26] See F. Streteanu, R. Chiriţă, *Răspunderea penală a persoanei juridice*, 2nd Edition, op.cit., pp.330; L. M. Stănilă, *Răspunderea penală a persoanei juridice*, Hamangiu Publishing House, Bucharest, 2012, pp. 170; C.F. Uşvat, *Infracţiunile de corupţie în contextul reglementărilor europene*, op.cit., pp. 291; A. Boroi, N. Neagu, - "*Armonizarea legislaţiei penale române cu legislaţia europeană în materie de corupţie*", in Right Magazine, no. 4/2003, pp. 118

[27] I. Pascu, M.Gorunescu – "*Răspunderea penală a persoanei juridice în perspective noului Cod penal român*", in Law Project, no. 2/2004, pp. 30

[28] Published in OJ no. 575, on June 29th 2004, abrogated by means of the provisions of Law no. 286, from 2009, regarding the Penal Code (published in OJ no. 510, on July 24th 2009).

[29] Published in OJ no. 219, on May 18th 2000.

no. 187/2012, to enforce the Law no. 286/2009, which brings changes and completions to Law no.78/2000.

On the other hand, the hush money infraction cannot imply the criminal liability of the legal person, as a result of the fact that this infraction, according to the content of the incrimination rule can be committed only by an official, on the line foreseen by law, and in case the hush money giver acts in the interest or in the name of a legal person, this will be criminally liable for committing the infraction of hush money giving among the legal person who will be liable in the quality of moral person.

Conclusions

We consider that to establish the criminal liability for a legal person for committing an infraction it is necessary to be fulfilled the constitutive elements of the infraction, but the rule enounced in the law text do not create the possibility of incriminating the legal person with the natural person, only in case of joint criminal enterprise, since in case there is no joint enterprise, the criminal liability can be committed either only for the natural person, or only for the natural person, moreover in case of incriminating the legal person for fine payment, this will not be able to perform a recourse action against the natural person, for its payment, as a result of the fact that the criminal liability is personal.

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APPRAISAL OF THE PHILOSOPHICAL, POLITICAL AND IDEOLOGICAL CONCEPT OF PRIVATIZATION: A REFLECTION ON THE NIGERIA EXPERIENCE

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Abstract

The concept of privatization is not a new phenomenon but the practice continues to elicit novel ideas that attract comments from academics and other practitioners around the globe. It is an idea that have transcended over the decades to ensure that public enterprises are better managed by private individuals and organizations in order to achieve efficiency in their productivity. Our primary goal in this article to examine the philosophical, political and ideological basis of the concept of privatization and how this idea has found its relevance in Nigerian Political landscape via a reflecting on the Nigerian experience. This paper will start by examining the universal ideas behind concept of privatization, the meaning and origin of privatization, its influence on Nigeria and references will be drawn from other countries around the world that have made some giant strides in the field of privatisation of their State owned enterprises. There will be an overview of the methods of privatization, the nature and pattern of privatization in Nigeria and why the government opted for privatization of public utilities. This paper will end with the authors' conclusion on how Nigeria can benefit from privatisation policy.

Keywords: *privatization, Nigeria, politics, private sector*

Introduction

Privatisation is a concept that has found its relevance in different fields of human endeavour namely Political Science, Economics, Government, Sociology, Law among others. It is a concept of many ideology[1] the ideas about privatization dates from Ancient Greece, when governments contracted out almost everything to the private sector. In the Roman Republic private individuals and companies performed the majority of services including tax collection

[1] See generally: Bulent Seven, "Legal Aspects of Privatisation: A Comparative Study of European: Implementations", Dissertation.com 2001, available online at www.dissertation.com/library/112174a.htm, accessed 12 June, 2013.

(tax farming), army supplies (military contractors), religious sacrifices and construction. However, the Roman Empire also created state-owned enterprises, for example, much of the grain was eventually produced on estates owned by the Emperor. Some scholars suggest that the cost of bureaucracy was one of the reasons for the fall of the Roman Empire.[2] Perhaps one of the first ideological movements towards privatization came during China's golden age of the Han Dynasty. Taoism came into prominence for the first time at a state level, and it advocated the laissez-faire principle of *Wu we*, which literally means "do nothing".[3]

It could easily be recalled that for most part of the twentieth century, there were two opposing ideologies on how society should be governed and developed: capitalism versus socialism. Capitalist ideology typified by neo-liberalism insists that a self-regulated system of market will bring about a spontaneous process of development. On the other hand, the Socialists and many other variants such as the interventionists argue that unregulated capitalism will always bring about poverty, unemployment and human misery and there is the need to intervene to regulate the market. At the end of the 20th century with the end of the cold war, there is an ascendancy of capitalism and neo-liberalism[4] and this phenomenon has been a necessary concomitant to the principle of privatisation, which involves the transfer of control in terms of ownership and management from the government to private investors. This phenomenon has gained worldwide support and frenzy. Following the privatisation of British Telecom in 1984 under the Telecommunications Act, and the host of the other privatisations that took place in Britain thereafter, several nations particularly those in Africa, have come to embrace the principle as a way of eliminating low performance and inefficiency in the public enterprises sector[5]. Though it was argued that Privatisation as a tool for economic management came to the front burner when Chile became the first country to turn public assets/businesses to private operators in the early 1970s. Since then, over 140 countries (both developed and developing) have embraced privatisation as a route to economic growth and prosperity.[6]

2. Definitions of the term 'Privatisation'

The term "privatization" can have different meanings depending on the starting point and approach in the definition. The starting point will vary depending upon the scope, range or structure of privatization. Since each country has different social, political and economic differences and circumstances, the definition and even the understanding of the concept of privatization may vary.[7] However, in a wider sense, privatisation can be defined as policies designed to improve the operating efficiency of public-sector enterprises through increased exposure to competitive market forces. Privatization, in nutshell, is a term of art which may best be described as that component of the government's strategy to restructure the economy by relinquishing fully or partially its ownership of some corporations, parastatals and public owned companies through sale of its equity shares or ownership of these organisation to private

[2] David Parker and David S. Saal, International Handbook on Privatization, Edward Elgar Publishing, 2003.

[3] "History of Privatization", available online at http://en.wikipedia.org/wiki/Privatization", accessed 20 June, 2013.

[4] Otive Igbuzor, Privatisation In Nigeria: Critical issues of concern to civil society, A Paper Presented At A Power Mapping Roundtable Discussion On The Privatisation Programme In Nigeria Organised By Socio-Economic Rights Initiative (Seri) held at Niger Links Hotel Abuja on 3rd September, 2003.

[5] N. L. Dimgba, "Privatisation in Nigeria: Guidelines for the Foreign Investor", at p. 2, available online at, http://www.chrisogunbanjo.com/files/PRIVATISATION%20IN%20NIGERIA.pdf, accessed 25June, 2013.

[6] See Comments by Professor Anya O. Anya, Chief Executive, The Nigerian Economic Summit at the Netherlands Congress Center (NCC), at the Hague as part of the Independence Day Celebration by The Nigerian Embassy at The Hague, available online at www.nigerianlawguru.com/.../company%20law/PRIVATISATION%20I...accessed 24 October, 2013.

[7] Jonathan Bradley, "Privatisation in Central and Eastern Europe: Models and Ideologies", Privatisation: Social Science Themes and Perspectives, Edited By: Derek Braddon and Deborah Foster, Centre for Social and Economic Research, Faculty of Economics and Social Science, University of West England, England & USA: Ashgate Publishing Limited, 1996.

interests, thus reducing the size of an overburdened public economy sector.[8]

Emeka Iheme defined privatisation as "any of a variety of measures adopted by government to expose a public enterprise to competition or to bring in private ownership or control or management into a public enterprise and accordingly to reduce the usual weight of public ownership or control or management. However in a strict sense, privatization means the transfer of the ownership (and all the incidence of ownership, including management) of a public enterprise to private investors".[9] The later meaning has the advantage of helping one to draw a line between privatisation and other varieties of public enterprise reform. It is also the sense in which the term has been statutorily defined in the legislations on privatization in Nigeria.

According to The Florida House of Representatives Committee on Governmental Operations, privatisation involves: engaging the private sector to provide services or facilities that are usually regarded as public sector responsibilities; shifting from publicly to privately produced goods and services; transferring government functions or assets, or shifting government management and service delivery to the private sector, attempting to alleviate the disincentive towards efficiency in public organizations by subjecting them to the incentives of the private market and using the private sector in government management and delivery of public services. Summarily it can be seen from definitions that privatisation involves ownership change from public to private[10].

From the above definitions, we can see that privatisation is not limited to parastatals alone but can be viewed from a broader perspective of deregulation or reduction of state intervention on entire industries. It can also be seen from these definitions that privatisation basically involves transfer of ownership and management of public enterprises from state control to private hands for the purpose of achieving economic efficiency.[11]

3. The Philosophical Origin of the Concept of Privatisation

From our study, gamut of literatures reveals that privatization is not a new concept. Adam Smith (1776) in his book *Wealth of Nations argued* that: "In every great monarchy in Europe, the sale of the crown lands would produce a very large sum of money, which if applied to the payment of the public debts, would deliver from mortgage a much greater revenue than any which those lands have ever afforded to crown.... When the crown lands had become private property, they would, in the course of a few years, become well improved and well cultivated". The above statement is to sustain the claim that privatization is not new, rather the practice is what seems to be new. To different people and different schools of thought, privatization means different things. We believe that the origin of the idea of privatization is as old as the origin of the debate on private versus public ownership. Therefore its origin can be traced back to ancient Greece.

Thus, Plato thought private ownership and private property were evil, and favoured communal ownership. In "The Republic" Plato states that: "...Once they (guardians) start

[8] M. T, Okorodudu, "The Worker and Privatisation of Public Enterprises in Nigeria: A Legal Perspective", The Nigerian Current Law Review (198$) pp. 134-154.

[9] See: Emeka Iheme, The Incubus: The Story of Public Enterprise in Nigeria, Lagos: The Helmsman Associates, 1997, p. 60. Available online at, http://www.nigerianlawguru.com/articles/company%20law/READINGS%20ON%20PRIVATIZATION.pdf, accessed 29 August, 2013

[10] Eze Onyekpere *(ed),* "Challenges for the Privatisation Programme in Nigeria" in Readings on Privatisation in Nigeria, Lagos: Socio-Economic Rights Initiative SERI, 2003 at, p.52.

[11]The first definition of privatisation can, however, be qualified, in so far as the transfer may be total or merely partial. Holding all the shares in a firm is not the same as merely holding a majority or even a minority large enough to put a stop to certain decisions. Privatisation is thus partial if full ownership is not transferred. (For this also see: Stuart Butler, "Privatisation for Public Purposes", Privatisation and its Alternatives, Edited by: William T. Gormley, The University of Wisconsin Press, USA, 1991, p. 18); This definition agrees with the definition of Privatisation in Nigeria. See Public Enterprises (Privatisation-and Commercialisation) Act 1999 Cap. P30 Laws of Federation of Nigeria, 2004.

acquiring their own lands, houses, and money, they will have become householders and farmers instead of guardians. From being the allied of the other citizens they will turn into hostile masters.[12] "... I think that if they are going to be true guardians they should not have private houses, or land, or property of any kind, but that they should receive their livelihood from other citizens as payment for their guardianship, and all make use of these resources jointly[13]...It will stop them introducing private pleasures and pains along private property...since they have no private property apart from their own bodies, everything else being jointly owned..."[14].

His student, Aristotle, however, thought communal ownership was insufficient; that it allowed the lazy to take advantage of the industrious: According to Aristotle: "...It is universal truth that men find difficulty in living together...especially when it comes to hold a property in common[15]...it is evidently better, therefore, that property should be subject to private ownership...and it is special business of the legislator to make the necessary arrangements to that end...[16] And yet by reason of goodness, and in respect of use we must take account not only of the disadvantages from which those who hold property in common will be saved, but also the benefits they will lose[17]...No legislator could hope to build a state unless he distributed and divided its constituent parts into associations for common meals on the one hand, and on the other into clans and tribes; and it is therefore obvious that Plato's suggested legislation does nothing more original that forbid the guardians to cultivate the soil...[18].

From the ideological point of view, privatization is considered to lead to smaller government, lower taxes, and less government intervention in public affairs[19]. In that context, and that among economic and social theories, liberal theory seems to be the closest system to the idea of privatization, classical liberalism is often represented as a purely privatizing ideology.[20]

Liberalism refers to the following concepts: (a) limited government, in order to protect human liberty and avoid totalitarian regimes; (b) the virtues of free-market economics, the preservation of economic liberty and initiative in conjunction with the right to private ownership; and, (c) a civil rather than a political society in which the mediating institutions of the civil order are vibrant and provide the necessary constraints for the market and public morality.[21] Therefore in the classical liberal constitutional order,[22] the activities of government,

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[12]G. R. F Ferrari (ed) Plato, "The Republic", Translated by: Tom Griffith, Cambridge: Cambridge University Press, 2000, p. 163.

[13] Ibid. at, p. 252.

[14]Ibid, at p. 164.

[15]John Warnngton (ed), Aristotle's Politics and Athenian Constitution, London: J. M. Dent Sons, 1959, at p.35.

[16]Ibid.

[17]Ibid, at p. 36.

[18]Ibid, at p. 36-37.

[19] Paul Starr, "The New Life of the Liberal State: Privatisation and the Restructuring of State-Society Relations", available online at http://www.princeton. edu/~starr/newstate.html, accessed 12 June, 2013.

[20] Elizabeth Martinez and Arnoldo Garcia, "What is Neo-Liberalism?", web page of Corporate Watch, available online at http://www.corpwatch. org/trac/corner/glob/neolib.html, 12 June, 2013.

[21]M. A. Gregory Gronbacher, "The Philosophy of Classical Liberalism", web page of Acton Institute, available online at http://www, acton, org/cep/papers/classical/ib. html, accessed 12 June, 2013.

[22]Classical liberalism is a term used to describe a political philosophy commonly held in nineteenth century England and France. Classical liberal political thought has its beginnings in John Locke. Classical liberalism can be divided into several schools or branches, but the common strain throughout revolve around a strident defence of liberty in all its dimensions-social, political, and economic. At the heart of liberalism is a passionate commitment to the pursuit of liberty. Liberty as a political theory translates into a wider social vision. Classical liberals advocate free markets, a vibrant array of non-governmental institutions (such as civic groups, schools, churches, the free press, etc), and a minimum of tax-financed government services. Classical liberals firmly believe that government's first duty is to protect both persons and property from physical harm. They also emphasize the strict enforcement of contracts. Classical liberals, consider liberty to be the highest political value. Some examples of classical liberal thinkers include: John Locke, Frederic Bastiat, Adam Smith, David Hume, Francois de Voltaire, Adam Ferguson, Lord John Acton, Thomas Jefferson, John Stuart Mill, Herbert Spencer, Henry David Thoreau, Frederic Bastiat, Alexis de Tocquevile and Friedrich Hayek (Gregory M. A. Gronbacher,

no matter how the agents are selected, are functionally restricted to the parameters for social interaction. Governments, ideally, were to be constitutionally prohibited from direct action aimed at "carrying out" any of the several basic economic functions like setting the scale of values, or organizing production, or distribution of the product.

These functions were to be carried out beyond the conscious intent of any person or agency; they were to be performed through the operation of the decentralized actions of the many economic participants, as coordinated by markets, and within a framework of laws and institutions that were appropriately maintained and enforced by government.

This liberal theory sees government or even the public sector as being an obstacle to economic development in recent times. In most cases, the liberals argue that government's intervention results in failure, which is a problem the government intervention meant to correct. Thus, this theory currently advocates increasing reliance on the market economy, through effective privatisation and commercialization of existing public enterprises, deregulation of domestic industries and markets and the liberalization of trade.

It can be rightly perceived that this theory forms the basis of which the World Bank/IMF - endorsed the Structural Adjustment Programmes (SAP) which Nigeria and many developing countries in serious economic crisis have adopted over the years.

Privatization in Nigeria was formally introduced by the Privatization and Commercialization Decree of 1988 as part of the Structural Adjustment Programmes (SAP) of then Military ruler, Ibrahim Badamosi Babangida's administration who ruled Nigeria between 1985 till 1993. As McGraw has argued, SAP is a neo-liberal development strategy devised by International financial institutions to incorporate national economies into the global market:

The vision of a "global market civilization" has been reinforced by the policies of the major institutions of global economic government up to the mid 1990s. Underlying the structural adjustment programmes has been a neo-liberal development strategy referred to as the Washington Consensus which prioritizes the opening up of nation economies to global market force and the requirement for limited government intervention in the management of the economy.[23]

One of the main objectives of SAP was therefore to pursue deregulation and privatization leading to removal of subsides reduction in wage bills and the retrenchment of the public sector ostensibly to trim the state down to size the public work force.[24] The Structural Adjustment Programme, as implemented in Nigeria, consisted of a macro-economic policy reform which aimed at: having competitive real exchange rates, using prudent fiscal and monetary measures to improve the budget deficit position, achieving trade liberalization, privatising and commercializing Public Enterprises, down-sizing government and enlarging private sector role to serve as the engine of growth; and deregulating prices and markets.[25]

The above listed policy measures were based on the assumption that: the private sector was more efficient than the public sector, and as such, deserved to be encouraged to: play a more dynamic role in the economic development process; The allocation of resources and prices should be determined by the free interplay of market forces.

The neo-liberal theory blames the economic woes of the country on the public sector. It emphasizes the need to replace the public sector with the private sector in the economic

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"The Philosophy of Classical Liberalism", web page of Acton Institute, available online at http://www. acton, omcep/papers/classical/ib. html, 21 June, 2013. "Historical Roots of Libertarianism", available online at http://www.libertarian.org/history.html. accessed 21 June, 2013.

[23]A. Me Grew, "Sustainable Globalization? The Global Politics of Development and Exclusion in the New world order" in Allen, T. and Thomas, A (eds), Poverty and Development into the 21st Century. New York: Oxford Universities Press Inc. 2000.

[24]S.G. Egwu, "Structural Adjustment, Agrarian Change and Rural Ethnicity in Nigeria". Research Report No. 103. Uppsala, Sweden, the Nordic African institute 1998.

[25]Ibid.

development process. Under this theory, the public sector is expected to play supportive roles in the economic development process. This paradigm shift has been tagged, "Governance Led Development Theory"[26] and its central theme is that good governance provides the lead in the development process.

Within this framework, governance is perceived as the "good government of a society which guides the country along a course leading to the desired economic development". The term embraces three distinct but intimately related dimensions of politics, techniques and institutions. The establishment of good development objectives to guide the private sector and the exercise of proper leadership are identified with the political dimensions.[27]

It is important to note from the foregoing theoretical expositions that both the market system and state intervention could be necessary for the economy at its different development stages. However, it will be crucial under neo-liberal thesis for an interventionist state to intervene by merely strengthening the existing market institutions. Besides, it will also be necessary to create or stimulate such markets, where one exists, in order to influence the behaviour of economic agents, effectively.

Thus, within a market-oriented economy, the state's role will be that of promoting and supporting the right type of market institutions to allow for effective private sector dominance of economic activities. Nevertheless, in a crisis-ridden economy, the role of the state (public sector) will hinge on the severity of the crisis, and of course, the developmental stage of the economy.[28]

To us, the liberal theory seems to be the closest system to the idea of privatization, the connection between liberalism and privatization should be made with caution and the following points need to be taken into account in evaluating this link:

(a) In the course of this paper, privatization and liberalization will be viewed from two different concepts. Liberalization refers to the opening up of any industry to competitive pressures.[29] In other words, liberalization refers to the abolition or relaxation of the monopoly powers of nationalized industries.

The opening up of public monopolies to private entrepreneurs is a form of privatization (in terms of broader understanding of privatization) that is also liberalizing in its nature. However, it is entirely possible to privatize without liberalizing, by selling shares of monopolies without significantly subjecting them to competitive forces.

Conversely, it is also possible to liberalize without privatizing, that is to introduce competition into public sector without transferring ownership.[30] Governments can also privatize and liberalise together by both selling state enterprises and deregulating entry into their markets

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[26] Quoted in Allene O. Esther, "Implementation of Privatisation Policy in African Petroleum PLC", unpublished thesis for M.Sc (Public Administration) Obafemi Awolowo University, Ile- Ife (2004).

[27] James M. Buchanan, "Notes on the Liberal Constitution", the Cato Journal, Vol. 14, No. 1, available online at hhp://wmw. cato. org/pubs/joumal/cjl4nl-l.html, accessed 24 June, 2013.

[28] For detailed discussion on this theory, see: Bulent Seven, above note 1, at pp.8-18.

[29] In Nigeria, petroleum, energy, power, communication and recently the power sectors have now been liberalized. Liberals favour competition. For example, Hayek states that: "... competition (is) superior... not only because it is in most circumstances the most efficient method known, but even more because it is the only method by which our activities can be adjusted to each other without coercive or arbitrary intervention of authority. See also F. A. Hayek, The Road to Serfdom, Rome and London: George Routledge & Sons Ltd, 1944, p. 27. "... competition operates as a discovery procedure not only by giving anyone who has the opportunity to exploit special circumstances the possibility to do so profitability, but also by conveying to the other parties the information that there is some such opportunity. It is by this conveying of information in coded form that the competitive efforts of the market game secure the utilization of widely dispersed knowledge...". F.A. Hayek, Law, Legislation, and Liberty-Volume-2-The Mirage of Social Justice, London and Henley: Routledge & Kegan Paul, 1976, p. 117.

[30] Paul Starr, "Limits of Privatisation", Proceedings of the Academy of Political Science, Vol. 36, No. 3, Prospects for Privatization, 1987, pp. 124-13, at p. 110.

as it is currently been done by Nigeria.[31] Finally it is even possible to nationalize and liberalise at the same time[32] (as the French socialists demonstrated in the early 1980s, and Nigeria indigenized the banking and insurance sectors in early and mid 1970s, both countries first nationalized banks and later liberalized financial markets).

(b) Secondly the trend toward privatization might be explained in straightforward political and ideological terms if those developments had been limited to liberal governments. However, privatization have been adopted by labour governments in Britain (particularly under the Labour Party), New Zealand and Australia, Spain (under socialist governments), and by a variety of countries with more mixed regimes as different as those of Japan and Mexico.

Again, Russia, Poland and other nations that were under the repressive influence of Soviet Union which are now enthusiastically pursuing fundamental economic reforms, top on the agenda of which is privatization. In the case of African Countries and other third world countries commonly described as the Least Developed Countries (LDCs) of the world, privatization came as a Greek gift embedded in the Structural Adjustment Programs (SAP) designed by the International Monetary Fund (IMF) as the elixir for the economies of the perpetually heavily indebted nations who while praying for cancellation of their debts are at the same time demanding more credit. These countries, of which Nigeria is one, were for the most past, nations under authoritarian regimes with scant regard to efficiency and accountability in the management of State resources.[33]

Countries, such as Nigeria, that not long ago, were nationalizing multinationals have been inviting new foreign investments and selling off pieces of the public sector[34]. Socialist governments throughout Western Europe now seem more keen on liberalizing markets than on seizing control of the means of production.[35]

China exemplified a case of a partial privatization, where workers in three state-owned factories in southern China have invested $2.9 million USD to buy 30 percent of the enterprises and further to that some state owned homes were sold[36].

(c) Privatisation may ultimately result in less state control, but it first requires states to develop capacities not previously had, such as the capacity to maintain the rule of law, instill confidence among investors, supervise contracts, and provide expedient administration of official rules and regulations.[37] Government will still need to regulate a delivered service even though it has been privatized, since privatizing a service does not leave government without responsibilities. Issues of public safety, public health, and quality of service will arise[38].

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[31] In Nigeria, the federal government has divested all its equity holdings in every Bank in the country under the current privatization programme. The petroleum, energy, communication, power sectors have been deregulated or liberalised.

[32]Paul Starr, "The Meaning of Privatization", Yale Law and Policy Review 6 (1988): 6-41. Reprinted in Alfred Kahn and Sheila Kamerman, eds., Privatization and the Welfare State Princeton University Press, 1989. Available online at, http://www.princeton. edu/starr/meaning.html. 24 June, 2013

[33]Kalu Onuoha "The Legal Regulation of Privatisation: A Critique", in Eze Onyekpere (ed), above note 10, at, p. 9.

[34]See, Z.O. Aje, "Indigenisation of Enterprises in Nigeria", an unpublished Ph.D thesis submitted to the School of Postgraduate Studies, University of Lagos, Nigeria, 1978.

[35] Paul Starr, "The New Life of the Liberal State: Privatisation and the Restructuring of State-Society Relations", available online at http://www.princeton.edu/~starr/newstate.html, accessed 16 July, 2013.

[36]Peter Young, "Privatisation around the World", Proceedings of the Academy of Political Science Vol. 36, No. 3, Prospects for Privatization (1987), p. 193, 205. According to Young ... "Throughout the world socialism has been revealed as a failed ideology. It neither delivers the goods nor provides the motivation....". Also see also, "Cautious Privatisation in China", web page of Le Monde Diplomatique, available online at http://www.monde-diplomatique.fr/en/1997/ll/china; accessed 20 July, 2013.

[37]Paul Starr, above note 19.

[38]Robert W. Bailey, "Uses and Misuses of Privatisation", Prospects for Privatisation, edited by H. Steve Hanke, ASP (Proceedings of the Academy of Political Science), Volume 36, Numbers, New York, 1987, p. 148, Even liberals believe that regulation is needed. Thus according to Hayek; "...special regulations for the use of facilities

Therefore, privatization does not mean that public administration will disappear.

While it is believed that in the privatization movement ideological factors and considerations are important, the underlying impetus for privatization, however, has been practical.[39] For example one pragmatic approach was that the fact that State Owned Enterprises (SOEs) were losing money and many of them were in deep financial crisis, politicians found it easy to sell and get rid of SOEs instead of raising taxes.[40] Similarly, privatization diverts claims away from the state. Just as employment is privatized, so too are consumer dissatisfactions privatized.[41]

This research underscored the impact of privatization to reviving the ailing national industries and further observed that worldwide, both liberal and socialist governments have been implementing privatization processes. It therefore argued that privatization represented a pragmatic solution to specific administrative, financial and economic problems.

It is noteworthy that with the collapse of socialism in the 1930s and 1990s, liberalism was the only player in the field of economic advancement of nations. According to Fukuyama: "*...liberal democracy may constitute the-end point of mankind's ideological evolution and the final form of human government,* and as such constituted the end of history".[42] It is arguable whether the liberal democracy is the end of the history but our analysis revealed that, since the launch of first privatization efforts, the concept of privatization has lost its ideological character and turned into a pragmatic economic and social instrument that almost all governments have adopted around the world. In other words, this paper considered privatization as a "pragmatic" approach instead of an ideological approach; it cannot be attached purely to one ideology or system in any political economy.

Also, this paper believed that the global economic recession which started in America as a mortgage financing problem in year 2007 and has now compelled all European, American and virtually every government all over the world to be providing huge sums of money to bail out financially distressed banks and companies could be seen as a return to socialism. The government of United States of America has purchased non-voting shares in the three large American car producing companies- Crysler, Ford and General Motors as part of the terms for financial bailout for the companies[43]. It is not inconceivable that the Nigeria government will in future buy back its equity in the banks which it sold in 1992[44]. A more recent socialist approach to privatization was exhibited by Nigeria in the bailout by the Federal Government of Nigeria of four banks that are at the brink of collapse or liquidation viz: Afribank, Spring Bank and Bank PHB and were nationalised in 2011. Assets Management Corporation of Nigeria (AMCON), a Nigerian agency then recapitalised them and changed their names to Mainstreet Bank,

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provided by government for the public are undoubtedly necessary...". See also F.A. Hayek, Law Legislation and Liberty Volume 3 the Political Order of a Free People, Routledge & Kegan Paul, 1979, at p.48.

[39]Therefore in many countries both liberal and socialist governments have adopted privatization programmes. For example in Austria all major parties implemented privatisation programmes: Vincent Wright (ed) "Privatisation in Western Europe - Pressures, Problems and Paradoxes" Pinter Publishers, Great Britain, 1994. Similarly, privatisation has not been an ideological issue in the Netherlands. (B. Rudy Andeweg, "Pnvatisation in the Netherlands: The Results of a Decade", "Privatisation in Western Europe-Pressures, Problems and .Paradoxes, Vincent Wright (ed), Great Britain: Pinter Publishers, 1994, p.199. Andeweg states that: "... Dutch privatisation (is) neo corporatist/bureaucratic, not party political...".

[40]Thus for example in the United Kingdom it became political to regard privatisation receipts as a means by which tax cuts could be financed without the need to cut public expenditure. Peter Curwen, Privatisation in the United Kingdom, The Facts and Figures, published by Ernst & Young, 1994.

[41]Paul Starr, above note 19.

[42] Francis Fukuyama, The End of History and the Last Man, England: Penguin Books, 1992, at p. xi.

[43] Curled from C.N.N. News (Cable News Network) of at 9p.m on 11 December, 2008.

[44]J. O. Ekundayo in "Privatisation of Government Owned Banks and the Issue of Ownership and Control...," 1996 N.I.A.LS. p. 43. The Nation Newspaper of 2 February, 2009 reported at page 4 that the Federal Government of Nigeria is to re-acquire banks shares. Similarly, CNN News Report of 17 December, 2009 at 9.pm said that Germany is to renationalize banks.

Enterprise Bank and Keystone Bank, respectively. AMCON holds the non-performing assets of troubled banks in Nigeria.[45] This paper having espoused in detailed manner the philosophical, political and ideological theories of privatization, the definitions and origin of privatization, we shall in the next sub-issue, examine the methods of privatization applied by modern political societies.

4. Examining the Different Non-divestiture Methods of Privatisation

Under this sub-heading, the authors will examine the different non-divestiture methods of privatization being practiced by different countries and these are as follows: Subcontracting or contracting out, Management contract, Franchising contract, Leases, Built-Operate-Transfer, Build-own operate, Build-Transfer-Operate and Universal Service Obligations.

(i). Subcontracting (contracting out). This is where the public agency that previously conducted the activity now subcontracts its execution to a private party.[46] In Nigeria, contracting-out has been used in revenue collection for government, hostel management in Universities, ward cleaning in hospitals, and security management in government establishments. Furthermore, contracting out can take many forms, including the relatively straightforward award of a contract for services, long-term arrangements that involve innovative private project financing, lease-back of capital equipment, or long-term per-unit fees for service[47]. The public agency or authority may contract with a private firm or individual, but it may also contract out to voluntary or co-operative organizations, or in some cases to other public sector agencies.

Under contracting out arrangements, public authorities continue to bear direct responsibility both for the provision arrangements and for the quality of service provided although the work is actually carried out by the employees of private firms.[48]

(ii). Management contracts: These contracts are agreements between government and a private company, in which government pays a fee to the private company for managing the State Owned Enterprise (SOE). These contracts are common in hotels, and airlines. Management contracts are usually less politically contentious than sales. They avoid the risk of asset concentration, and can enhance productivity. Governments nonetheless tend to prefer sales for a number of reasons. Typically, contractors do not assume risk; operating losses must be borne by the owner (the state) even though it has relinquished day-to-day control of the operation. Many standard management contracts are flat fee for service arrangements, payable regardless of profits, which provide little incentive to improve efficiency. Further, unless proper legal safeguards are developed, and enforced by monitoring, there is a risk that the contractor may run down the assets. Another drawback is that few management contractors provide adequate training for local counterparts. These risks can be reduced with properly drawn-up

[45] Oyetunji Abioye "AMCON Seeks Buyers for Enterprise Bank", Punch Newspaper, 3 September 2013, available online at http://www.punchng.com/business/business-economy/amcon-seeks-buyers-for-enterprise-bank/, accessed 5 November, 2013.

[46]Sometimes it is referred to as "outsourcing". Outsourcing [is, however, different from contracting out. Under outsourcing a government entity remains fully responsible for the provision of affected services and maintains control over management decisions, while another entity operates the function or performs the services. This approach includes contracting out, the granting of franchises to private firms, and the use of volunteers to deliver public services. According to the definition of General Accounting Office of USA: "Contracting out is the hiring of private-sector firms or non-profit organizations to provide goods or services for the government Under this approach, the government remains the financier and has management and policy control over the type and quality of goods or services to be provided. Thus, the government can replace contractors that do not perform well". In the U.S, the term has often been broadly applied to the contracting out of the management of public schools, prisons, airports, sanitation services, and a variety of other government-owned institutions, especially at the state and local levels.

[47]"Harnessing the Market: The Opportunities and Challenges of Privatisation", Department of Energy of USA-Privatisation, available online at http//www.osti.gov., accessed 16 August, 2013.

[48] Ibid.

contracts, but that requires strengthening government's capacity to negotiate, monitor and enforce contractual obligations.[49]

(iii). Franchising contract: This is where the government grants a concession or privilege to a private sector entity to conduct business in a particular market or geographical area-for example, operating concession at ports, hotels, and other services provided in certain public places. The government may regulate the service level or price, but users of the service pay the provider directly[50]. In Nigeria, for example private firms were granted concession on to operate the Nigerian ports.[51]

(iv). Leases: This is another form of privatisation which has overcome some of the drawbacks to management contracts. In leases, the private party, which pays the government a fee to use the assets, assumes the commercial risk of operation and maintenance, and thus has greater incentives (and obligations) to reduce costs and maintain the long-term value of the assets. Hence, fees are usually linked to performance and revenues.[52] In other words in the lease-and-operate contract, private contractor is responsible at its own risk for provision of the service, including operating and maintaining the infrastructure, typically against payment of a lease fee.[53] Furthermore, if the lease includes an option to buy, the operation could be regarded as a divestiture.[54]

(iv). Built-Operate-Transfer: With *Build-Operate-Transfer* (BOT) arrangements, the private sector designs, finances, builds, and operates the facility over the life of the contract. At the end of this period, ownership reverts to the government.

(v). Build-own operate (BOO) is a similar scheme as BOT but does not involve transfer of the assets.[55] With Build-Own-Operate (BOO) arrangements, the private sector retains permanent ownership and operates the facility on contract.[56]

(vi). Build-Transfer-Operate: A variation of BOO and BOT, is the Build-Transfer-Operate (BTO) model, under which title transfers to the government at the time construction is completed.[57]

(vii). Universal Service Obligations: This form of contract requires the private company in charge of providing the service to give access to all groups in the area of the concession, regardless the level of income. In the case of Universal Service Obligation (USO), the contract must also specify pricing schemes (possibility of cross-subsidies) and mechanisms for public subsidies when they are necessary.[58]

At this point, it will be necessary to examine the concept of privatization in Nigeria since the idea of transferring state owned enterprises to private individuals and organization for effective management in Nigeria have gained ground in Nigeria since the regime of General

[49]J. R. Nellis, and M. M. Shirley, Privatisation: The Lessons of Experience, Washington DC: The World Bank Publications, 1992, p. 25-26.

[50]"Terms Related to Privatisation Activities and Processes", July 1997 GAO (General Accounting Office of USA), available online at http://www,privatistaion.org/ accessed 20 August, 2013.

[51]In Nigeria, concessions for ports were granted to Dangote Groups of Companies Flour Mills (Nig) Ltd and ENL (Nig) Ltd.

[52]Lease arrangements have been widely used in Africa, particularly in sectors when it is difficult to attract private investors. (Privatizing State-Owned Companies:, The Prosperity Papers Series, Prosperity Paper Three web page of Centre for International Private Enterprise, available online at http//www. Cipe.org/), accessed 20 August, 2013.

[53]Pierre Guislain and Michel Kerf, "Concessions-The Way to Privatise Infrastructure Sector Monopolies", Public Policy for the Private Sector, The World Bank, Note No 59, October 1955.

[54]Pierre Guslain, The Privatization Challenge: A Strategic, Legal, and Institutional Analysis of International Experience, Washington DC: World Bank Publications, 1997, p. 10.

[55]Pierre Guislain and Kerf, above note 53 at p.1.

[56] "Types and Techniques of Privatisation", Privatisation Database, available online at http://www.privatisation.org, accessed 20 August, 2013.

[57] Ibid.

[58] Ibid.

Ibrahim Babangida as noted earlier in the course of this paper. Even though references have been made above to the privatization process in Nigeria, this paper in the next sub-issue will examine in a more holistic manner, the concept of privatization in Nigeria.

5. The Concept of Privatisation: the Nigeria Experience

The privatization process in Africa is not peculiarly African.[59] To a large extent, it is part of the globlisation process.[60] According to Otive Igbuzor, the participation of the state in enterprises in Nigeria dates back to the colonial era. The task of providing infrastructural facilities such as railways, roads, bridges, water, electricity and port facilities fell on the colonial government due to the absence of indigenous companies with the required capital as well as the inability or unwillingness of foreign trading companies to embark on these capital-intensive projects.[61] This involvement was expanded and consolidated by the Colonial Welfare Development Plan (1946-56) that was formulated when the labour party came to power in the United Kingdom. This trend continued after independence such that by 1999, it was estimated that successive Nigeria Governments have invested up to 800 billion naira in public owned enterprises.[62]

In Nigeria, privatization process started with the concept of "Privatisation and Commercialization" which was introduced in Nigeria in 1988, The Privatisation and Commercialisation Act 1988[63] provided the legal and institutional framework for the programme. In 1993, the Technical Committee on Privatisation and Commercialisation (TCPC) which was set up under the 1988 Act completed its work of privatistaion and commercialization of specific enterprises listed in the schedules to the Act and submitted its final reports.

Following the recommendations of the TCPC, the Federal Government designed a new phase of the programme and, by virtue of the Bureau for Public Enterprises Act 1993 (now repealed) replaced the Act of 1988. The Act of 1993 introduced rules and set up a new agency to continue the programme. In 1999, the Federal Government again revisited the programme and enacted the Public Enterprises (Privatisation and Commercialisation) Act 1999[64], which in turn repealed and replaced the Act of 1993. The Act of 1999 is the statute that currently regulates the programme.

In both the Privatisation and Commercialisation Act 1988, and the Bureau of Public Enterprises Act 1993, "privatization" is defined as "the relinquishment of part or all the equity and other interests held by the Federal Government or any of its agencies in enterprises whether wholly or partly owned by the Federal Government".[65]

With respect to the commercialization component of Privatisation in Nigeria, much unlike in other countries that have embarked upon a programme of public enterprise reform, the Federal Government of Nigeria introduced privatization along with a programme of Commercialisation. Commercialization was conceived as an alternative to the privatization of sortie public enterprises. The Act of 1988 defined commercialization as "the reorganization of an enterprise wholly or partly owned by the Federal Government in which such

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[59] R. Munyonyo, "The Privatisation Process in Africa: Ethical Implications", Chapter VI, available online at http://www.crvp.org/book/Series02/II-8/chapter_vi.htm, accessed 20 August, 2013.

[60]Yash Tandon defines globalisation as "the final conquest of capital over the rest of the world." However, he credits globlisation with "the spread of cultural pluralism, the development of technology and productive forces, the global awareness of the underlying unity of humankind, and more recently the (partial) return to nature as an inherent part of life in all its many forms." Tandon Yash, "Globalization and Africa's Options, International South Group Network, Monograph No. 2, 1999, p. 3.

[61]E. Iheme, above note 9.

[62]Otive Igbuzor, above note 4, at p.36.

[63] Cap 369 Laws of Federation of Nigeria, 1990 now repealed.

[64]Public Enterprises (Privatisation and Commercialisation) Act 1999, now Cap P38 Laws of Federation of Nigeria, 2004.

[65]The word is not defined in the Public Enterprises (Privatization and Commercialisation) Act 1999 but there is no doubt that it is in that sense that the word is used in the Act.

Commercialised enterprises shall operate as profit making commercial venture and without subventions from the Federal Military Government".[66]

The economic principles of deregulation and privatisation were first introduced in Nigeria in the1980s through the policy of Structural Adjustment Programme (SAP). Since then, government monopolies had disappeared in many industries. According to Kudus Adebayo, over 85 Public Enterprises in mining, education, health, agriculture, transportation and telecommunication were transferred, either fully or partially, to private owners. The idea of deregulation and privatisation were welcomed policies of government for several reasons that range from the demand for efficiency and effectiveness in public enterprises to the need for accountability, generation of employment, curb external borrowing, and strengthen the capital market amongst others.[67] This paper will now engage in a cursory examination of the method used for achieving the concept of privatization in Nigeria having underscored the policy issues behind deregulation and privatisation in Nigeria.

5.1 Full and Partial Privatisation in Nigeria

Our research reveals that the process of privatisation involves full and partial modes of privatisation. Privatisation can also be classified according to the privatization techniques, considering the level of investment responsibility and the degree of the risk transferred to the private sector, and to the relative irreversibility of the privatisation transaction. :

The Public Enterprises (Privatisation and Commercialisation) Act list four categories, and affected enterprises. Category I, are enterprises in which equity held by government shall be partially privatized. Category II, represents enterprises in which 100% of equity held by government shall be fully privatized. Category III, contains enterprises to be partially commercialized; while category IV are enterprises to be fully commercialized. We may tend to ask ourselves that what then do the terms "full" and "partial" privatisation, and "full" and "partial" commercialization mean? The Act itself provides no definitions. However, the Guidelines on Privatisation and commercialization of Government Enterprises (hereinafter referred to as "the Guidelines") do.[68]

According to the Guidelines, full privatisation means the "disinvestment by the Federal Government of Nigeria, of all its ordinary shareholding in the designated Enterprise". Partial privatisation on the other hand, means the: "disinvestment by the Federal Government of part of its ordinary shareholding in the designated enterprise".[69]

In the course of writing this paper, the authors learnt that the first economic argument for partial privatisation follows from the difficulty of determining a fair price for the enterprise in an uncertain environment. The second economic argument follows from the difficulty of actually obtaining a fair price for the enterprise, even if it can be determined, when the offering is large relative to the existing capital market. Selling part of the shares initially, letting the market set a price over time, and later selling the rest can thus increase government revenues.[70]

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[66] Public Enterprises (Privatisation and Commercialisation) Act 1999, now Cap P38 Laws of Federation of Nigeria, 2004.

[67]Kudus Adebayo, "Deregulation and Privatisation in Nigeria: Benefits and Challenges", Paper Prepared for Industrial Sociology Seminar in the Department of Sociology, University of Ibadan March 2011, at p.4, aavailable online at http://www.academia.edu/2357107/Deregulation_and_Privatisation_in_Nigeria_Benefits_and_Challenges, accessed 22 October, 2013.

[68] Ibid.

[69]See Section 6 paragraph 4(a) and (b) of the Guidelines on Privatisation and Commercialisation in Nigeria, available online at www.nigeria.gov.nig. Accessed 11 October, 2013 (See the website of BPE the agency for privatisation in Nigeria). There is also a variation of partial sale in the case of fragmentation, or breaking up and/or restructuring. SOE into component parts and selling them separately. In Nigeria the National Electric Power Authority was broken into pdwer generation, transmission, and distribution companies. See Federal Government Gazette. No. 24 Vol.91 of l/3/2003

[70] Full privatization is the transfer of 100% of ownership and control to the private buyer or buyers; partial divesture is anything less. Partial divesture in turn reflects a continuum of choice on the ownership scale but a

The political arguments for partial privatisation is that, in the presence of contending political forces, the alternative to the compromise of partial privatisation may be no privatisation, at least for the time being.

In Nigeria, as in many other countries, partial privatisation has been undertaken as a strategy of gradual introduction of a company into the stock market, for reason related to the perceived absorption capacity of the later. That has been the case in the British (British Gas), Spanish (Telefonical, Argentaria) Kalian (ENI, Telecom Italia), France Telecom and Royoe KPN of the Netherlands. These companies have been only partially floated with the state intending to remain a controlling shareholder. Some of the smaller economies have kept large stakes of their utilities (telecoms Jin Czech Republic, and electricity in Belgium), after having sold important minority stakes to strategic foreign investors, Partial privatization, in some circumstances that were mentioned above, may improve both the country's economic welfare and the government's political well being..[71]

As part of the guidelines on privatisation and commercialisation, under the privatisation programme as announced on July 20, 1998 by former military Head of State, General Abdulsalami Abubakar, Government will retain 40% of the telecom, electricity, petroleum refineries, coal and bitumen production, tourism, and spill-overs from the first phase of privatisation equities of the affected enterprises whilst 40% will be alienated to strategic investors with the right technical, financial and management capabilities. The remaining 20% will be sold to the Nigerian public through the Stock Exchange. President Olusegun Obasanjo in his Presidential order to the Vice President of the Federal Republic of Nigeria dated 6th July 1999, directed that as the first step in the phased implementation of the administration's privatisation programme, action was to be initiated to enable the sale of shares listed on the Lagos Stock Exchange and owned by the Federal Government and its agencies in: Commercial and Merchant Banks, Cement Plants and Petroleum Marketing Companies.[72] The sales were supposed to be completed by December, 1999 and Core Investors are to be encouraged to buy into any of the privatised enterprises. The second phase consisted of hotels and vehicles assembly plants, amongst others. The third phase will involved work on the companies being prepared for privatisation including NEPA (PHCN),[73] NITEL, NAFCON, Nigeria Airways,

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discontinuity on the control scale, depending on whether or hot control/ing interest is sold. See Guislain, above note 54, at p. 11.

[71] Stilpon Nestor and Ladan Mahboobi, "Privatisation of Public Utilities", The OECD Experience, Rio-9 Doc. 22 April, 1999, at p. 27.

[72]Nigeria: Embassy of the Federal Republic of Nigeria, Washington D.C, "Guidelines on Privatisation and Commercialisation" available online at http://www.nigeriaembassyusa.org/index.php?page=privatisation, accessed 23 October, 2013.

[73]Ibid, The first coordinated approach towards electricity development in the Nigeria was in 1950 when the colonial government passed the Electricity Corporation of Nigeria (ECN) Ordinance 15. The ordinance established the ECN which took over the work of the electricity department as well as the generating plants that had been established in different parts of Nigeria. National Electric Power Authority (NEPA) was an amalgam of the Niger Dam Authority and the Electricity Corporation of Nigeria. Although the authority was proclaimed by the Military Administration of General Yakubu Gowon on April 1, 1972, it started operation in January 1973. Because of NEPA's poor operational and financial performance, the Federal Government of Nigeria (FGN) amended the then prevailing laws (Electricity and NEPA Acts) in 1998 to remove NEPA's monopoly and encourage private sector participation. FGN established the Power Holding Company of Nigeria (PHCN) the initial holding company) and subsequently unbundled it into eighteen (18) successor companies. Strategically, the objectives of the reform include (i) the transfer of management and financing of SC operations to the organised private sector; (ii) the establishment of an independent and effective regulatory commission to oversee and monitor the industry; and (iii) focusing the FGN on policy formulation and long-term development of the industry. This will lead to (i) increased access to electricity services; (ii) improved efficiency, affordability, reliability and quality of services; and (iii) greater investment into the sector to stimulate economic growth. The successor companies that were handed over to the new investors include Abuja Distribution Company (owned by KANN Consortium Utility), Benin Distribution Company (Vigeo Power Consortium), Eko Distribution

Refineries, etc.[74]

The following are Nigeria Parastatals that were listed for privatisation, these enterprises are under the key sectors of the economy such as communication, energy, industry and manufacturing, natural resources, ports, power, services, transport and aviation and among them are: Nigerian Postal Service, Nigerian Telecommunication, Eleme Petrochemicals Company Limited, Kaduna Refining & Petrochemical Company Limited, Nigeria Gas Company Limited, Pipelines and Products Marketing Company (PPMC), Port Harcourt Refining Company Limited, Stallion Property and Development Company Limited, Warri Refining and Petrochemicals Company Limited, Anambra Motor Manufacturing Company Limited, Electric Meter Company of Nigeria, Federal Super Phosphate Fertilizer Co Limited,[75] Iwopin Pulp and Paper Company, Lafiaji Sugar Company Limited, LEYLAND, National Fertilizer Company of Nigeria (NAFCON), Nigeria Romania Wood Industry, Nigeria Sugar Company Limited, Nigeria Unity Line Plc, Nigerian Machine Tools Limited, Nigerian Newsprint Manufacturing, Peugeot Automobile Nigeria Limited, Steyr Nigeria Limited, Sunti Sugar Company Limited, Volkswagen of Nigeria, Ajaokuta Steel Company Limited, Ayip–Eku Oil Palm, Delta Steel Company, Ihechiowa Oil Palm Company Limited, Jos Steel Rolling Company, Katsina Steel Rolling Mill Company, National Iron Ore Mining Company Limited, Nigeria Uranium Mining Company, Nigerian Coal Corporation, Nigerian Mining Corporation, Oshogbo Steel Rolling Mill Company, River Basin Development Authority, Nigerian Ports Authority, National Electric Power Authority, Abuja International Hotels (Le Meridian), Abuja National Stadium, Abuja Stock Exchange, Afribank Nigeria PLC, Bank of Industry, International Conference Centre Abuja, Lagos International Trade Fair, National Theatre, NICON Insurance Corporation, Nigerian Agricultural Bank, Nigerian Film Corporation, Nigerian Television Authority, Tafawa Balewa Squrae Investment Limited, Federal Airports Authority of Nigeria, Inland Waterways Authority, National Clearing and Forwarding Agency (NACFA), Niger Dock Nigeria PLC, Nigeria Airways Limited, Nigeria Airways Subsidiaries, Nigerian Aviation Handling Company Limited, Nigerian Railway Corporation, and Railway Property.[76] It is important to state that most of these enterprises have either gone underground, privatised or awaiting privatisation.

In the case of Nigeria, as aptly described by Professor Anya O. Anya, "the issue of mismanagement and under-utilisation which led to huge wastage of resources and manpower potentials gave the government no other option but to pursue a privatisation programme. There are about 600 public enterprises in Nigeria run by or controlled by the Federal Government.

Company (West Power & Gas), Enugu Distribution Company (Interstate Electrics Ltd) and Ibadan Distribution Company (Integrated Energy Distribution & Marketing Limited). Others are Ikeja Distribution Company (NEDC/KEPCO Consortium), Jos Distribution Company (Aura Energy Limited), Kano Distribution Company (Sahelian Power SPV Limited), Port Harcourt Distribution Company (4 Power Consortium) and Yola Distribution Company (Integrated Energy Distribution & Marketing Limited). The generation companies expected to be handed over are Shiroro (owned by North-South Power Company), Kainji (Mainstream Energy Solutions Ltd), Geregu (Amperion Power Distribution) and Ughelli (Transcorp Ughelli Power Plc).... this handing over is a culmination of 14 years of painstaking effort by the NCP, BPE and other key stakeholders to reform and liberalise Nigeria's electricity industry, which began in 1999. The official handing over of physical assets of the defunct Power Holding Company of Nigeria (PHCN) to new owners by the Federal Government took place on 1 November, 2013. See, Tunde Dodondawa, Leon Usigbe and Paschal Okeke, "Nov 1 handing over: PHCN workers embark on strike", Nigerian Tribune, 1 November, 2013. See Everest Amaefule "Power Sector: Slowly, Nigeria on the path of recovery", Punch Newspaper, 1 October, 2013. Available online at, http://www.punchng.com/nigeria-53/slowly-nigeria-on-the-path-of-recovery/ accessed 30 October, 2013. See also Nigeria Electricity Privatisation Project (PHCN), available online at http://www.nigeriaelectricityprivatisation.com/?page_id=2, accessed 30 October, 2013.

[74] Ibid.

[75] Nigerian Government Companies Listed for Privatization", available online at http://www.nairaland.com/46829/nigerian-govt-companies-listed-privatization, accessed 29 October, 2013.

[76] Ibid.

Many more are controlled by State Governments.[77] These companies take a sizeable portion of the Federal Budget and account for over 5,000 appointments into their management and Board. Transfers to these enterprises ran into billions of naira".[78]

These transfers were in form of subsidized foreign exchange, import duty waivers, tax exemptions and/or write-off of arrears, unremitted revenues, loans and guarantees and grants/subventions. These companies were also infested with many problems which became an avoidable drag on the economy such as abuse of monopoly power, defective capital structure, heavy dependence on treasury funding, rigid bureaucratic structures and bottlenecks, mismanagement, corruption and nepotism. With all these problems the government had no other option but to take a positive step.[79] The reform as conceived has two interrelated components-Privatisation and Commercialisation. The overall objectives of the privatization exercise were: to improve on the operational efficiency and reliability of our public enterprises; to minimise their dependence on the national treasury for the funding of their operations; to roll back the frontiers of State Capitalism and emphasised private sector initiative as the engine of growth; to encourage share ownership by Nigerian citizens in productive investments hitherto owned wholly or partially by the Nigerian Government and, in the process, to broaden and deepen the Nigerian market.

During the first phase of the exercise which spanned from July 1988 and June 1993, the following programmes were executed: 36 enterprises were privatised through public offer of their shares; 4 enterprises were privatised on Deferred Public Offer method; 8 enterprises were privatised via Private Placement method; 8 enterprises were privatised via Sale of Assets method; 1 enterprise was privatised through Management Buy Out method (MBO). Sale of non-water assets of about 18 River Basin Development Authorities.[80]

Under the Phase I programme, about 88 public enterprises were either fully or partially privatised. These were enterprises in which the Nigerian Government invested jointly with foreign or private Nigerian investors. With the exception of the Cement and the Oil Marketing companies, the capitalisation of most of them was small. The huge capital-intensive and basic industries like the Fertiliser Companies, Sugar companies, Vehicle Assembly Plants, Paper and the Steel Mills which hold vital positions in the economy could not be privatised for various reasons ranging from financial insolvency to negative networth. Finally, there was lack of clarity of Government's policy on some critical issues associated with the implimentation of the programme.[81]

6. Reasons Why Governments Embark on Privatization: The Factors Worldwide

The reasons why government embark on privatization will be later captured under two sub-heads for the purpose of this paper otherwise there could be more and there are: poor performance of state owned enterprises and political interferences.

The period around 1970s was characterized by the multiplication of public enterprises in majority of the developing countries, mainly because of the thought that they cover the strategic sectors.[82] But even during that period, public enterprises proliferated in sectors that could

[77] Anya O. Anya, above note 6.
[78] Ibid.
[79] In March 1988, the then Nigerian Head of State, Ibrahim Badamosi Babangida promulgated a decree establishing the Technical Committee on Privatisation and Commercialization (TCPC). The committee was formally inaugurated in July 1988 to undertake the task of reform of public enterprises, as an integral and critical component of the Structural Adjustment Programme (SAP), which was started in 1986.
[80]Ibid.
[81] Ibid.
[82]State owned enterprises were widely promoted during the 1960s and 1970s on the basis of following principal premises.: -Such enterprises encouraged broad social responsibility and responsiveness to the public interest, SOEs helped to create stable investment and employment partners, SOEs provides models for improved industrial relations, SOEs could beneficially replace private natural monopolies, producing higher output at lower prices,

scarcely be called strategic. Examples of such service activities (e.g. marketing and exporting offices, tourism, hotels and catering, financial services, etc.) arid to a lesser extent small and medium industrial enterprises. This expansion of the public sector in all directions is evidence of the growing role of the state within the different types of mixed; economy in the developing countries which resulted in the most heterogeneous public appropriations in the late 1970s. It made a reaction in favour of the private sphere in the form of privatization virtually inevitable.

Moreover, public enterprises often need to keep afloat at the taxpayer's expense, either through explicit governmental subsidies, such as direct cash grants, or through implicit subsidies, such as subsidized credit, guaranteed sales to the government at the fixed prices, reductions of tax liabilities, governmental injections of equity, or preferential exchange rates[83]. Finally, because of the burden of the SOEs, some authors argue that the state has failed to implement appropriate economic and social policies.[84]

Each country has different social, political and economic circumstances. Therefore, the reasons for privatization and the decline of nationalization activity vary from country to country and even from one enterprise to another. Generally, however, privatization programme worldwide has been driven by both political ideology and pragmatism. Although there are many considerations, privatisation was largely a reaction to the shortcomings of the public enterprise sector and the failure of previous attempts to exercise effective parliamentary control of their management and operations. Privatization was expected to result in increased efficiency and better management. In addition, the proceeds from privatization met a rising share of Governments' revenue needs, and helped to finance tax cuts[85].

The following reasons can be considered the most common facts of the privatization trend in the international arena:

(a) Disappointing Performance of State Owned Enterprises

State Owned Enterprises (SOEs) have generally posted disappointing performances.[86]

With the utilities as a favourite example, SOEs provided irreplaceable means of direction and control in defence-related industry, SOEs could successfully stimulate sectoral competition, SOEs were potent instruments of decolonization, given the desire of nationalist political elites to radically reduce foreign corporate ownership within the private sector.

[83] According to Shirley: "The economic problems that arise when bureaucrats are in business; that is, when governments own and operate enterprises that could be run as private firms...bureaucrats typically perform poorly in business, not because they are incompetent... but because they face contradictory goals and perverse incentives that can distract and discourage even very able and dedicated public servants. See also, Mary M. Shirley, "Getting Bureaucrats Out of Business: Obstacles to State Enterprise Reform", web page] of Center for International Private Enterprise, available online at http//www.dpe,org/ accessed 13 October, 2013.

[84] In economic terms, state failure means supplying a country with public goods that are too highly priced and too low in quality-in both cases for structural reasons. In political terms, state failure means a chronic inability to take decisions widely agreed to be necessary-again for deep-seated reasons. (Martin Janicke, State failure-The Impotence of Politics in Industrial Society, Translated by: Alan Braley, Polity Press, Cambridge & Oxford, 1990, p. 8.

[85]For example, in other words, in the United Kingdom, as in many other countries, the political pressure for privatisation, came from a combination of disillusionment with the result of state ownership and from a belief that private ownership would bring substantial economic benefits, State-owned industries were viewed as highly Inefficient, slow at developing by introducing new technologies, subject to over-frequent and damaging political intervention and dominated by powerful trade unions. Privatization seemed to offer a means of ridding the state of the financial burden of loss making activities, while at the same time spreading share ownership 'and curtailing union power. Moreover, privatization sales offered a tempting source of state funding at a time when economic policy was geared to reducing the public sector- borrowing Requirement. According to Graham background factors in British privatisation programme are as follows: (a) The neo-liberal ideals of Conservative Party and Margaret Thatcher, (b) The aim of cutting back the public expenditure and in that context cutting back the public sector borrowing requirement (PSBR), (c) The financial difficulties of nationalized industries. (Cosmo Graham, "Privatisation-The United Kingdom Experience", Brooklyn Journal of International Law, Volume XXI, 1995, Number 1, p. 190, 191).

[86] See Michael I. Obadan**,** The Economic and Social Impact of Privatisation of State-owned Enterprises, African Books Collective, 2008, Chapter 5.

Although some of the SOEs function well,[87] many others are considered notoriously inefficient. Most SOEs in most developing countries have suffered severe and sustained losses. They manage to survive through tariff protection against competing imports, preferences in public procurement, exclusive rights, and preferential access to credit, governmental guarantees, tax exemptions, and public subsidies. The chronic losses incurred by state-owned enterprises often force governments to borrow money to cover them. These measures lead to high inflation, which discourages investment and causes capital flight.

For example in Nigeria, before the divestment exercises of the 1980s, the financial involvement of the Federal Government of Nigeria in industrial and commercial enterprises was about N23.2 billion naira. This was made up of N11.4 billion naira in equity and N11.8billion as loans and guarantees. Besides, government grants and subventions to these public enterprises were estimated at N11.5 billion naira. These investment statistics will only make much meaning if they are examined against the backdrop of the performance of these public enterprises, particularly in terms of their return on investment.

There is no gain-saying it that over the years, successive government have decried the inefficiency and poor performance of most public enterprises. The setting up of many special panels from the 1960s to look into various aspects of all or specified public enterprises bears eloquent testimony to this unsatisfactory performance. For example, the 1981 Presidential Commission on Parastatals (Onosode Commission)[88] revealed in its report that public enterprises in Nigeria had critical problems relating to; defective capital structures resulting in heavy reliance on the national treasury for financial operations; mismanagement of funds and operations; corruption; misuse of monopoly powers; and bureaucratic bottlenecks within Public Enterprises, on the one hand, and between them and their supervising Ministries, on the other.

(b) Political interference

State Owned Enterprises (SOEs) are also thought to serve political objectives or purposes, and consequently, suffer frequent interference by government and bureaucrats.[89] In some countries, they have also contributed to income redistribution in favour of the relatively well-off, over the poor, who generally lack access to both the jobs the-SOEs provide and their products.

Also political interference in the enterprise results in excessive employment, poor choices of product and location, lack of investments and ill-defined incentives for managers). While Public Enterprises are more susceptible to pressure from interest groups, private firms are able to focus solely on maximising profits.

The poor performance of the Public Enterprises that existed before 1970 was attributed to the poor nature of management especially with respect to the process of selection, appointment, promotion, incentive and discipline in the leadership hierarchy.[90] In Nigeria, the problem seems to be a post-independence development.

Conclusions

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[87] The performance of some state-owned enterprise-for example, in Malaysia and France-has been excellent. (Paul $tarr/meaning,html). In France, in Renault and EOF (an electrical heating company) the performance was very good. (Jean-Pierre C. Anastassopoulos, "The French Experience: Conflicts with Government", State-Owned Enterprise in the Western Economies, Edited By: Raymond Vernon and Yair Aharani, Croom Helm Ltd., 1981, p.111). Similarly, the most efficient steel company in the world, is the Korean Posco (Pohang Steel Company) which is state owned.

[88] Federal Republic of Nigeria, Report of the Presidential Commission on Parastatals (under the Chairmanship of G.O. Onosode) 24th October, 1981.

[89] B.O. Oshionebo, "Public Enterprises Performances and Management in Nigeria: An overview" at the Seminar on Public Enterprises Reforms, NCEMA, Ibadan, Nigeria, June 5-16, 2000, p.79. See also, M.I Obadan above note 86, at p. 46-47.

[90] Ibid.

This research have shown that the concept of privatization is an old but noble idea that governments have adopted to secure the continued existence of public utilities or state enterprises which ordinarily would have gone underground because of poor performances by selling existing shares to individuals and private corporations. It is observed after the disintegration or collapse of the Union Soviet Socialist Republic (USSR) in the early 90s,[91] there is hardly any country in the world that have not adopted one form of privatization or another in other to bailout ailing state infrastructure or to meet with the socio-economic and political promises to the citizens. Though the process of privatization is sometimes cumbersome as government will have to put in place necessary legislation to set the ball of privatization rolling, most times the goals set out are achieved after several years would have gone and its is sometimes an on-going process in the political life wire of a country. This argument could be buttressed by the experience of Nigerian nation that is still in the process of privatization after the idea was introduced in 1988 by the Ibrahim Babangida's administration; in 2013, after more than 13 years, the government of President Goodluck Jonathan has struggled to privatise the Power sector in Nigeria as part of its economic reform policies.[92] It is also observed that apart from poor performances, political interferences constitute a major reason why nations embark on privatization drive and the benefits accruable from the idea of privsatisation of public enterprises in Nigeria include but not limited to: curbing corruption, promote operational efficiency and effectiveness through better corporate governance; generate employment through private sector driven expansion; cut down on public debt and control public spending; to develop the capital market, increase the stakes of individual citizens in public enterprises through share ownership and encourage activities in other sectors of the economy.[93]

[91] In December of 1991, the Soviet Union disintegrated into fifteen separate countries. Its collapse was hailed by the west as a victory for freedom, a triumph of democracy over totalitarianism, and evidence of the superiority of capitalism over socialism. Gorbachev conceded power, realizing that he could no longer contain the power of the population. On December 25, 1991, he resigned. By January of 1992, by popular demand, the Soviet Union ceased to exist. In its place, a new entity was formed. It was called the "Commonwealth of Independent Republics," and was composed of most of the independent countries of the former Soviet Union. "The Cold War Museum: Fall of the Soviet Union", available online at http://www.coldwar.org/articles/90s/fall_of_the_soviet_union.asp, accessed 24 October, 2013.

[92]Clara Nwachukwu, "Nigeria Realised N400bn from Electricity Privatisation" Vanguard Newspaper 3 September, 2013. The Technical Committee of the National Council on Privatisation, NCP. The Council just concluded the largest privatisation transaction in Nigeria's history with the sale of 15 power companies unbundled from the Power Holding Company of Nigeria, PHCN, to private investors. the number of PHCN Successor Companies. There are 11 Distribution Companies (Discos) and seven Generation Companies (Gencos) and then there is the Transmission Company of Nigeria (TCN), available online at http://www.vanguardngr.com/2013/09/nigeria-realised-n400bn-from-electricity-privatisation/#sthash.pUqfYgQR.dpuf, accessed 27 October, 2013.

[93] Kudus Adebayo, above note 67, at p.7.

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CHALLENGES OF CRIMINAL LAW IN THE 21ST CENTURY – CHANGES IN THE GENERAL PART OF THE NEW HUNGARIAN CRIMINAL CODE

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Abstract:

The new Criminal Code (hereinafter CC) came into force in Hungary on the 1st of July in 2013. In my study I attempt to present a selection of the significant innovations which the legislator of the new Criminal Code kept in mind during codification.

Among them, I would like to introduce the changes to the general part of the CC, not including changes to the penalty system.

I focused especially on the questions of the age of punishability, legal defense, and the term of limitation of the crimes.

Keywords: *new Hungarian Criminal Code, juvenil, legal defense, emergency, term of limitation.*

Introduction:

The new Criminal Code (hereinafter CC) came into force in Hungary on the 1st of July in 2013. The previous Criminal Code (Act IV, 1978), has been altered over a hundred times since 1979, the entry into force.

During the last three decades, the legislators have amended the Criminal Code over ninety times (i.e. more than once every year on average) and more than ten Constitutional Court's decisions have been applied. These changes amended, introduced, or repealed more than 1600 provisions.[1] *These numerous changes were due not only to the differing criminal policies of the successive governments which often conflicted the previous ones, but, at the same time, also to the technical and scientific development, and the obligation to harmonize the law system to the EU, after Hungary's accession.*

These factors explain the urge to create a new Criminal Code in Hungary. The legislator's chief concern during the codification work of the Criminal Code was that it should meet the challenges of our modern age, while respecting and following the traditions of national criminal law.

The new Criminal Code does not break completely with the previous Criminal Code, since, although it required changes and additions, the previous Criminal Code was also an effective protection of our fundamental values.

In my study I attempt to present a selection of the significant innovations which the legislator of the new Criminal Code kept in mind during codification. Among them, I would like to introduce the changes to the general part of the CC, not including changes to the penalty system.

The new Criminal Code, like most foreign Criminal Codes, sets out the principles of *nullum crimen sine lege* and *nulla poena sine lege*. These principles were previously

[1] Justification of Law 100, year 2012 about the Criminal Code.

expressed only in the Constitution and the Basic Law of Hungary, but the Criminal Code did not declare them. The new Criminal Code aimed to amend this shortcoming by including this principle in the chapter of *Basic Provisions*[2].

Regarding the question of scope, the Criminal Code defines a new exception from the prohibition of retroactivity in accordance with the Basic Law. The principle of the criminal law continues to be that there is a serious criminal law with retroactive effect, an exception to this rule is punishable under the scope of the generally recognized rules of international law acts. During these war crimes and crimes against humanity understand that without transformation are part of domestic law and which may be applied retroactively, even if at the time of committing the offense under Hungarian law did not constitute a criminal offense.

As an innovation, the Criminal Code introduced the so-called passive personality principle in order to protect Hungarian citizens more effectively. The new Criminal Code creates the Hungarian jurisdiction for the case of a non-Hungarian citizen committing an offense against a Hungarian citizen abroad, or a Hungarian legal person or other entity without legal personality.

The Criminal Code limits the age of punishability to the age of 12 for certain offenses. The 16th § of the Criminal Code contains provisions which forbid the punishment of the young person charged who has not been in the fourteenth year of age when the offense was committed, with the exception of homicide [160 § (1)-(2)], manslaughter (161 §), assault [164 § (8)], robbery [365 § paragraphs (1)-(4)], and plunder [366 § (2)-(3)], given that the perpetrator of the offense committed the crime after the twelfth year of age, and the person possessed the necessary insight to recognize the offense.

Previously the law uniformly classified the person who has reached the age of 14 when the crime was committed juvenile. The reason for this was that the majority of children finish their primary education and achieve a level of physical and mental maturity which classifies them criminally liable. When creating the new Criminal Code, the legislator considered the fact that nowadays the development of children accelerated significantly, and before reaching the age of 14 they are affected by certain effects from which they had previously been protected. There has been an increasing rise in violent advocacy among children between the ages of 12 and 14, which fact made it was necessary to mitigate the minimum age for criminal liability in cases of abnormally aggressive and violent crimes. If the offender completed the age of 12 at the time of the offense, two factors must be considered. On the one hand, the classification of the offense, since impeachment is possible only in offenses listed in the Criminal Code. On the other hand, it has to be considered whether the perpetrator of the crime had the insight necessary to recognize the offense. The prosecutor is obliged to rebut the presumption that the 12-year-old person had the discretionary insight in the particular case which obviously means "imputation". Consequently, an appropriate expert's opinion can have a determining role before decision. Predominantly a psychologist's evidence is justified, but the prosecutor must also obtain information on the antecedent factors, school opinions, and environmental studies. In the case of a person who has not completed the age of fourteen at the time of the offense, only measures can be taken. The most severe penalty can be reformatory education. According to the precept, the perpetrator counts as a child on their 14th birthday, and exceptionally on their 12th birthday, and juvenile age begins on the day after their birthday[3].

The rules of lawful defense have also changed in the new Criminal Code. Article Five of the Basic Law of Hungary states that "Every person shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the

[2] About this topic in more details, see: BLASKÓ, Béla, *Hungarian Criminal Law*, „General Part", 5th revised edition, Rejtjel, Budapest—Debrecen, 2013. Pp. 69 - 72.

[3] See: GÖRGÉNYI, Ilona, GULA, József, HORVÁTH, Tibor, JACSÓ, Judit, LÉVAY, Miklós, SÁNTHA, Ferenc, VÁRADI, Erika: Hungarian Criminal Law, General Part, Complex Kiadó, Budapest, 2012. p. 524.

same." As a consequence, defense against an illegal attack is declaredly a constitutional fundamental right, thus the every citizen of Hungary has become empowered with the fundamental right of natural resistance to injustice, which is no longer an exceptional opportunity. As a result, the new Criminal Code allows a wider codification for the rules concerning legal protection than ever before.

The legislator primarily kept in mind the aspects that the risk of unfair attacks must be borne by the illegitimate attacker and the repelling action of the attacked must be judged fairly.

The new Criminal Code creates the case of the so-called situational self-defense establishing statutory presumption that there are cases when the unlawful attack happens in such a way that the attacked may assume that the attack was directed against their life, and in such cases the circumstances of the unlawful attack give the possibility to overrun the extent of the necessary defense. In such the situational self-defense is established and the unlawful assault should be treated as if it were intended to extinguish the life of the defending if the assault against a person is committed at night, armed, or by armed groups. It is also presumed to be considered lethal attack in the cases of unlawful intrusion into an apartment at night, armed, or in a group, or in the case of wrongful intrusion by force of arms into an enclosed space that belongs to the dwelling.

In these cases the court does not have to consider the issue of necessary extent. The Act disposes that a person who has been attacked at night, or who is attacked with a gun, may rightly presume that the attack was aimed at taking their life, and they have the right to choose the way of defense accordingly. This assumption may be based on the numerical superiority of the attackers as well. By this the legislator intended to broaden the case of legitimate defense to ensure effective action against violent crime, and they set up a statutory presumption in regard to the time, manner, and circumstances of the attack. The legislator appreciated that the person has multiple handicaps compared to the attacker, since the attacker decides the place, the way, the time, the purpose of the attack, and gets ready for this, while the attacked is taken by surprise, unexpectedly.

The Supreme Court of Hungary has recently adopted a new uniformity resolution in accordance with the new rules of self-defense. [4] It gives a new meaning to the previous rules, and, with regard to the response actions, it states that the only measure is the necessity of remedial action, but there is no need for a proportionality test any longer, given that the Criminal Code disposes that the person who exceeds the level of necessary measure of self-defense as a result of fright or passion, is not punishable. The defensive person is responsible for exceeding lawful self-defense only if the unlawful attack did not cause fright or anger in the attacked, and they deliberately disregarded the more moderate repelling when choosing the more serious outcome. In the latter case, the lawful self-defense is used as revenge, for which, of course, the criminal law does not authorize the attacked person.

The rules of proportionality in emergency have also been altered in the new Criminal Code. A person acting in emergency prevents danger created accidentally or by another person. If the emergency is avoided by means of a minor or the equivalent harm as the threat, and the action does not threatens society, then the offender can not be punished. If the response action causes more harm, but this is caused by fright or excusable emotion, it also results in the impunity of the defendant. Under the previous rules, in an emergency only minor harm was proportional, the equivalent harm exceeded emergency. The consistent application of the previous rule could create a situation which demanded self-sacrifice in order to save the life of another person. This is completely contrary to human nature, to the fact that the instinct of self-preservation overcomes all moral and legal considerations. A

[4] 4/2013 BJE Resolution (Criminal Law Harmonization Resolution).

person in emergency can not be expected to renounce their own life or physical integrity for the sake of saving another person. [5] The principle can therefore be considered appropriate that the new Criminal Code considers it proportionate if the defendant causes equivalent harm to the one to be repelled.

In the system of impediments of culpability the measure allowance is declared. By the regulation of measure allowance the law expresses that the legal system as a whole must be considered in determining criminal responsibility, as laws other than criminal law may exclude criminal liability. This can not be considered criminal offense what another law allows or declares impunity. However, it should be emphasized that only a statutory provision can exclude the unlawfulness of an action that is declared to be a crime. A regulation of a lower level does not create a criminal offense; consequently it cannot declassify the provisions of the Criminal Code. The legislation may be an abstract or a specific permission.

The new Criminal Code aggravates the rules of limitation compared to the previous provisions. The limitation period for criminal liability uniformly spans the upper limit of the appropriate punishment according to law, but at least five years. Under the previous rules it was three years. Offenses that are punishable by life imprisonment became imprescriptible offenses unanimously. With regard to EU law harmonization, for certain offenses the limitation period is extended in order to give opportunity to make a complaint or private motion by the victim after reaching the age of eighteen, in the cases when the rightful person had not done it previously. Therefore, in the cases of offenses such as strong emotion manslaughter, intentional assault which is punishable with less than three years of imprisonment, kidnapping, trafficking, violation of personal freedom and sexual morality, if the victim has not reached eighteen years of age at the time of the offense, and the punishability of the offense would expire before reaching the twenty-third year, the period of limitation is extended until the person reaches the age of twenty-three, or the date on which they reach the age of twenty-three.

Conclusions

With regard to sentencing, the new Criminal Code, in accordance with recent amendments of the old Criminal Code, preserved the tighter action and sentencing requirements against recidivists, and there are also more severe rules concerning those who commit the offense in an organized criminal group. The most severe action will prevail against violent multiple offenders. As part of the stringent action against recidivists, the law does not allow probation for recidivists, and does not allow suspended imprisonment for multiple recidivists.

One of the key requirements for the new Criminal Code is rigor which means the accentuated representation of the sentencing which is proportionate to the crime. Strictness is principally manifested in the rules concerning recidivists. In the case of first time offenders, the new Criminal Code allows the validation of preventive aspects. The question of how much the stricter Criminal Code will live up to the expectations, will be proved by practice.

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FACTORING AGREEMENT – INSTRUMENT FOR CREDIT INSTITUTIONS

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Abstract

The Factoring agreement as operational instrument of credit institutions is of special importance due to its permanent applicability, with the effect of streamlining the commercial activities, both at national and international level. This contract represents a financial technique closely related to the banking sector, and it can be considered as a variety of the bank credit.

Key words: *factoring, banking practice, contract, adherent, cession;*

Introduction

Taking into consideration more than succinct regulation regarding the factoring contract at the national level, it is still considered an unnamed contract [1]. Within the Romanian legislation the factoring agreement was first mentioned by GEO no. 10/1997 on decreasing financial blockage and losses in the economy [2], for subsequently to be regulated by Law no. 469/2002, currently abrogated.. Internationally the factoring agreement is regulated by UNIDROIT Convention on International Factoring agreement from Ottawa in 1988, the Rome Convention of 1980 on the law applicable to contractual obligations as well as the United Nations Convention in New York in 2001 on the assignment of receivables in international trade.

The concept, the legal nature and the parties of factoring agreement

The concept of factoring has its origins in the 17th century, in the Anglo-Saxon Law, and it played a significant role in the development of international trade, at the time of its appearance being concentrated in the textile trade between England and the United States.

In French doctrine [3] factoring is considered a technique by means of which a customer called adherent or supplier submits his receivables to a factoring company called factor which is a credit institution subject to the rules of Monetary and Financial Code. In return for remuneration, the factor undertakes to collect the adherent's receivables from its debtors and to pay in advance, in whole or in part, the receivables transferred, ensuring the enforcement of receivables even if the debtor cannot pay.

Within the Romanian legislation the factoring agreement was defined as that "agreement concluded between a party called adherent, supplying goods or providing services, and a banking company or specialized financial institution, called factor, by means

[1] Brânduşa Vartolomei, *Contractul de factoring*, Lumina Lex Publishing House, Bucharest, 2006, p. 40-41.
[2] Official Gazette of Romania. no. 72/22.04.1997, abrogated by art. 13 of Law no. 469/2002, in its turn abrogated by Law no. 246/2009 published in the Official Gazette of Romania no. 450/30.06.2009.
[3] Lavinia Smarandache, Alina Dodocioiu, *Consideraţii privind contractul de factoring,* Revista de ştiinţe juridice Publishing House, no. 4/2008, p. 98 *apud* T. Bonneau, *Droit bancaire*, Montchrestien, Paris, 2003, p. 373.

of which the latter shall ensure the financing, receivables monitoring and the protection against credit risks, and the adherent assigns to the factor, by way of sale, the receivables arising from the selling of goods or provision of services to third parties".[4]

In the Romanian literature [5] as well, the factoring agreement is considered to be that contract whereby a party called adherent assigns its receivables against its customers to the other party called factor, which in the exchange of a certain commission, undertakes to pay to the adherent the value of these receivables which it is to collect from the debtors taken over, therefore being subrogated to the rights the adherent had against its customers

In most European countries the factoring agreement is regulated starting from the institution of assignment of receivables that has many similarities with regarding the receivables transmission. Although as legal nature this contract has similarities with receivables assignment, it cannot be mistaken with this civil law institution, as it is a contract concluded between professionals, an original and complex contract. In addition it is an adhesion contract that is concluded intuitu personae. On the other hand, in France the factoring agreement is much closer regulated by the contractual subrogation consented by the creditor, but it cannot be confused with this institution, as it cannot be confused as well with the operation of discount or credit insurance.

Taking into consideration the definitions existing in the literature at the national and international level, the parties of the factoring agreement are: the adherent, the factor and the assigned debtor.

The adherent is always a good supplier, a services provider or a contractor, in other words it is a natural or legal person professional. There are points of view in the literature considering that the status of adherent could be acquired by legal persons as well, other than professionals, to whom the legislation in force allows to develop accessory nature commercial activities and closely related to the main purpose of that legal person. This category is considered to contain autonomous[6] administrations or the associations, foundations and federations[7].

If in terms of the adherent we have shown that it can be a natural or legal person professional and, according to some opinions, even an unprofessional, in what concerns the factor, it is a legal qualified subject. The factor can only be a specialized financial institution or a banking company that is a legal person.

The assigned debtor, although it is a participant within the factoring operation itself, it is not part of the factoring agreement. Nevertheless, certain effects of the factoring agreement are reflected on its own person, as we will show in the following.

By the conclusion of the factoring agreement, the payment liability of the assigned debtor is transferred from the adherent to the factoring company, the debtor being forced to pay all the amounts recorded in the invoices only to the factoring company. The payment shall be made starting from the date the receivables become due. In case the debtor refuses to make the payment, even though it is not part of the factoring contract it can be directly taken to court by the factor and, consequently, in its turn, it will be able to defend itself by invoking all the exceptions and defenses that it would have had available against the adherent. In its defense, the assigned debtor may oppose to the factor including the exception to limitation of actions, to extinguish the debt by payment, prior to the notification, or compensation, occurring previously to the receivables assignment[8].

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[4] Art. 6 par. (2) letter b) of Law no. 469/2002.

[5] B. tefănescu, I. Rucăreanu, *Dreptul comerţului internaţional,* Didactică şi Pedagogică Publishing House, Bucharest, 1983, p. 231.

[6] Brânduşa Vartolomei, *op. cit.*, p. 49.

[7] See art. 48 of GO no. 26/2000 regarding associations and foundations, published in the Official Gazette of Romania no. 39/31.01.2000, with all subsequent amendments and completions.

[8] L. Stănciulescu, V. Nemeş, *Dreptul contractelor civile şi comerciale în reglementarea noului Cod civil,* Hamangiu Publishing House, Bucharest 2013, p. 619.

Types of factoring agreement

Several criteria are used in order to classify factoring types.

Therefore, depending on the time the factor pays the adherent the receivables incorporated in the invoices, the factoring agreement may be classified in:

a. Old line factoring - which is characterized by the fact that the receivables payment is performed by the factor upon receipt thereof, that means before their maturity date;

b. Maturity factoring – when the factor shall pay the adherent the assigned receivables only at their maturity; the risk of default of invoices payment by the assigned debtors as well as the invoices management are transferred to the factor person;

c. Agency factoring –when the factor buys the adherent's receivables and, after their acceptance he pays them in advance, taking over the risk of the debtors' default of payment. The difference is the fact that the invoices management remains to the adherent who will take care of collecting invoices in its own name, submitting afterwards the collected amounts to the factor.

Depending on the right of recourse [9] the bank may have on the adherent:

a. Factoring with recourse – the risk of insolvency or the refusal to pay the debts by the assigned debtor belongs to the adherent;

b. Non-recourse factoring – the risk of payment default or insolvency of the assigned debtor passes to the factor at the same time with his obtaining the debts from the adherent;

Taking into account the participants to the factoring operation[10]:

a. Domestic factoring - when the factoring operation is carried out within the territory of a single state, with a single factor intervention;

b. External factoring - when we are in the situation of an international commercial contract, in the factoring operation taking place the intervention of 2 factors: an export factor and an import factor;

Object and specific clauses of the factoring agreement

The object of the factoring agreement is a special one consisting in financing, monitoring and protection against the credit risks by the factor, obtaining in exchange the receivables from the adherent[11]. An essential condition is the fact that, in order to be the object of a factoring agreement, the receivables must be clear and liquid and have expressly stated the due date or at least to have the possibility to determine it. Including future receivables may be the object of a factoring agreement. The assigned receivable may rise only from a commercial act and it shall be expressed by a specific title - the invoice.

Given the risk taken over by the factor when accepting the adherent's receivables, there are two clauses specific to the factoring agreement:

a. Exclusivity clause - by which the adherent is required to submit only to the factor all the invoices including the receivables on the debtors. In this situation, the factor has the possibility that of all the invoices submitted by the adherent to choose only those that present the lowest risk of not being paid at maturity by the assigned debtor;

b. The global clause - by which the adherent transfers to the factor all its invoices in order to prevent the possibility of being tempted to assign the factor only the invoices with an increased risk of not being collected, and keep to himself the certain receivables, easily to be recovered.

Functions of the factoring agreement

[9] L. Stănciulescu, V. Nemeş, *op. cit.*, p. 612.
[10] Lavinia Smarandache, Alina Dodocioiu, *op. cit.*, p. 101.
[11] L. Stănciulescu, V. Nemeş, *op. cit.*, p. 615.

Starting from the tripartite relationship arising under the factoring agreement and taking into consideration the literature at the national and international level, we can conclude that the most important functions of the factoring agreement are the following[12]:

1. Financing function - also called liquidity function.

By the factoring agreement, the factor provides a financial service to the adherent for which it does not require guarantees, the guarantee function being completed by the transferred receivables. Therefore, the factor, under the conditions of taking over the receivables from the adherent, shall provide him with the necessary liquidity. Therefore, the adherent benefits from liquidity before the moment its receivables would have reached maturity. It should be mentioned the fact that this type of financing is made for a short period of time, of 90 to a maximum 120 days, and only exceptionally 180 days.

This type of financing represents a special category as it consists in an exchange of actual assets, receivables being converted into financial obligations.

2. Services function - also called service provision function or management function.

During the performance of the factoring agreement, depending on the type of factoring chosen, the factor can provide in favor of the adherent a complex package of services, such as:

- Checking the creditworthiness situation of the debtors;
- The debtors' record and accounting, with all the necessary data regarding the receivables records;
- Monitoring the solvency degree of the debtors taken over;
- Invoicing responsibilities;
- Receivables collection responsibilities;
- Consultancy regarding the activity of debts liquidation;
- Consultancy having as its object the accounting and financial management;
- Consultancy regarding the factoring business in tax issues;

This function is of particular importance within the factoring process, relieving the adherent of certain activities and costs that are taken over by the factor, the adherent being able to exclusively focus on the manufacturing or services provision activity. It basically occurs an outsourcing of the aforementioned services, noting that the enumeration is not exhaustive.

3. Del credere function - also called the credit risk assuming

By the del credere function the factor takes over the credit risk from the time of receivables purchase. Basically this function requires the action of taking over by the factor of the creditworthiness risk of assigned receivables, after a prior verification of the credibility and ability to pay of the debtor, verification performed by the factor. This means that, after signing the factoring agreement, the factor shall no longer be able to invoke the action of recourse against the adherent in case of insolvency or any default of payment of the assigned debtor.

Conclusions

Taking into consideration the current economic situation as well as the fact that banks granting loans is increasingly difficult and the capital market moves with difficulty, in this context, on the national and international transactions market, as well as in European companies development and financing, factoring becomes the most available tool, representing the only financing source through which the financing increases at the same time with the sales, being also the cheapest form of short-term financing.

Given the fact that factoring is a financial product of financing without guarantees but also a highly complex commercial management product, this type of contract can represent

[12] See Cosmina Petre, *Factoringul, o alternativă modernă de finanțare a întreprinderilor europene,* Danubius Proceedings, Volume II, 2007, p. 568.

the saving solution for the companies that cannot support themselves from the financial point of view, but that have a well-developed business plan.

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REFLECTIONS REGARDING SANCTIONS STIPULATED IN THE INTERNATIONAL TREATIES CONCERNING DISARMAMENT

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Abstract

The main objective of the United Nations Organization, from its founding, is the exclusion of force from international relations, which also implies limiting the weaponry arsenal existent, until removing entire categories of it, as arms control and disarmament, even though they do not eliminate „per se" of political, economic or ideological reasons of using force, it significantly contributes to the diminishing of war risks.

When it is considered that the obligations resulting from disarmament treatment were infringed, one may appeal to the application of sanctions stipulated in the international law, the status of the author of infringement, as a reaction to the violation of the treaty.

Key words: *disarmament, international sanctions, countermeasures, violation of treaties, state liability*

Introduction

In cases when infringements of the disposition in the disarmament treaties are ascertained, the application of sanctions or other measures stipulated in the treaties breached is imposed, or in conformity with the general rules of international law, such as suspension of treaty, withdrawal from the treaty, countermeasures etc. Thus, states may adopt, individually or collectively, sanctioning measures against those who breach treaties in the disarmament domain, even in cases in which the respective agreements do not excessively stipulate this fact[1].

International Sanctions in Treaties Concerning Disarmament

The concept of „disarmament: is used in a narrowed sense, that of numerical reduction or total elimination of a weapon system[2], as well as in a large sense. In this latter one, by "disarmament", we understand all the measured targeted at: stopping, limiting, reducing or disbanding certain types of weapons; prohibiting certain military activities; regulating limitation in the placing of armed forces; prohibiting the transfer or certain articles of a military importance; reducing risks of accidentally starting war and limiting or reducing the use of certain types of weapons or methods of waging war. In other words, in a broad sense, the notion of "disarmament" also includes "weapon control"[3].

[1] Sur S., *Obligations en matière de désarmement et de limitation des armements: problèmes de respect et mesures d'imposition*, L'Institut des Nations Unies pour la recherche sur le désarmement, Nations Unies, New York et Genève, 1995, p. 124.
[2] "Disarmament" also has the notion of limiting armaments, imposed by a state, o group of states or an international organization at the end of war. Examples in this sense are the restrictions imposed on Germany, after the Second World War or on Irak, after the first war in the Golf (1991).
[3] Popescu D., *Dezarmarea – concepte şi implicaţii juridice*, in "Studii şi cercetări juridice", no. 3, 1987, p. 35.

Regularly, the disarmament agreements are achieved in the framework of the United Nations Organization or in another institutionalized specialized framework. At the level of the United Nations Organization, the General Assembly is the main organ with responsibilities in the disarmament field; aspects regarding disarmament are examined in the framework of the Disarmament Committee or even directly under the attention of the General Assembly, where member states have the opportunity to expose their official positions and to participate to informal consultations[4].

The Security Council of the United Nations Organization has the obligation to elaborate plans for establishing a control and regulation system of weaponry[5], having the ability to take measures in this sense[6]; similarly, the Council is actively involved in the process of imposing the observance of assumed liabilities by treaties by the party states.

In the year 1952 the Disarmament Commission was founded, as a successor of the United Nations Organization Committee for Atomic Energy and the United Nations Organization Committee for Conventional Armaments, which, including all the members of the United Nations Organization, has an activity status of inter-subsidiary body of the \general Assembly, debating different concepts regarding disarmament.

On the European scale, the Organization for Security and Cooperation in Europe establishes one of the most efficient regional mechanisms of negotiation in the sphere of disarmament and security.

In this domain there were adopted numerous treaties with an universal, but also regional character, the majority forecasting guarantees and control mechanisms for respecting the obligations concerning disarmament, such as: *national declarations*[7] or *routine inspections*[8], etc.

Technological progress, especially in the domain of *satellites*, created the possibility of obtaining informations referring to respecting the disarmament treaties by means of „non-invasive" technical procedures. Thus, listening systems can be assembled on satellites or planes which perform recognition actions, without the consent of the state targeted. Moreover, *radars* are used for surveillance, especially on cloudy weather and seismometers for detecting subterranean nuclear explosions, etc.

The reactions against states which infringe the obligations stipulated in the disarmament treaty are:

- Spontaneous and regulated (ad-hoc dispositions or submitted to conditions, such as notification, explanatory memorandum, moratorium);
- Unilateral or collective (adopted by a single international entity or by the majority of interested states, or even by the competent international organizations);
- Direct or indirect (direct taken by a party – parties – of the breached treaty, or which supposes seizing the Security Council of the united nations organization or

[4] Following the debates, the General Assembly adopts resolutions comprising proposals and recommendations. When they consider it necessary to give more attention to a certain aspect concerning disarmament, the General Assembly reunites in special sessions, the first in this sense being organized in the year 1978.

[5] Art. 26 from the Charter of the United Nations Organization.

[6] For example, in the year 1991, the Security Council of the UNO adopted the Resolution no. 687 by with it was declared the elimination of chemical and biological weapons, as well as rockets carrying these types of weapons, owned by Irak.

[7] For example, in the *Convention concerning the prohibition of development, production, stocking and use of chemical weapons*, adopted in the 13th of January 1993 in Paris and entered in force on the 29th of April 1997, approved by Romania by the Law no. 125/9 December 1994 (Official Gazette no. 356/22.12.1994), shows that each state party undertakes to, in term of maximum 30 days from the entering in force of the Convention, to declare whether it possesses chemical weapons, their placement and quantity, to elaborate a destruction plan of these weapons, etc.

[8] Routine inspections target the verification of armament stocks, the process of reducing them and the way in which states conform to the obligation of stopping the production of weapons prohibited by treaties.

other bodies, as to obtain support for ensuring the observance of treaties or fo the application of sanctions)[9].

In some international treaties referring to disarmament in which there are no sanctions for the infringing parties, the possibility of seizing the Security Council is provided, situation in which it was established that a state party has breached the obligations assumed. For example, the Convention concerning the prohibition of development, production, stockage and use of chemical weapons and destroying them, acknowledges the right of the state parties that "in cases of particular gravity", to bring the issue, and including the relevant conclusions and informations, at the knowledge of the Security Council and General Assembly of the United Nations[10]. Similar to the situation of the Convention upon the prohibition of perfecting, production and stockage of bacteriological (biological) weapons with toxins and upon their destruction[11], in art. VI, pct. 1 of the latter stipulating that: any state party of this Convention which ascertains that another state party breaches the obligations resulting from the dispositions of the Conventions may submit a complaint to the Security Council of the United Nations".

In the content of other treaties, such as the Treaty concerning the non-proliferation of nuclear[12], no reference is made regarding the notification of the Security Council for applying sanctions[13], in its content also being stipulated the guarantees and measures which may be taken for observing its dispositions.

The formal notification of the United Nations Organization or of other competent international organizations, in case of infringing the obligation undertook in the treaty, makes possible the bringing of the case to the *public opinion*, which constitutes, in itself, a sanction which affects the prestige and credibility of the state in case[14].

The state which suffered damages by the violation of a treaty, may directly notify the Security Council[15], in the absence of pertinent institutionalized mechanisms[16], also

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[9] Istrate C., *Dreptul dezarmării. Acorduri multilaterale*, All Beck Publishing, Bucharest, 2005, pp. 209-210.

[10] In conformity with art XIV, pct. 1 from the Convention" Disputes which may arise concerning the application or the interpretation of the present convention will be solutioned according to the pertinent dispositions of the present convention and in conformity with the dispositions of the United Nations Charter".

[11] The convention regarding the prohibition of perfecting, producing, stocking of bacteriological (biological) weapons with toxines, and upon their destruction was opened for signing on the 10th of April 1972, in London, Moscow and Washington and it entered in force on the 26th of March 1975; Romania approved this Convention by the Decree 253/6 July 1979 (Official Gazette no. 57/7 July 1979).

[12] Adopted on the 12nd of June 1968 by the General Assembly of the United Nations Organization, entered in force on the 5th of March 1976 and approved by Romania by the Decree of the State Council no. 21from the 31st of January 1970, published in the Official Gazette no. 3/31 January1970.

[13] Security Councillor of the United Nations Organization must be notified in term of 3 months prior to the situation of a withdrawal from the Treaty of a state party (art. X, pct. 1, thesis 2).

[14] See also Larsen J.A., Rattray G.J., *Arms Control Toward the 21st Century*, Lynne Rienner Publishers, Boulder (Colorado), 1996, p. 83, according to who the simple informing of the public concerning the breach of an agreement may even have contrary effects, in the sense of undermining the agreement, if sanctions will not follow.

[15] As it has been shown, the convention regarding the prohibition of biological weapons stipulates that any state who considers that any state party who breached the dispositions of the convention may file a claim to the Security Council of the United Nations Organization, attaching any proof to support the assertion, as well as requesting the examination by the Council. Similar dispositions are comprised in the Convention regarding the prohibition of techniques which modify the environment, in military or hostile purposes, adopted by the General Assembly of the United Nations Organization on the 10th of December 1976, and opened for signing on the 18th of May 1977 (Romania approved the Convention by the Decree no. 100/28.03 1983, published in the Official Gazette no. 23/01.04.1983).

[16] The Charter of the United Nations Organizations does not expressively entitle the Security Council to adopt measures against states which breach the obligations resulting from a disarmament treaty in which there are parties, but in the situation in which it considers that the situation created risks to determine international frictions, the Council may solicit the state or states affected, in conformity with the Chapter VI of the Charter, "adequate methods or procedures of settling conflicts".

mentioning the proofs on which the notification is based[17]. The Council may decide that a certain breach of the obligations assumed by the treaty, constitutes „a threat to peace", a hypothesis in which, according to the dispositions in the 7th Chapter of the Charter, it is entitled to request the member states of the United Nations Organization the application of sanctions to the state in case. These may be: *the partial or total interruption of economic relations or rail, marine, aerial, postal, telegraphical, radio communications and other communication means, including force demonstrations, blockade and other operations of the armed forces belonging to the member states of the United Nations Organization[18]*.

Formally, the Security Council has the necessary means to combat the perils of peace, resulting from the infringement of international agreements, but in practice, it is sometimes difficult to obtain the necessary consensus for taking measures, from its members, because although the majority requested of 2/3 is met, the decision may be blocked by the veto[19] of one of the five permanent members[20]; The veto right continues to function without restrictions, the nuclear powers refusing to limit their rights beyond the limits established by the United Nations Charter[21].

In some cases, the Security Council has intervened in the innovative spirit with punitive measures [22] which is only partially based on treaty dispositions[23].

In the public international law there are other bodies or intergovernmental organizations, such as, the *International Agency for Atomic Energy*[24]or the *Organization for Prohibition of Chemical Weapons*[25], which may act on the application of sanctions for non compliance with the disarmament treaties. Thus, the infringement of disarmament treaties is reported to the Security Council and the General Assembly of the United Nations Organization. If these organizations fail to adopt recovery measures in a reasonable interval of time, the Governing Council of the International Agency of Atomic Energy may decide, as a

[17] Istrate C., [9], p. 214 and fol.

[18] Art. 41 and 42 from the United Nations Charter.

[19] The issue of reconcilliating the right to veto with the imperative of applying treaties in the domain of disarmament appeared ever since the year 1946, in the context in which the USA proposed Baruch Plan, in view of creating an international agency to control nuclear energy. The United States insisted that the right of veto must not be used in the purpose of protecting those who infringe international treaties, however no result was obtained due to the opposition of other states. The abusive use of the right to veto was also analysed in other circumstances (for example, in the context of negotiations regarding the prohibition of biological weapons), showing that maintaining this right, in such situations, would contravene the equality sovereign principles and non-discrimination of states parties to the same treaty.

[20] Goldblat J., *Arms Control – A Guide to Negotiations and Agreements*, International Peace Research Institute, Oslo – Stockholm International Peace Research Institute, SAGE Publications, London – Thousand Oaks – New Delhi, 1994, p. 235 and fol.; Larsen J.A., Rattray G.J., [14], p. 83.

[21] See also Sims N.A., "The Evolution of Biological Disarmament", in *Chemical and Biological Warfare Studies*, No. 19, Stockholm International Peace Research Institute, Oxford University Press, New York, 2001, p. 53 and fol.

[22] See Sur S., [1], p. and fol.; Rice M., 1999, Security Council replaces UNSCOM; paves way for inspections, sanctions relief, in *Arms Control Today*, Arms Control Association, December 1999, p. 27 and fol.

[23] Thus, in the disarmament issue, by the Resolution no. 687 (1991) the Security Council established that Irak must destroy or render harmless all stocks of chemical and biological weapons, all research, development and production installations relevant in this field, as well as all ballistic missiles with range greater than 150 km, their main components, as well as the production installations or rocket repairs. In conformity with the sanctioning regime applied to Irak, it should not have developed nuclear weapons, susceptible materials to producing these weapons, relevant research, development or production components or installations. Moreover, the exportation of weapons and military material to Irak was prohibited until the contrary decision of the Security Council.

[24] According to art. III, pct. 1 from the Treaty concerning the nuclear non-proliferation, every state party undertakes to observe the guarantees stipulated in the agreement concluded with the International agency for Atomic Energy.

[25] Article VIII A from the Convention concerning the prohibition to develop, produce, stock and use chemical weapons and destroying them.

sanction, *the interruption or cancelling of assistance provided by the Agency* and solicit the guilty state *to return material or equipment which were already transferred*. Moreover, one may decide the *suspending of the state in case, from the benefit of rights and privileges offered by the quality member of the Agency*[26].

The conference of prohibiting chemical weapons provides a series of attributions of the *Organization for Prohibition of Chemical Weapons* in view of redressing the situation and ensuring the observance of assumed obligations, including the adoption of *sanctions*[27]. If the illicit activity of a state party may seriously damage the objective and target of the Convention, the conference of prohibiting chemical weapons may recommend the state parties to adopt *collective measures*, and in cases of extreme gravity, may also notify the General Assembly of the United Nations Organizations and the Security Council for taking the measures imposed[28].

In establishing the legal regime of nuclear weapons the International Court of Justice was also involved, in the year 1996, when, at the initiative of multiple non-governmental organizations, the Global Heath Organization adopted a resolution by which it requested the International Court of Justice a consultative notice regarding the legality of using nuclear weapons, taking into account the consequences of using those weapons, for the health of the people and of the environment. In its notice, the Court showed that the use of nuclear weapons is „contrary to the regulations of the international law applicable to armed conflicts and, especially to the principles and rights of the humanitarian law", but it also evidenced that „taking account of the current state of the international law and the elements at its disposal, the Court may not definitively decide if the threat or use of nuclear arms is legal or illegal in the extreme circumstance of self-defense, in which the survival of a state in itself may be questioned"[29].

Conclusions

By studying international reality, it is observed that, although the nature of sanctioning measures against states that breach the obligations stipulated in the disarmament treaties is relevant, the primordial importance is represented by the proportionality of sanctions with the gravity of violating contractual obligations. In this way, a broad range of reactions/ countermeasures can be used for obtaining the desideratum of treaty compliance, which embodies economical measures (suspending the assistance programs, imposing commercial restrictions or ceasing the vital deliveries of raw materials, equipment), but also diplomatical and political measures, namely reducing the level and intensity of relations with the state in cause [30]. For example, taking into account the high level of peril, created by performing nuclear experiments by India and Pakistan in the year 1998, international reactions were extremely ferm, by being condemning of numerous states and international bodies (United Nation Organization, International Agency for Atomic Energy, The Group of 8, Permanent Commune Council of the North Atlantic Organization Treaty – Russia) and warning upon the extensively baneful impact of these experiences for regional and global security. Likewise, certain countries *withdrew the support* offered to India for *the occupation of a permanent member position in the Security Council of the United Nations Organizations*. Moreover,

[26] Goldblat J., [20], p. 236 and fol.; Istrate C., [9], p. 210.

[27] Sur S., [1], p. 27 and fol. The conference of the member state of the Organization for Prohibition of Chemical Weapons is entitled to adopt recovery measures in view of observing the Convention, and in case of non-compliance of the measures adopted, it may reduce or suspend the rights and privileges of the state in cause, the sanctions remaining in force until taking the requested measures.

[28] Istrate C., [9], p. 211.

[29] See Sayed A., *Quand le droit est face à son néant. Le droit à l'épreuve de l'emploi de l'arme nucléaire*, Éditions Bruylant, Bruxelles, 1998, p. 66 and fol., which shows that the proof of rare sensibility of the issue analysed, the assertion regarding the notice reunited seven votes pro and against, the vote of the President of the International Justice Court, Mohamed Bedjaoui being necessary for the adoption of this notice.

[30] Istrate C., [9], p. 219.

together with the political convictions, some states also adopted other unilateral sanctions, such as the ones imposed on India by the United states of America, which refers to the *cancelling of economic assistance*, except the one regarding food provision in humanitarian purposes; *cancelling of armament sales* and other military products; *rejecting loan requests or of financial assistance; prohibiting the exportation of items or technologies subject to licenses*[31].

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[31] These sanctions were cancelled on the 22nd of September 2001, in the context of the campaign against terrorism.

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CORRELATIONS BETWEEN THE EVOLUTION OF INTERNATIONAL RELATIONS AND PERFECTING THE INTERNATIONAL MEANS OF PROTECTING HUMAN RIGHTS

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Abstract

The evolution of relations between states made necessary the establishment, at an international level, of certain behavioural regulations and fundamental principles, whose violation may cause prejudices to the collaboration relationships developed among states. Thus, over time these were consecrated by customary rules, treaties or other international conventions, imperative norms of conduct, which are strictly imposed to all partners at international juridical relations[1].

Moreover, international norms which aim at respecting the fundamental human rights and liberties were adopted, thus contributing to the defense of the universal values of humanity.

Key words*: international methods of protecting human rights, improvement, international relations, correlation, historical evolution*

Introduction

Over the years, societies defined, implicitly or explicitly, in juridical terms or without using them, the rights and obligations of their members, taking into account their needs and social aspirations, so that the „history of the human rights is mistaken for the history of humanity"[2].

The problem of protecting human rights is fundamentally related to the relations between humans and their social environment, which are not meant to last, thus legally, abstract rights do not exist, as the form of right, like any other normative system, is in itself the reflection of a certain social order[3].

The evolution of international means of human rights protection

Even though there were some concepts of a humanistic nature in the Antiquity period or in the political theory of the Middle Ages, the concept of „human rights" was consolidated in the period of intellectual preparation for the bourgeois revolutions in Europe[4], and the apparition of a coherent theory and some actual practices regarding the protection of these

[1] Duculescu V., 2002, *Instituții de drept public şi relații internaționale în dinamică*, Lumina Lex Publishing, Bucharest, p. 73.
[2] Mbaye K., 1991, *Les droits de l'homme et des peuples*, in Droit International, Bilan et Perspectives, coordinator Mohammed Bedjaoui, Pedone Publishing, Paris, p. 111.
[3] Tomuschat Ch., 1981, *International Standards and Cultural Diversity*, HR Teaching Publishing, p. 2.
[4] Năstase A., 2004, *Destinul contemporan al dreptului internațional. Reflecții dintr-o perspectivă europeană*, Universitatea „Nicolae Titulescu" Publishing, Bucharest, p. 173.

rights is the product of an extended period, in which time the premises necessary for the crystallisation of juridical basis of human rights have been accumulating[5].

Some of the norms of international humanitarian law are of a customary nature, although many of them have found their expression in international conventions, as a result of the growing preoccupation for protection, on an universal level, a series of juridical and moral values of humanity.

The first conventional norms targeted the humanization of war, combating the slave trade and, generally, with human beings, as well as protectig the religious minorities. Moreover, in the planning of state relations certain preoccupations of a humanitarian nature manifested, however they were only targeting certain specific and determined categories, such as: diplomatic envoys (messengers) whose inviolability was known (*sancti habentur legati*) or non-combatant persons (women, children) which were to be spared in case of conquering cities.

From the ancient times[6] certain categories of human rights were protected, in times of wars, by means of the *humanitarian right*[7], which is sometimes presented as an integral part of the international law of human rights[8].

A thorough analysis shows that between the international law and the humanitarian laws there are connections and overlappings, both aiming, with specific means, to protect the fundamental human values, firstly the right to life and other rights related to the latter.

If the humanitarian law comprises regulations by which the human rights are protected during armed conflicts; consequently, the norms which make the object of the international law of human rights embody numerous dispositions of a humanitarian nature, which target the protection of human rights and values, both in times of peace and armed conflicts.

Commencing with the 17th century, the evolution of the humanitary international law was dominated by the idea that the belligerent are not allowed to make use of forces which surpass the necessary limits to achieve the war target and that those forms of violence which are not absolutely necessary for obtaining victory are not permitted; customary norms or later named conventional norms from this domain having as subject the way to wage war[9], which was considered only a relation between states, and not individuals[10].

An important moment of the revolution of international humanitarian law was the adopting and signing, in the year 1864, at the international conference from Geneva, of the first humanitarian convention – "The Convention for improving the fate of wounded soldiers of the army forces in campaign"[11], through which the International Committee of the Red

[5] Ewyzanski Ch. E., 1979, *The Philosophical Background of the Doctrines of Human Rights*, in *Human Dignity the Internationalisation of Human Rights*, coordinator A. Henkin, Aspen Institute of Humanistic Studies, p. 10.

[6] In the Antiquity there were rules to wage wars for every nation which sanctioned excesses committed by the invasion troops upon individuals (O'Brien,2001, *International Law*, Cavendish Publishing Limited, London-Sidney, p. 760); The Sumerians, Egyptians, Hittites, Persians or Jews, as well as other people in Antiquity imposed their own troops to respect humanitary rules and sanctioned their infringement (Pictet J., 1983, *Développement et principes du droit internațional humanitaire*, Institut Henry Dunant-Generve, Editions A. Pedone, Paris, pp. 12-19. In the Middle Ages, the Catholic Church, influenced by Thomas d'Aquino, established norms or waging war which prohibited the combating states to attach certain categories of persons, such as priest, women and children (Bădescu V.S., 2007, *Umanizarea dreptului umanitar*, CH Beck Publishing, Bucharest, p. 41).

[7] Cloşcă I. & Suceavă I., 1992, *Dreptul internațional umanitar*, Şansa SRL Publishing, Bucharest, p. 35.

[8] Diaconu I., 1993, *Drepturile omului*, Romanian Institute for Human Rights, Bucharest, p. 111.

[9] Cloşcă I. şi Suceavă I., 1992, p. 15.

[10] Duculescu V., 2002, p. 47.

[11] Signed by Romania in the year 1874.

Cross was founded[12], an organization with an extremely special role in protecting the human rights[13].

The Covenant of the League of Nations[14], although it did not prohibit war, it conditioned it to the preliminary accomplishment of some conciliation attempts, thus there subsequently existed certain tendencies to promote international conventions which would elaborate some *humanitarian norms*, in the framework of admitted rules for waging war.

The middle of the 19th century recorded a new phenomenon in the domain of human rights: the problem of their protection was debated on an international level[15], however it was achieved relatively late at an international level, as an imperative of global community and only after the atrocities of the second world war[16].

Thus, until the year 1945, the process of human rights international protection was described as being fragmentary, referring only to certain social categories[17]. These partial regulations were limited, among others, due to its intergovernmental character of the international right and, in virtue of the sovereignty right, the regime to which the state submitted its own citizens was generally considered as a issue of internal law, thus avoiding the settlement of the human rights at an international level[18].

An extraordinary event in the evolution of human rights regulations at an international level was the conclusion of the Treaty of Berlin, from 1878, by which a series of states (including Romania) undertake to grant religious liberty to the persons submitted to their jurisdiction, including the national minorities. Moreover, the Convention concluded in Geneva, on the 26th of June, 1936, constitutes an important legal instrument for fighting against slavery, and the Convention in Geneva from the 30th of September 1921 and the 11th of October 1933 develops previous conventions, adopted in Paris, on the 18th of May 1904 and 1910, regarding the prohibition of trading women and children[19]. As well, the founders of the International Labour Organization[20] decide to offer the trade unions of workers and patrons associations the right to demand the states to respect the conventions of this organization and the possibility to address the League of Nations[21].

The international law of human rights, as a distinct and modern branch of public international law developed only after the second world[22], the creation of the United Nations

[12] The Red Cross is the successor of the „International Committee for Relief to the Wounded", which was founded in the year 1863 (See also Pictet J., 1983, *Développement et principes du droit internațional humanitaire*, Henry Dunant-Generve Institute, Editions A. Pedone, Paris, p. 7).

[13] Geamănu G., 1983, *Drept internațional public*, Treaty, vol. II, Didactical and Pedagogical Publishing, Bucharest, p. 443.

[14] The League of Nations Covenant represents an integral part of the Peace Treaty of Versailles from the year 1919.

[15] Cloşcă I. & Suceavă I., 1992, p. 31.

[16] Năstase A., 2004, *Destinul contemporan al dreptului internațional. Reflecții dintr-o perspectivă europeană*, Universitatea Publishing„Nicolae Titulescu", Bucharest, p. 178.

[17] Popescu D. & Năstase A.,1997, *Drept internațional public*, Reviewed and completed edition, „Şansa" SRL Publishing and Press, Bucharest, p. 119.

[18] Popescu D. & Paşoi R., 2003, *Protecția internațională a drepturilor omului*, Studies of Romanian Law, new series, year 15 (48), no. 3-4, July – December 2003, Academia Română Publishing, p. 279.

[19] See also Geamănu G., 1977, *Dreptul internațional penal şi infracțiunile internaționale*, Academia Română Publishing, Bucharest, pp. 168-204.

[20] Founded by the Treaty of Versailles from 1919, targeting the improvement of work conditions for people and promoting liberty of association.

[21] Anghel I.M., 2002, *Subiectele de drept internațional*, 2nd Edition, Lumina Lex Publishing, Bucharest, p. 424. See also Paraschiv R.G., 2011, „Drepturi şi libertăți garantate international", in *Dinamica dreptului românesc după aderarea la Uniunea Europeană*, Universul Juridic Publishing, Bucharest, p. 723-725.

[22] The protection of human rights took form in a series of regulations of an universal, regional of sectorial nature, as a consequence of perpetuating the practice of infringement of these rights in the states submitted to a communist regime (Năstase A., Aurescu B. & Jura C., 2003, *Drept internațional public*, All Beck Publishing, Bucharest, p. 194).

Organization by adopting the UN Charter[23], thus permitting the redefining of preoccupations in the area of human rights.

The UN Charter only vaguely refers to the domain of human rights, the moment of reference in this sense being the Universal Declaration of Human Rights[24] – the first document with universal vocation, based on the fundamental principles of human rights: liberty, equality[25], universality and perpetuity.

Although not adopted through a legally binding act[26], the Universal Declaration of Human Rights had and still has a great echo, becoming a veritable international instrument which stands at the basis of forming the most developed protection system of human rights known in history, the principles stipulated here being written in the constitutions of democratic states and in numerous international conventions[27].

After the year 1948, over 60 conventions and declarations regarding human rights were adopted in the framework of the United Nations Organization, similarly regulating mechanism for applying them. Among the most important are: the International pact regarding the civil and political rights[28], together with the optional Protocol of this Pact[29], and the international Pact concerning economic, social and cultural rights[30].

Also at an international level there were elaborated and adopted a series of specific juridical instruments for certain domains, such as: fighting discrimination, protecting human lives (meant to prevent and suppress genocide, war crimes and crimes against humanity) or for the protection of certain categories of people (refugees, stateless persons, etc.).

The regional protection systems of human rights acknowledge and also protect the right of an individual (European, American and African system), however the European system established a more efficient protection system[31].

In the European framework more juridical instruments were adopted by means of which fundamental human rights and liberties are being ensured, the most important of these being the European Convention of Human Rights[32] which guarantees a general protection

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[23] The UN Charter was signed on the 26th of June 1945, at the San Francisco Conference (April-June 1945) and entered into force on the 26th of October 1945. Romania became member of the United Nations Organization by means of the General Assembly Resolution of the United Nations Organization no. 995(X) from the 14th of December 1955.

[24]The Universal Declaration of Human Rights was adopted on the 10th of December 1948, by means of the General Assembly Resolution of the United Nations Organization no. 217A(III), with 48 votes „for" and no vote „against".

[25] In conformity with art.1 of the Declaration "all humans are born free and equal in rights".

[26] Concerning the different opinions regarding the role of the General Assembly Resolution of the United Nations Organization, see: Prost M. & Kingsley Clark P., 2006, *Unity, Diversity and Fragmentation of International Law: How Does the Multiplication of International Organizations Really Matter?*, in the Chinese Journal of International Law, vol. 5, No. 2, pp. 354-358.

[27] See Gazano A., 2007, *L'essentiel des Relations internationals*, 4-eme edition, Gualino Publishing, Paris, p. 72.

[28] Adopted on the 16th of December by means of the General Assembly Resolution of the United Nations Organization 1966 no. 2100A(XX), in New York, entered into force on the 23rd of March 1976; signed by Romania on the 27th of June 1968 and approved by the Decree 212/31 October 1 974, published in the Official Gazette of S.R. of Romania no. 146/20 November 1974.

[29] Adopted and opened for signature by the General Assembly of the United Nations Organization by the Resolution 2200 A (XXI) from the 16th of February 1966, entered into force on the 23rd of March 1976.

[30] Adopted on the 16th of December 1966 by means of the General Assembly Resolution of the United Nations Organization no 2200 A (XXI), entered into force on the 19th of December 1966; signed by Romania on the 27th of June 1968 and approved by the Decree no. 212 from the 31st of October 1974, published in the Official Gazette of Romania no. 146 from the 20th of November 1974.

[31] Cohen-Jonathan G., 1989, *La Convention Europeenne des Droits de l`homme*, Economica Publishing, Paris, pp. 278 and fol.

[32] Convention for the defense of human rights and fundamental liberties, adopted in Rome on the 4th of November 1950, entered in force on the 3rd of September 1953, approved by Romania on the 31st of May 1954. It is also named the European Convention of human rights.

framework and the fundamental rights and liberties. The Convention was then amended by Protocols no. 3, 5, 8 and completed by Protocol no. 2 which represents an integral part of the Convention, along with its entering in force[33].

As the main defense mechanism of rights in Europe we must mention the European Court of Human Rights, headquartered in Strasbourg.

The defense of human rights on the American continents has developed within the American State Organization[34], commencing with the adoption of the „*American Declaration of the Rights and Duties of Man*", on the 2nd of May 1948. The interamerican system of human rights is based on the *American Convention of human rights*[35], also known under the name of the Pact of San Jose (Costa Rica), which was subsequently completed by two additional articles: *the Protocol concerning the economic, social and cultural rights,* signed in 1988, and the *Protocol concerning the abolition of death penalty*, signed in 1990.

As control mechanisms concerning the observance of the rights stipulated in the Convention, the following were founded: *the Inter-American Commission on Human Rights* and *the Inter-American Court of Human Rights.*

The African system of human rights is based on two documents: *The African Charter of human and people rights*[36] and the *Protocol to the African Charter of human and people rights for establishing the African Court of human and people rights*[37], inspired from the European and American practice in the domain[38].

The African Charter of human and people rights represents the first instrument of the African defense system of the human rights. This instrument creates a control mechanism of observance of the human rights, by means of the *African Commission of Human and People Rights* (whose competences and procedures are similar to those of the councils resembling the European and African systems), as well as by means of the *African Court of Human and People Rights*.

The Muslim (Islamic) law, encountered in almost 20% of the world's population, found its source in the *Koran,* which, having been completed by *Sunna* constitutes the Islamic law named Saria (Charî'a).

On the 15th of September 1994 the Arab Charter of human Rights was adopted, which contains a generous list of rights, however in the preamble it refers to the eternal principles defined by the Muslim law and the declaration from Cairo for the human rights in Islam. Between proclaiming human rights and refusing to give priority to these norms, to the „divine", based on the fact that this may represent a form a blasphemy, there is a clear contradiction.

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[33] Entered in force on the 21st of September 1970.

[34] The constitutive Charter of the American States Organization was adopted in Bogota, on the 30th of April 1948, in the framework of the 9th International American Conference, subsequently amended by the Protocol in Buenos Aires, from the 27th of February 1967.

[35] It was adopted on the 20th of November 1969 and it entered in force in the year 1978, being accepted by 26 states from the 35 members of the American States organization (it was not approved by the United States of America). This establishes a catalogue of civil and political rights, as well as a general clause concerning the promotion of economic, social and cultural rights.

[36] Adopted in 1981 and it entered into force on the 21st of November 1986. It was inspired from the corresponding treaties adopted in the framework of the United Nations Organization, as well as in the European and American systems. Unlike these afore-mentioned, the African Charter contains civil, political, economic, social and cultural rights, but also collective rights along with individual duties.

[37] It was adopted in the year 1988 at Ouagadougou (Burkina Faso), but it did not came into effect. These treaties were adopted under the aegis of the aegis of *the Organization of African Unity*, an inter-governmental organization created in 1963, headquartered in Addis-Abeba (Etiopia), which on the 9th of July 2002 was replaced with the *African Unity,* an organization that assembles all the states on the African continent (53) and which took over the tasks in protecting the human rights.

[38] To see also Mubiala M., 1999, *Protocolul la Carta africană a drepturilor omului şi ale popoarelor relativ la instituirea unei Curți*, Romanian Journal of Humanitarian Law, nr. 5-6 (29-30), pp. 25-28.

Conclusions

The evolutions from the past decades make the Muslin law not exclusively explainable according to religious precepts, except for two countries: Afghanistan and Maldive. Nevertheless, there are still great differences between the Occidental and Arabic systems of human rights, as the Muslim religion is involved in all the aspects of the life of its adepts: a person's status, family, social and cultural life, institutions are submitted to precepts embodied in religious sources related only to the Muslim law[39].

In present times, adopting a huge number of legal instruments, with the participation of the majority of the world's countries, indicates the tendency to extend international cooperation in the domain of protecting human rights by the acceptance of the sovereign states, which are more and more pronounced in the sense of protecting and observing these rights in the framework of international organizations[40]. Similarly, acknowledging and establishing certain rights by means of international instruments contributed to perfecting the national legislation concerning the defense of human rights.

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[39] Also see Scăunaş S., 2003, *Dreptul internaţional al drepturilor omului*, All Beck Publishing, Bucharest, pp. 135 and fol..; Sudre F., 2006, *Drept european şi internaţional al drepturilor omului*, Polirom Publishing, pp. 137 and fol.

[40] Vântu I. & Duculescu V., 1969, *Rolul reglementărilor juridice naţionale şi internaţionale în apărarea, garantarea şi respectarea drepturilor omului*, in Juridical Studies and Research, year 14, no. 1, Bucharest, p. 52.

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THE NECESSITY OF TERRORISM INCLUSION IN THE CATEGORY OF INTERNATIONAL CRIMES *STRICTO SENSU*

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Abstract

Terrorism is a process of inducing fear on the population, by means of repeated violent actions, used by the individuals, groups or state actors, for criminal motives or political claims, whose aims, unlike assassinations, do not represent the main targets. The unmediated victims of violence, are generally chosen randomly or selectively (representative or symbolic targets), from a certain population. Terrorist acts generate messages and the threat and violence, as a communication process between the terrorist (organization), immediate victims and main targets, are used in order to terrify and manipulate the population, which is transformed in a target of terror, a target of demands or a target of attention, depending on the target pursued: intimidation, coercion or propaganda

Keywords: *terrorism, international cooperation, reglementation, repression, international criminal law*

Introduction

International criminal law– formed of internal legal norms, some adopted in conformity with international conventions – defends the internal order of every state, but also contributes to the defense of international legal order, the acts that combine to form its structure also having an element of extraneity, which may refer to: place of committing the acts or of producing their consequences, the nationality of the perpetrators, the place where they are after committing the offenses etc.

Unlike the above-mentioned, the international criminal law represents the set of regulations, recognized in international relations, which target the defense of international legal or social order by repressing the violations brought to precepts of public international law[1].

Terrorism - international crime *stricto sensu*?

Being the distinct branch of public international law, the international criminal law is called upon to protect, by sanctioning the persons guilty of having committed serious offenses, the peace and security of the entire humanity, the development of relations between states in accordance with the norms of law and morality, the existence and perenity of certain fundamental values of humanity[2].

In the framework of preoccupations of a legal nature of the different international forums we may also include the elaboration of studies and international convention projects

[1] Glaser St., *Droit international pénal conventionnel*, tome I[er], Etablissements Emile Bruylant, Brusells, 1970, p. 16-17.
[2] Paraschiv D. Şt., *„Considerații privind dreptul internațional penal"*, in „Dreptul românesc în contextul european - Aspecte teoretice şi practice", Sitech Publishing, Craiova, 2008, p. 100-105.

for widely modifying the institutions of criminal law belonging to states concerning the regulations which target the sanctioning of grave infractions, as well as codifying and standardizing certain regulations regarding basic institutions which are included in the general part of criminal law: tendency, the forms of penal participation, legitimate defense, necessity state, relapse, safety measures, extradition, legal effects of foreign decisions etc., with the intention of elaborating an universal penal code[3]. These preoccupations target, among others, to unify internal penal legislations in issues related to the general interest of humanity, expressed in the international regulations, means to aim at sanctioning those who commit offenses which lead to the achievement of universal values.

In addition to the international crimes *stricto sensu*[4], which are under the international legal jurisdiction, states have established by means of international conventions that other acts also represent a social danger, such as: terrorism, placing or illegal use of weaponry, racial discrimination, apartheid, slavery, torture, illegal experiments on human subjects, producing serious and intentional damage upon the environment (caused in other circumstances than those specific to crimes against humanity, war crimes or genocide), piracy, traffic and production of drugs, traffic of obscene publications, theft of nuclear material, illegal use of mail, interference with submarine cables, forgery and counterfeiting of currency, corrupting official foreign persons etc.

From the above-mentioned crimes, the *Rome Statute*[5] regulates: racial discrimination, apartheid, slavery, torture, illegal experiments on human subjects, producing serious and intentional damage upon the environment, as acts which are comprised in the international crimes *stricto sensu*, related to the competence of the International Penal Court, when they are committed in the context of certain circumstances, specific to international crimes *stricto sensu*, such as: for war crimes, their committance in the framework of an armed conflict; for crimes against humanity, committing them as part of a systematic attack or expanded against the civil population etc.

In the absence of special circumstances of aggravation, specific to international crimes of the competence of the International Penal Court, the international illicit acts enumerated above no longer represent international crimes *stricto sensu*, being considered of a reduced level of peril, thus they have remained in the exclusive competence of the national courts. Regulating the mentioned infractions at an international level consists of establishing an obligation to incriminate these acts by the state parties at the international conventions concluded in this purpose, as well as a general obligation of interstatal cooperation in view of research, arrest, judging and condemning those who commit illicit acts in international conventions [6].

The level of social peril of some of the illicit acts regulated internationally is still very high, the international conventions which regulate them presenting characteristics of customary law, with norms of *jus cogens*, which would justify framing them in the category

[3] Crețu V., 1996, *Drept internațional penal*, Societatea "Tempus" Publishing, Romania, Bucharest, p. 11.
[4] These are: crimes against humanity, war crimes, genocide, and crime of aggression.
[5]Adopted on the 17th of July 1998, in the framework of the Diplomatic Conference at Rome of the Plenipotentiaries of the United Nations.
[6] The international convention regarding the repression of the expansion of obscene traffic publications, adopted in 1923 under the aegida of the Society of Nations; the unique convention concerning narcotics, signed in New York in 1961; Convention concerning psychotropic substances, concluded in Viena in the 21st of February 1971; Convention from Montego Bay (Jamaica) for acts which infringe the sea law, from the 10th of December 1982; Convention concerning illicit narcotics and psychotropic substances traffic, concluded in Viena on the 20th of December 1988; Convention referring to slavery from 1926, completed in 1956 by the additional convention concerning the abolishing of slavery, of slave traffic and institutions and practices related to slavery; Convention for repressing and abolishing the traffic of human beings and exploiting prostitution, concluded on the 2nd of December 1949; Convention concerning the elimination of all forms of discrimination against women, concluded on the 18th of December 1979; Convention concerning children's rights from 1989.

of international crimes *stricto sensu* and rethinking the means of preventing, following and punishing those acts.

This type of international illicit act would be *international terrorism*, which is used as a method of achieving one's civil and political purposes by the undiscerning use of violence. Terrorist actions occurred along history[7], as a primary method of combat practiced by extremist groups as to achieve the satisfaction of certain demands by the governments of some states or as a way of revenge for certain measures which were taken.

Terrorist acts consist of attacks on state presidents or other persons who occupy high positions in the state, destruction acts of important state or private property, bombing attacks against the civil population, assaulting the diplomatic missions, attempts against personalities of the public life, attacking crowded means of transport, public institutions or commercial companies etc.

The reaction of the international community takes shape in adopting conventions, which incriminate and sanction terrorist acts at international levels, or in establishing methods and mechanisms to prevent and minimize the effects of terrorist attacks.

Thus, among the first reactions of the international community in this sense, we mention the convocation of a conference regarding the international repression of terrorism, which followed the assassination of king Alexander I of Yugoslavia and the Minister of Foreign Affairs of France in the year 1934, as a result of the terrorist attack in Marseille. In the framework of this conference the text of the *International convention for preventing and suppressing terrorism* was elaborated, signed Geneva in the year 1937, by which the participating states undertook to punish the persons guilty of committing terrorist acts.

After the Second World War, the terrorism acts committed in various forms of manifestation were in the attention of the international community, which adopted several conventions means to repress these acts[8].

The conventions which regulate the different acts of terrorism no not embody a complete and complex definition of this illicit international act, which gains as time passes new dimensions, however they segmentally describe the international acts of terrorism.

The issue referring to the notion of terrorism was firstly disputed internationally in the framework of the process of unifying principles of penal responsibility at the beginning of the 20th century, the Conference in Varsovia for unifying penal law (1927), unsuccessfully trying to define this phenomenon. The final resolution of the conference suggested not only sanctioning terrorism acts, but also other acts such as: piracy, money forgery, slave commerce, as well as the international use of means capable of creating a common peril.

At the second conference on this subject, taking place in Bruxelles in the year 1930, the following definition of terrorism was formulated: „ The deliberate use of means capable to produce a common peril, represents acts of terrorism which consist of crimes against life and physical integrity of certain persons, or which are pointed against private or statal property, in the purpose of achieving political or social objectives", and a year later, at the Conference of Paris, a new definition was formulated: *„Anyone, in the purpose of terrorizing the population, uses against persons and properties bombs, mines, inflammable devices, explosives, firearms*

[7] Over 2500 years ago, the military genius Sun Tzu, author of "The Art of War"" showed which the essence of terrorism is "kill one, terrify ten thousand".

[8] Convention in Tokyo from 1963 regarding the offenses and certain acts committed on the board of the aeroplane, the Haga Convention from 1970 for repression of the illicit capture of aeroplanes; Convention in Montreal from 1971 for supressing illicit acts against civil aviation security; European convention from 1976 for supressing terrorism; Convention from 1973 concerning the prevention and repression of offenses pointed against persons who enjoy international protection, including diplomatic agents; International convention from 1979 concerning the taking of hostages; Convention in Montreal from 1991 regarding the markage of plastic explosives as for detecting; International convention for repression terrorist attacks using bombs (New York, 1997); Convention regarding the repression of terrorism financing (New York, 1999).

or other means, or anyone who interrupts or attempts to interrupt a public service or of public utility will be sanctioned", however none of these definitions was ever adopted [9].

Defining terrorism was also a challenge for the UNO, the member states having attempted for 30 years to establish an universal definition of terrorist acts, however their efforts were hampered by the differences in opinions generated by political interests, which would explain the great number and diversity of the conventions adopted for fighting concrete facts, considered as being terrorist acts[10]. Although, in a common declaration, made on the 9th of December 1994, is affirmed that "intentional or calculated criminal acts that provoke an atmosphere of terror in the public opinion, of a group of persons of individuals, for political purposes, are not justifiable in any circumstance, given any considerations of a political, philosophical, ideological, racial, ethnical, religious or another, which may be invoked for justifying them"[11].

Recent attempts to reach an international agreement regarding a comprehensive definition of international terrorism occurred during the negotiations for the *Statute of International Criminal Law*, when the proposal to include terrorism in the framework of *ratio materiae* Court jurisdiction was made. However, these efforts proved to be unsuccessful. By limiting the competence of the International Penal Court in the four categories of customary international crimes (aggression crimes, war crimes, genocide and crimes against humanity), the political will of the international community manifested in the sense of not including terrorism on the list of international crimes *stricto sensu*, as the delegations of the Arab States which refused, argumented that the future Court will be politicized if terrorism were included in the category of international crimes *stricto sensu*.

In the last decades, terrorist attacks appealed to more destructive methods, targeting quantitative aspects, such as killing a large number of persons or huge material destruction[12]. Contemporary terrorism has also varied its financing resources, forming international affiliations based on religious or ideological affinities, as well as common hate against the great nations.

The unparalleled international organization of terrorist groups[13] permits attacks with a level of high peril, which is hardly detectable or preventable, which would impose new methods of incriminating and legal sanctioning of these acts.

Although the majority of the world's states express frim positions against terrorism, there are countries which are suspected of supporting terrorism, or event using it of their own free will, as an element of state policy[14].

The existent international conventions do not ensure a sufficient reaction for eradicating this phenomenon whose manifestations are becoming more and more numerous and difficult to counter-attack, and international obligations stipulated by these conventions for the state parties –of incriminating and internal sanctioning of different acts of terrorism

[9] Năstase A., Aurescu B. & Jura C., *Drept internațional public. Sinteze pentru examen*, III-rd edition revised and completed, All Beck Publishing, Bucharest, 2002, p. 342.

[10] Jura C., *Terorismul internațional*, All Beck Publishing, Bucharest, 2004, p. 20 and fol.

[11] United Nations organization, General Assembly, *Declaration concerning measures for eliminating terrorism* A/RES/49/60, 9th of December 1994.

[12] For example, the simultaneous terrorist attack in the USA, from the 11th September 2001, resulted in the destruction of the two twin towers in New York and the damaging of the building of Pentagon in n Washington, as well as the death of over 7000 persons, and in the terrorist attack in Madrid, from the 11th of March 2004, also died a few hundreds of people.

[13] Until recent time, over 20 terrorist groups were identified, from which the most acknowledged from the point of view of terrorist events in which the Arabic terrorist organizations were involved: Hamas, Hezbollah, Al-Qaida.

[14] In this sense manifest or have manifested the regions of Syria, Sudan and Afghanistan, which ensured funds, refuges, training bases and terrorist weapons. In similar situations were Libia, North Coreea or Cuba. See Onica-Jarka Beatrice, *Jurisdicția internațională penală*, C.H. Beck Publishing, Bucharest, 2006, p. 101.

and of extension of international cooperation activities, such as extraditions of persons accused of committing terrorist acts – do not have the expected efficience, due to the relativity principle of international conventions effects, which can not be mandatory for all states[15].

Following the terrorist attacks from the 11th of September 2001, Security Council of the United Nations Organization took attitude and adopted, based on the 7th Chapter from *the Charter of the United Nations Organization*, two resolutions: 1368(2001) from the 12th of September 2001 and 1373(2001) from the 28th of September 2001, in which they *classify terrorism as an act of threatening the peace and security of the international security, establishing a series of obligations of fighting and preventing terrorism acts for all states, from which the most important target the obligation of retaining from assuring any form of passive or active support of entities and persons involved in terrorist acts, such as incriminating all terrorist acts and adheration to international conventions which regulate terrorism.*

Conclusions

International terrorism has obtained an unexpected high grade of peril on an international level, thus its legal framing in the categories of international crimes *stricto sensu* would be imposed, and which are in the competence of the International Penal Court.

The unifying of regulations concerning international terrorism acts and their classification in the conventional plan, in the category of the international crimes *stricto sensu* would ensure the intervention of international penal jurisdiction and upon the citizens of certain states which have not approved this jurisdiction, for the acts committed on the territory of state parties to this jurisdiction, thus creating a possibility to benefit from the support of the Security Council of the United Nations Organization for bringing the persons accused of international terrorism to international justice. This would be made in order to use even more military measures against states which refuse to submit to the request of handing over to the International Penal Court of the persons pursued, according to the regulations stipulated in the 7th Chapter of *the Charter of the United Nations Organization*.

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Năstase A., Aurescu B. & Jura C., *Drept internațional public. Sinteze pentru examen*, III-rd edition revised and completed, All Beck Publishing, Bucharest, 2002;

Crețu V., *Drept internațional penal*, Societatea „Tempus" Publishing, Romania, Bucharest, 1996;

Glaser St., *Droit international pénal conventionnel*, tome I[er], Etablissements Emile Bruylant, Brusells, 1970.

[15] The Afghanistan case that sheltered Ossama Bin Laden, one of the leaders of the terrorist organization Al-Qaida, suspected of being involved in the terrorist acts from the USA on the 11th of September 2001, is relevant for signalling that international terrorism can not be stopped by customary means regulated on a national or international level.

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STATE SOVEREIGNTY AND THE INTERNATIONAL LAW OF HUMAN RIGHTS

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Abstract

Promoting human rights at an international level implies state cooperation for establishing agreements concerning the improvement of measures which are imposed in this field, as well as adopting certain conventions related to the new dimensions of rights or even with the new human rights.

Human rights represent an extraordinarily complex branch of law, which embodies both internal order as well as international order, defining and adding up a set of rights, liberties and obligations of people- some against the other, of the states to defend and promote these rights, of the entire international community to survey the observance of those rights and liberties in each country – which permits the intervention by means of public international law in those situations in which these right would have normally been breached in a certain state. Thus, the principle of state sovereignty may not be opposed to the necessity of protecting human rights, in order to justify to the international community the infringement of these rights inside states.

Keywords: *sovereignty, international law, human rights, international protection of the human rights, subsidiarity*

Introduction

From the beginning of mankind and over its evolution, scientists, wisemen, clairvoyant, have contributed to affirming some rights of the individual in his relation with power[1]*, formulating realistic law principles such as: liberty, equality, solidarity, which, gradually led to the attenuation of brute force in social relations, in favour of emancipating man.*

Consecrating at an international level the defense of human rights is based on the state acceptance of the fact that protecting these rights can not be left to the discretion of every individual state, as the sovereignty of the state represents the grounds for protecting the rights of their own citizens[2] *and other persons from its territory or that enter in contact with the state, and not by breaching them.*

[1] In China, Confucius considered man to be the center of his thinking system, indicating justice and humanity as main virtues.

[2] "It is an elementary principle of international law which authorises the state to protect its prejudiced citizens by means of contrary acts to the international law committed by another state and for which they could not obtain any redress using ordinary means of appeal. By embracing the cause of one of its citizens and setting in motion the diplomatic or international legal action in its favour, this state is valuing his own right, the right to be observed in the person of its citizens, the international law" (The International Permanent Court of Justice, Mavrommatis Concessions in Palestina, Greece against the United Kingdom of Great Britain, Decision from 30th of August 1924 – in Miga-Beşteliu R.& Brumar C., *Protecția internațională a drepturilor omului*, 4th edition reviewed, Universul Juridic Publishing, Bucharest, 2008, p. 14).

Human rights and state sovereignity

The idea that the human being possesses, by its nature, certain valid rights even if they do not meet or partially meet dispositions of positive legal laws – has appeared from ancient times, being affirmed and argumented by the stoic religion, as well as by the scholars who lived in all the historic times, sometimes being inspired from the religious dogma, and other times only from the light of ration.

Transposed in the legal framework, the concept of „human rights" firstly designates "man's subjective rights" [3] which define its position in relation to public power, but it also represents a veritable legal institution, a set of internal and international legal norms which target as regulatory aim the promoting and ensurance of human rights and liberties, his defense against the abuses of the state and perils of any nature[4].

By means of the international conventions in the field of human rights the states principally are compelled, not towards other states, but to individuals, who are the beneficiaries of the international regulations. Thus, we are not facing a contractual issue, but an objective one that is a part of the international public order. Nevertheless, some rights are not exclusively consacrated by international conventional regulations, but also by regulation embodying a customary character, and the most important rights (the right to life, repression of genocide) have a *ius cogens* value, the obligation of observing them being imperative[5].

Initially, human rights have been considered to form a legal *institution* of the public international law, but in the present one may affirm that a distinct branch of the international law already exists and the international regulations in this field, forming the *international law of human rights*[6].

The international law of human rights represents a *distinct* legislative assembly (such as the Law of Treaties, Law of the Sea, Diplomatic Law, etc) being governed by the fundamental principles of international law, even if it also presents certain specific characteristics[7].

As a distinct branch of public international law, international law of human rights *embodies all the international legal regulations that target the protection of the human being, its aim being the defense of human rights*[8], and the date of 10 December 1948, when the Universal Declaration of Human Rights was proclaimed, marks the moment of birth of the modern law of human rights[9].

The idea that the international law of human rights, as a set of principles and norms that govern state cooperation regarding the promotion of human rights evidenced in the doctrine does not reflect an universal consensus, with a unitary, immutable model which is generally[10]. The axiological process generating human rights is developed in an expanded or narrowed framework, as in each historical period, the valorisation processes at a national level coexists and is mutually influences with what is achieved at the international level; the important fact is that when such a process has acquired an international validation, the respective values cannot be any longer „denied" on the local level[11].

The axiological „conglomeration achieved around a fundamental value is legally expressed by a set of norms which define at the veritable international level *juridical*

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[3] Năstase A., *Destinul contemporan al dreptului internațional. Reflecții dintr-o perspectivă europeană*, Universitatea "Nicolae Titulescu" Publishing, Bucharest, 2004, p. 210.
[4] Scăunaș S., *Dreptul internațional al drepturilor omului*, All Beck Publishing, Bucharest, 2003, pp. 3-4.
[5] See also Craven M., "Legal Differentiation and the Concept of the Human Rights Treaty in International Law", *11 European Journal of International Law*, 2000, pp. 500-504.
[6] Sieghart P., *The International Law of Human Rights*, Oxford, 1983, p. 13-17.
[7] Năstase A., [3], p. 213.
[8] Scăunaș S., [4], p. 4.
[9] Cloșcă I., Suceavă I., *Tratat de drepturile omului*, Europa Nova Publishing, Bucharest, 1995, p. 38.
[10] Năstase A., [3], p. 211.
[11] Conforti B., *Diritto internazionale*, 3rd Edition, in Editoriale Scientifico, Naples, 1987, p. 203.

institutions. Thus, an initial legal consecration is accomplished at an international level, the rational norm adopted by the states, subsequently forms what is called "human rights with variable contents"[12]. By means of these contents which are differenced from the specific of every state, thus achieving the guarantee and effective protection of rights[13].

Embodying principles, mechanisms, procedures which are related to the domestic legal order, but also to the international order, the branch of human rights presents a divalent character, being in the same time an institution of domestic law, integrated in constitutional norms, but also a branch of the international law, that configurates the characteristics of a juridical principle applicable in state relations[14].

In the domain of human rights, we have the subsidiarity rule of consecrating and international guaranteeing of rights, compared to consecrating and guaranteeing them in the domestic plan, the international level of human rights protection representing a minimal standard for states that can guarantee an insured protection of human rights at a national level. Thus, the international protection structure intervenes only in a subsidiary manner, when state mechanisms are unsatisfactory – observing the domestic remedies, before the intimation of a body, being mandatory.

The relation between public international law and domestic law has concerned the legal system even since the 19th century, in the doctrine two currents being formulated: *the monistic theories* that, considering the domestic law and the international law as components of a unique legal system, affirms whether the primacy of the first or of the latter[15] and *the dualistic theory* which states that both the domestic and the international law are legal and independent phenomena.

In internal systems that adopted the monistic conception with the primacy of the international law, the international norms concerning human rights may be applied directly, on the condition that they embody a precise and complete content, without the necessity of subsequent acts of transposition or application. Moreover, the states participating to international conventions concerning human rights must observe the commitments undertaken by these conventions regarding the defense of persons and guaranteeing the above-mentioned rights, as well as referring to the cooperation with international bodies they adhered to (reports, notifications, enforcements of judgements, etc.)[16].

International regulation concerning human rights are not relation to the subordination law as, like every regulation of public international law, it is developed in the framework of international society,the coordination law being specific to the later [17].

However, it can be stated that they *are not exclusively related to the coordination law* either, as it targets to form a protection law of the individual. The incapacity of general public international law to ensure this defense function, leads to the formation of *specific* international regulations, in the case of *international protection of human rights*, regulations which impose to exceed the classical conception of international law.

Taking into consideration the enormous importance for humanity to observe the rights of all humans, in the specialized legal literature there are ample debates referring to the relations among state sovereignty and „internationalization" of human rights, two main

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[12] Ruiz G.A., *The UN Declaration on Friendly Relations and the System of the Sources of International Law*, Sijthoff, Alphen, 1979, p. 277.
[13] Năstase A., [3], p. 208.
[14] Duculescu V., *Protecția juridică a drepturilor omului*, Lumina Lex Publishing, Bucharest, 2008, p. 24.
[15] See also Hegel, *Principes de la philosophie du droit*, 6th edition, Dalloz Publishing, Paris, 1970, pp. 216 and fol. and *Enciclopedia ştiinţelor filosofice. Filosofia spiritului*, Academia Publishing, Bucharest, 1966, p. 359. The superiority and primacy of the international law of international legal order compared to the domestic law is sustained among others by Kelsen H., *La thèorie pure du droit*, II-eme edition, Paris, 1962, p. 444, as well as by Rousseau Ch., *Droit international public*, Dalloz Publishing, Paris, 1970, pp. 16 and fol.
[16] See Barre J., *L'integration politique externe*, Université Catholique, Louvain, 1969, p. 82.
[17] See Sudre F., *Drept european şi internaţional al drepturilor omului*, Polirom Publishing, 2006, p. 33.

tendencies being evidenced: on the one hand that of diminishing the significance and importance of sovereignty in international contemporary relations, and on the other that of finding legal solutions to „avoid" the effects of sovereignty in the domain of human rights. Nevertheless, some authors claim that sovereignty represents an outdated political and legal phenomenon, a residue of competence left to the states by the international law, a perilous, unacceptable dogma.

In the doctrine[18], the theory according to which sovereignty is the one that created international rights was stated, and it "recognizes sovereignty as its fundament and basic principle".

In opposition with this theory, there is also an opinion[19] that pleads in favour of redefining the relation between state sovereignty and international law, showing that it possesses an originating status having existed prior to state sovereignty and international law, whose source of legal qualification is not pre-existent to certain international regulations.

By analysing the international realities we are led to the conclusion that, in fact, state interdependence cannot be contrasted to sovereignty, which does not represent an obstacle for international cooperation, including the domain of human rights defense, but an „avouchment of what could bear the name of state dignity"[20]. International contemporary life evidences the necessity of sovereign states having to coexist; however, sovereignty cannot be absolute in the frame of international relations, just because it must ensure tolerance and observance for the sovereignty of other states. Nevertheless, *the right to observance* was considered by the classical doctrine as being one of the fundamental state.

The existence of international treaties in the field of human rights does not stand for a limitation of state sovereignty[21], as the latter are considered the expression of the state's will to develop cooperation in this domain. By the conclusion of agreements in the sphere of human rights, states aim to determine *the frame and forms of their cooperation* in this domain, and not to abandon their sovereignty [22]; in this way, "the state independence is not compromised, or the sovereignty achieved by undertaking certain international obligations"[23].

In respecting the regulations of public international law concerning the promoting and protection of human rights, there is nothing to affect sovereignty of the states in cause or the distinction between international and domestic law[24].

The question whether human rights are excluded from the domestic state jurisdiction to joint the international jurisdiction is not justified, as there is a functional separation between the domestic legal order and the international one, in the sense that some aspects concerning human right protection and promotion remain in the competence of the state – even in the cases in which the states have become parties to international treaties in the domain – while other aspects are a part of the international order[25].

It cannot be contested that every states decide upon its internal issues, but in the same time the right and obligation of the United States to supervise international policies when they can *affect the global community* is recognized, in these policies being also included the issue

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[18] Arand R. P., "Sovereign Equality of States in International Law", in *Recueil des Cours de l'Académie de Droit International*, vol. 197, 1986, p. 42.

[19] Dinh N.Q., Pellet A., Dailier P., *Droit international public*, Librairie générale de droit et de jurisprudence, Paris, 2003, p. 76.

[20] Colliard, C.A., *Institutions des relations internationales*, Dalloz Publishing, Paris, 1974, p. 108.

[21] See Titulescu N., "Dinamica păcii", in the volume *Documente diplomatice*, Politic Publishing, Bucharest, 1967, p. 298.

[22] Ruize D., *Droit international public*, Dalloz Publishing, Paris, 1987, p. 62.

[23] Dinh N.Q., Pellet A., Dailier P., [19], pp. 385 and fol.

[24] Ruiz G.A., "Human Rights and Non-intervention", in Helsinki Final Act, vol. 157, in *Recueil des Cours de l'Académie de Droit International*, 1977, p. 291. Van Boven Th., *United Nations and Human Rights. A critical Approach*, New York, 1985, p. 122, quoted by Năstase A., [3], p. 189.

[25] Ermacora F., "Human Rights and Domestic jurisdiction", vol. 124, in *Recueil des Cours de l'Académie de* Droit International, 1968, p. 431.

of human rights. As a result, a state that does not fulfil its international obligations undertaken cannot invoke the principle of national sovereignty to justify having not fulfilled the above-mentioned obligations, even if the liabilities are referring to the rights of its own citizens[26].

The principle of sovereignty, of non-intervention etc, cannot be invoked as a ground for non-observance of human rights, as not observing human rights cannot ultimately lead to the contesting of state sovereignty[27], even if these must comply to the norms they have conventionally accepted, being obligatory on the basis of the principle *pacta sunt servada*, or on the grounds of international customary law or *ius cogens*[28].

States have not lost their jurisdictional attributions concerning human rights[29], but these are more and more receptive to the decisions of international bodies. The application of international courts and bodies founded by treaties continuously influences the states' jurisprudence, including the American one[30], even if legal remedies of these international courts, against breaching human rights, are subsidiary[31].

Conclusions

Although the authority of the state is clearly recognized – reflected in the condition of those who claim the infringement of human rights to international courts, to exhaust the internal ways of attack[32] before addressing an international body, but also in the attention that bodies for implementing treaties from the domain of human rights defense is granted to the possibility of appreciating the national legal system – the application of international bodies clearly influenced the content of the national law of the majority of democratic states, concerning human rights.

The evolution of limitations brought to sovereignty also generates obligations to undertake, according to which, sates internationally respond not only for the acts accomplished against individuals, but also for not ensuring the adequate protection or reaction in cases of human rights infringement. Thus, the sovereignty concept has not become in any way *obsolete*, but it evolved to a point where states are liable for their subjects, for other persons, as well as towards the international community[33]. Nevertheless, when governments are convinced that certain national values or traditions are threatened by the extending application of standards concerning human rights and are restricting certain rights by means of normative acts which are clear and predictable for the one affected, such limitations are generally accepted if they are justified by the necessity of ensuring public order or other similar reasons[34].

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[30] See Janis M.W, *International Law*, Fifth Edition, Aspen Publishers, Walter Kluwer Law&Business, 2008, p. 106, who quotes the case Filartiga v. Pena-Irala, 630 F.2 d 876 (2 d Civ. 1980), this constituting an important example of applying international law of human rights in the American jurisprudence; international customary law is used in applying Allien Torts Statute to a victim of torture. Judge Kaufman decided that „from the examination of the sources of international and customary law, the state application, the jurisprudence and doctrine – we conclude that torture accomplished by the authorities is presently prohibited in the nation law".
[31] See Nowak M., *Introduction to the International Human Rights Regime*, Bill Academia Publishers (Martinus Nijhoff Publishers) Leiden, 2003, pp. 63-64.
[32] In conformity with the art. 35 from the European Human Rights Conventions, „The Courts cannot be notified until after the exhaust of domestic remedies, as it is understood from the principles of international laws generally acknowledged"…
[33] See Glendon M.A., *A World made New; Eleanor Roosevelt and The Universal Declaration of Human Rights Random House*, New York, 2002, pp. 59-60.
[34] Nowak M., [31], pp. 59-60.

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PARTICULARITIES OF THE HEARING TACTICS IN THE CASE OF PERSONS WITH DISABILITIES

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Abstract

This paper attempts to polarize the attention of the judicial authorities of the Romanian State on the complex issues raised by the hearing of persons with special needs from two perspectives, that of compliance with the criminal procedural framework and that of the observance of human rights. It also aims to provide practical solutions that might facilitate communication with such persons depending on their type of disability and solve the problem of accessibility in the investigator-citizen relationship. Modern approaches in the specialized literature grant an increasingly wider space to knowing the accused or the defendant's personality, adapting the investigator's speech to this reference point and individualizing the ways of relating throughout the judicial investigation. Moreover, a specific pattern of the personality of the criminal investigation body is outlined, through the psycho-intellectual and moral-affective qualities of the person leading the investigation that might ensure the success of this judicial approach specific to the hearing of people with special needs.

Keywords: deficiency, handicap, disability, special needs, accessibility, hearing, communication strategies.

Introduction

When considering the behaviour and attitude of a representative of public authority in relation to a person with special needs, particular attention is required, which derives from a double perspective, referring to the concept of interpersonal relationship, as well as to the expectations that society has of an institutionally-employed person. The violation of the first concept is contrary to morality and subject to internal censorship and the violation of the second concept clashes with deontological norms and with the entire national and international law. Consequently, we have an intrinsic perspective of one's self-image and an extrinsic one of the institution's image, both being equally important in the short term as well as the long term, and damage to either should be carefully avoided.

The Hearing Tactics in the Case of Persons with Disabilities – General Rules

In support of the legal action taken to find out the truth, the criminal investigation bodies must know, address and use appropriate methods and patterns of behaviour in relation to a disabled person. While there are clear and precise rules in approaching the legal side of the criminal investigation, their formal and informal application requires a particular approach that takes into account the very particularity of the subject of these legal proceedings, the person with special needs, with disabilities. The particularities of the approach will be dictated by the categories of handicap (profound, severe, moderate and mild) and the dysfunctions

associated with each category. The categories we take as the basis of the situational analysis carried out in this chapter will be disabilities of the following types: physical, somatic, verbal, auditory, visual, associated, deaf-blindness and other rare diseases.

To identify the real needs and the complex problems raised by the hearing of these people we have initiated a scientific research in Romanian prisons. The lot undergoing the research was selected from five prisons, in compliance with the pre-existing methodology in the Romanian penitentiary system and the research was done with the written consent of the sentenced persons to participate in this study, their acceptance being built around the concept of personal data protection.

This study was conducted on a sample of 53 male subjects of different ages, with varying degrees of handicap, convicts with final sentences for various offences. The legal classification of the antisocial acts that they committed involves imprisonment sentences, within a range between three years' imprisonment and life imprisonment. The types of crimes considered relevant in the research are: murder, wounds and blows causing death, robbery, theft, road traffic offences, fraud, destruction, sexual offences, drug trafficking and consumption, human trafficking and begging. The study group comprises people who repeatedly committed antisocial acts, as well as first offenders (non-repeat offenders).

The data obtained were used in drawing up tactical rules useful to the investigator and covering the area of three essential concepts of judicial proceedings, namely *tactical rules, communication and relating* with these categories of persons with special needs.

Interviewing the accused or the defendant is an obligation of the criminal investigation body, as well as of the court.

Access and Accessibility – A first aspect that we need to consider when organizing the interrogation of a disabled person is access and current facilities which naturally pose no problem to people with normal health status. The initial barrier that most people with disabilities have to face is that of the physical access to the place where the judicial activity is carried out. For many of them, the lack of access to the parking lot, to the building, is a problem, therefore we need to find answers to questions such as: Is there an available parking space?; Is there enough space to get in/out of the car?; Can these persons get into the building?; Is access done through an entrance provided with a special slope?; Is there a lift (elevator); Can they move and/or rotate through the corridors of the building?; Are there any locked or self-locking doors on the route?; Is there any place of rest or pause?; Is there easy access to the means of current hygiene/sanitary facilities?; Is there a nearby doctor or medical office, in case of necessity?, etc. Some people with physical disabilities cannot perform the same physical activities as othes. This includes people with walking difficulties or those with abnormal physical dimensions. These people may use wheelchairs, canes and other assistive devices. Those whose arms or hands are affected may have difficulties in opening doors or access ways, in writing by using standard tools (fountain pen, ballpoint pen), etc. Some people with motor disabilities may quickly tire or undergo severe pain, therefore requiring breaks, so it is desirable that the interrogation should take place in a space on the ground floor or with easy access.

The criminal investigation and prosecution bodies should be aware of the physiological and mental limitations of people with disabilities, in order to be able to accurately understand and interpret the facts described, presented by these people during the hearings, regardless of their legal capacity (witness, victim or suspect).

In all specialized bibliography we find formulations already established stating that the hearing is the procedural act by which individuals, the accused or the defendant, the other parties/witnesses expected to hold data in connection with the offence or the offender, or who may provide information for the establishment of the state of facts are called to submit them or provide explanations before the criminal judicial bodies. The first logical conclusion is that the hearing is based on the communication of cognitive experience transmitted through language.

Communication is essentially an outward manifestation of an inner reality, while also being relation, information, action and transaction. Taking into account the fact that the actual hearing/interrogation is based on communication and inter-relationship and that the accurate interpretation of the facts depends on its success, we further bring to your attention a number of rules that the criminal investigation body must consider in the presence of a disabled person[1]. In the specialized literature, T. Bogdan identifies a few tactical rules[2] that can help establish a verbal contact between interlocutors, but in our particular case what matters is to identify the communication mode first and only then the actual transmission of the informational content, which in the case of a hearing is done through the question-answer technique. Thus, the following tactical rules are to be remembered:

1. In your contact with the interlocutor remember that before being listened to, we are looked at (except by persons with severe sight disabilities);
2. Determine whether the person you are hearing has communication difficulties and whether he/she is classified as a person with a handicap. If so, check the degree of handicap (mild, moderate, severe or profound) and the functional limitations corresponding to each degree;
3. Determine whether you need an interpreter or not;
4. Identify a suitable system of communication, depending on the type of disability and the most severe impairment interfering with the communication process;
5. Identify the specific mode of communication (verbal, sign language, combined);
6. Expressing yourself as clearly as possible, in an understandable language, accessible to the interlocutor, is mandatory. The vast majority of people with special needs prefer the communication mode that uses recordings, most commonly using large size characters, Braille/Moon characters, digital records, e-mails, existing texts or combinations thereof;
7. If the person in question considers speaking in public as difficult and as emphasizing his/her deficiency (disability), it would be preferable to provide a more intimate setting or a setting with a limited number of participants;
8. Listen carefully to what the person is saying or transmitting, always answer questions related to the ambient factors or the atmosphere of the discussion itself and do not be misled by the way the utterances are pronounced;
9. Ensure continuity of the hearing/interrogation and conduct discussions so as to avoid being unduly interrupted by other people or activities. Remember that people with special needs get tired more easily and are generally more sensitive to prolonged actions;
10. Do not forget to check whether during the hearing the person should administer themselves or be administered some treatment. Check the psycho-physiological implications of this type of treatment.

Organizing/planning the hearings – In planning the activities, one must take into account the degree and type of handicap, so that the activity can be carried out, and adapting the investigation plan to the situational reality is necessary. As a personal opinion, it is recommended that the activity should not be planned for a date and time when medical activities are scheduled (surgical operations, treatments, regular mandatory or exploratory analyses, etc.) and the investigator should be informed about the person's medical status on the day of the interrogation in order to make sure that no new problems or

[1] Înțelegerea dizabilității – Ghid de bune practici (Understanding Disability – a Good Practice Guide) / ETTAD - 134653-UK-GRUNDTVIG-GMP (pp. 13-14).

[2] Tiberiu Bogdan, Ion Sîntea, Rodica Drăgan Cornianu, Comportamentul uman în procesul judiciar *(*Human Behaviour in the Judicial Process), Ed. MI (Ministry of the Interior Publishing House), pp. 151-152, personal processing and interpretations.

complications/aggravations of existing ones should occur. Going further down to medium-level details, one should first check the conditions of accessibility, the possibility to provide medical support if needed, to provide a space that might guarantee a minimum of privacy in case self-administration of treatment is needed, access to meeting one's physiological needs, technical equipment and infrastructure that would ensure communication depending on the type of handicap and recordings, defining the participants and their roles. All these should be set out in detail, not only in general terms. Already in the planning stage, the investigator will make sure that they understand the correct meaning of the physical, psychological and physiological limitations corresponding to the degree and type of handicap of the person they will be hearing and that they are aware of the appropriate relationship and communication strategies.

Formulating hypotheses – In the case of persons with special needs, our view is that the interpretation of the data derived from the evidentiary material available does not bear discussion, but the formulation of hypotheses might raise some comments in the sense that more elaborate versions will have to take into account any mobility or time-space orientation limitations on the part of the suspect. In other words, they must be very realistic in terms of the real possibilities for action and for the actual materialization of the criminal act, in relation to the type of handicap, configuration of the space/land, the presence/absence of natural barriers and the possibility to overcome them (or the lack thereof), interaction with the victim (the ability to fight back), use of a weapon or physical force, motive, etc. From this we can deduce whether it was possible for the respective person to commit the offence or not, whether there was only one offender or he/she had been helped by someone else and, not least, analyze the possibility for that person to have been intentionally placed in the position of sole author. I have mentioned here examples of the situational plans that I considered as relevant, they are actually much more diversified depending on the concrete situation. All these will be correlated with data obtained from investigations of the crime scene, statements, expertises, etc., and will provide a note of veracity or discrepancy. The latter variant will require a reanalysis and reformulation of the hypothetical work-in-progress versions.

Providing an interpreter is required by law on the basis of the general assumption that the presence of an interpreter is necessary when the accused or the defendant to be heard does not understand Romanian or, even if they do understand it, they cannot express themselves in it. For persons with communication disabilities (of speech and hearing), the reason for the need to provide an interpreter is basically the same, not understanding (the) "language" or being unable "to express oneself" in it, but here it is not a different language that one doesn't know, belonging to a different cultural space or a dialect, but rather the inability to articulate speech sounds as they are recognized in everyday oral communication.

TACTICAL RULES OF HEARING DISABLED PERSONS, CONSIDERING THEIR HANDICAP

The hearing of the accused or defendant is performed separately (Art. 71, para. 1). We should start by clarifying the specifics of procedural activities in relation to the issues of people with special needs[3].

In the relationship with a disabled person using a mobility assistive device, the investigator or police officer should not, out of the desire to be helpful, push the wheelchair without first politely asking for permission. According to the ETTAD good practice guidelines, wheelchair users move independently anyway, and if they need help when encountering obstacles they will ask for help themselves. The investigator should not check the stability/safety of a person or touch their crutches, for example, without their consent. When interviewing a person in a wheelchair, the investigator will place himself at that

[3] See Ghidul practic de relaționare pentru anchetator raportat la persoanele cu nevoi speciale (An Investigator's Practical Guide to Relating to Persons with Special Needs).

person's level and at a relatively close distance. However, the orthostatic (standing) position should be avoided, as this leads to a dominant position on the part of the investigator.

The person with language and speech difficulties – In such a situation, the investigator will display a calm demeanour and give the person more time to finish/complete what he/she has to say. There are people who appreciate the help in completing their sentences, but one must determine whether the person in question accepts it or whether such an intervention only further heightens the relational discomfort. The investigator can be put in the position of hearing a person with speech difficulties, such as stuttering. In general, the flow of speech is disrupted and this can cause discomfort both to the speaker and the listener. The cause for stuttering remains unknown. Latest research suggests that there is an innate predisposition for stuttering, which might be inherited, and then there are other factors that will influence when and how stuttering occurs and how it progresses. These factors can be broadly divided into four categories: physiological, linguistic, environmental and emotional (Rustin, Botterill and Kelman, 1996).

The person with visual impairment – Besides the general rules of conduct and access to the premises set out in the above paragraphs, upon the person's entry into the investigation room/office, if he/she has never been there before, the investigator will give a brief description of it (size, windows, door position and content: furniture, equipment, etc.). The investigator will introduce himself/herself, by clearly saying his/her last name, first name (rank, if applicable), will specify the location (police station, prosecutor's office, laboratory, etc.), will mention and indicate the presence of other people in the office (prosecutor, other investigators, psychologist, sociologist, forensic pathologist, etc.), as well as their role in the investigation. In group conversations, when referring to a particular person, the investigator will use their name, and if another participant on behalf of the authority intervenes in the debate on their own account, they should begin by introducing themselves. Some people have blurred vision or cannot accurately estimate distance and speed or they cannot discriminate between objects of similar colours or they can only see shadows. Before inviting the person to present what they know, you should provide clear instructions and explanations. It is possible for people with visual disabilities not to have experience in making structured presentations or coherent descriptions. If, for any reason, you must temporarily leave the investigation office, inform the person and do not let them speak in an empty room. Tell them that the conversation is over and that you are going to another office or that you are showing them out.

With visually-impaired people, upon presentation of written materials, the investigator will use large-sized characters. Characters (fonts) of sizes ranging from at least 16 to 18-20 (preferably) are recommended. This can be achieved by copying an enlarged version or by directly using large characters from the computer (printing should be preferred to photocopying). If the office is provided with multimedia facilities, a zoomed projection on screens or directly on a white wall can be a suitable alternative. Today's computer technology has the benefit of offering a great many solutions to such problems, such as the use of programs with dedicated facilities (e.g. Microsoft Windows has Accessibility Options) that allow for changes in resolution, colour and size, text and command verbalization. There are software products that enable voice recognition, an extremely useful facility, such as DragonDictate and ViaVoice in the case of Apple technology, which require minimal user training and practice. Speech checker "Texthelp" is also available.

If the presentation of video footage or photographic slides is required, the accused should be positioned so that he/she can hear/see well. The investigator will take measures to ensure optimal lighting, as apparently minor adjustments can make a big difference. The degree of accommodation varies from person to person, glare light posing, at times, as many problems as darkness. Emphasis will be put on choosing the appropriate degree of light by consulting the person interviewed. All these activities should not be considered as a waste of

time because they provide fair trial guarantees and certainty about the relevance of the answers obtained.

There are people with special needs who come accompanied by a guide dog. There is a natural tendency for the investigator to focus on the task (obtaining investigation-related information, clarifzing defences, verifying hypotheses). Remember that a guide dog has needs and it is possible for the person interviewed to no longer focus on the accuracy of the statement, being more concerned about the dog's needs.

The person with hearing difficulties – It is quite common for people with hearing impairments to use hearing devices, even if they also use other forms of communication. These devices amplify sounds, but all sounds are amplified equally, therefore background noise may pose them real problems. It is recommended that the investigator should keep their head straight when speaking, because even if they don't state it, these people try supplementing information by "*lip-reading*". Also they should be careful not to have their mouth covered by their hand, cigarette and should not be chewing gum. For the same reasons it is recommended that the investigator should not have a beard or moustache.

The investigator should be positioned so that their face is sufficiently lit/visible and talk at a slower pace than they usually do so that the person interviewed can keep up with the discussion. Otherwise, there will be an information disparity, that might hinder good relations and generate misunderstandings, unsynchronized answers, confusing explanations or gaps in communication. If a sign language interpreter accompanies the deaf person to facilitate communication, the investigator will always be facing and addressing the person interviewed, not the interpreter. This does not exclude positioning himself/herself so that both the interpreter and the person interviewed can see him/her.

When the hearing involves a person with hearing difficulties, the investigator will make sure that the person is attentive and watches him/her, while he/she is asking the questions. To attract the attention of the person interviewed, some decent gestures or a light touch on the shoulder may be used. The investigator must not lose patience, nor forget that raising his/her voice does not help. He/she should help the person to overcome the inevitable barrier that the symbol of the authority creates, namely the prosecution service/police station. If there are several representatives of the authorities involved in the hearings, the investigator coordinating the activity will make sure that they take turns in the interrogation and that there is no disturbing background noise.

When questions are formulated and an interpreter is present, the interpreter should be given enough time to translate what is being discussed into sign language and the person with hearing difficulties should also be given the necessary time to answer. Unnecessary abstractions or very lofty language can alter communication. If the hearing/interview takes a long time, you should occasionally interrupt the activity to provide a short break for the interpreter, knowing that translation into sign language is a demanding task.

If there are several people in the office who are involved in the activity (prosecutor, police officers, psychologist, etc.), they should be asked in advance to indicate through visible gestures when they start talking and not to walk around the office while talking.

The deaf-blind person – In such a case, the investigator must not forget that people who are born with a condition of this type have poorly developed language or do not speak at all, because of their ear canal impairment, and, given their visual deficiency, they have no representation of objects, phenomena and events. Thus, it is necessary to establish a rational relationship that might provide trust and security, describe the space in which the hearing takes place and offer the actual possibility for the person to explore by touch the surrounding objects. Also, the message will be repeated at a slow pace in order to make it easier to understand.

The person with dyslexia – Some people with dyslexia are familiar with voice recognition software programs (e.g. Dragon Dictate or, for Mac - Via Voice, Texthelp). The Windows environment is also provided with specialized programs, which you can find in the

Control Panel, the "Easy Access Center" window. The investigator will make sure that such software products are available on the computers in the office where the hearing is to be carried out and that he/she is familiar with how to use them. For fluency of the activities, it is also advisable to have an IT specialist present.

The person with an undeclared/unrecognized disability – It is the type of disability that we consider as the most insidious, because when the handicap is visible, as in the cases described above, on the one hand the investigator is aware of the existence of the condition and complies with the situation, and on the other hand the person has already internalized this condition. When the impairment is not visible and has no explicit expression, has an episodic occurrence or only occurs in certain situations with a high emotional load, the people in question do not see it as a disability and sometimes do not even say they have certain special needs. People with such conditions may consider themselves prejudiced if they reveal their problem.

Panic attacks, anxiety, phobias, seizures and epilepsy are the most common conditions in this category, the main problem being that they occur spontaneously. Being unpredictable, it is hard to solve them in a controlled manner, the spontaneity of their occurrence generating a spontaneity of reaction. The investigator must remain calm, collected and deal lucidly with such situations. We recall here the need for the investigator to be familiar with the characteristic symptoms and with the first measures recommended in such cases. As a prevention measure, the investigator should not show his/her discontent with these people's requests for frequent breaks, for example, to eat at certain times or to solve certain physiological needs. The investigator will facilitate, on request, the person's withdrawal into a private space for self-administration of medication, if there is no medical service available in the neighbourhood.

The stress resulting from the emergence of new situations, as is the case in a criminal investigation, may affect some people, for example those suffering from asthma. The physical environment may affect them, particularly certain factors, such as dust, cigarette smoke, strong air fresheners, which can trigger an asthma attack. People with these conditions usually take their medication with them, but they should be asked from the very beginning of the hearing whether they are under treatment. In parallel, the investigator will follow the physiological reactions of the person to be heard and, in case of a fit, will immediately call for emergency health care assistance.

Finally, we should also mention multiple handicap, which is a combination of two or more impairments in the same person, the two deficiencies being, as a rule, subsequent to each other. The most important and serious multiple handicaps are autism and deaf-blindness.

Conclusions

Generally, in the approach of the recommendations contained in this paper, we plead for an increased degree of attention in the establishment of the relationship between the criminal investigation and prosecution bodies and the people with special needs, in terms of the support provided to overcome the limitations that the disabilities corresponding to each type of handicap impose and to participate actively in a fair criminal trial. We must also stress that condescension and kindness, as main attributes of the relationship, should not mistakenly turn into a lenient or favouring attitude, only into a balanced and fair one. In order to support this approach, an ***"Investigator's Practical Guide to Relating to Persons with Special Needs" (Ghidul practic de relaționare pentru anchetator raportat la persoanele cu nevoi speciale)*** has been developed. The guide contains provisions applicable to the investigation and prosecution bodies, with tasks/responsibilities related to the hearing/interviewing of people with special needs.

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MODERN SLAVERY

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Abstract

This study aims to examine the extent to which slavery is a dangerous criminal offense and unfortunately abundant in a society considered to be civilized and advanced in all respects.

Slavery is a crime which is part of the category of offenses against the freedom of persons, that is regulated in Chapter VII, Title I of the Special part of the Romanian New Criminal Code, Article 209.

This phenomenon has existed since ancient times. Placing and keeping the persons in a state of slavery, as well as trafficking in slaves, are well known.

Keywords*: slavery, criminal offense, human exploitation, victim, traffic, the breach of the human's rights.*

Introduction

Modern slavery represents the most serious violation of human rights in which persons are been revoked freedom and dignity, that is exactly what make us humans.

Slavery is a crime which is part of the category of Slavery is a crime which is part of the category of offenses against the freedom of persons, that is regulated in Chapter VII, Title I of the Special part of the Romanian New Criminal Code, Article 209 and consists of placing and keeping a person in a state of slavery, as well as trafficking in slaves, are punished by imprisonment from 3 to 10 years and the prohibition of certain rights.

This offense was incriminated by the Romanian legislator as a result of commitments at the international level.

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This offense was incriminated by the Romanian legislator as a result of commitments at the international level.

The international act which marked a crucial moment in this field was the Slavery Convention signed at Geneva on 25 September 1926. Entered into force on 9 March 1927, in accordance with the provisions of Article 12, the Convention was amended by the Protocol done at the Headquarters of the United Nations, New York, on 7 December 1953[1].

[1] The amended convention entered into force on 7 July 1955, date to which all the amendments set in the addendum in the Protocol from 7 December 1953 entered into force according to Article III of the Protocol. Romania ratified the Convention through the Decree no. 988 in the "Romania's Official Monitor", Part I, no. 76 from 1 April 1931.

According to Article a of the Convention, Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

Article 2 provides that "The High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps:

(a) To prevent and suppress the slave trade;

(b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms."

Another very important act is the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery[2] which in the Preamble provides that "The States Parties to the present Convention,

Considering that freedom is the birthright of every human being,

Mindful that the peoples of the United Nations reaffirmed in the Charter their faith in the dignity and worth of the human person,

Considering that the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations as a common standard of achievement for all peoples and all nations, states that no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms,

Recognizing that, since the conclusion of the Slavery Convention signed at Geneva on 25 September 1926, which was designed to secure the abolition of slavery and of the slave trade, further progress has been made towards this end,

Having regard to the Forced Labour Convention of 1930 and to subsequent action by the International Labour Organisation in regard to forced or compulsory labour,

Being aware, however, that slavery, the slave trade and institutions and practices similar to slavery have not yet been eliminated in all parts of the world,

Having decided, therefore, that the Convention of 1926, which remains operative, should now be augmented by the conclusion of a supplementary convention designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery."

Despite the entry into force of the Slavery Convention and the official interdiction in almost all the countries, slavery continues to exist on large scale, both in its traditional form, as well as in modern form.

According to the studies published in the past few years there may be, still, 27 million slaves in the world.

One of the fundamental principles of the law and of the modern society, in general, provides men are equal, being prohibited the exploitation of fellow humans between them. However, this principle has not been and it is not always respected, slavery and trafficking in slaves representing the most serious forms of crime.

The importance of human resources on organization level is analyzed also in terms of equal opportunities, fundamental rights of human resources in any organization that provides for the abolition of slavery in the modern economy[3].

[2] Adopted on 7 September 1956 by the the United Nations Conference of Plenipotentiaries was convened pursuant to resolution 608 (XXI) of the Economic and Social Council of the United Nations on 30 April 1956. Entered into force on 30 April 1957, according to the provisions of Article 13, Romania ratified the Convention on 13 November 1957 through Decree No. 375, published in Romania's Official Journal, Part I, No.33 on 9 December 1957.

This phenomenon has existed since ancient times. Placing and keeping the persons in a state of slavery, as well as trafficking in slaves, are well known.

Placing and keeping people in a state of slavery, as well as slave trading, represents the best-known form of exploitation, in the course of the history.

This method of exploitation of the human being has existed since ancient times, slaves providing the manpower necessary to build the big constructions or to work the fields. In ancient times, wars represented a main source of getting slaves. For example, in Roman Empire, gradually in so far as conquering other peoples, the number of slaves increased substantially, reaching toward the end of the Republic to represent more than one-third of the total population of the state[4].

The trade with black slaves determined, probably, the largest forced migration in history. According to the latest estimates, 15 million black people were displaced from Africa to American continent, and other 30 - 40 million perished, from various causes, such as the brutality of the treatment, the difficult conditions of the transport, malaria etc[5].

It is hard to imagine that in our democratic and free countries from the EU, tens of thousands of human beings are deprived of freedom and are exploited, sold like objects for profit. But this is the sad truth, and trafficking in human beings is all around us, closer than we think.

When we talk about ruthless, cruel, unscrupulous exploitation of humans, we do not have to think only about beings kept under key, whom someone obliges them to work or to prostitute themselves.

Many victims of slavery today comply voluntarily to the requirements of exploiters and they do not think at any moment tor un away from these. This is because of fear, of frustration, of helplessness, or because of blackmail to which they are subjected to.

Social environment represents the factor generator of slavery. There are found the favorable conditions to maintain this phenomenon, the moral degradation, the existence of a demand for the services of those exploited, and the material lacks of the victims are playing a decisive role. The exploitation of vulnerable persons is linked to the level of the development of human civilization. For example, inventing photo cameras, video cameras, developing information technique have been used to make pornographic materials, often, children being involved[6].

Slavery and bondage seem to us, today, to be notions from the history and geography, there were once or there exist somewhere, but there are incompatible with the democracy and modernism, that characterize us. However, let us take a look around us.

Each year millions of people, most often women and children, are being scammed or forced to fall in various forms of servitude from which they cannot escape, or from which they escape with great difficulty[7].

Modern slavery represents the most serious violation of human rights in which persons are been revoked freedom and dignity, that is exactly what make us humans.

Regardless of the fact that it is about the sexual exploitation, domestic slavery or forced labor, forced beggary or other criminal activities, the persons who are exploited do not choose their fate[8].

Therefore, slavery is a current phenomenon and it is largely extended at both national and international level.

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[3] G. Bologa, *Diagnosticul şi evaluarea întreprinderii*, Agora Publishing House, Oradea, 2007, p. 19

[4] J. N. Robert, *Roma*, Bic ALL Publishing House, Bucharest, 2002, p. 95

[5] D. Mannix, M. Cowley, *Corăbiile negre – o istorie a negoțului cu sclavi din Atlantic – 1518 – 1865*, Scientific Publishing House, Bucharest, 1968, p. 5.

[6] G. C. Zaharia, Summary to Doctoral Dissertation, www.unibuc.ro

[7] http://freedomkeepersro.wordpress.com/despre-sclavia-moderna/

[8] Idem

Romania is also distressed, being especially an origin and transit country for the large networks of exploited persons, originating especially from Asia, but also from the neighboring countries as Ukraine, Moldavia.

We conclude, therefore, that according to how they are designed, how they are committed as well as their consequences, most of these crimes present certain elements of internationalization, for which slavery is assimilated to a larger group of international crimes like those relating to human trafficking, drugs, weapons, terrorism, crimes against, humanity, war crimes or genocide[9].

The incrimination of the Romanian penal law established as pre-existing conditions: a.

a. Object of the crime:

Special juridical object constitutes social relationships regarding the protection of the individual freedom against illegal activities of placing and keeping a person in state of slavery[10].

The condition of free man is an important conquest of humanity, and it is protected by penal law in all democratic states[11].

The material object of the crime is the human itself who is in a state of slavery, reduced to the level of a simple material object, which can no longer be subject in the sphere of social relationships.

b. Subjects of the crime

(a) The active subject can be any person, the subject does not need to have a certain quality. The participation is possible in all its forms.

If the acts of slavery are committed by a foreign citizen in our country, he will be sanctioned based on the territorial principle of the criminal law. Foreign citizens and persons without citizenship, who commit abroad such acts, will not be judged and punished, at the time when they are in our country, according to the universality principle of the criminal law. Romanian criminal is applied to foreign citizens or to persons without citizenship who are not resident in the country, if they have committed crimes outside Romania, with the condition that the offender is voluntarily in Romania.

(b) The passive subject is the person – non-circumstantial – placed in state a slavery or is the subject of trafficking in slaves[12].

The slave is a person lacking any rights, property of a slave master for whom he works[13].

At the regional level, the financial crisis from the past years has facilitated an increase of the victims of trafficking for exploitation through work.

Statistics based on cases solved by the authorities, that apply the law, state ascending evolutions of the trafficking in human beings to exploit them through work in a series of legal and illegal sectors, including agriculture, horticulture and food processing, cleaning services, construction, catering services, entertainment industry (in particular among artists: dancers, entertainers, for example, in amusement parks), hotel industry, care centers, restaurants, catering services or small businesses in which physical work is used[14].

”In particular, forced labor is determined by the nature of relationship between the person concerned and the employer. This implies restrictions on freedom of movement, confiscation of the identity documents, hurling threats such as threats with violence or with

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[9] L. A. Lascu, *Modalități de participare la comiterea crimelor date în competența instanțelor penale internaționale*, Hamangiu Publishing House, Bucharest, 2013, p. 10-15

[10] V. Dobrinoiu, Drept penal. Partea specială, Vol. I, Teorie şi practică judiciară, Lumina Lex Publishing House, Bucharest, p. 166

[11] Idem

[12] V. Dobrinoiu, op. cit., p. 167

[13] http://dexonline.ro/definitie/sclav

[14] “Transnational study regarding the characteristics of the policies in the domain of trafficking in persons to be exploited through work 2009-2011”, published on http://anitp.mai.gov.ro/

denouncing the person to the authorities of immigration to the immigrants who complain of standards of living and working conditions" [15].

"One of the most outspread types of control on the victims is the system of "slavery by debt" which, from a legal point of view, represents the state or the condition resulting from a commitment borne by the debtor to pay back a debt through services executed in person or by other person on whom this has an authority as security for that debt, if the value of those services, assessed reasonably, does not have the capacity to cover their debt or that the duration and the nature of these services are limited" [16].

c. The constitutive content

- Objective side:

The material element consists of an action by which the active subject places or keeps in a state of slavery or by which the trafficking in slaves is realized[17].

Placing a person in a state of slavery means a change from the situation of free person into the situation of total dependence on another person.

The last person becomes the owner of the first person[18].

Keeping in slavery means to maintain the state of slavery, that is the state in which a person is by exerting the prerogatives of property right[19].

Finally, *trafficking in slaves* means acts of trade, of slaves, that is acts of sale/purchase, transport or barter with slaves[20].

There are no special conditions concerning the time or the place where the offense was committed.

The immediate outcome is placing a free person in a state of slavery, that is the total dependence on the slave owner or maintaining in this state or placing a person in slavery from one owner to another through acts of purchase or transfer.

It is not necessary for this result to have a legal consecration, being sufficient to be produce in fact.

c) Causality relation. The objective side is performed only when among the action of the offender (placing or keeping a person in slavery, or trafficking in slaves) and the immediate outcome, the existence of a casual link can be set. It is necessary to assess to verify if the activity of the active subject has produced or has contributed to the generation of these outcomes.

B. Subjective side.

The crime of slavery may be committed with direct and oblique (indirect) intent. The movable and the activity's goal of author are not relevant. Also, the eventual consent of the victim is not inquired.

Among the causes of trafficking in slaves we find the profits that are obtained from this type of criminal activity, the lack of a satisfactory standard of living of the victims, their educational shortcomings, the existence of a demand for the services provided by the trafficked persons, a permissive criminal law or a lack of diligence in applying the legal provisions.

Although the specific arrangements of trafficking in slaves differ from one case to the other, looking as a whole the phenomenon, we can outline broadly how the smugglers act, as well as the steps that are taken up to the actual exploitation of the victims. Also, based on certain characteristics frequently encountered, we can also achieve a profile of the traffickers and of the victims.

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[15] Idem
[16] Idem
[17] C. Duvac, Drept penal. Partea specială, Vol. I, C. H. Beck Publishing House, Bucharest, 2010, p. 139
[18] Ghe. Diaconescu, în Ghe. Diaconescu, C. Duvac, Tratat de drept penal. Partea specială, C. H. Beck Publishing House, Bucharest, 2009, p. 160
[19] V. Dobrinoiu, op. cit., p. 167
[20] Idem

Usually, the *recruitment* is done by promising some well-paid jobs abroad. After the victims' confidence has been gained, the second stage of trafficking in persons, the *transport* starts. After reaching their destination, the victims are retained the travel documents and the identity cards and they are *accommodated* or *housed* and *exploited* directly by the traffickers which have recruited them in the first place, or are *transferred* to other traffickers, in exchange for money, to be exploited by them[21].

Trafficking in persons can lead to negative consequences for the victims on several levels. So, their personal integrity or health can be affected by or endangered, or their psychic may be altered. The social relationships in which trafficked persons are engaged, may be, in turn, disrupted. Victims often experience a feeling of inferiority, they may feel stigmatized by their fellow humans, and they may present a high risk of social exclusion[22].

In these cases, it is advisable that the hearing of the victims should take place in four stages, namely: building the relationship or preliminary discussions, the free account of the event, of the history of the traffic or free reports, asking questions and receiving answers, conclusion of the hearing by summarizing the essential points in the victim's testimony and checking their accuracy with the latter[23].

- Causality relation

The objective side is performed only when among the action of the offender (placing or keeping a person in slavery, or trafficking in slaves) and the immediate outcome, the existence of a casual link can be set[24].

It is necessary to assess to verify if the activity of the active subject has produced or has contributed to the generation of these outcomes.

d. Subjective side.

The crime of slavery may be committed with direct and oblique (indirect) intent.

Victim's consent does not remove the penal character of the offense, being a social value of which the person may not have (the condition of freedom) [25].

The movable and the activity's goal of author are not relevant.

The offense is consumed when the immediate outcome was produced, that is placing and keeping the victim in the state of slavery, or performing a material act of trafficking.

In the manner of placing and keeping a person in slavery, the offense has a continuous character.

In the manner of trafficking, the offense is consumed instantly.

The attempt of the offense is punished.

"On 19 July 2012, the EU has approved a strategy for the eradication of this phenomenon, deemed to be unacceptable for the society in which we are. The basis of a common European legislation have been laid, that has to be adopted by the Member States in a common effort to eradicate the phenomenon of trafficking in persons, but until the expiry date, 6 April 2013, only 6 countries have implemented the European directive (Czech Republic, Latvia, Sweden, Hungary, Finland, Poland) and other 3 are in the process of adopting the new directions (Belgium, Lithuania, Slovenia)" [26].

There are concerns at global level regarding the prevention and combating of this phenomenon, with a highlight in the specialized literature on the importance of a good global gouvernance of migration existing either within institutions or as a result of the cooperation between institutions dealing with migration, but elements of global governance can also be

[21] G. C. Zaharia, Summary Doctoral Dissertation, www.unibuc.ro

[22] I. G. Oltei, *Social assistance accorded to the victims of trafficking in persons*, in Law magazine, no. 7/2008, p. 225

[23] Elena-Ana Nechita, *Metodologia investigării infracțiunilor (Crime Investigation Methodology)*, 2012, PRO Universitaria Publishing House, Bucharest, p. 51-54

[24] V. Dobrinoiu, op. cit., p. 168

[25] C. Duvac, op. cit., p. 140

[26] adev.ro/mm438q

found in the decisions following international consultation rounds and arrangements[27].

By finding a common denominator, the coordination of authorities' efforts from the Member States is attempted to fight more efficiently with the trafficking in human beings.

4. Forms. Ways. Sanctions

A. Forms. The offense is consumed when the immediate outcome was produced, that is placing and keeping the victim in the state of slavery, or performing a material act of trafficking. In the manner of placing and keeping a person in slavery, the offense has a continuous character. In the manner of trafficking, the offense is consumed instantly.

The attempt of the offense is punished.

B. Ways. The offense presents in three ways: placing in a state of slavery, keeping in a state of slavery and trafficking in slaves.

Relating to each normative ways, there are various factual ways.

C. Sanctions. Slavery is punished with imprisonment from 3 to 10 years and the prohibition of certain rights.

Conclusions

From the analysis presented it has been observed that, despite the entry into force of the Slavery Convention and the official interdiction in almost all the countries, slavery continues to exist on large scale, both in its traditional form, as well as in modern form.

Laws cannot change human nature.

Laws only create the premise for punishment.

Beyond what we all want, depending on education, culture, tradition, religion or personal experiences, there are things that have happened, there are happening and they are going to happen for a long time.

We cannot prevent them, or master them.

We can only limit their effects.

But these things will continue.

And not only poverty "justify" them.

Otherwise, we would have to admit that a large part of the world's population could do that. We know that it's not so. There are needy people but with a perfect morality.

It's about our nature. Human weakness… flaccidity!

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[27] N. Iancu, *Migrația internațională a forței de muncă (International Labour Migration*), 2013, PRO Universitaria Publishing House, Bucharest, p. 115

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DISCIPLINARY SANCTIONS APLICCABLE TO ROMANIAN CIVIL SERVANTS

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Abstract

Disciplinary liability of civil servants, as form of judicial liability, has started a series of debates among Romanian doctrinaires. This paper aims to analyze the disciplinary sanctions applicable to civil servants subjected to Law No 188/1999, starting from the analysis of the concept of civil servant and from their classification according to the doctrine and legal provisions.

Keywords: *civil servant, disciplinary offence, disciplinary sanction*

Introduction

Specific regulations regarding the statute of civil servants are stated by Law No 188/1999[1] with its subsequent modifications and amendments.

Law No 188/1999 of the Statute of Civil Servants, states, as any statute of a profession, the conditions of the judicial liability for civil servants.

The specificity of the disciplinary liability of civil servants is given by the actions representing disciplinary offences, by the specific sanctions and by their own disciplinary procedure.

Given that the disciplinary liability of civil servants is a very broad topic, we shall analyze, without aiming to deplete the subject, the disciplinary sanctions applicable for the disciplinary offences committed by them.

Section 1. General aspects regarding civil servants

The definition of the profession and of the civil servant has known numerous attempts in the doctrine and started so many controversies[2].

It was correctly mentioned[3] that the civil position and the civil servant are legal institutions of the public law, in general, and especially of the administrative law, over which

[1] Published in the Official Gazette No 600/8 December 1999, republished in the Official Gazette
[2] In order to analyze the doctrinaire controversies on the legal status of civil servants see Verginia Vedinaș, *Drept administrativ*, 7th edition reviewed and added, Universul Juridic Publishing House, Bucharest, 2012, pp. 501-504

doctrinaire, legislative and jurisprudential controversies have arisen in time, both in literature, as well as in the practice of different European states[4] having an administrative system well shaped, but also in the Romanian legislation and jurisprudence.

A theory[5] mentioned, that, actually, the public servant is nothing else but an employee with a special statute, his job report representing "a typical form of a legal employment report, which, though different from the individual employment contract is not entirely different from the latter one..." This theory has had its opponents[6], to which we concur, who showed that the institution of civil servants is not included in the labor law, being part of the public law, especially of the administrative law, "the undeniable specificity of the job report of the civil servant towards the job report of an employee".

Art 2 of the Law No 188/1999 defines both the civil position, as well as the civil servant. Thus, "the civil position represents the entirety of duties and responsibilities settled by the law, in view of fulfilling the prerogatives of public power by the central public administration, by the local public administration and by the autonomous administrative authorities". The "civil servant is the person nominated, as per the law, in a public position. The person who was released of the public position and it is now in the reserve body of civil servants preserves the quality of civil servant".

The doctrine[7] defines the civil position as "the determined legal situation of the natural person having the prerogatives of a public authority, as a public power, aiming the continuous achievement of a public interest". Another opinion[8] states that the civil position represents "the entirety of the rights and obligations established for a natural person (chosen or appointed) in order to achieve the competence of a public authority, public institution or agency, for the continuous fulfillment of a public interest".

The civil servant is defined as the "person invested by appointment in a public position as part of a public administrative service, with the purpose of achieving its competence"[9] or "the natural person chosen or appointed in a public position as part of a public authority or institution, with the purpose of fulfilling their competences and prerogatives"[10]. The law establishes for the civil servant the coordinates of his position, his attributions being general, in the best interest of the public service, his legal situation being objective and, as a consequence, the relation between the civil servant and civil position being an objective legal report, the civil servant exerting a legal power[11].

The statute of the civil servants defines another important institution, namely the body of the civil servants representing the entirety of civil servants within the autonomous administrative authorities and within authorities and bodies from central and local public administration[12]. It was stated[13] that the performance of the prerogatives of public power "has

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[3] Andreea Drăghici, Ramona Duminică, *Deontologia funcţionarului public. Curs pentru studenţii programului frecvenţă redusă*, University of Piteşti Publishing House, Piteşti, 2010, p.8

[4] See also Elise Nicoleta Vâlcu- *Introducere în dreptul comunitar material*, Sitech Publishing House, Craiova, 2010, pp.106 and next.

[5] Ş. Beligrădeanu, *Considerente - teoretice şi practice - în legătură cu Legea nr. 188/1999 privind Statutul funcţionarilor publici*, in Law Review No 2/2010, p.7.

[6] Verginia Vedinaş, *Despre natura juridică a raportului de serviciu al funcţionarilor publici*, in the Private Law Review No 5/2010, pp.190-207.

[7] Verginia Vedinaş, *Drept administrativ*, 7th edition reviewed and added, Universul Juridic Publishing House, Bucharest, 2012, p. 506.

[8] Doina Popescu, Andreea Drăghici, *Deontologia funcţionarului public*, Paralela 45 Publishing House, Piteşti, 2005, p. 13.

[9] Verginia Vedinaş, *Drept administrativ*, 7th edition reviewed and added, Universul Juridic Publishing House, Bucharest, 2012, p. 507.

[10] Andreea Drăghici, Ramona Duminică, *Deontologia funcţionarului public. Curs pentru studenţii programului frecvenţă redusă*, University of Piteşti Publishing House, Piteşti, 2010, p. 18.

[11] Dana Apostol Tofan, *Drept administrativ*, 1st Volume, All Beck Publishing House, Bucharest, 2003, p. 283.

[12] Art 2 Para 5 of the Law No 188/1999 with its subsequent modifications and amendments.

the credit of motivating every person to aspire to the quality as civil servant, knowing that the civil servants are a prestigious socio-professional category...".

The Law No 188/1999 classifies the civil servants as such:

A. *Debutant andpermanents civil servants* (Art 11 of the Statute)

Can be appointed as debutant civil servants the persons who promoted the evaluation for a public position and do not fulfill the conditions previewed by law for a permanent one. Can be appointed as permanent civil servants:

a) the debutant civil servants who finalized the probation period previewed by the law and who obtained an appropriate result at the evaluation;

b) the persons who enter the civil servant body through contest and who have the experience required for occupying the public position of minimum 12 months, 8 months and, respectively, 6 months, depending on the level of concluded studies;

c) the persons who promoted training programs in public administration.

B. 1. *High ranking civil servants* (Art 12 of the Statute):

a) General Secretary of the Government and deputy to general secretary of the Government;

b) General Secretary from the ministries and from other specialized entities of the central public administration;

c) Prefect;

d) Deputy to general secretary from the ministries and from other specialized entities of the central public administration;

e) Sub-prefect;

f) Government inspector.

2. Managing civil servants (Art 13 of the Statute):

a) General Director and deputy to general director within the structure of autonomous administrative authorities, of ministries and of the other specialized bodies of the central public administration, as in the specific public positions assimilated to those;

b) Director and deputy to director within the structure of autonomous administrative authorities, within ministries and within the other specialized units of the central public administration, and in the specific public positions assimilated to those;

c) Secretary of the administrative - territorial unit;

d) executive director and deputy to executive director of disconcerted public services of ministries and of the other specialized bodies of the central public administration from the administrative - territorial units, within the prefecture, within the structures of the authorities of the local public administration and of their subordinated bodies, as in the specific public positions assimilated to those;

e) Head of service, as in the specific public positions assimilated to this;

f) Head of office, as in the specific public positions assimilated to this.

3. *Execution civil servants* (Art 14 of the Statute):

a) Execution civil servants of first class: councilman, juridical councilman, auditor, expert, inspector, as in the specific assimilated public positions;

b) Execution civil servants of second class: specialty referent and the public positions assimilated to this;

c) Execution civil servants of third class: referent and the public positions assimilated to this.

According to Art 77 of the Statute, the disciplinary responsibility of the civil servants is engaged if they perform actions representing disciplinary deviations. The disciplinary deviation, as the only ground of the disciplinary responsibility, is defined by the same article and represents "the infringement by fault of the duties appropriate to the public position held by the civil servants and of the rules of professional and civil behavior regulated by norms".

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[13] Alina Livia Nicu, *Statutul funcționarului public între plus și minus*, Universitaria Publishing House, Craiova, 2007, p. 29.

The Statute not only defines the disciplinary deviation committed by civil servants, but also states, limitative, in order to avoid the abuses committed by superiors, the actions representing such deviation:

a) Systematic delay in performing duties;
b) repeated negligence in solving duties;
c) Unmotivated absences from work;
d) repeated disrespect of working hours;
e) Interventions or persistence in solving various requests outside the legal frame;
f) Disrespect of the professional secrete or of the confidentiality of secret works;
g) Events harming the prestige of the public authority or body;
h) Performing political nature activities during the working hours;
i) Refusal to fulfill duties;
j) Infringement of legal provisions referring to duties, incompatibilities, interest conflicts and interdictions set by law for the civil servants;
k) Other acts considered disciplinary deviations in the norms from the field of public position and civil servants.

Art 23 Para 1 of the Law No 7/2004[14] on the Code of Conduct for the Civil Servants states that for the infringement of the provisions previewed by this Code the civil servant is held disciplinary responsible.

Section 2. Specific sanctions

All the disciplinary sanctions applicable for civil servants are stated by Art 77 Para 3 of the Statute:

a) Written reprimand;
b) Reduction of salary rights with up to 5-20% for a period up to 3 months;
c) Suspension of the advancement right in salary levels or, as it case may be, of the advancement right in public position for a period that goes from 1 to 3 years;
d) Degradation in salary levels or degradation in public position for a period up to one year;
e) Removal from the public position.

It was stated in the doctrine[15] that it has been eliminated from the actual form of the Statute one of the disciplinary sanctions having a preponderant moral feature, namely the warning, considering that previous to this modification, the same author has criticized the existence of two moral disciplinary sanctions.

a) *Written reprimand* has been defined by the doctrine as being the "written warning of the civil servant regarding the seriousness of his deviation having negative or detrimental consequences for the public structure's or authority's activity with the express mention that on the future he shall be subjected to more severe sanctions, going up to his dismissal"[16].

Written reprimand is the only sanction applicable to civil servants having a preponderant moral feature, being usually applied for the commission of a first disciplinary deviation, which did not caused significant prejudices.

b) Reduction of salary rights with up to 5-20% for a period up to 3 months is a disciplinary sanction with a predominantly patrimonial feature.

The legislator has foreseen for this sanction two categories of limits: one regarding the quantum of the salary reduction and one regarding the period for which this sanction can be sentenced.

[14] Published in the Official Gazette of Romania, Part 1, No 157/23 February 2004 and republished based on Art II of the Law No 50/2007 for the modification and amendment of Law No 7/2004 on the Code of Conduct for the Civil Servants, published in the Official Gazette of Romania, Part 1, No 194/21 March 2007, renumbering the texts

[15] Verginia Vedinaş, *Statutul funcţionarilor publici*, Universul Juridic Publishing House, Bucharest, 2009, p. 291.

[16] I. Santai, *Drept administrativ şi ştiinţa administraţiei*, Risoprint Publishing House, Cluj-Napoca, 2008, p. 137.

Regarding the quantum of salary reduction, have been stated two limits: one inferior of 5% under which it cannot be descended, and one superior which cannot exceed 20%. Unlike the common law, where the similar sanction affects only the base salary, for the civil servants the diminution affects all salary rights.

The measure cannot be disposed for over 3 months, without specifying its minimum period. As lege ferenda, we consider that the provisions regarding this sanction should be completed; both for the protection of the civil servants who are generally sanctioned with the maximum period, as well as for the achievement of the purpose aimed by this disciplinary measure, in the actual regulation being applied even for a single day.

c) *Suspension of the advancement right in salary levels or, as it case may be, of the advancement right in public position for a period that goes from 1 to 3 years* is considered in the doctrine[17] as being a sanction specific for the civil servants.

It is considered[18] that this sanction is applicable to those civil servants who, having a history of disciplinary deviations, commit a serious deviation causing outstanding damages for the public institution or authority.

This sanction can be sentenced for minimum 1 year but without exceeding the maximum of 3 years.

d) *Degradation in public position for a period up to one year* is a sanction affecting the civil servant both pecuniary as well as morally.

The degradation in public position assumes the diminution of the salary rights. This sanction cannot be sentenced for more than one year, the minimum period being unlimited.

The mandatory degradation in a public position and not in an auxiliary one is obvious from the legal provision.

e) *Removal from the public position* is the most serious sanction applicable for civil servants, being equivalent with the disciplinary dissolution of the contract in the common law.

This is the only offence applicable for civil servants for which the Law No 188/1999 states the deviations for which is applicable. Thus, Art 101 states that the removal from public position can be sentenced only in the following cases:

a) for repeated commitment of various disciplinary deviations or of a disciplinary deviation with serious consequences;

b) if a legal reason of incompatibility has arisen, and the civil servant doesn't take steps to remove it within 10 calendar days since the date of intervention of the incompatibility case.

The civil servant who is disciplinary sanctioned with the removal from the public position shall no longer held another public position for a period stated by Art 82 Para 1 Let c) of the Statute, stated for the radiation of this sanction, namely 7 years[19].

The individualization of the disciplinary sanction is made according to the following aspects[20]:

the seriousness of the offence representing a disciplinary deviation
the circumstances in which it was committed
- the degree of guilt of the civil servant
the general behavior of the civil servant during service
the consequences of the deviation
- the perpetration of other disciplinary deviations by the civil servant which have not been radiated yet. The public authorities and institutions where the civil servants are appointed have the obligation, according to Art 48 Para 3 of the Decision, to request from the former employer of the civil servant his disciplinary situation, within 10 days from the issuance of the administrative act of appointment. The obligation belongs to the public

[17] I. Santai, *Drept administrativ şi ştiinţa administraţiei*, Risoprint Publishing House, Cluj-Napoca, 2008, p. 138.
[18]. Dabu, *Răspunderea juridică a funcţionarului public*, Global Lex Publishing House, Bucharest, 2000, p.268
[19] Ana Mocanu-Suciu, *Deontologia funcţiei publice*, Techno Media Publishing House, Sibiu, 2010, pp.143-144
[20] Stated both by Art 77 Para 4 of the Statute, as well as by Art 47 Para 2 of the Decision.

authorities and institutions only for those civil servants whose employment contracts have stopped with less than three months before their appointment in a public position.

Section 3. Application of sanctions

The administrative act of sanction is issued within 10 calendar days from the moment when the report of the disciplinary commission is received, by the person who has legal competence in applying the disciplinary sanction. Under the sanction of the absolute void, the administrative act of sanction shall be accompanied by the report of the disciplinary commission and shall mandatory comprise:

a) The description of the offence representing a disciplinary deviation;
b) The legal ground based on which the disciplinary sanction is applied;
c) The reason for which has been applied another sanction than the one proposed by the disciplinary commission, where the person who has legal competence in applying the disciplinary sanction, motivated applies another sanction than the one proposed by the disciplinary commission.

The proposal of the disciplinary commission is not mandatory for the one who has competence in applying disciplinary sanctions, being able to apply a lighter sanction.

d) The term in which the sanction can be appealed;
e) The competent court where the administrative act stating the disciplinary sanction can be appealed.

The administrative act is communicated within maximum 15 calendar days from the moment when the report of the disciplinary commission is received, to the following persons and administrative structures:

a) The departments with attributions in the area of human resources from the public institution or authority which is the employer of the civil servant whose action has been classified as a disciplinary deviation;
b) The disciplinary commission who has drafted and sent the report;
c) The civil servant whose action was classified as a disciplinary deviation;
d) The person who has submitted the intimation.

If by the same intimation are reported several disciplinary deviations committed by the same civil servant, the disciplinary commission shall propose, after the administrative investigation, the application of a single disciplinary sanction, with the consideration of all disciplinary deviations.

The disciplinary competence[21] in applying the sanctions is stated by Art 78 of the Statute of civil servants.

Thus, the written reprimand can be applied directly by the person with legal competence of appointing in public positions. The other four disciplinary sanctions are applied by the person with legal competence of appointing in public position, at the proposal of the disciplinary commission. Regardless of the applied sanction, the preliminary investigation is mandatory.

The disciplinary sanctions can be applied within maximum one year since the moment when the disciplinary commission has been notified about the disciplinary deviation. This term of prescription must be framed in the general term of prescription of the disciplinary liability, the term of two years since the disciplinary deviation was committed. Thus, even if the sanction has been applied within one year since the notification of the disciplinary commission, but exceeding the general term of two years from the commission of the disciplinary deviation, the administrative act is void. The same thing shall happen in the

[21] A detailed analysis of the particular aspects determined by the regulations regarding the competence in the application of disciplinary sanctions has been made by A. Trăilescu in *Limitele competenței aplicării sancțiunilor disciplinare prevăzute de Legea nr. 188/1999*, in Law Review No 1/2009, pp.92-97. The author shows that the manager of such public authority cannot disciplinary sanction a civil servant if the disciplinary commission proposed the classification of the intimation.

reverse situation, namely if it is fulfilled the general term of two years from the commission of the disciplinary deviation but is not fulfilled the term of one year from the notification of the disciplinary commission, thus violating the principle of celerity.

In this respect, in practice[22] it has been shown that the two terms are not alternative, being mandatory that the application of the disciplinary sanction must circumscribe both terms, so that the failure to respect either one of them is considered as a vice of illegality.

Conclusions

Starting from the multiple definitions given by the doctrine to the notion of "civil servant", we could say that the civil servant is a legal institution of the public law, namely of the administrative law, being a simple employee with a special statute. The special statute of the civil servants is stated by Law No 188/1999, also previewing special rules regarding their disciplinary liability.

The disciplinary sanctions which can be sentenced for the disciplinary deviations committed by civil servants are:

a) Written reprimand;
b) Reduction of salary rights with up to 5-20% for a period up to 3 months;
c) Suspension of the advancement right in salary levels or, as it case may be, of the advancement right in public position for a period that goes from 1 to 3 years;
d) Degradation in salary levels or degradation in public position for a period up to one year;
e) Removal from the public position.

The individualizați on and application of these sanctions are made according to special rules stated by the Statute of the civil servants, which were analyzed in this paper.

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INTERNATIONAL INSTITUTIONS WITH AUTHORITY IN THE MATTER OF INSOLVENCY

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Abstract

The article aims at presenting the international context of the ongoing phenomenon of acute imposibility of debt paying, with which the economic environment all around the world has been dealing with for the past 5 years, more precise the international organisations that cooperate or help with the development of insolvency laws (including crossborder insolvency laws) or principles that should govern an insolvency law for a convergence towards a more efficient and predictable insolvency procedure. The study isn't concerned with the international professional associations, nongovernmental international organisations, legal subjects of the national law under which they came to be. Lastly there will be presented topics of interest to be considered together with points of action.

Key words: *insolvency, bankruptcy, international organisations, UN, UNCITRAL, model law, EU, Council Regulation (EC) No 1346/2000.*

Introduction

Felix qui nihil debet (happy is the one who owes nothing) – Beside the fact that it seems to be a Latin truism, in the current economical state of society, the absence of debt remains a desideratum. It should not necessarily be the worst element in a debtor's patrimony. If it is controlled, it may become an impulse, a real fuel for a fruitful mechanism allowing to cover the needs and reach the socio-economical aspirations of each person. The danger emerges when the assets succumb to the level of debt in an uncontrolled, irresponsible and edgy way.

"Bankruptcy comes from the word *fallere*, which means *to cheat*. In roman law, bankruptcy embodied a procedure called venditio bonorum that manifested itself by cessating the activity of the trader, confiscating and selling it's goods. In the small italian cities, the bankrupt merchants were considered felons. In 1673 the insolvency proceedings are regulated by the Colbert Ordinance, and in 1807 they are included in the french Commercial Code".[1]

The domino effect produced worldwide by the financial crises has started many insolvency and crossborder insolvency proceedings. This is not an ended phenomenon since the affected countries are still looking for legislative solutions for equilibrating the internal market.

With this occasion, the mechanisms available to the creditors for recovering the claims from other national jurisdictions in a term as short as possible, were submitted to real challenges and the positive aspect consists of a better understanding of the weak points, their disadvantages and the starting of the works for improving and completing them. A current

[1] Dumitru Mazilu, *International Comerce Law. General considerations*, 7-th edition, Lumina Lex Publishing house, Bucharest, 2008, p. 217; For other details, Ana Birchall, *Insolvency proceedings. Judicial reorganisation and the liquidation proceeding*, 3-rd edition, Universul Juridic Publishing house, Bucharest, 2010;

example is the V Work Group of UNCTIRAL which, at the 43 session that had place in New York between April 15th-19th, wanted to clear the interpretation and the application of some extremely important notions of the UNCITRAL Model Law regarding the crossborder insolvency concerning the center of main interest or the obligations of the persons able to make the managerial decisions, usualy the administrator, in the period of time close to bankruptcy.

In Romania, the impact of the economical crisis has led many times to the change of the insolvency law[2] and the most important ones are about the quantum of the limit value of the claim (gradually increasing from 3,000 lei to 45,000 lei) and the non-payment term from the date of payment and then the insolvency is presumed (from 30 days to 90 days) and it culminated with a coding intercession[3] of this matter, reuniting both the stipulations of the pre-insolvency stage (the ad-hoc mandate and the preventive agreement) and the one of proper insolvency. Thus, the need to reconceptualise and reinvent some guilt terms based on the adaption of the norms to the needs of the practice in matter.

In an age where the national and regional policies tend towards convergence in order to ease the intensification of the economical exchanges, when the logistics allows the intercontinental transport of the merchandise in much easier conditions, when the electronic means have a more and more important place in the accomplishment of the international commercial transactions, we should also look to the penumbra of this globalisation phenomenon, by observing, analysing, responding to certain dilemmas created by the ramifications of the negative effects of a status of incapacity of payment propagated beyond the limits of only one jurisdiction.

Based on the need to delimitate the organisms able to conceive some norms of broad applicability in the international context, providing thus a minimum treatment standard in the procedures, leading lines in the elaboration of the intern legislations, easing an efficient and predictable practice, one of the raised questions is – Which international organism is able to guide, to suggest a transnational organisation in matter of insolvency, considering the international law norms and the numerous and varied regional or international juridical systems?

Whereas every government is supposed to protect the national interest in the international context, Romania's accession to different intergovernmental organisms with concerns in draining the free exchange policies between its members, makes sense. In this purpose, we may also consider the participation to international organisations having a financial vocation (for example, the International Monetary Fund, the World Bank Group) by means of which we may obtain a support in solving the potential problems appeared in the context of disbalancing the payment balance.

Without minimising the importance of other international actors, certain international professional organisations have an impact in the matter of developing the insolvency principles, as they are co-opted in the elaboration of the different policies of crossborder insolvency, of the international coding or of the best collections of practices in the matter (e.g. INSOL International, International Bar Association).

Shortly, the most important international organisms involved in the international cooperation in the matter of insolvency are:

3. The United Nations Commission on International Trade Law (UNCTIRAL)

The Commission on International Trade Law (UNCITRAL) represents the basic structure in matter of the United Nations Organisations, focused on the gradually development and coding of the international law.

The necessity to support the international trade has an immeasurable importance, as it works on several plans, even reaching beyond the war policies (we noticed that there are

[2] Law 85/2006, published in the Official Gazette of Romania, Part I no. 359 from 21.4.2006;
[3] At this time the Insolvency Code is still in public debate;

smaller chances to start aggression acts against a country with strong economical connections).

Under the universal vocation of U.N.O. (it is currently constituted of 192 members), it is normal for one of its legal bodies to be concerned with the modernisation and the harmonization of the international commercial rules for its members. The legitimacy of this approach resides even in the text of the U.N.O. Charter preamble stating, among others, that for reaching the purpose it is instituted for, it commits too contract international mechanisms for promoting the economical and social progress for everyone – since UNCITRAL is one of these mechanisms. The process has place by negotiating the instruments with a broad variety of participants, such as the member states of UNCITRAL, the non-member states, governmental and non-governmental institutions. The result consists of recognition and a broad assimilation of these texts, offering favourable solutions for all the countries, no matter the legal traditions or the economical development degree.

Based on the lack of another UNO organism familiar and devoted to the international trade, of the General Secretary's report on the progressive development of the international trade law ("Schmitthoff Study"), of the conviction according to which it is wanted for this organism to have an important role in the field, on December 17th, 1966 with the occasion of the 1497th plenary meeting, the Resolution of the General Assembly 2205 (XI) was adopted and it actually settled UNCITRAL

The juridical texts of UNCITRAL (conventions, model laws, legislative guides) may be adopted by the states by the regulation in the domestic legislation.

The difference between model laws and conventions consists of the fact that the first one represents a pattern suggested to the legislative of a state as a model for the development of an intern law, while the convention is mandatory for the states or the entities that may be a part of it.

The UNCITRAL model law regarding the crossborder insolvency focuses on authorizing and encouraging the cooperation and coordination between the jurisdictions, not necessarily a uniformization of the substantial law. This, in its analysis, should be corroborated together with: a) its guides which may help the national authorities or the legislative bodies to evaluate different approach ways together with the valid solutions and to choose the most adequate one for the national context (the Legislative Guides of UNCITRAL on the Insolvency Law – parts one and two, 2004; part three, 2010); b) the texts elaborated by UNCITRAL for easing the judges' activity by offering uniform interpretations to the stipulations, increasing thus the predictability in the application of the model law; c) the practical cooperation guide in matter of crossborder insolvency, responding thus to the procedural and substantial difficulties created by the many judicial systems covered by such an insolvency.

By means of the principles stipulated in the preamble of the Model Law regarding the crossborder insolvency, it is followed a) a cooperation between the courts and other authorities or organisms of the states involved in crossborder insolvency procedures; b) to offer a degree of legal predictability for economical exchanges and other investments; c) a just and efficient procedure of crossborder insolvency protecting the rights of all the creditors or stakeholders (a stakeholder is an affected person or group which may influence or which has something to say referring the activities, the products or the services of a company), including the debtor's ones; d) to protect and maximise the debtor's fortune; e) to safeguard the enterprises having financial difficulties, protecting thus the investments and the employment.

Nationally, the international legislation was harmonized by adopting Law 637/2002 regarding the reports of international law in the insolvency field, thus Romania being one of the first countries which developed a legislation based on the UNCITRAL Model Law regarding the crossborder insolvency, next to Eritrea (1998), Japan (2000), Mexico (2000), South Africa (2000) and Montenegro (2002).

A healthy policy regarding the insolvency law may be one of the pieces forming an efficient economical and financial system. The process in front of the courts wants to be a secondary means of solving the disputes where we may reach preferably only if the negotiations fail, seeing thus the importance of the extrajudicial mechanisms of insolvency relieving the judicial activity by reaching to a consensus between the parties "in the shadow" of the law, certainly conditioned by unequivocal stipulations providing a certain predictability in the final result op the opening of an insolvency procedure.

4. The European Parliament, the European Union Council as organs having an enactment power in the framework of the European Union.

The main organisms of the European Union having enactment attributions are the European Parliament and the European Union Council (the Council).

According to the Dictionary of European Comunity terms[4], "The European Parliament is one of the main EC institution, established by the Treaty of the European Coal and Steel Community[5], in the form of a Parliamentary Assembly composed of member states' representatives (art. 20 of the ECSC treaty)"

Across the last decades, the power of the European Parliament has constantly increased; as a consequence, it currently exerts the co-legislator role in almost all the fields enacting the European Union, adopting or changing the suggestions of the European Commission, next to the Council.

According to art. 223 of the Treaty on the Functioning of the European Union, the European Parliament elaborates a project for establishing the necessary stipulations which could allow the election of its members by a direct universal vote according to a uniform procedure in all the member states or according to the common principles of all the member states. Therefore, we may notice that it is not about a European uniform law, but there may be specific stipulations as long as they are compliant to the common principles of all the member states.

The lists of candidates may be suggested only by the political parties, the political alliances and the citizen organisations belonging to the legally constituted national minorities, and also by the electoral alliances constituted in the conditions of Law no. 33/2007 regarding the elections organisation and development for the European Parliament, as further amended and completed.

The European Parliament is reunited in a yearly session the second Tuesday of March. The European Parliament may be reunited in an extraordinary session, at the request of most of the members who compose it, of the Council or of the Commission.

The legislative procedure specific to the European Union is translated by a mechanism where the two institutions adopt legislative documents either in the first reading, or in the second one. If the two institutions do not get to an agreement after the second reading, a conciliation committee is convoked, proceeding thus to the third reading.

The European legal framework in the matter of insolvency is represented by the Regulation (CE) 1346/2000 from May 29th, 2000 regarding the insolvency procedures, published in the Official Journal no. L 160/2000 benefits from direct implementation, considering Romania's accession to the European Union on January 1st, 2007. From that moment, we step into a new age that was to stay under the reforms and the modernisation, all of them under the guardianship of one of the biggest, the most complex and particular international organisations of integration. This is different from other organisations by certain special features: it creates the new juridical order with direct implementation in the national juridical system; there are institutions where representatives of the member states participate, but they are independent from them.

[4] Ion Jiga, Andrei Popescu, *Dictionary of European Community terms*, Lumina Lex Publishing house, Bucharest, 2000, p. 136.

[5] Also known as the Paris Treaty of 1951; it expired in 2002.

There are problems when recognizing a procedure stipulated in the Romanian legislation, but not in the European one, and vice versa – here, I mean the procedure of personal bankruptcy recognized by the Regulation but with no place in the intern legislation, and in the regulation sphere of the regulation, the lack of the reorganisation procedures in the pre-insolvency stage, recognized by the Law of the preventive concordat and ad-hoc mandate, Law no. 381/2009.

The Regulation (CE) 1346/2000 has appeared based on the intensification of the crossborder economical activities of the enterprises, on the desire to provide the good functioning of the intern market. Before the adoption of this regulation which uniforms the insolvency procedure at the community level, the parties were tempted to transfer the goods or the judicial procedures from a member state to another in order to obtain a more favourable juridical situation ("forum shopping").

The document is efficient because it is an imperative, community juridical document directly applicable to the member states, even if an update of its stipulations is good for regulating the disadvantages felt after the financial crisis that started in 2008.

5. Other international organisms offering cooperation frameworks in the matter are:

- The International Monetary Fund (IMF) – Orderly & Effective Insolvency Procedures (1999). The fruit of an intensive intellectual effort made by the IMF legal department, "Disciplined and efficient procedures of Insolvency" does not want to be a standard coding with an imperative imposing to the member states, even if it sometimes expresses its preference for one of the solutions, but it is rather a report of insolvency political themes addressed by the states when they were in the elaboration stage of an insolvency law.
- The World Bank Group (WBG) – Principles for the system of an efficient insolvency and of the creditors' rights (2001, reviewed in 2005). Emerged based on the financial crisis crossed by the emerging markets at the end of the '90s, at the pressure of the international community, WBG has elaborated the first barometer internationally accepted, measuring the efficiency of the creditors' domestic rights and the insolvency systems.

IMF and WBG are international organisations with a broad participation of the world states. The operational activity of IMF and WBG consists of conceiving reports and of observing the standards and codes. The use of the evaluations based on the *Procedures* and on the *Principles* was useful in the developing and operative work and in offering efficient assistance to the member states.

IMF works for supporting the global monetary cooperation, for providing the financial security, for facilitating the international trade, for promoting a high rate for occupying the manpower and a strong economical increase, and also for reducing global poverty.

WBG is formed of 5 institutions: the International Bank for Reconstruction and Development (IBRD), which granted loans to the countries with average and low incomes, but solvable ones; the International Development Association (IDA), which granted credits with no interest to the most poor countries; the International Financial Corporation (IFC) works exclusively in the private sector; the Multilateral Investments Guarantee Agency (MIGA), with attributions in promoting the foreign investments in the developing countries, offering political guarantees; the International Centre for Regulating the Controversies in the Investment Field (ICSID) facilitates the conciliation and the international arbitrage in disputes related to the investments.

Having 188 members each, IMF and WBG are among the biggest international organisation (ONU has currently 192 members). The membership to IBRD, according to art. 2 section 1 of the own regulation of organisation and functioning, depends on the membership to FMI, and for being a part of IDA, IFC and MIGA it is necessary to subsequently register to IBRD.

Conclusions

The slow but steady paced emergence out of the economical crisis in which the whole world has collapsed into in 2008 represents another ground for an imperative renewal of the way insolvency is regarded together with a legislative revival concerning bankruptcy. This tendency needs to be given satisfaction with the aid of the most important specialized international institutions, better able to direct the harmonisation of transnational legislations.

The European crossborder insolvency mechanism remains a faulty, poor and scanty one, having major issues on the level or recognition of procedures envisioned by the romanian legislation but not the EC regulation, and vice versa – I'm refering here to the personal (not corporate) bankruptcy proceedings, recognised by the EC regulation but not by the romanian Insolvency law, thus being at risk of undergoing an infringement procedure, and to the lack of concern on the European Union level regarding the preinsolvency proceedings, Romania having in effect such law.

Concerning UNCITRAL Model Law on Crossborder Insolvency, now it's the perfect moment to promote the benefits of this legal framework throughout its members, a step objectified in a wider implementation of a national insolvency regulation having in regard said model law. It would translate in a better, more efficient arming against future economical crises, this phenomena having been demonstrated its cyclical character.

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LEGAL ETHICS, A NEED FOR THE GOOD ADMINISTRATION OF JUSTICE

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Abstract

Ethics is the science of behavior and habits, a theoretical study of the principles that govern practical maters and moral represents all the means necessary for leaving.

Ethics consists of a number of rules that are shared by a certain community, rules that are essential for defining good and evil.

Being a branch of juridical science ethics analyses personal and professional conduit of the jurist it also manifests attention for the ethic of laws.

Keywords: *Ethic, rationality, history, philosophy, ideas, opinions, concept of justice, responsibilities, jurists, lawyers, prosecutor, judges,*

Introduction

Ethic is a normative, required science, ethic must be studied "not only for finding out what is virtue but mostly for becoming virtue." [1]

Ethic, one of the most important branch of philosophy initiates itself in solving moral problems through a cognitive way, by knowing the good and the evil, by recognizing the duty each of us has to the society and to each of us.

We cannot speak about ethic without mentioning the three great philosophers, learners, views of Ancient Greece, that is Socrate, Platon and Aristotel. Even if the theories, these three great philosophers developed are in essence different, the common point we find even in the contemporary ethic theories is represented by the fact that happiness, virtue, good and rationality are included in the philosophic speech about ethic. The Greeks said that, the individual has to "follow the supreme good which is not limited to compliance with certain rules of behavior but it focuses on the constantly search upon the himself and by means of his capacities and the most important quality of the individual is the reason."

This way of explaining the world we leave in, of explaining and understanding the human being, that is by rational thought, affected the entire Western world, including the theology. As a consequence of this influence, the main objective of the scholars, as School of philosophy was the combination of reason, called also "the natural light" and theology. I mention here Toma d' Aquino who said that "reason becomes a pioneer for theology"[2].

[1] Daniel Fodorean, *Legal Ethics*, Notes, 2010, Bucharest
[2] Toma d;Aquino, „*About human being and essence*", Paideia Publishing house, 1995

Sf. Anselm, called by the history of philosophy, the Father of scholars was the one who included the ontological argument of God, saying that: "I find evidence of negligence if, after we managed to have faith, we don't do our best to understand what we think."[3]

Ethic creates rules regarding both the behavior of the individual and the moral structure of the social life. Ethic analyses situations, cases and all the branches, such as: business ethics, biotic, medical ethics, international relationship ethics, media ethics, environment ethics and so one.

Descartes said that "the laws of nature are sufficient for explaining the harmonious composition of nature[4]. We may say, that our laws, the laws of people, that is both the moral and the legal ones, are not sufficient in clarifying whether we, the people are formed of harmony.

The complexity of our problems shows us that what we know represents almost nothing from what fallows to find. We can only try to find out, to know and to know each other.

We must decide ourselves to think, thought must proceed from a sense of life, from the humanist ethos of joy of life, of curiosity regarding the world and of thirst for certainty of thought and domination of nature, domination of our own spirituality, domination of our own morality.

It is interesting the contradiction between the opinions the people have and the their actions, between words and deeds.

The rationality is the one which determines us to support the "pass of thought" upon the process of knowing, upon the successive results of our own judgment.

We live in a society in which each of us may express his/her ideas, opinions, even if they are strange. We needed so much time for this. In the past, we must not forget that important people had suffered for expressing their opinions and thoughts. Some of them paid expensive price for what they were thinking, even with their own life. I give as example the tragic end of Giordano Bruno, who was burned on the stake by the Inquisition, it's pressure upon Galilei.

Let's remember about the Charron's book "About wisdom" where the French skeptic urged the readers " Not to fallow the known roads, but to walk on the blazed trails, never to judge according to the present opinions, but to avoid them, to create a new road, both in business and in science and religion."

One of our desire is "to live as happy as possible". Here comes another problem. Happiness means "something else" for each of us. Each of us has some values, has other opinions related to everything that surrounds us, to all we think and do.

In may opinion, nowadays we live a spiritual misalignment. Our values have no roots in the rationality, "the highest morality has no more the same meaning. The highest morality has to be a fruit of wisdom, of science and must not be limited only to rationality, which is also different from person to person. The rationalist ethos starts from Rationality, relies always on it, but includes also some other values which are not intellectual, but affective and social.

What is important for our study are the concept of justice, just and unjust in comparison to people's behavior in society, at work and within his/her own family.

Man cannot but inside human society and every society needs a structure, order and discipline, and the actions of people generally have to meet a moral needs of the society to express its values[5].

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[3] http://tonysss.wordpress.com/2007/01/19/sfantul-anselm-si-argumentul-ontologic/

[4] Rene Descartes, „*Speech about the methode of good thinking and finding the truth in science*", Academiei Române Publishinghouse, Bucharest 1990

[5] Laura-Roxana Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishimg House, Bucharest, 2011, p.12.

All that is unfair, illegal or not allowed are opposite to the term of just. Justice has to be seen also as a moral virtue. The name of justice comes from the Latin JUSTITIA, which derives from Justus, which also derives from jus, juris which means right. The original notion of jus is religious, meaning involving in a sacred formula, meaning to swear. In ancient times, the oath was sacred, represented the commitment of incurring penalty in case of breaking or not respecting it.

He legal ethic is a branch of legal sciences which studies the individual and professional behavior of the lawyer. Only by having the legal ethic he/she may acquire the respect and the trust of society. Also, the legal ethic demonstrates interest for the ethic of legal rules.

These aspects studies by the legal ethic gives several advantages, such as: the individual and professional authenticity, avoids the raise of corruption in society, creates legal rules well created from the moral point of view, promote the ethic in society.

The code of Ethics of the jurists, lawyers, prosecutor, judges, etc establish levels of behavior in compliance with honor and dignity of the profession.

The social reality, the official documents issued by the national and international institutions about Romania demonstrate that the study of ethics has become a present-day necessity.

The reports of European Union about the Romanian legal system emphasizes not only systemic errors but also the fact that the personal and professional ethics is focused more on the economical values than on the moral-ethical ones. " a better analyze gives the conclusion that the legal system is the projection of a society in a great need of a moral reform"[6].

There are institutions and organizations that made great efforts to define a desirable behavior of those who work in the legal system and the standards are included in some instruments, such as The Code of Conduct of those who apply the law (ONU 1979), this code applies to people with political duties, especially that of arrest and detention, that is policemen, prosecutors, judges, officials from the Prisons from our country. The articles of this code say that the responsibilities are exercised for the community, for the protection of people against the illegal actions, the agents being forced to respect the human rights and to use force only when it is absolutely necessary, to keep the privacy policy of the obtained information, not to provoke, not to tolerate torture or cruelty, to assure the health of the arrested people and to prevent the violation of these.

The application of the code is encouraged by the " The guide for effective implementation of the Code of Conduct of those who apply the law" ECOSOC 1989, where it is recommended to give maximum importance to selection, education and forming of the officials.

It is important to speak also about the International Code of Conduct of the public agents, UN 1996. By this code, UN declare the corruption as being a problem which affects the stability and the security of citizens, damages the democracy and morality, o problem which prevents the economical, social and political development. This code is recommended as an instrument for all the countries to fight against the corruption. It includes the general principles for the conduct of the public agents, the principles of prevention of the conflicts of interest, wealthy statements, codes acceptance, management of the confidential information and involvement in political activities.

Also, the Bangalore Principles (India) 2001 regarding the legal conduct, where the UN showed that a serious obstacle in implementation of any anti-corruption strategy is the corruption from justice, the extension of it in the courts of many countries all over the world, being carefully examined by specialists who made the program to strengthen judicial integrity. Actually, it is about a code of conduct for the judges, but in Romania it is applied

[6] Transparency International Report

also to the prosecutors. When the code was developed there were taken into consideration the main international documents in this field made by institutions and organizations from various countries. The code speaks about values as: Independence, Impartiality, Integrity, Label, Equality, Competence and Endeavor.

It is necessary to remember also about the Advisory Board of the European Prosecutors, an advisory body of the Board of Ministers of the European Council, established in 2005 for to institutionalizing the meetings that were taken part so far as conferences of the General Prosecutors from Europe. At this kind of meeting, which took place in Budapest was adopted in May 31, 2005 an European Guide upon the ethics and the conduct of the prosecutors.

The two advisory councils, that of the judges and the one of the prosecutors highlighted that " For a good administration of justice it is necessary to share the legal principles and the ethic values by all those who work in this field and are involved in a legal trial."

Also, the General Assembly of the European network of the Legal Council, within the London Meeting, 2-4 June 2010 appreciates that: "RECJ has as an objective the improvement of the cooperation and a good understanding between the Legal Councils and the members of the legal forces from Member States and the acceding States to European Union and the assertion of principles and common values at he European level in order to concrete the mutual understanding and therefore the mutual understanding between judges within the European legal space"[7].

Among the introduction of the Report regarding the legal ethics 2009-2010 it is mentioned that the conduct principles were written according to the decision which was approved at the General Meeting of the European Network of the Legal Councils (RCEJ) organized in June 2007 at Brussels

"The assertion of the professional ethics principles for judges strengthen the public trust and allows a better understanding of the role the judge has in society. Traditionally, the role of the judge is that of solving the conflicts by using the law. He has the duty to act according to the law and it is a guarantee of the fact that the judge won't have an arbitrary attitude. But, in the European society, the role of the judge evolved: he is no more limited on being "the voice of law" but he is also, in a certain case, the creator of law, which implies responsibilities and rules of conduct consistent with this evolution."[8]

It is important that any professional who works in the legal system to be concerned about the development of a balance between the independence of justice, the transparence of the institutions, the freedom of press and the right to information for the public. The professionals from the legal system must understand that the society has great expectations and that the protection of independence of justice is real important, it shouldn't be affected by pressure and manipulations.

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THE RIGHT TO A TRIAL WITHIN A REASONABLE TIME: A GENERAL GUARANTEE OF THE RIGHT TO A PENAL EQUITY TRIAL

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Abstract

The present article examines the judicial protection of the persons confronted with the non-application of a coherent legislation at a European level, during a penal trial, which can present the risk of generating different standards of protection of the right to a fair trial of the defendant (for the exceeding or hasting excessively the judicial procedure, according to the individual option of every European state.

Keywords: *reasonable time, presumption of innocence, right to a fair trial*

General considerations regarding the right to a fair trial[1]

Respecting the fundamental human rights and freedoms is not only understood as a condition of legality, but also as an expression of the democratic character of the society as a whole.

Implying minimum standards of protection and not being treated exhaustively, most of the rights provided by the European Convention for the protection of fundamental human rights and freedoms[2] are limited in what concerns the conditions of protection of national security, public safety, economic interest or crime prevention although most of them are of civil or political nature.

Instituted by article 6[3] of the European Convention, the right to a fair trial insures the parties of the trial the guarantee that their rights and freedoms will be respected in court[4]. Practically, this right offers the parties several guarantees to keeping the

[1] In Romanian Law, the right to a fair trial is established by article 21 in the Constitution (free access to justice) both in penal and civil matters and by article 10 of Law 304 of 2004 concerning the judicial organization (the last amendment happening by Government Decision no. 666 of the 4th of July 2012, published in the Romanian Official Monitor, Part I, no. 481 of the 13th of July 2012), according to which All persons are entitled to a fair trial and the solution of the accounts within reasonable time... In penal matters, the provisions of article 6, paragraph 2, Penal Procedure Code, meaning regardless of the procedural phase of the cause, both criminal prosecution bodies and courts have the obligation to insure the suspects and the people involved in the account, the specific procedural guarantees, which result from a fair trial.

[2] The Convention for the protection of fundamental human rights and freedoms, also known as the European Convention of Human Rights, signed on the 4th of November 1950 in Rome, enacted on the 3rd of September 1953 and ratified by Romania through Law no.30/1994, regarding the ratification of the Convention for the protection of fundamental human rights and freedoms and the additional protocols of this convention, published in the Romanian Official Monitor, part I, no. 135 of the 31st of March 1994.

[3] According to article 6, paragraph 1 any person has the right to a fair and public trial within a reasonable time, by an independent and impartial court, instituted by law, which will determine either on the infringement of their rights and obligations with a civil character, or on the sturdiness of any accusation in penal matters against them. We find a similar provision in article 47, paragraph 2 of the European Union Charta of Fundamental Rights (2007/C 303/01), in the sense that any person has the right to a fair and public trial within reasonable time in front of an independent and impartial court, having already been constituted by law.

[4] This right is also consecrated by the European Commission Green Card, entitled The Procedural Guarantees given to suspects and people involved in the account in penal procedures in the European Union (COM/2003/0075, finally accessible at http://eur-lex.europa.eu) offering these people the right to the judicial

procedure fair, respectively, the right to a trial within a reasonable time; the guarantee of the presumption of innocence of the defendant; the right to independent and impartial court, instituted by law; the right to publicity of the trial; the principle of "equal weapons " and contradictionality; the right to silence and not self-incrimination of the defendant; the right to defence, and the obligation of the courts to motivate their decisions.

The estimation criteria of the E.C.H.R. in the determination of the infringement of the right to a trial within a reasonable time

Although it is a theme debated by the Romanian and foreign doctrine[5], exceeding the reasonable time of solving a penal account constitutes one of the most frequent heads of claim brought to the European Court.

Lately, the provisions of article 6, paragraph 1 of the European Convention of Human Rights, which use the collocation "reasonable time", although considered a "minimum limit", separating the abidance and non-abidance by the Convention, are easily replaced by another, respectively "optimum and predictable term" (quantifiable), which will also be the new aim of judicial systems, regardless of the fact that it means the common law courts or specialized courts[6]. We believe that this collocation better identifies the time interval when the entire judicial procedure should develop because a too fast procedure would also affect the right of the petitioner to a fair trial, meaning that the term could be unreasonable due to the haste with which it was developed by the judicial bodies.

The starting point *(dies a quo)* of the calculation of the reasonable penal term does not coincide with the civil one. In what concerns the guarantee of a reasonable time, timewise, the moment when the prosecution against a person is officially stated will be considered[7]; this moment may coincide with the date of the arrest, of the beginning of the prosecution or the date of announcement of the indictment, respectively the date when the prosecution was officially announced as an official notification provided by a competent authority who accuses a suspect, therefore, even the detention, arrest or execution of a court order.

Those entitled to such a right are natural or legal persons, subjected to pending penal inquiries, and the period of time, which is considered point terminus of the guarantee *(dies ad quem)* - is either that of the announcement of a final solution concerning the account[8] (be it definitive conviction court orders, remit court orders, acquittal court orders or non-prosecution curt orders).

The exceptions to the insurance of guarantees provided by article 6 paragraph 1 are the accounts to be revised, in definitive procedures and also rendition procedures[9].

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assistance of a lawyer, chosen of given ex officio, the right to be assisted by a qualified or tolerated interpreter and/or translator, the protection of vulnerable people, the right to knowledge of the existence of their rights and the right to consular assistance.

[5] M. Udroiu, O. Predescu, *European Protection of Human Rights and the Romanian Trial. Treated*, C.H. Beck Publishing House, Bucharest, 2008, pp. 638-647; R.ChiriȚă, *The Right to a Fair Trial*, Judicial Universe Publishing House, Bucharest:, 2008, pp. 276-289; C. Bîrsan, *The European Convention of Human Rights. Article Commentary. Rights and freedoms*, vol. I, Judicial Universe Publishing House, Bucharest, 2005, pp. 533-540; B. Selejan-GuȚan, *European Protection of Human Rights*, second edition, Judicial Universe Publishing House, Bucharest, 2006, pp. 108-120; M. Udroiu, O. Predescu, *Reasonable Time of Penal Procedures*, Law Magazine, No.2, 2009, pp. 233-241; J-F. Renucci, *Treaty of European human rights law*, Hamangiu Publishing House, Bucharest, 2009, pp. 460-470; J. Pradel, *La célérité et les temps du proces penal. Comparation entre quelques législation européennes*, Compendiu Ottenhof, Dalloz Publishing House, 2003, pp. 251 and these.

[6] For more details, see: the European Union Program for the Efficiency of Justice (EUPEJ), entitled "A new goal for judicial systems: processing each case in an optimum and quantifiable time-frame", reminded by M. Tabarca, The principle of Law in a fair trial, in optimum and predictable time, in the light of the new Code of civil procedure, in Law magazine, no. 12/2010, pp. 42-56.

[7] See E.C.H.M., decision if the 30th of November 2001, in account Šleževičius versus Lithuania, Paragraph 23-31. We metnion that all E.C.H.M. decisions in this material are accessible on the website www.echr.coe.int.

[8] It holds no relevance whether the person has been definitively convicted in contumacy (E.C.H.M., decision on the 9th of September 2003, in the account Jones versus the United Kingdom; E.C.H.M., decision on the 10th of November 2004, in the account Sejdovic versus Italy).

[9] See E.C.H.M, decision on the 6th of February 2003, in the account Mamatkulov and Abdurasulovic versus Turkey, paragraph 80.

Although neither has a decisive character, the European Court of Human Rights set four estimation criteria, thoroughly analysing each account, taking into consideration the criterion of behaviour of the parties, the authorities, the importance of the object of the procedure for the party involved and the criterion of the complexity of the cause as a whole.

In certain situations, the parties' behaviour, often the claimer's behaviour, may be the cause of procedural delay, in which case it can be imputed an insufficient diligence in cooperating with judicial authorities, such as the excessive change of defenders, the delay in submitting the written conclusions that are indispensable for the judicial procedure. Moreover, in the judicial practice[10] it was questioned whether the abusive use of the means of attack could constitute a dilatory behaviour of the claimer in the conclusion of his/her judicial procedure.

Fair trial versus reasonable time

In what concerns the lack of a reasonable time necessary to the claimer in order to contest the declarations on which his/her conviction was based, the account Lucâ versus Italy is representative[11]. In fact, N. and C., being found to have a certain quantity of cocaine, were arrested. On this occasion, N. declared that C. and he went to the claimer, who was willing to supply them with a certain quantity of cocaine. At first, N. was considered a mere witness, but then he was interrogated by the attorney as the accused. The claimer and C. were arraigned for drug traffic and N. was charged in a different trial for drug possession. Summoned as a witness in the claimer's trial and as a defendant in a related trial N. used his right to remain silent. Thus, the claimer could not ask any questions or determine him to make a statement. In this situation, the Court acknowledged N.'s refusal to testify and used the possibility provided by the law, according to the Constitutional Court, of using the statements made by defendants in related procedures. Therefore, the records of evidence of N.'s statements to the attorney were read in court.

The claimer was sentenced to 8 years of prison and a fine and the appeal and recourse were denied.

All ways of attack having been used, the claimer addressed the European Court of Human Rights claiming that the solution of Italian courts was announced violating the principle of contradictionality.

Examining the reasons appealed to and the documents presented, the Court estimated that any pieces of evidence must, as a rule, be administered in the presence of the defendant in a public meeting in order to be submitted to a contradictory debate. This principle, even if it may have some exceptions, cannot prejudice the right to defence of the claimer. If a conviction is exclusively or largely based on the depositions of a person whom the defendant has not had the possibility to interrogate or to have that person interrogated, the right to defence is limited in an incompatible way with the requirements of article 6 in the European Convention.

In this case, the courts exclusively based on the depositions made by N. prior to the trial, when neither the claimer, nor his attorney had the possibility of interrogating him. Hence, the claimer did not have an adequate and sufficient occasion to contest the declarations on which his conviction was based. As a consequence, the Court unanimously acknowledged an infringement of article 6, paragraph 1 in the European Convention.

In another account, - Schumacher versus Luxembourg[12] - the claimer was charged for money laundering through drug traffic. Several investigations were made, especially with the help of international rogatory commissions. On the 17th of November 2000, it was settled that the penal procedure had already been prescribed because there was no criminal prosecution made in the last three years.

The European Court considered that, in such a situation, the final step of the procedure is that of the edict of release from criminal prosecution so as up to that date, the

[10] See E.C.H.M, decision on the 27th of April 2008, in the account Heremans versus Belgium, paragraph 17-43.
[11] See E.C.H.M, decision on the 27th of May 2001, in the account Lucâ versus Italy, paragraph 31-45.
[12] See E.C.H.M, decision on the 25th of November 2003, in the account Schumacher versus Luxembourg, paragraph 23-36.

defendant is waiting for the solution of his/her file. In regard to the reasonable character of this duration, the Court ascertained that in three years' time there has been no act of procedure, so there was an immense period of inactivity of the criminal prosecution bodies; hence article 6, paragraph 1 was infringed.

The account Ardelean versus Romania[13], although a recent account, is representative for the infringement of the right to a fair trial. The claimer, an attorney convicted for fraud, among others, complained about the duration of the criminal procedure of his file, claiming that his right to a fair trial within a reasonable time had been infringed.

The Court reiterated the fact that the reasonability of the procedure must be assessed and interpreted according to the circumstances of each pending cause, respectively the complexity of the cause, the claimer's behaviour, the competent authorities in question, emphasising that, in criminal matters, the right to a trial within a reasonable time is important so as not to drag on this state of uncertainty of the defendant.

Although the length of the trial phase of 2 years and 8 months seems to be unreasonable for the two levels of jurisdiction, the Court still estimated that the duration of the procedure was excessive, despite the fact that the account had not been complex; the first sentence was pronounced five years after the beginning of the criminal prosecution, the account being suspended countless times and the exceptions of unconstitutionality presented by the parties suggest a long period of passivity or inactivity in the account, hence, article 6, paragraph 1 was infringed.

Furthermore, in the account Mattocia versus Italy[14], the E.C.H.R. ascertained that the judicial procedure exceeded the rational duration, but not because of reasons imputable to the petitioner, but to the national authorities, also mentioning that not only the nature of the crime itself catalogues the judicial procedure as being a complex one (in fact, it is about the commission of rape), but the complexity of the account in its whole, under the aspect of the object and size of the file, the number of those inquired and of witnesses to hear, the number and nature of the crimes (often with a cross-border character), examinations, and the duration of procedural acts made by the rogatory commission and rendition procedures.

In the account Mitap and Müftüoglu versus Turkey[15], the two claimers, arrested in 1981 and sent to court only the next year for political crimes, were convicted to prison for life. After using all the attack methods provided by national legislation, the claimers addressed the European Court of Human Rights, appealing to the excessive duration of the trial, respectively over 14 years (out of which the elaboration of the conviction sentence took no less than 4 years). The commission acquired the reasons invoked by the claimers and noticed E.C.H.R., which established that, although the account was complex, there was no reason to justify such a long duration of the trial.

On the contrary, in another account, Idalov versus Russia[16], the claimer, arrested in 1999 for several offences of organised crime, invoked in court, among others, that the duration of the trial was excessive, the hearings being postponed by the court repeatedly and baselessly. Meanwhile, the culprit state claimed that the adjournment of the hearings was reasoned, given that they confronted the health deterioration of one of the defendants, the account being a complex one.

Although the European Court acknowledges the complexity if the account, it reiterates the fact that the duration of the procedure must be estimated according to other criteria, respectively the conduct of the claimer and the authorities in question, and the claimer's stake in the pending litigation. The Court noticed that the claimer had been arrested in June, 1999, and the definitive sentence was given in May, 2004. As a result, the duration of the procedure was of 4 years and 11 months but the duration of the procedure in this account

[13] See E.C.H.M, decision on the 30th of October 2012, in the account Ardelean versus Romania, paragraph 77-85.
[14] See E.C.H.M, decision on the 25th of July 2000, in the account Mattoccia versus Italy, paragraph 73-81.
[15] See E.C.H.M, decision on the 25th of March 1996, in the account Muftuoglu and Mitrap versus Turkey, paragraph 29-37.
[16] See E.C.H.M, decision on the 22th of May 2012, in the account Idalov versus Russia, paragraph 165-192.

was largely due to the claimer's postponements. Out of approximately 40 hearings in Court, 11 of them were due to the claimer, which shows that he was not fully diligent for the expedience of the procedure. As a consequence, the Court established that article 6, paragraph1 was not infringed.

Furthermore, in the account Boddaert versus Belgium[17], the European Court, examining the account and considering that in regard to the objective difficulties of the process, the defendants' attitude of disturbance of the judicial bodies' inquiry, the discovery of new facts, the gravity of the crimes committed, has unanimously decided that there has been no infringement of the right to a fair trial.

This was also the solution in the account Nevskaya versus Russia[18], where, after having made an ensemble assessment of the circumstances of the account, the Court estimates that the reasonable time has been respected, despite the fact that the claimer cannot be compelled to actively cooperate with the judicial authorities and not all methods of attack have been used having the domestic legislation defending his/her interests.

Substitutes for conclusions

1. Both jurisprudence and the doctrine in the matter estimate that the determination of the reasonable duration, although being considered a demand of expedience of the trial, may sometimes create certain difficulties of interpretation.

2. Skimming over the small jurisprudence catalogue concerning the field of application of article 6, paragraph 1 of the Convention, we can easily notice that the excessive duration constitute a major problem in most member states, characterised by either passive or inactive behaviours of the authorities, by repeated adjournments of hearings, of competence refusals, procedure vices, etc.

3. Therefore, the infringement of the guarantee of the right to a fair trial by exceeding the reasonable time of penal procedures is due to commissive or omissive behaviours of the states and those that have not been effectively improved in national courts may be submitted to the European Court of Human Rights, a court that can grant a fair reparation.

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[17] See E.C.H.M, decision on the 12th of October 1992, in the account Boddaert versus Belgium, paragraph 165-192.

[18] See E.C.H.M, decision on the 11th of October 2011, in the account Nevskaya versus Russia, paragraph 18-28.

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LIABILITY OF THE PRESIDENT IN LITHUANIA. THE CASE OF PRESIDENT ROLANDAS PAKSAS

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Abstract

The purpose of this paper is to analyse the legal framework of liability of the president in Lithuania. The particular interest for this model is due to the fact that Lithuania was the first and only (until this year) European Union member country where the procedure of impeachment of the President was finished by his dismissal. More specifically, in 2004, Rolandas Paksas became the first European president who was dismissed as a result of triggering the constitutional impeachment proceedings.

In the present context, when the liability of the Heads of State is increasingly questioned, the Lithuanian case is worth being evoked and known, because it represents a benchmark for all those who are preoccupied, theoretically or practically, by this matter.

Keywords: *president, immunity, liability, impeachment, dismissal.*

Introduction

Following the declaration of independence from the Soviet Union, Lithuania adopted a constitution in 1992, which set up an attenuated semi-presidential regime.

According to Article 78 of the fundamental law, the head of the Lithuanian state is the president, elected by universal, equal and direct suffrage, for a five-year term. In order to fulfil his duties, which are quite numerous and regulated by Article 84, the President issues decrees, among these only that of appointing and recalling the diplomatic representatives, conferring the highest military ranks, declaration the state of emergency state and granting the Lithuanian citizenship. All these decrees shall be countersigned by the First Minister and by the appropriate Minister.

I. The immunity of the Lithuanian President

During his office, the president enjoys immunity, Article 86 stipulating that his person is inviolable: he cannot be arrested and he shall not be held criminally or administratively liable.

The protection of the presidential office requires equally the avoidance of the impunity of the President himself, while his acts or conducts, fulfilled or shown throughout his tenure, appear clearly incompatible with the normal exercise and dignity of his office. The President shall not be prevented in any way to perform his office, instead the person holding the office must be submitted for dismissal if he does not perform his duties or if he performs it inappropriately. Thus, assuming that a President exercises the powers of his function for purposes or limits other than those established by the Constitution, the enjoyed immunity may be rebutted by training its liability according to procedures defined by the Constitution[1].

[1] P. Ségur, *La responsabilité politique. Que sais-je?*, PUF, Paris, 1998, p. 17.

This possibility is perfectly illustrated in the case of the President of Lithuania, Rolandas Paksas, subject to impeachment proceedings in 2004.

II. Regulation of the liability of the Lithuanian President

According to the same Article 86 of the Constitution of Lithuania, the President of the Republic may be removed from office, before the end of the term, only for serious violation of the Constitution, breach of the oath he took when he was invested, or when it transpires that a crime has been committed. His removal will be decided by the Lithuanian Parliament (Seimas), as stipulated by Article 74 of the Constitution and widely regulated by the Statute of Seimas, Part VIII, Chapters XXXVIII and XXXIX, Articles 227-243.

Therefore, we find ourselves in the presence of a liability that has a constitutional nature and that was triggered both for serious violation of the Constitution or breach of oath, and for committing any punishable acts by the criminal law.

According to Article 74 of the Constitution of Lithuania, the President of the Republic (...) may be removed from office, by a majority of 3/5 of the total number of the legislative assembly, as stipulated by the removal proceedings regulated by the Statute of the Seimas.

The impeachment is initiated on the proposal of at least 1/4 of the members of the Seimas, and where there is a suspicion that the president had committed an offense, the Prosecutor General shall promptly inform the Seimas. Hearing this, the legislature shall form a special commission of inquiry, which will be composed of a maximum of 12 parliamentarians belonging both to the power and opposition, according to its political configuration. Once with the formation of the commission, the Seimas shall also appoint its chairman and vice-chairman, and shall set a deadline for completing the parliamentary investigation (Article 232 of the Statute of the Seimas).

The sittings of the special investigation commission shall be held behind closed doors, but all discussions will be recorded in writing by the secretary of the commission. The arguments and explanations of the President shall be heard, the witnesses shall be questioned, any evidence that seems appropriate shall be produced, experts and specialists shall be invited if necessary. The representative of the President shall be entitled to attend all the sittings of the commission (Article 233 of the Statute).

The chairman of the Commission or another member authorised by him shall inform mass media about the course of the investigation (Article 234 of the Statute).

The report of the special investigation of the commission shall include, mainly, the Commission proposal on initiation the impeachment proceedings, the concrete circumstances of committing the indicted felony, the explanations of the President of the Republic (Article 236 of the Statute). To be approved, the report must meet the vote of half plus one of the commission members and, then, must be signed by the chairman and the vice-chairman of the commission.

The approved report and any other relevant documents shall be submitted by the commission to the president of the Seimas in order to be presented to the plenary of the representative assembly, at the next meeting.

If the Seimas, by the majority of vote of the present members, approve the report of the special investigation commission which concluded that there are no grounds for initiation of impeachment proceedings, or, does not approve the report that pronounces in favour of impeachment, it shall adopt a resolution of concluding the investigation proceedings. Also, the Seimas may decide on completion or restoration of the investigation by the same commission or by a new one appointed for this purpose (Article 238 of the Statute of the Seimas).

Conversely, if the Seimas approves by a majority of the vote of the present parliamentarians the report of the investigation commission that is favourable to start the impeachment proceedings, it shall adopt a resolution of initiating the procedure and request, in writing, the Constitutional Court to express its opinion in that case.

The *impeachment* procedure against the Lithuanian President will continue its course only if the Constitutional Court decides that the concrete actions of the head of state are in conflict with the Constitution, or, more precisely, those actions had as result a serious breach of the provisions of the fundamental law, breach of the investment oath in office or a felony (Article 238 of the Statute of the Seimas). If the conclusions of the Constitutional Court establish that the concrete actions of the President do not infringe the Constitution, the Seimas shall adopt a decision to stop the dismissal procedure (Article 240 paragraph 7 of the Statute).

Taking note of the approval of the Constitutional Court to continue the procedure for dismissal, the Seimas shall determine the date of the sitting to discuss the charges that are made to the President. It must be informed in writing of the date of the debates.

The president will have the right to take part to the sitting of the Seimas in person or to nominate a representative. Also, he will be entitled to more lawyers, whose names must be communicated with at least two days prior to any hearing, so that they can be invited in writing to the Seimas sitting.

On the occasion of the hearing, the President and his defenders may offer evidence considered to be significant for the constitutional responsibility by the members of the legislative assembly. If the President and his defenders do not present themselves to debates, without a serious reason, this situation does not represent an impediment to the development of the case.

The Seimas sitting that will question the dismissal of the President of the Republic shall be public, being transmitted by radio and national television (Article 240 paragraph 2 of the Statute of the Seimas). The debates are opened by the Chairman who will read a report on the findings of the Constitutional Court. Only for strong reasons he can decide to postpone the hearings.

The President of the Republic has the right to speak to the Seimas, or, upon request, one of his lawyers will speak. The chairman of the sitting and the defenders will be able to ask questions. The members of the Seimas will be able to ask questions to the president or to his lawyer only with the permission of the Chairman.

The hearings will conclude with a final statement of the impeached President. Subsequently, the members of the Seimas will be able to speak, according to the ordinary parliamentary procedure.

After completing the discussions on the removal from office, the President or the Vice-President of the Seimas shall present to the parliamentarians a draft resolution for each charge separately, which shall contain the conclusions of the Constitutional Court, the decision of dismissing from office the President of the Republic, as well as the information that the resolution will produce effects from the day of its publication in the mass media.

The resolution on dismissal of the head of state will be taken if 3/5 of all Seimas members votes in its favor. The President shall be deemed dismissed from the moment the resolution has been published in mass media. Also, he will have to undertake the responsibility for the offences committed under ordinary criminal laws (Article 242 of the Statute of the Seimas.

III. The case of Rolandas Paksas

The Lithuanian mechanism of liability of the President of the Republic has a particular importance given the fact that there was held the first *impeachment* proceedings concluded with the dismissal of the head of state in Europe.

In 2003, shortly after his election as President, Rolandas Paksas began to be suspected of links with the Russian mafia. In particular, the fact that drew the attention was that Paksas granted, by "exceptional" decree, the Lithuanian citizenship to Yuri Borisov, president of Avia Baltika company, who previously donated $ 400,000 for his presidential election campaign. Notified by the Seimas, the Constitutional Court stated that the Lithuanian citizenship granting decree contradicts several constitutional provisions (Articles 29 paragraph 1, 82 paragraph 1 and 84 paragraph 21), the rule of law and the law on citizenship.

Even so, in December 2003, eighty-six members of the Seimas signed the proposal of initiation the impeachment proceedings of President Paksas. According to the Statute, the Seimas decided to form a special investigation commission to verify the reasonableness and seriousness of the charges brought to the head of state, and to determine if, indeed, the initiation of the impeachment proceedings is appropriated.

On 19 February 2004, the special investigation commission concluded that some of the charges brought to the President were founded and serious. It recommended to the Seimas to start the impeachment proceedings, which happened on the same day. So deciding, the Seimas asked the Constitutional Court to decide whether the deeds of the President of the Republic had as result the violation of the fundamental law.

The decision of the Constitutional Court of 31 May 2004 established that the head of state was guilty of serious violations of the Constitution, as well as the breach of the constitutional oath submitted on his appointment, given the following facts:

- granting unlawfully the Lithuanian citizenship to Y. Borisov by Decree no. 40, as a reward for the financial support;

- disclosure, knowingly, of some state secrets to the same Y. Borisov, including the actions of the state institutions of investigating the business man and the tapping of his telephone conversations;

- use of his official powers in order to influence the decisions of the management of a private company so as to provide material benefits to people close to him.

On 6 April 2004, the Seimas decided to dismiss the president in office for serious infringements of the Constitution, noticed by the Constitutional Court.

Subsequently to the dismissal, Paksas expressed his intention to run for the presidential elections, as consequence of the vacancy of the office in the manner shown above. In response to this action of Paksas, the Seimas amended the law on presidential elections, inserting a provision that prohibited the persons dismissed from office by the Seimas, as a consequence of impeachment proceedings, to be elected as President of the Republic for 5 years after their removal from office.

Following this amendment, the Central Election Committee refused to register Paksas' candidacy in the presidential election. However, the Seimas has asked the Constitutional Court to review the constitutionality of the amendment brought to the Election Law.

By its decision, the Court held that it was constitutional to prevent the presidential candidacy of a person dismissed from public office, but it was unconstitutional to stipulate the time of 5 years for prohibition. So deciding, the Constitutional Court underlined that a person who was removed from the office of president for a serious violation of the Constitution or for breach of an oath, should not ever be elected as President of the Republic, member of the Seimas and should never be able to hold any public office for which it was necessary to take the oath prescribed by the Constitution.

Paksas's dismissal for the incriminating facts established by the Constitutional Court had consequences in the criminal proceedings, too. Lacking immunity, the former president was indicted for disclosing classified information as a state secret. The Court of Vilnius acquitted him in October 2004 for lack of evidence. Yet, this decision was invalidated by the Court of Appeal, which found Paksas guilty, but did not applied him any criminal penalty, holding that the dismissal from office and prohibition of running for a public office involving the provision of an oath were sufficient. In December 2005, the Supreme Court of Lithuania quashed the decision of the Court of Appeal, confirming the acquittal solution given by the Court of Vilnius.

In 2011, the European Court of Human Rights has found the life ban to run for a public office applied to the former President Rolandas Paksas being disproportionate and thus contrary to the European Convention on Human Rights[2].

Concusions

The Lithuanian example confirms the trend of reaffirming the liability principle of the heads of state, as well as the identification concerns of a more precise and effective correlation between the powers held and exercised by the head of state, on the one hand, and his responsibility, on the other hand.

In Lithuania, the breach of legal and constitutional provisions, the abusive exercise of duties, led to the impeachment of the President by the Seimas, the Lithuanian Parliament and, subsequently, his judgment by the Constitutional Court. The sanction imposed by the Constitutional Court of Lithuania was a political one: the dismissal, which, however, did not rule out in principle the application of other penalties, civil or criminal. Only the penalty infringing the exercise on voting rights, particularly the right to be elected to public functions applied to the ousted President is considered abusive in the legal vision of the European Court of Human Rights.

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CRIMINAL POLITICS: CHANGES IN THE SYSTEM OF PENALTIES THROUGH THE NEW HUNGARIAN CRIMINAL CODE

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Abstract

The new Hungarian Criminal Code came into force just recently. This paper is analysing the trichotomical system of sanctions enlisting the most important penalties of the Criminal Code and highlighting on their possible effects and expectations towards a new penal policy.

Keywords: *Hungarian Criminal Code, penal policy, system of penalties, measures, punishments, sanctions.*

Introduction

In this paper I attempt to give an overall view of the Hungarian system of punishments and to describe recent changes in the penal policy. It is interesting to examine and compare the similarities and differences between the Hungarian and the Romanian system of penalties. Both countries are members of the European Union, so the same international legal background offers the framework for the construction of the fundamental principles of criminal law. Such documents are the two most prominent ones, namely the International Covenant on Civil and Political Rights and the European Convention of Human Rights and in general any requirements arising from the EU membership.

On July 1, 2013, a new Criminal Code came into force. An analysis of this Criminal Code shows the directions of penal policy which are valid not only in Hungary. Writing this article I used the justification for Law number 100 / year 2012 as a source.

The Hungarian system of punishment is traditionally dualistic, which means that it allows the use of punishments and measures simultaneously. The system of sanctions can be characterized by a trichotomy, including penalties, only one attainder, and measures. Penalties can only be applied when the culpability is declared. A common feature of these measures is that for their application it is sufficient to establish the unlawful conduct, so they can be used even against a person who can not be punished. An essential aspect of the actions is that, in contrast to penalties, their application never results in a criminal record.

Changes in penalties have two directions in the new Criminal Code. On the one hand, there is an aggravation in the increase of the lower and upper limits of imprisonment, in the increase of the duration of community service, etc. On the other hand, new and more lenient sanctions appear such as prohibition from visiting sports events, “digital confiscation”, or permanent inaccessibility of electronic data, and reparation work. Criminal policy runs on a dual gauge in Hungary. On the one hand it can be characterized by a rigor against perpetrators of outstanding fixed-weight crime, recidivists, and violent multiple recidivist offenders, and the evaluation of multiple sets also became more stringent as well, as a result of the recent changes. In the cases of perpetrators of low-weight crimes, first offenders, and occasional

offenders, there are more lenient sentences, and the application of alternative punishments and sanctions and restorative sanctions appear to avoid imprisonment.

With regard to the acceptance of certain concepts of justice, the authors of international criminal policy literature are basically organized either around the retributive or restorative approaches. One school of thought therefore prefers criminal threat and repression (i.e., they pay less attention to the victims' side, while they support the use of imprisonment as widely as possible on the perpetrator's side), while the other turns to reparation and alternative sanctions provided to the victim, proposing solutions such as diversion, various solutions for reparation, discretionary prosecution, and mediation (agreement between victim and offender).

Penalties in the new Criminal Code

In the list of penalties below I attempt to show the reasons and expectations behind the new penalties in a nutshell.

a) imprisonment

Imprisonment can actually continue for life or for a specified period of time. The shortest duration increased to three months, the longest span is twenty years, twenty-five years in case of the existence of further conditions. The upper limit of the frame line increased as well.

b) the incarceration

The new Criminal Code introduced the legal institution of incarceration as a new way of penalties. Incarceration is a penalty resulting in imprisonment, it is appropriate in cases when short-term detention is also available for the purpose of punishment. It is mainly applicable to those to whom other penalty is impractical, regarding their personal circumstances or property.

c) community service

Work of public interest is done for the benefit of the community without remuneration, the offender's consent is still unnecessary. The new law aggravates the previous regulation, the minimum amount of community service is forty-eight hours, the maximum rate is determined by three hundred twelve hours instead of three hundred forty-two hours.

d) fine

Fine is the most commonly punishment used penalty in Hungary. It has double advantage, since on the one hand the offender does not fall off from work, nor breaks away from family, on the other hand, it is a source of income for the state, as opposed to other penalties. As an important change, that the new law reduces the lower limit of the daily amount, while increases the upper limit.

e) professional disqualifications and

f) disqualification from driving

There were no significant changes concerning the disqualification from driving in the New Criminal Code.

g) expulsion

Expulsion restricts the right to choose the place of residence, the expulsed person must not stay in the settlement, part of the settlement, or part of the country determined by the court. Thus it has a protective purpose, serving the prevention of re-offence, aimed to correct the criminogenic nature of the area. It can be imposed no longer just next to imprisonment, but also independently, in addition to other penalties.

h) prohibition from visiting sports events

The new Criminal Code passed the prohibition from visiting sports events among penalties, which can be imposed separately or in addition to other penalties. This punishment is intended to curb the recently proliferated phenomenon of sport hooliganism. If the offender commits the crime during a sport event, on the way to or on departure from a sport event, the punishment can be applied. It can cover sports events of one or all branches of sport of as

well. The offender can be prohibited from a sports event organized by any sport federation, under any branch of sport, any sport facility. The court determines the prohibition in a sentence. The minimum period of prohibition is one year, the longest span is five years.

i) expulsion

This penalty can only be used against offenders who are non-Hungarian citizens, that is, only against foreign citizens or stateless.

(2) Additional penalty: prohibition from public affairs.

Prohibition from public affairs includes two types of sanctions, on one hand it deprives the prohibited person from certain rights, on the other hand, it prohibits them from the acquisition of certain rights under its duration.

(3) These punishments can be inflicted simultaneously.

As we can see, the Hungarian penalty system has become more stringent, the span of the inflictable penalties has increased. We can observe a parallel trend in recent years in respect of the imposed sentences namely that the application of the law is more stringent, and penalties are more severe, too.

The principles applied during the codification process of the New Criminal Code can be characterized by the idea expressed in the Platform of National Cooperation that the "strictness of legislation, the increase in the items of penalties, the more frequent use of life imprisonment, and the protection of victims will curb the offenders of crime, and make it clear to all members of society that Hungary is not a paradise for criminals."[1]

Consequently, the Government's primary objective is to re-establish order in Hungary and to improve the citizens' sense of security. A tool for this is if strict laws are made to guarantee protection for every law-abiding citizen, while offenders have to expect effective and dissuasive punishments.

One of the main expectations of the new Penal Code is strictness which does not necessarily mean only an increase of the item limits, but the more pronounced presence of a crime-proportionate criminal attitude of the law, even at the expense of both the specific and general principles of prevention.

We must not forget that, just like other policies, criminal policy is a means of high politics. Politics, according to the well-known definition, is the science of acquiring and retaining power. It has therefore dual objective, on the one hand making professionally thought-out decisions that lead to the future, on the other hand, just like any other tools of politics, it has to help in bringing more votes at the end of the cycle. This does not always serve thoughtful, professionally based decisions during the permanent reform of the criminal law, but, on the contrary, it supports spectacular solutions, which carry clear, simple messages for as many people as possible.

It is not a phenomenon experienced in only Hungary that in many cases the government raises the tools of criminal law to solve social and economic problems as if it were suitable to solve such problems.

Conclusions

The situation of penal policy is not simple. Several opposing forces influence it at the same time. First, as a result of the declining sense of security in the society, there are powerful social expectations to aggravate punishments, and to increase the duration of punishments, while, on the other hand, professional criticism means to preserve the basic criteria of professionalism, the urge to fulfill the harmonization requirements arising from the EU membership, and, perhaps most importantly, the coercive power of the limitation of financial means. Punishments are becoming more stringent, the population of prisons is increasing,

[1] See: justification for Law number 100 / year 2012.

even though we know from Beccaria that it is not the weight of punishments, but their unavoidability that is really deterrent. It is also a well-known fact that a 25% increase in prison population results in only 1% decrease in the volume of crime. It is largely accepted in democratic countries that the punitive power is not omnipotent, only a tool, which, if based on public consent, may contribute to the strengthening of social peace. Thus, criminal law is not the exclusive means, nor is the most important tool in the fight against crime.

With regard to the applicability of the new sanctions, Attorney General Péter Polt held that, according to international experience, the aims and principles are correct, and the question how these legal institutions will function in practice, life will decide.[2]

[2] http://hvg.hu/itthon/20130209_Polt_Peter_a_buntetoeljarasi_torvenyt_is

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COMPARATIVE ASPECTS REGARDING THE EXPULSION MEASURE IN THE PENAL CODE AND NEW PENAL CODE

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Abstract

With the aim of combating the delinquency phenomenon, by means of the provisions of art. 286/2009, regarding the Penal Code, it was diversified the general background of complementary punishments, which can be applied if the main punishment established is prison or fine payment. Therefore, is to be changed also the judicial nature of the expulsion measure, becoming complementary punishment by changing the rationality of applying this sanction.

Keywords: penal liability, sanctions, safety measure, main punishments, complementary punishments

Introduction

For the proper performance of the activities in human collectivities it is necessary to respect the general behavior rules. In general, the people's attitude towards the legislative imperatives it manifests on the line of respecting the judicial rules within a conformation judicial report. The efficiency of the penal judicial rules is assured by their application and by the way in which the persons, who committed infractions, by breaking the provisions of the judicial rules, are brought to book for the infractions committed[1].

Within the penal right judicial report, it is established the penal liability in the forms and modalities foreseen by law, in terms of the type of infraction committed, the level of social danger implied by the infraction and also by the particularities of the perpetrator[2].

With the aim of combating the delinquency phenomenon it is necessary, firstly, to combat the causes which generate the delinquency phenomenon and also the conditions which favor this phenomenon. This implies, of course, an effort from the company, so that the entire judicial-penal regulation to assure the prevention of committing dangerous deeds[3], both by

[1] Gheorghe Nistoreanu, Vasile Dobrinoiu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, *Drept penal. Partea generală*, Europa Nova Publishing house, Bucharest, 1997, pp. 84; Costică Bulai, Bogdan Bulai, *Drept penal. Partea generală*, Universul Juridic Publishing house, Bucharest, 2007, pp. 282; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, Edition VIII reviewed and enlarged, Universul juridic Publishing house, Bucharest, 2010, pp. 181

[2] Gheorghe Nistoreanu, Vasile Dobrinoiu, Ilie Pascu, Alexandru Boroi, Ioan Molnar, Valerică Lazăr, *Drept penal. Partea generală*, Atlas Lex Publishing house, Bucharest, 1996, pp. 341

[3] See Maria Zolyneac, *Drept penal. Partea generală*, Vol. III, "Chemarea" Foundation Publishing House, Iaşi, 1993, pp. 803

conformation and also by constraint for those who commit such deeds. On this line, the application of the judicial-penal regulations and penal policy of the state should contribute to the decrease of the delinquency at reasonable limits, protection of the social values, which fall under the incidence of penal law, to provide the filling of safety and social protection for all members of society[4].

In the penal right, the sanctions are very important, being regulated in one of the three fundamental institutions of the penal right, with the infraction and penal liability, the doctrine in domain considering the sanctions as representing, evidentially, the effect of penal liability, and this, at its turn, is the judicial consequence of the infraction commission.[5] These are essential means of achieving the goal of the penal law, contributing to the defense of the fundamental social values of the society against infractions[6], representing also instruments for achieving and reestablishing the rule of law[7]. In terms of the persons who committed deeds foreseen by penal law, with all afferent threat, and accompanies the background of penal right sanctions, the sanctions represent inevitable consequences of their dangerous conduit and they aim to provide their constraint and decrease on the line of respecting the provisions of the penal right rules[8].

In order to achieve the goal of the penal law, in the Penal Code are regulated several categories of sanctions. In terms of some variables specific to the delinquency phenomenon, namely the type of infraction committed, the level of social danger implied by the infraction, the person and perpetrator's conduit, the penal right sanctions, in the course of time, met a continuous diversification, so that in present it contains three categories of penal right sanctions: punishments, educational measures and safety measures[9].

The appearance of safety measures in Romanian penal legislation is relatively recent[10] and although it has a juridical feature that is different and controversial in the field of study, it had occupied an important and relevant role of prevention[11]. As in the penal legislation of other countries, the safety measures didn't occur on a new field, also the older penal laws contained sanctions with a preponderant prevention role, although their existence in the Penal Code didn't represent safety measures, but they were considered either complementary punishments, or consequences of condemnation[12].

Being relatively recent, the first stipulations in the law text regarding safety measures can be found in Stirbey Penal Code, from 1850, where under the collocation "place under police supervision" it was regulated a safety measure[13].

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[4] See Alexandru Boroi, *Drept penal. Partea generală*, C.H.Beck Publishing House, Bucharest, 2008, p.17

[5] See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, Academia Republicii Socialiste Romania Publishing House, Bucharest, 1970, pp. 19; Costică Bulai, Bogdan Bulai, *Manual de drept penal. Partea generală*, op.cit., pp. 284; Gheorghe Nistoreanu, Vasile Dobrinoiu, Alexandru Boroi, Ilie Pascu, Valerică Lazăr, Ioan Molnar, *Drept penal. Partea generală*, op.cit., p. 343

[6] See Gheorghe Nistoreanu and collaborators, *Drept penal. Partea generală*, op.cit., p. 404

[7] See Vintilă Dongoroz, *Drept penal* (republication of the edition from 1939), Romanian Association of Penal Sciences, Publishing House of Tempus Company, Bucharest, 2000, p.456; Alexandru Boroi, *Drept penal. Partea generală*, op.cit., pp. 329; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 8th Edition reviewed and enlarged, op.cit., p.182

[8] Alexandru Boroi, *Drept penal. Partea generală*, op.cit., p.329; Constantin Mitrache, Cristian Mitrache, Romanian Penal law. General section, 8th Edition reviewed and enlarged, op.cit., p.181

[9] See Alexandru Boroi, *Drept penal. Partea generală*, op.cit., p. 331; Mihai Adrian Hotca, *Codul penal – comentarii şi explicații*, C.H.Beck Publishing House, Bucharest, 2007, pp. 616; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, 8th Edition reviewed and enlarged, op.cit., p. 183

[10] See Costică Bulai, *Manual de drept penal. Partea generală*, ALL Publishing House, Bucharest, 1997, pp. 585

[11] Laura-Roxana Popoviciu, *Drept penal. Partea generală*, Pro Universitaria Publishing House, Bucharest, 2011, p. 348.

[12] See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, op.cit., p. 277; See Viorel Paşca, *Măsurile de siguranță -sancțiuni penale*, Lumina Lex Publishing House, Bucharest, 1998, pp.97

[13] See Viorel Paşca, *Măsurile de siguranță -sancțiuni penale*, op.cit., p. 97

The safety measures were not regulated, even in the Penal Code from 1864[14], but it was established, at the art. 37[15], the special confiscation as complementary punishment. Also, by means of the provisions of art. 62, it was instituted also as complementary punishment, the action by which mentally incompetent persons who committed penal crimes were sent in a monastery, all these becoming afterwards safety measures.

If the Penal Code from 1864 do not contain in the law text provisions regarding safety measures, we can tell instead about the Penal Code from 1936 that is one of the first European panel codes which regulated the aspects related to safety measures, totally, as a result of the influences specific to the inter-war period[16].

In the Penal Code from 1936[17], the provisions regarding the safety measures are presented under Title IV „Safety measures"[18]. The principles according to which the safety measures were taken, contained aspects related to the identification of the existence of an infraction and concerning the danger status in regard to which it was established the application of a safety measure, confirmation that the concerned person committed the infraction and the real fear that new penal deeds will be committed[19].

In Chapter I, named "General provisions", at art. 70[20], there were foreseen by the legislator the conditions of applying the safety measures, these were either coming with a punishment, or they were pronounced by themselves. These were pronounced only if the judge determined the danger status of the law-breaker.

In Chapter II, named "Different types of safety measures", by means of the provisions of art. 71, from the Penal Code, it was described by the legislator the types of the safety measures, being regulated a number of 15 safety measures, of which we mention also the expulsion of foreign nationals, and within the Section VIII, at art. 79, it was regulated the safety measure afferent to the expulsion of foreign nationals, situation in which the court could forbid by conviction sentence the staying in Romanian territory, temporary or permanently, of the law-breaker with foreign nationality, guilty of a deed qualified as crime or delict, and after the expiration of the punishment, the convict was expelled.

In the Penal Code from 1968[21], concerning the safety measures, in regard to the provisions of the Penal Code from 1936, about safety measures, the legislator's intention was

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[14] Published in Official Journal (OJ) Part I, on October 30th 1864

[15] Art. 37 of the Penal Code, from 1864 -„Judges will be able to order the confiscation of: the things/elements produced by crime, delict or contravention; things/elements which were used or with which it was intended to commit an infraction, if these things/elements will belong to the infraction's perpetrator, or to an accomplice; the descriptions, images and figures which would indicate the elements of a condemnable action: for this it will also order to destroy all samples/copies which are to be found, and also the packages, formats or prints which are aimed to reproduce them. The confiscation and destruction will be partial, when some excerpts or some parts of packages, formats or prints will be against the law".

[16] According to the resolution of the International Congress on Penal Law in Bruxelles, form 1926, under the title„La mesure de surete doit-elle se substituer a la peine, ou simplement la completer?, the attendant countries are asked to foreseen expressly the safety measures as complementary means to combat the delinquency - in Actes du Congres International de Droit Penal Bruxelles- 1926. Compterendu des discutions, citated by Viorel Paşca, *Măsurile de siguranță -sancțiuni penale*, op.cit., p. 98.

[17] Published in OJ no. 65, on March 18th 1936.

[18] The safety measures are regulated in the Penal Code from 1936, in Book I „General provisions", at Title IV named „Safety measures", in Chapter I, II and III.

[19]C.I.Rătescu, I.Ionescu-Dolj, I.Gr. Periețeanu, Vintilă Dongoroz, H.Aznavocian, Traian Pop, Mihail Papadopolu, N.Pavelescu, *Codul penal Carol al II-lea*, annotated, vol. I, general section, Socec Publishing House, Bucharest, 1939, pp. 170-175.

[20] Art. 70 of the Penal Code from 1936 -„Safety measures are applied only by court, coming with a punishment, except for the cases foreseen by law, when they are pronounced also by themselves. They can be pronounced only if the judge determines the danger status of the law-breaker".

[21] The Penal Code was adopted by means of Law no. 15/1968, published in OJ no. 79-79 bis, in June 21st 1969, it was subsequently republished in OJ no. 55-56, on April 23rd 1973 and once again republished, according to Law no. 140/1996, in OJ no. 65, on May 16th 1997.

to separate the educational measures applicable to minor law-breakers from the other safety measures[22]. Also, it was replaced the nationality criterion which enabled the action of taking measures in terms of the persons with no nationality, but who were staying in the country, harmonizing therefore the provision of the art. 117, regarding the extension of the principle of penal law personality foreseen in art. 4, from the Penal Code.

In present, the expulsion measure is regulated by means of the International Pact regarding the civil and political rights[23], the Additional Protocol to the European Convention concerning the transfer of convicted persons, adopted in Strasbourg, on October 18th 1997[24], the Protocols 4 and 7 to the European Convention concerning the human rights defense and the fundamental liberties[25].

Also, on internal background, the expulsion measure is regulated by means of the provisions of the Government Emergency Ordinance (GEO) no. 194/2002, regarding the regime of foreign nationals in Romania, in Section 4 of Chapter 5, concerning the "Regime of removing the foreign nationals from Romanian territory", and as a measure of constitutional order, the expulsion is foreseen in the provisions of art. 19.

The safety measure of expulsion, according to the provisions of art. 117, from the Penal Code, stipulates the interdiction of staying in the country of the law-breakers, foreign citizens or stateless persons, with no residence in Romania, in case they represent a danger for society.

The danger status which imposes the application of this safety measure results from the connection of two factors: deed (infraction) committed by the foreign citizen and the personal status, socially dangerous of the law-breaker[26].

The incrimination character of this measure is implied by the obligatory removal of the foreign citizen from the Romanian territory and the interdiction to return in our country's territory[27]. This measure applies only in relation with the law-breaker person foreign citizen, the family members of the law-breaker couldn't be expelled following the application this safety measure, but as a result of the expulsion measure on administrative way, when this measure imposes[28]; the administrative expulsion can be applied by the administrative organs in regard to foreign citizens considered undesirable on our country's territory, according to the provisions of art. 19, align. 3, from the Romanian Constitution, although they committed no deeds foreseen by the penal law[29].

Instead, when the convict has strong relations with Romanian state, the expulsion safety measure cannot be applied. However, in the situation when the convict has the entire family, property and affairs in Romania, the measure can applied, the jurisprudence being able to go over the reality of some strong family connections[30].

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[22]Constantin Bulai, Drept penal român. Partea generală, vol. II,,,Şansa"-S.R.L. Publishing House and Press, Bucharest, 1992, pp. 154; Viorel Paşca, *Măsurile de siguranţă -sancţiuni penale*, op.cit., p. 99

[23] Adopted by the United Nations General Assembly on December 16th 1966 and which became effective on March 23rd 1976. Romania ratified the Pact by means of the Decree no. 212/1974, published in OJ no. 146/20.11.1974.

[24] Ratified by Romania by means of OJ no. 92/1999, published in OJ no. 425/31.08.1999.

[25] Ratified by Romania by means of Law no. 30/1994, published in OJ no. 135/31.05.1994.

[26] See Î.C.C.J., S. pen., dec. n

r. 1843/1999, Bulletin Jurisprudence from 1999; Î.C.C.J., s. pen., dec. no. 112/2004, on www.scj.ro

[27] See Vintilă Dongoroz and collaborators, *Explicaţii teoretice ale Codului penal român*, vol. II, op. cit, p.312; Maria Zolyneac, *Drept penal. Partea generală*, vol. III, op.cit., pp. 882

[28] See Vintilă Dongoroz and collaborators, *Explicaţii teoretice ale Codului penal român*, vol. II, op. cit, p.312; Alexandru Boroi, *Drept penal. Partea generală*, op. cit., pp. 376.

[29] Constantin Bulai, *Drept penal român. Partea generală*, vol.II, op.cit., p. 161

[30] See C.S.J., s.pen., dec. nr.1162/2001; Benrachid Cause c. France; Moustaquim Cause c. Belgium on www.coe.int

It is admitted in literature[31], the fact that the danger implied by the commission of some infractions regards the foreign law-breaker, as a passive subject and not active of an infraction, in the sense that not the fear that this foreign national will commit another infraction concretizes the danger but the fear that other persons, displeased by the presence on the country's territory, after executing the punishment, of the foreign law-breaker, could react against him, committing infractions and disturbing the public order.[32] The expulsion measure can be applied following the achievement of the following conditions: the deed committed (in country or abroad) to be an infraction; the law-breaker to be foreign citizen or to be stateless person with residence abroad, in the moment of pronouncing the conviction; the case in which the law-breaker continues to stay in the country imply a dangerous state of things for the society[33].

The expulsion is performed with precise destination and with the agreement of the state to which the national, namely the convict, belongs, not being possible to perform the expulsion of a person in a state where the convict might risk to receive the death punishment or to be tortured or to endure severe sanctions, inhuman or degrading, interdiction which results from the New York Convention, to which our state adhered in 1990.[34]

The measure can be applied on long term, and in case the danger state of things stops or in case the person would obtain, subsequently, the Romanian nationality, the measure, where applicable, to be removed or to be replaced with another safety measure.[35]. The expulsion comes, as a general rule, with prison punishment and it is performed after the execution of this punishment.

Also in Law no. 301, from 2004[36], regarding the Penal Code, the safety measures were regulated within the Title V from the general section of the Penal Code, by means of the provisions of art.128-136. As regards the content, the types of safety measures were not different from those foreseen in the Penal Code from 1968. By means of the provisions of art. 128, from the Penal Code, there were stipulated the following safety measures: obligation to receive medical treatment, medical admission, interdiction to take a position or exercise a profession, a handicraft or another occupation, interdiction to be in some localities, interdiction to return to the family home for a limited time, expulsion of foreign nationals and special confiscation.

Concerning the Law no. 286/2009, regarding the Penal Code[37], we mention that some safety measures were eliminated from the content of the provisions of art. 112, from the actual Penal Code, being kept in the provisions of art. 108, from Law no. 286/2009, only: the obligation to receive medical treatment, medical admission, interdiction to take a position or exercise a profession, special confiscation and extended confiscation, measure which was

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[31] See Alexandru Boroi, *Drept penal. Partea generală*, op.cit., pp.376

[32] C.S.J., penal section, decision no. 1008/2001, in Bulletin Jurisprudence from 2001, p. 179.

[33] See Bucharest Court of Law, s. pen., sent. pen. no.219, dated on October 3rd 1987, unpublished, C.S.J., s.pen., dec. no. 1843/1999, unpublished, in Alexandru Boroi, Sorin Corlățeanu, *Drept penal. Partea generală*, Selection of test cases for students use, C.H.Beck Publishing House, Bucharest, 2003, pp.280

[34] The measure was inserted in Romanian legislation by means of Law no. 20, dated on October 20th 1990, published in OJ no. 112, on October 20th 1990; Mihai Adrian Hotca, *Codul penal – comentarii şi explicații*, op. cit., pp. 790; See Bucharest Court of Law, Section I pen., dec. no. 1044/A, dated on September 28th 2004, in Bucharest Court of Law. Selection of judicial practice in penal domain 2000-2004, op. cit., p. 213

[35] See Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român*, vol. II, op. cit., pp. 314; See Bucharest Court of Law, Section I penal, sentence no. 1481/F, dated on November 16th 2004, in Bucharest Court of Law. Selection of judicial practice in penal domain 2000-2004, Wolters Kluwer Publishing House, Bucharest, 2007, p. 208

[36] Law no. 301/2004, regarding the Penal Code, which followed to enter in force, according to the provisions of art. 512, from Law no. 301/2004, on September 1st 2008, as it was reviewed by means of the provisions of GEO no. 50/2006 (published in OJ no. 566/ on June 30th 2006). Law no. 301/2004 was published in OJ no. 575, on June 29th 2004 and abrogated by means of the provisions of Law no. 286/2009, regarding Penal Code.

[37] Published in OJ no. 510, on April 24th 2009

inserted subsequently in the content of art. 108, by means of the provisions of art. II, pct.2, from Law no. 63, from 2012.

By diversifying the content of the complementary punishment the legislator intended to provide a better harmonization of the sanction in regard to the concrete circumstances of the clause, by increasing its efficiency. Also, a part of the sanctions were inserted in the content of the complementary punishment, which in present can be found in the content of the safety measures, namely the interdiction to be in certain localities, expulsion of foreign nationals and the interdiction to return to the family home for a limited time, since by their nature these have a pronounced punitive character, and by their application it aims especially the restriction of the movement liberty of the convict, and as a result of this effect, it is performed the removal of the danger status and the prevention of committing new infractions.

Therefore, as regards the complementary punishments, the Romanian legislator extended the area of the main punishments with which can be applied complementary punishments, interdiction to exercise some rights being possible both with the prison punishment, irrespective of its duration, and with fine payment punishment. The conception of the old penal code, which conditions the possibility of applying the complementary punishment and the interdiction of exercising some rights of committing an infraction of a certain severity level expressed by the application of the prison punishment for at least 2 years, was abandoned in the favor of a more flexible regulation, which allows the evaluation of the necessity to apply the complementary punishment, considering also the nature and severity of the infraction, circumstances of the cause and law-breaker person, ignoring the nature and duration of the main punishment applied, a similar regulation containing also the art 113-7, from the French Penal Code.

As regards the expulsion, this is contained by the provisions of the New Penal Code, as complementary punishment, being foreseen at the art. 66, lit. c, from the New Penal Code, and which stipulates the interdiction of exercising for a period between one and five years of "the right of the foreign national who stays on Romania territory". The legislator considered that the reason for expelling the foreign national[38] from the Romanian territory is to apply a complementary punishment to the main punishment, to which the foreign national was convicted, instead of a safety measure, as a result of the fact that not the danger status and the prevention of committing some infractions is the reason of the sanction, but the necessity to apply a sanction in addition to the main punishment, to which the foreign national was convicted[39]. By means of this modification it is changed the judicial nature of this penal law institution, which imply the modification of the conditions in which can be applied and which are not commune to all categories of rights that are interdicted as complementary punishments according to the New Penal Code.

The actual regulation is in accordance with European law systems, these sanctions being contained also by French Penal Code, at art. 131-30, by Spanish Penal Code at art. 39, and also by Polish Penal Code, at art. 39.

Also, there were absorbed in the content of art. 66, regarding the content of the complementary punishment to interdict the exercise of some rights, at align. 4, the provisions concerning the person protection, which follows to leave, constringed, the Romanian territory, provisions inserted in the Penal Code as a result of the ratification by means of Law no.

[38] In the New Penal Code is not defined the term "foreign national", but according to art. 2, lit.a, from GEO no. 194/2002 (published in OJ no. 955, on December 27th 2002) regarding the regime of foreign national in Romania, the foreign national is a person who don't has Romanian nationality but of another state member of EU, or of the European Economic Area. Also, according to art.2, align.1, lit.c, from Law no. 122/2006 (published in OJ no. 428, on May 10th 2006), regarding the asylum in Romania, the foreign national is the foreign citizen or the stateless person.

[39] See George Antoniu and collaborators, *Explicații preliminare ale noului Cod penal*, vol. II, Universul Juridic Publishing House, Bucharest, 2011, pg.56

19/1990[40], of the Convention against torture and other punishments or inhuman or degrading treatments, and in the aspect of executing this punishment, the interdiction of the foreign national right to stay on Romanian territory don not apply in case it was applied the suspension of the punishment under supervision.

Conclusions

Although, changed in regard to the judicial nature in the provisions of the New Penal Code, the expulsion, as complementary punishment, will be applied after the execution of the main punishment, indeed this change determines the modification of the conditions in which it can be applied this punishment since, in this case, not the danger status and the prevention of committing some infractions will represent the reason of applying it, but the necessity to apply a sanction as a result of committing an infraction. Concerning the term "foreign national" we can ask ourselves if the person with no Romanian nationality, which has the nationality of a state member of EU, can be considered a foreign national or not, since this person can be considered foreign national only in the context in which this person would formulate an asylum application in Romania, because in this moment Romania is also a EU member.

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[40] Published in OJ no. 112, on October 12th 1990

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THE CLASSIFICATION OF THE CIVIL CONTRACTS FROM THE NEW CIVIL CODE

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Abstract

In this paper ,we are debating the problem of the relationship between the civil juristic document and the contract .The civil juristic document was defined as ... „a manifestation of will with the intention of producing juristic effects, meaning the birth, change and cancel of an concrete civil juristic relation" or … "the manifestation of will occurred for the realization of juristic effects materialized in the creation, the change, the transfer or the canceling of an concrete civil juristic relation" (Art.1166 C.civ.).

The contract was defined [1]in the doctrine as the agreement of a will between two or more persons for the purpose of producing juristic effects, in other words giving birth, changing, transferring or canceling juristic relations. The contract is the main form of the juristic act, and the new civil code made the classification from more points of view (art.1171-1177) in synallagmatic and unilateral contracts, contracts with onerous title and contracts with costless title, contracts with immediate or successive fulfillment, named or no-named contracts, consensual, solemn and real contracts, etc.

Keywords: *the synallagmatic and unilateral contracts, contracts with onerous title and contracts with costless title, contracts with immediate or successive fulfillment ,named or no-named contracts, consensual, solemn and real contracts.*

Introduction

The contracts can be classified from more points of view. Each one of the classifications made by the doctrine has a theoretical and practical interest. Most frequently, the classification of a contract included in a certain category obligates the contract to produce certain juristic consequences that are different from the ones that are created by the contracts that belong to other categories.

The new civil code regulates deliberately some of them, for example: sale and purchase, location, society, mandate, bailment, transaction etc. As we will see some classifications of the contracts are enumerated in the texts of code (art. 1171-1177), other classifications are the result of the juristic doctrine activity.

I. The civil juristic document was defined as „a manifestation of will with the intention of producing juristic effects, meaning the birth, change and cancel of an concrete civil juristic relation" or "the manifestation of will occurred for the realization of juristic effects materialized in the creation, the change, the transfer or the canceling of an concrete civil juristic relation" (Art.1166 C.civ.).

[1] See art.1166 from the New civil code

The contract was defined in the doctrine as the agreement of a will between two or more persons for the purpose of producing juristic effects, in other words giving birth, changing, transferring or canceling juristic relations.

The comprehension domain. As it may be observed from the analysis of the two juristic categories – the juristic act and the contract – results:

a) the civil juristic act is a manifestation of will occurred in the purpose of producing juristic effects, while the contract is an agreement (agreement of will) occurred to produce juristic effects;
b) the manifestation of will in the case of the civil juristic act is non circumstantiated under the aspect of the number of the civil right subjects, which means that, in this case, the will can be unilateral (manifested by only one person) or we can find ourselves in the presence of an agreement of will (a will that is manifested by two or more persons that, together, create the agreement of their will);
c) in the case of the contracts we discuss only the agreement of a will that occurs between two or more persons in the purpose of …;
d) According these elements, results that civil juristic act has a bigger comprehensive domain than the contract, because between the civil juristic act and the contract exists a gender (a whole) – species (party) relation, the whole namely the gender is the civil juristic act and the species, the party is the contract.

The main form of the civil juristic act is the contract. This results from the following specifications:

a) as a domain of comprehension, the contract almost covers the comprehension domain of the civil juristic act;
b) the bilateral juristic acts (the contracts) have a much bigger frequency in the daily juristic life than the unilateral civil juristic acts; people may realize or not what they do, but they are concluding every day an impressive number of contracts. For example, every day people buy the necessary things nourishment and we have, through extrapolation to all of his needs, the approximate image of the impressive number of the contracts that he concludes;
c) among the civil juristic acts, the contract represents the juristic category of civil right without which the juristic operations between the civil right subjects cannot be conceived;[2]
d) a large number of legal texts are assigned for the contract, this is why there is a much wider domain of juristic rules in comparison with the other civil juristic acts.

It can be observed that the juristic regulations concerning the contract, trough extrapolation, are applied in some cases to the civil juristic act. Even from the way of defining the civil juristic act by the specialized literature – the definition, on one side, of his various species, and on the other side, the general definition of this act – results that in the outlining of the civil juristic act, we start from the consecrated juristic regulations of his most important species – the convention (the contract) – and other species as the offer, the testament etc.

II. The classification of the contracts

The importance of the classification. The contracts can be classified from more points of view. Each one of the classifications made by the doctrine has a theoretical and practical interest. Most frequently, the classification of a contract included in a certain category obligates the contract to produce certain juristic consequences that are different from the ones that are created by the contracts that belong to other categories.

The new civil code regulates deliberately some of them, for example: sale and purchase, location, society, mandate, bailment, transaction etc. As we will see some

[2] See Liviu Pop " *Treaty of the civil law"*, "Universul Juridic" Publishing House, Bucharest 2011, p.122.

classifications of the contracts are enumerated in the texts of code (art. 1171-1177), other classifications are the result of the juristic doctrine activity.

II. 1. Synallagmatic contracts and unilateral contracts

Depending of their content, the contracts are classified in synallagmatic contracts and unilateral contracts.

The synallagmatic contracts. The synallagmatic contracts are the contracts that give birth to some mutual obligations between the parties. Every party of the contract assumes obligations and of course, and receives rights as well.

The specific of the synallagmatic contract is the mutual and interdependent character of the party's obligations. This means that every party has at the same time the quality of creditor and the quality of debtor. In comparison with the other party: the obligation that costs one of the parties has a juristic cause in the mutual obligation of the other party; they cannot exist one without the other, they are interdependent.[3] The idea of cause, that explains the interdependency of the obligations in the synallagmatic contracts, must be understood in a bivalent way, as a manifestation of the idea of the purpose when the contract is concluded and during the existence and the execution of the contract.

The most relevant example of the synallagmatic contracts is the sell – purchase contract. The seller takes the responsibility to transfer the right of propriety of the soled object and to hand it over, and the buyer has the obligation to pay the price. This example demonstrates that in the synallagmatic contracts:

- parties assume obligations, but they also earn rights;
- the obligations of the parties are mutual, meaning that all the parties from this type of contract have obligations;

the obligations of the parties are in connection, meaning that to one obligation of one party it corresponds a certain obligation of another party; for example, to the obligation of the seller to transfer the right of propriety of the soled good corresponds the obligation of the buyer to pay the price or to the obligation of the seller to hand over the soled good corresponds the obligation of the buyer to receive the soled good.

The unilateral contracts. The unilateral contracts are the contracts that born obligations only for one of the parties, the other party is the holder of some correlative rights. The new Civil Code in the article 1171 stipulates: "The contract is unilateral when one or more persons have obligations towards one or more persons, without the last one to have obligations". One party is only debtor and one party is only creditor. Thus in a donation contract the giver is only a debtor and the acceptor is only a creditor.

II. 2. Contracts with onerous title and contracts with costless title

This is the classification of the contracts that considers the purpose of the parties in the moment of their conclusion.

Contracts with onerous title. These contracts are those ones in which each of the parties intends an advantage, a conscription in exchange, meaning the creation of an own patrimonial interest. The head quarter for this is the article 1172, new Civil Code, that stipulates „The onerous contract is the contract in which every party wants to receive an advantage". This includes the location contract, the change contract, life annuity contract etc. There are two types of onerous contracts: commutative and aleatory.

The onerous title contract is commutative when the obligation of one party is the equivalent of the obligation of the other party. It is characterized through the fact that the mutual labor conscriptions to which the parties obligate themselves are equivalent, and the dimension of the owed labor conscriptions by the parties is sure and their value is known from the moment of the contract's conclusion. We can observe that the contracts with onerous title have a commutative character[4].

[3] See Valeriu Stoica ,"*The civil law and the civil contracts*", "Editas" Publishing House, Bucharest, 2011, p. 206.
[4] See Gabriel Boroi,"*The new civil code*", Hamangiu Publishing House, Bucharest, 2010, p. 238.

The aleatory contract. According to the regulations of article 1173, paragraph 2 of the new Civil Code, a contract is aleatory when the equivalent depends, for one of the parties, by an uncertain event. Thus the advantages that will be obtained are unknown because the parties have obligations, one towards the other, that depend on a future and uncertain event concerning the production or at least the moment of the production of it. The event represents for every party, at the same time a chance to win and a risk to lose. An example of this type of contract is the insurance contract, life annuity contract, the maintenance contract etc.

II. 3. The charity contracts or with onerous title

The new Civil Code, article 1172, paragraph 2, stipulates: "The costless contract or charity contract is the contract that in which one of the parties wants to obtain, without an equivalent, an advantage for the other". Thus, one of the parties has the obligation to obtain for the other a patrimonial advantage without receiving something in exchange. Are parts of this category: donation, bailment, mandate, guarantee etc.

These contracts are divided in: liberality and costless service contracts or disinterested contracts.

a) The liberalities are those onerous contracts through which one of the parties transfers a right from his patrimony in the patrimony of the other party without receiving an equivalent. One of the parts becomes poor and the other rich. The object of this type of contract is the labor conscription of giving. Through liberalities we mean the donation contracts. We want to mention that enter, in the wide category of liberties, some unilateral juristic acts, example the legatee.
b) Contracts of costless services or disinterested contracts are those contracts through which one party has the obligation to do a service without becoming poorer and neither in the purpose of the enrichment of the other party: costless mandate, the costless bailment, the costless loan.

At the base of the difference between these contracts with onerous title and those with costless title are two criteria: an objective and a subjective. The objective criteria consist in the existence of mutual advantages for both parties in the onerous contracts and the lack of any advantage for one of the parties in the costless contracts. The subjective criteria consist in the cause or the purpose of concluding the contract. In the onerous contracts, the parties give their consent for concluding the contract having the intention of obtaining an equivalent in exchange of the labor conscription that is obligated. On the contrary, in the contract with costless title, the party that has the obligation is doing it in the purpose or with the intention of obtaining an advantage for someone else, without claiming, under juristic aspect, nothing in exchange. Therefore, the subjective element consists in the intention of liberality.

II. 4. Contracts with immediate or successive fulfillment

These types of contracts are those classified according their execution.

Contracts with immediate execution (instantaneous) are those contracts whose execution is made immediately after their conclusion; normally the object of the obligation is labor conscription. Contracts with successive execution are those contracts whose execution takes place in time, as permanent labor conscription, for example the renting contract or as some successive labor conscriptions, for example the providing contracts. The importance of this classification consists in the followings:

- for the non execution from guilt of the contracts with immediate execution operates the resolution and therefore, is abolished with retroactive effect, while the non execution by guilt of the contracts with successive execution operates the annulment and are abolished only for the future[5];

[5] See Constantin Stătescu, Corneliu Bîrsan, *"The civil contracts"*, Hamangiu Publishing House, Bucharest 2010, p. 178.

- some contracts with successive execution can be annulled through the will of any party, for example the location contract without a term, or only through the will of one party, for example the renting contract or the bailment contract;
- normally, the suspension of the obligations is put only in the contracts with successive execution;
- this classification presents an importance even in the domain of supporting contractual risks, according to the rules that govern this domain.

II. 5. Named contracts and no-named contracts

Named contracts are the contracts that have a special regulation, that correspond to some economical operations. Ex: the selling contract, the location contract, the change contract etc. This category of contracts was known even in the roman law, it was called nova negotio (new juristic acts) containing:

- do ut des = I give you so you can give me;
- do ut facis = I give you so you make me;
- facio ut des = I make you so you can give me;
- facio ut facias = I make you so you can make me[6].

The importance of this classification consists in the fact that parties do not have to stipulate all the relation's implications in which they enter, because these are regulated by the law, only if they violate the regulations – suppletive of course – of the law, while, in the case of the no-named contracts, the parties have to stipulate the clauses the refer to all the implications of such relations.

II. 6. Consensual contracts, solemn contracts and real contracts

This classification has at it's base the criteria of their way of valid creation (art.1174, new code civil).

A. Consensual contracts. Are those contracts that are concluded through the simple agreement of the parties (solo consensu), without no other formality. In our law, the consent is a principle that has some exceptions to, deliberately stipulated by the law for some contracts. The existence of these exceptions is determined by the necessity of protecting the interests of the parties and of third parties and other times, for the defense of a public interest. Therefore, regarding the parties, the obligation of respecting some formal conditions is disposed by the law to win their attention on the importance of their decisions and offers them time to think; otherwise, the respect for a certain form, that consists, normally, in the writing of a document, means precision and clearness in the establishment of the contract's effects and of the parties responsibility, offering to the third parties, that want to contract one of them, the possibility to know for sure the existent juristic relation. Other times, the written form of the contract is to serve the public interest consisting in the necessity of knowing, by some authorities of the State, all the changes that have occurred in the juristic situation of some goods of great importance for the society, as the real estates.

B. The solemn contracts. The solemn contracts are those contracts for which for conclusion to be valid is needed that the will agreement of the parties to wear a certain form or to be enclosed by certain solemnities foreseen by the law. The simple will agreement is not sufficient to have the value of a contract. Not respecting the form or the formalities foreseen by the law is penalized with the absolute nullity of the contract. The solemn contracts are: the donation (art. 1011/1033 Civ. c), the mortgage contract (art. 1772 Civ. c), conventional subrogation agreed by the debtor (art. 1107 p. 2 Civ. c), the selling-buying of the lands (art. 46 from the Law nr. I8.1991). All these contracts must be concluded under the form of authentic document. Exception is the donation of mobile goods, when the solemnity that must be respected consists in the material handing of the good or the goods from the giver to the receiver.

[6] See Liviu Pop, " *Treaty of the civil law"*, "Universul Juridic" Publishing House, Bucharest, 2011, p. 336.

C. The real contracts. Are those contracts for which forming, besides the will agreement of the parties, the material handing of the thing that is the object of one of the party's carrying-out is also needed. The juridical doctrine includes in this category: the loan of consumption, storage, the mortgage contract and the transportation contract. All these contracts are considered concluded only from the moment of the handing of the good at which it refers. Considering those shown above, within the literature of specialty has been said that in reality we wouldn't find ourselves in front of the presence of different categories of civil contracts. This because the handing of the good, object of the contract, from a party to the other, would be a necessary solemnity for the conclusion of the contract. There for, the solemn contracts may be grouped in: authentic contracts and real contracts. For one, the solemnity consists in an authentic document, and for the other, in the material handing of the good, object of the contractual carrying-out.

Conclusions

Most frequently, the classification of a contract included in a certain category obligates the contract to produce certain juristic consequences that are different from the ones that are created by the contracts that belong to other categories.

The new civil code regulates deliberately some of them, for example: sale and purchase, location, society, mandate, bailment, transaction etc. As we will see some classifications of the contracts are enumerated in the texts of code (art. 1171-1177), other classifications are the result of the juristic doctrine activity. Depending of their content, the contracts are classified in synallagmatic contracts and unilateral contracts.

The synallagmatic contracts. The synallagmatic contracts are the contracts that give birth to some mutual obligations between the parties. Every party of the contract assumes obligations and of course, and receives rights as well.

The specific of the synallagmatic contract is the mutual and interdependent character of the party's obligations. The unilateral contracts are the contracts that born obligations only for one of the parties, the other party is the holder of some correlative rights. The new Civil Code in the article 1171 stipulates: "The contract is unilateral when one or more persons have obligations towards one or more persons, without the last one to have obligations". One party is only debtor and one party is only creditor. Thus in a donation contract the giver is only a debtor and the acceptor is only a creditor.

Contracts with onerous title. These contracts are those ones in which each of the parties intends an advantage, a conscription in exchange, meaning the creation of an own patrimonial interest. The head quarter for this is the article 1172, new Civil Code, that stipulates „The onerous contract is the contract in which every party wants to receive an advantage". This includes the location contract, the change contract, life annuity contract etc. There are two types of onerous contracts: commutative and aleatory.

The onerous title contract is commutative when the obligation of one party is the equivalent of the obligation of the other party. It is characterized through the fact that the mutual labor conscriptions to which the parties obligate themselves are equivalent, and the dimension of the owed labor conscriptions by the parties is sure and their value is known from the moment of the contract's conclusion. We can observe that the contracts with onerous title have a commutative character.

The aleatory contract. According to the regulations of article 1173, paragraph 2 of the new Civil Code, a contract is aleatory when the equivalent depend, for one of the parties, by an uncertain event. Thus the advantages that will be obtained are unknown because the parties have obligations, one towards the other, that depend on a future and uncertain event concerning the production or at least the moment of the production of it.

The new Civil Code, article 1172, paragraph 2, stipulates: "The costless contract or charity contract is the contract that in which one of the parties wants to obtain, without an equivalent, an advantage for the other". Thus, one of the parties has the obligation to obtain

for the other a patrimonial advantage without receiving something in exchange. Are parts of this category: donation, bailment, mandate, guarantee etc.

These contracts are divided in: liberality and costless service contracts or disinterested contracts.

Contracts with immediate execution (instantaneous) are those contracts whose execution is made immediately after their conclusion; normally the object of the obligation is labor conscription. Contracts with successive execution are those contracts whose execution takes place in time, as permanent labor conscription, for example the renting contract or as some successive labor conscriptions, for example the providing contracts. Named contracts are the contracts that have a special regulation, that correspond to some economical operations. Ex: the selling contract, the location contract, the change contract etc.

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PROTECTION OF HUMAN RIGHTS IN EUROPEAN COMPETION LAW

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Abstract

One of the most common defenses raised by businesses inspected by the Commission relates to violations of privacy, correspondence and home, protected by article 8 of the Convention, namely that the Commission's investigative powers, often regarded as excessive or exorbitant discretionary do not meet the standard of "necessary measure in a democratic society", set out in article 8 paragr. 2 of the Convention to justify interference under paragr. 1.

Key words: *competition, inspections, the right of privacy, correspondence and home, art.8 E.C.H.R.*

1. Introduction.

"Guardian of European competition policy" European Commission (the Commission) is entrusted and, consequently has the properly instruments of the effective application of Community competition law.

In order to ensure the effective application of Community competition law, enhanced investigative powers of the European Commission and national competition authorities, under Council Regulation (EC) no. 1/2003 of 16 December 2002 implementing rules on competition laid down in art. 81 and 82 of the Treaty establishing the European Community (now art.101, 102 TFEU) raised many issues in terms of rights enshrined in the Convention (European) Human Rights and Fundamental Freedoms (hereinafter the Convention) in particular Article 6 and Article 8.

2. The European autonomous notion of “home”.

One of the most common defenses raised by businesses inspected by the Commission relates to violations of privacy, correspondence and home, protected by article 8 of the Convention, namely that the Commission's investigative powers, often regarded as excessive or exorbitant discretionary do not meet the standard of "necessary measure in a democratic society", set out in article 8 paragr. 2 of the Convention to justify interference under paragr. 1.

This defense was first invoked in National Panasonic. In this case, two Commission officials arrived without notice at the point of sale Panasonic, having a Commission decision authorizing an unannounced inspection of all company documents. The inspection began without company lawyer, who arrived three hours later and lasted seven hours, the two Commission officials raising officials copies of documents and notes. Panasonic challenged this procedure, alleging breach of Article 8 of the Convention. European Court of Justice (hereinafter ECJ) ruled in that case that the inspection powers of the Commission under Regulation 17/62, the first Regulation implementing Articles 81 and 82 TEC, which allows it

to conduct an investigation without prior notice does not defeat any rights arising from Article 8 of the Convention, since they are provided by law and necessary in a democratic society for the preservation of the community's economic welfare.

Three decades after the first judgment, it is still questionable whether the protection offered by the ECJ against the arbitrary use of powers conferred on it by Chapter V of Council Regulation (EC) no. 1/2003 is equivalent to the protection afforded by the Convention in the light of the right to privacy, correspondence and home. This question becomes especially relevant because, even in its Preamble, the new Regulation 1/2003 states that he "(...) respects fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union".

2.1.Applicability of Article 8 ECHR to professional offices. The provisions of art. 8 para. 1 of the Convention guarantees the right to privacy, correspondence and home.

For the purposes of art. 8 of the Convention, this right includes the right of individuals to have a home, a place that is freely chosen, where to carry personal life permanently protected from unwanted interference from others.

Both privacy and family life and the right to correspondence are in strong correlation with the notion of the residence of a person.

Domicile is usually defined as the physical space where a person pursues his private or family life.

From the perspective of the ECHR jurisprudence, the concept of "home" in the sense of Art. 8 of the Convention, however, is an autonomous concept which is not limited to homes that are occupied or acquired legally. Qualification of a particular area as home for the purposes of art. 8 actually depends on the specific circumstances of each case being considered, in particular the existence of a sufficient and continuous links with a particular place. The concept of home has a broad interpretation of the ECHR, is included in the broad concept of privacy. Therefore, what it has to be protected is the place where a person could legitimately expect to not be bothered by the authorities or other intruders.

The Court of Luxembourg raised firstly the issue of applicability of Article 8 of the Convention, in the context of an economic opposition to a Commission inspection, under the scope of Regulation nr.17/62. In 1987, the Commission decided to conduct a investigation of chemical companies producing chemicals and polyethylene, including the German company Hoechst. Inspections were carried out on three occasions: firstly, the Commission officials were accompanied by officials of the national competition authority, secondly they were also accompanied by two policemen but they left, saying that a search warrant is needed. Then NCA addressed to the competent national court in order to obtain the warrant, but the application was rejected, the court arguing that no fact likely to establish a presumption of the existence of agreements or concerted practices was provided.

Finally, the Commission obtained a warrant, but the search took place just over two months. Hoechst appealed the Commission decision imposing a fine for non-compliance with the Commission's investigation, arguing that it was contrary to Article 8 of the Convention, as it had been issued no judicial warrant. E.C.J.stated that Article 8 does not apply to commercial establishments, only private dwellings of natural persons.

Hoechst case was reaffirmed by E.C.J. in cases Dow Benelux and Dow Chemical Iberica. Moreover, in case Limburgse Vinyl Maatschappij NV and others against the Commission, the applicants alleged that the inspections carried out by the Commission breached the principle of inviolability of the home, as enshrined in Article 8 of the Convention, but the ECJ stated that "the fact that the ECHR jurisprudence relative to the applicability of Article 8 of the European Convention businesses changed after the cases Hoechst, Dow Benelux and Dow Chemical Iberica has no direct implication on the considerations of the solutions adopted in these decisions".

But, in the ECHR case law, the residence acquires new meanings, widening its scope and covering the place where a person carries his professional activity and, within certain

limits, the offices and agencies of companies. In this regard, it was stated by the doctrine that we are witnessing the consecration of a "commercial private lives".

In this purpose it should be mentioned the Strasbourg Court decsions in the cases Kopp v. Switzerland and Niemietz v. Germany.

In the first case, E.C.H.R. found that the business premises such as offices of attorney (law firm in this case Kopp and associates), are part of the person's home, being under the scope of notion of privacy.

With regard to the second case, the plaintiff (attorney Niemietz) complained that the search conducted by the judicial authorities in his law office is a violation of art. 8 of the Convention, because damaged his cabinet clientele and reputation as a lawyer.

The German government denied the existence of interference, arguing that art. 8 of the Convention defines a border between private life and home, on the one hand and business premises, on the other hand.

E.C.H.R. held that there is no reason not to include under the scope of the notion of privacy the professional or business activities. In the case of a liberal profession, their work may be part of their lives to such an extent that it is impossible to distinguish in what quality they work at a time.

Regarding the English word “home” in the context of art. 8, the European Court found that in some Contracting States, including Germany, it is recognized that it is extended to business premises. Moreover, this exegesis comes in full agreement with the French version of the text, whereas the term "domicile" has a wider connotation than the home and may include, for example, the office of a person performing a profession, such as the lawyer. Also, E.C.H.R. noted that, in general, to interpret the words "privacy" and "home" as including certain professional or business activities or premises would answer to the essential object and purpose of art. 8 to protect the individual against arbitrary interference of the authorities.

So, the professional premises can be included in the concept of "home" in the sense of art. 8 ECHR and the Court considered that the rights disputed were ignored considering the conventional rules.

This interpretation is further confirmed in the case of Société Colas Est and others against France, where the ECHR tooking into account the dynamic interpretation of the Convention, as living instrument, which must be interpreted in the light of current living conditions, considered that it is the time to recognize that, in certain circumstances, the rights guaranteed by article 8 paragr. 2 of the Convention may be interpreted as including the right of a company to respect its registered office, its agencies and professional venues.

After hesitations in causes Hoechst and Dow Chemical Iberica, ECJ followed the case law of E.C.H.R. in the cases Société Colas Est and others and Niemietz v. Germany v. France and extended the protection afforded by the right to respect the home and the headquarters of companies in cases concerning a search at the premises of this company in competition law investigations by the Commission. The development of jurisprudence of E.C.J. aimed at ensuring the EU law effective protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities of individuals or businesses.

The argument that Article 8 does not apply to commercial premises can not survive subsequent to jurisprudence Niemietz and Société Colas. Following this case, the exercise by the Commission of inspection powers conferred by Article 20 of Regulation no. 1/2003 constitutes an interference within the meaning of article 8 paragr. 1 of the Convention. Therefore, the question is whether the procedure "raids" of the Commission are justified according to the criteria set out in article 8 paragr. 1 of the Convention and, in particular, if it meets the requirement of proportionality to constitute" a necessary measure in a democratic society".

3. Inspections national competition authorities and the Commission. Possible interference and its justification

a) Inspections at the premises of undertakings. According to paragraph 2 of Article 20 of Regulation 1/2003, the officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered: to enter any premises, land and means of transport of undertakings and associations of undertakings; to examine the books and other records related to the business, irrespective of the medium on which they are stored; to take or obtain in any form copies of or extracts from such books or records; to seal any business premises and books or records for the period and to the extent necessary for the inspection; to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

As noted above, subsequent to jurisprudence Niemietz and Société Colas, the exercise of the Commission's powers of inspection conferred by Article 20 of Regulation no. 1/2003 constitutes an interference within the meaning of Article 8 of the Convention paragr. 1. Consequently, the criteria identified above are also relevant in order to check the compliance with the conditions required to justify the interference and to determine whether the "raids" of the Commission are justified, according to the criteria of paragr.2 Article 8 of the Convention and, in particular, whether these meet the requirement of proportionality to constitute "a necessary measure in a democratic society".

E.C.H.R. conducted a first analysis of this requirement for an inspection in a competition case in Société Colas Est and others against France. For the justification for the interference, the Strasbourg Court held that the investigative powers of the national competition authority had a legal basis and pursued a legitimate aim, namely "economic welfare of the state" and "crime prevention". However, E.C.H.R. found that the inspections were not necessary in a democratic society, in terms of providing adequate and effective guarantees against abuse. The competition authorities had very wide powers which, under the law, it confers exclusive jurisdiction to determine the appropriateness of the number, duration and scope of inspections. Moreover, those inspections had taken place without a prior warrant issued by a judge without a police officer being present.

In light of the conflict between the two European courts, the ECJ decided, finally, in case Roquet Frères, to support the position of Strasbourg. Thus, under the old regime introduced by Regulation nr.17/62 in preliminary ruling in Case C-94/2000, Roquet Frères SA v. Commission, the ECJ especially stated on the interpretation of art. 14 of this Regulation, in particular on the scope of the inspection powers of the Commission, national competition authorities' obligation to provide assistance and the powers of national courts when they are asked to authorize the entry into the premises of economic operators.

In this case, E.C.J. looked particularly where economic operators oppose inspections by the Commission and must ensure penetration into force in such areas, requiring the assistance of national competition authorities and sometimes judicial authorization issued by the competent national court. Such authorization may be required to ensure the efficient preventive inspection. E.C.J. found that, once invested with a request for authorization of an investigation without the cooperation of the respective entity, so that involves entering into force in an enclosure, the national court must determine whether coercive measures ordered are not arbitrary and are proportionate to the investigation. The national court can not rule on the need for an inspection ordered by the Commission to review the legality of the Commission decision is subject to review only by the ECJ.

E.C.J. stated that, in accordance with art. 14 para. 3) of Regulation No 17/62, the Commission must give reasons for the decision which has an inspection, stating its purpose and object.

First, the measures taken to verify the effective conduct an inspection are not arbitrary, the court must determine whether there is evidence of an infringement of competition rules by the economic agent. Commission must show the court that he has evidence. The court can not claim to be submitted to the information and evidence available to the Commission's file,

which its suspicions are unfounded. E.C.J. stressed in this regard that it is particularly important that the Commission to ensure the anonymity of certain bodies of its information sources to ensure the prevention of anti-competitive practices.

Second, to verify that measures taken are proportionate to the survey, the national court must determine that such measures do not constitute the aim pursued, a disproportionate and intolerable interference.

In this respect, the national court must indicate:

- Essential aspects of the infringement, namely at least supposed to be affected market description and nature of the alleged restriction of competition, without being absolutely necessary to define precisely the relevant market to determine the exact legal nature of the breach or to indicate the period where the infringement occurred;

- The way in which it is assumed that the operators concerned are involved in the violation;

- Evidence sought, in the most precise and inspection powers conferred on the Commission representatives;

- If the assistance of the national authorities is required as a precautionary measure to counter opposition to the economic question, such explanations to convince the national court that, without prior authorization, would be difficult or impossible to determine violation. E.C.J. also held that, where the information provided by the Commission do not meet these conditions, the national court may reject the application. It is obliged, without delay, inform the Commission and the national authority which made the request on behalf of the Commission over these difficulties and possibly require further explanations to enable it to properly consider the request.

Information provided by the Commission may be included in the decision making inquiry or request for assistance submitted in a national or in a response to a question from the national court.

The findings of this case have been integrated in the new regulation, some of Regulation 1/2003, reproducing passages full of case-law cited.

However, the doctrine considers it difficult to sustain the inspection powers conferred by Regulation 1/2003 the Commission shall be accompanied by sufficient guarantees to pass the standard set by the ECHR Case Société Colas Est and others against France, and Roquette Frères jurisprudence that success was short-lived one.

According to paragraph 4 of Article 20 of Regulation 1/2003, undertakings and associations of undertakings are required to submit to inspections required by the Commission's decision. The decision shall specify the subject matter and purpose of the inspection, appoint the date of commencement thereof and indicate the penalties provided for in art. 23 and 24 and the right to have the decision reviewed by the ECJ. The Commission shall take such decisions after consulting the competition authorities of the Member State in whose territory it is to be conducted.

When the officials and other accompanying persons authorized by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall provide them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority so as to enable them to carry out inspection and if this support requires authorization from a judicial authority according to national rules, an application for such a permit, according to article 20 paragraph 7. You can submit an application for such a permit, and as a precautionary measure.

In the latter case, national courts may check only the Commission decision is authentic and that the coercive measures envisaged are arbitrary or excessive having regard to the inspection. When checking the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations, especially the reasons for suspecting infringement Commission art. 81 and 82 TEC and the seriousness of the suspected infringement and the

nature of involvement of the undertaking concerned. However, the national court may question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The legality of the Commission's decision may be reviewed only by the ECJ (Art.20 alin.8). The first issue raised by these provisions in the light required by the Société Colas Est due for inspection compliance with article 8 is that, without a judicial authority in the proper sense of that term, the Commission is empowered to order investigation itself unexpected, according to article 20 paragraph 4 of the Regulation. A second problem is that it ordered an investigation without prior judicial authorization.

There are authors who argue that there is no problem in this regard since it can oppose undertaking investigation and if this happens, the national court approval is required, and the ECJ may still review the legality of the Commission decision was imposed inspection. However, the above arguments do not take into account the fact that as long as that undertaking does not preclude investigation, inspections authorized by the Commission shall remain an independent judicial authority. In addition, national courts are called upon to authorize inspection if an opposition, not to question the need for inspection, may check only the Commission decision is authentic and that the coercive measures envisaged are arbitrary or excessive (Art.20 alin.8) which can not constitute a guarantee of effective judicial authorization.

Finally, the fact that E.C.J. may review the legality of the Commission decision was required control inspection ensures only a posteriori, after the inspection has taken place, contrary to the ruling in the case of Société Colas Est, the ECHR imposed a priori requirement of a judicial warrant. Also, the presence of officials from national competition authority is not equivalent to the presence of the police officer referred to the ECHR Case Société Colas Est. One building still uncertain legal doctrine envisioned a possible remedy for this shortcoming, as a specialized community courts (EC Competition Court) to ensure ex-ante control of the Commission's decisions on inspection. Such a mechanism would be an instrument of centralization of competition policy whose central idea was just decentralization reform.

However, this tool may prove useful in the investigation of multinational cartels in different states require inspections and therefore possibly the issuance of judicial warrants in as many states.

The new rules further specify regarding the possibility of the court to require detailed information on the Commission's reasons for suspecting infringement of art. 81 and 82 TEC, the seriousness of the suspected infringement and the nature of involvement of the undertaking concerned, without being able to ask to be provided with information in the Commission's file.

A recent example of the case where it claimed that it (the Commission) has not fulfilled its obligation to provide the national court with sufficient information for it to be able to determine if the inspection is arbitrary or contrary to the principle of proportionality is because France Telecom.

This case brings some very important details in terms of understanding the principle of proportionality in the interest case.

Court of First Instance (CFI) reiterates that the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed what is appropriate and necessary for the purpose intended, it being understood that, when choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

In the area of interest case, the principle of proportionality requires that the inspection does not cause unacceptable inconvenience and disproportionate to the aims pursued by the inspection in question.

However, the choice between the Commission must make the inspection carried out on a simple authorization and inspection ordered by a decision does not depend on the

particular circumstances such as the seriousness of the situation, extreme urgency or need for absolute discretion, but needs a research appropriate, given the particular circumstances. As a result, when an inspection decision only designed to allow the Commission to gather the elements needed to assess the possible existence of an infringement of the Treaty, such a decision infringes the principle of proportionality.

T.P.I. concludes that it is for the Commission to decide in principle whether certain information is required to be able to detect a violation of the competition rules and, even if it already has evidence or even evidence of the existence of an infringement, it is legitimate that the Commission deem it necessary to have additional checks allow him to better appreciate infringement or duration.

b) inspections in other areas. If the inspection cover a non-commercial setting, Article 21 of Regulation 1/ 2003 provides that the authorization required by a national court, before the Commission inspection decision can be made.

Thus, if there is a reasonable suspicion that certain records or other records and the inspection activity, which may be relevant to prove a serious violation of art. 101 or 102 TFEU, are kept in any other premises, land and means of transport, including the homes of directors, managers and other staff members undertakings or associations of undertakings concerned, the Commission may, by decision, conduct an inspection locations, specifying therein the object and purpose of the inspection, the date when indicating right to have the decision reviewed by the Court of Justice and in particular the reasons that led it to conclude that there is no such suspicion.

The Commission shall take such decisions after consulting the competition authority of the Member State where it is to be conducted.

In this case, the national court verifies that the Commission decision is authentic and that the coercive measures envisaged are arbitrary or excessive having regard in particular to the seriousness of the suspected infringement, weight of evidence investigated the involvement of the undertaking concerned and acceptable probability that the records and registers business related to the inspection to be kept on the premises for which the license. The national court may ask the Commission, directly or by the competition authority of the Member State concerned, detailed explanations on those elements that are necessary to enable it to verify the proportionality of the coercive measures envisaged.

However, the national court may, in this case, to question the necessity for the inspection nor demand that it be provided with information in the Commission's file. The legality of the Commission's decision may be reviewed only by the ECJ.

Extension of inspection powers of the Commission and to other places than the head company can raise more serious problems in terms of justifying interference, ie the conditions for the" necessary measure in a democratic society".

This condition is evaluated differently in ECHR when it is compared to private home professional office. Thus, Niemietz, E.C.H.R. suggests a double standard, showing that the interference justified under article 8 paragr. 2 of the Convention can go far when it comes to professional or commercial offices, which means greater protection for private homes. First, if these inspections without a judicial warrant is a particular concern when searching private homes. If the requirement of a judicial warrant is of particular importance in this case, however, it is not a decisive factor in itself.

If the requirement of a judicial warrant is of particular importance in this case, however, it is not a decisive factor in itself. Thus, Niemietz, cited above, a search warrant was drafted in broad terms, providing search and raising documents without any limitation in order to reveal the identity of the writer offensive ECHR concluding that the manner of conducting the search has led to violation of professional secrecy to an extent disproportionate to the aim pursued.

Second, as noted above, to consider the criteria established by the Strasbourg Court that pass inspection "proportionality test".

At first glance, Article 21 of the Regulation appears to provide sufficient guarantees: First, authorization by a national court is required before a Commission inspection decision can be made. Secondly, the Commission may adopt a decision only if there is a reasonable suspicion that certain records or other records and the inspection activity, which may be relevant to prove a serious violation of art. 101 or 102 TFEU, are kept in any other premises, land and means of transport, including the homes of directors, managers and other staff in undertakings or associations of undertakings concerned. Thirdly, the Commission shall specify therein the reason that led it to conclude that there is no such suspicion. Fourth, the Commission's investigative powers are limited to business books and records. Finally, if the national court has the same powers to check the Commission's decision stated in article 20, paragraph 3 in Article 21 assigns special powers to check: the importance of researched evidence (...) and the acceptable probability that the records and registers related to the inspection to be kept on the premises for which the license.

However, even in this case the guarantees provided by regulation can not be considered safe from any criticism.

The national court may, in this case, to question the necessity for the inspection nor demand that it be provided with information in the Commission's file. In this regard, one can not speak of a true national court authorization by the Commission for inspection in private homes.

Furthermore, it is possible to E.C.H.R. inspection to appreciate the power of households' directors, managers and other personnel enterprises "exceed the limits of what a competition investigation should aim: the discovery of violations of competition rules by businesses. Might consider that extending these inspection powers homes of directors is allowed, but extending them to anyone working for the enterprise has a purpose too wide.

5. Conclusions.

Very broad coercive powers of the Commission in proceedings concerning competition law, particularly the authority to investigate and conduct searches, remains a fertile source of litigation in which the general principles of law and fundamental rights have often been invoked to challenge executive and administrative action of the Commission, the parties affected repeatedly asking the Court of Luxembourg to limit and control the exercise of these powers by reference to fundamental principles of law.

However, out of the 30 cases of EU competition law that have raised issues concerning human rights, the conclusion that emerges is that EU courts avoided as much as possible to rule in favor of arguments based on the text of the Convention or the ECHR jurisprudence.

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PLEA BARGAINING – A NEW CRIMINAL PROCEDURE INSTITUTION

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Abstract

This work deals with the plea bargaining (plea agreement) as an institution which is intended to be entered by means of the new Romanian Code of Criminal Procedure, adopted by Law no. 135/2010, in the light of the conditions, of the conclusion procedure, of its contents and consequences. Similar negotiated justice proceedings are found both in the adversarial and in the inquisitive systems (USA, England, as well as in Germany, France, Belgium, Greece, Republic of Moldova, Czech Republic, Croatia.

Keywords: *plea bargaining, simplified judgement proceedings, the new Code of Criminal Procedure*

Introduction

The present study aims to spotlight a new criminal procedure law institution, the plea bargaining agreement, governed by the provisions of the new Romanian Code of criminal procedure, adopted by Law no. 135/2010 and which will enter into force on the date fixed by the implementing Law.

The work is structured around the main themes stemming from this topic, such as the notion and the reasons of the new simplified procedure, the conditions for application, the holders, the form and content of the agreement, the consequences of the agreement, the referral to the Court with the plea bargain agreement, the procedure before the Court, the solutions it can pronounce and the remedies.

Last but not least, it is analysed the compatibility of the regulation with the provisions of the European Convention on human rights, from the perspective of the right to a fair trial and the reasonable time.

The study aims to analyze the institution, in order to facilitate understanding and deepening the legal provisions of the new Code of criminal procedure.

The subject is of current interest both for theorists, most notably for practitioners of law, given the multitude of problems that will arise in this respect, in the jurisprudence of the Courts.

1. The notion and the reason of the new simplified procedure

The plea bargaining agreement is one of the main novelties introduced by the new Romanian Code of criminal procedure, the provisions being contained in Chapter I of title III, entitled "Special procedures", respectively, art. 478-488.

This analysis will take into account the provisions contained in the Law no. 255/2013 for the implementation of the Law no. 135/2010 - the Code of criminal procedure and on modification and completion of some legal acts containing criminal procedure provisions (hereinafter referred to as the implementation Law).

The new Romanian Code of criminal procedure was adopted by Law no. 135/2010. The Preliminary Conclusions of the project were prior approved by the Government Decision no. 829/2007. The new Code of penal procedure will enter into force 1 February 2014.

According to the Explanatory Memorandum of the Code, the new regulation aims to respond to the requirements of predictability of criminal proceedings arising from the European Convention for the protection of human rights and fundamental freedoms and, implicitly, in the caselaw of the European Court of human rights.

As shown in the Explanatory Memorandum, it was not intended bz the new Code of criminal procedure to necessarily contain original solutions in comparison with the existing solutions that have been proven to be viable in practice, but to change the corresponding solutions that generated all those difficulties and to introduce new solutions based on comparative positive experiences or geared towards favourable effects expected, all as a result of the study of the relevant doctrine, the internal system and the European systems.

Therefore, the new Romanian Code of criminal procedure has kept its predominantly continental european character, but as a novelty, introduces many elements corresponding to the adversial trial, adapted to our own legal system.

As it has been noted in the doctrine, the procedure of plea bargaining agreement brings classic elements of negotiated justice, in which an accused who pleads guilty, agrees to be sentenced without a trial and to waive any right that may be granted.

The regulation complete thus the reform of the romanian criminal procedure, started by Law nr. 202/2010, that also introduced a new simplified procedure - judgment in the case of admission of guilt (art. 320^1 of the actual Romanian Code of criminal procedure) a procedure that can also be found in the new Criminal procedura cod, art. 374. As the judgment in the case of admission of guilt, plea bargaining agreement is an abbreviated form of judgment for certain crimes, which aims to empower the parties to the proceedings and and at the same time to relieve the courts.

Inspired by the Anglo-Saxon law, the institution of plea bargaining agreement was taken gradually into the legislation and practice of States with continental legal system, so that, today, it is applied in one form or another in countries such as Germany, France, Italy, Hungary, the Czech Republic, the Republic of Moldova.

In adversial systems, the plea bargaining agreement is a traditional institution and aims to avoid the expensive and traumatic procedure with uncertain results; in fact, it is a negotiating positions of equality between prosecution and defence, and the result is a compromise whereby the Prosecutor accepts the defence plea in favour of guilt offering instead an accusation gentler (and hence a reduced sentence).

In these systems, the judge can only check the existence of consent of the accuser, not the facts.

In the continental law countries, the plea bargaining agreement differ considerably, especially in terms of the validation of the agreement by an independent judge, within certain limits, includindg the analysis of the facts.

In respect of the premises of the introduction of this procedure under national law, in the Explanatory Memorandum of the new Romanian Code of criminal procedure reads that, „the plea bargaining agreement is an innovative legislative solution that would ensure the resolution of cases in a time-optimal and predictable, but it is also a remedy for eliminating the deficiencies of the judicial system, such as the excessive length of court proceedings, but also a means of empowering the parties to the proceedings and at the same time to relieve the courts."

In the regulation of the new Romanian Code of criminal procedure, subject to the plea bargaining agreement is the recognition of the crime committing and the acceptance of the legal classification on which the prosecution has been made. The negotiation involves the kind and amount of punishment, as well as the form of its execution.

2. The compatibility of the regulation with the provisions of the European Convention on human rights

The plea bargaining agreement does not violate the provisions of article 6 parag. 3 d) of the European Convention on human rights (hereinafter referred to as the Convention), which guarantees a defendant the right to inquire or seek prosecution witness hearing and to obtain the attendance and hearing of the defence witnesses under the same conditions as prosecution witnesses.

This right is relative, the accused may waive its exercise before an independent and impartial court, and choose to be judged on the basis of evidence collected in the criminal investigation phase.

In this sense, the Court in Strasbourg (judgment of 28 august 1991, Brandstetter v. Austria case) has shown that the defendant has the possibility to opt out of the right guaranteed by article 6 parag. 3 d) of the Convention and, therefore, cannot claim that this right has been violated, if the national Court bases the convinction on the statement given during the criminal investigation phase by aprosecution witness (including witnesses with protected identity), whose hearing the accused has waived.

Art. 6 parag. 1 of the Convention provides for the right of all persons to a fair hearing, publicly and in a reasonable period of his cause. The European Court of human rights has shown that the examination in a reasonable period of each case is a procedural guarantee. its purpose is to protect all the litigants against the excessive length of the proceedings.

Such a provision emphasizes that the judiciary should not be performed with a delay that could compromise its efficiency and credibility.

The reasonableness of the procedure shall be assessed according to several criteria: the complexity of the case, the conduct of the parties, the conduct of the authorities, and the importance for the parties to the proceedings. Only delays due to the behaviour of the authorities are likely to give rise to violations of the European Convention.

The European Court of human rights has held that States must respect an obligation of result: trial within a reasonable period of time. The means chosen to achieve this result are left to the discretion of States. As a result, our internal system will include the plea bargaining agreement.

3. Conditions of application

a. The agreement may be concluded in the course of criminal proceedings, but after setting in motion the criminal action under art. 309 of the new Romanian Code of criminal procedure, i.e. as soon as it becomes apparent that there is evidence which shows reasonable grounds for believing that a person has committed a crime and there is any of the foreclosure cases (art. 16 of the code).

This is logical, given the fact that the criminal responsibility of the perpetrator involves the existence of sufficient evidence of guilt and that only from this moment the suspect is indicted and has unlimited procedural rights and the possibility of an active contribution to the establishment of criminal liability.

Moreover, as stated in the doctrine, whereas with regard to suspect there is only a reasonable suspicion that he committed a criminal offence prescribed by the law, to recognize the possibility of concluding the agreement would mean a damage of the right against self incrimination.

b. The agreement is accomplished on the initiative of the Prosecutor or the accused.

The agreement is preceeded by the opinion of the Prosecutor upwards, which establishes the effects and limits of this initiative. This provision is similar to that concerning the verification of the legality and solidity of indictment by the Prosecutor upwards.

We appreciate that the opinion of the Prosecutor upwards is obligatory for the Prosecutor of the case. The least will conclude the said agreement with the defendant without creating an easier situation than that envisaged by the Prosecutor upwards.

For example, in its opinion, the Prosecutor upwards may establish the minimum and maximum limit of punishment that can be negotiated, or may set a maximum threshold below which it cannot pass, may require a certain type of the execution of the punishment, etc. If the defendant would agree, for example, with a different way of enforcing the penalty, which is not among the ones set by the Prosecutor upwards, the agreement cannot be completed.

We believe that the Prosecutor of the case could get a situation more difficult for the accused, and this circumstance wolud not constitute a violation of the opinion of the Prosecutor upwards. in reality, such a situation could only reach as far as the defendant would not have knowledge of the contents of the opinion. However, from the analysis of the law and of the reasons for the institution's existence, it follows that the defendant will know the bounds between which the Prosecutor of the case can "negotiate".

It should be noted in this context that the right of the accused to enter into an agreement is not an absolute right, the Prosecutor is not obliged to enter into such an agreement even if the legal conditions, as provided by law, are met.

The Prosecutor, with the consent in writing of the hierarchically superior prosecutor, is the sole power to decide the topic concerning the conclusion of an agreement in the State. In making this decision, can be considered as elements of the defendant's will to cooperate with prosecution or prosecution of other persons; attitudes towards criminal activity and criminal antecedents; the nature and severity of the indictment; probability to obtain the condemnation in the case in question; public interest to achieve a more efficient trial with lower expenses.

If the agreement is initiated by the Prosecutor, the defendant has the possibility to request the Prosecutor to grant a term, in which he can reflect on his proposals, in order to satisfy the rights of the defence. With regard to the form that the initiative for its conclusion has to take, we appreciate that, although the law does not provide, in principle it should be a registered document, in which the defendant or the Prosecutor to understand under what conditions projected should be that agreement concluded.

c. Effects of plea bargaining agreement are subject to the opinion of the hierarchically superior prosecutor.

The scope of the concept of effects of plea bargaining agreement being given, we appreciate that you have to assume the existence of an agreement already concluded validly, which is only likely to have an effect. In this situation, the role of the hierarchically superior Prosecutor's opinion is to make bringing the agreement of the Prosecutor in court. Thus, it can be inferred that the notice is placed in time subsequent to agreement and prior to referral to the Court with it.

This provision leads to the existence of two consecutive opinions, one targeting boundary agreement, and second, to acceptance of the hierarchically superior Prosecutor as the Court is seised with the agreement already concluded. We consider that *de lege ferenda* it is necessary to clarify the text.

d. The agreement is an optional procedure that can end only with respect to offences for which the law provides the penalty of fine or imprisonment not exceeding 7 years. Art. 480. (1) is limiting, therefore, the scope of application of the agreement to the crimes of a small or medium gravity, this limitation being, of course, justified by the degree of danger of the acts committed.

e. Agreement procedure shall apply only when, from the evidences taken, it appears that there are sufficient data on the existence of the offence for which the criminal proceedings started and with respect to the guilt of the accused.

In this respect, of the evidence necessary for the validity of the agreement, without any doubt, this institution that is expected to appear in the Romanian legal landscape has an important consequence. Negotiated waiver involves, from the start, a waiver of one of the main effects of the presumption of innocence, namely the right of the accused not to be convicted only on the basis of legally administered and evidence strong enough to remove any

reasonable doubt in the mind of decisional party-the Court. Although a level of probation still remains necessary for the validation of the agreement by the Court, the standard of proof beyond any reasonable doubt, that is, by default, stipulated in our criminal law, suffers an important collapse, even by the consent to the agreement of the accused.

f. Unlike the procedure judgment based on guilt, the law prohibits juvenile defendants access to this procedure (art. 478 para. 6 of the new Romanian Code of Criminal Procedure), as an additional protection for them, in respect to the vulnerability of the age. In the absence of other rules, we have to conclude that such agreements cannot be concluded either personally, with the consent of the legal representative, in the case of minors with limited exercise capacity, or, even less, by legal representative, in the case of those deprived of exercise capacity. However, de lege ferenda,if provisions relating to persons summoned to attend any hearing or confrontation of the minor and for minors who have reached 16 years of age were extended, we appreciate that an agreement would be appropriate also if the defendants are minors. Of course, in this hypothesis, provisions regarding the limits of punishment applied to juvenile offenders should be related.

g. As a guarantee of procedural rights, art. 480 (2)of the new Romanian Code of Criminal Procedure provides that at the conclusion of the plea bargain, legal assistance is mandatory. Therefore, the legislation assigns a particular importance to the defendant in the context of this procedure, his activity aiming the assessment of suitability for conclusioning the agreement and assistance in the negotiation of the penalty and the way of its execution.

In the original form of the draft of the new Romanian Code of Criminal Procedure there was not provided the mandatory judicial assistance during the procedure for negotiating plea bargain agreement, gap that was likely to leave without adequate legal protection a large category of persons. Through Law No. 135/2010 on the Romanian Code of Criminal Procedure, the mandatory legal assistance only for the time the agreement is plea bargaining had been expressly provided.

We appreciate this modification useful, given the fact that, by the conclusion of a plea bargaining agreement initiated by the Prosecutor, the defendant waives the right to be judged within a full trial and so, a number of procedural rights and guarantees are not granted. Therefore, the defendant must understand fully and clearly the circumstances surrounding that decision. In this regard, a major role is confered to the Defender.

4 The holders of the agreement

The agreement has a consensual and personal nature, being discharged, in the case of participation, with each participant individually, separate and distinct, without the need, however, to conclude an agreement with all participants in the crime.

According to art. 478 (2)of the new Romanian Code of Criminal Procedure, if the criminal proceedings has been set in motion against several defendants, a separate plea bargaining can be won with each of them, without any harm being brought to presumption of innocence of the defendants for whom no agreement has been concluded.

More favourable conditions which would benefit to one or some of the participants in the case of concluding a plea bargain agreement might not affect the presumption of innocence of the defendants for whom no agreement has been concluded. On the same line, the right of the Court to admit the plea bargaining agreement only in respect of one or some of the defendants is recognized [art. 485 (2) of the new Romanian Code of Criminal Procedure.

Separation of court procedures is carried out in practice, by disjunction of the case, fact which might be imposed, since the law does not distinguish, also in case of indivisibility.

Some criminal procedural legislation prohibit the conclusion of an agreement if at least one of the participants will choose the ordinary procedure.

Equally, it must be established which is the purpose of the wording "without any harm being brought to presumption of innocence of the defendants for whom no agreement

has been concluded". In this respect, there is a point of view of doctrine, which we definitly agree.[1]

The mentioned author materializes this provision in the obligativity of the Attorney not to mention in the declaration of plea bargain of the defendants who have reached the agreement, data concerning the defendants which have not concluded such an agreement.

In the reasoning behind this interpretation is relevant also the circumstance that, in the event that the agreement ends only in respect of some of the facts or only in respect of some of the defendants, and the rest of the acts or defendants are sent to Court, the Prosecutor submittes to the Court only prosecution documents that relate to facts and persons who have been subject to plea bargaining agreement.

In this context it is born a practical problem, namely what happens when legal classification is determined by the number of participants, and only one of them picks the special procedure. In this case, the legal classification of the offence cannot be established, without the reference to the participation of other persons from committing the offence. For these reasons, we appreciate that, at least for cases of indivisibility situation, it is necessary to stipulate that the agreement cannot be concluded if at least one of the participants choose the ordinary procedure.

As shown, the agreement shall be concluded between the Prosecutor and the defendant, without the participation of the injured person. *De lege ferenda* it should be regulated the right to be informed about the agreement to be concluded, such a regulation being in line with the European Community which provide for the right of persons injured by committing crimes to be informed and to be heard in criminal proceedings.

5. The form and content of the agreement

Plea bargaining agreement ends in written form and shall contain the particulars referred to in article 482 of the new Romanian Code of Criminal Procedure.

As published in the code, these provisions provide that the plea bargaining agreement shall contain particulars concerning: the date and place of conclusion; name, surname and the quality of those who end the conclusion; data concerning the defendant, prescribed in art. 107 (1); the description of the offence forming the subject of the agreement; the legal classification of the offence and the penalty prescribed by law; evidence and probation; the express statement of the defendant whereby acknowledges committing the offence and the legal framework through which the criminal proceeding was put in motion; Prosecutor demands; the signatures of the defendant, the Prosecutor and of the lawyer.

In the form modified by Law enforcement, the Prosecutor's claims were detailed, specifying that the agreement will have to include information about the type and amount of punishment and the enforcement's shape. We also appreciate that justifiably was made so that the agreement can lead to a waiver of punishment or deferment of the application of the penalty, so that negotiation between Prosecutor and defendant is no longer limited to the conviction. We note, thus, a set up of a role at all neglected of the Prosecutor and the accused, including the process of determining the amount of the penalty.

6. The consequences of the agreement

According to the article 481 (2) of the new Romanian Code of Criminal Procedure, in the event that agreement is concluded by the plea bargain, the Prosecutor may not draw up the indictment with defendants which he has concluded the agreement.

As published, under art. 480. (3) of the new Romanian Code of Criminal Procedure: "the defendant has reduced by one-third of the limits of the punishment prescribed by law if the prison sentence, and one-fourth reduction of the limits of the punishment prescribed by law, in the case of the fine". The law for implementation repealed art. 480 (3). We appreciate that such a solution is liable to criticism, as it is likely to deter the defendants to conclude the

[1] S. Siserman, Considerații privind acordul de recunoaştere a vinovăției, available online at http://www.juridice.ro/163263/consideratii-privind-acordul-de-recunoastere-a-vinovatiei.html.

agreement at the stage of prosecution, which could benefit from a similar reduction of the limits of punishment, by applying the plea bargaining during the trial.

7. Referral to the Court with plea bargaining agreement

Plea bargaining agreement is subject to the supervision of the Court with respect to its subject matter and the conclusion. The role of the judge is to ascertain whether the agreement has been concluded in accordance with the law and whether there are sufficient evidences confirming the conviction. Reporting to this, the Court may, whether or not to accept the agreement.

Thus, according to art. 483. (1) of the new Romanian Code of Criminal Procedure, after the conclusion of the plea bargain, the Prosecutor shall refer the Court to which it would return power to judge the case and sends its plea bargaining agreement with the prosecution atcs, the only criminal acts that relate to facts and persons who have been subject to agreement of plea bargaining.

According to paragraph (2) of the same legislative text, in the event that the agreement ends only in respect of some of the facts or only in respect of some of the defendants, and other acts or defendants are sent to Court, the referral to the Court is made separately. Also, if prior the agreement there has been a settlement or an agreement to mediate between the accused, the civil party and the one responsible according to the civil law, as reffered in article. 23. (1) of the new Romanian Code of Criminal Procedure, the Prosecutor submittes to the Court such acts, also.

8. The procedure in Court

Upon receiving the request, the Court shall verify the formal conditions of plea bargaining agreement, and if it finds any lack of mandatory metters or if those were not complied with the conditions laid down in article 482 and 483 of the new Romanian Code of Criminal Procedure, it provides coverage of omissions in not more than 5 days and notifies accordingly the Prosecutor who issued the consent.

According to the article. 484. (2) of the new Romanian Code of Criminal Procedure, if formal requirements are fulfilled, the Court shall pronounce upon the plea bargain by sentence, by an noncontradictory procedure, in open court, after hearing the accused and lawyer as well as a civil party, if present.

According to the article. 487 in the new Romanian Code of Criminal Procedure, the sentence shall compulsory provide:

a) the particulars which it must contain and the decisions of the meeting, and the exposure of a sentence which is pronounced at first instance;

b) the deed for which ended in a plea bargain agreement and its legal classification.

9. The solutions the Court could sentence

With regard to the solutions the Courtcould sentence, those are referred to in art. 485. (1) of the new Romanian Code of Criminal Procedure.

Thus, if the conditions are met as in art. 480-482 of the new Romanian Code of Criminal Procedure with regard to all the facts the defendant was retained to and which were the subject of the agreement, the Court recognizes the plea bargaining agreement with one of the solutions provided for in art. 396. (2) to (4) of the Code, namely the condemnation, giving up at sentencing or defering application of punishment, solution that cannot create a culprit heavier than that on which they arrived at an agreement.

Please note, however, that punishment and its execution procedure laid down in the agreement does not bind the Court, which may proceed to a reindividualization of the penalty or the manner of its execution, without creating to the defendant a heavier situation.

We appreciate that this regulatory option is liable to criticism, as it is likely to create a reserve on the part of the Prosecutor to enter into plea bargaining agreement, given that he cannot quantify exactly what benefits will be from the negotiation with the defendant. A more suitable solution would be to regulate the obligation of the Court to sentence the conviction within the limits laid down in the agreement, in terms of the amount of the penalty and the

shape of its execution, of course provided that they are legally established, otherwise rejecting the agreement.

At the same time, according to art. 485. (2) of the new Romanian Code of Criminal Procedure, the Court may admit the plea bargaining agreement only for some of the defendants.

If the conditions are not met as in art. 480-482, the Court rejects the plea bargaining agreement and sends the dossier to the Prosecutor for further prosecution, pronouncing at the same time ex oficio about the custody state of the defendants. Through implementation law it is introduced a new case for the rejection of the agreement, namely the situation where the Court considers that the solution that was reached an agreement between Prosecutor and defendant is unreasonably mild in relation to the seriousness of the offence or the offender dangerousness. This provision softens the conventional character of the agreement, by setting up a greater role of judges in the process of individualization of punishment, as an important part of the Court's function that he meets. In this way, the regulation departs from the adversial form and is coming to the specific features of criminal process of continental style, in which the judge does not have just a referee role, but active role in finding out the truth in all aspects.

It is noted that the new Romanian Code of Criminal Procedure does not provide guarantees for the preservation of the presumption of innocence where plea bargaining agreement is rejected by the Court. Versus the need to protect the defendant's rights, in particular of the silence and self disincrimination, we appreciate that it is necessary to clarify that the recognition of facts by the defendant cannot be used against him.

With regard to the settlement of civil action, in the case of acceptance of the agreement, art. 486 of the new Romanian Code of Criminal Procedure, as published, provided that if between the parties ended in a settlement or mediation agreement with regard to the civil action, the Court takes note about that by sentence. In other cases, the Court may decide disjoining the civil action and send it at the competent Court according to the civil law, when settling the civil side would delay the settlement of the criminal process. In the form modified by implementation law, this text provides that where the parties have not concluded the transaction or agreement to mediate, the Court leaves unresolved civil action, in this case the decision was upheld by the plea bargain agreement having become final in the civil Court.

The solution is natural, since the civil settlement is no longer subject to the judgment in the form of special procedure of plea bargaining, civil action could have been resolved either through a separate application addressed to civil Court, or through an alternative means of dispute resolution.

10. Legal remedies

Against the sentence handed down under art. 485 of the new Romanian Code of Criminal Procedure, the Prosecutor and the defendant may declare the appeal within 10 days of receipt.

Through draft of implementing law, article 488 of the Romanian Code of Criminal Procedure is modified, providing expressly that against the decision by which the recognition was admitted, it may be declared appeal solely on the kinds and amount of punishment or execution form, other reasons being excluded.

We appreciate this provision justified, provision which is intended to contribute to achieving the main aim of this simplified procedure, by relieving Courts and ensuring as much as possible a short lasting Court proceedings, while constituting a mean of empowering parties in the process.

It is objectionable, however, the fact that it is not provided the possibility of introducing the appeal in matters relating to legal conclusion of the agreement. In this way, the agreement cannot be invalidated for harming the consent.

Also through the provisions of the implementation law, there have been developed disposures concerning the solutions delivered as a result of processing the appeal.

Thus, the Court of appeal may decide one of the following:

a) rejects the appeal, maintaining the contested decision, whether the appeal is late or inadmissible or unfounded;

b) allowes the appeal, dissolving sentence whereby the agreement has been upheld only with respect to the manner and amount of punishment or form of its execution and pronounces a further judgement, acting under art. 485 (1) letter a), which shall apply accordingly;

c) allowes the appeal, dissolves sentence, whereby the agreement was rejected, allowes the plea bargaining, art. 485 (1)letter a) and art. 486 applying properly.

Conclusions

The study analyzed the institution of plea bargaining agreement, both from the perspective of the new Romanian Code of Criminal Procedure, as well as of the amendments brought by the implementation law.

Without issuing the claim that through our approach the vast theme has been fully addressed, we believe that through advanced theoretical considerations we have managed to bring into focus the main issues which will arise from the institution and to identify possible preferable legislative solutions.

Whereas at the time of entry into force of the new Romanian Code of Criminal Procedure, the criminal trial will suffer a radical transformation, and fundamental safeguards such as the presumption of innocence, the right to silence and to self disincrimination, the right to propose the witnesses and to hear prosecution witnesses, and, generally, the right to a fair trial will be redrawn, to an extent not neglected, as the imperatives of inquisitorial justice will mitigate substantially, the subject of current interest both for theoreticians, especially for law practitioners, considering the multitude of problems that will arise in this metter, in jurisprudence of the Courts.

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BRIEF CONSIDERATIONS ON THE FINANCIAL CRISIS AND INSOLVENCY OF THE ADMINISTRATIVE-TERRITORIAL UNITS IN THE VIEW OF THE NEW REGULATIONS

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Abstract:

The reason for which the Government Emergency Ordinance No 46/2013 regarding the financial crisis and insolvency of administrative-territorial units is the fulfillment of the obligations assumed by Romania in order to reduce the overdue registered by the administrative-territorial units to their suppliers of goods, services and works. The article aims to analyze the general framework and the procedures regarding the coverage of the liability and the financial recovery of the administrative-territorial units which are in a financial crisis or in insolvency, relating to the general framework for insolvency, namely Law No 85/2006, as well as the Law No 273/2006 regarding local public finances updated and amended by Law No 13/2011.

Key words: *financial crisis, insolvency, financial recovery plan, main credit release authority, bankruptcy judge, National Register for the Insolvency Cases of the administrative-territorial units*

Introduction

The normal performance of the commercial activity requires that all professionals who have assumed contractual obligations to respect them according to their provisions. The nonperformance of the obligations, in general, especially of the financial ones, at their expiration, produces negative consequences not only for the creditor, but also for the other merchants with whom the creditor has legal relations, in the meaning that the nonpayment of the obligations assumed according to the contract by the debtor have chain consequences also for other merchants, finally leading to a financial blockage with serious effects against the security of the credit, one of the economic pillars.

The nonperformance of the financial obligations at their expiration can be determined by the lack of liquidities of the merchant-debtor caused by financial difficulties.

In such situation it is raised the question regarding the treatment applicable for this category of merchants. In the support of finding the answer, the Romanian legislatior brings its contribution, in the meaning that after 1989, when the market economy has been introduced, was adopted the Law No 64/1995 on the procedure of reorganization (the notion "recovery" is the terminological equivalent of the same notion from the French law) and judicial liquidation (the notion "liquidation" is the modern equivalent of the notion of "bankruptcy ").

Under the impact of the critics arguing the abandonment of the institution of bankruptcy, the title of the Law No 64/1995 was modified by Government Emergency Ordinance No 58/1997 becoming the law "on the procedure of reorganization and bankruptcy". After 10 years, the Law No 64/1995 was abrogated and replaced by Law No 85/2006 on the procedure of insolvency[1].

The new law is mostly a reproduction of the Law No 64/1995[2]*, substantial modifications being made for practical considerations*[3].

Law No 85/2006 is completed, to the extent of their compatibilities, with the New Code of Civil Procedure, New Civil Code and Regulation (EC) No 1346/2000 on insolvency proceedings[4].

Yet even this last variant is not considered satisfactory because it does not include preventive proceedings that will allow the avoidance of the debtor's insolvency, as other EU legislations state. These legislative gaps were removed by the adoption of Law No 381/2009 regarding the preventive concordat and the ad-hoc mandate[5].

The insolvency stated by Law No 85/2006 is general and does not refer to autonomous administrations or to the administrative-territorial units, for which the legislator states special provisions[6].

I. Comparative analysis regarding the concepts of financial crisis and insolvency in the view of the G.E.O No 46/2013 on financial crisis and insolvency of administrative-territorial units

A) The financial crisis of the administrative-territorial units

G.E.O No 46/2013 emerged in the context of the imminence of a new stand-by agreement with the International Monetary Fund. In order to conclude this agreement, Romania had to reduce the maturing debts to services, assets and works suppliers.

This regulation states the general framework and the proceedings for covering the passive and for the financial recovery of the administrative-territorial units found in a financial crisis or in insolvency.

Art 2 of the G.E.O No 46/2013 is reserved for definitions, namely *financial crisis*[7] and *insolvency.*

From the analysis of Art 2 Let m^{1}), m^{2}), r^{1}) and r^{2}), both the *financial crisis,* as well as the *insolvency* are those conditions of the patrimony of administrative-territorial units,

[1] Official Gazette of Romania No 359/21 April 2006

[2] Stanciu Cărpenaru, *Tratat de drept comercial român,* 3rd Edition reviewed according to the New Civil Code, Universul Juridic Publishing House, Bucharest, 2012.

[3] It mostly aims the creation of a simplified procedure applicable for merchants found in special situations or for those who have declared by an application their intent to go bankrupt, was amplified the role of the creditors' assembly and of the creditors' committee for the application of the procedure, were enlarged the responsibilities for the judicial administrator and liquidator, are reduced some terms in which the procedural documents must be filled in, is simplified the procedure of summoning, notification and communication in the National Bankruptcy Register.

[4] Published in the EU Official Journal No L 160/30 June 2000.

[5] Official Gazette of Romania, No 870/14 October 2009.

[6] Law 503/2004 on the financial recovery and bankruptcy of insurance undertakings is applicable for the insurance companies; Government Emergency Ordinance No 10/2004 on bankruptcy of credit institutions is applicable for credit institutions, the ordinance being completed and amended by Law No 278/2004.

[7] The financial crisis was previously stated by Art 74 of the Law No 273/2006 on local public finances.

characterized by the existence of a financial difficulty, by the serious lack of financial liquidities, which leads to the impossibility to perform their obligations, liquid and on term for a certain time.

Specifically, the difference between these two notions (financial crisis and insolvency) is represented by the fact that the *financial crisis* is presumed in the following situations: a) noncompliance with the payment obligations, liquid and on term, older than 90 days and exceeding 15% of the annual budget of that administrative-territorial unit; b) noncompliance with the salary rights stated in the budget of incomes and expenses for over 90 days from their term, while the *insolvency* is the situation of the administrative-territorial unit, characterized by the insufficiency of the funds available for paying the debts on term and is presumed in the following cases: a) noncompliance with the liquid and on term payment obligations older than 120 days and exceeding 50% of the annual budget, without considering those in litigation; b) noncompliance with the salary rights stated in the budget of incomes and expenses for over 120 days from their term.

A closer analysis of the text reveals that the procedure of financial crisis is not a judicial one, but a pure administrative one triggered by the deliberative authority, which, after taking this decision, empowers the *credit accountant* to draw a *project for a financial recovery plan.*

It must also be emphasized the fact that procedure of financial crisis does not represent a mandatory stage previous to insolvency. If the requirements for insolvency are met, the administrative-territorial unit shall be declared insolvent, without a previous initialization of the procedure of financial crisis.

Art 3 of the G.E.O No 46/2013 states the idea that while a large category of persons stated by Art 74 of the Law No 273/2006, namely the main credit accountant of the administrative-territorial unit, the chief accountant of the local public authorities, secondary or tertiary authorizing officers from the public services subordinated to local councils, different creditors etc., have only the ability to inform about the financial crisis, only the main credit accountant has the obligation to inform about the financial crisis, otherwise he shall be sanctioned according to Art 114 Para 1 of the G.E.O No 46/2013.

Within 5 days from the adoption of the decision stating the crisis by the deliberative authority, the main credit accountant has to request its registration in the local register of financial crisis of the administrative-territorial units, managed by the county general directorates of public finances, or of Bucharest. The situations in which a financial crisis is opened or closed are monthly communicated to the Ministry of Public Finances.

Also, within the term of 5 working days from the adoption of the decision which declared the financial crisis, shall be formed the committee for situations of financial crisis, by order of the prefect. The Committee shall be convoked by the prefect and shall be formed by: the mayor or the president of the county council; the chief accountant; the manager of the public service of local interest which generated the financial crisis, if necessary; a representative of the general directorate of county or Bucharest public finances; a representative of the associated structure of the local public authorities from whose category the concerned administrative-territorial unit is part.

Within 30 days from the adoption of the decision which declared the financial crisis it shall be elaborated the plan for financial recovery by the main credit accountant together with the members of the committee for situations of financial crisis, with the approval of the county chamber of accounts.

Art 3 Para 2 of the G.E.O No 46/2013 states that the deliberative authority empowers the main credit accountant to draft the project of the financial recovery plan, and Art 5 Para 3 states that the plan is elaborated in common by the main credit accountant and the members of the committee for crisis situations. In these conditions, it can be concluded that the main credit accountant drafts a project of the plan, and then the elaboration is made based on that project.

Of course it can be raised the issue of the duration of elaboration of this project, because G.E.O No 46/2013 does not state anything about this.

The plan is approved by a decision of the deliberative authority based on the proposal submitted by the main credit accountant, according to Art 74 Para 9 of the Law No 273/2006, being submitted for approval to the deliberative authority within 3 days from its elaboration and *shall be adopted* within 5 days from its submission. It is shall not be adopted, the deliberative authority shall subject it to a reanalysis. If after the reanalysis is not adopted, it is considered to be adopted in its original form. As a conclusion, regardless of whether the deliberative authority adopts it or not, is shall be considered adopted anyway.

Monthly, the main credit accountant shall send a report regarding the evolution of the plan for the members of the committee and for the deliberative authority, and the Committee for crisis situations controls the accomplishment of the measures stated by the plan[8].

The cessation of the financial crisis shall be declared by a decision of the deliberative authority, at the request of the main credit accountant with the advisory opinion of the committee for financial crisis situations, if: a) for 180 calendar days were not emphasized the criteria which determined the financial crisis; b) are met the criteria for declaring the insolvency, case in which the administrative-territorial unit is subjected to the procedure of insolvency.

B) The insolvency of the administrative-territorial units

In the procedure of the insolvency of the administrative-territorial unit the participants are different than the ones from the "common law" procedure of insolvency. According to art 5 of the Law No 85/2006 the participants in the common law procedure of insolvency are the courts, the syndic judge, the judicial administrator and the liquidator. According to Art 14 of the G.E.O No 46/2013 the participants in the procedure of insolvency of the administrative-territorial unit are all the above mentioned, plus the main credit accountant for that unit, the deliberative authorities (local councils of communes or cities, County Councils or the General Council of Bucharest), without the liquidator, because the present norm does not state the possibility of liquidating an administrative-territorial unit.

Regarding the causes to be decided for the insolvency are in the competence of the court in whose teritorial area that administrative-territorial unit is located, being trialed by a syndic judge.

The appeal against the decision of the court shall be trialed at the Court of Appeal, being submitted only for the reasons stated by Art 488 of the New Code of Civil Procedure (8 reasons for appeal), and the appeal court shall be able to annul and retrial under Art 498 of the same code.

The term of appeal is 10 calendar days from the communication of the decision, if the law does not state differently. The appeal is trialed by specialized panel of judges within 30 days from the submission of the case file to the Court of Appeal. In order to trial the appeal, shall be sent to the Court of Appeal, in copies certified by the chief-clerk only the documents concerning the resolution of the appeal, selected by the syndic judge. If the court of appeal considers necessary other documents from the initial case file, shall notify the parties to submit them in a certified copy.

The main attributions of the syndic judge[9], according to the present law, are:

a) Issuing a motivated decision for the opening of the procedure of insolvency;
b) Judging the contestations stated by the administrative-territorial unit against the requests of the creditors to open the procedure;

[8] Art 10 of the G.E.O No 46/2013.

[9] The attributions of the syndic judge are limited to the judicial control of the activity of the judicial administrator, to the trials and judicial requests regarding the procedure of insolvency. The managerial attributions belong to the judicial administrator or to the main credit accountant of the administrative-territorial unit if his right to exert the attribution of main credit accountant has not been suspended.

c) The motivated appointment of a judicial administrator by the decision to open the procedure of insolvency, the establishment of his attributions, the control over his activity and, if necessary, his replacement;

d) Trialing the requests submitted by the judicial administrator to cancel the transfer of assets performed previous the opening of the procedure;

e) Judging the contestations submitted by the administrative-territorial unit or creditor against the measures adopted by the judicial administrator;

f) The admission and confirmation of the plan for financial recovery of the administrative-territorial unit;

g) Solving the contestations stated against the reports of the judicial administrator;

h) Establishing the suspension of the enforcement procedures against the administrative-territorial unit;

i) Trialing the actions submitted by the judicial administrator for the suspension of the payments performed by the administrative-territorial units to its creditors after the declaration of insolvency and until the elaboration of the plan for paying the debts to the creditors;

j) Trialing the actions submitted by the judicial administrator and the Committee of creditors for the annulment of the fraudulent documents concluded by the main credit accountant;

k) Issuing the decision to close the procedure of insolvency.

Art 55 of the G.E.O No 46/2013 points out the documents to be submitted with the voluntary request to open the procedure of insolvency, among which we mention *the list of the most important public services that the administrative-territorial unit must provide during the procedure.* According to Art 56 of the G.E.O, if the list with the necessary documents is not attached to the case file in good time, the request to open the procedure of insolvency shall be rejected.

The creditors may oppose the decision to open the procedure of insolvency issued by the main creditor accountant.

If the request is expressed by the creditors[10], the main credit accountant may submit an appeal. The failure to submit an appeal has as direct consequence the opening of the procedure of insolvency. Thus, according to Art 63: *"if the administrative-territorial unit does not challenge the insolvency within the term stated by Art 60 Para 2, the syndic judge shall rule to open the procedure of insolvency.*

The immediate effect of the opening of insolvency consists in the fact that all judicial or extra-judicial actions initiated against the administrative-territorial unit are suspended[11].

The recovery plan exclusively aims the procedure of insolvency, because, in the hypothesis of the financial crisis of the administrative-territorial units, there is the plan of financial recovery, different than the recovery plan from the procedure of insolvency. This must state both a plan to pay the debts to the creditors, as well as measures aiming the restructuration of the administrative-territorial unit, restricting the administrative apparatus, giving up some investments etc.

The plan shall be elaborated by the judicial administrator together with the main credit accountant within 30 days from the appointment of the judicial administrator and shall be communicated by him to all the creditors, mentioning the date of the meeting of all creditors, which shall debate this plan.

[10] As an effect of the requests to join the statement of affairs expressed by the creditors shall be formed a table of claims which can be appealed both by the creditors, as well as by the administrative-territorial unit. This table is preserved by the clerk of the court.

[11] In this regard see Art. 66.

In order to be adopted, the recovery plan must be approved by the Public Finances General Directorate of counties or Bucharest and by the Court of Accounts, also being necessary the approval of the deliberative authority.

The approval of the recovery plan shall be made the creditors' assembly, with the vote of the majority, representing two thirds of the value of debts.

Conclusions

We consider that this law represents a legislative normality imposed by the economic reality specific for the administrative-territorial units, entities having in the present of 2013 serious financial crisis generated on the one hand by the global financial crisis, and on the other hand by the agreements concluded between Romania and the International Monetary Fund.

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